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Case No: CO/2368/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2017

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE LEGGATT

- -

Between :

THE QUEEN on the application of PRIVACY INTERNATIONAL	**Claimant**
- and -	
INVESTIGATORY POWERS TRIBUNAL	**Defendant**
- and -	
(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	
(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS	**Interested Parties**

- -

Ben Jaffey and **Tom Cleaver** (instructed by Bhatt Murphy, London) for the Claimant
Jonathan Glasson Q.C. (instructed by the Government Legal Department) for the Defendant
James Eadie Q.C. and **Kate Grange** (instructed by the Government Legal Department) for the Interested Parties

Hearing date: 2 November 2016

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Approved Judgment

Sir Brian Leveson P :

1. On 12 February 2016, the Investigatory Powers Tribunal ("IPT") ruled against an application brought by Privacy International relating to the proper construction of section 5 of the Intelligence Services Act 1994 ("the 1994 Act"). It held that the provision which empowered the Secretary of State to authorise "the taking … of such action as is specified in the warrant in respect of any property so specified" was wide enough to encompass computer and network exploitation or, in colloquial language, hacking of computers including mobile devices on a thematic basis, i.e. in respect of a class of property or people or a class of such acts.

2. Privacy International wishes to judicially review that ruling but has been met with section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA") and the contention that this clause is an ouster providing that no right of appeal or challenge lies from a decision of the IPT. Thus, these proceedings have been brought to establish, first, that section 67(8) of RIPA does not prevent judicial review of a decision of the IPT when it errs in law and, second, that the proper construction of section 5 of the 1994 Act does not permit such computer and network exploitation.

3. On 17 June 2016, Lang J granted permission to apply for judicial review, observing that she had "real doubt" whether the court had jurisdiction to determine the substantive claim. As a result, she ordered a preliminary issue to be tried of the issue whether the decision of the IPT was amenable to judicial review. She also made a protective costs order.

4. On the hearing of the preliminary issue, we have been assisted by Ben Jaffey and Tom Cleaver for Privacy International and by James Eadie Q.C. and Kate Grange for the Secretary of State for Foreign and Commonwealth Affairs and Government Communications Headquarters as the relevant institutions of government named as Interested Parties. Jonathan Glasson Q.C. for the IPT has provided a note to assist the court in relation to the history and statutory functions of the IPT along with the manner in which it fulfils those functions but he did not argue the merits of the ouster issue.

The Structure and Functions of the IPT

5. It is no accident that RIPA (establishing the IPT) came into force at the same time as the Human Rights Act 1998 and the Civil Procedure Rules (described as "a single legislative scheme": see *A v Director of the Security Service ('A v B')* [2010] 2 AC 1 [2009] EWCA Civ 24 and [2009] UKSC 12 per Laws LJ (at [14]) and Dyson LJ (at [48]) in the Court of Appeal echoed by Lord Brown in the Supreme Court at [21]). The Explanatory Notes to RIPA identified that the main purpose of the Act was to ensure that investigatory powers (including, for example, the interception of communications and the carrying out of surveillance) were "used in accordance with human rights".

6. The IPT effectively replaced the Interception of Communications Act Tribunal, the Security Services Act Tribunal and the Intelligence Services Act Tribunal which now exist only in relation to complaints made before 2 October 2000. These tribunals (established by the Interception of Communications Act 1985, the Security Services

Act 1989 and the 1994 Act respectively) were repealed by RIPA and contained almost identical ouster provisions. Thus, section 7(8) of the 1985 Act provides:

> "The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court."

Similarly, section 5(4) of the 1989 Act and section 9(4) of the 1994 Act provide:

> "The decisions of the Tribunal and the Commissioner under that Schedule (including decisions as to their jurisdictions) shall not be subject to appeal or liable to be questioned in any court."

7. The IPT also replaced the complaints provision of Part III of the Police Act 1997 (concerning police interference with property). It stands apart from other tribunals and is not part of Her Majesty's Courts and Tribunal Service on the basis that (according to Sir Andrew Leggatt in his Report of the Review of Tribunals at para 3.11) "it is wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service". Sir Andrew went on:

> "The Tribunal's powers are primarily investigatory, even though it does also have an adjudicative role. Parliament has provided that there should be no appeal from the tribunal except as provided by the Secretary of State."

8. The membership of the IPT is made up of the President, the Vice President, three other judges (all five of whom are judges of the High Court) and other distinguished lawyers including representatives from Scotland and Northern Ireland. Its remit is established by section 65 of RIPA (as amended) in these terms:

> "(1) There shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint.
>
> (2) The jurisdiction of the 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;
>
> (c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 17, on his

relying in, or for the purposes of, any civil proceedings on any matter; and

(d) to hear and determine any other such proceedings falling within subsection (3) as may be allocated to them in accordance with provision made by the Secretary of State by order.

(3) Proceedings fall within this subsection if—

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

(b) they are proceedings against any other person in respect of any conduct, proposed conduct, by or on behalf of any of those services;

(c) they are proceedings brought by virtue of section 55(4); or

(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).

(4) The tribunal is the appropriate forum for any complaint if it is a complaint 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, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service or telecommunication system; and

(b) to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services.

(5) Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is–

(a) conduct by or on behalf of any of the intelligence services;

(b) conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system;

(c) conduct to which Chapter II of Part I applies;

(ca) the carrying out of surveillance by a foreign police or customs officer (within the meaning of section 76A);

(d) other conduct to which Part II applies;

(e) the giving of a notice under section 49 or any disclosure or use of a key to protected information;

(f) any entry on or interference with property or any interference with wireless telegraphy.

(6) For the purposes only of subsection (3), nothing mentioned in paragraph (d) or (f) of subsection (5) shall be treated as falling within that subsection unless it is conduct by or on behalf of a person holding any office, rank or position with–

(a) any of the intelligence services;

(b) any of Her Majesty's forces;

(c) any police force;

(ca) the Police Investigations and Review Commissioner;

(d) the National Crime Agency;

(f) the Commissioners for Her Majesty's Revenue and Customs;

and section 48(5) applies for the purposes of this subsection as it applies for the purposes of Part II.

(7) For the purposes of this section conduct takes place in challengeable circumstances if–

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or

(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;

but, subject to subsection (7ZA), conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.

(7ZA) The exception in subsection (7) so far as conduct is authorised by, or takes place with the permission of, a judicial authority does not include conduct authorised by an approval given under section 23A or 32A.

(7A) For the purposes of this section conduct also takes place in challengeable circumstances if it takes place, or purports to take place, under section 76A.

(8) The following fall within this subsection–

(a) an interception warrant or a warrant under the Interception of Communications Act 1985;

(b) an authorisation or notice under Chapter II of Part I of this Act;

(c) an authorisation under Part II of this Act or under any enactment contained in or made under an Act of the Scottish Parliament which makes provision equivalent to that made by that Part;

(d) a permission for the purposes of Schedule 2 to this Act;

(e) a notice under section 49 of this Act; or

(f) an authorisation under section 93 of the Police Act 1997.

(9) Schedule 3 (which makes further provision in relation to the Tribunal) shall have effect.

(10) In this section–

(a) references to a key and to protected information shall be construed in accordance with section 56;

(b) references to the disclosure or use of a key to protected information taking place in relation to a person are references to such a disclosure or use taking place in a case in which that person has had possession of the key or of the protected information; and

(c) references to the disclosure of a key to protected information include references to the making of any disclosure in an intelligible form (within the meaning of section 56) of protected information by a person who is or has been in possession of the key to that information;

and the reference in paragraph (b) to a person's having possession of a key or of protected information shall be construed in accordance with section 56.

(11) In this section "judicial authority" means–

(a) any judge of the High Court or of the Crown Court or any Circuit Judge;

> (b) any judge of the High Court of Justiciary or any sheriff;
>
> (c) any justice of the peace;
>
> (d) any county court judge or resident magistrate in Northern Ireland;
>
> (e) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge of the Crown Court or of a justice of the peace."

9. I have set out the remit of the IPT extensively in order to identify the range of its activities and the responsibility of the Secretary of State to allocate work to it (as to which see section 66(1) of RIPA). Alongside its work, there is further and additional oversight of the authorities which is provided by the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Chief Surveillance Commissioner (two of whom being retired members of the Court of Appeal, the third a retired Lord Chief Justice of England and Wales). Their activities fit into the work of the IPT which has power to require a relevant Commissioner to provide it with all such assistance as it thinks fit (section 68(2) of RIPA) and, in relation to every person holding office under the Crown, to disclose "all such documents and information as the Tribunal may require for the purposes of enabling them to exercise the jurisdiction conferred on them by section 65 or otherwise to exercise or perform any power or duty conferred on them by RIPA." (section 68(6) (a) and (b)of RIPA).

10. The way in which the IPT exercises its jurisdiction, its procedure and its powers (which include the right to award compensation) are prescribed by sections 67 and 68 of RIPA having been tailored to the sensitive subject matter with which it deals. As to procedure, RIPA permits the Secretary of State to make rules regulating the exercise by the IPT of its jurisdiction and any matters preliminary or incidental to, or arising out of, the hearing or consideration of any matter brought before the IPT (section 69(1) of RIPA). The Investigatory Powers Tribunal Rules 2000 ("the Rules") allow the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law": see r.11(1).

11. The IPT is also able to consider material which, for reasons of national security, cannot be disclosed in open proceedings. This can relate either to the internal arrangements and safeguards operated by the relevant intelligence services or to facts relevant to the individual complaint or complainant. With the benefit of what has been learnt in closed session and full argument, the IPT can probe whether what has been disclosed in closed hearing can and should be disclosed in an open hearing and thereby publicised: see *Liberty/Privacy (No. 1)* [2014] UKIP Trib 13, [2015] 3 All ER 142 at [46]. In the same case, challenges to the fairness of the hearing were dealt with in these terms (at [50(ii)]):

> "We do not accept that the holding of a closed hearing, as we have carried out, is unfair. It accords with the statutory procedure, and facilitates the process referred to at [45] and [46] above. This enables a combination of open and closed hearings which both gives the fullest and most transparent opportunity for hearing full arguments *inter partes* on

> hypothetical or actual facts, with as much as possible heard in public, and preserves the public interest and national security."

12. For the purposes of this challenge, it is unnecessary to rehearse the procedure adopted by the IPT in any greater detail. Suffice to say that these procedures were considered by the European Court of Human Rights in *Kennedy v United Kingdom* (2011) 52 EHRR 4 which concluded that an effective remedy had been afforded in accordance with Article 13 of the ECHR, expressing itself in these terms (at [18]):

> "Having regard to its conclusions in respect of Article 8 and Article 6§1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications."

13. Before parting from this analysis of structure, it is important to add that an alternative mechanism of resolving disputes has been developed by the IPT; this involves proceeding on the basis of assuming the facts alleged. The process was described in the Investigatory Powers Tribunal Report 2011-2015 in these terms:

> "2.7 The Closed Material Procedures have been introduced in the civil courts in order to handle civil cases where the Government may need to rely on sensitive material to justify an executive action. As a judicial body handling similarly sensitive material, the Tribunal's policies and procedures have been carefully developed and have evolved with the aim of balancing the principles of open justice for the complainant with a need to protect sensitive material. The approach of hearing a case on the basis of assumed facts has proved to be of great value.
>
> 2.8 *Assumed facts:* This means that, without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to *assume for the sake of argument* that the facts asserted by the claimant are true; and then, acting upon that assumption, decide whether they would constitute lawful or unlawful conduct. This has enabled hearings to take place in public with full adversarial argument as to whether the conduct alleged, if it had taken place, would have been lawful and proportionate. Exceptionally, and where necessary in the interests of public safety or national security, the Tribunal has sat in closed (private) hearings, with the assistance of Counsel to the Tribunal, to ensure that points of law or other matters advanced by the complainants are considered."

14. Mr Jaffey relies on the fact that the IPT has found a mechanism whereby it can conduct proceedings in public as demonstrating that open justice (with, he argues, concomitant rights of appeal) can clearly be available through the mechanism adopted by the IPT. I shall return to this argument having analysed the provisions which deal with potential challenge.

15. The relevant provisions are contained in section 67 which, on its face, deals with the extent to which decisions of the IPT can be challenged and the responsibilities of the Secretary of State in relation to certain appeals. The relevant provisions are:

> "(8) Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.
>
> (9) It shall be the duty of the Secretary of State to secure that there is at all times an order under subsection (8) in force allowing for an appeal to a court against any exercise by the Tribunal of their jurisdiction under section 65(2)(c) or (d).
>
> (10) The provision that may be contained in an order under subsection (8) may include—
>
> (a) provision for the establishment and membership of a tribunal or body to hear appeals;
>
> (b) the appointment of persons to that tribunal or body and provision about the remuneration and allowances to be payable to such persons and the expenses of the tribunal;
>
> (c) the conferring of jurisdiction to hear appeals on any existing court or tribunal; and
>
> (d) any such provision in relation to an appeal under the order as corresponds to provision that may be made by rules under section 69 in relation to proceedings before the Tribunal, or to complaints or references made to the Tribunal.
>
> (11) The Secretary of State shall not make an order under subsection (8) unless a draft of the order has been laid before Parliament and approved by a resolution of each House."

Ouster clauses

16. In order to consider the efficacy of section 67(8) of RIPA, it is necessary to analyse it not only in the context of the legislation, described above, but also against the background of other attempts to oust the jurisdiction of the court. Thus, the starting point is *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, which concerned the determination by a Commission chaired by Queen's Counsel, set up under the Foreign Compensation Act 1950, as to eligibility for an award of compensation in relation to expropriated or sequestrated property arising (in this case) from the Suez crisis in 1956. The Commission had to construe an Order to determine whether the claim for compensation was established. By section 4(4) of that Act, it was provided that "the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law".

17. The House of Lords decided that a "determination" which was based on a misinterpretation of the Order was a nullity with the result that section 4(4) did not preclude judicial review by way of certiorari. Thus, a provision which was intended to oust any inquiry by the court would be expected to be "much more specific than the bald statement that a determination shall not be called in question in any court of law" (per Lord Reid at 170E) so that by the word 'determination' "Parliament meant a real determination not a purported determination" (per Lord Pearce at 199H).

18. The effect of this decision was described in *O'Reilly v Mackman* [1983] 2 AC 237 in the speech of Lord Diplock (with whom the other members of the committee agreed) in these terms (at 278):

> "The break-through that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination,' not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity."

19. That is not to say that it is impossible for Parliament to legislate in such a way as to exclude judicial review. In *R (Gilmore) v Medical Appeal Tribunal* [1957] 1 QB 574, Denning LJ made it clear (at 583) that this was a possibility when he observed that "the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words". In the *Anisminic* case itself Lord Wilberforce said (at 207B) that "the position may be reached, as the result of statutory provision, that even if [specialised tribunals] make what the courts might regard as decisions wrong in law, these are to stand." The same point was made in *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths (at 693H) when he said:

> "Parliament can by the use of appropriate language provide that a decision on a question of law whether taken by a judge or by some other form of tribunal shall be considered as final and not be subject to challenge either by way of appeal or judicial review."

20. Against that background, Mr Jaffey points to various decisions which he argues demonstrate the reluctance of courts to construe what are said to be ouster clauses as having achieved that intention. It is, however, important to analyse the parliamentary language concerned and understand the context of each. Two recent examples will suffice. Thus, in *R (Woolas) v Parliamentary Election Court* [2012] QB 1, consideration was given to section 144(1) of the Representation of the People Act 1983 which mandates the election court to determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void and goes on to provide that "the determination so certified shall be final to all intents as to the matters at issue on the petition". This court made it clear that the judgment was *in rem* and in that sense binding on the world; Thomas LJ (as he then was) did not suggest that Parliament

could not oust the jurisdiction of the court but explained that this provision was not such a clause. He said (at [47])::

> "Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required."

21. The second example relates to the Special Immigration Appeals Commission ("SIAC") and the Upper Tribunal: see *R (Cart) v Upper Tribunal* [2011] QB 120, [2009] EWHC 3052 (Divisional Court) [2010] EWCA Civ 859 (Court of Appeal); [2012] 1 AC 663, [2011] UKSC 28 (Supreme Court). In relation to SIAC, the Anti-terrorism Crime and Security Act 2001 amended the Special Immigration Appeals Commission Act 1997 such that section 1(3) of the latter Act prescribed SIAC as a superior court of record and section 1(4) allowed a decision of SIAC to be questioned in legal proceedings only in identified circumstances which did not include an application for bail. Similarly, the Upper Tribunal had been designated as a "superior court of record" (see section 3(5) of the Tribunals, Courts and Enforcement Act 2007).

22. It was argued before the Divisional Court that a superior court of record was *ipso facto* immune from judicial review but held that the phrase "superior court of record" was not a reliable guide, let alone a definiens of courts that were immune from the supervision of the High Court by way of judicial review: see per Laws LJ at [56]. Analysing the jurisdictions, however, he also concluded, on the one hand, that the Upper Tribunal was an alter ego of the High Court and thus not amenable to judicial review (save exceptionally when it entered into a case beyond its statutory remit) but, on the other, that SIAC was in fact reviewable on grounds of excess of jurisdiction there being no basis for autonomous immunity arising under the common law.

23. An unsuccessful appeal was mounted to the Court of Appeal in relation to the Upper Tribunal; that court approached the issue in a slightly different way. Thus, a jurisprudential difference was identified between an error of law made in the course of an adjudication which the tribunal was authorised to conduct (such as that in the case before the court) and serious error outside the range of decision making authority, such that it would be contrary to the rule of law if the High Court could not step in (see [36]). On further appeal, however, the Supreme Court concluded that the 2007 Act did not contain the clear words necessary to oust or exclude judicial review although there was nothing in the two cases argued before the court which brought them within what were entirely appropriate second-tier appeal criteria.

24. As to the principle, Baroness Hale recognised (at [40]) that it lay within the reach of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it had to administer so that its decision stands even if the courts might regard it as wrong in law. She referred, however, to the risk of developing so called 'local law' which could remain uncorrected and said at [43]:

> "But that risk is much higher in the specialist tribunal jurisdictions, however expert and high-powered they may be.

> As a superior court of record, the Upper Tribunal is empowered to set precedent, often in a highly technical and fast moving area of law. … It may seem only a remote possibility that the High Court or Court of Appeal might take a different view. Indeed, both tiers may be applying precedent set by the High Court or Court of Appeal which they think it unlikely that a higher court would disturb. The same question of law will not reach the High Court or the Court of Appeal by a different route. There is therefore a real risk of the Upper Tribunal becoming in reality the final arbiter of law which is not what Parliament has provided."

25. The same might be said of the highly significant areas of law covered by the IPT but the approach of the Supreme Court to that jurisdiction has been different. In *A v B* (referred to in [5] above), a former member of the Security Services wished to publish a book about his work with the service. Consent was refused and an application for judicial review was challenged on the basis that the claim was brought under section 7(1)(a) of the 1998 Act for which by virtue of section 65(2)(a) of RIPA, the IPT was the only appropriate tribunal. The claimant succeeded before Collins J but failed in the Court of Appeal. Laws LJ said (at [22]):

> "It is elementary that any attempt to oust altogether the High Court's supervisory jurisdiction over public authorities is repugnant to the constitution. But statutory measures which confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT, whose membership I have described, offers with respect no cause for concern on this score."

26. In the Supreme Court it was held that exclusive jurisdiction was given to the IPT which was not a court of inferior jurisdiction but operated subject to special procedures apt for the subject matter in hand. The provision was not an ouster but represented the allocation of the ordinary jurisdiction of the courts to the IPT.

27. The case was concerned with a determination of the appropriate forum for the challenge being brought and not with the removal of a right of appeal from such a determination but the analysis (per Lord Brown of Eaton under Heywood with whom the other members of the court agreed) was clear and repays detailed consideration. Having set out the "legislative provisions most central to the arguments" (including section 67(8) of RIPA), he said (at [14]):

> "There are, moreover, powerful other pointers in the same direction. Principal amongst these is the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the

> limited disclosure of information to the complainant (both before and after the IPT's determination). There are, however, a number of counterbalancing provisions both in RIPA and the Rules to ensure that proceedings before the IPT are (in the words of section 69(6)(a)) "properly heard and considered". Section 68(6) imposes on all who hold office under the Crown and many others too the widest possible duties to provide information and documents to the IPT as they may require. Public interest immunity could never be invoked against such a requirement. So too sections 57(3) and 59(3) impose respectively upon the Interception of Communications Commissioner and the Intelligence Services Commissioner duties to give the IPT "all such assistance" as it may require. Section 18(1)(c) disapplies the otherwise highly restrictive effect of section 17 (regarding the existence and use of intercept material) in the case of IPT proceedings. And rule 11(1) allows the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law". All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined. None of them are available in the courts. This was the point that so strongly attracted Dyson LJ in favour of B's case in the court below. As he pithily put it, ante, p 19, para 48:
>
> > "It seems to me to be inherently unlikely that Parliament intended to create an elaborate set of rules to govern proceedings against an intelligence service under section 7 of the 1998 Act in the IPT and yet contemplated that such proceedings might be brought before the courts without any rules."

28. Having concluded that section 65(2)(a) was not an ouster clause on the basis that it had allocated scrutiny of the subject matter to the IPT which was a specialist tribunal with apt special procedures, Lord Brown went on to consider section 67(8) of RIPA and said (at [23]):

> "Nor does *Anisminic* assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing. Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny (as to section 7(1)(a) HRA proceedings) to the IPT.

29. Lord Brown then referred to the observations of Laws LJ set out above and went on:

> "… True it is that section 67(8) of RIPA constitutes an ouster (and, indeed, unlike that in *Anisminic*, an unambiguous ouster) of any jurisdiction of the courts over the IPT. But that is not the provision in question here and in any event, as A recognises,

there is no constitutional (or article 6) requirement for any right of appeal from an appropriate tribunal."

24. The position here is analogous to that in *Farley v Secretary of State for Work and Pensions (No 2)* [2006] 1 WLR 1817 where the statutory provision in question provided that, on an application by the Secretary of State for a liability order in respect of a person liable to pay child support, "the court … shall not question the maintenance assessment under which the payments of child support maintenance fall to be made". Lord Nicholls of Birkenhead, with whom the other members of the committee agreed, observed, at para 18:

> 'The need for a strict approach to the interpretation of an ouster provision … was famously confirmed in the leading case of *Anisminic* … This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court.'"

30. It is not surprising that Mr Jaffey argued that the observation that section 67(8) was "an unambiguous ouster" was *obiter,* the court having heard no argument on the point because "that is not the provision in question here". Mr Eadie, on the other hand, argued that the Supreme Court clearly recognised that the IPT was a judicial body of like standing and authority to the High Court, operating in a highly specialised regime and never intended to be the subject of judicial review.

31. Mr Jaffey contrasted *A v B* with *Brantley v Constituency Boundaries Commission* [2015] 1 WLR 2753, in which the Privy Council considered section 50(7) of the Constitution of St Kitts and Nevis which provides that "[t]he question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6)… shall not be enquired into in any court of law…" and, citing *Anisminic,* held (at [32]), that: "on the ordinary principles of judicial review, it is arguable that the making of the proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for an improper purpose". Given the difference between a proclamation by the Governor-General and the decision of a judicial tribunal such as the IPT, I do not find this decision of particular assistance.

32. Neither is it helpful to analyse the submissions or briefings addressed to Parliament, letters to The Times, various speeches by distinguished lawyers or, indeed, the observations of the Joint Committee on Human Rights all addressing the proposed clause 11 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003 in relation to decisions of the Asylum and Immigration Tribunal. The context within which those provisions fell to be determined is very different.

33. It is also worth referring back to *Kennedy v United Kingdom* (2011) 52 EHRR 4, which analysed the extensive jurisdiction of the IPT, noting (at [77]) that there was no

appeal from one of its decisions. Finding that the restrictions applied by it in order to safeguard secret information were compatible with Article 6 of the ECHR, the court underlined that the IPT provided an important level of scrutiny to surveillance activities in the UK (on which, see [167]).

34. Before concluding this review, it is appropriate to add two further points about prospective appeals. First, there is no doubt that section 67 makes provision for appeals and, if section 67(9) were bought into force, would impose a duty on the Secretary of State to allow for appeals against the exercise of jurisdiction by the IPT under section 65(2)(c) or (d) of RIPA. Such a provision would not have been necessary had there been a wider route of challenge open not only in those cases but also in every other case. Second, it is undeniably the case that the Investigatory Powers Act 2016 ("the 2016 Act"), passed following the conclusion of argument in this case, specifically provides for a wider right of appeal than that required by section 67(9) of RIPA. Thus, section 242 of the 2016 Act inserts a new section 67A into RIPA dealing with appeals from the IPT in these terms:

> "(1) A relevant person may appeal on a point of law against any determination of the Tribunal of a kind mentioned in section 68(4) or any decision of the Tribunal of a kind mentioned in section 68(4C).
>
> (2) Before making a determination or decision which might be the subject of an appeal under this section, the Tribunal must specify the court which is to have jurisdiction to hear the appeal (the relevant "appellate court").
>
> (3) This court is whichever of the following courts appears to the Tribunal to be the most appropriate-
>
> (a) the Court of Appeal in England and Wales,
>
> (b) the Court of Session
>
> (4) The Secretary of State may by regulations, with the consent of the Northern Ireland Assembly, amend subsection (3) so as to add the Court of Appeal in Northern Ireland to the list of courts mentioned there.
>
> (5) The Secretary of State may by regulations specify criteria to be applied by the tribunal in making decisions under subsection (2) as to the identity of the relevant appellate court.
>
> (6) An appeal under this section –
>
> (a) is to be heard by the relevant appellate court, but
>
> (b) may not be made without leave of the Tribunal or, if that is refused, of the relevant appellate court.
>
> (7) The Tribunal or relevant appellate court must not grant leave to appeal unless it considers that –

(a) the appeal would raise an important point of principle or practice, or

(b) there is another compelling reason for granting leave.

(8) In this section – "*relevant appellate court*" has the meaning given by subsection (2), "*relevant person*", in relation to any proceedings, complaint or reference, means the complainant or –

(a) in the case of proceedings, the respondent,

(b) in the case of a complaint, the person complained against, and

(c) in the case of a reference, any public authority to whom the reference relates."

35. In these circumstances, the second-tier appeal test approved by the Supreme Court in *Cart* in relation to the Upper Tribunal will, from the commencement of the 2016 Act, apply to the IPT. Thus, the problem generated by this case will, for the future, be avoided and, if leave be granted, an appeal from one of the IPT's decisions could in future be mounted through the relevant appellate courts. Mr Jaffey argues that this underlines that section 67(8) cannot have been intended to prevent an error of law by the IPT from being corrected in the courts. Mr Eadie, on the other hand, argues that this provision is Parliament now providing, for the first time, a carefully restricted route of appeal, recognising that it is appropriate to do so. It says nothing about the pre-amendment law which has proceeded on the premise that there is no right of appeal, thereby continuing the position adopted by the legislation before RIPA.

Discussion

36. It is not in issue that Parliament is able to oust the jurisdiction of the court provided it does so in appropriately clear terms. Furthermore, the courts will presume against the conferment of such a power save in the clearest cases specifically because of the risk of unchallengeable decisions on the breadth of the jurisdiction conferred or unreviewable errors of law. Thus, it is not surprising that in *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, Lord Hoffmann made it clear:

> "The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words."

37. Mr Jaffey argued that the ouster clause in *Anisminic* is materially identical to section 67(8) of RIPA save for the additional words "(including decisions as to whether they have jurisdiction)". He submitted that the effect of these words is simply to make clear that a lawful decision by the IPT that it did or did not have jurisdiction in a particular case cannot be impugned, and that the words have no effect on the ability of the courts to review unlawful decisions. In addition, the words confirm that a right of appeal could be created under section 67(8) against a decision of the IPT to reject a case for want of jurisdiction under section 65, as well as against a substantive finding.

38. Mr Eadie challenges the proposition that the clauses are materially identical, referring to the observation of the Supreme Court in *A v B* that section 67(8) is "unambiguous". In *Anisminic* the provision mandated that a decision "shall not be questioned in any court of law" without splitting out the concepts of appeal and judicial review, whereas the provision in this case is that decisions "(including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court". The words in parentheses identify that the category of error does not matter and exemplify (rather than limit) types of decision caught by the provision.

39. Mr Jaffey contends that the word 'jurisdiction' in this context only relates to Lord Reid's "narrow and original sense of the tribunal being entitled to enter on to the inquiry in question". This approach was, however, rejected in *Cart* with Baroness Hale referring to "technicalities of the past" as "a retrograde step" [40] and Lord Dyson identifying the distinction between jurisdictional and other error as "artificial and technical" [111]. He approved and endorsed the language of the editors of De Smith's Judicial Review, 6th edn, to the effect that "all administrative actions should be simply, lawful, whether or not jurisdictionally lawful".

40. Furthermore, the proper approach to interpretation of this (or any) statutory provision is not simply a matter of looking at the words and comparing them with other words used in another statute where the context might be entirely different. "Context is everything" (*R. (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, per Lord Steyn at 548); it "provides the colour and background to the words used": see Bennion on Statutory Interpretation, 6th edn, at 540 and, in particular, *AG v HRH Prince Ernest Augustus of Hanover* [1957] AC 436 per Viscount Simonds (at 461), Lord Normand (at 465) and Lord Somervell of Harrow (at 476).

41. In exercising its powers to hear proceedings under section 65(2)(a) and to consider complaints under section 65(2)(b) of RIPA, the IPT is performing a similar oversight function in relation to activities of the intelligence services to that ordinarily performed in relation to the actions of public bodies by the High Court when it deals with claims for judicial review. This is reflected in subsections 67(2) and (3)(c) of RIPA, which require the IPT, in determining such proceedings and complaints, to apply the same principles "as would be applied by a court on an application for judicial review." The reason for allocating this judicial review jurisdiction to a specially constituted tribunal is the nature of its subject matter, involving as it does highly sensitive material and activities which need to be kept secret in the public interest. Such cases are not suitable for determination through the normal court process and a carefully crafted regime has been created by Parliament to deal with them. In the words of Laws LJ in *A v B* quoted at [26] above, the solution adopted has been to "confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand."

42. There is a material difference between a tribunal – such as the Foreign Compensation Commission whose "determination" was in issue in *Anisminic*, SIAC, or the Upper Tribunal (when dealing with appeals from the First-tier Tribunal) – which is adjudicating on claims brought to enforce individual rights and the IPT which is exercising a supervisory jurisdiction over the actions of public authorities. In the former case there are compelling reasons for insisting that a decision of the tribunal is not immune from challenge and that, if the tribunal follows an unfair process or

decides the case on a wrong legal basis, the decision may be subject to judicial review by the High Court. The need, and indeed the justification, for such judicial review is far less clear where the tribunal (here the IPT) is itself exercising powers of judicial review comparable to those of the High Court. Indeed, in *R (Cart) v Upper Tribunal* [2011] QB 120 at [94], in considering the role of the Upper Tribunal, Laws LJ thought it "obvious" that judicial review decisions of that tribunal could not themselves be the subject of judicial review by the High Court.

43. A further feature of the regime under RIPA which differs from that considered in *Anisminic* is that Parliament has made provision in section 67 of RIPA for challenging decisions of the IPT by way of an appeal in specified cases. In so far as there is a presumption, therefore, that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight, it is not engaged in this case.

44. I recognise that the Supreme Court in *A v B* did not deal with s.67(8) of RIPA as part of the *ratio* of its decision but, for my part, I agree with the view there expressed. In my judgment, the provision achieves the aim that Parliament clearly intended of restricting the means by which decisions of the IPT may be challenged in the courts to the system of appeals for which the Act itself provides. Were it otherwise, as I have explained, there would have been no point in including authority within s.67(8) for the Secretary of State by order to provide for a right of appeal, a duty under s.67(9) to do so in relation to a person who claims under s.65(2)(c) and (d) of RIPA and the power to create mechanisms in order to do so: see s.67(10).

45. I have had the advantage of reading the judgment of Leggatt J and fully recognise the force of the reasoning and reservations which he articulates. In my judgment, however, the legislation having provided for the Secretary of State to authorise an appeal (albeit that this step has not been taken), in the particular circumstances of this case, and this decision of the IPT, judicial review does not lie. For the future, when s. 67A is brought into force, the position will be different.

Leggatt J :

46. It is firmly established that, unless ousted by statute, the reach of the High Court's jurisdiction to consider claims for judicial review extends to all lower courts and statutory tribunals. The fact that the IPT has been described as "a judicial body of like standing and authority to that of the High Court" (see *A v B* [2010] 2 AC 1 at [22], per Laws LJ) is not a basis for exemption.

47. As the decision of the Supreme Court in *Cart* confirms, the jurisdiction of the High Court by way of judicial review extends even to the Upper Tribunal. That is so although the Upper Tribunal is designated by statute as a superior court of record, its members include *ex officio* all judges of the High Court and Court of Appeal and its Senior President is a judge of Court of Appeal rank. As Laws LJ noted in the Divisional Court in *Cart* in holding that SIAC is amenable to judicial review, the rank of the presiding judge is nothing to the point: see [2011] QB 120 at [82]. The same must equally be true of the rank of other members of a tribunal. It is not a relevant consideration that a member of a tribunal is, for example, a High Court judge when he or she is not acting in that capacity. Nor does the fact that a tribunal has been given comparable standing and powers to those of the High Court render it immune from

the supervision of the High Court. As Sedley LJ observed in the Court of Appeal in *Cart* with regard to the Upper Tribunal:

> "The statute invests with standing and powers akin to those of the High Court a body which would otherwise not possess them precisely because it and the High Court are not, and are not meant to be, courts of co-ordinate jurisdiction."

See *R (Cart) v Upper Tribunal* [2011] QB 120 at [20].

48. The reason why the High Court exercises a supervisory jurisdiction over all lower courts and statutory tribunals is to maintain the rule of law. Judicial review serves this end in two related ways. First and foremost, it does so by providing a means of correcting legal error. It is an important aspect of the administration of justice that, when a court or tribunal at first instance gets the law wrong or follows an improper procedure, the error (at least if it is sufficiently serious) can be put right. To acknowledge the need for such a facility is not in any way to impugn the expertise of the members of the tribunal, who in the case of the IPT are all lawyers of great distinction. But as Baroness Hale observed in *Cart*, we all make mistakes and no one is infallible: [2012] 1 AC 663 at [37]. Such mistakes can occur when, to take an example, perhaps in a case where the complainant is not represented the tribunal's attention is not drawn to a binding precedent or statutory provision. Moreover, where a mistake is one of law or due process, it is liable to be repeated in other cases, unless some mechanism is available which allows it to be corrected. For all lower courts and statutory tribunals, judicial review by the High Court provides such a mechanism.

49. There is also a principle, recognised in *Cart*, that a statutory tribunal should not be completely cut off from the court system, and that there should be some means by which questions of law of general public importance can be channelled to the higher courts: see [2012] 1 AC 663 at [42]-[43], per Baroness Hale. The rule of law requires that the law should, so far as practicable, be consistently interpreted and applied. The doctrine of precedent and the hierarchy of courts are designed to achieve this and to ensure that questions of law are decided within the system at a level which is commensurate with their public importance and difficulty. The integrity of the legal system would be undermined if a statutory tribunal operated as a legal island without any means by which its decisions on significant questions of law can reach the higher courts. Again, judicial review provides such a means.

50. It is, as I see it, because of the importance of the power of judicial review in these ways to the administration of justice, which is the constitutional responsibility of the courts, that statutes are interpreted on the understanding that Parliament does not intend to insulate a court or tribunal from it. The leading case illustrating this fundamental principle is *Anisminic*. But the principle had been established for several centuries before that: a consistent train of authority starting in the seventeenth century was cited by Denning LJ in *R (Gilmore) v Medical Appeal Tribunal* [1957] 1 QB 574 at 583-5. Throughout this long history there does not appear to have been any case in which a "no certiorari" or similar clause has ever been held to render a tribunal completely immune from judicial review. Thus, in *Anisminic* (at 170) Lord Reid was able to say:

> "Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity."

51. What was new about the *Anisminic* case was that, at least as subsequently interpreted, it "rendered obsolete" (per Lord Browne-Wilkinson in *R v Hull University Visitor ex parte Page* [1993] AC 682 at 701), or "effectively removed" (per Baroness Hale in *Cart* at [18]), the distinction between errors going to the jurisdiction of the tribunal and other errors of law. The effect was to insist that any error of law by a tribunal will be treated as taking its decision outside the scope of an ouster clause so as to be capable of correction.

52. Although it has repeatedly been said that Parliament could, in principle, exclude the possibility of judicial review by using language of sufficient clarity, it is striking that no language so far used (unless it be that in the present case) has been held to be sufficiently clear to have that effect. Moreover, it is difficult to conceive how Parliament could have been more explicit than it was in section 4(4) of the Foreign Compensation Act 1950, other than by referring to "purported determinations" rather than simply "determinations" of the tribunal.

53. I recognise that in *A v B* [2010] 2 AC 1 at [23] Lord Brown described the provision at issue in this case as "unlike that in *Anisminic*, an unambiguous ouster". This observation was, however, an *obiter dictum* uttered in circumstances where, although its meaning was not in question, both parties asserted that section 67(8) of RIPA had this effect. The claimant adopted that position no doubt in the hope (although the hope proved forlorn) that it would assist the argument that Parliament could not have intended to prevent claims falling within section 65(2)(a) of RIPA from being brought in the courts.

54. For myself, I find it difficult to see how section 67(8) can be characterised as unambiguous when the operative words ("shall not … be liable to be questioned in any court") are materially similar to the words ("no determination … shall be called in question in any court of law") which were held by the House of Lords in *Anisminic* to be ineffective to oust the supervisory jurisdiction of the High Court – as Parliament in enacting RIPA must be taken to have known. I cannot see that the inclusion of the further words "shall not be subject to appeal" in section 67(8) can affect the position, since there was no means of appeal from decisions of the Foreign Compensation Commission – so that the prohibition against its decisions being questioned in any court could only have been intended to exclude judicial review. Yet the House of Lords refused to accept that it did so.

55. The only potentially relevant difference in the wording of section 67(8) is that it contains the words in brackets "(including as to whether they have jurisdiction)". But I find it hard to see how these words can make a critical difference in the light of *Anisminic*. It seems to me that on a realistic interpretation that case did not decide that every time a tribunal makes an error of law the tribunal makes an error about the scope of its jurisdiction. Rather, it decided that any determination based on an error of law, whether going to the jurisdiction of the tribunal or not, was not a "determination" within the meaning of the statutory provision. That reasoning, and the underlying presumption that Parliament does not intend to prevent review of a

decision which is unlawful, is just as applicable in the present case and is not answered by pointing to the words in brackets.

56. A further difference between section 67(8) of RIPA and section 4(4) of the Foreign Compensation Act is that the former makes provision for permitting appeals, whereas the latter did not. In this respect, however, section 67(8) of RIPA is similar to section 1(4) of the Special Immigration Appeals Commissions Act 1977 under which SIAC is constituted. Section 1(4) provides that a decision of SIAC "shall be questioned in legal proceedings only in accordance with" section 7 of the Act, which allows for appeals.[1] In *Cart* one of the applications considered by the Divisional Court was for judicial review of a decision of SIAC to revoke bail. Such a decision is not one from which an appeal lies under section 7 and it was argued by the Secretary of State that section 1(4) prevented the decision from being challenged in proceedings for judicial review. The Divisional Court gave that argument short shrift. Laws LJ described section 1(4) as "a no certiorari clause which falls foul of the *Anisminic* principle": see [2011] QB 120 at [83]. The court accordingly held that the decision to revoke bail was subject to judicial review. That conclusion was not challenged on appeal.

57. The existence of an appeal procedure does not of itself exclude the judicial review jurisdiction of the High Court. But that jurisdiction will not be exercised, as the grounds for doing so do not apply, where there is another, adequate means of correcting legal error. Thus, in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 the Court of Appeal confirmed that the judicial review jurisdiction of the High Court extends to decisions of a county court. But the Court of Appeal held that, in circumstances where Parliament has put in place an adequate system for reviewing the merits of decisions taken in the county court through a statutory appeal procedure, claims for judicial review should not be entertained, whether or not the appeal procedure has been exhausted.

58. Similarly, in *Cart* the Divisional Court made it clear that judicial review "will not be deployed to assault SIAC's appealable determinations": see [2011] QB 120 at [85]. In the case of the Upper Tribunal, the Supreme Court in *Cart* regarded the right of appeal to the Court of Appeal on a point of law as providing in most cases an adequate alternative remedy justifying the refusal to entertain a claim for judicial review. However, the Supreme Court considered that in a situation where the Upper Tribunal has refused permission to appeal from a decision of the First-tier Tribunal, the statutory scheme was not wholly adequate such that it would be appropriate to allow judicial review of the Upper Tribunal's decision in a case which meets the second-tier appeal criteria.

59. I would readily accept that, once the new section 67A of RIPA comes into force, there will be an adequate system of appeals from decisions of the IPT in place, with the result that it will not be appropriate for the High Court to entertain claims for judicial review. I have much more difficulty in accepting that the jurisdiction of the High Court has been ousted, with the result that unless and until such an appeal procedure has been introduced any legal error made by the IPT is incapable of correction, however serious the error and whatever the public importance of the issue. Although section 67(9) of RIPA says that it shall be the duty of the Secretary of State to secure

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[1] There is a further exception, not relevant for present purposes, concerning derogations by the UK from article 5(1) of the ECHR.

that there is at all times an order in force allowing for an appeal against certain decisions of the tribunal, that provision (as mentioned earlier) has never been brought into force; and in the 16 years since the rest of section 67 took effect no order has been made allowing for appeals. The logic of the argument advanced by the Secretary of State is that, during all this time, and currently, no challenge to any decision of the tribunal is possible. Mr Eadie QC did not shrink from submitting that section 67(8) has the effect of preventing judicial review even of a decision affected by bias or other serious procedural irregularity or made in ignorance of a binding precedent or statutory provision. For my part, I am extremely reluctant to attribute to Parliament an intention to achieve a result which would be so clearly inconsistent with the rule of law.

60. I recognise the special features of the IPT's work which the President has emphasised, in particular the fact that it deals with sensitive and secret material and operates under procedures calibrated for that purpose. I have no difficulty in understanding why the primary decision-making role in the areas within its remit has been conferred on the IPT to the exclusion of the courts. I have greater difficulty in seeing, however, how these considerations could justify the exclusion of judicial review for error of law. Indeed, it seems to me that the enactment of section 67A demonstrates that, in the view of Parliament, there is no reason of policy why there cannot on a point of law be recourse from a decision of the IPT to the higher courts.

61. A further feature of the IPT's jurisdiction under subsections 65(2)(a) and (b) of RIPA is that the tribunal is required by section 67(3) to determine the proceedings or complaint by applying the same principles as would be applied by a court on an application for judicial review. The Secretary of State has argued that it is inappropriate for proceedings determined by application of judicial review principles to be themselves the subject of judicial review. In my view, there would be force in this argument if, for example, a decision of the tribunal were to be challenged on grounds of irrationality: it would make little or no sense to apply a test of irrationality on top of an irrationality test. But such an objection does not seem to me compelling where a challenge is made, for example, on grounds of procedural irregularity or, as in this case, that the IPT has made an error of statutory interpretation. In such circumstances I do not see that the fact that the tribunal has not itself applied judicial review principles makes judicial review of its decision incoherent or inappropriate.

62. For these reasons, which I have stated at some length, I was inclined to the view that section 67(8) does not exclude the possibility of judicial review. Having read the judgment of the President, however, I see the cogency of the contrary opinion. In circumstances where this court at least is not the final arbiter of the law that it applies, nothing would be served by causing the issue to be re-argued before a different constitution. In the circumstances I have concluded that the right course is to concur in the result, while recording my reservations.