IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT (Sir Brian Leveson PQBD and Leggatt J)

B E T W E E N:

THE QUEEN on the application of

PRIVACY INTERNATIONAL

Appellant

-and-

INVESTIGATORY POWERS TRIBUNAL

Respondent

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Interested Parties

APPELLANT'S SKELETON ARGUMENT

A. Introduction

1. This appeal concerns an important question of law: is a decision of the Investigatory Powers Tribunal ("IPT") amenable to judicial review, or is the High Court's jurisdiction ousted by s.67(8) Regulation of Investigatory Powers Act 2000 ("RIPA 2000")?

2. The appeal arises from judicial review proceedings in which the Appellant challenged the lawfulness of a decision by the Defendant (the IPT) as to the proper interpretation of s.5 Intelligence Services Act 1994. The underlying issue is whether the Secretary of State's power to grant warrants authorising 'specified' acts in respect of 'specified' property in fact authorises her to grant general warrants authorising a broad class of possible activity in respect of a broad class of possible property. The IPT held that it did.

3. Lang J granted permission and a Protective Costs Order was granted. The Court directed a preliminary issue as to whether the claim was precluded by s.67(8) RIPA 2000, which provides: "*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.*"

4. The Appellant argued that the principles in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 – in which a statutory provision that determinations by the Commission "*shall not be called in question in any court of law*" was held not to preclude judicial review of such a determination – applied with equal force to s.67(8) RIPA 2000, not least because the drafting of s.67(8) did not:

   a) evidence any clear intention to override the result in *Anisminic;* or

   b) address the reasons why in that case the clause had not prevented judicial review.

5. On 2 February 2017, the Divisional Court (the President of the Queen's Bench Division and Leggatt J) ruled that s.67(8) does oust the High Court's judicial review jurisdiction. On 9 February 2017 it granted permission to appeal.

6. The President's reasons for reaching that conclusion were:

   a) Since the Tribunal was already exercising a supervisory jurisdiction over the actions of public authorities and exercising powers of judicial review, there were no "*compelling reasons for insisting that a decision of the tribunal is not immune from challenge*" as there were in *Anisminic* (§42); and

   b) Since the legislation authorised the Secretary of State to create a right of appeal (albeit that the power has never been exercised), the presumption that Parliament "*could not have intended to make a statutory tribunal wholly immune from judicial oversight*" was not engaged (§43, §45).

7. Leggatt J disagreed, but concurred because nothing would be served by forcing a rehearing before a differently constituted Divisional Court: §62. It is clear that Leggatt J reached a different view on the substance of the issue. In his judgment he held:

a) It is firmly established that the High Court has jurisdiction to consider claims for judicial review even over statutory tribunals "*of like standing and authority*", unless that jurisdiction is ousted by statute (§§46-47);

b) The reason for that jurisdiction is to maintain the rule of law by (i) providing a means of correcting legal error, and (ii) ensuring that a specialist tribunal does not operate as a "*legal island*" without the possibility of issues of general public importance being determined at a higher level of the court hierarchy (§§48-49);

c) The operative words of s.67(8) were "*materially similar*" to the words which had been held by the House of Lords in Anisminic to be ineffective to oust the High Court's supervisory jurisdiction, "*as Parliament in enacting RIPA must be taken to have known*" (§§54-55);

d) The fact that Parliament had given the Secretary of State the power to create a right of appeal made no difference, just as in R (Cart) v Upper Tribunal [2011] QB 120 the fact that there *actually was* a right of appeal in respect of some decisions of the Special Immigration Appeals Commission ("SIAC") and the Upper Tribunal did not mean that their other decisions were not amenable to judicial review (§§56-59); and,

e) While the fact that the IPT itself applied judicial review principles might make it inappropriate to challenge a decision on grounds of irrationality ("*it would make little or no sense to apply a test of irrationality on top of an irrationality test*"), there was no reason why it would be inappropriate for a decision to be challenged on grounds of procedural irregularity or error of law, and why the jurisdiction should therefore be ousted altogether (§61).

8. The Appellant submits that Leggatt J's analysis was correct for the reasons he gave. Any attempt to oust the supervisory jurisdiction of the High Court requires clear words. Those words would have to demonstrate a clear intention to achieve a different outcome

from that in *Anisminic*, the leading case on the interpretation of such provisions. s.67(8) of RIPA 2000 does not come close.

9. The President's reasoning does not support any different conclusion. Both SIAC and the Upper Tribunal were bodies in respect of whose decisions Parliament had created some rights of appeal, but judicial review was nevertheless held in *Cart* to be available in respect of the unappealable decisions of both. Further, there is no logical reason why the mere fact that the IPT applies judicial review principles should insulate errors of law made by the IPT from judicial review.

B. Background: the IPT proceedings and the substantive claim for judicial review

10. The claim before the IPT was about the hacking of computers, including mobile devices and network infrastructure (known within the security and intelligence services as 'CNE' - computer and network exploitation).

11. Section 5 of the Intelligence Services Act 1994 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*" in respect of property in the British Islands. The reference to "*action*" is wide enough to encompass the activity involved in carrying out CNE.

12. The Appellant was prompted to bring proceedings in the IPT by disclosures suggesting that the security and intelligence services use CNE techniques to gain access to potentially millions of devices, including computers and mobile phones. During the proceedings, the Intelligence Services Commissioner (Sir Mark Waller) published his 2014 report, in which he indicated that the agencies had been using section 5 "*in a way which seemed to me arguably too broad or 'thematic'*", and that the agencies had advanced and acted upon an interpretation of section 5 under which "*the property does not necessarily need to be specifically identified in advance*". Sir Mark Waller rightly brought the agencies' (hitherto secret) interpretation of section 5 to public notice precisely so that it could be challenged. The Appellant contended in the proceedings that Section 5 did not support that broad interpretation.

13. The Appellant relied on, amongst other things, the long-established hostility of the common law to 'general warrants', or any warrant which leaves questions of judgment

to the person with authority to execute it rather than the person with authority to issue it. The Appellant argued that that principle, recognised in celebrated cases such as *Entick v Carrington* (1765) 2 Wilson KB 275, *Money v Leach* (1765) 3 Burr 1742 and *Wilkes v Wood* (1763) Lofft 1, should not be taken to have been displaced by Parliament in the absence of clear words, and that a statutory power to take specified action in respect of specified property did not meet the necessary threshold to overturn that principle. The Appellant also relied on Articles 8 and 10 of the European Convention on Human Rights.

14. On 1-3 December 2015, the IPT held an open hearing. It gave judgment on 12 February 2016. The IPT accepted the Government's submissions. It held at paragraph 37:

> "Eighteenth Century abhorrence of general warrants issued without express statutory sanction is not in our judgment a useful or permissible aid to construction of an express statutory power given to a Service, one of whose principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy."

15. The effect of the IPT's decision is that a covert warrant may be granted in materially identical terms to those granted in the general warrant cases (e.g. a "*strict and diligent search for the… authors printers and publishers of the aforesaid seditious libel intitled The North Briton… and them or any of them having found, to… seize… their papers*" (*Money v Leach* (1765) 3 Burrow 1742, 97 ER 1075), purely by virtue of Parliament's decision in 1994 to empower the Secretary of State to grant a warrant authorising specified action in respect of specified property. The Respondents contended it would have been lawful in principle to use a single warrant to hack every mobile telephone in a particular city in the UK (IPT judgment, para. 36(iii)).

C. Relevant Law

I. Statutory framework

RIPA 2000

16. Section 67(8) of RIPA provides, in relation to the IPT:

> "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."

17. Section 65 sets out complex provisions governing the IPT's jurisdiction. Whether or not the IPT has jurisdiction to consider a particular complaint may be a fact sensitive issue, involving consideration of sensitive material.

IOCA 1985, SSA 1989 and ISA 1994

18. Prior to RIPA, the Interception of Communications Act 1985 governed interception of communications. It contained a similar (but not identical) 'ouster clause'. Section 7(8) provided:

> "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".

19. The Security Service Act 1989 and the Intelligence Services Act 1994 contained similar provisions. Section 5(4) of SSA and section 9(4) of ISA both provided:

> "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."

20. All three provisions were repealed by RIPA.

II. Anisminic and subsequent authority

21. In *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, Anisminic sought compensation from the Foreign Compensation Commission. The Commission had to construe an Order to determine whether the claim for compensation was established. Section 4(4) of the Foreign Compensation Act 1950 provided "*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*".

22. The House of Lords held that a "*determination*" which was based on a misinterpretation of the Order was a nullity. Accordingly, there was no "*determination*" of any application and section 4(4) did not preclude certiorari. The court was not precluded from inquiring whether or not the order of the Commission was a nullity.

23. The effect of *Anisminic* is (and was, at the time RIPA was enacted) well-established: errors of law by a tribunal render its decision *ultra vires*. A misdirection in law makes the

(purported) decision a nullity. See *Boddington v British Transport Police* [1999] 2 AC 143 at p. 154 per Lord Irvine LC and *R (Williams) v Bedwellty JJ* [1997] AC 225 at pp. 232-233 per Lord Cooke.

24. As Lord Wilberforce put it in *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 at pp. 701-2:

> "*Anisminic*… rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires.
>
> Professor Wade considers that the true effect of *Anisminic* is still in doubt… But in my judgment the decision of this House in *O'Reilly v. Mackman* [1983] 2 AC 237 establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said, at p. 278, that the decision in *Anisminic*:
>
> > "has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. 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.""

25. Similarly, Lord Griffiths said in *Page* at p. 692:

> "In the case of inferior courts, that is, courts of a lower status than the High Court, such as the justices of the peace, it was recognised that their learning and understanding of the law might sometimes be imperfect and require correction by the High Court and so the rule evolved that certiorari was available to correct an error of law of an inferior court. At first it was confined to an error on the face of the record but it is now available to correct any error of law made by an inferior court."

26. These principles have since been applied to:

a) a parliamentary election court, comprising two judges of the High Court and subject to an ouster clause[1] (*R (Woolas) v Parliamentary Election Court* [2012] QB 1);

b) the Upper Tribunal – a superior court of record[2] (*R (Cart) v Upper Tribunal* [2012] 1 AC 663);

c) the Special Immigration Appeals Commission – also a superior court of record (*Cart*);

d) Coroners' courts (*R v Greater Manchester Coroner, ex p Tal* [1985] QB 67); and

e) a local election court (*R v Cripps, ex p Muldoon* [1984] QB 68).

III. Other actual and proposed 'ouster clauses'

27. Where Parliament (or the draftsman) has wished to go further, preventing judicial review of a particular class of decision or act, the intention has been made abundantly clear. That is necessary because, as Denning LJ held in *R (Gilmore) v Medical Appeal Tribunal* [1957] 1 QB 574 at 583, "*the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words*".

28. For example, the (Canadian) National Service Mobilization Regulations 1942 – referred to in the course of argument in *Anisminic* itself at 157D-G – provided: "*no decision of a board shall, by means of an injunction, prohibition, mandamus, certiorari, habeas corpus or other process, issuing out of court, be enjoined, restrained, staged, removed, or subjected to review or consideration on any ground, whether arising out of alleged absence of jurisdiction in the board, nullity, defect, or irregularity of the proceedings or any other cause whatsoever, nor shall any such proceedings or decision be questioned, reviewed or reconsidered in any court.*" Counsel for

[1] Section 144(1) of the Representation of the People Act 1983 provides that "*At the conclusion of the trial of a parliamentary election petition, the election court shall 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 the determination so certified shall be final to all intents as to the matters at issue on the petition*". The certification is made in writing to the Speaker of the House of Commons. This then leads to the House taking steps to confirm the return of the member, or issuing a writ for a new election (s. 144(2, 7)).

[2] Unlike the Upper Tribunal, the Special Immigration Appeals Commission and the Employment Appeal Tribunal, the IPT is not a superior court of record. Although some of the IPT's members are current or retired judges of the High Court, this is not a requirement for appointment save for the office of President of the IPT. See Schedules 1 and 3 to RIPA.

Anisminic submitted: "*That was a wartime regulation and that is the way the intention, when it exists, should be achieved*."

29. Their Lordships did not comment specifically on that provision, but Lord Reid said at 170D: "*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. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery*[3]*, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law.*"

30. Similarly, Parliament's response to the decision in *Anisminic* was to enact section 3(3) of the Foreign Compensation Act 1969, in which a "*determination*" was defined so as to include "*anything which purports to be a determination*" – presumably with the intention that a purported determination which was in fact a nullity should be immune from review.

31. Even then, however, Parliament did not seek to preclude judicial scrutiny of the Commission's decisions altogether, or even to reverse the outcome of *Anisminic* in substance; s.3 of the Foreign Compensation Act 1969 also created a right of appeal to the Court of Appeal "*on any question of law relating to the jurisdiction of the Commission*" or "*any question as to the construction or interpretation of any provision of an Order in Council under section 3 of the Foreign Compensation Act 1950*", the latter category encompassing the issue that was held in *Anisminic* to be capable of determination by the courts. As recorded in Wade & Forsyth, *Administrative Law* (11th edition, 2014) at p. 615: "*After the Anisminic decision the government did indeed propose a more elaborate ouster clause to empower the Foreign Compensation Commission to interpret the Orders in Council for itself and making its interpretations unquestionable. But after criticism both in and out of Parliament this proposal was dropped, and instead provision was made for a right of appeal direct to the Court of Appeal, but no further, on any question as to the jurisdiction of the Commission or the interpretation of the Orders in Council; and all restriction of remedies was removed as regards breaches of natural justice.*"

[3] He went on to make clear at 170F and 171C-G that there was no distinction between forgery and any other ground for holding a determination to be a nullity.

32. Only once since *Anisminic* has a clause been proposed which clearly and openly attempted to prevent judicial review of a decision or class of decisions. Clause 11 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003 proposed the introduction of the following ouster:

> "108A Exclusivity and finality of Tribunal's jurisdiction
>
> (1) No court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the Tribunal.
>
> (2) No court may entertain proceedings for questioning (whether by way of appeal or otherwise)—
>
> (a) any determination, decision or other action of the Tribunal (including a decision about jurisdiction and a decision under section 105A),
>
> (b) any action of the President or a Deputy President of the Tribunal that relates to one or more specified cases,
>
> …(3) Subsections (1) and (2)—
>
> (a) prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of—
>
> (i) lack of jurisdiction,
>
> (ii) irregularity,
>
> (iii) error of law,
>
> (iv) breach of natural justice, or
>
> (v) any other matter…"

33. The clear purpose of that clause was to prevent judicial review of the decisions of the Asylum and Immigration Tribunal, even in the event of (among other things) an error of law. As Lord Mackay of Clashfern pointed out in debate in the House of Lords, the list in the proposed subsection (3) of the errors which a Court was to be prevented from reviewing had its origins in Lord Reid's speech in *Anisminic*, and the clause was plainly intended to circumvent the result in that case: "*Alert to that problem, those who have put the Bill together sought to avoid it*".[4]

[4] http://hansard.millbanksystems.com/lords/2004/mar/15/asylum-and-immigration-treatment-of#S5LV0659P0_20040315_HOL_315

34. The clause met with such Parliamentary and public concern that it was abandoned. For example:

a) The Constitutional Affairs Committee concluded in its Second Report of the 2003-2004 Session at paragraph 70[5]:

> "An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained."

b) The Council on Tribunals (the non-departmental body charged under the Tribunals and Inquiries Act 1992 with supervising the constitution and working of tribunals in the UK), in written evidence to the Constitutional Affairs Committee on 4 January 2004[6], said:

> "It is of the highest constitutional importance that the lawfulness of decisions of public authorities should be capable of being tested in the courts. […] In the Council's view it is entirely wrong that decisions of tribunals should be immune from further legal challenge."

35. The criticism of that attempt to exclude judicial review in respect of decisions of a Tribunal, and the fact that the Government ultimately abandoned the attempt in the face of Parliamentary and public opposition, provide a clear illustration of the importance of what Lord Hoffmann said in R (Simms) v Secretary of State for the Home Department [2000] 2 AC 115: "*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*."

IV. Commonwealth authority

Australia

36. In Kirk v IRC [2010] HCA 1 the High Court of Australia considered the ouster provision in section 179 of the Industrial Relations Act 1996:

[5] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21109.htm
[6] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we22.htm

> "(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal…
>
> (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.
>
> (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
>
> > (a) the Full bench of the Commission in Court Session, or
> >
> > (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision
>
> (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

37. Section 179 therefore contained an express prohibition on a grant of certiorari or a quashing order and covered "*a decision… on an issue of… law*" or "*a purported decision… on an issue of the jurisdiction of the Commission*".

38. The High Court of Australia applied the same technique of analysis as *Anisminic*:

> "105. … 'decision' should be read as a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions, that reading of the section follows from the constitutional considerations that have been mentioned. Section 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error.[7] To grant certiorari on that ground is not to call into question a 'decision' of the Industrial Court…"

39. Further, the High Court held that the reference to "*a purported decision… on an issue of the jurisdiction of the Commission*" in section 179(4) was also to be narrowly construed ("*… should be read as referring… to a decision of the Industrial Court that it does or does not have jurisdiction in a particular matter. No decision of that kind was at issue in this matter.*" [103])

[7] The Court addressed the scope of the concept of jurisdictional error elsewhere in the judgment, concluding at [72] that it included misconstructions of statutes relevant to the function being performed. It noted at [65], however, that English law had developed so that "*any error of law by a decision-maker (whether an inferior court or a tribunal) rendered the decision ultra vires*", and that "*that is a step which this Court has not taken.*"

New Zealand

40. Section 19(9) of the Inspector-General of Intelligence and Security Act 1996 provides:

> "Except on the ground of a lack of jurisdiction, no proceeding, report or finding of the Inspector-General shall be challenged, reviewed, quashed or called into question in any court."

41. The New Zealand Court of Appeal held in *AG v Zaoui* [2005] 1 NZLR 690 at [179] that this was an express acceptance by the legislature of the analysis in *Anisminic*: "*This particular form of privative clause is therefore a legislative indication that judicial review on grounds of lack of jurisdiction (in the Anisminic sense) is available*." The Court of Appeal therefore concluded at [182] that the relevant decision was "*generally amenable to judicial review*."

V. Obiter dicta

42. In *A v B* [2010] 2 AC 1, Lord Brown (for the Court) commented, *obiter*, that section 67(8) was an "*unambiguous ouster*". But Lord Brown also noted that the Court had heard no argument on the point: "*…but that is not the provision in question here…*"

43. In contrast, in *Brantley v Constituency Boundaries Commission* [2015] 1 WLR 2753 the Privy Council considered a stronger ouster clause than section 67(8). Section 50(7) of the Constitution of St Kitts and Nevis provides:

> "The 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…"

44. The Board held at [32], citing *Anisminic*, 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…"

D. The Divisional Court's judgment

45. The Divisional Court heard argument on the effect of s.67(8) RIPA 2000 on 2 November 2016, and gave judgment on 2 February 2017.

46. The President at §§36-45 set out his reasons for concluding that decisions of the IPT are not amenable to judicial review:

a) At §36, he pointed out that it was "*not in issue that Parliament is able to oust the jurisdiction of the court provided it does so in appropriately clear terms*"[8], but that "*the courts will presume against the conferment of such a power save in the clearest cases*."

b) At §§37-40 he addressed the differences between s.67(8) and the clause considered by the House of Lords in *Anisminic*, concluding that "*the proper 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*".

c) At §§41-42 he referred to the fact that the IPT applies judicial review principles in reviewing the conduct of the intelligence services, and held: "*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.*"

d) At §43 and §45 he referred to the fact that Parliament had made provision "*for challenging decisions of the IPT by way of an appeal in specified cases*", such that "*In so*

[8] The Appellant did not argue this point in the Divisional Court but reserved its position: Skeleton Argument for hearing on 2 November 2016, footnote 16.

far as there is a presumption […] that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight, it is not engaged in this case."

e) Finally, at §44 he acknowledged that the Supreme Court in *A v B* had not addressed the effect of s.67(8) as part of the ratio of its decision, but indicated that he agreed with the view expressed there.

47. Leggatt J concurred in the result, because "*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*." However, he set out in full his reasons for inclining towards the opposite view. As noted above, they included that:

a) There was no material difference between the words of s.67(8) and the words of the clause which had been held to be ineffective in *Anisminic* (§§54-56);

b) The existence of an appeal procedure does not of itself exclude the High Court's jurisdiction, as was clear from *Cart* (§§56-59);

c) The fact that a public authority itself reviews the acts of other public authorities, including by applying judicial review principles, does not make it incoherent or inappropriate that its own decisions should be reviewable for example on grounds of procedural irregularity or error of law (§61).

E. Submissions

48. **First,** the President was wrong to conclude that the similarity between s.67(8) RIPA 2000 and the ouster clause in *Anisminic* was irrelevant, or that the clauses were insufficiently similar for the decision in *Anisminic* to be of assistance. In view of the lack of material difference between the two clauses it is impossible to conclude that Parliament clearly intended that s.67(8) should achieve a different result.

a) As the President recognised at §36, a statutory provision will not be interpreted as ousting the High Court's judicial review jurisdiction unless it does so in the clearest possible terms.

b) *Anisminic* is the leading case on the effectiveness of ouster clauses. Any attempt to draft a clause which would oust the High Court's judicial review jurisdiction would need to address the reasons why the clause which the House of Lords considered in that case was held not to achieve that aim (namely, that a determination made on the basis of an error of law was a nullity, such that there was no 'determination' within the meaning of the clause).

c) S.67(8) does not evidence any such intention at all. It does not, for instance, provide that no determination "*or purported determination*" shall be called into question, nor does it even use the words "*judicial review*". It also does not adopt the language which was identified in submissions in *Anisminic* itself as "*the way the intention, when it exists, should be achieved*"[9].

d) The only differences between the two clauses are (i) the reference to challenge by "*appeal*", and (ii) the words "(*including decisions as to whether they have jurisdiction*)".

e) As to the first, the reference to an "*appeal*" simply reflects the possibility of the Secretary of State creating a right of appeal. As Leggatt J pointed out at §54, there was no suggestion of any decision of the Foreign Compensation Commission being appealable, so there was no need to refer to the possibility of such an appeal in the ouster clause.

f) As to the second, the reference to "*decisions as to whether [the IPT has] jurisdiction*" does not have the effect of precluding all judicial review.

    i) It is a reference to the complex provisions of s.65 RIPA 2000 for determining whether or not the Tribunal has jurisdiction to hear a particular issue. Numerous disputes could arise as to whether a case fell inside or outside those provisions: for example, there could be a dispute

[9] At 157, by reference to Regulation 9(5) of the National Service Mobilization Regulations 1942 of Canada: "*no decision of a board shall, by means of an injunction, prohibition, mandamus, certiorari, habeas corpus or other process, issuing out of court, be enjoined, restrained, staged, removed, or subjected to review or consideration on any ground, whether arising out of alleged absence of jurisdiction in the board, nullity, defect, or irregularity of the proceedings or any other cause whatsoever, nor shall any such proceedings or decision be questioned, reviewed or reconsidered in any court.*"

about whether a person accused of carrying out surveillance was or was not "*a foreign police or customs officer*" (s.65(5)(ca)), or whether an act complained of did or did not relate to "*the interception of communications in the course of their transmission*" (s.65(5)(b)). The effect of the words "*(including decisions as to whether they have jurisdiction)*" is to make clear that a lawful decision by the IPT that it had or did not have jurisdiction – for instance, because it concluded on the facts that the person carrying out the surveillance was not a foreign police officer but a civilian – is not to be impugnable. Those words have no effect on the ability of the Courts to review *unlawful* decisions.

ii) It is also relevant that the provision in RIPA ("*decisions as to whether they have jurisdiction*") differs from that in the predecessor legislation ("*decisions as to jurisdiction*"). The introduction of the word "*whether*" makes clear that the provision is concerned with the binary question of whether the IPT has jurisdiction to decide a particular complaint or not. That question is addressed comprehensively by section 65.

iii) As set out above, the High Court of Australia concluded in Kirk that a provision which precluded proceedings "*in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission*" was concerned only with "*a decision of the Industrial Court that it does or does not have jurisdiction in a particular matter*". Section 67(8) of RIPA is *a fortiori*. The provision in issue in this case is even more clearly limited: (i) it refers to "*decisions*" and not to "*purported decisions*", notwithstanding the relevance of that distinction following Anisminic, and (ii) it refers expressly to the binary question of "*whether*" the Tribunal has jurisdiction, which the High Court of Australia found to be merely implicit.

iv) Importantly, the reference to 'jurisdiction' does not evidence any intention to overcome the reasoning in Anisminic. As Lord Reid made clear in his speech in that case, the question whether or not a decision is a nullity does not depend on the concept of 'jurisdiction': "*It has sometimes been said that it is only where a tribunal acts without jurisdiction that its*

decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive." As Leggatt J said at §55: *"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."*

g) It is highly significant that, when the Government did propose a clear ouster of judicial review in clear terms – in the 2003 Bill – the Parliamentary and public concern led to the clause being dropped. In those circumstances it cannot be said that by enacting s.67(8) RIPA with its reference to "*decisions as to whether they have jurisdiction*", Parliament squarely confronted the fact that it was enacting the same measure and accepted the political cost.

49. **Second,** the President was wrong to conclude that the existence of the possibility of a right of appeal meant that no presumption as to the meaning of such a clause was engaged in the present case.

a) The President's reasoning was that, since Parliament had enacted a provision which envisaged that decisions of the IPT might be reviewed by a higher court in some cases, there was no room for the application of a presumption "*that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight*".

b) That is contrary to authority. In *Cart*, both of the bodies whose decisions were in issue – SIAC and the Upper Tribunal – had statutory rights of appeal in respect of some of their decisions. That did not prevent judicial review from being available in respect of decisions for which there was no such right. As Leggatt J pointed out at §56, the argument that the ouster clause relating to SIAC precluded judicial review of unappealable decisions was given "*short shrift*" by the Divisional Court in *Cart*. There is no reason why the present case should be any different.

c) Indeed, even where the actual decision in question is subject to a right of appeal, that does not necessarily mean that judicial review is unavailable; the issue is whether there is an adequate alternative remedy which means that the High Court should decline to interfere (*R v Sivasubramaniam v Wandsworth County Court* [2003] 1 WLR 475). Where no appeal is available in respect of the decision in question, that issue of alternative remedy obviously does not apply.

50. **Third**, the President was wrong to conclude that the IPT's status as a body reviewing the acts of other bodies, and applying judicial review principles in doing so, meant that the normal principles governing the interpretation of ouster clauses did not apply.

a) The logic of the conclusion is difficult to understand. If a body were tasked with reviewing a decision applying judicial review principles, and in a particular case it exercised that function without hearing any submissions from one of the parties or in a manner which was plainly motivated by bias, it is difficult to see

any reason why a challenge on the grounds of procedural irregularity should be inappropriate; the reviewing body will have made its own error which ought to be corrected.

b) The same applies where the error committed by the reviewing body is an error of law. To hold otherwise would be to conclude that Parliament intended that the reviewing body should be free to get the law wrong. That would be a surprising conclusion which would require clear words regardless of whether or not the body in question is making a fresh decision or reviewing an existing decision.

c) The reasons why the High Court hears claims for judicial review about errors of law made by other courts and tribunals (even where the decisions are made by a tribunal including High Court judges) were identified by Lady Hale in *Cart* at [42-43]. Specialist jurisdictions, however expert and skilled, ought not be the final arbiter of the meaning of the law:

> "… a certain level of error is acceptable in a legal system which has so many demands upon its limited resources… The district judge and the circuit judge may both have gone wrong in law. They may work so closely and regularly together that the latter is unlikely to detect the possibility of error in the former. But at least in the county courts such errors are in due course likely to be detected elsewhere and put right for the future. The county courts are applying the ordinary law of the land which is applicable in courts throughout the country, often in the High Court as well as in the county courts. The risk of their developing "local law" is reduced although by no means eliminated.
>
> … 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…
>
> There is therefore a real risk of the Upper Tribunal becoming in reality the final arbiter of the law, which is not what Parliament has provided. Serious questions of law might never be "*channelled into the legal system*" (as Sedley LJ put it [2011] QB 120, 169, para 30) because there would be no independent means of spotting them."

d) Leggatt J reiterated the same point at §§48-49. Indeed, the present case is a good example of those concerns. The IPT has jurisdiction over many claims against the intelligence and security services. It has rejected what the Appellant suggests is a

principle of constitutional importance and general application concerning the interpretation of Acts of Parliament (the principle of legality) on the grounds that that principle is unsuited to the context of national security in which the intelligence and security services operate. That is a distorted position as to the exceptionality of the area in which the IPT operates. The substantive question of law is arguable (as illustrated by the fact that permission was granted to pursue judicial review proceedings in relation to it) and important (as illustrated by the grant of a PCO). In other words, there is a real prospect that the IPT has erred in law, in a case with significant wider consequences.

e) Of course, there may be cases where to apply judicial review principles might be inappropriate. As Leggatt J recognised at [61], applying an irrationality test on top of an irrationality test would "*make little or no sense*"; at the very least, the chances are remote that a claimant would succeed in persuading a court that a reviewing body went beyond the bounds of what a reasonable reviewing body could have done in assessing the bounds of what the original decision-maker could have done. But that is no reason for treating judicial review of an error of law in the interpretation of a statute as inappropriate.

f) The only authority relied upon by the President in support of his conclusion was the decision of Laws LJ in the Divisional Court in Cart, where he commented at [94] that it was "*obvious*" that judicial review decisions of the Upper Tribunal could not themselves be the subject of judicial review by the High Court. But Laws LJ's conclusion in the relevant paragraph was that the Upper Tribunal was "*an alter ego of the High Court*", a conclusion which was rejected by the Court of Appeal at [19], and the practical outcome of which (that there could be no judicial review of its decisions other than in very exceptional cases) was overturned by the Supreme Court. Cart concerned decisions of the Upper Tribunal made on appeal from decisions of the First-Tier Tribunal; in other words, the decisions under challenge were not first-instance decisions. The Supreme Court nevertheless held that judicial review should in principle be available.

J. Expedition and protective costs order

51. Permission to appeal was granted by the Divisional Court. The Court is invited to expedite the listing of the appeal:

a) The underlying substantive issue of law about "thematic" general warrants remains of continuing importance. The lawfulness of using section 5 ISA 1994 to issue a general "thematic" warrant was litigated in the IPT because Sir Mark Waller raised concerns about the lawfulness of this use of the power in his annual report. The property interference power in section 5 of the Intelligence Services Act 1994 will remain in force after the Investigatory Powers Act 2016 (indeed the power has been widened to permit GCHQ and MI6 to engage in property interference in the British Islands – section 251 IPA 2016). The only significant change is that section 5 will no longer be used for computer hacking – section 13 and Part 5 IPA 2016.

b) Therefore, warrants that Lang J accepted were arguably unlawful (by granting permission) no doubt remain in effect today. The lawfulness of such warrants is a significant issue of ongoing importance that ought to be resolved as soon as possible.

c) The case raises an issue of law of real public importance. This is the first case in which the Courts have ever accepted that Parliament has ousted judicial review of a Tribunal for an error of law. The consequences for the rule of law are those identified by Leggatt J at §59.

52. The Court of Appeal is also invited to extend the Protective Costs Order (limiting the Appellant's liability to a total of £15,000) to the appeal:

a) Proceedings before the IPT are conducted without the risk of costs. As the Tribunal records on its website at http://www.ipt-uk.com/section.aspx?pageid=26: *"The Tribunal has never awarded costs and its*

present view is that its jurisdiction to do so, if it exists at all, would be exercised only in exceptional cases. […] Complainants should therefore assume that the likelihood is that no costs will be awarded." Further, the Appellant's lawyers all acted *pro bono* in the IPT. The Appellant was therefore able to raise the issue before the IPT without any costs risk.

b) Lang J made a protective costs order limiting the Appellant's liability to a maximum of £15,000. Since that order was made, no additional funds have become available which could be used to fund litigation (despite efforts, the Appellant has not yet been able to raise most of the £15,000 cap set by Lang J). The Appellant will serve a further witness statement evidencing this point shortly.

c) The Appellant is a charity. The case was brought in the public interest, to clarify the law, and not for private benefit.

d) In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600, the Court of Appeal held:

> "A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing."

e) The first to third criteria are clearly satisfied:

i) The claim raises issues of general public importance as to the extent of the powers of the security and intelligence services to carry out property interference. It is in the public interest that the Court determine whether that Act abrogated the general common law constraints on powers of interference with property in the manner alleged. The case is brought in the public interest with no private benefit.

f) As to the fourth and fifth criteria:

i) No further funds have become available since the litigation was commenced.

ii) The Appellant's counsel and solicitors are acting in these proceedings on conditional fee agreements, with their fees capped at Treasury rates and with no entitlement to be paid any fees unless the claim succeeds.

K. Conclusion

53. The Court is invited to grant expedition and extend the existing Protective Costs Order to the appeal. In due course, the Court is invited to allow the appeal and rule that s.67(8) RIPA 2000 does not preclude judicial review of decisions of the IPT.

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BHATT MURPHY

23 February 2017