THE HIGH COURT

JUDICIAL REVIEW

Record No. 2013 / 765 JR

Between:-

MAXIMILLIAN SCHREMS

Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

Statement of Opposition of the Respondent

TAKE NOTICE that the Respondent herein opposes the Judicial Review on the grounds following:

1. The Applicant is not entitled to a declaration that the failure by the Respondent to investigate his complaint made on 25 June 2013 in respect of Facebook Ireland Limited and "PRISM" is unlawful.

2. The Respondent declined to investigate the said complaint having formed the opinion ("the opinion") that it was frivolous or vexatious within the meaning of Section 10(1)(b)(i) of the Data Protection Acts 1988-2003 ("the DP Acts").

3. In forming the said opinion the Respondent acted within jurisdiction.

4. It follows that the Applicant is not entitled to an order of mandamus compelling the Respondent to investigate the complaint and to make a formal decision within the meaning of Section 10(1)(b)(ii) of the DP Acts.

5. It further follows that the Applicant is not entitled to an order of

certiorari quashing the said decision.

6. For the Respondent to rely on the law as expressed in EU Commission Decision C2000/520/EC does not amount to a fettering of his discretion. As a statutory decision-maker the Respondent is obliged to have regard to the relevant law. In this regard, the Respondent relies on, inter alia, Section 11(2) of the DP Acts.

7. It is denied that it was irrational for the Respondent to place reliance on EU Commission Decision C2000/520/EC. It is denied that the Respondent was compelled to conclude that Decision C2000/520/EC "can no longer represent good law" whether by reference to the passage of time or by reference to what the Applicant refers to as "higher ranking law".

8. If the Applicant is of the view that Decision C2000/520/EC is wrong then the appropriate venue for him to advance that view is at an EC level.

9. The fact that other data protection commissioners in other EU member states may be dealing with complaints that the Applicant (or anyone else) has made to them in a particular way is not a recognised legal basis for asserting that the opinion formed by the Respondent is thereby irrational and/or unreasonable. The Respondent is obliged to form his own opinion on a particular complaint and were he to regard himself as bound by the approach of other data protection commissioners that would amount to a fettering of his discretion.

10. It is denied that the opinion formed by the Respondent is in breach of EU law. The Respondent's opinion was formed on the basis of EU law, namely Decision C2000/520/EC.

11. It is denied that the Respondent erred in the interpretation of the words "frivolous or vexatious" in the DP Acts in his letter of 11 October 2013 whether by reason of what was said in that letter or by reason of any other published comments on them.

12. It is denied that the Respondent's opinion that the complaint was frivolous or vexatious was irrational or was based on matters that were irrelevant to the complaint. The Applicant has not properly particularised what matters he says were taken into account and are irrelevant to his complaint.

13. The plea of *ultra vires* does not appear to add anything to the plea of irrationality in the context in which it is made, but in any event it is denied that the opinion was *ultra vires*. The said opinion was formed in accordance with the provisions of Section 10(1)(b)(i) of the DP Acts.

14. It is denied that the Respondent failed to carry out any proper level of investigation as to whether or not the complaint was frivolous or vexatious. Section 10(1)(b)(i) of the DP Acts makes it clear that an opinion that a complaint is frivolous or vexatious is an alternative to investigating a complaint. It follows that an investigation was not itself required prior to forming the opinion in issue.

15. It is denied that the Respondent formed the opinion in breach of the Applicant's fundamental right to be heard. The Applicant was given every opportunity to make his complaint.

16. At no stage during the impugned process did the Applicant seek any further right to be heard. In the circumstances the Applicant is estopped and/or is guilty of acquiescence in respect of this issue and so cannot complain about it now.

17. It is denied that the Respondent's opinion was based on irrelevant considerations. In particular it is denied that the Respondent was not entitled to have regard to the fact that the Applicant did not submit any evidence that his own data had been transferred from Ireland to a third country by Facebook Ireland Limited.

18. It is denied that the Respondent's opinion was formed or arrived at in breach of the principles of good administration. In particular it is denied that no proper reasons were provided for it.

19. It is denied that the opinion formed by the Respondent placed an unlawful obstacle in the way of the Applicant's attempt to exercise EU law rights.

20. It is denied that the opinion formed by the Respondent is based on a misinterpretation of the DP Acts.

21. It is denied that the opinion formed by the Respondent infringed any of the Applicant's rights under the European Convention on Human Rights. The Convention does not form part of the domestic law of the State save as is provided for by the European Convention on

Human Rights Act, 2003. The Applicant has not sought or obtained leave to seek any relief pursuant to the European Convention on Human Rights Act, 2003.

22. Strictly without prejudice to the foregoing it is denied that the Applicant's right to a fair trial under Article 6 of the Convention is breached by the opinion formed by the Respondent. None of the civil rights or obligations of the Applicant were determined by the opinion. In particular the Applicant did not submit any evidence that his own data had been transferred from Ireland to a third country by Facebook Ireland Limited and/or that it had been accessed by the National Security Agency of the United States or any other agency. Without prejudice to that the entire scheme of the Acts together with the availability of judicial review amounts to compliance with Article 6.

23. It is further denied that the Applicant's right to respect for his private and family life under Article 8 of the Convention is breached by the opinion formed by the Respondent. In particular the Applicant did not submit any evidence that his own data had been transferred from Ireland to a third country by Facebook Ireland Limited.

24. The Applicant is only entitled to rely on the precise facts and circumstances of his own case and is not entitled to rely on a *jus tertii.*

25. The Applicant is only entitled to rely on the material that he submitted to the Respondent as part of his complaint and cannot seek to challenge the decision by reference to material that he did not submit to the Respondent.

26. If, which is fully denied, the Respondent erred in the procedures which he adopted as regards the complaint it is submitted that no purpose would be served in granting relief or in remitting the matter back to the Respondent in circumstances where the Applicant's complaint has no chance of success in the light of EU Commission Decision C2000/520/EC.

27. In all of the circumstances the Court should refuse to grant the discretionary relief that is available by way of judicial review.

28. In all of the circumstances the Applicant is not entitled to the relief sought or to any relief.

Dated this day of December, 2013

Signed: ____________________

Philip Lee Solicitors
7/8, Wilton Terrace
Dublin 2

TO:

The Chief Registrar
Central Office
High Court
Four Courts
Dublin 7

AND TO:

Ahern Rudden
Solicitors for the Applicant
5 Clare Street
Dublin 2

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Applicant

-and-

DATA PROTECTION COMMISSIONER

Respondent

Statement of Opposition

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Dublin 2

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Between:-

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-and-

DATA PROTECTION COMMISSIONER

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AFFIDAVIT OF BILLY HAWKES

I, **BILLY HAWKES**, of Canal House, Station Road, Portarlington in the County of Laois, aged 18 years and upwards, **MAKE OATH** and say as follows:-

1. I am the Data Protection Commissioner. I make this affidavit on my own behalf from facts within my own knowledge, save where otherwise appears, and where so otherwise appearing I believe the same to be true and accurate.

2. I make this affidavit for the purpose of verifying the Statement of Opposition filed herein and for the purpose of replying to the affidavit of Mr Maximilian Schrems sworn on 21 October 2013.

The impugned opinion

3. As Data Protection Commissioner, I formed the opinion that I should not investigate the Applicant's complaint in respect of Facebook Ireland Limited and "PRISM" ("the opinion") which said opinion is the subject matter of the within proceedings. The circumstances in which that opinion came to be formed, and the facts relevant to the basis upon which it was formed, are set out below.

Preliminary Point

4. I note that in his affidavit the Applicant has exhibited a complaint that another individual made to my Office against Apple Distribution International (**MS5**). My understanding is that the only issue the subject of the within judicial review is the opinion I formed in respect of the Applicant's complaint against Facebook Ireland Limited. In those circumstances I do not intend to address the complaint against Apple.

Background

The present complaint

5. By letter dated 25 June 2013 (**MS4**) the Applicant wrote to this Office by emailed letter entitled *"Complaint 23 against Facebook – PRISM"*. Attached was an 8 page complaint with the same title.

Prior complaints

6. As a subscriber to the Facebook social networking platform or service, the Applicant has previously submitted 22 separate complaints to my office raising data protection concerns in relation to the manner in which subscribers' personal data is processed by Facebook Ireland Limited ("Facebook Ireland").

7. The Applicant's 22 complaints referred to above do not form any part of the within proceedings.

Facebook Ireland

8. I say and believe that Facebook Ireland has been designated by its parent company, Facebook Inc., as the legal entity with whom Facebook subscribers resident in member states of the European Economic Area enter into contract. Subscriber contracts are concluded on the basis of the platform's standard terms and conditions of use.

9. Having regard to its establishment in this jurisdiction, Facebook Ireland is a "data controller" within the meaning of that term as defined in the Data Protection Acts, 1988 and 2003 ("**the DP Acts**") and is subject to the regulatory regime constituted by the DP Acts. In practical terms, Facebook Ireland is designated as a

"data controller" for personal data relating to Facebook subscribers resident in all member states of the European Economic Area.

10. While Facebook Ireland is subject to regulation under the DP Acts, some or all data relating to Facebook subscribers resident within the European Economic Area is in fact transferred to and held on servers located in the United States.

11. On a number of alternative bases, most notably, on the basis of the operation of a set of regulatory arrangements agreed between the United States and the European Commission and recorded in Commission Decision No. C2000/520/EC (referred to as "the **Safe Harbour**" principles), I say and believe that the transfer of subscriber data to the United States is permissible under national and EU data protection law. I further say and believe that the Safe Harbour principles, as endorsed by the European Union by means of Decision C2000/520/EC, expressly permit (subject to certain limited constraints) the accessing of personal or subscriber data where necessary to meet national security, public interest or law enforcement requirements.

12. For completeness, I say that, in 2011, my office undertook an audit of the operations of Facebook Ireland. In the course of that audit, I examined (amongst other things) the legal arrangements pursuant to which subscriber data is transferred by Facebook Ireland to the United States. On the basis of findings made in the context of that audit exercise, I satisfied myself that the transfer of subscriber data by Facebook Ireland to the United States is undertaken by reference to (and in accordance with) the Safe Harbour principles, and as such, such transfers of subscriber data have a sound basis in law.

The PRISM controversy

13. By way of further background, I say and believe that it is relevant to note that, prior to the submission by the Applicant of the complaint at issue in these proceedings, material came into the public domain in or about June 2013 in which it was alleged that national security services in the United States had obtained direct access to servers located in that jurisdiction containing personal data relating to Facebook subscribers and subscribers to a number of other internet companies. It was alleged that, on foot of such access, national security services in the United States were in a

position to access and process personal data relating to Facebook subscribers who are resident, not just in the United States, but also in the European Economic Area. It was also alleged that access to subscribers' data had been made available in bulk, rather than on the basis of targeted access requests made in accordance with established protocols designed to strike an appropriate balance between the data privacy rights of subscribers on the one hand and national security interests on the other.

14. The programme under which it was alleged that national security services in the United States had been afforded direct access to subscriber data was said to be titled "PRISM".

15. The matters so reported were the subject of substantial public comment and controversy both in Ireland and internationally. They also arose in a discussion between my office and Facebook Ireland in the course of which Facebook Ireland put it to me that the reports were untrue and that access to subscriber data had not been provided to national security authorities save by means of targeted requests, properly and lawfully made.

Chronology of events relating to the matters at issue herein

16. As averred to above, the Applicant's complaint was received by my office by email on the evening of 25 June 2013 (**MS4**). The email was received, after close of business, at my office's public access email account and, separately, by me, at my official email account.

17. On the morning of 26 June 2013, I saw and read the email. My initial reaction was to view the complaint in the context of the other 22 complaints then under investigation by my office. Consistent with the procedures adopted by my office in respect of those other complaints (pursuant to which the Applicant's complaints have been forwarded to Facebook Ireland for its comments and observations, with its comments and observations in turn being shared with the Applicant) I forwarded the Applicant's complaint to Facebook Ireland, indicating that this particular complaint would be addressed by reference to the same procedures as were being applied to the prior block of 22 complaints.

18. Following discussions internally with a number of senior colleagues within my office later on the same day, and having had

an opportunity to consider the complaint more fully, I formed the view that the complaint at issue in these proceedings was in fact materially different to the earlier block of 22 complaints. Specifically, it appeared to me that, whereas in the earlier block of complaints, my role was to apply the Data Protection Acts, 1988 and 2003 ("the Acts"), and to determine whether the complaints made by the Applicant could be sustained by reference to those Acts, the subject matter of complaint 23 was such that I would have to have regard to the above-referred Decision C2000/520/EC. This was because the Applicant's complaint concerned issues relating to the transfer of personal data from the European Economic Area to the United States. Having reflected on its content, I was concerned that, in truth, what the complaint demanded of me was that I agree to set aside or disapply Decision C2000/520/EC in circumstances where, under the express terms of Section 11(2) of the DP Acts, I am statutorily bound to apply it. Against this backdrop, I considered that I would have no standing to address the substance of the Applicant's complaint and that the complaint was one that could only properly be addressed by relevant institutions of the European Union.

19. For completeness, I say that I also noted that the Applicant did not appear to allege that *his* subscriber data had in fact been transferred to the United States and accessed by a U.S. national security authority. Rather, his complaint was framed in general terms, and appeared to be made in some sort of representative capacity on behalf of Facebook subscribers' generally, or a group of Facebook subscribers.

20. In the event, I formed the opinion that the Applicant's complaint should not be admitted for investigation because, in light of Section 11 of the Acts, Decision C2000/520/EC, and Facebook's self-certified adherence to the Safe Harbour principles (such certification having been verified by my office by examining entries noted on a publicly-accessible register operated by the United States Department of Commerce) the complaint was bound to fail and, as such, was properly to be considered "frivolous or vexatious" within the meaning of that term as set out at Section 10(1)(b) of the DP Acts.

21. Put simply, I considered that I was statutorily bound to accept that a transfer of subscriber data to the United States by Facebook

Ireland, undertaken in accordance with the Safe Harbour principles, is lawful, and remains lawful even where such data is accessed by national security authorities in the United States having regard to the express provision made in the Safe Harbour principles for third party access to the extent necessary to meet national security requirements.

22. Following the internal discussions referred to above, I directed that an acknowledgement be issued by email to the Applicant. That acknowledgement was duly issued later on the same day (26 June 2013) and advised that *"We are currently assessing the matters raised in your email in order to determine whether the Data Protection Commissioner should commence an investigation in accordance with Section 10 of the Data Protection Acts, 1988 and 2003. We will be in touch with you in due course."* I beg to refer to a copy of the said email attached hereto and upon which marked with the letters and number "**BH1**" I have signed my name prior to the swearing hereof.

23. On or about 28 June 2013, Facebook Ireland submitted preliminary observations in relation to the complaint, reiterating its position as previously outlined in discussions with my office to the effect that reports that subscriber data transmitted to the United States were being accessed directly and on a bulk basis by national security agencies in that jurisdiction were incorrect. Facebook Ireland also indicated that it was arranging for its parent company in the United States to confirm certain facts relevant to the allegations made.

24. Having already formed my opinion that the Applicant's complaint would not be the subject of an investigation for the reasons outlined above, the preliminary observations received from Facebook Ireland were not taken into account by me.

25. On or about 9 July 2013, I was contacted by Facebook Ireland to say that I would shortly be furnished with the confirmation referred to at paragraph 23 above. In response, I explained that such confirmation was not be required because the Applicant's complaint would not be the subject of investigation by my office in light of my opinion that its subject matter fell within the scope of Decision C2000/520/EC, a decision I was bound to apply. Material was nonetheless received from Facebook Ireland on the afternoon of 9 July 2013 but was not taken into account by me.

26. On 23 July 2013 (**MS10** and **MS18**) a substantive reply was issued to the Applicant by my office in relation to his complaint. The letter set out my view that an Irish-based data controller has met its data protection obligations in connection with the transfer of personal data to the United States if it has registered and self-certified its compliance with the Safe Harbor scheme. The letter noted that Facebook Inc. has a current Safe Harbor self-certification entry.

27. For the sake of completeness, I wish to confirm that the short delay in the issuing of the letter of 23 July 2013 arose simply because the Senior Compliance Officer within my office who was handling the matter under my direction was on annual leave for a short period.

28. On 24 July 2013 (**MS10** and **MS18**) there was an email exchange with the Applicant in which it was confirmed that this Office *"do[es] not consider that there are grounds for an investigation under Irish Data Protection Acts given that Safe Harbor requirements have been met and on that basis we cannot identify that any contravention of the Acts has taken place."*

29. On 25 July 2013 (**MS10** and **MS18**) the Applicant wrote setting out his response. By further letter of the same date (**MS10** and **MS18**) this Office explained that it had decided not to proceed with an investigation and it set out the relevant statutory provisions as well as the relevant case law that had interpreted them.

30. By second letter of 25 July 2013 (received on 26 July 2013) (**MS10** and **MS18**) the Applicant wrote setting out his further response.

31. My Office replied by letter of 26 July 2013 further setting out its position (**MS10** and **MS18**).

32. The Applicant replied by email of 26 July 2013 indicating that he was considering bringing judicial review proceedings. I beg to refer to a copy of the said email attached hereto and upon which marked with the letters and number "**BH2**" I have signed my name prior to the swearing hereof.

33. On 28 July 2013 (**MS10** and **MS18**) the Applicant wrote making a further submission.

34. On 29 July 2013 (**MS10** and **MS18**) this Office again replied. The letter explained that our previous correspondence had set out that we have no basis to investigate the matter on the basis that the Acts provide for legal recognition of EU Commission Adequacy Decisions. We further set out our interpretation of Section 10 and reiterated that our previous letters had referred to both S.10(1)(a) and S.10(1)(b)(i) and that, taken on an individual basis or, indeed, on a complementary basis, they provide a sustainable basis for the forming of an opinion to the effect that the Applicant's complaint should not to be investigated. We indicated that judicial review was a matter for the Applicant and that we had nothing further to add to our assessment that there is a clear position in law to underpin the transfer of personal data in this case. We also reserved our right to defend our position in response to an application for judicial review and to make such legal submissions as considered appropriate both in relation to proper interpretation of the Acts and on general principles of administrative law.

35. The Applicant responded by letter of 29 July 2013 (**MS10** and **MS18**).

36. On 30 July 2013 (**MS10** and **MS18**) this Office further confirmed its position, to which the Applicant replied, by email, on 31 July 2013. I beg to refer to a copy of the said email of 31 July 2013 attached hereto and upon which marked with the letters and number "**BH3**" I have signed my name prior to the swearing hereof.

37. By letter dated 7 October 2013 the Applicant wrote seeking my agreement to an application for a protective costs order in the judicial review proceedings threatened by the Applicant, but which had not yet issued. This letter has not been exhibited by the Applicant. I beg to refer to a copy of the said letter attached hereto and upon which marked with the letters and number "**BH4**" I have signed my name prior to the swearing hereof.

38. By letter of 11 October 2013 my Office wrote to the Applicant to reiterate its position and to ensure that the Applicant understood the precise basis on which his complaint was not being

investigated. This letter has likewise been omitted from the documents exhibited by the Applicant. I beg to refer to a copy of the said letter attached hereto and upon which marked with the letters and number "**BH5**" I have signed my name prior to the swearing hereof.

39. On 21 October 2013 the Applicant sought and obtained leave to bring the within judicial review proceedings.

Challenge to the merits of the impugned opinion

40. I say that in so far as the judicial review relates to a challenge to the merits of the opinion formed by me I respectfully disagree with the challenge on the merits and believe that the decision was properly made and is a rational one. I say and believe (and am so advised) that this is a matter properly to be dealt with by way of legal submission in due course.

41. I say that in so far as the Applicant makes any complaint about the procedures of this Office, it is clear from the chronology above that he was given every chance to make his case and that on each occasion when he did so this Office engaged with him and explained its position.

42. I note that in his papers the Applicant refers to his belief that Commission Decision C2000/520/EC is wrong. I say that there is no doubt that data protection is a rapidly developing area of the law and that there is an on-going debate at EU level in relation to the safe harbour arrangements. The manner in which the EU interacts with the United States in this context is clearly a matter that falls to be determined in the first instance by way of negotiations between the EU and the United States. In that regard, I say and believe that, as recently as 27 November 2013, a Communication was issued by the European Commission, directed to the European Parliament and Council, in which the European Commissioner recommended thirteen separate adjustments to the safe harbor scheme to address concerns raised about the operation of the scheme in terms of transparency, availability of redress, enforcement, and access by US authorities to transferred data. I say and believe that these recommendations are to be the subject of further discussion between the EU and the United States in the context of ongoing dialogue between their respective justice and home affairs ministerial representatives. I

beg to refer to a copy of the above-referred Communication of 27 November 2013, attached hereto and upon which marked with the letters and number "**BH6**" I have signed my name prior to the swearing hereof.

43. Separately, I say and believe that, it is of note that, by decision made on 15 November 2013, the Data Protection Authority of Luxembourg found that a complaint lodged by the Applicant in that jurisdiction concerning the application of the so-called "PRISM" programme to data transferred to the United States by Skype Communications S.A.R.L. (a company established in Luxembourg) could not be sustained. The Luxembourg DPA was satisfied that the transfer of data by Skype Communications S.A.R.L. to the United States was being undertaken lawfully under the safe harbour rules implemented and/or endorsed by Commission Decision C2000/520/EC. A decision to the same effect was reached in respect of a parallel complaint lodged by another party in respect of the application of the "PRISM" programme to data transferred to the United States by Microsoft Luxembourg S.A.R.L. I beg to refer to the German-language copies of the said decisions of 15 November 2013, and an English-language press release issued by the Luxembourg DPA on 18 November 2013, attached hereto and upon which marked with the letters and number "**BH7**" I have signed my name prior to the swearing hereof.

44. In paragraph 20 of his affidavit the Applicant states that whilst the European Commission has ruled that certain countries have in place an adequate level of protection for the data privacy rights of their citizens, no such finding has been made in respect of the United States. I say and believe that the correct position is that the above-referenced Commission Decision C2000/520/EC was adopted on 26 July 2000 pursuant to which the level of protection provided for the data privacy rights in the United States is deemed adequate on the basis of (and subject to compliance with) the safe harbour principles.

45. I say that the forming of an opinion not to investigate a complaint at a particular point in time is not necessarily a final one for all time and nor does it preclude a fresh complaint being made if the law changes. For example, if Commission Decision C2000/520/EC were to be revoked and/or replaced at some future date then clearly any new complaint that the Applicant might

wish to bring would fall to be considered under the new legal regime in place. However I say and believe that I have to have regard to the state of the law as it stands as at the time when I am considering a particular complaint. That is was what was done in this case.

Conclusion and Prayer

46. I note that in his affidavit the Applicant makes some comments relating to an impression he had that this Office did not want to investigate the matter or that it *"wanted to get this hot potato off the table without making any decision.*" The Applicant is perfectly free to hold any view that he wishes. However I say that at all times this Office has sought to apply in a *bona fide* manner what it believes to be the correct interpretation of the legislation and of the law. I fully respect the right of the Applicant to seek to judicially review my opinion that I should not investigate his complaint in respect of Facebook Ireland Limited and "PRISM" in proceedings before this Court and if there is anything further that I can do to assist this Court in determining the judicial review I will be happy to so assist.

47. In all of the circumstances I pray this Honourable Court to refuse the reliefs sought by the Applicant herein.

SWORN by the said **BILLY HAWKES**
this day of December, 2013

at

in the City/County of
before me a Practising Solicitor

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PRACTISING SOLICITOR

This affidavit is filed on behalf of the Plaintiff by Philip Lee Solicitors, 7/8 Wilton Terrace, Dublin 2. Filed this day of December, 2013

THE HIGH COURT

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Applicant

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Philip Lee Solicitors
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Dublin 2