THE HIGH COURT
JUDICIAL REVIEW

Record No. 2013/765/JR

BETWEEN:

MAXIMILIAN SCHREMS

APPLICANT

AND

DATA PROTECTION COMMISSIONER

RESPONDENT

REPLYING AFFIDAVIT OF MAXIMILIAN SCHREMS

I, Maximilian Schrems, [redacted], Austria, aged 18 years and upwards make oath and say as follows:

1. I am the Applicant herein and I make this affidavit from facts within my own knowledge, save where otherwise appears, and where so otherwise appears I believe those facts to be true and accurate. I make this affidavit in reply to the affidavit of Billy Hawkes filed herein on the 16th day of December 2013.

Preliminary Point

2. I confirm that the document referred to at paragraph 4 of the affidavit under reply in relation to Apple Distribution International is irrelevant to these proceedings and was included as part of an exhibit herein in my grounding affidavit in error.

Scope of Responsibility of Facebook Ireland

3. In regard to paragraph 9 of the affidavit under reply I say that, as far as I understand the position to be, Facebook Ireland is in fact designated as a "data controller" for all countries in the World (other than the United States of American and Canada) rather than only member states of the European Economic Area as stated therein.

4. Paragraph 10 of the affidavit under reply should similarly, in my view, refer to an area greater than the European Economic Area. In paragraph 10 of that affidavit the Commissioner refers to *"...some or all data relating to Facebook subscribers resident within the European Area is in fact transferred to and held on servers located in the United States"*.

Transfer of my Data to the USA

5. As hereunder is further referred to by me (Paragraph 15), the Commissioner disputes that I complained that my own personal data was so transferred, and thereby appears to question my *locus standi* to complain and / or take these proceedings (see for example paragraphs 23 & 24 of the Statement of Opposition). In my complaint I did however expressly rely on my own data being so transferred.

6. Even if this were not so, there is, by the Commissioner's own averment at paragraph 10 of the affidavit under reply, an acceptance by him that "some or all" of such data is in fact so transferred, it is therefore inappropriate for the Commissioner to reject my application by reference to my supposed failure to complain about the transmission of my own personal data. In these circumstances I say that it is incumbent upon the Commissioner to disclose now in these proceedings the source of his knowledge that "some or all" of such data is transferred to the United States and to exhibit whatever material he is relying upon in that respect to this Honourable Court.

Alternative Transfer Methods

7. Paragraph 11 of the affidavit under reply would seem to suggest that there are a "number of alternative bases" for permitting the transfer of subscriber data to the United States other than the "Safe Harbour" principles, but fails to address or specify what those bases might be.

Previous Audit

8. Again, in paragraph 12 of the affidavit under reply, the Respondent refers to "an audit" undertaken by his office in 2011. I say and am advised that such audit should be exhibited before this Honourable Court in circumstances where its apparent conclusions are sought to be relied upon by the Respondent.

9. Furthermore, I say that conclusions reached during an "audit" prepared in 2011 into the transfer of data to the United States should not have been relevant to the adjudication upon a complaint in 2013, or be relevant to these proceedings, in the light of the revelations that have surfaced since then concerning PRISM details of which are outlined in exhibits "MS1" and "MS3" in my grounding affidavit.

Discussion between DPC and Facebook Ireland

10. With reference to paragraph 15 of the affidavit under reply I say that the contents thereof do not deal in any way substantively with the position "on the ground" and ignore the information referred to by me in my grounding affidavit and complaint. In addition I say that it is unsatisfactory for the Respondent to refer to a discussion between his "office" and Facebook Ireland in these proceedings without, at least, stating clearly who that discussion was between and when it took place and exhibiting a memorandum of such discussion. It is not clear whether the Respondent himself is the appropriate person to aver to these facts or whether the discussion referred to was had by a member of his staff. There is evidence contained in the documentation exhibited at, for instance, the second page of exhibit "MS2" in my grounding affidavit that any such assurance provided by Facebook Ireland would not, in any event, have addressed the concerns raised: ("We do not provide any government organisation with direct access to Facebook servers"-said Joe Sullivan, Chief Security Officer for Facebook. Whereas, it is later recorded "It is possible that the PRISM slides and the company spokesmen is the result of imprecision on

the part of NSA author. In another classified report obtained by The Post, the arrangement is described as allowing "collection managers [to send] content tasking instructions directly to equipment installed at company controlled locations," rather than directly to company servers").

11. With reference to paragraphs 17 & 18 of the affidavit under reply the following matters arise. I say that the Respondent ought to exhibit a copy of all communications between himself and Facebook Ireland as referred to in his affidavit at paragraph 17 (and at paragraphs 23 & 25) regardless of whether same are alleged to have been relied upon or otherwise. Whilst I have been advised by my Solicitors that the question of whether the Respondent was correct in concluding that my Complaint was "frivolous and vexatious" is primarily a matter of law and a matter for legal submissions I say that my complaint, essentially comprised of a number of different matters (as referred to at paragraph 26 of my grounding affidavit) and even if it were the case that a particular element of my complaint were in fact "frivolous and vexatious" (which I deny) that fact should not relieve the Respondent of his obligation to investigate all other elements of my complaint, which appears to have been the stance adopted by the Respondent.

Matter to be addressed by EU

12. With further reference to paragraph 18 of the affidavit under reply and with regard to the view of the Respondent that "the complaint was one that could only be addressed by relevant institutions of the European Union" I say that as that now appears to have been the Respondent's belief it was incumbent upon the Respondent to make such Preliminary Reference (as had been suggested in my Complaint) rather than reject my claim as being "frivolous and vexatious". The difference is stark given on the one hand that a CJEU ruling, insofar as is necessary on such Preliminary Reference (as to which, see below), on my Complaint or part/s thereof would have been beneficial for all concerned, the effect of the "frivolous and vexatious" finding is that, but for these Judicial Review proceedings, that would be a complete end to my Complaint, without

recourse to any appeal to the Circuit Court, which is available in respect of all other decisions (as I understand it) upon complaints made to the Respondent under the Data Protection Acts 1988-2003.

Demand to set aside or disapply "Safe Harbor"

13. With further reference to Paragraph of the affidavit under reply the Respondent says that what I had demanded from him was to "set aside or disapply" the "Safe Harbor" decision. I say that what my Complaint set out was that I was of the opinion that the transfer of my data to the United States was not legal when correctly applying and interpreting the "Safe Harbor" decision and under the legal principles contained in the Data Protection Acts (pages 3-6 of my Complaint).

14. It was only if the Respondent disagreed with the aforesaid that I said at page 6 of my Complaint that the "Safe Harbor" decision might be invalid under higher ranking law (Directive 95/46/EC, Article 8 CFR and Article 8 ECHR). I therefore respectfully disagree with the Respondent's assessment that the substance of my Complaint was aiming to "set aside or disapply" the "Safe Harbor" decision. I disagree with the Respondents view that he had no standing to address the substance of my Complaint, apparently on the basis of his understanding (erroneous in my view) that I was seeking only that he set aside or disapply the "Safe Harbor" decision. The Respondent should have addressed my Complaint by investigating whether the transfer of my data was lawful under "Safe Harbor" and, only if so, would he then have had to ensure that "Safe Harbor" itself was lawful. This latter question might indeed have given rise to the necessity to request a Preliminary Reference from the CJEU, which, had it arisen, the Respondent could have then requested.

Transfer of my Data to the USA

15. With regard to paragraph 19 of the affidavit under reply I say that insofar as it is relevant, (and, for legal reasons which shall be the subject of submissions in due

course, I say it is not relevant) I did allege that my personal data was in fact transmitted to the USA in my Complaint and the terms thereof make that clear (page 1 thereof). The Respondent appears to accept that such data is held / processed in the USA in paragraph 10 of the affidavit under reply, at least to some extent. However, since Article 25 of Directive 95/46/EC and the domestic legislation are only concerned with the general "level of protection" (in other words the general risk of misuse rather than actual misuse in every case) in another country, it was irrelevant if my personal data had been forwarded to the NSA or used by the NSA. As addressed in my complaint the facts that are relevant is the transfer of my data abroad and the general level of protection such data is enjoying abroad.

Exceptions from the "Safe Harbor"

16. With regard to paragraph 21 of the affidavit I say that "the extent necessary" to meet national security requirements is a crucial consideration in regard to the proportionality of any decision on a complaint such as mine and yet was not considered at all or referred to in these proceedings to date by the Respondent. I say and accept that the Respondent is bound to apply the law but application of the law does not mean that the Respondent is bound to accept that because Facebook Inc. has agreed to be bound by the provisions of the Safe Harbour that a transfer is lawful purely on that account. The Respondent has a duty to ensure that the Safe Harbour agreement is in fact complied with. That duty must be heightened given the content of the PRISM revelations.

Request for Exhibits

17. With regard to paragraph 23 & 24 of the affidavit under reply I reiterate my view that the preliminary observations submitted to the Respondent by Facebook Ireland should be exhibited by him. Furthermore, it would appear contradictory for the Respondent to aver on the one hand that he did not take these preliminary observations into account, while, at the same time, selecting

one submission of Facebook Ireland relating to its "position" from those same submissions and relying on same.

18. With regard to paragraphs 25 and 26 of the affidavit under reply I again believe the documentation referred to by the Respondent ought to now be exhibited. The revelation on the part of the Respondent that Facebook was informed on the 9th July 2013 that my Complaint would not be investigated causes me unease and concern in circumstances where I was not informed of this until approximately two weeks later. It also causes me concern that there appears to have been much communication and furnishing of submissions / "confirmations" between Facebook Ireland and the Respondent concerning my Complaint which was not disclosed to me (and still has not been disclosed) and I am not satisfied that the Respondent did not take such materials into account, inter alia on account of the contents of paragraphs 8,10,15,23 & 25 of the affidavit under reply.

Clarity of Procedure

19. With regard to Paragraph 41 of the affidavit under reply I say that it is incorrect of the Respondent to say that "it is clear from the chronology above that he was given every chance to make my case and that on each occasion when he did so this Office engaged with him and explained its position". I say that the correspondence illustrates the opposite. For example despite enquiry as to whether the complaint was being held to be "frivolous and vexatious" no answer was furnished until 11th October 2013, over two and a half months after the decision was made. I do not know if the same explanation was provided to Facebook Ireland in the Respondents communication of the 9th July 2013 which I await sight of. Until receipt of the letter of the 11th October 2013 I was not aware that the decision was made on the basis that the Complaint was "frivolous or vexatious".

European Commission Report

20. In paragraph 42 of the affidavit under reply the Respondent exhibits ("BH6") a Communication issued by the European Commission. The Respondent points to this document as evidence that there is an on-going debate, however, this document is relevant to my Complaint / these proceedings in other, more important respects.

21. For example, the European Commission, in dealing with the possibilities to allow mass access under "Safe Harbor" to data find that the "Safe Harbor" principles of "Proportionality and Necessity", Limitations and Redress, and "Transparency" are violated by mass access through US authorities.

22. I say that the position taken by the Respondent in deeming my Complaint to be "frivolous and vexatious" is unsustainable given the statement of the European Commission that *"[t]he large scale nature of these programmes may result in data transferred under Safe Harbour being accessed and further processed by US authorities beyond what is strictly necessary and proportionate to the protection of national security as foreseen under the exception provided in the Safe Harbour Decision."*

Luxemburg Data Protection Commission

23. In paragraph 43 of the affidavit under reply the Respondent says that the Luxemburg Data Protection Commission ("CNPD") "found that" a similar complaint "could not be sustained" as the Respondent defines his test to make a complaint "frivolous". I respectfully disagree. I beg to refer to a true copy of the exchange of letters from the CNPD dated the 15th, 17th and 29th November 2013 together with a translation (which I prepared myself) thereof upon which marked with the letter "MS2" I have signed my name prior to the swearing hereof. The CNPD found that the complaint was admissible (*"Your request is according to Article 32 Section 2 Letter a) of the modified law from August 2nd 2002 for the protection of personal data at data processing accordingly admissible"*, see letter dated November 15th 2013), but could not be upheld against Skype because of a lack of evidence and had beforehand undertaken a

substantial investigation. The CNPD did not hold that my complaint was frivolous or could not be sustained but treated the matter very seriously.

24. Moreover, more relevant to the question of whether my Complaint could lawfully said to be "frivolous or vexatious", is the reason why the CNPD did not uphold my complaint. At paragraph 43 of the affidavit under reply the Respondent states (incorrectly) that the CNPD held that the transfer was "undertaken lawfully under the safe harbour rules" and exhibited a press release at "BH7". In the letter of the 29th November 2013 the CNPD make clear that the Luxemburg CNPD's findings were not based on a view that the mass access by NSA was legal under "Safe Harbor", on the contrary, the CNPD highlighted that they were *"in no case of the opinion that the "Safe Harbor" decision of the European Commission authorizes a mass access"*. I therefore respectfully disagree with the Respondent's view that my Complaint "could not be sustained" because the transfer was "undertaken lawfully".

25. My view is that the Luxemburg CNPD found my legal argument to be correct, but took the view that, in that case, they had not enough evidence of the existence or details of the PRISM programme. This aspect would appear in any event to be irrelevant to my Complaint as the Respondent acknowledges the existence of PRISM in his decision of the 23rd July 2013.

EU Working Group Report

26. In any event, since then the European Commission has published a report by the EU-US Working Group (dated the 27th November 2013) which clearly sets out that the PRISM programme existed and I beg to refer to a true copy thereof upon which marked with letters and number "MS3"I have signed my name prior the swearing hereof.

EU Parliament Draft Report

27. In addition the European Parliament's LIBE Committee has published a draft report on the 8th January 2013, which is dealing with the spy scandal and the "Safe Harbour" Decision. I beg to refer to a true copy thereof upon which marked with letters and number "MS4" I have signed my name prior the swearing hereof. On pages 20 and 21 of the draft report the European Parliament's committee is also expressing the view, that "*large-scale access by US intelligence agencies to EU personal data processed by Safe Harbour does not per se meet the criteria for derogation under 'national security'*" it further takes the view that "*as under the current circumstances the Safe Harbour principles do not provide adequate protection for EU citizens*". The draft report is finally explicitly calling on national data protection authorities like the Respondent to exercise existing powers to suspend data flows: "*Calls on Member States' competent authorities, namely the data protection authorities, to make use of their existing powers and immediately suspend data flows to any organisation that has self-certified its adherence to the US Safe Harbour Principles and to require that such data flows are only carried out under other instruments, provided they contain the necessary safeguards and protections with respect to the protection of the privacy and fundamental rights and freedoms of individuals*".

Summary of other Institutions' Views

28. In summary this means that to date the European Commission, the European Parliament's LIBE Committee, the European Data Protection Supervisor, the "Article 29 Working Party", the German DPCs and the Luxemburg DPC (CNPD) have expressed the view that "Safe Harbour" does not allow for data transfer out of the European Union, if a US authority is further using such data for mass spying. The Luxemburg DPC (CNPD) was simply unable to produce the necessary evidence to enforce this prohibition.

Adequacy Decision

29. As to paragraph 44 of the affidavit under reply I believe the Respondent is confusing the distinction between and "adequacy decision" for an entire country

(as were reached for e.g. Switzerland, Israel and Canada) with the sectorial solution that the "Safe Harbor" decision was designed to provide.

30. In the circumstances I pray this Honourable Court for the reliefs sought in the notice of Motion herein.

Sworn by the said Maximilian Schrems
on this the day of January 2014 before
me a Practising Solicitor/Commissioner
for Oaths at
and I know the Deponent (or the
deponent has been identified to me
by who is
personally known to me)

_____

Practising Solicitor/
Commissioner for Oaths

THIS AFFIDAVITIS FILED ON BEHALF OF THE APPLICANT BY AHERN RUDDEN SOLICITORS OF 5 CLARE STREET, DUBLIN 2 THIS DAY OF JANUARY 2014.