UKSC 2018/0004

# In The Supreme Court of The United Kingdom

**ON APPEAL**

**FROM THE COURT OF APPEAL**

**(CIVIL DIVISION)**

**C1/2017/0470**

**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***

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# APPENDIX

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***Agent for the Appellant***

**GOVERNMENT LEGAL DEPARTMENT**

***Agent for the Respondent***

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COURT 17
Appeal No.

C1/2017/0470

THURSDAY 23RD NOVEMBER 2017

# IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO23682016

**BEFORE** LORD JUSTICE FLOYD
AND LORD JUSTICE SALES
AND LORD JUSTICE FLAUX

**B E T W E E N**

THE QUEEN ON THE APPLICATION OF PRIVACY INTERNATIONAL
APPELLANT

- and -

INVESTIGATORY POWERS TRIBUNAL
RESPONDENT

- and -

1. THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALT
2. GOVERNMENT COMMUNICATION HEADQUARTERS
INTERESTED PARTIES

**UPON** the Court of Appeal handing down judgment on the appeal from the preliminary issued on 3 November 2017.

**AND UPON** the Court of Appeal having concluded that the High Court has no jurisdiction to consider a claim for judicial review of a decision of the Respondent pursuant to s.67(8) of the Regulation of Investigatory Powers Act 2000.

**AND UPON THE RESPONDENT** indicating that it made no application in relation to its costs.

**IT IS ORDERED THAT:**

1. The appeal is dismissed.

2. The Appellant pays the Interested Parties' costs of the appeal in the sum of £10,000.

3. The Appellant's application for permission to appeal to the Supreme Court is refused.



( The Court sat on 5th October 2017 from 10.35 to 16.25)

*By the Court*

**THURSDAY 23RD NOVEMBER 2017**

# IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT

ORDER

Copies to:

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Room C317
Royal Courts of Justice
The Strand
London WC2A 2LL

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* This order was drawn by A Marie Smith (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to A Marie Smith, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is

Case No: C1/2017/0470

Neutral Citation Number: [2017] EWCA Civ 1868
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT (QUEENS BENCH DIVISION)**
**SIR BRIAN LEVESON PQBD AND MR JUSTICE LEGGATT**
**CO23682016**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2017

**Before:**

**LORD JUSTICE FLOYD**
**LORD JUSTICE SALES**
and
**LORD JUSTICE FLAUX**

---

**Between:**

| | |
|---|---|
| The Queen on the Application of: **Privacy International** | **Appellant** |
| **- and -** | |
| **Investigatory Powers Tribunal** | **Respondent** |
| **1) Secretary of State for Foreign and Commonwealth Affairs** | **Interested Parties** |
| **2) Government Communication Headquarters** | |

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**Dinah Rose QC, Ben Jaffey QC & Tom Cleaver** (instructed by **Bhatt Murphy LTD**) for the **Apellant**
**Jonathan Glasson QC** (instructed by **Government Legal Department**) for the **Respondent**
**James Eadie QC and Kate Grange QC** (instructed by **Government Legal Department**) for the **Interested Parties**

Hearing date: 05 October 2017

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# Judgment

**Lord Justice Sales:**

1. This is an appeal from the decision of a two judge Divisional Court (Sir Brian Leveson, President of the Queen's Bench Division, and Leggatt J) on a preliminary issue in judicial review proceedings brought against the Investigatory Powers Tribunal ("the IPT" or "the Tribunal"). The IPT is a special tribunal which was established under the Regulation of Investigatory Powers Act 2000 ("RIPA") with jurisdiction to examine, among other things, the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters or "GCHQ" (together, "the intelligence services").

2. The preliminary issue determined by the Divisional Court relates to whether the ouster clause in section 67(8) of RIPA has the effect of preventing a judicial review claim being brought against the IPT. Section 67(8) is as follows:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards 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."

3. The Divisional Court made an order to the effect that by reason of section 67(8) a decision of the IPT is not amenable to judicial review. It did so in unusual circumstances, in that the court was divided in its view as to the effect of section 67(8). In the view of Sir Brian Leveson PQBD, for the detailed reasons set out in his judgment, section 67(8) does have the effect of exempting rulings by the IPT from judicial review by the High Court. Leggatt J inclined to the view that section 67(8) does not have that effect, for the countervailing detailed reasons set out in his judgment. Nonetheless, he was prepared to agree to make the order proposed by Sir Brian, since there was no point in having the issue re-argued before a different constitution of the Divisional Court where the order made could be taken forward to an appeal so that the issue could be considered and determined by this court.

4. On this appeal, the IPT itself was represented by Jonathan Glasson QC. Mr Glasson provided us with a helpful note on behalf of the IPT which explained its composition and functions. It also pointed out the practical difficulties which would arise in judicial review proceedings in relation to handling of sensitive confidential information if this court concludes that the appeal should be allowed and that the IPT is amenable to judicial review. However, the main burden of the submissions, both oral and written, in support of the order made by the Divisional Court was assumed by James Eadie QC for the interested parties.

*The structure and functions of the IPT*

5. In his judgment Sir Brian Leveson PQBD set out a helpful account of the structure and functions of the IPT. No-one has suggested it contains any errors. I gratefully adopt what he said, as follows:

> " 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 [the Intelligence Services Act 1994] 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.

(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 [appearing for the appellant below] 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.

....

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.""

6. It is a cardinal feature of the legislative regime which governs the IPT that its proceedings may be conducted in private and at certain stages in the absence of the complaining party: rule 9 of the Rules. The IPT is subject to a principle set out in rule 6(1):

> "The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

These features of the Rules are expressly authorised by section 69(4) of RIPA.

7. The context in which the IPT functions is one in which there is particular sensitivity in relation to the evidential material in issue and the public interests which may be jeopardised if it is disclosed. The intelligence services may have valuable sources of information about terrorist organisations, organised crime and hostile activity by foreign powers which would be lost if those targets of investigation and monitoring became aware of them. Human sources, such as informers, might be killed or threatened with serious harm if their identities (or even the possibility of their existence) were revealed. Technological capacities to obtain information might be rendered useless if it were revealed they existed and new strategies to evade them or block them were developed. Opportunities for exploitation of simple lapses of care on the part of targets which allow the intelligence services to obtain valuable information about them would be lost if the targets learned about them and tightened up their procedures. The aspects of the public interest which would be jeopardised if these things occurred, as referred to in rule 6(1), are of the most pressing importance.

8. Rule 6(1) requires the IPT to give overriding weight to protection of the specified aspects of the public interest in deciding how to conduct its proceedings. Given the context, it is easy to understand why this should be so. In contrast to what occurs in the ordinary courts when applications are made to withhold disclosure of evidence on grounds of public interest immunity, the IPT is not entitled to balance the public interest in non-disclosure against an individual litigant's interest in having the evidence disclosed to him.

9. Where such a balancing exercise is undertaken in court proceedings, there is at least a possibility that the court might order disclosure, even though that could do harm to aspects of the public interest. That risk is all the greater because the ordinary courts do not have general powers to conduct examination of claims in closed proceedings from which an individual claimant is excluded: see *Al-Rawi v The Security Service* [2011] UKSC 34; [2012] 1 AC 531 and *AHK v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin); [2014] Imm AR 32. Such powers were only introduced by the Justice and Security Act 2013, well after the enactment of RIPA. In ordinary court proceedings before the enactment of the 2013 Act, the choices for a public authority defendant and for the court were stark and it was difficult to reconcile competing aspects of the public interest. In the *Al-Rawi* litigation, for example, an application by the Security Service to be permitted to serve closed defences within a closed material procedure failed and the claims had to be settled without the merits being tested, because of the risk to national security if the litigation proceeded and orders were made for the disclosure of sensitive material.

10. The legislative regime for the IPT deliberately creates a judicial body with powers to examine in private and without disclosure any relevant confidential evidence which

cannot safely be revealed to the complainant, which body is at the same time subject to an imperative overriding rule which forbids it from requiring disclosure of such material. In this way, the regime provides a guarantee that the important aspects of the public interest referred to above are safeguarded while at the same time enabling the IPT to examine the merits of claims against the intelligence services and others on the basis of the relevant evidence in a closed proceeding.

11. At the relevant time there was no right of appeal from the IPT under RIPA, "Except to such extent as the Secretary of State may by order otherwise provide": section 67(8). No such order had been made. This means that under the legislative regime in issue in these proceedings no question could arise on an appeal from the IPT to the High Court or this court as to whether or how the court should modify its usual procedures to take account of the need to examine highly sensitive confidential information which might have been in issue on the appeal. The existence and extent of a right of appeal under RIPA was made subject to provisions in any order which might be made by the Secretary of State, which meant that she would be able to ensure that the same strict safeguards as exist in relation to disclosure of sensitive information at IPT level would have to be applied by an appellate court before the possibility of an appeal was made available. (RIPA has now been amended by the Investigatory Powers Act 2016, which has created a right of appeal from the IPT on a point of law, under a new section 67A of RIPA).

12. In my view the procedural regime governing the IPT and its differences from that applicable to the ordinary courts at the time RIPA was enacted are significant features of the legal context in which section 67(8) of RIPA falls to be construed.

*Factual Background*

13. The appellant has made a complaint to the IPT that GCHQ, one of the intelligence services, has been conducting unlawful computer network exploitation activity. As convenient shorthand I will refer to this as computer hacking. The appellant believes it may have been the subject of computer hacking by GCHQ.

14. One issue in that complaint was whether, if and to the extent that GCHQ had been carrying on computer hacking of the appellant, it had done so pursuant to a lawful warrant issued by the Secretary of State for Foreign and Commonwealth Affairs. In order to secure the maximum scope for participation in its proceedings for the appellant, the IPT directed the hearing of a preliminary issue on assumed facts, in accordance with its procedure described above. This enabled it to consider certain relevant issues of law in an open hearing in which the appellant could participate and make full submissions, while at the same time ensuring that the 'neither confirm nor deny' policy which is adopted by the intelligence services and is reflected in RIPA could be respected, thereby avoiding possible damage to national security or other aspects of the public interest.

15. One of the preliminary issues on which the IPT ruled concerned the proper interpretation of section 5 of RIPA. Section 5(1) provides that "No entry on or interference with property or with wireless telegraphy shall be unlawful if it is authorised by a warrant issued by the Secretary of State under this section". Section 5(2) provides that on an application by GCHQ the Secretary of State may issue a warrant authorising "the taking … of such action as is specified in the warrant in

respect of any property so specified or in respect of wireless telegraphy so specified ...", if certain conditions are met. There was a dispute between the appellant and GCHQ and the Secretary of State regarding the degree of specification in a warrant which was required by this language. In a judgment promulgated on 12 February 2016 the IPT upheld the submission of GCHQ and the Secretary of State that section 5(2) authorises him to issue warrants in general terms authorising a broad class of possible activity in respect of a broad class of possible property, going beyond the more restrictive interpretation of the degree of specificity required which was urged by the appellant: see the discussion of so-called thematic warrants in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and the Government Communications Headquarters* [2016] UKIP Trib 14 at [31]-[47].

16. This is potentially of legal significance in two ways. First, if action of GCHQ to interfere with property is not protected by a warrant issued under section 5, it is likely that GCHQ would commit torts of interference with that property which would sound in damages. Secondly, if GCHQ takes such action to hack computers in circumstances where it is not protected by a warrant, it is likely that it would be liable in law for breaches of its obligation under section 6 of the Human Rights Act 1998 to act compatibly with Convention rights, since it would not be able to show that any interferences with rights to respect for the home, correspondence and private life were in accordance with the law, as required by Article 8(2) of the European Convention on Human Rights (as scheduled to the Human Rights Act as a Convention right).

17. The appellant wished to challenge the IPT's ruling of law on the proper interpretation of section 5 of RIPA. There was no right of appeal, so the appellant commenced judicial review proceedings against the IPT. The Divisional Court ordered that the issue of the effect of section 67(8) of RIPA on those proceedings should be determined as a preliminary issue.

18. By its judgment herein on that preliminary issue the Divisional Court held that the decision of the IPT is not amenable to judicial review by reason of section 67(8). It made an order dismissing the appellant's application for judicial review. The appellant now appeals to this court with permission granted by the Divisional Court.

*Discussion*

19. The courts adopt a highly restrictive approach to the interpretation of statutory provisions which purport to oust the jurisdiction of the High Court. The classic case is *Anisminic Ltd v Foreign Compensation Commission* [1962] 2 AC 147 but there are many other authorities which illustrate the approach. For a recent discussion in the Supreme Court, see *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663. It is an approach which reflects the fundamental importance of the rule of law in our legal and political system. If an individual cannot get before a court or tribunal to determine a complaint that a public authority has engaged in unlawful conduct, the rule of law will be defeated. The law will not be applied as it should be.

20. Ms Rose QC for the appellant accepts for the purposes of the appeal to this court that it is in principle open to Parliament to exclude a right to apply to the High Court for judicial review, if it does so in terms which are sufficiently clear. She submits, however, that section 67(8) is not drafted in terms which are clearly to this effect. The IPT is not itself part of the High Court, but is an inferior tribunal. In line with

established principle, section 67(8) should be read in a narrow and restricted way, with the result that it cannot be found to mean that it excludes recourse to ordinary judicial review in the High Court in relation to the IPT. To give section 67(8) such a meaning would immunise decisions of the IPT on points of law from all review and the possibility of correction by the higher courts, from the High Court up to the Supreme Court. Parliament cannot have intended such a result.

21. Ms Rose submits that the restrictive approach to interpretation of ouster clauses which is illustrated by *Anisminic* is an example of the application of the principle of legality: compare *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115. I think that is right. The principle of legality is an approach to statutory interpretation in the light of a strong presumption that in promulgating statutes Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution. The rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of this fundamental character.

22. In Ms Rose's submission, by reason of the established restrictive approach to construction of an ouster clause of this kind, if it had been intended that section 67(8) should oust the judicial review jurisdiction of the High Court it would have needed to say in terms that "determinations *and purported determinations*" would not be liable to be questioned in any court, in order to take account of the decision in *Anisminic* itself; it would also have needed to say in terms that not being liable to be questioned in any court included being questioned in judicial review proceedings; and furthermore it would have needed to say in terms that this exclusion of judicial review applied even if the IPT had made an error of law.

23. Against this, Mr Eadie QC for the interested parties submits that there are different ways in which and degrees to which the principle of the rule of law and the right to have access to a court or tribunal might be brought into question by an ouster clause in a statute, depending on the context. On the one hand, if it is said that a provision should be construed as having the effect of excluding the possibility of judicial review in relation to an act of the executive, that would impact upon the usual principle of the rule of law in an especially intrusive way and the drafting required to achieve that effect would correspondingly need to be especially clear. On the other hand, if it is contended that a provision ousts the jurisdiction of the High Court in relation to judicial review but in the context of provision of a right of access to another court or tribunal, the rule of law would still be capable of being vindicated by an independent and impartial judicial body, even if not the High Court. The impact upon the rule of law would be far reduced and accordingly the courts should be more ready to find that the language of what appeared to be an ouster provision was indeed effective to achieve that result. In this case the IPT is an independent and impartial judicial body, presided over by a High Court judge. Mr Eadie submitted that in both types of case it is the substantive effect of the language used which is important, rather than the use of any particular formula. He contends that section 67(8) is in clear terms and should be construed to mean that there is no right to apply for judicial review in the High Court in relation to decisions and determinations of the IPT.

24. Although a lot of authorities were cited to us, this case turns on a short point of statutory construction in relation to RIPA.

25. I can see force in the general thrust of the submission made by Mr Eadie about the variable impact of the principle of legality. Nonetheless, it has to be recognised that a provision which isolates a tribunal from any prospect of appeal through to this court and the Supreme Court on points of law which may be controversial and important – which is a significant effect of reading section 67(8) as Mr Eadie contends – also involves a substantial inroad upon usual rule of law standards in this jurisdiction. That is particularly so where what is in issue is judicial determination of claims regarding the lawfulness of action taken by the intelligence services, the police and others.

26. In my judgment, however, on its proper construction, section 67(8) does clearly mean that all determinations, awards, orders and decisions of the IPT "shall not … be liable to be questioned in any court", including in the High Court on judicial review. This includes those determinations and decisions which the IPT may have made on the basis of what (if there were a judicial review or appeal) might have been found by a court to have been an erroneous view of the law. This interpretation is given clearly, in my view, by the language used in the provision as read in its legislative context.

27. Ms Rose relies strongly on the speeches in the *Anisminic* case itself in relation to the meaning of the word "determination" in the statutory provision in that case. The provision in issue in *Anisminic* was section 4(4) of the Foreign Compensation Act 1950, which applied in relation to determinations as to compensation made by the Foreign Compensation Commission. It 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."

28. The House of Lords held that the word "determination" in this provision "means a real determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity", as would be the case if the commission had made an error of law in its determination ([1969] 2 AC 147, 170A per Lord Reid, and see his discussion at pp. 170A-171F; also pp. 199E-200A per Lord Pearce; pp. 207D-208C per Lord Wilberforce; and p. 215A-D per Lord Pearson).

29. In *O'Reilly v Mackman* [1983] 2 AC 327, at 278C-F, Lord Diplock (with whom the other members of the appellate committee agreed) referred to the "landmark decision" of *Anisminic* and said that it had "liberated English 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"; now, any error of law by the tribunal would be taken to go to its jurisdiction.

30. In *R v Lord President of the Privy Council, ex p. Page* [1993] AC 682 the House of Lords affirmed the view, as derived from *Anisminic*, that after that decision "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"; with the consequence that "in general any error of law made by an administrative tribunal or inferior court can be

quashed for error of law" and regarded as a nullity: see, in particular, pp. 701F-702B per Lord Browne-Wilkinson.

31. Baroness Hale of Richmond JSC and Lord Dyson JSC made observations to similar effect in *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663. At [18] Baroness Hale said that in *Anisminic* "the House of Lords effectively removed the distinction between error of law and excess of jurisdiction"; see also [39]-[40] in her judgment. At [111] Lord Dyson described the distinction between jurisdictional error and other error as "artificial and technical" and agreed with the editors of *De Smith's Judicial Review*, 6th ed (2007), who said at para. 4-046 that it was unlikely that the distinction could be regarded as satisfactory, and that instead "all administrative actions should be simply, lawful, whether or not jurisdictionally lawful".

32. Relying in particular on *Barras v Aberdeen Steam Trawling and Fishing Company Ltd* [1933] AC 402 at 411, Ms Rose submits that the word "determination" in section 67(8) of RIPA must be given the same interpretation as the same word was given by the House of Lords in *Anisminic* when it was used in section 4(4) of the 1950 Act, to mean real determinations by the IPT and not purported determinations arrived at as a result of an error by the IPT which took it outside its jurisdiction, including an error of law by it. Similarly, the word "decision" in section 67(8) means a real decision, not a purported decision which is in fact a nullity because made as a result of an error of law.

33. In my judgment, however, the language used in section 67(8) is materially different from that in section 4(4) of the 1950 Act. The context for the two provisions is also materially different.

34. In *Anisminic*, the word "determination" was taken to exclude purported determinations made in excess of jurisdiction, where the excess of jurisdiction arose because of (among other things) an error of law made by the Foreign Compensation Commission in arriving at its determination. But the drafter of section 67(8) has expressly adverted to the possibility of the IPT making an error of law going to its jurisdiction or power to act, by the words in parenthesis in that provision: "including decisions as to whether they have jurisdiction". Therefore, at least so far as the word "decision" is concerned, it is not tenable to apply the simple distinction relied upon in *Anisminic* in the context of section 4(4) of the 1950 Act between a "determination" and a purported determination, in the sense of a determination made without jurisdiction. In section 67(8), the word "decision" is stated to include a decision which (if judicial review or an appeal were available) might be found to have been made without jurisdiction because of an error of law on the part of the IPT – that is to say, if one wants to use this phrase, a *purported* decision.

35. In the context of section 67(8) it makes no sense to distinguish the position in relation to a "determination" from that in relation to a "decision". In the first place, the language of section 67(8) indicates that the drafter regarded "determinations" as a form of "decision", because the word "decisions" is at the end of the list of "determinations", "awards" and "orders" and is introduced by the word "other". The concept of a "decision" is not a specific term of art in the context of RIPA, but is a compendious concept which covers all the things the IPT might decide. In that respect it is unlike the other items in the list. The concept of a "determination" marries up with section 67(1) and (2) and section 68(4), and means a final decision in relation to

a claim or a complaint. The concept of an "award" marries up with section 67(7), and is the formal outcome of a decision as to what compensation should be granted. The concept of an "order" marries up with section 67(6) and (7), and is the formal outcome of a decision regarding any other relief which should be granted.

36. Further, the IPT might make a discrete decision on some preliminary point of law on its way to making its determination on a claim, or it might deal with the point of law and decide it in the determination itself. As a matter of ordinary language one would say that the IPT has made a decision on the point of law in both these cases. Indeed, the procedure adopted by the IPT in this case and others of giving a ruling on issues of law on the basis of assumed facts in advance of making its final determination of a claim, so as to allow for argument on issues in the most open way possible which is consistent with its obligation under rule 6(1), means that it is very likely that the relevant decision on an issue of law will be in a ruling at the preliminary stage. Moreover, there is nothing to indicate that Parliament intended there to be any difference in the availability of a judicial review challenge as between these two situations and it is very difficult to see any reason why there should be.

37. The same reasoning applies in relation to other decisions the IPT might make. For example, one party might object to a particular member of the IPT sitting in a case on the ground that there were circumstances in relation to him which gave an objective appearance of bias, and the IPT would have to decide whether that member should recuse himself or whether it could proceed with him sitting as a member of the constitution which makes the final determination. Or the IPT might have to decide what fairness or natural justice requires in relation to some aspect of its procedure on its way towards making a final determination, which was a type of situation which the House of Lords in *Anisminic* remarked upon in the context of the procedures which might be adopted by the Foreign Compensation Commission. There, the members of the appellate committee considered that if the commission made a determination following a procedure which did not properly comply with the rules of natural justice, it would be a purported determination, not a real one, and judicial review would be available notwithstanding section 4(4) of the 1950 Act. But in the context of section 67(8) of RIPA, the IPT's decision on the point would be a decision as to whether they had jurisdiction to proceed in the particular way in issue, which could not be questioned in any court.

38. It is implicit in reading section 67(8) in this way that Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise and need to be decided for the purpose of making determinations on claims or complaints made to it. There is nothing implausible about this. The quality of the membership of the IPT in terms of judicial expertise and independence is very high, as set out in Schedule 3 to RIPA, so it is a fair inference that Parliament did intend that this should be the position. The IPT has been recognised to be "a judicial body of like standing and authority to that of the High Court": see *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24; [2010] 2 AC 1, at [22] per Laws LJ; and see [57] per Dyson LJ and [32] per Rix LJ.

39. It might be objected that the phrase "decisions as to whether they have jurisdiction" in section 67(8) could be taken to suggest that it is only where the IPT gives its attention to a particular issue affecting its jurisdiction and reaches a considered view on it that

it has made a decision *as to* whether it has jurisdiction. However, two points can be made. First, this is what has happened in this case: the IPT heard submissions about the meaning and effect of section 5 of RIPA and reached a reasoned decision on that point in the course of moving towards its determination of the appellant's claim. So even if this interpretation of section 67(8) were correct, it would not assist the appellant in the present case.

40. Secondly, however, I do not consider that this interpretation is correct. Again, there is no good reason for reading section 67(8) in this narrow way. It would create an unjustified distinction between advertent and inadvertent errors of law or in procedure which has never been part of public law. It would also lead to excessively subtle arguments about whether errors of law or in procedure were or were not the product of a considered view being reached by the IPT. Parliament, in legislating against the background of basic principles of public law as articulated in *Anisminic*, *O'Reilly v Mackman* and *ex p. Page,* did not intend to introduce a new form of esoteric distinction of this kind. In my view, the phrase "decisions as to whether they have jurisdiction" has the following straightforward meaning, appropriate in this public law context: "decisions in relation to their jurisdiction".

41. I also think that the use of the word "determination" elsewhere in the regime under sections 67 and 68 of RIPA tends to indicate that Parliament intended it to mean both a real determination and a purported determination (in the *Anisminic* sense of those terms): see section 68(4) and (5), where the word is used to refer to determinations in both senses.

42. These linguistic points are strongly supported by the statutory context in which section 67(8) appears, to which I have already referred. It is clear that Parliament's intention in establishing the IPT and in laying down a framework for the special procedural rules which it should follow, including the Rules, was to set up a tribunal capable of considering claims and complaints against the intelligence services under closed conditions which provided complete assurance that there would not be disclosure of sensitive confidential information about their activities.

43. Interpretation of section 67(8) as set out above gives it a meaning which promotes this purpose. To construe section 67(8) as allowing judicial review of determinations and decisions of the IPT would subvert it. It would mean that despite the elaborate regime put in place to allow the IPT to determine claims against the intelligence services in a closed procedure while guaranteeing that sensitive information about their activities is not disclosed, judicial review proceedings could be brought in which no such guarantee applied.

44. It is worth emphasising how far the subversion of Parliament's purpose would go, if the construction urged by the appellant were correct. There is no neat, absolute division between points of law and points of fact in judicial review proceedings. For example, it is open to a claimant who brings such proceedings to allege that a public body has made a decision which is irrational or disproportionate, having regard to all the evidence in the case. It is open to a claimant to allege that a decision has been made which is unsupported by any evidence or which is contradicted by evidence in the case. Such claims may require the reviewing court to examine all the evidence which was before the decision-making body. As observed above, the operation of the rules on public interest immunity in court proceedings does not afford the same

guarantee of non-disclosure of information damaging to the public interest as rule 6(1) of the Rules.

45. Sir Brian Leveson PQBD gave great weight to this legislative context in arriving at the interpretation of section 67(8) which I consider is correct, and rightly so in my opinion: see [40]-[44] of the judgment below.

46. It is a feature of the IPT regime which was emphasised both by this court and by the Supreme Court in the authority which is most relevant for the question of construction of RIPA with which we are concerned, namely *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 and [2009] UKSC 12; [2010] 2 AC 1. Both courts held that section 65 of RIPA conferred on the IPT exclusive jurisdiction to hear claims under section 7 of the Human Rights Act 1998 against any of the intelligence services. In this court, Laws LJ observed that the IPT was a judicial body "of like standing and authority to that of the High Court" and which "operates subject to special procedures apt for the subject matter in hand" ([22]); and Dyson LJ said this at [48]:

> "Rule 3 of the [IPT Rules] provides that the Rules "apply to section 7 proceedings and to complaints". The [IPT Rules] are detailed and elaborate. They are carefully drafted so as to achieve a balance between fairness to a complainant and the need to safeguard the relevant security interests. *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.* If it had been intended to allow a claimant to issue section 7 proceedings under the 1998 Act against an intelligence service in the courts, surely Parliament would have provided that the [IPT Rules] (adapted as necessary) should apply to the court proceedings. Having enacted such detailed procedural rules in this difficult and sensitive area for proceedings before the IPT, it would have been surprising if Parliament had intended to leave it to the courts to fashion their own rules. In this context, it is also not without significance that, as the Civil Procedure Rules demonstrate, Parliament routinely makes rules which govern court proceedings. They include rules which apply to proceedings in specialist courts" [emphasis supplied].

47. All the members of the Supreme Court agreed with the judgment of Lord Brown of Eaton-under-Heywood JSC. At [14] Lord Brown explained the special problems to which claims against the intelligence services give rise, referred to relevant restrictive provisions of RIPA and the Rules "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)", and said:

> "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 [the Director's] case in the court below. As he pithily put it: [Lord Brown then quoted with approval the part of para. [48] in Dyson LJ's judgment set out in italics above]".

48. Lord Brown also referred at [23] to section 67(8) of RIPA, and expressed the view that this was an ouster of any jurisdiction of the courts over the IPT and that it was, unlike the ouster clause in *Anisminic*, "an unambiguous ouster" of that jurisdiction. It is true that this is an *obiter dictum*, but it was a considered view expressed as part of a very careful analysis of the IPT regime established by RIPA and the Rules. It is also a view which fits closely with the rest of Lord Brown's analysis of that regime, and in particular what he said at [14] about what the regime was intended to achieve in terms of allowing claims against the intelligence services to be determined on the basis of full evidence about their activities whilst also ensuring that sensitive confidential information about those activities would not be disclosed. Unless section 67(8) is interpreted as Lord Brown indicated, it would permit the special procedural regime established for the IPT to be bypassed at the stage when judicial review proceedings in respect of its decisions are brought in the High Court, as explained above. That would undermine the coherence of Lord Brown's reasoning at para. [14] of his judgment. In my view, Lord Brown's view at [23] about the proper interpretation and effect of section 67(8) is of powerful persuasive authority. I agree with it.

49. For these reasons, I would dismiss this appeal.

**Lord Justice Flaux:**

50. I agree.

**Lord Justice Floyd:**

51. I also agree.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
BEFORE THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
AND THE HONOURABLE MR JUSTICE LEGGATT

CO/2368/2016

**IN THE MATTER OF** a Claim for Judicial Review


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 COMMUNICATION HEADQUARTERS

**Interested Parties**

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**ORDER**

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**UPON HEARING** Counsel for the Claimant, leading Counsel for the Defendant and leading Counsel for the 1st interested party regarding the preliminary issue

**IT IS ORDERED THAT:-**

1. On the preliminary issue, it is determined that the decision of the Defendant is not amenable to judicial review;
2. Consequential matters relating to the Claimant's application for an order under s. 12 of the Administration of Justice Act 1969 (as amended) or alternatively for leave to appeal and in relation to costs will be dealt with on the papers without a hearing following exchange of skeleton arguments between the Claimant and the Interested Parties within 10 days.

Dated: 02 February, 2017

***By the Court***

CO/2368/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
BEFORE THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
AND THE HONOURABLE MR JUSTICE LEGGATT

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**
**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*


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**ORDER**

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UPON the Divisional Court handing down judgment on the preliminary issue dated 2 February 2016

AND UPON the Divisional Court having concluded that this Court has no jurisdiction to consider this application for judicial review in light of s.67(8) of the Regulation of Investigatory Powers Act 2000

AND UPON THE DEFENDANT indicating that it made no application in relation to its costs

IT IS ORDERED THAT:

1. The Claimant's application for judicial review is dismissed.

2. The Claimant to pay the Interested Parties' costs in the sum of £15,000 not to be enforced until the conclusion of any proceedings in the Court of Appeal or further order.

3. Application by the Claimant pursuant to s. 12 of the Administration of Justice Act 1969 (as amended) refused. Permission to appeal to the Court of Appeal granted.

Dated 09 February, 2017

By the Court

**IN THE HIGH COURT**
**APPLICATION FOR LEAVE TO APPEAL**
**TO THE COURT OF APPEAL (CIVIL DIVISION)**

| | |
|---|---|
| Title of case/action:<br><br>The Queen on the application of Privacy International<br>v Investigatory Powers Tribunal | Action/case no.<br>CO/2368/2016<br>File no. |
| Heard/tried before (insert name of Judge):<br>Before SIR BRIAN LEVESON PQBD<br>and MR JUSTICE LEGGATT | Court no<br>3 |
| Nature of hearing<br>Judicial Review | |
| Date of judgement:<br>2 February, 2017 | |
| Results of hearing (attach copy of order):<br><br>Claim Dismissed. | |
| Claimant's application for leave to appeal to the Court of Appeal | Allowed |
| Reasons for decision (to be completed by the Judge):<br><br>The effectiveness of any ouster clause is a matter of public importance and the different approaches of the members of the court underline the validity of the different views that might be held. In the circumstances, an appeal must have a reasonable prospect of success and, in any event, there are other good reasons for allowing the matter to be ventilated further. | |
| Judge's signature:<br><br>President of the Queen's Bench Division | **Note to the Applicant:**<br>When completed this form should be lodged in the Civil Appeals Office on a renewed application for leave to appeal or when setting down an appeal |

Neutral Citation Number: [2017] EWHC 114 (Admin)

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**

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**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** |

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**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.

Neutral Citation Number: [2016] UKIP Trib 14_85-CH
IN THE INVESTIGATORY POWERS TRIBUNAL

P.O. Box 33220
London
SW1H 9ZQ
Date: 12/02/2016

**Before :**
**MR JUSTICE BURTON (PRESIDENT)**
**MR JUSTICE MITTING (VICE-PRESIDENT)**
**MR ROBERT SEABROOK QC**
**MR CHARLES FLINT QC**
**THE HON CHRISTOPHER GARDNER QC**
**Between :**

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|---|---|---|
| **Case No. IPT 14/85/CH** | **PRIVACY INTERNATIONAL** | **Claimant** |
| | **- and -** | |
| | **(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**<br>**(2) THE GOVERNMENT COMMUNICATIONS HEADQUARTERS** | **Respondents** |
| **Case No. IPT 14/120-126/CH** | **GREENNET LIMITED**<br>**RISEUP NETWORKS, INC**<br>**MANGO EMAIL SERVICE**<br>**KOREAN PROGRESSIVE NETWORK ("JINBONET")**<br>**GREENHOST**<br>**MEDIA JUMPSTART, INC**<br>**CHAOS COMPUTER CLUB** | **Claimants** |
| | **- and -** | |
| | **(1) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**<br>**(2) THE GOVERNMENT COMMUNICATIONS HEADQUARTERS** | **Respondents** |

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**Ben Jaffey and Tom Cleaver** (instructed by **Bhatt Murphy Solicitors**) for the **Claimants**
**James Eadie QC, Daniel Beard QC, Kate Grange and Richard O'Brien** (instructed by **Government Legal Department**) for the **Respondents**
**Jonathan Glasson QC, Counsel to the Tribunal** (instructed by **Government Legal Department**)
Hearing dates: 1, 2 and 3 December 2015
**Approved judgment**

**Mr Justice Burton (The President):**

1. This is the judgment of the Tribunal.

2. This has been a hearing in respect of the claim by Privacy International, the well known NGO, and seven internet service providers, of which Greennet Limited carries on operations in this country and the other Claimants have customers in this country, though their main operations are based abroad. The hearing has been of preliminary issues of law, whose purpose is to establish whether, if the Second Respondent ("GCHQ") carries on the activity which is described as CNE (Computer Network Exploitation), which may have affected the Claimants, it has been lawful. The now well established procedure for this Tribunal is to make assumptions as to the significant facts in favour of claimants and reach conclusions on that basis, and only once it is concluded whether or not, if the assumed facts were established, the respondent's conduct would be unlawful, to consider the position thereafter in closed session. This procedure has enabled the Tribunal, on what is now a number of occasions, to hold open inter partes hearings, without possible damage to national security, while preserving, where appropriate, the Respondents' proper position of Neither Confirmed Nor Denied ("NCND").

3. Various possible different methods or consequences of CNE, or in its colloquial form 'hacking', as summarised in paragraph 9 below, have been canvassed in the witness statements produced on behalf of the Claimants by Mr Eric King, Professor Ross Anderson and Professor Peter Sommer, to which there have been responses, always subject to the constraints of NCND, in the witness statements of Mr Ciaran Martin, the Director General of Cyber Security at GCHQ. The particular significance of the use of CNE is that it addresses difficulties for the Intelligence Agencies caused by the ever increasing use of encryption by those whom the Agencies would wish to target for interception. The Claimants point out that CNE inevitably goes beyond interception, in accessing what is not and would not be communicated. The context of the issue is that the security situation for the United Kingdom, presently described as severe, is such that there needs to be the most diligent possible protection by the Respondents of the citizens and residents of the UK. Mr Martin points out in his first witness statement that even in the past year the threat to the UK from international terrorism in particular has continued to increase, and Mr Eadie QC for the Respondents submitted that proper protection of the citizen against terrorist attack is of the most fundamental importance, and that technological capabilities operated by the Intelligence Agencies lie at the very heart of the attempts of the State to safeguard the citizen against terrorist attack.

4. The sections of the Intelligence Services Act 1994 ("ISA") which have been primarily under consideration at this hearing are s.3, which sets out the powers of GCHQ, s.5 (with its machinery in part set out in s.6) and s.7. We shall refer to a s.5 warrant and a s.7 authorisation:

> ***"3. The Government Communications Headquarters.***

*(1) There shall continue to be a Government Communications Headquarters under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be -*

*(a) to monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material; and*

*(b) to provide advice and assistance about—*

*(i) languages, including terminology used for technical matters, and*

*(ii) cryptography and other matters relating to the protection of information and other material,*

*to the armed forces of the Crown, to Her Majesty's Government in the United Kingdom or to a Northern Ireland Department or to any other organisation which is determined for the purposes of this section in such manner as may be specified by the Prime Minister.*

*(2) The functions referred to in subsection (1)(a) above shall be exercisable only—*

*(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or*

*(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or*

*(c) in support of the prevention or detection of serious crime.*

...

***5 Warrants: general.***

*(1) No entry on or interference with property or with wireless telegraphy shall be unlawful if it is*

*authorised by a warrant issued by the Secretary of State under this section.*

*(2) The Secretary of State may, on an application made by . . . GCHQ, issue a warrant under this section authorising the taking, subject to subsection (3) below, of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State -*

*(a) thinks it necessary for the action to be taken for the purpose of assisting . . .*

*(iii) GCHQ in carrying out any function which falls within section 3(1)(a) above; and*

*(b) is satisfied that the taking of the action is proportionate to what the action seeks to achieve;*

*(c) is satisfied that satisfactory arrangements are in force under section 2(2)(a) of the* [Security Service Act 1989 ("the 1989 Act")] *(duties of the Director-General of the Security Service), section 2(2)(a) above or section 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained under the warrant will be subject to those arrangements.*

*(2A) The matters to be taken into account in considering whether the requirements of subsection (2)(a) and (b) are satisfied in the case of any warrant shall include whether what it is thought necessary to achieve by the conduct authorised by the warrant could reasonably be achieved by other means.*

*(3) A warrant issued on the application of the Intelligence Service or GCHQ for the purposes of the exercise of their functions by virtue of section . . . 3(2)(c) above may not relate to property in the British Islands.*

*(3A) A warrant issued on the application of the Security Service for the purposes of the exercise of their function under section 1(4) of the Security*

*Service Act 1989 may not relate to property in the British Islands unless it authorises the taking of action in relation to conduct within subsection (3B) below.*

*(3B) Conduct is within this subsection if it constitutes (or, if it took place in the United Kingdom, would constitute) one or more offences, and either -*

*(a) it involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose; or*

*(b) the offence or one of the offences is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.*

*(4) Subject to subsection (5) below, the Security Service may make an application under subsection (2) above for a warrant to be issued authorising that Service (or a person acting on its behalf) to take such action as is specified in the warrant on behalf of the Intelligence Service or GCHQ and, where such a warrant is issued, the functions of the Security Service shall include the carrying out of the action so specified, whether or not it would otherwise be within its functions.*

*(5) The Security Service may not make an application for a warrant by virtue of subsection (4) above except where the action proposed to be authorised by the warrant—*

*(a) is action in respect of which the Intelligence Service or, as the case may be, GCHQ could make such an application; and*

*(b) is to be taken otherwise than in support of the prevention or detection of serious crime*

***6 Warrants: procedure and duration, etc.***

*(1) A warrant shall not be issued except—*

*(a) under the hand of the Secretary of State or in the case of a warrant by the Scottish Minister (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive; or*

*(b) in an urgent case where the Secretary of State has expressly authorised its issue and a statement of that fact is endorsed on it, under the hand of a senior official; or*

*(c) in an urgent case where, the Scottish Ministers have (by virtue of provision made under section 63 of the Scotland Act 1998) expressly authorised its issue and a statement of that fact is endorsed thereon, under the hand of a member of the staff of the Scottish Administration who is in the Senior Civil Service and is designated by the Scottish Ministers as a person under whose hand a warrant may be issued in such a case.*

(d) *in an urgent case where the Secretary of State has expressly authorised the issue of warrants in accordance with this paragraph by specified senior officials and a statement of that fact is endorsed on the warrant, under the hand of the specified officials.*

*(1A) But a warrant issued in accordance with subsection (1) (d) may authorise the taking of an action only if the action is an action in relation to property which, immediately before the issue of the warrant, would, if done outside the British Islands, have been authorised by virtue of an authorisation under section 7 that was in force at that time.*

*(1B) A senior official who issues a warrant in accordance with subsection (1)(d) must inform the Secretary of State about the issue of the warrant as soon as practicable after issuing it."*

*(2) A warrant shall, unless renewed under subsection (3) below, cease to have effect—*

*(a) if the warrant was under the hand of the Secretary of State or, in the case of a*

*warrant issued by the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998), a member of the Scottish Executive, at the end of the period of six months beginning with the day on which it was issued; and*

*(b) in any other case, at the end of the period ending with the second working day following that day.*

*(3) If at any time before the day on which a warrant would cease to have effect the Secretary of State considers it necessary for the warrant to continue to have effect for the purpose for which it was issued, he may by an instrument under his hand renew it for a period of six months beginning with that day.*

*(4) The Secretary of State shall cancel a warrant if he is satisfied that the action authorised by it is no longer necessary.*

*(5) In the preceding provisions of this section "warrant" means a warrant under section 5 above.*

. . .

***7 Authorisation of acts outside the British Islands.***

*(1) If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.*

*(2) In subsection (1) above "liable in the United Kingdom" means liable under the criminal or civil law of any part of the United Kingdom.*

*(3) The Secretary of State shall not give an authorisation under this section unless he is satisfied -*

*(a) that any acts which may be done in reliance on the authorisation or, as the case may be, the operation in the course of which the acts may be done will be necessary for the proper discharge of a*

*function of the Intelligence Service or GCHQ; and*

*(b) that there are satisfactory arrangements in force to secure -*

*(i) that nothing will be done in reliance on the authorisation beyond what is necessary for the proper discharge of a function of the Intelligence Service or GCHQ; and*

*(ii) that, in so far as any acts may be done in reliance on the authorisation, their nature and likely consequences will be reasonable, having regard to the purposes for which they are carried out; and*

*(c) that there are satisfactory arrangements in force under section 2(2)(a) or 4(2)(a) above with respect to the disclosure of information obtained by virtue of this section and that any information obtained by virtue of anything done in reliance on the authorisation will be subject to those arrangements.*

*(4) Without prejudice to the generality of the power of the Secretary of State to give an authorisation under this section, such an authorisation -*

*(a) may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified;*

*(b) may be limited to a particular person or persons of a description so specified; and*

*(c) may be subject to conditions so specified.*

*(5) An authorisation shall not be given under this section except -*

*(a) under the hand of the Secretary of State; or*

*(b) in an urgent case where the Secretary of State has expressly authorised it to be*

*given and a statement of that fact is endorsed on it, under the hand of a senior official.*

*(6) An authorisation shall, unless renewed under subsection (7) below, cease to have effect -*

*(a) if the authorisation was given under the hand of the Secretary of State, at the end of the period of six months beginning with the day on which it was given;*

*(b) in any other case, at the end of the period ending with the second working day following the day on which it was given.*

*(7) If at any time before the day on which an authorisation would cease to have effect the Secretary of State considers it necessary for the authorisation to continue to have effect for the purpose for which it was given, he may by an instrument under his hand renew it for a period of six months beginning with that day.*

*(8) The Secretary of State shall cancel an authorisation if he is satisfied that any act authorised by it is no longer necessary.*

*(9) For the purposes of this section the reference in subsection (1) to an act done outside the British Islands includes a reference to any act which -*

*(a) is done in the British Islands; but*

*(b) is or is intended to be done in relation to apparatus that is believed to be outside the British Islands, or in relation to anything appearing to originate from such apparatus;*

*and in this subsection "apparatus " has the same meaning as in* [RIPA].

*(10) Where–*

*(a) a person is authorised by virtue of this section to do an act outside the British Islands in relation to property,*

*(b) the act is one which, in relation to property within the British Islands, is*

*capable of being authorised by a warrant under section 5,*

*(c) a person authorised by virtue of this section to do that act outside the British Islands, does the act in relation to that property while it is within the British Islands, and*

*(d) the act is done in circumstances falling within subsection (11) or (12),*

*This section shall have effect as if the act were done outside the British Islands in relation to that property.*

*(11) An act is done in circumstances falling within this subsection if it is done in relation to the property at a time when it is believed to be outside the British Islands.*

*(12) An act is done in circumstances falling within this subsection if it–*

*(a) is done in relation to property which was mistakenly believed to be outside the British Islands either when the authorisation under this section was given or at a subsequent time or which has been brought within the British Islands since the giving of the authorisation; but*

*(b) is done before the end of the fifth working day after the day on which the presence of the property in the British Islands first becomes known.*

*(13) In subsection (12) the reference to the day on which the presence of the property in the British Islands first becomes known is a reference to the day on which it first appears to a member of the Intelligence Service or of GCHQ, after the relevant time–*

*(a) that the belief that the property was outside the British Islands was mistaken; or*

*(b) that the property is within those Islands.*

*(14) In subsection (13) 'the relevant time' means, as the case may be –*

*(a) the time of the mistaken belief mentioned in subsection (12)(a); or*

*(b) the time at which the property was, or was most recently, brought within the British Islands.*"

5. The 'assumed facts' procedure has been impacted to an extent on this occasion by virtue of the fact that there has been a considerable degree of acceptance by the Respondents, or 'avowal' as it has been called, of the existence and use of CNE by GCHQ, and certainly so since the publication on 6 February 2015, during the course of, and seemingly as a direct result of, the existence of these proceedings, of the draft Equipment Interference Code of Practice pursuant to s.71 of the Regulation of Investigatory Powers Act 2000 ("RIPA") ("the E I Code"), which has now, after a period of consultation, been laid before Parliament in November 2015. [Since the hearing, it has been brought into force by S.I.2016 no.38 dated 14 January 2016]. As a result of a Schedule of Avowals, helpfully prepared by Mr Jaffey of counsel on behalf of the Claimants, and responded to by the Respondents, the following matters are admitted:

i) GCHQ carries out CNE within and outside the UK.

ii) In 2013 about 20% of GCHQ's intelligence reports contained information derived from CNE.

iii) GCHQ undertakes both "*persistent*" and "*non-persistent*" CNE operations, namely both where an 'implant' expires at the end of a user's internet session and where it "resides" on a computer for an extended period.

iv) CNE operations undertaken by GCHQ can be against a specific device or a computer network.

v) GCHQ has obtained warrants under s.5 and authorisations under s.7, and in relation to the latter had five s.7 class based authorisations in 2014.

6. Apart from the provisions of the ISA, the other most material statutory provisions are as follows:

i) The 1989 Act (referred to above) by s.3 gave the power to the Security Service ("MI5") to apply for a warrant, which it is common ground could have authorised conduct by GCHQ (whose existence was not at that stage publicly admitted) on its behalf, whereby the Secretary of State could, on an application made by MI5 issue a warrant "*authorising the taking of such action as is specified in the warrant in*

*respect of any property so specified*" in the circumstances there provided for. This provision was replaced by ISA in 1994.

ii) The Official Secrets Act 1989 makes it an offence for a member of the Security and Intelligence Services by s.1 to disclose information relating to security or intelligence without lawful authority and by s.8 to retain it without lawful authority or fail to take proper care to prevent unauthorised disclosure of it.

iii) A similar provision to safeguard information obtained by any of the Intelligence Services, by limiting its disclosure and use to the proper discharge of any of their functions (including the interests of national security) is in s.19 of the Counter-Terrorism Act 2008.

iv) The provisions of the Data Protection Act 1998 preserve (notwithstanding any exemptions) the obligation on GCHQ to comply with the Fifth and Seventh data protection principles, namely:

> "*5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes. ...*
>
> *7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.*"

7. The Respondents accept and assert that as a matter of public law they have been bound since February 2015 by the draft E I Code, which was accompanied by a Ministerial statement to that effect. We are satisfied that that is the case. Prior to such publication, there was the Covert Surveillance and Property Interference Code (the "Property Code"), also pursuant to s.71 of RIPA, which has been materially in its present form since 2002. The Property Code continues in force, but under paragraph 1.2 of the E I Code where there is an overlap between the two Codes the E I Code takes precedence.

8. The parties agreed a List of Issues to be resolved at the hearing, which were agreed during the period of preparation for the hearing as a result of excellent cooperation between the parties, and with the very considerable assistance of Jonathan Glasson QC, Counsel for the Tribunal. As a result of the very careful preparation for, and the concise and persuasive presentation at, the hearing by both parties, it was possible to conclude the oral argument in 3 days. There was a degree of context for the resolution of the issues, not just by reference to the witness statements to which we have referred. The Respondents accept that the provisions of Articles 8 and 10 of the European Convention of Human Rights, which we do not need to set out, apply to Privacy International as a campaigning NGO, and, at least for the purposes of this hearing, that they both apply to the internet companies: in any event there is no material difference in the applicability of both Articles, which have been, as in previous hearings, argued in tandem. As to other matters:

i) Both parties accepted at this hearing the effect of this Tribunal's conclusions in what have become known as **Liberty/Privacy (No.1)** [2015] 3 AER 142 and **(No.2)** [2015] 3 AER 212. It was common ground that all the material decisions of the ECtHR were fully canvassed in **Liberty/Privacy (No.1)** and their effect set out in that Judgment. The consequence was that there was a great deal less need to refer to the underlying ECtHR Judgments themselves in the hearing before us, and it was common ground that the only material ECtHR decision since **Liberty/Privacy** is **R.E. v United Kingdom** (Application No.62498/11), Judgment 27 October 2015, to which we were referred by both sides.

ii) As in **Liberty/Privacy**, emphasis was placed by the Respondents on the existence of oversight of the security arrangements and procedures by the Intelligence and Security Committee of Parliament ("ISC") and by the Commissioners. In this case the relevant Commissioner is the Intelligence Services Commissioner, Sir Mark Waller, on whose Reports both sides relied. As is to be expected, and will be referred to below, Sir Mark's responsibility included drawing attention to areas which, upon his inspection of the Intelligence Services, he felt could be improved; but there is no doubt, by reference to those Reports, that it continues to be his view, as expressed in his 2013 Report, that "*GCHQ's staff continue to conduct themselves with the highest level of integrity and legal compliance*". The ISC's latest report of 12 March 2015 is to similar effect.

9. It was agreed for the purpose of the List of Issues (at paragraph 6) that CNE might be used by GCHQ so as to involve the following:

a) The obtaining of information from a particular device, server or network.

That constituted part of the Respondents' avowals, and consequently was no longer subject to NCND. As to the balance of the original paragraph 6 of the List of Issues:

b) The creation, modification or deletion of information on a device, server or network.

It was accepted at paragraph 46 of Mr Martin's First Statement that CNE could theoretically change the material on a computer, e.g. by way of an implant. In the light of that, coupled with the acceptance generally by GCHQ that it carries out CNE activities, GCHQ accepts that it has avowed the creation (to the extent that the placing of an implant on a device amounts to the creation of information) and modification of information on a device and this is no longer subject to NCND. In addition, whilst GCHQ accepts that creating or modifying information on a server or network could lawfully occur, this is neither confirmed nor denied.

But apart from that, sub-paragraph (b) is neither confirmed nor denied.

c) The carrying out of intrusive surveillance.

This is neither confirmed nor denied, although GCHQ has accepted that the use of CNE techniques may be intrusive.

d) The use of CNE in such a way that it creates a potential security vulnerability in software or hardware, on a server or on a network.

This is not avowed. However it has been accepted that any CNE operations which are carried out by GCHQ are conducted in such a way as to minimise the risk of leaving target devices open to exploitation by others (see paragraph 39 of Mr Martin's First Statement).

e) The use of CNE in respect of numerous devices, servers or networks, without having first identified any particular device or person as being of intelligence interest.

This has been characterised as 'bulk CNE'. The Respondents agree that this could arise pursuant to the powers of GCHQ within the scope of a s.7 authorisation, but neither admit nor deny that it has ever occurred, and Mr Martin in his third witness statement says that it is "*simply not correct to assert that GCHQ is using CNE on an indiscriminate and disproportionate scale*".

f) The use of CNE to weaken software or hardware at its source, prior to its deployment to users.

This is neither confirmed nor denied.

g) The obtaining of information for the purpose of maintaining or further developing the intelligence services' CNE capabilities.

This is neither confirmed nor denied.

10. The List of Issues, shorn of its paragraph 6 in which the above matters (a) to (g) were canvassed, appears as Appendix I to this Judgment. We turn to address those issues below, although not quite in the same format.

11. The value of these proceedings in open court before us has been to our mind again emphasised, whatever the outcome, by virtue of the full inter partes consideration of such issues, and in particular:

i) The knock-on effect that the very existence of these proceedings has clearly had. We have already noted the fact that the publication of the draft E I Code was on 6 February 2015, revealing for the first time in public the use by GCHQ of CNE and the procedures under which it is

to operate (in particular at paragraph 1.9 "*Equipment Interference is conducted in accordance with the statutory functions of each Intelligence Service*"). That was the same date as the service of the Respondents' Open Response in these proceedings, setting out their case as to CNE. The Claimants have pointed to the fact that within a month after the initiation in May 2014 of these proceedings by Privacy International, by which the Claimants raised the issue as to the import of s.10 of the Computer Misuse Act 1990 ("CMA"), proposed amendments to s.10 were laid before Parliament on 5 June 2014 (as part of the Serious Crime Bill), which have now been enacted. These amendments are said by the Respondents to clarify, but asserted by the Claimants to change, the nature of the un-amended s.10, which forms the basis of the discussion in Issue 1 below, and plainly were also a consequence of these proceedings.

ii) There are now in the public domain what were previously "*below the waterline*" arrangements (see paragraph 7 in the **Liberty/Privacy No.1** judgment) underlying both the Property Code and the E I Code, either redacted or gisted. Whether or not in the event they are determinative in relation to the issues canvassed before us in relation to the question of accessibility or foreseeability under Articles 8 and 10 of the ECHR, it is valuable that they have been produced by the Respondents in these proceedings. This arose as a result of the disclosure sought by the Claimants, and by Counsel to the Tribunal, and requested by the Tribunal.

iii) Simultaneously with the preparation and eventual presentation of this case, there has been the consideration by David Anderson QC, the Independent Reviewer of terrorism legislation, in his Report dated June 2015, and subsequently the draft Investigatory Powers Bill ("the IP Bill") laid before Parliament in November 2015, which in its present form has been before us, both of which plainly drew upon the ideas and submissions which have now been openly canvassed before us.

Issue 1: s.10 CMA

12. The first Issue is: Was an act which would be an offence under s.3 of the CMA made lawful by a s.5 warrant or s.7 authorisation, prior to the amendment of s.10 CMA as of May 2015?

13. The following is common ground:

i) S.1 of CMA reads in material part as follows:

> "***1. Unauthorised access to computer material.***
>
> *(1) A person is guilty of an offence if—*
>
> *(a) he causes a computer to perform any function with intent to secure access to any program or data held in any*

*computer, or to enable any such access to be secured;*

*(b) the access he intends to secure, or to enable to be secured, is unauthorised; and*

*(c) he knows at the time when he causes the computer to perform the function that that is the case.*

*(2) The intent a person has to have to commit an offence under this section need not be directed at—*

*(a) any particular program or data;*

*(b) a program or data of any particular kind; or*

*(c) a program or data held in any particular computer.*

. . ."

ii) S.3 reads as follows:

"***3. Unauthorised acts with intent to impair, or with recklessness as to impairing, operation of computer, etc.***

*(1) A person is guilty of an offence if -*

*(a) he does any unauthorised act in relation to a computer;*

*(b) at the time when he does the act he knows that it is unauthorised; and*

*(c) either subsection (2) or subsection (3) below applies.*

*(2) This subsection applies if the person intends by doing the act -*

*(a) to impair the operation of any computer;*

*(b) to prevent or hinder access to any program or data held in any computer; or*

*(c) to impair the operation of any such program or the reliability of any such data; or*

*(d) to enable any of the things mentioned in paragraphs (a) to (c) above to be done.*

*(3) This subsection applies if the person is reckless as to whether the act will do any of the things mentioned in paragraphs (a) to (d) to (c) of subsection (2) above.*

*(4) The intention referred to in subsection (2) above, or the recklessness referred to in subsection (3) above, need not relate to—*

*(a) any particular computer;*

*(b) any particular program or data; or*

*(c) a program or data of any particular kind.*

*(5) In this section -*

*(a) a reference to doing an act includes a reference to causing an act to be done;*

*(b) "act" includes a series of acts;*

*(c) a reference to impairing, preventing or hindering something includes a reference to doing so temporarily.*

. . . "

iii) An act of CNE, insofar as it consists of, for example, removing or replacing information on a computer, would not simply constitute an offence under s.1 but plainly also under s.3 (unless exempt from sanction).

iv) Since 3 May 2015 the amendment to s.10 (referred to in paragraph 11(i) above) makes it clear that a person acting under a s.5 warrant or s.7 authorisation commits an offence neither under s.1 nor under s.3 of the CMA.

So the only issue relates to the period prior to 3 May 2015.

14. S.10 of the CMA prior to its amendment read as follows:

"*10. Saving for certain law enforcement powers*

*Section 1(1) above has effect without prejudice to the operation –*

*(a) In England and Wales of any enactment relating to powers of inspection, search or seizure; and*

*(b) In Scotland of any enactment or rule of law relating to powers of examination, search or seizure.*

*. . .*"

15. S.10 as amended by the Serious Crime Act 2015 s.44(2)(a) now reads as follows:

*"10. Savings*

*Sections 1 to 3A have effect without prejudice to the operation -*

*(a) in England and Wales of any enactment relating to powers of inspection, search or seizure or of any other enactment by virtue of which the conduct in question is authorised or required; and*

*(b) in Scotland of any enactment or rule of law relating to powers of examination, search or seizure or of any other enactment or rule of law by virtue of which the conduct in question is authorised or required.*

*and nothing designed to indicate a withholding of consent to access to any program or data from persons as enforcement officers shall have effect to make access unauthorised for the purposes of any of those sections. In this section—*

*"enactment" means any enactment, whenever passed or made, contained in—*

*(a) an Act of Parliament;*
*(b) an Act of the Scottish Parliament;*
*(c) a Measure or Act of the National Assembly for Wales;*
*(d) an instrument made under any such Act or Measure;*
*(e) any other subordinate legislation (within the meaning of the Interpretation Act 1978)*

*. . .*".

16. The Claimants submit that until the passage of this amendment to s.10 any act of CNE which would contravene s.3 of the CMA was unlawful. On the Claimants' case, the effect of the amendment is to reverse the previous position; hence the need for it. The Respondents submit however that the amendment to s.10 was simply clarificatory. This the Respondents submit was made clear by the Home Office Circular (Serious Crime Act 2015) and the Home Office Fact sheet, both dated March 2015, which accompanied the bill. It is not contested that such documents are admissible in construction of

the bill which they accompanied, but it is equally accepted that those documents cannot provide any aid to construction of the original 1990 CMA.

17. Mr Jaffey submits that:

i) The CMA is the '*lex specialis*' relating to computer misuse. It governs the position, and there is specific reference in the unamended s.10 to the law enforcement powers which are exempted from the ambit of s.1, and s.3 is left entirely unaffected. When the ISA was enacted in 1994, it could not affect the position, namely that it is only s.1 of the CMA which has effect "*without prejudice to the operation in England and Wales of any enactment relating to powers of inspection, search or seizure*", and not s.3

ii) There may be good reason for Parliament having so differentiated because:

(a) Parliament is to be taken to have decided that less intrusive operations would be exempted from the ambit of the Act and not the more excessive activity covered by s.3.

(b) It may be that there were concerns that an act which would contravene s.3 might impact upon the reliability of evidence contained in a computer, in the context of its being admitted into evidence in subsequent criminal proceedings (there being no bar on the admission of such evidence, as there is and was in relation to intercept evidence). There is some discussion in **Hansard** at the time of passage of the bill as to concerns about the position of such evidence.

iii) The 1990 CMA, and its express savings, cannot be impliedly overruled by the subsequent 1994 ISA (see Lord Hope in H v Lord Advocate [2013] 1 AC 413 at 436, paragraph 30 as to implied subsequent repeal).

18. Mr Eadie submits that:

i) The language of ss.5 and 7 of the ISA, set out in paragraph 4 above is in each case clear. No act done pursuant to those sections can be unlawful either civilly or criminally. That plainly includes an act which would otherwise be an offence under s.3 of the CMA.

ii) The 1994 ISA was the '*lex specialis*' relating to the Intelligence Agencies. Earlier savings provisions cannot limit the powers given under s.5 and s.7 of ISA. S.10 of CMA (as un-amended) did not purport to be exhaustive: the heading, which is admissible for interpretation, refers to "*saving for certain law enforcement powers*", and even the words "*any enactment relating to powers of inspection, search or seizure*" would only appear to be relevant in relation to s.1 of CMA and not necessarily to s.3. In any event s.5 and s.7 post-date the CMA, and expressly authorise and exempt from sanction the relevant conduct, and it would be unthinkable that acts under it, in accordance

with GCHQ's express powers under s.3(1)(a), would be unlawful. Ss.5 and 7 are not, and are not relied upon as, an implied repeal of what was only a savings clause in the 1990 Act.

iii) With regard to the 1990 discussion in **Hansard**, there is no sign that concerns about the admissibility of evidence were discussed in the specific context either of s.3 or of (what became) s.10. In any event it is plain from **Hansard** that there was an amendment put forward, which would have placed what was called a temporary stop (pending further debate) preventing the Security Service from misusing computers (this would have been pursuant to s.3 of the 1989 Act referred to in paragraph 6(i) above). This amendment ("*to prevent hacking or similar activities by the Security Service*") was not pressed. It would seem therefore that it was accepted that the 1989 Act, already on the statute book, was not affected by the CMA. *A fortiori* the subsequent 1994 Act is not either.

19. We would add that if reference is made to the definition section in s.17 of the CMA there is not in fact a dramatic difference between *securing access* under s1 and acts covered by s.3 in any event. S.17(2) reads as follows:

> "*(2) A person secures access* [our underlining] *to any program or data held in a computer if by causing a computer to perform any function he –*
>
> *(a) Alters or erases the program or data;*
>
> *(b) Copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held;*
>
> *(c) Uses it; or*
>
> *(d) Has it output from the computer in which it is held (whether by having it displayed or in any other manner).*
>
> *And references to access to a program or data (and to an intent to secure such access . . .) shall be read accordingly.*"

Any concern about potential impact on computers for subsequent admissibility purposes would be as live in respect of such a wide definition of s.1 as it would be in respect of s.3.

20. Whatever was the purpose lying behind the precise wording of s.10 in its un-amended form, it seems to us clear that it had no effect upon and/or was expressly overtaken by the clear words of ss.5 and 7 of the ISA. It would indeed be extraordinary that proportionate and necessary steps taken for the

(permitted) purpose of protecting national security, taken under an express power under ss.5 or 7 of the ISA, and covered by an express removal of civil or criminal liability, could be rendered unlawful by reference to a saving under an earlier statute. The inability lawfully to take such steps under ss.5 and 7 would render the very function of GCHQ in relation to computers provided for in s.3 of ISA (set out in paragraph 4 above), including powers to "*monitor or interfere with electro magnetic, acoustic and other emissions . . . in the interests of national security*", entirely nugatory. Any argument in support of such an extraordinary outcome has been removed by the amendment, which is, we are satisfied, simply clarificatory, and we accept Mr Eadie's submissions.

Issue 2: Territorial jurisdiction in respect of ss.5/7

21. The Issue was: If an act by the Respondents constituting CNE was unlawful prior to May 2015, would any such act abroad have been unlawful?

22. S.4 of the CMA provides that it is immaterial whether any act occurred in the UK or whether the accused was in the UK at the time of any such act, provided that there was "*at least one significant link with domestic jurisdiction*" at the relevant time. By s.5, where the accused was in a country outside the UK at the time of the act constituting the offence, there would be such a significant link with domestic jurisdiction if the accused was a UK national at the time, and the act in question constituted an offence under the law of the country in which it occurred.

23. As we have decided Issue 1 in favour of the Respondents, this issue 2 does not arise. Suffice it however to say that the jurisdictional provisions of ss.4 and 5 of the CMA are very broad, and s.4 (2) provides that: "*at least one significant link with domestic jurisdiction must exist in the circumstances of the case for the offence to be committed*". The question could therefore only arise if there is no such significant link. Mr Jaffey sought to contend that s.31 of the Criminal Justice Act 1948 would render a Crown servant, such as an employee of GCHQ, criminally liable in such a case because it provides that "*any British subject employed under His Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence*". Although in the event we do not have to answer this issue, it appears clear to us that, in order for s.31 to avail, there would need to have been an offence under the CMA, which there would not have been if there was no *significant jurisdictional link*, and in any event, just as with the CMA itself, there would be the requirement to prove 'double criminality'. As it is, Issue 2 does not specifically require to be answered, but we conclude that any act abroad pursuant to ss.5 or 7 of the ISA which would otherwise be an offence under ss.1 and/or 3 of the CMA would not be unlawful.

Issue 3: Intangible property

24. Issue 3 as formulated by the parties is: "Does the power under s.5 of ISA to authorise interference with "property" encompass physical property only, or does it also extend to intangible legal rights, such as copyright?".

25. There is no definition of *property* in s.5 of the ISA. The relevant provision, set out above, simply refers to a warrant "*authorising the taking . . . of such action as is specified in the warrant in respect of any property* [our underlining] *so specified or in respect of wireless telegraphy so specified*". On the face of it, not only is the definition of property not limited to real or personal property, but there is nothing to exclude intangible property. The definition "*any property*", would appear to include it, and this is emphasised by the inclusion as an alternative subject matter of the warrant of "*wireless telegraphy*".

26. There appear to be two matters which led the Claimants to pursue this argument:

    i) The reference in a document published by Mr Snowden, and exhibited by the Claimants, to there possibly being a s.5 warrant which permitted interference with computer software in breach of copyright and licensing agreements.

    ii) The reference in s.5(3), and in s.5(3A) (for MI5), to the inapplicability of certain warrants in respect of "*property in the British Islands*". Mr Jaffey said that this is an inapt reference if intangible property is intended. But there appears to us to be no answer either to Mr Beard QC's succinct submissions on this topic for the Respondents, including the point that as defined by statute copyright is a collection of rights in respect of the United Kingdom, or to that put by the Tribunal in relation to choses in action such as bank accounts, which again would have a geographical identity.

27. The whole of this contention seemed to us to evaporate in the course of argument, when Mr Jaffey accepted (Day 1/127, 138, Day 2/14-16) that physical interference with property in the context of CNE authorised by a s.5 warrant may also involve an interference with copyright, which would then be taken to be authorised, as compared with what he called a "*pure interference with intellectual property rights*", i.e. that interference with copyright would be authorised if ancillary to interference with physical property.

28. We can see no justification whatever for such a construction of the Statute. We are satisfied that s.5 extends to intangible property, whether the action is directed at intangible property alone or is ancillary to interference with physical property. We note that this is also the view of the Intelligence Services Commissioner (page 17 of his Report of 25 June 2015). A s.5 warrant is as sufficient authority for such interference as is s.50 of the Copyright Designs and Patents Act 1988, whereby "*where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, . . . the doing of that act does not infringe copyright*".

29. An argument in relation to the possible impact of the EU Copyright Directive (2001/29/EC), raised by Mr Jaffey in his pleadings and his skeleton argument, was not pursued.

30. Accordingly we resolve this issue in favour of the Respondents.

Issue 4: "Thematic warrants" and the requirement for specification under s.5

31. We have set down the words "*thematic warrants*" in the above heading, because the words are used in the Agreed Issues. However, not only do such words have no statutory basis, but such description does not appear to us to capture the reality of the issue which we have to decide. The words first appear in a completely different context, namely at page 21 of the ISC Report of 12 March 2015, a passage in which interception warrants under s.8(1) of RIPA were being discussed.

32. S.8(1) provides that:

> "*(1) An interception warrant must name or describe either -*
>
> *(a) one person as the interception subject; or*
>
> *(b) a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place.*"

The ISC state in their Report in a section under the heading "*Thematic warrants*" as follows:

> "*42. While the very significant majority of 8(1) warrants relate to one individual, in some limited circumstances an 8(1) warrant may be thematic. The term 'thematic warrant' is not one defined in statute. However, the Home Secretary clarified that Section 81 of RIPA defines a person as "[including] any organisation* [and] *any association or combination of persons", thereby providing a statutory basis for thematic warrants. The Home Secretary explained that "the group of individuals must be sufficiently defined to ensure that I, or another Secretary of State, is reasonably able to foresee the extent of the interference and decide that it is necessary and proportionate"*
>
> *43. MI5 have explained that they will apply for a thematic warrant "where we need to use the same capability on multiple occasions against a defined group or network on the basis of a consistent necessity and proportionality case . . . rather than [applying for] individual warrants against each member of the group.*"

There is then discussion by reference to the issue of a s.8(1) warrant in the context of a number of circumstances where it may be appropriate to grant such a warrant by reference to a group linked by a specific intelligence requirement. The thematic reference is obviously because of the wide coverage of an (otherwise specific) s.8(1) warrant by virtue of the broad definition of '*person*' in s.8(1).

33. The description is taken up by the Intelligence Services Commissioner at paragraph 849 of his 2014 Report at page 18, which reads (though now in the context of a s.5 warrant) as follows:

> *"Thematic Property Warrants*
>
> *I have expressed concerns about the use of what might be termed "thematic" property warrants issued under section 5 of ISA. ISA section 7 makes specific reference to thematic authorisations (what are called class authorisation) because it refers "to a particular act" or to "acts" undertaken in the course of an operation. However, section 5 is narrower referring to "property so specified".*
>
> *During 2014 I have discussed with all the agencies and the warrantry units the use of section 5 in a way which seemed to me arguably too broad or "thematic". I have expressed my view that:*
>
> - *section 5 does not expressly allow for a class of authorisation; and*
> - *the words "property so specified" might be narrowly construed requiring the Secretary of State to consider a particular operation against a particular piece of property as opposed to property more generally described by reference for example to a described set of individuals.*
>
> *The agencies and the warrantry units argue that ISA refers to action and properties which "are specified" which they interpret to mean "described by specification". Under this interpretation they consider that the property does not necessarily need to be specifically identified in advance as long as what is stated in the warrant can properly be said to include the property that is the subject of the subsequent interference. They argue that sometimes time constraints are such that if they are to act to protect national security they need a warrant which "specifies" property by reference to a described set of persons, only being able to identify with precision an individual at a later moment.*
>
> *I accept the agencies' interpretation is very arguable. I also see in practical terms the national security requirement.*
>
> *The critical thing however is that the submission and the warrant must be set out in a way which allows the*

*Secretary of State to make the decision on necessity and proportionality.*"

It is plainly from this passage that Mr Jaffey has drawn the basis for his submissions set out below, and which have led to the formulation of Issue 4.

34. We prefer however to phrase Issue 4 as: What is the meaning of the words *'in respect of any property so specified'* for the purposes of the issue of a s.5 warrant?

35. Mr Jaffey submits as follows:

i) The common law sets its face against general warrants, as is well known from the seminal Eighteenth Century cases such as **Entick v Carrington** [1765] 2 Wilson KB 275 and **Money v Leach** [1765] 3 Burr 1742. As for statute law, he relies on Lord Hoffmann in **R v Secretary of State for the Home Department, Ex p Simms** [2000] 2 AC 115 at 131: "*Fundamental rights cannot be overridden by general or ambiguous words*". Thus he takes as a starting point that such words as were disapproved in the warrant in **Money v Leach**, relating to searching for and seizing the papers of the authors, printers and publishers of the North Briton (wheresoever found), should not be permitted pursuant to a s.5 warrant, or that a s.5 warrant should not be defined so as to permit "*any property so specified*" to include such a provision.

ii) He contrasts the provision in s.5(2) for a warrant "*in respect of any property so specified*" with the authorisation provided for in s.7, only available in respect of *acts outside the British Islands*, which by s.7(4) "*may relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified*". This latter is, and was described by the Intelligence Services Commissioner in the passage from his Report quoted above as, a '*class authorisation*'. It relates effectively to any operation carried out abroad by the Agencies: and there is provision within the E I Code (paragraphs 7.11-7.14) for situations where, because "*an authorisation under section 7 may relate to a broad class of operations*" (7.11), "*Where an authorisation relating to a broader class of operations has been given by the Secretary of State under section 7, internal approval to conduct operations under that authorisation in respect of equipment interference should be sought from a designated senior official*"(7.12). Mr Jaffey submits that this emphasises the difference between a s.7 authorisation and a s.5 warrant. The former can authorise a broader class of operation, but is subject to specific subsequent approvals, whereas the latter is not subject to any such protective or limiting provision.

iii) Mr Jaffey accepts that the property specified in a s.5 warrant may include a reference to more than one person or more than one place, up to an unlimited number, provided they are properly specified. But he submits that it must not extend to authorising an entire operation or

suite of operations, and that identification cannot depend upon the belief, suspicion or judgment of the officer acting under the warrant. It must also be possible to identify the property/equipment at the date of the warrant. Thus a warrant permitting CNE in respect of computers owned or used by any diplomatic representatives of the State of Ruritania, or by any member of a named proscribed organisation, is not adequate because (i) who they are is thus left open (unless a list of names is provided to be attached to the warrant); (ii) it is not limited to those who are part of that group at the time of the warrant; (iii) it leaves too much to the belief, suspicion or judgment of the officer, and deprives a Secretary of State of the opportunity to exercise his required discretion as to the necessity and proportionality of the warrant. Mr Jaffey submitted (Day 2/12) that the Secretary of State had to consider before granting a warrant whether or not such intrusion would be justified in the case of each individual.

iv) Mr Jaffey had made reference to **Hansard** in respect of discussion in Parliament in 1989, prior to the passage of the Security Service Act 1989, but both parties agreed that this was of no assistance. However Mr Jaffey also referred to the IP Bill, referred to in paragraph 11(iii) above, for the purpose of showing what is now proposed, by reference to clause 83 in Part 5 of the Bill. The IP Bill provides, by clause 81, for a new warrant, to be called a "*targeted equipment interference warrant*", and the broad definition of the subject matter of such proposed warrant is set out in clause 83, including eight permitted such targets including, by way of example "*(a) equipment belonging to, used by or in the possession of the particular person or organisation*" and "*(b) equipment belonging to, used by or in the possession of persons who form a group that shares a common purpose or who carry on, or maybe carrying on, a particular activity*". His submission is that such defined targets are much wider than what he submits is the more limiting ambit of a s.5 warrant.

36. Mr Eadie responds as follows:

i) As to the Eighteenth Century common law cases, they are at best of marginal relevance. They plainly relate to the limitation on common law powers in relation to executive acts within the United Kingdom. S.5 is not limited to acts within the United Kingdom and in any event is a creature of statute. The legislative context and intent relate to the powers of the Secretary of State in respect of the protection of national security, and substantial limitation is imposed by the requirement of the section itself to consider whether the warrant falls within the statutory purposes of the agency applying for it (s.3(1) so far as concerns GCHQ) ("legality"), necessity and proportionality. The word "*specified*" is used three times in s.5(2), relating to the actions sought to be authorised and in respect of any property or "*wireless telegraphy*". He submits that what is required is the best description possible. Even a s.8(1) warrant under RIPA, which is expressly more limited, can have a broad ambit, as discussed in paragraph 32 above,

and the inclusion of "*wireless telegraphy*" in the section is significant, being very broadly defined (see s.11(e) of the ISA) by reference to what was then the Wireless Telegraphy Act 1949 (now 2006), and, as Mr Jaffey accepted, could extend to an entire communications frequency or a group of communications frequencies.

ii) S.7 is a different provision. It relates to the "*Authorisation of acts outside the British Islands*", and is not in direct contrast with, or alternative to, s.5 (in the way for example that s.8(1) and s.8(4) fall to be contrasted in RIPA). Mr Jaffey accepts that a s.5 warrant can extend to property owned or used by a group of persons, and there may therefore be occasions in which the scope of a s.5 warrant may cover similar conduct to an operation which, if overseas, could be sanctioned under s.7, but it is nevertheless directed at specified property. Only in 2001 was s.7 amended so as to add the power for GCHQ to seek a s.7 authorisation, by the Anti-terrorism, Crime and Security Act 2001. Until then GCHQ could only rely on s.5. Thus in any event there was no such contrast between s.5 and s.7 so far as concerned GCHQ at the date of the passage of the Act.

iii) Mr Eadie does not accept any of the limiting propositions set out in paragraph 35(iii) above. He submits that the requirement is for the actions and property to be objectively ascertainable. The examples referred to above, both as to Ruritania and proscribed organisations, are in his submission entirely proper and adequate. It is not necessary to identify persons any more than is possible at the time of the issue of the warrant, and it is certainly not necessary for the individuals to be identified by name or by reference to the particular time when the warrant is issued. A warrant could cover, in the examples given, anyone who was at any time during the duration of the warrant (six months unless specifically renewed) within the defined group. What is important is that an application for a warrant contains as much information as possible to enable a Secretary of State to make a decision as to whether to issue a warrant, and, if so, as to its scope. This might involve reducing or putting a limit on the persons or category of persons covered, or defining property by reference to such a restriction. He submits that what is fundamental is the duty imposed on the Secretary of State to consider whether the warrant is within the powers of the agency applying for it (legality) and whether the issue of the warrant would satisfy the tests of necessity and proportionality. That is the discipline referred to in paragraph 88 of **R (Miranda) -v- Secretary of State for The Home Department** [2014] 1 WLR per Laws LJ. [1] Mr Jaffey points out that the requirement for proportionality was not introduced into s.5 by amendment until after the introduction of the Human Rights Act 2000, by the passage of RIPA, and that it cannot have been intended thereby to alter the scope of a lawful warrant under s.5. Mr Eadie points to the words of Lord Toulson in **R**

[1] The decision in the Court of Appeal ([2016] EWCA Civ.6), subsequent to the hearing before us, does not question the importance of this discipline, but considers the overlay of Article 10 in relation to press freedom (per Lord Dyson MR at paras 98-117).

(Brown) v Secretary of State for the Home Department [2015] UKSC 8 at paragraph 24, as to the relevance of a subsequent amendment to interpretation of the statute. In any event he is content to rely if necessary on the duties of the Secretary of State as to legality and necessity already, as he puts it, "*hard-wired*" into s.5 prior to 2000. He submits that the words of the North Briton warrant, referred to in paragraph 35(i) above, would, subject to questions of necessity and proportionality in the particular circumstances, certainly be sufficiently specified. Another example canvassed in the course of the hearing was "*all mobile phones in Birmingham*". This could, submitted Mr Eadie, be sufficiently *specified*, but, save in an exceptional national emergency, would be unlikely to be either consistent with necessity or proportionality or with GCHQ's statutory obligations.

iv) Mr Eadie submits that (as is indeed said in its accompanying Guide) the IP Bill, albeit in respect of a differently named warrant, brings together powers already available, and the descriptions of targets in the new proposed clause 83 would, subject to the requirements of necessity and proportionality, all be consistent with the existing s.5.

37. We accept Mr Eadie's submissions. 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. The words should be given their natural meaning in the context in which they are set.

38. The issue as to whether the specification is sufficient in any particular case will be dependent on the particular facts of that case. The courts frequently have to determine such questions for example in respect of a warrant under the Police Act 1997 s.93, when the issues, by reference to the particular facts would be fully aired in open. That is not possible in relation to a s.5 warrant, but it may still be subject to scrutiny by the Intelligence Services Commissioner, by the ISC and, if and when a complaint is made to this Tribunal, then by this Tribunal. But the test is not in our judgment different - Are the actions and the property sufficiently identified? The Home Secretary's own words as recorded in paragraph 42 of the ISC Report, set out in paragraph 32 above, relating to a s.8(1) warrant, are applicable here also. It is not in our judgment necessary for a Secretary of State to exercise judgment in relation to a warrant for it to be limited to a named or identified individual or list of individuals. The property should be so defined, whether by reference to persons or a group or category of persons, that the extent of the *reasonably foreseeable interference* caused by the authorisation of CNE in relation to the actions and property specified in the warrant can be addressed.

39. As discussed in the course of argument, the word under consideration is simply *specified*, and this may be contrasted with other statutes such as those relating to letters of request, where the requirement of the Evidence (Proceedings in Other Jurisdictions) Act 1975 is for "*particular documents specified*". There is no requirement here for specification of *particular*

property, but simply for specification of the property, which in our judgment is a word not of limitation but of description, and the issue becomes one simply of sufficiency of identification.

40. The statute does not fall to be interpreted by reference to the underlying Code, in particular one which, like the E I Code, has been in draft waiting to be approved by Parliament. But what is of course important is what is put in the applications to the Secretary of State, so that he can exercise his discretion lawfully and reasonably. Both in the Property Code, in place since 2002, (at paragraphs 7.18-7.19) and now in the E I Code (at paragraph 4.6), there is a lengthy list of what is required to be included in an application to the Secretary of State for the issue or renewal of a s.5 warrant. Apart from a description of the proposed interference and the measures to be taken to minimise intrusion, at the head of the list in both Codes is a requirement to specify "*the identity or identities, where known, of those who possess* [or use] *the* [equipment] *that is to be subject to the interference*" and "*sufficient information to identify the* [equipment] *which will be affected by the interference*" (the square bracketed parts are the changes from the Property Code to the draft E I Code).

41. We are entirely satisfied that Mr Jaffey's submissions have confused the property to be specified with the person or persons whose ownership or use of the equipment may assist in its identification. We do not accept his submission (Day 2/12) that the Secretary of State has to consider, by reference to each individual person who might use or own such equipment, whether CNE would be justified in each individual case. Questions of necessity and proportionality to be applied by the Secretary of State must relate to the foreseeable effect of the grant of such a warrant, and one of the matters to be considered is the effect and extent of the warrant in the light of the specification of the property in that warrant.

42. As originally enacted, s.5(2) authorised the Secretary of State to issue a warrant "*authorising the taking . . . of such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified if the Secretary of State:*

*(a) thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting* ... [our underlining]

*(iii) GCHQ in carrying out any function which falls within Section 3(1)(a) and*

*(b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means and*

*(c) is satisfied that satisfactory arrangements are in force under ... Section 4(2)(a)above with respect to the disclosure of information obtained ... and that any information obtained under the warrant will be subject to those arrangements*".

43. "*Specified*" must mean the same in relation to each action, property and wireless telegraphy. "*Wireless telegraphy*" as defined by s.11(e) of ISA meant

*"the emitting or receiving over paths which are not provided by any material substance constructed or arranged for that purpose, of electro magnetic energy or frequency not exceeding 3 million megacycles per second . . ."*. (S.19(1) Wireless Telegraphy Act 1949).

44. Given the width of meaning contained in the words "*action*" and "*wireless telegraphy*" and, at least potentially, in the word "*property*", *specified* cannot have meant anything more restrictive than 'adequately described'. The key purpose of specifying is to permit a person executing the warrant to know when it is executed that the action which he is to take and the property or wireless telegraphy with which he is to interfere is within the scope of the warrant.

45. It therefore follows that a warrant issued under s.5 as originally enacted was not required:

i) to identify one or more individual items of property by reference to their name, location or owner or

ii) to identify property in existence at the date on which the warrant was issued.

Warrants could therefore, for example, lawfully be issued to permit GCHQ to interfere with computers used by members, wherever located, of a group whose activities could pose a threat to UK national security, or be used to further the policies or activities of a terrorist organisation or grouping, during the life of a warrant, even though the members or individuals so described and/or of the users of the computers were not and could not be identified when the warrant was issued.

46. The amendment of s.7 in 2001 to add GCHQ cannot alter the meaning of s.5, which has, in all respects relevant to this Issue, remained unchanged.

47. In our judgment what is required is for the warrant to be as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable.

Issue 5: Scope of the Convention

48. Issue 5 is the question: Do Articles 8/10 apply to a complaint by reference to a s.7 authorisation? This issue only arose specifically in the course of the hearing, in which the Tribunal is of course being asked to decide pursuant to the List of Issues whether "*the regime which governs* [CNE] *is 'in accordance with the law' under Article 8(2) ECHR 'prescribed by law' under Article 10(2) ECHR*" (original Legal Issue 4).

49. S.7 applies, as is clear from its heading, to "*authorisation of acts outside the British Islands*". S.7 was not dealt with in the Property Code, and there is no power for the Secretary of State to issue Codes of Practice in relation to s.7, by

reference to s.71 of RIPA or at all (see paragraph 1.4). In that paragraph, and more specifically in paragraph 7.1 of the E I Code, it is stated that "*SIS and GCHQ should as a matter of policy apply the provisions of* [the] *code in any case where equipment interference is to be, or has been, authorised pursuant to section 7 of the 1994 Act in relation to equipment located outside the British Islands*". But there is a footnote to that paragraph which expressly says "*without prejudice as to arguments regarding the applicability of the ECHR*".

50. It was, in the event, common ground that, subject to Mr Jaffey's reserving his clients' position to be considered further if necessary in the ECtHR, there is a jurisdictional limit on the application of the ECHR, by virtue of Article 1, ECHR, which provides that "*the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention*". It was also common ground that, in the absence of any ECtHR authority, the Convention should not be interpreted more generously in favour of claimants than the ECtHR has been prepared to go, in circumstances where there is no right of appeal for the Government from the domestic courts to the ECtHR: see **R (Ullah) v Secretary of State for the Home Department** [2004] 2 AC 323 at para 20 per Lord Bingham.

51. Jurisdiction under the ECHR is accordingly territorial; and it is only in exceptional circumstances that extraterritorial jurisdiction arises (see **Bankovic v UK** [2007] 44 EHRR SE 5 and **Al-Skeini v UK** [2011] 53 EHRR 18 at para 131). As is made clear in **Bankovic** at paragraph 73, jurisdiction is not a doctrine of 'mere effects'.

52. There is thus no dispute between the parties that in ordinary circumstances there would be no jurisdiction by reference to Articles 8 or 10 with regard to the acts outside the British Islands which would be the subject of authorisation under s.7. Mr Eadie submitted that other circumstances would be exceptional. Mr Jaffey gave examples of circumstances which might engage those Articles: complainant in the jurisdiction but computer or information abroad, computer or phone brought back to the jurisdiction etc. But he accepted that in most cases where someone who is the subject of an authorisation granted under s.7 is abroad it was difficult to argue that such person is within the territorial scope of the Convention, and in any event that there would be a "*very limited number of circumstances*" in which there was going to be a breach of the Convention (Day 2/25). As is clear from the current Advance Training for Active Operations, disclosed in these proceedings, "*CNE operations must be authorised under ISA Section 5 or Section.7, depending whether the target computer or network is located within or outside the British Islands*".

53. Before fully accepting the consequences of the jurisdiction argument, which the Vice-President had put to him, Mr Jaffey appeared to argue (Day 1/161) that any s.7 authorisation prior to the introduction of the E I Code "*had to fall*" (Day 1/161), a submission which he later expressly clarified (Day 3/177). Both in that latter passage and earlier (Day 2/24-26) he appeared to agree in clear terms with Mr Eadie (Day 3/120) that the fact that there might be an individual claimant who might be able to claim a breach of Article 8/10 rights as a result of a s.7 authorisation would not lead to a conclusion that the s.7 regime as a whole could be argued to be non-compliant with Articles 8 or 10.

In any event we reserve for future consideration, if and when particular facts arise and the position of jurisdiction to challenge a s.7 warrant can be and has been fully argued, whether an individual complainant may be able to mount a claim. Even though Issue 5 was formulated as an agreed preliminary issue between the parties, it is clear to the Tribunal that, given the agreed difficult issues as to jurisdiction, we have an insufficient factual basis, assumed or otherwise, to reach any useful conclusion.

Issue 6: A s.5 warrant and Articles 8/10

54. We have concluded in respect of Issue 4 that a s.5 warrant is not as restricted as the Claimants have contended, by reference to construction of it at domestic law. Mr Jaffey submits that the Respondents are on a Morton's Fork, and that the wider the construction of s.5 for which they contend the more unlikely it is that there will be sufficient safeguards for the purposes of the ECHR. We can deal with this issue quite shortly.

55. Part of Mr Jaffey's case is again that, whereas s.7 provides for underlying approvals, as referred to in paragraph 35(ii) above, s.5 does not. But the essential question is, if an application for a warrant so specifies the property proposed to be covered by it as to enable a Secretary of State to be satisfied as to its legality, necessity and proportionality, and so that the property to be covered is objectively ascertainable (paragraph 47 above), whether a warrant so issued is in adequate compliance with the Convention.

56. As to Mr Jaffey's submissions in this regard:

i) He refers to **Malone v UK** [1985] 7 EHRR 14 as his foundation, but in that case, as he reminded us, the ECtHR made clear that "*in its present state the law in England and Wales governing interception of communications for police purposes is somewhat obscure and open to differing interpretations*" long before the present suite of statutory provisions. What the Court laid down as fundamental requirements, as set out in paragraphs 67 and 68 of the Judgment, is that "*there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities . . . A law which confers a discretion must indicate the scope of that discretion*".

ii) He naturally referred to **Weber** and **Saravia v Germany** [2008] 46 EHRR SE5, which we addressed in detail in **Liberty/Privacy (No.1)**, and in paragraph 33 of that judgment we set out the "**Weber** requirements", numbering them from 1 to 6 for convenience:

> "95. *In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: (1) the nature of the offences which may give rise to an interception order; (2) a definition of the categories of people liable to have their telephones tapped; (3) a limit on the duration of telephone tapping; (4) the procedure to be followed for examining, using and storing the data obtained; (5) the precautions to be taken when communicating the*

*data to other parties; and (6) the circumstances in which recordings may or must be erased or the tapes destroyed.*"

57. In **R.E. v UK**, the ECtHR was satisfied, with regard to the surveillance provisions there referred to, so far as concerned **Weber** (1) and (2) at paragraph 136 of its Judgment, and so far as duration is concerned gave approval in paragraph 137. Duration of the s.5 warrant is limited by s.6, to which no specific criticisms have been addressed.

58. In **Weber** itself, a broad and untargeted warrant, similar to a warrant under s.8(4) of RIPA - a far broader and less *specified* warrant than the s.5 warrant which we are here considering - was found to comply with the Convention.

59. We are satisfied in this case that a s.5 warrant which accords with the criteria of specification which we have set out at paragraph 47 above complies with **Weber** (1) to (3), namely in regard to the circumstances, the definition of the categories of people/property and duration, and consequently with Articles 8 and 10 in that regard. We deal with **Weber** (4) to (6) below.

Issue 7: Bulk CNE

60. Issue 7 relates to the absence of a similar certificate to that in s.16 of RIPA in relation to CNE. It arises from the matters in (e) in the original paragraph 6 of the List of Issues, set out in paragraph 9 above, which were the subject of NCND by the Respondents. There are two specific complaints which are made:

i) That, unlike in the case of a s.8(4) warrant under RIPA, where communications are intercepted in bulk and subsequently accessed for examination, there is no provision, in the event of this occurring pursuant to CNE, for 'filtering': i.e. as in s.16(1) and (3) of RIPA for intercept to be read, looked at or listened to only by reference to a certificate that the examination of material selected is necessary for one of the statutory purposes. S.16 is what was referred to in **Liberty/Privacy (No.1)** (paragraph 103) as the provision which did the '*heavy lifting*'.

ii) That there is no special protection, if information is obtained in bulk through the use of CNE, for those persons *known to be for the time being in the British Islands*, as in s.16(2)(3) and (5) of RIPA. Such a scenario is in fact addressed in the E I Code at paragraph 7.4 (relating to a s.7 warrant) which reads:

> "*7.4 If a member of SIS or GCHQ wishes to interfere with equipment located overseas but the subject of the operation is known to be in the British Islands, consideration should be given as to whether a section 8(1) interception warrant or a section 16(3) certification (in relation to one or more extant section 8(4) warrants) under the 2000 Act should be obtained in advance of commencing the operation*

> *authorised under section 7. In the event that any equipment located overseas is brought to the British Islands during the currency of the section 7 authorisation, and the act is one that is capable of being authorised by a warrant under section 5, the interference is covered by a 'grace period' of 5 working days (see section 7(10) to 7(14)). This period should be used either to obtain a warrant under section 5 or to cease the interference (unless the equipment is removed from the British Islands before the end of the period).*"

David Anderson in his Report refers to this paragraph of the E I Code, and comments, at paragraph 6.33:

> "*It does not elaborate on what factors should be taken into account in the course of that 'consideration'.*"

61. As for the latter point (ii), Mr Eadie submits, and we accept, that, provided that the matter is indeed considered, as is required by paragraph 7.4, such an issue is simply one of the matters which are required to be brought before a Secretary of State, pursuant to his obligation to consider alternative and/or less intrusive measures, rather than, as Mr Jaffey submitted, that this is part of an attempt to circumvent the statutory scheme under s.8(4).

62. Both aspects of Mr Jaffey's complaints appear to have been taken up in the IP Bill. Under the heading "*BULK POWERS*" in the accompanying Guide, it is stated, at paragraph 42, that where the content of a UK person's data, acquired under bulk interception and bulk equipment interference powers, is to be examined, a targeted interception or equipment interference warrant will need to be obtained. As for the question of presence in the British Islands, it is specifically provided in draft clause 147, within the Chapter dealing with "*Bulk Equipment Interference Warrants*", namely by clause 147(4), that there is to be a similar safeguard to that in s.16 of RIPA in relation to the selection of material for examination referable to an individual known to be in the British Islands at the time.

63. It seems to us clear that these criticisms are likely primarily to relate to Bulk CNE carried out, if it is carried out at all, pursuant to a s.7 authorisation (hence paragraph 7.4 of the E I Code). Mr Jaffey's own example was of the hacking of a large internet service provider in a foreign country, and the diversion of all of the data to GCHQ, instead of intercepting that material "*over a pipe*" which might be encrypted, so as to render access by ordinary bulk interception difficult if not impossible. As with Issue 5, Mr Jaffey specifically accepted (Day 2/46) that, if Bulk CNE were taking place, and if, prior to any changes such as discussed above, there were to be insufficient safeguards in place, that does not render the whole CNE scheme unlawful. As with Issue 5, we reserve for consideration, on particular facts and when questions of jurisdiction are examined, whether an individual complainant might be able to mount a claim.

Issue 8: S.5 post-February 2015 (Weber (4) to (6)

64. Issue 8 is: Whether the s.5 regime is compliant with the Convention since February 2015. We now address **Weber** (4) to (6). The E I Code applies to both s.5 and s.7 (see paragraph 49 above), and, as Mr Jaffey accepted, the Respondents, having publicly accepted that they are acting and will act in accordance with the draft Code, are as a matter of public law bound by the Code both in relation to s.5, during the period prior to its being finally approved by Parliament (see paragraph 7 above), and s.7. However in the light of our conclusions in respect of Issue 5, we now address only the question of s.5, though in relation to this Issue the answer would be the same in respect of s.7.

65. We do not need to repeat all of what we said in **Liberty/Privacy (No.1)** (in particular at paragraphs 38-41) by way of summary of the ECtHR jurisprudence. It suffices to cite what we said at paragraph 41(d), namely:

> *"It is in our judgment sufficient that:*
>
> *i) Appropriate rules or arrangements exist and are publicly known and confirmed to exist, with their content sufficiently signposted, such as to give an adequate indication of it . . .*
>
> *ii) They are subject to proper oversight."*

The oversight relevant to this issue by the Intelligence Services Commissioner seems to us to have been admirable in its dedication to raising any questions of concern.

66. In addition to the E I Code, in November 2015 there was disclosure during these proceedings of *below the waterline arrangements* applicable to GCHQ, whose existence is highlighted in the E I Code (e.g. at paragraph 64) and in statute, as canvassed in our judgments in **Liberty/Privacy No.1** and **No.2**. Insofar as those *arrangements* add something new which had not been previously signposted, and which would not therefore have been *accessible/foreseeable*, then any unlawfulness in relation to the published code would only have been made good by the publication of such *arrangements* in November. Mr Jaffey has submitted that the *arrangements* should have been disclosed earlier, but, as will appear, we do not conclude that the content of those *arrangements* as now disclosed adds anything material to the previously published Code.

67. There has been no material addition to ECtHR jurisprudence since **Liberty/Privacy** with the exception of **R.E. v UK**, to which we shall return below, and in which (particularly at paragraph 133) the Court repeated the same principles in the context of national security.

68. It is common ground that compliance with the Convention can be addressed by reference to the **Weber** requirements, and in this regard specifically by **Weber** (4) to (6). The significant paragraphs of the E I Code relating to **Weber** (4) to (6) are in Sections 5 and 6, which are attached as Appendix II to

this judgment, though Weber (6) may not be directly applicable to the use of CNE so far as it consists of 'implants'. We have attached the paragraphs in the form in which they were put before Parliament in November 2015. Although there have been some changes in the draft E I Code during the period of public consultation, and the parties helpfully provided us with tracked changes to explain them, there were none which appeared to us to be material: Mr Jaffey pointed to a number of changes (two in the Sections included in Appendix 2, one in paragraph 6.2 and one in 6.5) of the words *must* to *should*, but he was not able to identify to us, and nor can we see, any material difference in that regard. There are then the *below the waterline arrangements* which have been disclosed from GCHQ's policies, relating to storage of and access to data, and handling/disclosing/sharing of data, obtained by CNE operations. Neither Mr Eadie nor Mr Jaffey suggested that there were any apparent lacunae or alleged inadequacies in the Code which were made good by the disclosure of these *arrangements*.

69. There were very limited criticisms made by Mr Jaffey, in the context of **Weber** (4) to (6), of the E I Code (even without the supplementary *arrangements*):

i) He was critical of the apparent lack of provision for record keeping in relation to intrusions pursuant to s.7, but, quite apart from the fact that this related to s.7 and not to s.5, in fact it is clear that, as indeed he accepted, a combination of paragraphs 5.1 and 7.2 of the E I Code does require the keeping of records in relation to "*the details of what equipment interference has occurred*".

ii) He described as "*Delphic*" a reference in Mr Martin's witness statement to the nature of a recommendation by the Intelligence Services Commissioner with regard to a s.5 record, but accepted the explanation provided by Mr Eadie during the course of his submissions: Day 3/74.

70. We have no doubt at all that, insofar as compliance must be shown with **Weber** (4) to (6), the E I Code does so comply, and has so complied since its publication in 6 February 2015, since which time it has been binding in law on the Respondents. We are satisfied that the requirements for records are sufficient and satisfactory, and that adequate safeguards have been in place at all times for the protection of the product of CNE, and that there exists a satisfactory system of oversight.

Issue 9: S.5 prior to February 2015

71. The issue is: Did the s.5 regime prior to February 2015 accord with the Convention (it is accepted that, as set out in paragraph 49 above, the Property Code did not apply to s.7)?

72. This is obviously a more difficult question, because, by definition, if the publication of the E I Code in February 2015 improved the position, and made sufficiently public the arrangements which govern the use by the Respondents of their powers, the published arrangements prior to February must have been

inferior. Mr Eadie emphasises that the Tribunal, and indeed any court, should not discourage improvement by immediately concluding that what was in existence prior to an improvement was defective. He obviously accepts our conclusion at paragraph 23 of **Liberty/Privacy No.2** that, before the disclosures prior to and in our judgment in that case, the regime governing information sharing under Prism had been unlawful, but he submits, as is the case, that there had been effectively no disclosure at all prior to that of the existence of any arrangements, adequate or otherwise.

73. The question for us is, as it was for the ECtHR in **Liberty v UK** [2008] 48 EHRR 1 (at paragraph 69), whether at the time the regime complied, and that time in these proceedings is, pursuant to the agreed List of Issues at paragraph 4(d), 1 August 2009. The Property Code was in existence throughout the period from August 2009 to February 2015 and did not materially change, and so we have addressed the most recent version (2014).

74. There are underlying issues:

i) It was not, at any rate with any great force, sought to be argued by Mr Jaffey that the position was any different in relation to **Weber** (1) to (3) prior to and subsequent to February 2015, and we are satisfied that our conclusions in Issue 6 above apply prior to February 2015, and we shall address for the purposes of this Issue only **Weber** (4) to (6).

ii) It was common ground before us that **Weber** (1) to (6) constitute a minimum to be complied with, but that there are other factors to consider such as:

a) The existence and standard of oversight. It is entirely clear to us that both sides have relied upon his Reports, and that the oversight by the Intelligence Services Commissioner has been of great value.

b) The existence of sufficiently signposted underlying *arrangements*, which are adequate to control arbitrary action by the Respondents. It is important to bear in mind, for example, that the Tribunal concluded in **Liberty/Privacy No.1** that the s.8(4) regime complied with the Convention, after taking into account the *arrangements*, which we concluded had been adequately signposted prior to any further disclosures by the Respondent (e.g. paragraph 140). This did not involve or require disclosure of the detail of those *arrangements*.

iii) **R.E. v UK** requires to be addressed specifically, as the only relevant ECtHR decision since **Liberty/Privacy**. The Court was addressing the Property Code (there called the "Revised Code"), and contrasting it with the Interception of Communications Code of Practice ("the Interception Code"), which the ECtHR had approved in **Kennedy v UK** [2011] 52 EHRR 4. The case before it concerned the issue of the safeguarding of legally and professionally privileged ("LPP") communications in relation to covert surveillance. The Court

concluded that **Weber** (1) to (3) were satisfied, but that **Weber** (4) to (6) were not. We shall need to address that conclusion, unfavourable to the Respondents, by the Court.

75. The material provisions for consideration in respect of the period from August 2009 to February 2015 are as follows:

i) The statutory provision in relation to GCHQ, which is obviously fundamental. This appears in s.4 of ISA.

> *"4 The Director of GCHQ.*
>
> *(1) The operations of GCHQ shall continue to be under the control of a Director appointed by the Secretary of State.*
>
> *(2) The Director shall be responsible for the efficiency of GCHQ and it shall be his duty to ensure—*
>
> *(a) that there are arrangements for securing that no information is obtained by GCHQ except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary for that purpose or for the purpose of any criminal proceedings; and*
>
> *(b) that GCHQ does not take any action to further the interests of any United Kingdom political party.*
>
> . . .
>
> *(4) The Director shall make an annual report on the work of GCHQ to the Prime Minister and the Secretary of State and may at any time report to either of them on any matter relating to its work."*

There is a cross reference to s.4 in s.5(2)(c) of ISA, set out in paragraph 4 above together with s.6, which is also relevant.

ii) The other related statutory provisions set out in paragraph 6(ii), (iii) and (iv) above: disclosure or use by an employee of GCHQ of information in breach of a relevant *arrangement* within s.4(2)(a) of the ISA above set out would constitute a criminal offence pursuant to the OSA.

iii) The Property Code, being the published *arrangements*. Relevant to **Weber** (4) to (6) are:

> *"8.3 The following information relating to all authorisations for property interference should be centrally retrievable for at least three years:*

*• the time and date when an authorisation is given;*

*• whether an authorisation is in written or oral form;*

*• the time and date when it was notified to a Surveillance Commissioner, if applicable;*

*• the time and date when the Surveillance Commissioner notified his approval (where appropriate);*

*• every occasion when entry on or interference with property or with wireless telegraphy has occurred;*

*• the result of periodic reviews of the authorisation;*

*• the date of every renewal; and*

*• the time and date when any instruction was given by the authorising officer to cease the interference with property or with wireless telegraphy.*

. . .

*9.3 Each public authority must ensure that arrangements are in place for the secure handling, storage and destruction of material obtained through the use of directed or intrusive surveillance or property interference. Authorising officers, through their relevant Data Controller, must ensure compliance with the appropriate data protection requirements under the Data Protection Act 1998 and any relevant codes of practice produced by individual authorities relating to the handling and storage of material.*

. . .

*9.7 The heads of these agencies are responsible for ensuring that arrangements exist for securing that no information is stored by the authorities, except as necessary for the proper discharge of their functions. They are also responsible for arrangements to control onward disclosure. For the intelligence services, this is a statutory duty under the 1989 Act and the 1994 Act."*

76. There are then the *under the waterline arrangements*. In this regard we refer to paragraphs 42 to 44 of the Tribunal's judgment in **Liberty/Privacy No.1**, the relevant cross-references for the purposes of this case being to paragraph 18(ix) and (xi) of that Judgment. In addition to the statutory provisions we have referred to in paragraph 75 above, there is the reference in paragraph 9.3 of the Property Code to *arrangements* and *codes of practice*. The arrangements so signposted are summarised in paragraph 99ZK-99ZR of the

Respondents' Open Response as follows (underlining in the original signifies the existence of gisting):

> *"Storage of and access to data*
>
> *99ZK. GCHQ also has policies for storage of and access to data obtained by CNE.*
>
> *99ZL. The section of the Compliance Guide concerning "Review and Retention" states that GCHQ treats "all operational data" (i.e. including that obtained by CNE) as if it were obtained under RIPA. It sets out GCHQ's arrangements for minimising retention of data in accordance with RIPA safeguards. This is achieved by setting default maximum limits for storage of operational data.*
>
> *99ZM. In addition GCHQ has a separate policy specifically concerning data storage and access. It defines different categories of data, and importantly ascribes specific periods for which different categories of data may he kept, as well as explaining how different categories of CNE data relate to the categories of operational data set out in the Compliance Guide.*
>
> *99ZN. Where CNE analysts identify material as being of use for longer periods than the stipulated limits, it can be retained for longer, subject to justification according to specific criteria.*
>
> *99Z0. Access to data is also subject to strict safeguards, which are set out in the Compliance Guide. CNE content may be accessed by intelligence analysts, but they must first demonstrate that such access is necessary and proportionate by completing a Human Rights Act ("HRA") justification. HRA justifications are recorded and made available for audit. CNE technical data relating to the conduct of CNE operations may only be accessed by a team of trained operators responsible for planning and running such operations.*
>
> *99ZP. GCHQ's policy on storage of and access to data also requires GCHQ analysts who are not in the CNE operational unit to justify access to CNE data on ECHR grounds (particularly*

*necessity and proportionality). The justification must be recorded and available for audit.*

*Handling/disclosure/sharing of data obtained by CNE operations*

*99ZQ. Pursuant to GCHQ's Compliance Guide, the position is that all operational material is handled, disclosed and shared as though it had been intercepted under a RIPA warrant. The term "operational material" extends to all information obtained via CNE, as well as material obtained as a result of interception under RIPA.*

*99ZR. The general rules, as set out in the Compliance Guide and the intelligence Sharing and Release Policy which apply to the handling of operational material include, inter alia, a requirement for mandatory training on operational legalities and detailed rules on the disclosure of such material outside GCHQ and the need to ensure that all reports are disseminated only to those who need to see them.*

*a) Operational data cannot be disclosed outside of GCHQ other than in the form of an intelligence report.*

*b) Insofar as operational data comprises or contains confidential information (e.g. journalistic material) then any analysis or reporting of such data must comply with the "Communications Containing Confidential Information" section of the Compliance Guide. This requires GCHQ to have greater regard to privacy issues where the subject of the interception might reasonably assume a high degree of privacy or where confidential information is involved (e.g. legally privileged material, confidential personal information, confidential journalistic information, communications with UK legislators) GCHQ must accordingly demonstrate to a higher level than normal that retention and dissemination of such information is necessary and proportionate."*

77. This is a very full picture of the guidelines under which GCHQ is required to operate, and we are satisfied that they would be adequate, in the context of the

interests of national security, to impose the necessary discipline on GCHQ, and give adequate protection against arbitrary power: further there is, as we have been satisfied, adequate oversight of GCHQ's compliance by the Intelligence Services Commissioner.

78. The nub of the problem arises in two respects, both emphasised by Mr Jaffey:

i) The impact of the fact that until February 2015, i.e. throughout the period we are addressing, it was not admitted by the Respondent that GCHQ carried out CNE;

ii) The impact of the decision of **R.E. v UK**, in relation to the consideration by the ECtHR.

We will deal with the second submission first.

79. It is important to bear in mind that, as set out in paragraph 74(iii) above, the Court in **R.E. v UK** was addressing a specific and different question, the matter of adequate protection for LPP communications in respect of covert surveillance. We deal ourselves with LPP as a separate topic in Issue 10 below, and we are not concerned with it in our present considerations. We set out the conclusions of the Court in **R.E. v UK** in relation to the Revised Code (the Property Code) and **Weber** (4) to (6), after it has recorded its conclusion that it was satisfied in relation to **Weber** (1) and (2) (in paragraph 136) and **Weber** (3) (in paragraph 137):

> "*138. In contrast, fewer details concerning the procedures to be followed for examining, using and storing the data obtained, the precautions to be taken when communicating the data to other parties, and the circumstances in which recordings may or must be erased or the tapes destroyed are provided in Part II of RIPA and/or the Revised Code. Although material obtained by directed or intrusive surveillance can normally be used in criminal proceedings and law enforcement investigations, paragraph 4.23 of the Revised Code makes it clear that material subject to legal privilege which has been deliberately acquired cannot be so used (see paragraph 75 above). Certain other safeguards are included in Chapter 4 of the Revised Code with regard to the retention and dissemination of material subject to legal privilege (see paragraph 75 above). Paragraph 4.25 of the Revised Code provides that where legally privileged material has been acquired and retained, the matter should be reported to the authorising officer by means of a review and to the relevant Commissioner or Inspector during his next inspection. The material should be made available during the inspection if requested. Furthermore, where there is any doubt as to the handling and dissemination of knowledge of matters which may be subject to legal privilege, Paragraph 4.26*

*of the Revised Code states that advice should be sought from a legal advisor before any further dissemination takes place; the retention or dissemination of legally privileged material should be accompanied by a clear warning that it is subject to legal privilege; it should be safeguarded by taking "reasonable steps" to ensure there is no possibility of it becoming available, or it contents becoming known, to any person whose possession of it might prejudice any criminal or civil proceedings; and finally, any dissemination to an outside body should be notified to the relevant Commissioner or Inspector during his next inspection.*

*139. These provisions, although containing some significant safeguards to protect the interests of persons affected by the surveillance of legal consultations, are to be contrasted with the more detailed provisions in Part I of RIPA and the Interception of Communications Code of Practice, which the Court approved in Kennedy (cited above, §§ 42 – 49). In particular, in relation to intercepted material there are provisions in Part I and the Code of Practice limiting the number of persons to whom the material is made available and restricting the extent to which it is disclosed and copied; imposing a broad duty on those involved in interception to keep everything in the intercepted material secret; prohibiting disclosure to persons who do not hold the necessary security clearance and to persons who do not "need to know" about the material; criminalising the disclosure of intercept material with an offence punishable by up to five years' imprisonment; requiring intercepted material to be stored securely; and requiring that intercepted material be securely destroyed as soon as it is no longer required for any of the authorised purposes.*

*140. Paragraph 9.3 of the Revised Code does provide that each public authority must ensure that arrangements are in place for the secure handling, storage and destruction of material obtained through directed or intrusive surveillance. In the present case the relevant arrangements are contained in the PSNI Service Procedure on Covert Surveillance of Legal Consultations and the Handling of Legally Privileged Material. The Administrative Court accepted that taking together the 2010 Order, the Revised Code and the PSNI Service Procedure Implementing Code, the arrangements in place for the use, retention and destruction of retained material in the context of legal consultations was compliant with the Article 8 rights of*

*persons in custody. However, the Service Procedure was only implemented on 22 June 2010. It was therefore not in force during the applicant's detention in May 2010.*

*141. The Court has noted the statement of the Government in their observations that only one intrusive surveillance order had been granted up till then in the three years since the 2010 Order (introducing the Revised Code) had come into force in April 2010 (see paragraphs 11 and 12 above). Nevertheless, in the absence of the "arrangements" anticipated by the covert surveillance regime, the Court, sharing the concerns of Lord Phillips and Lord Neuberger in the House of Lords in this regard (see paragraphs 36 – 37 above) is not satisfied that the provisions in Part II of RIPA and the Revised Code concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings may or must be erased or the material destroyed provide sufficient safeguards for the protection of the material obtained by covert surveillance.*

*142. Consequently, the Court considers that, to this extent, during the relevant period of the applicant's detention (4 – 6 May 2010 – see paragraphs 18 – 20 above), the impugned surveillance measures, insofar as they may have been applied to him, did not meet the requirements of Article 8 § 2 of the Convention as elucidated in the Court's case-law."*

80. It seems to us entirely clear that they were addressing the adequacy of the Property Code (as compared with the Interception Code) in respect of LPP communications, in relation to which (as discussed in Issue 10) the Government has previously conceded before this Tribunal that the regime established by and for the Intelligence Services was not compliant with the Convention (**Belhadj** [2015] UKIP TRIB 13_132-8 of 29 April 2015). When the ECtHR addressed, in the cited paragraph 139 above, the benefits of the Interception Code, it is plain to us that they were doing so not in respect of **Weber** (4) to (6) generally, but in respect of the way in which the Interception Code gave improved safeguards by protecting "*the interests of persons affected by the surveillance of legal consultations*". The Court did not address specifically, and reach conclusions as to, whether the Property Code was inadequate (other than in respect of LPP) to comply with **Weber** (4) to (6) in the light of:

(i) the statutory obligations of and upon GCHQ referred to in paragraph 75 (i) and (ii) above (very much more significant than those imposed upon the Police):

(ii) the provisions of paragraph 9.3 and 9.7 of the Code:

(iii) the *under the waterline arrangements* set out in paragraph 76 above, which we are satisfied were adequately signposted:

(iv) the oversight by the Intelligence Services Commissioner of GCHQ's compliance with their obligations.

Taken together, these are safeguards designed to prevent any arbitrary exercise of the powers to conduct CNE. But none of the safeguards would have been an answer to a system concluded (and now conceded) to have been inadequate in respect of its protection of LPP communications.

81. As to the first submission, as referred to in paragraph 78 (i) above, it is clear that prior to February 2015 there was no admission that property interference by GCHQ (governed by the Property Code) extended to CNE by the use of a s.5 warrant (or *a fortiori* a s.7 authorisation). Nevertheless it was quite clear that at least since 1994 the powers of GCHQ have extended to computer interference (under s.3 of ISA). It was thus apparent in the public domain that there was likely to be interference with computers, 'hacking' being an ever more familiar activity, namely interference with property by GCHQ (and see in particular the 1990 Hansard references in paragraph 18 (iii) above), and that if it occurred it would be covered by the Property Code. Use of it was thus foreseeable, even if the precise form of it and the existence of its use was not admitted.

82. The question is whether we are satisfied that there was, prior to February 2015, adequate protection from arbitrary interference. If there was inadequacy within the Property Code, as compared with the EIC, we do not conclude that the inadequacy was in the circumstances such as to constitute a contravention of Articles 8/10. Compliance with **Weber** (4) to (6) will in our judgment mean the provision, particularly in a national security context, of as much information as can be provided without material risk to national security. In our judgment, not least because of the consequences of a conclusion of unlawfulness simply by virtue of a perceived procedural insufficiency, a conclusion that procedural requirements or the publication of them can be improved (i) does not have the necessary consequence that there has prior thereto been insufficient compliance with **Weber** (4) to (6) and (ii) does not constitute such a material non-compliance as to create a contravention of Article 8. This Tribunal sees it as an important by-product of the exercise of its statutory function to encourage continuing improvement in the procedures adopted by the Intelligence Agencies and their publication (and indeed such improvement took place as a consequence of our Judgments in **Liberty/Privacy No.1**, **Liberty/Privacy No.2** and **Belhadj**), but it does not conclude that it is necessary, every time an inadequacy, particularly an inadequate publication, is identified, to conclude that that renders all previous conduct by the Respondents unlawful. The E I Code is plainly a step forward by the Respondents, which this Tribunal welcomes: taking the Property Code together with the other safeguards which we have set out in paragraph 80 above, we are satisfied that there was prior to that step adequate protection from arbitrary interference.

83. We accordingly resolve Issue 9 in favour of the Respondent. The s.5 regime prior to February 2015 was compliant with the Convention.

Issue 10 Legal and Professional Privilege

84. Issue 10 is: Does the system relating to LPP communications derived from CNE since February 2015 comply with the Convention? Mr Jaffey raised briefly at one stage the question of journalistic sources, but that forms an entirely separate topic, with which this judgment does not deal. The Respondents accepted in **Belhadj** that since January 2010 the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has contravened Article 8 ECHR and was accordingly unlawful. This Issue 10 therefore relates only to the period since February 2015 and whether, in relation to LPP, the E I Code has remedied the problem. Mr Jaffey raised only three points by way of continuing criticism, and in the event all of them have become moot so far as any continuing problem is concerned.

85. The first related to GCHQ's definition of legal and professional privilege, which had previously appeared not to include litigation privilege. Mr Jaffey accepts that this has now been made good by the adoption in the E I Code of a definition of privilege analogous to that in the Police Act, which does not exclude litigation privilege.

86. The second criticism related to the fact that the Respondents have said that they were establishing appropriate 'Chinese walls' which would satisfy Mr Jaffey's concerns but did not yet appear to have done so. According to Mr Martin's second statement at paragraph 18, the practice, now described in a document headed "Summary of GCHQ Policy on Handling Material Derived from the Interception of Communications of Individuals Engaged on Legal Proceedings where HMG has an Interest" was still awaiting formal approval. Mr Eadie told us on instructions that the policy had in fact been implemented while still in draft in April 2015, but accepted that nevertheless it had not yet been approved, albeit imminently was to be so. He also referred to paragraph 3.19 of the E I Code, by which the detailed guidance in paragraphs 3.1-3.18, with which Mr Jaffey takes no exception, "*takes precedence over any contrary content of an agency's internal advice or guidance*". Nevertheless we have now been supplied since the hearing with confirmation that this policy was approved, in November 2015.

87. The third problem was that of metadata, which could attract LPP by reference to communications with lawyers, even without their content. There was no dispute between Counsel that metadata might attract LPP. There was no specific mention of metadata in the E I Code, although that of itself would not be a problem. What is a problem is that there is an apparent express exclusion from potentially LPP material of metadata in an internal GCHQ document called "Summary of GCHQ LPP and Sensitive Communications Policy". Because of the lack of mention of metadata in the E I Code, this would not benefit from the 'override' of clause 3.19, and plainly there has been the risk of somebody incorrectly relying upon such guidance. Mr Eadie told us that this guidance would be corrected, and since the hearing a copy of such corrective policy has

been supplied to us, attached as Appendix III: again the underlining denotes gisting.

88. Even without such corrections, Mr Jaffey made clear that none of his criticisms would result in this case in the whole system being unlawful, but it is accepted that there might on the facts (including the facts relating to these Claimants) be a case in which LPP communications have been inappropriately dealt with by virtue of the absence of accurate guidance or policy at the time, and thus amount to a breach of Article 8. There is no need for us to give any specific conclusion in relation to this issue, the discussion of which has once again proved the value of these inter partes proceedings.

Conclusion

89. Our conclusions in relation to the above Issues, where material, are consequently as follows.

(i) Issue 1: An act (CNE) which would be an offence under s.3 of the CMA is made lawful by a s.5 warrant or s.7 authorisation, and the amendment of s.10 CMA was simply confirmatory of that fact.

(ii) Issue 2: An act abroad pursuant to ss.5 or 7 of the ISA which would otherwise be an offence under ss.1 and/or 3 of the CMA would not be unlawful.

(iii) Issue 3: The power under s.5 of ISA to authorise interference with *property* encompasses intangible property.

(iv) Issue 4: A s.5 warrant is lawful if it is as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable, and it need not be defined by reference to named or identified individuals.

(v) Issue 5: There might be circumstances in which an individual claimant might be able to claim a breach of Article 8/10 rights as a result of a s.7 authorisation, but that does not lead to a conclusion that the s.7 regime is non-compliant with Articles 8 or 10.

(vi) Issue 6: A s.5 warrant which accords with the criteria of specification referred to in Issue 4 complies with the safeguards referred to in **Weber** (1) to (3), and consequently with Articles 8 and 10 in that regard.

(vii) Issue 7: If information were obtained in bulk through the use of CNE, there might be circumstances in which an individual complainant might be able to mount a claim, but in principle CNE is lawful.

(viii) Issue 8: The s.5 regime since February 2015 is compliant with Articles 8/10.

(ix) Issue 9: The s.5 regime prior to February 2015 was compliant with Articles 8/10.

(x) Issue 10: So far as concerns the adequacy of dealing with LPP, the CNE regime has been compliant with the Convention since February 2015.

90. The use of CNE by GCHQ, now avowed, has obviously raised a number of serious questions, which we have done our best to resolve in this Judgment. Plainly it again emphasises the requirement for a balance to be drawn between the urgent need of the Intelligence Agencies to safeguard the public and the protection of an individual's privacy and/or freedom of expression. We are satisfied that with the new E I Code, and whatever the outcome of Parliamentary consideration of the IP Bill, a proper balance is being struck in regard to the matters we have been asked to consider.

## APPENDIX I

## SCHEDULE

## LEGAL ISSUES

**Domestic law**

1. Prior to the amendments to the Computer Misuse Act 1990 ("CMA 1990") with effect from 3 May 2015, and after those amendments:

    a. was an act constituting an offence under s.3 CMA 1990 capable of being rendered lawful by a warrant issued under the Regulation of Investigatory Powers Act 2000 ("RIPA 2000") or a warrant or authorisation under the Intelligence Services Act 1994 ("ISA 1994")?

    b. would the CNE activities of a Crown servant in the course of his employment, if committed in a foreign country or against assets or individuals located in a foreign country, have amounted to an offence under s.3 CMA 1990 as though the activities had been committed in England and against assets or individuals located in England?

2. Does s.5 ISA 1994 permit the issue of a 'class' or 'thematic' warrant, i.e. a warrant authorising certain acts or types of acts in general rather than by reference to specified property or wireless telegraphy?

3. Does the power under s.5 ISA 1994 to authorise interference with "property" encompass physical property only, or does it also extend to intangible legal rights, such as copyright?

**ECHR**

4. Is the regime which governs Computer Network Exploitation ("the regime") "*in accordance with the law*" under Article 8(2) ECHR / "*prescribed by law*" under Article 10(2) ECHR? In particular:

    a. Is the regime sufficiently foreseeable?

    b. Are there sufficient safeguards to protect against arbitrary conduct?

    c. Is the regime proportionate?

    d. Was this the case throughout the period commencing 1 August 2009?

5. Specifically:

a. Should CNE activities be authorised by specific and individual warrants, or is it sufficient that they be authorised by 'class' or 'thematic' warrants or authorisations without reference to a specific individual target?

b. What records ought to be kept of CNE activity? Is it necessary that records of CNE activity are kept that record the extent of the specific activity and the specific justification for that activity on grounds of necessity and proportionality, identifying and justifying the intrusive conduct taking place?

c. Have adequate safeguards been in place at all times to prevent the obtaining, storing, analysis or use of legally privileged material and other sensitive confidential documents?

d. What, if any, is the relevance of the fact that, until February 2015, it was neither confirmed nor denied that the Respondents carried out CNE activities at all?

e. What, if any, is the relevance of the Covert Surveillance and Property Interference Code, issued in 2002 and updated in 2010 and 2014?

f. What, if any, is the effect of the publication of a Draft Equipment Interference Code of Practice in February 2015?

g. What, if any, is the relevance of the Intelligence Services Commissioner's oversight of the use of the powers contained within ISA 1994?

h. What, if any, is the relevance of the oversight by the Tribunal and the Intelligence and Security Committee of Parliament?

## 5. Keeping of records

### Centrally retrievable records of warrants

5.1 The following information relating to all section 5 warrants for equipment interference should be centrally retrievable for at least three years:

- All applications made for warrants and for renewals of warrants:
- the date when a warrant is given;
- whether a warrant is approved under urgency procedures;
- where any application is refused, the grounds for refusal as given by the Secretary of State;
- the details of what equipment interference has occurred;
- the result of periodic reviews of the warrants;
- the date of every renewal; and
- the date when any instruction was given by the Secretary of State to cease the equipment interference.

## 6. Handling of information and safeguards

### Overview

6.1 This chapter provides further guidance on the processing, retention, disclosure deletion and destruction of any information obtained by the Intelligence Services pursuant to an equipment interference warrant. This information may include communications content and communications data as defined in section 21 of the 2000 Act.

6.2 The Intelligence Services must ensure that their actions when handling information obtained by means of equipment interference comply with the legal framework set out in the 1989 and 1994 Acts (including the arrangements in force under these Acts[2]), the Data Protection Act 1998 and this code, so that any interference with privacy is justified in accordance with Article 8(2) of the European Convention on Human Rights. Compliance with this legal framework will ensure that the handling of information obtained by equipment interference continues to be lawful, justified and strictly controlled, and is subject to robust and effective safeguards against abuse.

[2] All information obtained by equipment interference must be handled in accordance with arrangements made under section 2(2)(a) of the 1989 Act and sections 2(2)(a) and 4(2)(a) of the 1994 Act (and pursuant to sections 5(2)(c) and 7(3)(c) of the 1994 Act).

**Use of information as evidence**

6.3 Subject to the provisions in chapter 3 of this code, information obtained through equipment interference may be used as evidence in criminal proceedings. The admissibility of evidence is governed primarily by the common law, the Civil Procedure Rules, section 78 of the Police and Criminal Evidence Act 1984 and the 1998 Act.

**Handling information obtained by equipment interference**

6.4 Paragraphs 6.6 to 6.11 provide guidance as to the safeguards which must be applied by the Intelligence Services to the processing, retention, disclosure and destruction of all information obtained by equipment interference. Each of the Intelligence Services must ensure that there are internal arrangements in force, approved by the Secretary of State, for securing that these requirements are satisfied in relation to all information obtained by equipment interference.

6.5 These arrangements should be made available to the Intelligence Services Commissioner. The arrangements must ensure that the disclosure, copying and retention of information obtained by means of an equipment interference warrant is limited to the minimum necessary for the proper discharge of the Intelligence Services' functions or for the additional limited purposes set out in section 2(2)(a) of the 1989 Act and sections 2(2)(a) and 4(2)(a) of the 1994 Act. Breaches of these handling arrangements must be reported to the Intelligence Services Commissioner as agreed with him.

**Dissemination of information**

6.6 The number of persons to whom any of the information is disclosed, and the extent of disclosure, must be limited to the minimum necessary for the proper discharge of the Intelligence Services' functions or for the additional limited purposes described in paragraph 6.5. This obligation applies equally to disclosure to additional persons within an Intelligence Service, and to disclosure outside the service. It is enforced by prohibiting disclosure to persons who do not hold the required security clearance, and also by the need-to-know principle: information obtained by equipment interference must not be disclosed to any person unless that person's duties are such that he needs to know about the information to carry out those duties. In the same way only so much of the information may be disclosed as the recipient needs; for example if a summary of the information will suffice, no more than that should be disclosed.

6.7 The obligations apply not just to the Intelligence Service that obtained the information, but also to anyone to whom the information is subsequently disclosed. In some cases this may be achieved by requiring the latter to obtain the originator's permission before disclosing the information further. In others, explicit safeguards may be applied to secondary recipients.

**Copying**

6.8 Information obtained by equipment interference may only be copied to the extent necessary for the proper discharge of the Intelligence Services' functions or for the additional limited purposes described in paragraph 6.5. Copies include not only direct copies of the whole of the information, but also extracts and summaries which identify

themselves as the product of an equipment interference operation. The restrictions must be implemented by recording the making, distribution and destruction of any such copies, extracts and summaries that identify themselves as the product of an equipment interference operation.

**Storage**

6.9 Information obtained by equipment interference, and all copies, extracts and summaries of it, must be handled and stored securely, so as to minimise the risk of loss or theft. It must be held so as to be inaccessible to persons without the required level of security clearance. This requirement to store such information securely applies to all those who are responsible for the handling of the information.

**Destruction**

6.10 Communications content, communications data and other information obtained by equipment interference, and all copies, extracts and summaries thereof, must be marked for deletion and securely destroyed as soon as they are no longer needed for the functions or purposes set out in paragraph 6.5. If such information is retained, it should be reviewed at appropriate intervals to confirm that the justification for its retention is still valid.

**Personnel security**

6.11 In accordance with the need-to-know principle, each of the Intelligence Services must ensure that information obtained by equipment interference is only disclosed to persons as necessary for the proper performance of the Intelligence Services' statutory functions. Persons viewing such product will usually require the relevant level of security clearance. Where it is necessary for an officer to disclose information outside the service, it is that officer's responsibility to ensure that the recipient has the necessary level of clearance.

## Appendix III

## Reporting LLP

### Legally privileged communications

The GCHQ Compliance Guide explains that the RIPA Interception of Communications Code of Practice stipulates that greater regard should be had for privacy issues where the subject of the interception might reasonably assume a high degree of privacy or where confidential information is involved. This means that there are certain categories of communication where a particular high threshold of proportionality must be applied to the release of the content, because the content of the communication would ordinarily be considered confidential (in the common sense of the word) or otherwise privileged. These categories are:

-Legally privileged communications;
-Personal information held in confidence relating to physical or mental health;
-Personal information held in confidence relating to spiritual counselling:
-Confidential journalistic material;
-Confidential constituent information

Legal Professional Privilege (LPP) broadly falls into two categories.

-**legal advice privilege** which attaches to communications between a professional legal adviser, acting as such, and their client where the communications are made confidentially for the purpose of seeking or providing legal advice.

-**litigation privilege** which attaches to communications between the client and his legal adviser or agent, or between one of them and a third party, if such communications come into existence for the sole or dominant purpose of either seeking or providing legal advice with regard to litigation or collecting evidence in respect of litigation. This second category is wider than the first since it is possible for
litigation privilege to attach to communications other than those directly between a lawyer and their client, *i.e.* privilege can attach to communications between a lawyer and a third party where such communications are in connection with legal proceedings.

The concept of LPP applies to:

- The content of communications that fall into one of the categories above, and

- Exceptionally, some communications data (*i.e.* 'events' or the fact of a communication),

The purpose of LPP is to ensure that individuals are able to consult a lawyer in confidence without fear that what passes between them will later be used against
them in court and it is therefore fundamental to the right to a fair trial and the rule of law. Intelligence material subject to LPP cannot be released to a customer who may
be a party to any legal case to which the material relates, because this would give
that customer an unfair litigation advantage (it being a basic principle that litigants cannot be required to reveal privileged material to either their opponents or the

court in a given piece of litigation). However, communications made with the intention of furthering a criminal purpose (whether the lawyer is acting unwittingly or culpably) are unlikely to be protected by LPP. For more details contact the Disclosure Policy team.

The judgment as to whether it is necessary and proportionate to include information subject to LPP in the release of intelligence material by GCHQ must take account of the particular sensitivity of such information and any associated risks. It is likely that any release of material protected by LPP that is deemed both necessary [and] proportionate will be to a more limited readership limited and possibly more highly classified than would otherwise be the case. The judgment of necessity and proportionality in these cases is reserved to Mission Policy, and all reporting containing anything that you believe may be covered by LPP must be submitted for checking. For the sake of simplicity, in order to ensure that all intelligence material containing potentially LPP information is submitted and assessed, reports featuring the following types of intelligence must be submitted for checking before issue:

- Content and/or communications data ('events') relating to (including instances where a target has been in contact with) lawyers, legal advisers, solicitors, attorneys, or any other member of the legal profession, or content that includes legal advice, regardless of the profession of the communicant.

The sensitivity of reporting LPP information is not mitigated by disguising or removing the identity or occupation of the communicant. But neither is there a 'ban' on identifying or reporting such material – it may well be necessary and proportionate to report such information to certain circumstances. The checking process is designed to determine this. If Mission Policy considers it proportionate in a particular case to release intelligence based on communications that attract legal privilege, the reporter will be instructed to apply the following rubric to the report:

*This report contains material that may be subject to legal professional privilege, and onward dissemination/Action On is not to be taken without reverting to GCHQ.*

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)

BETWEEN:

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

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# APPELLANT'S SKELETON ARGUMENT

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## 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*".

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[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.

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 *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*

[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.

*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."*

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]

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*

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

*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:

> "(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])

*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:

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[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."*

"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 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

[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.

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].

[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."*

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 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.

## I. 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.

**BEN JAFFEY QC**

**TOM CLEAVER**

**Blackstone Chambers**

**BHATT MURPHY**

**23 February 2017**

**IN COURT OF APPEAL (CIVIL DIVISION)** **C1/2017/0470/A**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**DIVISIONAL COURT (SIR BRIAN LEVESON PQBD AND LEGGATT J)**

**BETWEEN**

**THE QUEEN ON THE APPLICATION OF**

**PRIVACY INTERNATIONAL**

**Appellant**

**AND**

**THE INVESTIGATORY POWERS TRIBUNAL**

**Respondent**

**AND**

**SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (1)**

**GOVERNMENT COMMUNICATIONS HEADQUARTERS (2)**

**Interested Parties**

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# RESPONDENT'S NOTE

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*References to the Appeal Bundle are given as **[tab A/1]**, as appropriate. The Note has been updated to include references the Authorities Bundle which are given as [Authorities/ n.] and to correct typographical errors in the original Note.*

1. This Note has been prepared on behalf of the Respondent, the Investigatory Powers Tribunal ("the IPT"), to assist the Court of Appeal in relation to the appeal against the judgment of the Divisional Court in which it found that the IPT was not amenable to judicial review.

2. The Note sets out the IPT's history and statutory functions as well as the manner in which it performs its statutory functions. It is largely based on a similar Note that was submitted to the Divisional Court[1], but has been updated, principally to reflect developments in the oversight regime introduced by the Investigatory Powers Act 2016 and, in particular, the introduction of a domestic right of appeal from the decisions of the IPT.

***The history of the IPT***

3. The IPT was established by the Regulation of Investigatory Powers Act 2000 ("RIPA"). The IPT effectively replaced the Interception of Communications Act Tribunal, the Security Services Act Tribunal and the Intelligence Services Act Tribunal which are now defunct except in relation to complaints made before 2 October 2000.[2] The IPT also replaced the complaints provision of Part III of the Police Act 1997 (concerning police interference with property).

4. The President and Vice-President of the IPT are appointed by HM the Queen by Letters Patent. They are required to hold or to have held high judicial office (see paragraph 2 of Schedule 3 to RIPA). The members of the IPT are similarly appointed by HM the Queen by Letters Patent. They are required to have held the relevant legal qualification for at least seven years (see paragraph 1 of Schedule 3 to RIPA).

5. The IPT's first President and Vice-President were Mummery LJ and Burton J. On the retirement of Mummery LJ, Burton J was appointed President and Sales J (as he then was) was appointed as the Vice-President. Subsequently Mitting J was appointed to replace Sales J as the Vice-President.

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[1] As the IPT indicated in its Acknowledgement of Service, the IPT did not intend to make any submissions in relation to the impugned judgment concerning to s.5 of the Intelligence Services Act 1994 even if the Divisional Court had found that the Tribunal was amenable to judicial review. It would obviously have been inappropriate for the IPT to comment any further on the judgment that it has delivered.

[2] See ss 70, 82(2) and Schedule 5 of RIPA and the Regulation of Investigatory Powers Act 2000 (Commencement No 1 and Transitional Provisions) Order 2000 SI 2000/2543

6. Current members of the IPT include 3 serving High Court Judges (Edis, Singh and Sweeney JJ) as well as a retired judge of the High Court in Northern Ireland (Sir Richard McLaughlin).[3]

7. The IPT's members are drawn from Scotland and Northern Ireland as well as England and Wales, reflecting the fact that the IPT has a UK wide jurisdiction. It usually sits in London but last year sat in Edinburgh to hear the case of *David Moran and others v Police Scotland* [2016] UKIPTrib15_602-CH.

8. The IPT's members are supported by a small secretariat who assist in the administration related to the investigation of each complaint.

9. The IPT's powers under RIPA are primarily investigative. Much of its work is paper based, with its members directing investigations of complaints and adjudicating upon the outcome of the investigations. The vast majority of complaints made to the Tribunal do not lead to a hearing and instead are determined on paper.

10. Although it is called a Tribunal, the IPT is not part of 'Her Majesty's Courts and Tribunal Service'. In his 2001 Report of the Review of Tribunals (Paragraph 3.11) Sir Andrew Leggatt explained this, outlining some of the exceptional features of the Tribunal:

> "There is one exception among citizen and state tribunals. This Tribunal (IPT) is different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other tribunals. It is therefore wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service. So although the chairman [of the Tribunals system] is a Lord Justice of Appeal and would be the senior judge in the Tribunals System, he would not be in a position to take charge of it.
>
> 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.
>
> Subject to tribunal rules made by the Secretary of State the Tribunal is entitled to determine its own procedure. We have accordingly come to the conclusion that this Tribunal should continue to stand alone; but there should apply to it such of our other recommendations as are relevant and not inconsistent with the statutory provisions

[3] A list of the IPT's current members is contained at Chapter 7 of the IPT's 2011-2015 report which was annexed to the IPT's Acknowledgement of Service in these proceedings [see **tab B/53**]. [**Authorities/ 45**]

relating to it."[4]

***The statutory scheme***

11. The IPT was established by s.65 of RIPA:

"65 **The tribunal**

(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.

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[4] Report of the Review of Tribunals by Sir Andrew Leggatt: "Tribunals for Users - One System, One Service", available at http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm **[Authorities/43]**

(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."

12. Section 243 of the Investigative Powers Act 2016 amends s.65-67 of RIPA. The result is that the IPT will have jurisdiction regarding claims brought against public authorities in respect of all the powers provided for in the 2016 Act. A date has not yet been set for when s.243 will be brought into force.

*Oversight of powers exercised under RIPA, Intelligence Services Act and the Police Act 1997 Part III*

13. The IPT acts as one of the main pillars of oversight of the powers exercised under RIPA. Those include the Commissioners, the Intelligence and Security Committee of Parliament and the system of authorisations required under RIPA.

*The Commissioners*

14. The Commissioners provide oversight of the way in which all public authorities in the United Kingdom carry out covert surveillance.

15. Until the Investigatory Powers Act 2016 comes into force, oversight is provided by:

(a) *The Interception of Communications Commissioner:* responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by the three Security and Intelligence Agencies (SIAs), police forces and other public authorities. (Section 57 RIPA). The current Commissioner is the Rt. Hon.

Sir Stanley Burnton.

(b) *The Intelligence Services Commissioner*: responsible for providing independent judicial oversight of the conduct of the SIAs and the Ministry of Defence (Section 59 RIPA). The current Commissioner is the Rt. Hon Sir John Goldring, who was appointed in January 2017 to succeed Sir Mark Waller.

(c) *The Chief Surveillance Commissioner and Assistants:* they are responsible for overseeing the conduct of covert surveillance and covert human intelligence sources (other than the SIAs) by public authorities. (Police Act 1997 and Sections 62 and 63 RIPA). The current Chief Commissioner is The Rt. Hon. the Lord Judge.

16. The Investigatory Powers Act 2016 will replace those Commissioners with the newly created office of the Investigatory Powers Commissioner (IPC) who will be supported in carrying out his functions by other Judicial Commissioners. No-one may be appointed as the IPC or as a Judicial Commissioner unless they have held a judicial position at least as senior as a high court judge.[5] Section 229 of the Investigatory Powers Act gives a wide remit to the IPC to oversee the way public authorities intercept communications, acquire or retain communications data or carry out equipment interference. The IPC will undertake, with the assistance of the Judicial Commissioners and staff, the functions currently undertaken by the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Surveillance Commissioners. The IPC and other Judicial Commissioners will have discretion as to how they must fulfill their functions, but this must include audits, inspections and investigations.

17. In March 2017, the Prime Minister approved the appointment of Fulford LJ as the first Investigatory Powers Commissioner. It was announced that Fulford LJ would start to establish his office immediately and that he would commence his statutory functions "in due course".[6]

[5] S.227 of the Investigatory Powers Act 2016
[6] https://www.gov.uk/government/news/investigatory-powers-commissioner-appointed-lord-justice-fulford

*The Intelligence and Security Committee of Parliament*

18. The Intelligence and Security Committee of Parliament ("ISC") is a statutory committee of Parliament that has responsibility for oversight of the UK intelligence community. The ISC was originally established by the Intelligence Services Act 1994 and was recently reformed, and its powers reinforced, by the Justice and Security Act 2013.[7] The ISC oversees the intelligence and security activities of the UK, including the policies, expenditure, administration and operations of the Security Service (MI5), the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ). The ISC also scrutinises the work of other parts of the UK intelligence community, including the Joint Intelligence Organisation and the National Security Secretariat in the Cabinet Office; Defence Intelligence in the Ministry of Defence; and the Office for Security and Counter-Terrorism in the Home Office.

19. The ISC consists of nine Members drawn from both Houses of Parliament. The Chair is elected by its Members. The Members of the Committee are subject to Section 1(1)(b) of the Official Secrets Act 1989 and are given access to highly classified material in carrying out their duties. The Committee sets its own agenda and work programme. It takes evidence from Government Ministers, the Heads of the intelligence Agencies, officials from the intelligence community, and other witnesses as required. The Committee is supported in its work by an independent Secretariat and an Investigator. It also has access to legal, technical and financial expertise where necessary. The Committee makes an annual report to Parliament on the discharge of its functions.[8]

*Authorisations*

20. Intrusive powers under RIPA, the Intelligence Services Act 1994 and the Police Act 1997 Part III may only be exercised upon the authority of a warrant or an authorisation given by a "designated person" with statutory authority to do so. They

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[7] This is reflected in a Memorandum of Understanding between the ISC and the Prime Minister.
[8] See page 3 of its 2015-2016 Annual Report.

must be granted only if the particular power sought is in all the circumstances lawfully available.

***The Tribunal's procedures***

21. Section 68 of RIPA provides for the IPT's procedure. Under section 68(2), the IPT has the power to require a relevant Commissioner to provide it with all such assistance (including the Commissioner's opinion as to any issue falling to be determined by the IPT) as it thinks fit. Section 68(6) and (7) requires those involved in the authorisation and execution of an interception warrant to disclose or provide to the IPT all documents and information it may require.

22. Section 68(4) deals with reasons for the IPT's decisions and provides that:

> "Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
>
> (a) a statement that they have made a determination in his favour; or
>
> (b) a statement that no determination has been made in his favour."[9]

23. The IPT has the power to award compensation and to make such other orders as it thinks fit, including orders quashing or cancelling any and orders requiring the destruction of any records obtained, for example, under a section 8(1) warrant (section 67(7) RIPA).

24. In the event that a claim before the IPT in relation to a warrant, authorisation or other permission given or granted by a Secretary of State is successful, the IPT is required to make a report to the Prime Minister (section 68(5) of RIPA).

*Procedural Rules*

25. Section 69(1) of RIPA provides that the Secretary of State may make rules regulating any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings before it. Under section 69(2), such rules may:

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[9] In 2015 the IPT gave a ruling in relation to the proper interpretation of this provision in the context of a claim brought by Mr Belhadj and others in relation to the alleged interception of legally privileged material – see *Belhadj & Others vs. the Security Service, SIS, GCHQ, Home Office and FCO* IPT/13/132-9/H.

"(c) prescribe the form and manner in which proceedings are to be brought before the Tribunal or a complaint or reference is to be made to the Tribunal;

...

(f) prescribe the forms of hearing or consideration to be adopted by the Tribunal in relation to particular proceedings, complaints or references ... ;

(g) prescribe the practice and procedure to be followed on, or in connection with, the hearing or consideration of any proceedings, complaint or reference (including, where applicable, the mode and burden of proof and the admissibility of evidence);

(h) prescribe orders that may be made by the Tribunal under section 67(6) or (7);

(i) require information about any determination, award, order or other decision made by the Tribunal in relation to any proceedings, complaint or reference to be provided (in addition to any statement under section 68(4)) to the person who brought the proceedings or made the complaint or reference, or to the person representing his interests."

26. Section 69(6) provides that in making the rules the Secretary of State shall have regard to:

"(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and

(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

27. The Secretary of State has adopted rules to govern the procedure before the IPT in the form of the Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) ("the Rules"). The Rules cover various aspects of the procedure before the IPT. As Laws LJ commented in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 [**Authorities/ 22**] they represent a "*series of provisions elaborating special procedures clearly fashioned to accommodate the particular considerations, not least those of national security, which are likely to arise*"[10] in such proceedings.

28. As regards disclosure of information, Rule 6 provides:

"(1) The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of

[10] Paragraph 7

the United Kingdom or the continued discharge of the functions of any of the intelligence services.

(2) Without prejudice to this general duty, but subject to paragraphs (3) and (4), the Tribunal may not disclose to the complainant or to any other person:

(a) the fact that the Tribunal have held, or propose to hold, an oral hearing under rule 9(4);

(b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing;

(c) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act (or provided voluntarily by a person specified in section 68(7));

(d) any information or opinion provided to the Tribunal by a Commissioner pursuant to section 68(2) of the Act;

(e) the fact that any information, document, identity or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (b) to (d).

(3) The Tribunal may disclose anything described in paragraph (2) with the consent of:

(a) in the case of sub-paragraph (a), the person required to attend the hearing;

(b) in the case of sub-paragraphs (b) and (c), the witness in question or the person who disclosed or provided the information or document;

(c) in the case of sub-paragraph (d), the Commissioner in question and, to the extent that the information or opinion includes information provided to the Commissioner by another person, that other person;

(d) in the case of sub-paragraph (e), the person whose consent is required under this rule for disclosure of the information, document or opinion in question.

(4) The Tribunal may also disclose anything described in paragraph (2) as part of the information provided to the complainant under rule 13(2), subject to the restrictions contained in rule 13(4) and (5).

(5) The Tribunal may not order any person to disclose any information or document which the Tribunal themselves would be prohibited from disclosing by virtue of this rule, had the information or document been disclosed or provided to them by that person.

(6) The Tribunal may not, without the consent of the complainant, disclose to any person holding office under the Crown (except a Commissioner) or to any other person anything to which paragraph (7) applies.

(7) This paragraph applies to any information or document disclosed or provided to the Tribunal by or on behalf of the complainant, except for the statement described in rule 7(2)(a) and (b) or, as the case may be, rule 8(2)(a) and (b)."

29. It is noted that Rule 6 (1) requires the IPT to ensure that it does not permit the disclosure of information that would be contrary to "*the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services*": this is a wider definition of categories to be protected than that

contained in section 6 of the Justice and Security Act 2013 **[Authorities/ 7]** (see further below).

30. Rule 9 deals with the forms of hearings and consideration of the complaint:

"(1) The Tribunal's power to determine their own procedure in relation to section 7 proceedings and complaints shall be subject to this rule.

(2) The Tribunal shall be under no duty to hold oral hearings, but they may do so in accordance with this rule (and not otherwise).

(3) The Tribunal may hold, at any stage of their consideration, oral hearings at which the complainant may make representations, give evidence and call witnesses.

(4) The Tribunal may hold separate oral hearings which:

(a) the person whose conduct is the subject of the complaint,

(b) the public authority against which the section 7 proceedings are brought, or

(c) any other person specified in section 68(7) of the Act,

may be required to attend and at which that person or authority may make representations, give evidence and call witnesses.

(5) Within a period notified by the Tribunal for the purpose of this rule, the complainant, person or authority in question must inform the Tribunal of any witnesses he or it intends to call; and no other witnesses may be called without the leave of the Tribunal.

(6) The Tribunal's proceedings, including any oral hearings, shall be conducted in private."

31. In Applications Nos IPT/01/62 and IPT/01/77, 23 January 2003 **[Authorities/ 34]**, the IPT held that rule 9(6) of the 2000 Rules, requiring the tribunal's proceedings to be conducted in private, was ultra vires section 69 of RIPA as being incompatible with article 6 of the ECHR which guarantees the right to a fair hearing before an independent and impartial tribunal; but "*in all other respects the 2000 Rules are valid and binding on the tribunal and are compatible with articles 6, 8 and 10 of the Convention*"(para 12 of the decision).

32. The taking of evidence is addressed in Rule 11:

"(1) The Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law.

(2) The Tribunal may require a witness to give evidence on oath.

(3) No person shall be compelled to give evidence at an oral hearing under rule 9(3)."

33. Rule 13 provides guidance on notification to the complainant of the IPT's findings:

"(1) In addition to any statement under section 68(4) of the Act, the Tribunal shall provide information to the complainant in accordance with this rule.

(2) Where they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact.

...

(4) The duty to provide information under this rule is in all cases subject to the general duty imposed on the Tribunal by rule 6(1).

(5) No information may be provided under this rule whose disclosure would be restricted under rule 6(2) unless the person whose consent would be needed for disclosure under that rule has been given the opportunity to make representations to the Tribunal."

34. In *Kennedy v United Kingdom* (2011) 52 EHRR 4 **[Authorities/ 30]** the European Court of Human Rights considered the IPT's procedures and concluded that the applicant had been afforded an effective remedy in accordance with article 13 ECHR:

"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."[11]

*The IPT's evolving procedures for dealing with sensitive materials*

35. In its 2011-2015 Report, the IPT explained:

"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."[12] (Emphasis as per original)

[11] Paragraph 196 **[Authorities/ 45]**

[12] See page 12. The IPT set out guidance in relation to the role of Counsel to the Tribunal in *Liberty/Privacy (No. I)* [2014] UKIPTrib 13/77-H; [2015] 3 All ER 142, paragraphs 8-10 **[Authorities/ 35]**

36. In recent cases, the IPT has proceeded to give judgment on issues of law not only on the basis of assumed facts but also on the basis of significant pre-hearing disclosure that has been made by the SIAs following an OPEN and CLOSED disclosure process, where the interests of the claimants are advanced in CLOSED by Counsel to the Tribunal.[13] Those disclosure exercises have resulted in significant "avowals" of particular types of activity by the SIAs that have informed the IPT's rulings on preliminary issues of law.

***Recent judgments***

37. The IPT maintains a website[14] which, as well as containing guidance for potential complainants, also contains the IPT's open judgments since its inception. A summary of key judgments given by the IPT since 2010 is contained in Chapter 5 of its 2011-2015 Report.

38. Since that report the IPT has also given judgment in

(a) *Human Rights Watch and others v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib15_165-CH, a ruling concerning the worldwide campaign by Privacy International following the IPT's judgments in *Liberty/Privacy Nos 1 and 2* UKIP Trib 13/77- H, [2015] 1 Cr. App. R 24, [2015] 3 All ER 142, 212;

(b) *David Moran and others v Police Scotland,* UKIP Trib 15_602-CH, a judgment concerning complaints arising out of the obtaining by Police Scotland of four relevant authorisations under Part 1 Chapter 2 (Acquisition and Disclosure of Communications Data) (ss 21-25) of RIPA;

(c) *Kerr v The Security Service* [2016] UKIP Trib 15_134-C, a preliminary issue judgment concerning a complaint that since 2003 the complainant had been the

[13] See para 5 of the judgment in *Privacy International and GreenNet v The Secretary of State for Foreign and Commonwealth Affairs and others* 14/120-126/CH and IPT 14/85/CH and most recently *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib 15_110-CH at para 13.

[14] http://www.ipt-uk.com/default.asp

subject of a campaign of harassment by members of the Security Service, acting in their official capacity;

(d) *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 15_110-CH, where the IPT found that the obtaining by the SIAs of bulk communications data under s.94 of the Telecommunications Act 1984 and the obtaining of bulk personal datasets was contrary to Article 8 ECHR and was consequently unlawful until 2015; and

(e) *Dias and Matthews v Chief Constable of Cleveland* [2017] UKIPTrib15_586-CH, where two former police officers in the Cleveland Police Force brought a complaint against the Chief Constable of Cleveland Police alleging that the acquisition of their communications data had been unlawful. The Tribunal determined that the applications for and approvals of the obtaining of communications data relating to the claimants were unlawful and should be quashed.

***The nature and volume of complaints to the IPT***

*Organisations to which complaints related*

39. In 2015 the majority of complaints (43%) received by the IPT related to law enforcement agencies (such as the police and the National Crime Agency), closely followed by complaints relating to the SIAs (35%). In 2015 12% of the complaints received by the IPT related to local authorities and 10% to other public authorities such as the Department of Work and Pensions.[15]

40. Those figures are broadly similar to 2010 – where 32% of all complaints received by the IPT related to law enforcement agencies, 30% to the SIAs, 28% to other public authorities and 10% to local authorities.[16]

41. In its 2011-2015 report, the IPT commented:

[15] See figure 3 on p.20 of the IPT's 2011-2015 report **[Authorities/ 45]**

[16] See also Chapter 3 of the IPT's 2010 report.

"There remains a relatively even spread across the types of organisation which are the subject of complaints. Local authorities, however, received far fewer complaints than SIAs, law enforcement agencies and miscellaneous public authorities, and these have continued to decline perhaps in part due to the changes in authorisation procedures. In practice, there is a tendency on the part of complainants who may suspect they are subject to intrusive powers, but are unsure about the public authority involved, to allege unlawful conduct against all public authorities with RIPA powers, but especially to cite the Police and SIAs as general bodies."[17]

*The volume of complaints*

42. The volume of complaints to the IPT has risen from 95 in its first year to over 250 in 2015.[18] Not counted in that figure for 2015 are the 660 individual complaints brought as a result of the IPT's judgment in *Liberty/Privacy International (No 1) and (No 2)* [2014] UKIP Trib 13/77-H [2015] 3 All ER 142 and [2015] 3 AER 212, referred to above.[19]

43. Chapter 4 of the IPT's 2011-2015 Report sets out a detailed analysis of the complaints that have been referred to the IPT over four years: see in particular figure 6 at p.22 of the report.

44. Just under half of the complaints received in 2015 were ruled as "frivolous or vexatious" whilst 30% received a "no determination" statement in accordance with section 68 (4) (b) of RIPA. Those figures are broadly similar to figures for previous years – in 2011 for example 44% of all complaints were ruled as "frivolous or vexatious" and 36% of all complaints resulted in a "no determination" outcome.

*Frivolous and vexatious complaints*

45. In its 2011-2015 Report , the IPT states:

"The Tribunal has robust procedures for determining whether complaints are frivolous and vexatious, out of jurisdiction and out of time, as dictated by the Rules, and these have been established over its 16-year history. The history and justification of these policies and procedures is considered in depth in Chapter 2. Decisions on whether a claim is out of jurisdiction, out of time, or frivolous or vexatious are only made if two or more Members are in agreement as to the reasons for determining such an outcome. Figure 6 shows the number

[17] Page 20 of the 2011-2015 IPT Report for 2011-2015 [**Authorities/ 45**]

[18] See para 4.2 of Chapter 4 of the IPT Report for 2011-2015. [**Authorities/ 45**]

[19] See para 4.3 of Chapter 4 of the IPT Report for 2011-2015 [**Authorities/ 45**].

of complaints received by the Tribunal during the period of this report and their outcome. Figure 1 [on page 18] explains what those outcomes mean in greater depth. The number of cases judged by the Tribunal to be 'frivolous or vexatious' has remained high since it began its work in 2000."[20]

46. In its report for 2011-2015, the IPT explains that a finding that a complaint is frivolous or vexatious is made where "*[t]he Tribunal concludes in such cases that the complaint is obviously unsustainable and/or that it is vexatious. A complaint is regarded as obviously unsustainable if it is so far-fetched or lacking in foundation as to justify this description. A complaint is regarded as vexatious if it is a repetition or repeated repetition of an earlier obviously unsustainable complaint by the same person*".[21]

47. In instances where a complaint is dismissed as being frivolous and vexatious, the complainant receives a notice in accordance with section 67(4) of RIPA which provides that "*The Tribunal shall not be under any duty to hear, consider or determine any proceedings, complaint or reference if it appears to them that the bringing of the proceedings or the making of the complaint or reference is frivolous or vexatious.*" The decision provided to the complainant is issued pursuant to Rule 13(3)(1) of the Rules which states that a complainant is to be notified where the IPT has made a determination "*that the bringing of the section 7 proceedings or the making of the complaint is frivolous or vexatious*".

48. In the last year, two complainants whose complaints had been dismissed as being frivolous and vexatious have sought to challenge the IPT's decision in the High Court.

49. One of the complainants sought judicial review against the IPT as well as the Metropolitan Police Service. In that case, *R (oao) Christopher Ramanrace v IPT and Metropolitan* Service, CO/3654/2016, the application for permission was eventually refused on 31 October 2016 as being totally without merit.

50. The other complainant sought to injunct the IPT as well as the Undercover Policing Inquiry, the SIAs, the Ministry of Defence and a number of other defendants. In that

[20] See para 4.10 of Chapter 4 of the IPT Report for 2011-2015 **[Authorities/ 45]**

[21] Figure 1, p.18

case, *Mandy Richards v IPT, Undercover Policing Inquiry, MI5, MI6 and others*, HQ16X03179, the application was dismissed by Globe J on 19 October 2016. Two days later the complainant issued a further set of proceedings which were eventually struck out as being entirely without merit on 24 March 2017 following a hearing that took most of the day – see the judgment of Nicol J [2017] EWHC 560 (QB) [**Authorities/ 29**].

*Complaints resulting in a "no determination"*

51. A "no determination" notice under section 65 (4) of RIPA is issued where, after full consideration and investigation, the IPT is satisfied that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, or that there has been some activity under RIPA which is not in contravention of the Act, and cannot be criticised as unlawful. In many (but not all[22] instances) the provisions of RIPA and the Rules do not allow the Tribunal to disclose whether or not complainants are, or have been, subject to activity under RIPA. In most instances however the IPT is not permitted to disclose what evidence it has taken into account in considering the complaint.[23]

*Representation of complainants*

52. The vast majority of complainants to the IPT are not legally represented. No public funding is available to complainants but potential complainants are advised by the IPT that they may be assisted by citizens advice bureaux or by law centres.

***Appeals from the IPT***

[22] See for example the judgments in *Vaughan v South Oxfordshire Council*, IPT/12/28/C (whether Council Tax home inspections constituted surveillance under RIPA) and *BA and others v Cleveland Police* IPT/11/129/CH (police surveillance by way of covert monitoring in the sitting room of a flat owned by a seriously disabled patient designed to detect the perpetrators of thefts from the patient). In both cases the reasons for a "no determination" notice were given in full judgments by the IPT.

[23] The IPT has considered the application of the "neither confirm nor deny" policy in conjunction with Rule 6 of the Rules in its procedural rulings in *IPT/01/77* and *IPT/06/81* [**Authorities/ 34**]. As the IPT explained in its 2011-2015 report at para 2.21: "*The justification for this policy is that if allegations of interception or surveillance are made, but not denied, then, in the absence of the NCND policy, it is likely to be inferred by a complainant that such acts are taking place. This is especially so if other complainants are being told that they have no cause for complaint, because no such acts are, or have been, taking place in relation to them. If criminals and terrorists became aware, or could infer the possibility, of covert activities, they are likely to adapt their behaviour accordingly. The likely outcome of this is that the all-important secrecy would be lost and with it the chance of obtaining valuable information needed in the public interest or in the interests of national security.*"

53. Section 67(8) of RIPA recognises that there may be provision for the Secretary of State to order (or *a fortiori* Parliament to conclude) that there could be an appeal from the IPT (other than to the ECtHR).

54. The Investigative Powers Act 2016 provides for such an appeal using the "second tier" appeal test approved by the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663, [2011] UKSC 28 [**Authorities/ 23**] in relation to the Upper Tribunal. 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-
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> (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."

55. This new provision means that a complainant as well as a respondent to a complaint can appeal against determinations of the IPT falling within Section 68(4)[24] and 68 (4C)[25] of RIPA – i.e. final determinations as well a final decision on a preliminary issue. No appeal can be brought in relation to a decision concerning a procedural matter.

56. The Secretary of State will be issuing for consultation a new set of procedural rules which will give effect to the appeal rights introduced by s.242 of the Investigatory Powers Act 2016 and which will also reflect the Tribunal's developed procedural practice. It is envisaged that the appeal rights and the new rules will come into force by the end of 2017.

***Conclusions***

57. The summary of the IPT's history, statutory functions as well as the manner in which it performs its statutory functions contained above indicates that there would be particular practical difficulties if the appeal were to be allowed and this Court

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[24] Section 68(4) provides: "(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
(a) a statement that they have made a determination in his favour; or
(b) a statement that no determination has been made in his favour."

[25] This provides:

"(4C) Where the Tribunal make any decision which—

(a) is a final decision of a preliminary issue in relation to any proceedings, complaint or reference brought before or made to them, **and**

(b) is neither a determination of a kind mentioned in subsection (4) nor a decision relating to a procedural matter,

they must give notice of that decision to every person who would be entitled to receive notice of the determination under subsection (4) or (4A)." (Emphasis added)

concluded that the IPT was amenable to judicial review.

58. In the Divisional Court the Appellant argued that those practical difficulties would be met by s.6 of the Justice and Security Act 2013[26], but those provisions are an incomplete answer to such difficulties. The Justice and Security Act 2013[27] only applies to closed material which is "*damaging to the interests of national security*" (see section 6 of that Act) whereas the provisions of Rule 6 of the Rules (set out above) are far wider. Therefore in defending a claim for judicial review of an IPT "no determination", where information has been withheld for reasons (for example) because disclosure would be prejudicial to the "*the prevention or detection of serious crime*", the interested party would have to make an application for a Public Interest Immunity Certificate. That would mean that the material that led to the IPT's conclusion would not actually be available to the reviewing court, rendering the claim being struck out (see *Carnduff v Rock & Anor* [2001] 1 WLR 2205 [**Authorities/ 18**]).

59. Unrepresented complainants seeking to challenge the dismissal of their complaints as being frivolous or vexatious will also be likely to place a considerable burden on the Court's resources as well as those of the IPT. The two recent attempted challenges referred to above at paragraphs 48-50 give an indication of those difficulties. For example, the *Mandy Richards* claims have resulted in three separate hearings, one before Dove J, one before Globe J and the most recent one before Nicol J.

60. Finally, the importance of the fact that Parliament specifically legislated in RIPA for the possibility of an appeal right is a significant factor in determining whether or not the effect of s. 67 (8) of RIPA is such that the IPT is not amenable to judicial review – see the judgment of Sir Brian Leveson PQBD at [43]-[44] and in particular his conclusion at [44]:

> "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)."

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[26] See para 54 of the Claimant's Skeleton Argument in the Divisional Court.
[27] **Authorities/ 7**

61. Parliament has now provided for such an appeal route that is subject to carefully circumscribed criteria to be applied in circumstances which recognise the unique role played by the IPT as a specialist tribunal.

**JONATHAN GLASSON QC**

Matrix Chambers
Griffin Building
Grays Inn London WC1R 5LN
3 April 2017 Updated 27 September 2017

**Appeal Ref: 2017/0470**

**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)**

**BETWEEN:**

**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***

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# SKELETON ARGUMENT OF THE INTERESTED PARTIES

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***Time estimate:*** 1 day
***Essential reading:*** Divisional Court judgment dated 2 February 2017; IPT judgment in 'Privacy' and 'Greennet' complaints (IPT/14/85/CH and IPT/14/120-126/CH) dated 12 February 2016 at §§1-11 & 31-47.

## Introduction

1. This is an appeal from the decision of the Divisional Court dated 2 February 2017 in which it determined a preliminary issue in these judicial review proceedings, namely whether the Investigatory Powers Tribunal ('IPT') is amenable to judicial review. Following a detailed and careful review of the statutory scheme governing the IPT and the case law on ouster clauses, the Divisional Court concluded that s.67(8) of the Regulation of Investigatory Powers Act 2000 ('RIPA')[1] did oust the jurisdiction of the High Court in any application for judicial review of the IPT. The Divisional Court's reasons are set out in the judgment of the President of the Queen's Bench Division (see

[1] Which provides as follows: "*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.*"

§§1-45). Leggatt J concurred in the result, having recognised the "cogency" of the President's reasoning, but chose to record a number of "reservations" in his separate judgment (see §§46-62).

2. The unanimous conclusion of the Supreme Court in *A v Director of the Security Service* [2010] 2 AC 1 ('*A v B*') was also that s.67(8) clearly and unambiguously excludes the application of judicial review to decisions of the IPT. The Supreme Court recognised the specialist context in which the IPT operates. It also concluded that conferring final jurisdiction on the IPT - a body of like standing and authority to the High Court and subject to special procedures apt for its unique task - was "*constitutionally inoffensive*"[2]. The IPT sits as one part of a carefully balanced system of oversight of the acts of the Security and Intelligence Agencies ('SIAs'). Its procedures have been upheld as compatible with Art 6 ECHR[3].

3. The President's judgment recognised the need for clear and explicit words excluding the judicial review jurisdiction of the High Court and he conscientiously analysed the wording of RIPA and the "*carefully crafted regime*" which Parliament had created. He rightly rejected suggested parallels with the ouster clause in *Anisminic*[4] and agreed with the Supreme Court in *A v B* that Parliament had restricted the means by which decisions of the IPT may be challenged in the courts to the system of appeals for which RIPA itself provides. Whilst Leggatt J expressed "reservations" about that conclusion, his approach in recording those reservations was demonstrably too narrow (e.g. on the basis of words read in isolation) and without proper regard to the specialist features of the RIPA regime.

4. The JR challenge the Appellant seeks to mount is to the IPT judgment in the linked 'Privacy' and 'Greennet' complaints[5]. They related to GCHQ's "Computer Network Exploitation" ('CNE') activities. The constitution of the IPT consisted of two High Court Judges (Burton J and Mitting J as President and Vice President respectively) and three senior QCs[6]. In its judgment the IPT decided a number of preliminary issues concerning the lawfulness of CNE, including the compatibility of the regime with Arts. 8 and 10

[2] *A v B* at §23 per Lord Brown (with whom all the other members of the Supreme Court agreed), citing Laws LJ in the Court of Appeal.
[3] *Kennedy v United Kingdom* (2011) 52 EHRR 4.
[4] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 – discussed further below.
[5] IPT/14/85/CH and IPT/14/120-126/CH.
[6] Mr Robert Seabrook QC, Mr Charles Flint QC and The Hon Christopher Gardner QC.

ECHR. Following the preliminary issues judgment in February 2016, the IPT made "*no determination in favour*" in respect of each of the complainants[7].

5. The Appellant has sought (both in this appeal and in the Court below) to frame its case on jurisdiction by reference to the allegedly egregious nature of the IPT's "*rejection*" of the principle of legality[8]. As to that:

   a. The Appellant has seriously mischaracterised the IPT's decision in this case. Nowhere in the operative paragraphs setting out its reasoning does the IPT state that the principle of legality does not apply to matters of national security (see the Appellant's skeleton at §50(d)). The IPT did conclude (correctly) that the eighteenth century common law cases about general warrants were "*not a useful or permissible aid to construction*" of the express statutory powers given to the intelligence agencies in the Intelligence Services Act 1994 ('ISA') (see §37 of the judgment). It was no part of the IPT's reasoning to conclude that the principle of legality could never have application in the national security sphere.
   b. It is also important to be clear about the proper limits of the IPT's actual decision. It gives general guidance about the scope of warrants under s.5 ISA. It was careful to make plain that the lawfulness of the warrant in any particular case would be dependent on the particular facts of that case (see §38); and that any warrant should be "*as specific as possible*" in relation to the property covered by the warrant (§47). The day to day oversight for such matters rests with the Intelligence Services Commissioner (as explained at §27 of the Interested Parties' Summary Grounds)[9].
   c. The merits of any challenge have been stayed pending resolution of this preliminary issue; and the preliminary issue itself has ramifications beyond this case.

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[7] In accordance with the statutory provisions in s.68(4) of RIPA, and notified them by letter dated 9 March 2016.

[8] Ss asserted at §9, §37 and §57 of the Claimant's Grounds and see e.g. §15 and §50(d) of the Appellant's skeleton argument in this appeal.

[9] The final sentence of §15 of the Appellant's skeleton should also be approached with caution. Whilst it is right that the Interested Parties submitted that warrants did not have to identify specific persons, they submitted that the warrant needed to be as specific as possible to enable the Secretary of State to take a view on its legality and its necessity and proportionality. The Appellant's summary of the Interested Parties' submission is not a fair reflection of the submissions made to the IPT as recorded at §36(iii) of its judgment.

## The relevant statutory framework establishing and governing the IPT[10]

6. On 2 October 2000 a "*single legislative scheme*"[11] came into existence consisting of the Human Rights Act 1998 ('the HRA'), RIPA and the Civil Procedure Rules 2000[12]. As set out in the Explanatory Notes to RIPA, the main purpose of the Act was to ensure that investigatory powers (including e.g. the interception of communications and the carrying out of surveillance) were "*used in accordance with human rights*"; and that included making provision for the IPT with functions and jurisdiction in relation to those matters.

7. The IPT was established by s.65(1) of RIPA. Members of the IPT must either hold or have held high judicial office, or be a qualified lawyer of at least 7 years' standing (§1(1) of Sch. 3 to RIPA). The President of the IPT must hold or have held high judicial office (§2(2) of Sch. 3 to RIPA).

8. The IPT has exclusive jurisdiction to consider claims under s.7(1)(a) HRA brought against any of the SIAs or any other person in respect of any conduct, or proposed conduct, by or on behalf of any of the intelligence services (ss.65(2)(a), 65(3)(a) and 65(3)(b) RIPA). The IPT may consider and determine any complaints by a person who is aggrieved by any conduct by or on behalf of any of the SIAs which he believes 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 telecommunications service or system (ss.65(2)(b), 65(4) and 65(5)(a) RIPA). Any person, regardless of nationality, may bring a claim or raise a complaint in the IPT. Where the Tribunal hears proceedings under s.7(1)(a) of the HRA (s.65(2)(a)) it is to apply the same principles for making their determination "*as would be applied by a court in an application for judicial review*" (s. 67(2)). Similarly complaints of the latter sort (i.e. under s.65(2)(b)) must be investigated and then determined "*by applying the same principles as would be applied by a court on an application for judicial review*" (s.67(3)).

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[10] The President summarised the structure and functions of the IPT at §§5-14 of his judgment.
[11] See *A v B* at §21 per Lord Brown and see also the Court of Appeal judgment in that case per Laws LJ at §14 and Dyson LJ at §48.
[12] Those rules, *inter alia*, contained provisions governing claims under s.7 of the HRA at CPR 7.11 (see *A v B* at §3).

9. One of the special features of the IPT's regime is its interaction with the relevant Commissioners, including the Intelligence Services Commissioner and the Interception of Communications Commissioner. The role of these Commissioners is set out in ss.57-60 of RIPA. In broad terms, it is to provide independent oversight of the exercise by the SIAs of their statutory powers. Every member of the intelligence services has a duty to cooperate with the Commissioner by providing *'all such documents and information as he may require for the purpose of enabling him to carry out his functions.'*[13] The relevant Commissioner then reports to the Prime Minister, at least on an annual basis.[14] In turn, the Prime Minister is required to lay the reports before each House of Parliament (with the discretion to exclude matters that may be *'contrary to the public interest'*).[15] Pursuant to s.68(2) RIPA, the IPT has a broad power to require a relevant Commissioner (as defined in s.68(8)) to provide it with "*all such assistance...as the Tribunal think fit*". Thus, in a case involving the exercise of powers under the ISA 1994, the IPT may require the Intelligence Services Commissioner (see ss.59-60 of RIPA) to provide it with assistance in connection with any investigation of any matter by the Tribunal, or otherwise for the purposes of the Tribunal's consideration or determination of any matter (see also s.59(3)). The Tribunal is also obliged to ensure that every relevant Commissioner is aware of proceedings in the IPT which are relevant to their functions and to keep the Commissioner informed of any determination, award or other decision made by the Tribunal in respect of that matter (s.68(3)). The current Intelligence Services Commissioner is Sir John Goldring. The current Interception Commissioner is Sir Stanley Burnton.

10. The IPT's procedure is governed by ss.67-69 of RIPA and the Rules made under s.69. When making Rules pursuant to s.69, the Secretary of State is to have regard, in particular, to the need to ensure that complaints are "*properly heard and considered*" (s.69(6)(a)). Subject to those Rules, the IPT is entitled to determine its own procedure in relation to any proceedings, complaint or reference brought before it (s.68(1)). It is also allowed to "*receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law*" (r.11(1)). Pursuant to s.18(1)(c) the prohibition in s.17 of

[13] RIPA, s.60(1).
[14] *Ibid*, s.60(2) and (3).
[15] *ibid*, s.60(4) and (5).

RIPA (regarding the existence and use of intercept material) is disapplied. As explained in the Tribunal's 2011-2015 Report:

> *"The Tribunal adopts an inquisitorial process to investigate complaints in order to ascertain what has happened in a particular case. This is in contrast to the wholly adversarial approach followed in ordinary court proceedings."* (§2.2)

11. Central to the IPT's judicial oversight is the duty of disclosure in IPT proceedings which is imposed on the Government (it is imposed on every person holding office under the Crown). Such persons are required to disclose "*all such documents and information as the Tribunal may require for the purposes of enabling them*", to exercise their functions: see s.68(6) of RIPA. In practice, that means that there is wide-ranging disclosure provided to the Tribunal of all information (including sensitive information) which is relevant to the particular complaints. As stated by the IPT in its 2011-2015 Report:

> *"It is the experience of the Tribunal that it has received full and frank disclosure of relevant, often sensitive, material from those bodies of whom requests have been made. This is in no small part due to the strength of the procedures developed by the Tribunal to protect this material, and the confidence this inspires."*

12. In §173 of the IPT's procedural ruling of 22 January 2003 in IPT/01/62 and IPT/01/77 ('the Procedural Ruling'), the IPT held that "*purely legal arguments, conducted for the sole purpose of ascertaining what is the law and not involving the risk of disclosure of sensitive information*" should be heard by the IPT in public (Procedural Ruling, §172); and the IPT's reasons for its ruling on any "*pure questions of law*" (§195) that are raised at such a hearing may be published without infringing either r.13 of the Rules or s.68(4) of RIPA (Procedural Ruling, §§190-191). Thus, where necessary, the IPT holds an open legal issues hearing to consider any relevant (and disputed) issues of law, and subsequently publishes its rulings (with its reasoning) on such issues. In order to enable the legal issues to be determined the IPT can, if necessary, consider some (or all) of those issues on the basis of 'assumed facts', as occurred in the substantive IPT proceedings in this case (see §§5-9 of the February 2016 judgment).

13. Importantly, and consistently with its specialist functions, the IPT is able to consider matters which, e.g. for reasons of national security, cannot be disclosed into open. It does so by holding closed hearings, often with the assistance of Counsel to the Tribunal

('CTT') where the complaint raises issues of complexity. The IPT will investigate and consider in closed session such sensitive material as is relevant to the complaints. It then produces its decisions having regard to that closed material. That closed material may relate e.g. to the internal arrangements and safeguards which are operated by the SIAs and which, for reasons of national security, cannot be disclosed. It may also relate to the factual position vis à vis individual complainants and/or to the intelligence picture insofar as that is relevant to the proportionality of particular intelligence regimes/techniques. That access to closed material, coupled with the extensive disclosure duties which arise in IPT proceedings, puts the IPT in a special position. It means that the IPT's open determinations can be determined against the background and with the benefit of knowledge of the full position in closed. In a case involving alleged interference with Art 8/Art 10 ECHR rights that enables the IPT, for example:

a. to assess whether the SIAs' internal arrangements/safeguards are, in fact, in place, in accordance with the publicly available regime;
b. to evaluate the adequacy and effectiveness of those internal arrangements/safeguards;
c. to make an assessment as to whether more needs to be said about those arrangements/safeguards in open;
d. to make an assessment of the proportionality of the measures/techniques which are used;
e. to investigate the particular factual circumstances of each claimant including whether they may have been the subject of any relevant activity and, if so, the lawfulness of that activity.

14. As the IPT explained at §7 and §46(iii)-(iv) of its 5 December 2014 judgment in the *Liberty/Privacy* proceedings, which considered the lawfulness of the intelligence sharing regime and the regime for the interception of external communications under s.8(4) of RIPA:

> *"...we considered in particular the arrangements... described during the public hearing as "below the waterline", regulating the conduct and practice of the Intelligence Services, in order to consider (i) their adequacy and (ii) whether any of them could and should be publicly disclosed in order to comply with the requirements of Articles 8 and 10 of the Convention as interpreted by the ECtHR...*

*...[The IPT] has access to all secret information, and can adjourn into closed hearing in order to assess whether the arrangements (a) do indeed exist..., (b) are adequate to do the job of giving the individual "adequate protection against arbitrary interference".*
*[The IPT] has, and takes, the opportunity, with the benefit of full argument, to probe fully whether matters disclosed to it in closed hearing, pursuant to the Respondents' obligation to do so pursuant to s.68(6) of RIPA, can and should be disclosed in open and thereby publicised."*

15. By considering the closed material, the IPT is able to ensure that the public hearings are appropriately targeted at the right issues, avoiding the possibility of a disconnect between the open arguments and the true factual position in closed. As stated at §50(ii) of the 5 December Judgment in *Liberty/Privacy*:

> *"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."*

16. In a number of recent IPT cases, Counsel to the Tribunal (CTT) has performed a somewhat similar function to that of a Special Advocate. That has included reviewing the closed disclosure provided to the Tribunal to identify documents, parts of documents or gists that ought properly to be disclosed, together with making submissions to the IPT favour of disclosure, in the interests of the claimants and open justice (see e.g. §10 of the December 2014 judgment in *Liberty/Privacy*)[16]. That process also occurred in the *Privacy* proceedings which are the subject of these proceedings, as is evident from e.g. §11(ii) of the IPT's judgment.

17. The IPT's remedial discretion is also very broad and includes the following special features:
    a. On determining any proceedings the IPT can make any award of compensation or other order which it "*thinks fit*", and also has the power to quash or cancel any warrant or authorisation: see s.67(7) RIPA.

[16] It is that disclosure function of CTT which has been similar to that which would be performed by a Special Advocate. For the avoidance of doubt, these are not cases involving executive action where there are positive factual allegations against an individual and therefore they do not need special advocates representing the interests of the complainants in quite the same way.

b. Where the IPT determines any proceedings, complaint or reference brought before it, it can either make a statement to the complainant that it has made a determination in his favour or a statement that no determination in favour has been made (see s.68(4)).

c. The finding of "*no determination in favour*" plays an important role in preserving the neither confirm nor deny principle[17]. It means that after considering the case and requiring any necessary investigation, either the Tribunal is satisfied that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, or that there has been some official activity which is not in contravention of relevant statutory powers, and cannot be criticised as disproportionate. In these circumstances the provisions of RIPA therefore do not allow the Tribunal to disclose whether or not complainants are, or have been, of interest to the SIAs or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.

d. Subject to the general duty imposed on the Tribunal pursuant to r.6(1)[18], if the IPT makes a determination in favour it shall provide the complainant with a summary of that determination, including any findings of fact.

e. Where a determination in favour has been made, the IPT may be required to make a report of its findings to the Prime Minister - see s.68(5)[19].

f. The IPT is also obliged to make sure that every relevant Commissioner is kept informed of any determination, award, order or other decision made by the Tribunal in respect of any matter – see s.68(3)(b) RIPA.

g. The IPT also has the power to make such interim orders, pending final determination, as it thinks fit – see s.67(6) RIPA.

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[17] For a discussion of the application of that policy, see the Undercover Policing Inquiry Ruling 3 May 2016, Restriction Orders: Legal Principles and Approach (Pitchford LJ) at §§113ff.

[18] Which provides that "*The Tribunal shall carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.*"

[19] The IPT is required to make such a report where they make a determination in favour of any person and where the determination relates to any act or omission by or on behalf of the Secretary of State or to conduct for which any warrant, authorisation or permission was issued, granted or given by the Secretary of State.

18. The IPT sits as one of a number of oversight bodies, all of which work together to ensure that the activities of the SIAs are properly and appropriately scrutinised. The interface between the Tribunal and the Commissioners has already been referred to above. Those bodies also include the Intelligence and Security Committee (see the ISA 1994 and Justice and Security Act 2013), described as "*robustly independent, and now additionally fortified by the provisions of the JSA*" in *Liberty/Privacy* at §121. This comprises distinguished Parliamentarians who have further responsibility for the oversight of the SIAs (MI5, MI6, and GCHQ) and other parts of the UK intelligence community including overseeing their activities, policies, expenditure, administration and operations. This Committee is currently chaired by the Rt. Hon. Dominic Grieve QC MP.

19. **Annex 1** to this skeleton argument provides some recent examples of the IPT's work. As is evident from these recent cases, the IPT is a bespoke tribunal set up for a very specialist purpose of investigating, considering and ruling on sensitive and difficult issues connected with the exercise by the SIAs of their statutory powers. In fulfilling its functions it has at its disposal a panoply of specialist powers which ordinary courts (including the High Court) do not possess. It also sits within a carefully crafted scheme of checks and balances which work together to provide important oversight of the exercise of sensitive intelligence gathering powers.

**The judgment of the President**

20. The Appellant has not fairly or accurately summarised the President's reasoning in §6 and §46 of its skeleton. He began his analysis with a careful review of the structure and functions of the IPT (see §§5-15). At §9 he explained that he had 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*". He noted that, alongside its work, there was further and additional oversight by the relevant Commissioners, whose activities "*fit into the work of the IPT*" (§9). He concluded that the way in which the IPT exercises "*its jurisdiction, its procedure and its powers*" (under ss. 67-69 of RIPA) were "*tailored to the sensitive subject matter with which it deals*" (§10). In that regard, he noted the breadth of the IPT's procedural powers (§10), its ability to consider closed material in closed hearings (§11) and the development of mechanisms for resolving disputes in the IPT, including on the basis of assuming the facts as alleged (§12).

21. At §§16-35 of his judgment the President considered how s.67(8) of RIPA sat against the background of other attempts to oust the jurisdiction of the High Court, before going on to set out his key conclusions at §§36-44. Starting with the House of Lords decision in *Anisminic* he considered the key case law applicable to ouster clauses. In doing that, he noted three overarching principles:

22. **First**, it is not impossible for Parliament to legislate in such a way as to exclude judicial review. Parliament can, by the use of appropriate language, provide that a tribunal is to be the final arbiter of the law it has to determine and that a decision on a question of law shall be considered final and not subject to challenge either by way of appeal or judicial review – see §§19, 20, 24, 29 of the President's judgment - citing *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at 583, *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths at 693H, *Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §40, citing Lord Wilberforce *Anisminic* at 207B[20]. **Secondly**, the courts will presume against the conferment of such a power save in the clearest of cases - clear and explicit words will be required - see §§19 & 36 citing *R (Gilmore) v Medical Appeal Tribunal* (per Denning LJ at 583) and *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 (per Lord Hoffmann at 131 E-G). **Thirdly**, it is important to analyse the parliamentary language concerned and to understand the statutory ***context*** of each i.e. it is not simply an exercise in considering the language of the ouster clause in isolation – see §20, 25-29, 31-32 of the President's judgment[21]. As he later recorded at §40:

> "*... 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*

[20] Where she stated: "*it does of course lie within the power of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer: "the position may be reached, as the result of statutory provisions, that even if they make what the courts might regard as decisions wrong in law, these are to stand.*"" (§40)

[21] This underlines the fundamental difference in approach between the President and Leggatt J when interpreting s.67(8). The President's judgment is infused with references to the statutory context within which the relevant words have to be determined. By contrast, Leggatt J's judgment takes a narrower approach to the wording of s.67(8) and makes only passing reference to the special features of the statutory regime in which the IPT operates (see §60).

*Prince Ernest Augustus of Hanover [1957] AC 436 per Viscount Simonds (at 461), Lord Normand (at 465) and Lord Somervell of Harrow (at 476)."*

23. Applying these overarching principles, the President analysed s.67(8), in particular at §§36-44 of his judgment. He reached the following core conclusions:

a. In exercising its functions the IPT performs a similar oversight function in relation to the 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 ss. 67(2) and 67(3)(c) of RIPA which require the IPT to apply the same principles "*as would be applied by a court on an application for judicial review*" (§41).

b. 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 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*" (§41).

c. 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 (§42).

d. A further feature of the regime under RIPA which differs from that considered in *Anisminic* is that Parliament has made provision in s. 67 of RIPA for challenging decisions of the IPT by way of an appeal in specified cases (§34 & §43). Those provisions would not have been necessary had there been a wider route of challenge open, not only in those cases, but in every case (§34).

e. Even though the Supreme Court in *A v B* did not deal with s.67(8) as part of the *ratio* of its decision, its analysis was correct – 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 (§44) (as discussed further below).

a. Were it otherwise, 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 ss.65(2)(c) and (d) of RIPA and the power to create mechanisms in order to do so: see s.67(10) (§44).

***The Supreme Court's conclusions in A v B***

24. That the statutory context is all important in construing the import of the relevant provisions was emphasised by the Supreme Court in *A v B* in this very context – see the judgment of the President at §§25-30. There the Supreme Court considered whether RIPA (and in particular s.65(2)(a)) had conferred exclusive jurisdiction on the IPT to hear claims under s.7(1) HRA against any of the intelligence services.

25. Lord Brown gave the judgment of the Court, with whom all other members of the Supreme Court agreed. As noted by the President at §27 of his judgment, the Court set out the "***legislative provisions most central to the arguments***". These included s.67(8) of RIPA 2000 (see §3 and §5). The Court then emphasised the specialist nature of the IPT regime. At §14 (quoted by the President at §27) they stated:

> *"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."*** *(emphasis added)*

26. At §§21-24 the Supreme Court then considered whether s.65(2)(a), in providing for the exclusive jurisdiction of the IPT in respect of certain types of claims against the intelligence agencies, constituted an impermissible ouster of the ordinary jurisdiction of the Courts. They concluded that it did not. That was because:

    a. RIPA, the HRA and the Civil Procedure Rules had come into force at the same time as part of a "*single legislative scheme*".
    b. The exclusive jurisdiction given to the IPT did not take away a pre-existing common law right to access the courts and, for that reason, did not amount to an ouster of the ordinary jurisdiction of the courts anyway.
    c. Parliament had not ousted judicial scrutiny of the acts of the intelligence services, it had simply *allocated* that scrutiny to the IPT. The IPT was not a court of inferior jurisdiction. It was rather a specialist tribunal with special procedures apt for the subject matter in hand.

27. At §§23-24, the Court specifically distinguished the relevant regime from that which had operated in *Anisminic*; and also considered the import of s.67(8) of RIPA. They stated:

> *"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. Furthermore, as Laws LJ observed, ante, p 13, para 22:*
>
> > ***"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 … offers … no cause for concern on this score."***

***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.""* (emphasis added)

28. Even if the Supreme Court's conclusions on s.67(8) were *obiter* (see the President at §30), they are highly persuasive given that s.67(8) was one of the legislative provisions most central to the arguments in that case (see §3 and §5). As made clear by the President at §44 of his judgment, the conclusions of the Supreme Court were entirely consistent with his own view as to the effect of s.67(8).

**Alleged flaws in the President's analysis**

29. The Appellant asserts three flaws in the analysis of the President.

**(1) Alleged similarities with the ouster clause in *Anisminic***

30. At §48(a)-(g) of its skeleton the Appellant asserts that the President was "*wrong to conclude that the similarity between s.67(8) of RIPA and the ouster clause in Anisminic was irrelevant, or that the clauses were insufficiently similar for the decision in Anisminic*

*to be of assistance*". That criticism is unfounded and also mischaracterises the conclusions of the President.

31. **First,** the central point made by the President was that the statutory context in *Anisminic*, as compared with RIPA and the IPT, was materially different – see §42 of his judgment. That was at the heart of his reasoning on *Anisminic*, rather than a technical analysis of the respective ouster clauses when read in isolation. As set out above, that approach accords with well-established rules of statutory interpretation and with the analysis of the Supreme Court in *A v B* when interpreting the very same provisions of RIPA. Section 67(8) sits in its own and very particular context. Many of the features of the RIPA regime which were relied upon by the Supreme Court when interpreting s.65 in *A v B* play equally powerfully into the interpretation of s.67(8).

32. As the President made clear, there was no suggestion in *Anisminic* that the Foreign Compensation Commission was of like standing and authority to High Court and there was nothing equivalent to the security context and the very specialist powers and processes (unmirrored in the High Court) which are operated by the IPT. Nor was there any suggestion that the Commission in *Anisminic* was part of a carefully crafted scheme (of which the IPT is one part) exercising a supervisory jurisdiction over the actions of public authorities. It was those features of the RIPA regime which made s.67(8) "*constitutionally inoffensive*"[22].

33. **Secondly,** the Appellant is wrong to assert that that the ouster clause in *Anisminic* is materially identical to s.67(8) of RIPA[23]. Leaving aside the important differences in the statutory context, there are the following key differences:

    a. In RIPA Parliament has made plain that all aspects of the IPT's decision-making shall not be challenged whether by way of appeal or by way of questioning in any Court. The words used in s.67(8) to describe that which falls within the preclusion are evidently and deliberately broad (in contrast to the language used in

[22] Per Laws LJ in *A v B*, as unanimously approved by the Supreme Court in that case at §23.

[23] Section 67(8) reads as follows: "*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.*" By contrast, the ouster clause in *Anisminic* read as follows: "*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.*'

*Anisminic*) – i.e. they are designed to cover everything, including that which is in issue here i.e. a "*determination*" of the IPT.

b. The wording of s.67(8) was evidently intended to, and on its face and natural meaning does, exclude the application of judicial review to decisions of the IPT. That judicial review jurisdiction falls within the final words of the section. They sit in contradistinction to, and operate in addition to, "*appeal*" which is also precluded. The ouster clause in *Anisminic* merely contained the phrase "*shall not be questioned in any court of law*" and did not split out the concept of an appeal and of judicial review[24].

c. In s.67(8) Parliament has included important words in parenthesis (which did not feature in *Anisminic*) i.e. "*(including decisions as to whether they have jurisdiction)*". Those words make plain that it matters not what the alleged category of error is, since it would include even a basic error as to whether or not the Tribunal had jurisdiction to embark on the determination of the matter i.e. they are given exclusive "*kompetenz kompetenz*". That is significant both (a) to the range of decision making covered but also (b) as a strong pointer to the fact that judicial review is included in the preclusion, since, at one time (and even for some time post-*Anisminic*), there was still some importance in the difference between challenges on grounds of excess of jurisdiction and other species of challenge not affecting jurisdiction[25].

34. It is also highly significant that the Supreme Court expressly considered this point in *A v B* and concluded that the two clauses were not the same – s. 67(8) was "*unambiguous*" in contrast to the clause in *Anisminic* (see Lord Brown at §23).

35. **Thirdly** the Appellant's case is that, in order to be effective, the ouster clause needs to expressly confront the fact that a decision made in error of law is "*void*" and a "*nullity*" (see e.g. §48(b), (c), (f)(i) and (ii) of its skeleton argument). On that basis, it is said that the ouster clause is ineffective because it does not refer to a "*purported determination*" as well as a "*determination*" (see §48(c) of the Appellant's skeleton).

[24] It is no answer to that point to highlight the fact that there was no right of appeal from the Foreign Compensation Commission in *Anisminic* – see §48 of the Appellant's skeleton and §54 of Leggatt J's judgment. That does not undermine the importance of the contradistinction between appeals and judicial review in s.67(8) itself, which is a strong pointer to Parliament's intention in the RIPA context. That this was not required in *Anisminic* does not mean that its inclusion in s.67(8) is insignificant.

[25] See e.g. the cases discussed in De Smith's Judicial Review, 7th Edition, at 4-032-4-040.

36. But that ignores important developments in public law which post-date *Anisminic*. The position used to be that the Courts would attempt to draw a distinction between void and voidable errors. In the case of jurisdictional errors, these were considered *ultra vires*, i.e. acts in excess of jurisdiction where the decisions were considered *void ab initio* and incapable of ever having produced a legal effect. In the case of non-jurisdictional errors, if an error was made which was still within jurisdiction (usually the answering of a question of law which the courts considered incorrect), this was said to be voidable i.e. valid until set aside. But the distinction between jurisdictional (void) and non-jurisdictional (voidable) acts gave rise to problems of "*excruciating complexity*" and the Courts became "*increasingly impatient with the distinction*"[26]. In addition the notion that void acts were never of any legal effect was always subject to major qualifications, including where appeals were permitted against ostensibly void acts.

37. As a result, the modern approach in public law attaches no real importance to the distinction between decisions that are void and voidable. In public law there is now a recognised presumption of validity; including a clear recognition that the grant of a remedy in judicial review, creating the Court's desired legal effects, is a separate and necessary part of creating those legal effects. The position is summarised at §4-059 of De Smith:

> "*Decisions are thus presumed lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this: the public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the procedures for judicial review which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time, whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect. So does a decision found to be unlawful but where a remedy is, in the court's discretion, withheld. The language of void and voidable cannot, however accommodate such an effect, as it would insist that a void decision, being void ab initio, is devoid of legal consequences and that a voidable decision is capable of being set aside.*"[27]

38. And see also:

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[26] See De Smith's Judicial Review 7th Edition at 4-054 and 4-058 including the cases cited at footnotes 189-190 including *Hoffmann-La Roche* [1975] AC 295 at 366 per Lord Diplock, *Smith v East Elloe RDC* [1956] AC 736 per Lord Radcliffe at 769 and see also *Anisminic* at 171 per Lord Reed.

[27] See also Lewis "Judicial Remedies in Public Law" at 5-009.

a. Professor Wade, in a passage expressly approved by Lord Carnwarth in *R (New London College) v Home Secretary* [2013] 1 WLR 2358 at §45:

> *"... the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative depending upon the court's willingness to grant relief in any particular situation."*[28].

b. Lord Bingham in *Mclaughlin v His Excellency the Governor of the Caymen Islands* [2007] UKPC 50, [2007] 1 WLR 2839 at §14 and §16:

> *"It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect,* ***at any rate once a court of competent jurisdiction so declares or orders.*** *...*
> *...****Since public law remedies are, for the most part, discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case.***" (emphasis added)

c. Professor Paul Craig:

> *"In administrative law there are rules of locus standi, time limits, and other reasons for refusing a remedy such as acquiescence. It is only if an applicant surmounts these hurdles that a remedy will be given....It is, as Lord Diplock said [in Hoffmann-La Roche] confusing to speak of the terms void or voidable before the validity of an order has been pronounced on by a court of competent jurisdiction."*[29] [30]

39. In asserting that a decision made in error of law by the IPT is a "*nullity*" and merely a "*purported decision*" to which s.67(8) could not attach, the Appellant is seeking to revive the "*void/voidable*" distinction. That amounts, in effect, to a contention that unlawfulness without more operates to deprive a decision of legal effect. But such a principle is seriously at odds with conventional public law principles:

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[28] Wade and Forsyth, Administrative Law (11th Edn) at p251.
[29] Paul Craig 'Administrative Law' 7th Edition 2012 at 24-011 p749
[30] See also the article by John Laws '*Is the High Court the guardian of fundamental constitutional rights?*' Public Law 1993, at page 15 in which he emphasised that the "*doctrine of nullity*" was one which "*I hope will soon be finally discarded by the courts*". He was also of the view that *Anisminic* "*was a case about statutory construction, not the metaphysic of nullity.*"

a. It would substantially undermine the acknowledged existence of the remedial discretion. There would be no point in a Court considering whether it is appropriate to grant a remedy.

b. The mere finding of unlawfulness would achieve the same effect as quashing – thereby removing not merely the question whether a remedy is appropriate but also any question as to the form of remedy (eg a prospective or limited declaration).

c. The presumption of validity would be replaced by a rule that unlawful public law decisions were void.

40. Accordingly, in interpreting s.67(8), the President did not err by failing to adopt this absolutist (and highly controversial) approach. Unlawful public law decisions are not "*void*" and a "*nullity*" and to be treated, without more, as retrospectively without legal effect and it is wholly unrealistic to have expected Parliament to have shaped its language in that way. There need be no reference to "*purported decisions*" in s.67(8) in order for that provision to be effective.

41. **Fourthly**, on the Appellant's case, the words in parenthesis would mean that unhelpful distinctions would be drawn between those categories of case which were and were not excluded from judicial review. At §48(f)(i)-(ii) of its skeleton it is said that the effect of these words is to "*make clear that a lawful decision by the IPT that it had or did not have jurisdiction – is not to be impugnable*", but that those words "*have no effect on the ability of the Courts to review unlawful decisions*". The Appellant's position appears to be that "*jurisdiction*" in this context could, at most, only relate to what Lord Reid in *Anisminic* referred to as "*the narrow and original sense of the tribunal being entitled to enter on to the inquiry in question*", with the result that no other challenges (e.g. on the grounds of error of law) are excluded. But, if that interpretation were right (and as made clear by the President at §39 of his judgment), it would mark a return to a distinction between jurisdictional and non-jurisdictional errors which was rejected, most recently, by the Supreme Court in *Cart*. Baroness Hale was of the view that returning to such "*technicalities of the past*" would be a retrograde step (§40). Similarly, Lord Dyson referred to the distinction as "*artificial and technical*" (§111), citing with approval the editors of De Smith's judicial review 6th Edition (2007) at 4-046:

> *"It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based on foundations of sand. Much of the super-structure had already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply, lawful, whether or not jurisdictionally lawful."*

42. In those circumstances, the straightforward approach is to read s.67(8) as making clear that it matters not whether a challenge is on the grounds of excess of jurisdiction (in the narrow sense) or in a broader sense (i.e. the Court gets the law wrong). Both will be excluded by the provision. That is apparent from the use of the word "*including*" in the words in parentheses i.e. the question is not a binary one. What Parliament has done is to give an (obvious) example of the type of decision which is excluded, but that is only an example. The words Parliament has chosen to use are inconsistent with it having intended to draw difficult distinctions between jurisdictional and non-jurisdictional errors.

43. Moreover, as a matter of Parliamentary logic in this particular context there is no sound basis for putting narrow jurisdictional errors outside the reach of the provision but making determinations (i.e. judgments) within it. On the Appellant's case any arguable "error of law" would be outwith the preclusion. But that ignores the fact that the boundary between fact and law can be difficult and especially so in this particular context where the facts will remain largely (if not exclusively) in closed, as Parliament can be taken to have anticipated when RIPA was enacted. A recent example of that is to be found in the IPT's judgment in the *Liberty/Privacy* complaints which considered the Art. 8 ECHR compatibility of the intelligence sharing and interception regimes (see Annex 1 to this skeleton at §§2-3). As part of that consideration, the IPT considered "*below the waterline*" safeguards when determining whether the regime contained sufficient safeguards against abuse (as part of the Art 8(2) analysis)[31]. As the IPT itself concluded at §47 of its Note for the Divisional Court dated 26 October 2017:

> *"The summary of the IPT's history, statutory functions as well as the manner in which it performs its statutory functions... indicates that there would be particular practical difficulties in a finding by the Court that the IPT was amenable to judicial review."*[32]

[31] As made clear by the IPT at §32 of its Note for the Divisional Court (dated 26 October 2016), in recent cases the IPT has proceeded to give judgment on issues of law not only on the basis of assumed facts but also on the basis of significant pre-hearing disclosure that has been made by the SIAs following an OPEN and CLOSED disclosure process, where the interests of the claimants are advanced in CLOSED by Counsel to the Tribunal.

[32] Further, it is no answer to that to point to the availability of closed material procedures under the Justice and Security Act 2013 ('JSA 2013'). Those statutory provisions were not in existence when RIPA was enacted and

44. This part of the Appellant's case is also fundamentally at odds with its absolutist approach on jurisdictional errors and nullity. In asserting that a reference to a "*purported determination*" is required, the Appellant adopts a broad interpretation of the concept of jurisdictional error. But, when it comes to the words in parenthesis, the Appellant is forced to contend that "*jurisdiction*" must be construed narrowly, otherwise its argument proves too much. The answer lies in the straightforward interpretation of s.67(8) preferred by the President.

45. **Fifthly**, the Commonwealth authorities (from Australia and New Zealand) are of little assistance in this context (see §§48(f)(iii) and 36-41 of the Appellant's skeleton) and the Divisional Court was right not to refer to them:

    a. In Australia the constitutional position is fundamentally different because the written constitution provides for the Supreme Courts to be superintendent over other inferior courts and tribunals in the relevant State - see *Kirk v IRC* [2010] HCA 1 at §4 and §§93-100. That constitutional point is made in the quotation which appears at §38 of the Appellant's skeleton i.e. from §105 of the judgment.
    b. More generally it was expressly stated in *Kirk* (with reference to English principles of the availability of certiorari and prohibition) that the "*constitutional context is too different*" to permit of a transposition to Australia of the principles applied in England[33].

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cannot have been within the contemplation of Parliament when s.67(8) was enacted. In addition there is a mismatch between the IPT's powers and those which the Administrative Court could exercise under the JSA 2013. For example the IPT is under a duty to "*carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services*" (see r.6(1) of the Tribunal Rules). In contrast, the JSA 2013 only applies to closed material which is "*damaging to the interests of national security*" (s.6(11) JSA 2013); any other relevant material which is damaging to the public interest has to be the subject of a PII application with the consequence that, if upheld, the material is excluded from the court's consideration (see, for example, *CF & Mohammed v Security Service & Others* [2014] 1 WLR 1699 at §§52-62 and *Ignaoua v Secretary of State for the Home Department* [2014] EWHC 1382 (Admin)at §32 ). That introduces the prospect that the High Court cannot properly review the decisions reached by the IPT because the closed material relied upon by the IPT would not be available to it. It has particular consequences e.g. in cases involving the IPT's oversight of the police since closed information relevant to the "*prevention or detection of serious crime*" could not be put before the Administrative Court in closed proceedings under the JSA 2013. This disconnect between the two statutory schemes serves to underline the undesirability of re-litigating issues which are considered by the IPT in another forum which does not have its specialist powers and procedures.

[33] see §66, and also §93, §103 & §107, as discussed in De Smith, Judicial Review 7th ed at 4-071.

c. It is also to be noted that the context in *Kirk* was an industrial court of "*limited power*"[34]. There was no indication that it acted in like manner to the Supreme Court (i.e. the equivalent of the High Court here).

d. Similarly, the New Zealand case of *AG v Zaoui* [2005] 1 NZLR 960 (see §§40-41 of the Appellant's skeleton argument) related to a decision of an "*Inspector-General*" i.e. a quasi-executive decision maker and it was not a case about a body with similar standing to the IPT[35].

46. **Finally** the President was right to conclude that it was not helpful to seek to analyse RIPA by reference to e.g. legislative proposals which were never enacted by Parliament (see §32 of his judgment and see §§32-35 and 48(g) of the Appellant's skeleton). "*The context within which those provisions fell to be determined was very different*" (President at §32). For example, as is clear from Clause 108A and Schedule 4 to the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003, the proposal was for the Immigration and Asylum Tribunal - comprised of e.g. advocates of at least 7 years standing (i.e. nothing equivalent to Judges in the High Court) - to be immune from judicial review. There is no proper analogue between those bodies/decision-makers and the IPT and it is notable that there was no reliance on these provisions in Leggatt J's reservations.

**(2) Importance of the appeal provisions in s.67**

47. At §49 of its skeleton argument the Appellant asserts that the President was wrong to conclude that the existence of the possibility of a right of appeal in s.67 of RIPA meant that any presumption that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight was not engaged in this case (see §43).

48. Section 67(9) of RIPA provides that the Secretary of State must, by order, make provision for appeals from the IPT in certain categories of case (not engaged in the present context)

[34] See §107 of the judgment.
[35] And see also the discussion in *Bulk Gas Users Group v Attorney General* [1983] NZLR 129, referred to at §179 of *AG v Zaoui*, at 133-136.

(see §15 of the judgment)[36]. As highlighted by the President at §34 of his judgment, such 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*". Put another way, it is improbable that, in providing this appeal route, Parliament intended merely to open the door to appeals on the facts in those categories of case, in circumstances where (on the Appellant's case) errors of law could already be corrected by means of judicial review. That position is some considerable way away from the wording which Parliament has chosen to use.

49. It is also no answer to point to the decision in *Cart* on the basis that there were relevant appeal provisions relating to SIAC, which did not preclude judicial review (see the Appellant's skeleton at §49(b), citing Leggatt J at §56). The question in *Cart* was whether decisions which were not "*final determinations*" of SIAC (such final determinations being appealable to the Court of Appeal[37]), could be amenable to judicial review e.g. bail decisions by SIAC. Importantly s.1(4) of the SIAC Act was not at the heart of the Defendants' case, since the language used in s.1(4) lacked the clarity of e.g. s.67(8) of RIPA[38]. It was for that reason that the Defendants' primary case in *Cart* rested, not on the language used in s.1(4) of the SIAC Act, but on the basis of SIAC's status as a "*superior court of record*" in s.1(3) of that Act (as recorded at §28 of Laws LJ's judgment in the Divisional Court). The Divisional Court rejected that contention. The jurisdiction could not be removed by statutory implication, or one which amounted, in effect, to a deeming provision (see Laws LJ at §§31-32). That is very different from the present situation where the language of s.67(8) clearly and expressly excludes judicial review challenges of the IPT.

50. In considering this ground of appeal it is also important to be clear about the full extent of the President's reasoning. As is evident from §44 of his judgment he was not simply making the point that the fact that there were routes of appeal against certain IPT

[36] Those provisions have not, to date, been brought into force. However that is not relevant to the construction of RIPA at the time it was enacted. As stated in Bennion on Statutory Interpretation at section 231 "*Nothing that happens after an Act is passed can affect the legislative intention at the time it was enacted*" – p654.

[37] See s.7(1) of the Special Immigration Appeals Commission Act 1997 cited at §8 of the Divisional Court judgment in *Cart* – [2010] 2 WLR 1012.

[38] Section 1(4) states: "*A decision of the commission shall be questioned in legal proceedings only in accordance with – (a) section 7, or section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)*".

decisions made it unlikely that Parliament would have envisaged that its decision-making would be subject to judicial review on a much wider basis. What is also important about s.67(9), when read with 67(10) of RIPA, is that those provisions show that Parliament envisaged that there would be *specific mechanisms* for any appeals from the IPT; mechanisms which are inconsistent with there being a parallel regime for judicial review. In particular s.67(10) makes clear that any order allowing for an appeal may make provision for "*the establishment and membership of a tribunal or body to hear appeals*" (s. 67(10)(a)) and may include provisions corresponding to the Tribunal's specialist procedure rules (as provided for by s.69 of RIPA) in any such appeals (s.67(10)(d) – as cited at §15 of the President's judgment). The clear intention of these provisions is that any oversight of the IPT's decision-making should be by a specialist body, with powers mirroring those available as part of the IPT's specialist regime and that is a powerful indicator against a more general application of judicial review.

51. Finally, as highlighted by the President at §34 of his judgment, if the Appellant is right in its interpretation, the effect would be that, in creating a new right of appeal from the IPT in the Investigatory Powers Act 2016 (see s.242 which inserts a new section 67A into RIPA dealing with appeals from the IPT[39]), Parliament has narrowed the routes of challenge from IPT decisions, rather than broadened them. The new appeal provisions provide for an appeal from the IPT on a point of law, but only in circumstances where the "*second tier appeals criteria*" is satisfied (see *Cart* in the Supreme Court at §52 per Lady Hale and §129 per Lord Dyson) i.e. it is not any error of law which will justify an appeal, but only one falling within the restricted tests set out in s.67A(7) of RIPA[40]. That supports the proposition that Parliament intends the statutory regime to be a complete code (with no room for the application of judicial review) i.e. Parliament sets the limits on the jurisdiction of the IPT and any challenges from it.

**(3) Error of approach regarding status of the IPT**

[39] As set out in full at §34 of the Divisional Court judgment. It is to be noted that s.242 of the 2016 Act, which introduces the new s.67A is not yet in force. The Secretary of State will be making Regulations under s.67A(5) which will specify the criteria to be applied by the Tribunal when considering the relevant appellate court. The IPT Rules also need to be updated to make the appeal route operational. In the light of these necessary steps, it is currently anticipated that this appeal route will be commenced before the end of 2017

[40] i.e. (1) an appeal would raise an important point of principle or practice or (2) there is another compelling reason for granting leave" – see §34 of the President's judgment.

52. At §50 of the Appellant's skeleton it is asserted that 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. But that is not what the President decided. Nowhere in his judgment did he decide that the normal rules on the interpretation of ouster clauses should not apply. On the contrary, as already noted, the President analysed RIPA in accordance with well-established rules of statutory interpretation, including against the background of "*other attempts to oust the jurisdiction of the court*" (see §16) and starting with the decision in *Anisminic*.

53. In §§41-42 the President was highlighting a number of different features of the IPT regime which, as a matter of interpretation, strongly suggested that it was not amenable to judicial review. As he concluded, it is clear from the constitution, jurisdiction and powers of the Tribunal that it is not properly to be regarded as inferior to the High Court. And one of the features which fed into that analysis was the fact that the IPT is tasked with applying the same principles for making its determination as would be applied by a court on an application for judicial review (see s.67(2) and, to same effect, s.67(3) of RIPA). That was a significant factor pointing to the conclusion that Parliament intended the IPT to perform a similar oversight function in relation to activities of the SIAs to that ordinarily performed in relation to the actions of public bodies by the High Court (see §41 of his judgment).

54. The Appellant asserts that there is no principled basis which precludes judicial review of a body which has already applied judicial review principles (see §§50(a)-(b) of the Appellant's skeleton) e.g. where serious procedural irregularities occurred below. But that theoretical possibility does not detract from the fact that this is another useful pointer to the question whether Parliament intended the IPT to be subject to the supervisory jurisdiction of the High Court. As the President noted, the need and the justification for judicial review is "*far less clear*" where the Tribunal is itself exercising powers of judicial review (see §42) and that conclusion was amply supported by the Supreme Court decision in *A v B*, as made clear by the President at §41 of his judgment.

55. As is apparent from the judgment of the President, there are a number of features of the IPT's regime which support that conclusion, including the following factors:

a. Members of the Tribunal must either hold or have held high judicial office, or be a qualified lawyer of at least 7 years' standing[41] and the President of the Tribunal must hold or have held high judicial office[42]. The fact that High Court Judges sit in the IPT is a "*powerful factor*" against the application of judicial review, albeit not conclusive – see Thomas LJ in *R (Woolas) v Parliamentary Election Court* [2012] QB 1 at §33, citing *R v Cripps ex p Muldoon* [1984] QB 68 at 84C-D.

b. Parliament has been specific about the types of determinations which can be made by the Tribunal at the conclusion of its proceedings, recognising the importance of maintaining secrecy in the work of the SIAs. As set out at §17 above, the statutory scheme limits the nature of its determinations, including confining them to a statement that there is "*no determination in favour*" in appropriate circumstances (s. 68(4)). That again points to Parliament's clear intention that the scheme should be a final and conclusive one, since other courts (including the High Court) will not be subject to the same statutory constraints.

c. The IPT's remedial discretion is very broad and arguably goes even further than the High Court's (broad) remedial jurisdiction in judicial review proceedings[43]. In particular the Tribunal can make any order it "*thinks fit*" and has broad powers to quash relevant warrants or authorisations and to award compensation where appropriate.

d. The IPT is not part of Her Majesty's Courts and Tribunal Service. As explained by Sir Andrew Leggatt in his 2001 Report of the Review of Tribunals (§3.11):

> *"There is one exception among citizen and state tribunals. This Tribunal (IPT) is different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other tribunals. It is therefore wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service. So although the chairman [of the Tribunals system] is a Lord Justice of Appeal and would be the senior judge in the Tribunals System, he would not be in a position to take charge of it.*
> *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.*

[41] §1(1) of Sch. 3 to RIPA
[42] §2(2) of Sch. 3 to RIPA
[43] In judicial review proceedings remedies are not as of right, see *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614 at §77, in contrast with e.g. applications for *habeas corpus*.

*Subject to tribunal rules made by the Secretary of State the tribunal is entitled to determine its own procedure. We have accordingly come to the conclusion that this tribunal should continue to stand alone; but there should apply to it such of our other recommendations as are relevant and not inconsistent with the statutory provisions relating to it."*

e. The IPT sits as part of a carefully crafted scheme in order to provide important oversight of the SIAs. Its relationship with the Commissioners, with the Intelligence and Security Committee and with the Prime Minister in certain circumstances (see e.g. s.68(5) RIPA) sets it apart from other Courts or tribunals[44].

56. Finally, the Appellant seeks to rely on the dangers of "local law", with reference to the speech of Lady Hale in *Cart* (and as highlighted in Leggatt J's reservations at §§48-49). As to that:

a. It is important to recognise that Lady Hale's starting point in *Cart* was that Parliament can legislate to exclude judicial review, provided it uses clear words to do so – see her judgment at §37.

b. As explained by the authors of De Smith[45], the rule of law has a number of permutations in the present context. Whilst excess of powers by public bodies should generally be subject to restraint, the sovereignty of Parliament is also of importance and Parliament may permit a public body to be the ultimate interpreter of the law it has to administer.

c. No-one could sensibly suggest that excluding a right of appeal from a species of High Court decision could be open to "local law" objection.

d. The IPT regime was endorsed by the ECtHR in *Kennedy v United Kingdom* (2011) 52 EHRR 4, in which the extensive jurisdiction of the IPT and the considerable restrictions applied by it in order to safeguard secret information, were found to be compatible with Article 6 ECHR. Nothing was said in that case to indicate any Article 6 concern about the exclusivity of its jurisdiction. On the contrary, the ECtHR specifically noted at §77 of its judgment that there was "no appeal from a decision of the IPT". The ECtHR was clear that the IPT provides an important level of scrutiny to surveillance activities in the UK and that that the

[44] It is to be noted that a tribunal's constitutional relationship with Parliament can also be an important factor – see *Woolas* at §§48-53.
[45] See 4-044 7th Edition.

procedures that it operates and that surround it are compatible with Article 6 ECHR – see §167.

e. The danger of "local law" is one which, if it realistically exists, is a policy judgement for Parliament. But the policy intention behind the exclusivity of the IPT is clear – there needs to be a specialist tribunal which has the powers to oversee the work of the SIAs and it is inappropriate for that body to be overseen by bodies without equivalent powers. As Dyson LJ noted in *A v B*[46], it is inherently unlikely that Parliament would have established such elaborate procedures whilst also contemplating that the High Court could review such decisions, without any comparative powers.

f. In this particular specialist context, that danger is significantly mitigated by the IPT being of like standing and authority to the High Court (i.e. sitting with one, and sometimes two, High Court Judges).

g. It is also mitigated by the other systems of oversight which are built into the regime, including by the Commissioners, the ISC and under the RIPA regime itself, in terms of e.g. the warrantry safeguards which must be satisfied for SIA activity to be carried out.

**Leggatt J's "reservations"**

57. It is submitted that the President's reasoning is compelling and should be followed. The following specific, summary submissions are made on the "reservations" expressed by Leggatt J:

a. Leggatt J makes only glancing reference to the particular statutory context in which the IPT operates (see §60 of his judgment). But those features of the statutory scheme lie properly at the heart of the correct analysis.

b. In §§48-52 Leggatt J comes close to suggesting that Parliament could never legislate to exclude the application of judicial review to statutory tribunals, contrary to the established principle that that can be done.

c. At §49 he states that there is a "*principle*" that a statutory tribunal should not be completely cut off from the court system. He refers to §§42-43 of Lady Hale's

[46] In the Court of Appeal at §48.

judgment in *Cart*. But he does not acknowledge her acceptance that Parliament can legislate to oust judicial review, as made clear at §37 and §40 of her judgment. To elevate her concerns about the development of "local law" to a "*principle*" that this cannot occur is incorrectly to analyse her judgment. As set out at §55 above, any concerns about the development of "local law" are met, not least by the specialist constitution and powers of the IPT and its place in a carefully balanced scheme of oversight.

d. At §§54-55 he does not deal with the important differences in the language used in *Anisminic* and in s.67(8) (see §§33-34 above).

e. At §52 and §55 he does not recognise important developments in public law post-dating *Anisminic*, including the principle of legality and the erosion of the void/voidable distinction (see §§36-40 above). On his interpretation of the law a "*determination*" is not valid if made in error of law and cannot be subject to an effective ouster clause (unless perhaps it refers to "*purported determination*" see §52). Further, on his interpretation of s.67(8), the words in parenthesis are meaningless – see his conclusion at §55.

f. As noted at §49 above Leggatt J was wrong to suggest at §56 that s.67(8) was similar to s.1(4) of the SIAC Act addressed in *Cart*. Neither the statutory context, nor the language used in *Cart* was similar to that which arises in the present case.

g. He was also wrong to conclude that the fact that the IPT applies principles of judicial review was irrelevant to the analysis of whether its decisions were amenable to judicial review (see §§52-55 above).

h. Finally, the enactment of s.67A of RIPA as part of the Investigatory Powers Act 2016 does not demonstrate that there is no reason of policy why decisions of the IPT cannot be subject to judicial review. On the contrary, the enactment of such limited rights of appeal from IPT decisions supports the contention that Parliament has not already opened up the IPT's decision-making to broad and unlimited challenge in judicial review proceedings.

**3 April 2017**

**JAMES EADIE QC**

**KATE GRANGE QC**

## Annex 1 - Recent examples of the IPT's operation

1. As explained in the IPT's Report for 2011-2015, there have been considerable changes in the workload and the day to day working of the Tribunal, in part, due to the alleged disclosures made by the former NSA Contractor Edward Snowden[47]. That has prompted a number of high-profile challenges in the IPT brought by NGOs or individuals/companies allegedly affected by the SIAs' activity[48].

2. In the ***Liberty/Privacy***[49] proceedings, the Tribunal sat as a tribunal of five distinguished lawyers, including two High Court Judges. It considered the legality of two regimes referred to as "*the Intelligence Sharing regime*" and "*the section 8(4) RIPA regime*". It held open hearings, initially over 5 full days in July 2014. It considered a very large quantity of evidence and submissions produced by the parties. The Applicants were represented throughout by experienced teams of Leading and Junior Counsel. It considered and applied the relevant Articles of the Convention (Articles 8, 10 and 14) and the Convention jurisprudence relating to them. It also conducted closed hearings. It did so because, unsurprisingly given the context, there were some relevant aspects (relating to the facts concerning the Applicants, the nature of the safeguarding regimes, and the SIA' capabilities) which could not be considered in open without damaging national security. At those hearings, and more generally, the IPT was assisted by Leading Counsel acting as Counsel to the Tribunal. That assisted a thorough and rigorous examination of the relevant matters in closed – including specifically of the safeguards provided by internal arrangements in place to provide additional layers of protection surrounding any interferences with eg Article 8 rights. In its 5 December 2014 judgment [2015] 3 All ER 142, the IPT concluded that the two regimes were lawful and consistent with Articles 8, 10 and 14 ECHR. Thereafter, in a judgment of 6 February 2015, [2015] 3 All ER 212 the IPT considered an outstanding issue, namely whether prior to certain public disclosure the Intelligence Sharing regime was in accordance with the law. It held that it was not, because without such disclosure the internal arrangements were inadequately signposted.

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[47] See the foreword to the report at page 1.

[48] In addition the Tribunal continues to determine more routine complaints. It is to be noted that 47% of the complaints in 2015 were ruled to be "frivolous or vexatious" and dismissed on that basis. See s.67(4) of RIPA which makes clear that the Tribunal shall not be under any duty to consider or determine proceedings if it appears to them that the bringing of the proceedings or the making of the complaint is frivolous or vexatious.

[49] IPT/13/77H, IPT/13/92/CH, IPT/13/168-173/H, IPT/13/194/CH, IPT/13/204/CH.

However, it declared that in light of the disclosure the regime was now in accordance with the law.

3. In a further judgment dated 22 June 2015, the IPT considered whether there had, in fact, been unlawful conduct in relation to any of the claimants' communications under either of the Intelligence Sharing or the s.8(4) regimes. In determining that issue, the IPT considered proportionality both as it arose specifically in relation to the claimants' communications, and as it arose in relation to the s.8(4) regime as a whole (i.e. what the IPT described as "*systemic proportionality*"). The IPT concluded that there had been unlawful conduct in relation to two of the claimants, whose communications had been intercepted and selected for examination under the s.8(4) regime: namely, the Legal Resources Centre and Amnesty International. In each case, the unlawful conduct in question was "*technical*", in that it had caused the claimants no prejudice (so that a declaration constituted just satisfaction). The IPT stated at §18:

> *"The Tribunal is concerned that steps should be taken to ensure that neither of the breaches of procedure referred to in this Determination occurs again. For the avoidance of doubt, the Tribunal makes it clear that it will be making a closed report to the Prime Minister pursuant to s.68(5) of RIPA."*

4. In 2014/2015 the IPT also determined a series of complaints by individuals who alleged that the regime for the interception of legally privileged communications was not compatible with the ECHR – ***Belhaj & others v Security Service & others*** (IPT/13/132-9/H). Those proceedings were commenced in late 2013 and were listed for a determination of preliminary issues in March 2015. During the proceedings, the IPT appointed CTT to assist it in the same manner as occurred in the Liberty proceedings. During the proceedings CTT made submissions to the IPT on disclosure, having seen the closed material produced by the SIAs which was relevant to the preliminary issues. That process led to the SIAs agreeing to disclose aspects of their internal policies dealing with the handling of legally privileged information. In addition, the Tribunal determined an application for interim relief, which resulted in undertakings being provided to the claimants in the proceedings. Those undertakings were designed to protect the legal privilege of the claimants in their communications, if any such communications had been intercepted (see the IPT judgment dated 7 February 2014).

5. In the event, in February 2015, the Respondents conceded that from January 2010, the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material had not been in accordance with the law for the purposes of Article 8(2) of the ECHR and was accordingly unlawful. A declaration in those terms was made by the Tribunal. Following that, the IPT proceeded to consider the specific factual complaints which had been made by the *Belhaj* claimants. That involved an open hearing on the basis of hypothetical assumptions, together with consideration of the factual position in closed session. That resulted in the IPT's further determination of 29 April 2015 in which it, indicated, *inter alia*, that two documents containing legally privileged material relating to the Third Claimant had been held by the Agencies. However the IPT was satisfied that there was no improper use or disclosure of that privileged material in a manner which would contravene Article 6 ECHR. Therefore, in the *Belhaj* proceedings, the IPT gave a determination in favour of one of the claimants and made an order for the destruction of certain records. That outcome could not have been achieved without the IPT being able to consider sensitive material relevant to the factual complaints in closed.

6. In 2015 and 2016 the IPT considered a complaint against the Metropolitan Police by News Group Newspapers and three journalists – ***News Group Newspapers & Others v The Commissioner of Police of the Metropolis*** [2015] UKIPTrib_14_176-H. In those proceedings the IPT considered the lawfulness of four authorisations issued under s.22 of RIPA which gave power to the police to obtain communications data from communications operators. The IPT concluded that one of those authorisations (referred to as the Third Authorisation) did not comply with the requirements of s.22 of RIPA; it was neither necessary nor proportionate to the legitimate aim sought to be achieved and was thereby unlawful (see §83 and §126 of the judgment). That led to a finding in favour of the Fourth Complainant in respect of the Third Authorisation. By a further judgment, dated 4 February 2016, the Tribunal concluded, by reference to its own authorities and those of the European Court of Human Rights, that the remedy of a declaration and a quashing order amounted to due satisfaction, and that it was not necessary to award any compensation.

7. Most recently in October 2016 the IPT handed down its first judgment in the case of ***Privacy International v Secretary of State for Foreign and Commonwealth Affairs and***

***Others*** IPT/15/110/CH in relation to the acquisition, use, retention, disclosure, storage and deletion of Bulk Personal Datasets ("BPDs") and the use of s.94 of the Telecommunications Act 1984 by the Home and Foreign Secretaries to give directions to Public Electronic Communications Networks ("PECNs") to transfer bulk communications data to GCHQ and MI5 ("BCD"). Again the full *inter partes* argument was heard on the basis of agreed or assumed facts[50]. The IPT concluded that collection of bulk communications data by s.94 Telecommunications Act 1984 is lawful domestically; that both the bulk communications data (BCD) and bulk personal data (BPD) regimes are currently lawful under Art 8 ECHR (subject to one point - which will require further submissions (§95). However it held that neither regime was lawful prior to a public avowal in 2015 because there was no public Code or handling arrangements relating to either regime and, in addition, Commissioner oversight for BCD was inadequate (unlike for BPD, which was adequate from 2010 onwards). The proportionality of the BCD and BPD regimes is to be considered at a further hearing in June 2017 (which will also consider EU law issues).

[50] See §18 of the IPT judgment.

**IN COURT OF APPEAL (CIVIL DIVISION)** **C1/2017/0470/A**

**BEFORE FLOYD, SALES AND FLAUX LJJ**

**AND ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**DIVISIONAL COURT (SIR BRIAN LEVESON PQBD AND LEGGATT J)**

**BETWEEN**

**THE QUEEN ON THE APPLICATION OF**

**PRIVACY INTERNATIONAL**

**Appellant**

**AND**

**THE INVESTIGATORY POWERS TRIBUNAL**

**Respondent**

**AND**

**SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (1)**

**GOVERNMENT COMMUNICATIONS HEADQUARTERS (2)**

**Interested Parties**

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## RESPONDENT'S SUPPLEMENTARY NOTE

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1. At the hearing on Thursday 5 October, there was some discussion as to the approach that the Investigatory Powers Tribunal ("the Tribunal") would take to a claim under s.65(2)(c) or (d) of Regulation of Investigatory Powers Act 2000 ("RIPA"). Those sub-sections provide:

> "(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.**" (Emphasis added)

2. Those provisions bear on s. 67 (9) of RIPA which in turn provides:

> "(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).**" (Emphasis added)

3. Sections 65 (c) and (d) of RIPA have not been brought into force (see schedule of commencement provisions from Halsbury's attached). The Tribunal has therefore never had to consider a claim under those provisions.

**JONATHAN GLASSON QC**

Matrix Chambers
Griffin Building
Grays Inn
London WC1R 5LN

9 October 2017

**65 The Tribunal**

The following notes derive from those printed in Halsbury's Statutes Vol 07(2) (2017 reissue), title Communications.

**Commencement**

Sub-ss (1), (2)(a), (b): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (3)(a), (b): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (3)(c): 1 October 2007; ; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (3)(d): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (4): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (5)(a), (b): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (5)(c): 5 January 2004; ; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (5)(d): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (5)(e): 1 October 2007; ; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (5)(f): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-ss (6), (7): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (8)(a): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (8)(b): 5 January 2004; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (8)(c): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (8)(d), (e): 1 October 2007; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (8)(f): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (9): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (10): 1 October 2007; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (11): 2 October 2000; see s 83(2) and the note "Orders under this section" thereto.

Sub-s (2)(c), (d) come into force on a day or days to be appointed by order under s 83(2).

For the latest information, call Halsbury's Statutes on 020 7400 2518 or use Is it in Force? online at www.lexisnexis.com/uk/legal.

**Sub-s (2): The Tribunal**

As to the exercise of the Tribunal's jurisdiction, see s 67; as to appeals from the Tribunal, see s 67A; as to the procedures of the Tribunal, see s 68; and as to the Tribunal's rules, see s 69.

S 17(1) does not apply to any proceedings before the Tribunal; see s 18(1)(c).

For the duty of the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Investigatory Powers Commissioner for Northern Ireland to give assistance to the Tribunal in connection with its investigations and determinations, see ss 57(3), 59(3), 61(3); for the corresponding duty of every Commissioner of Police, see the Police Act 1997, s 107(5B), Vol 35, title Police and Fire and Rescue Services.

Members of the Tribunal are disqualified for membership of the House of Commons and the Northern Ireland Assembly; see the House of Commons Disqualification Act 1975, Sch 1, Pt II, and the Northern Ireland Assembly Disqualification Act 1975, Sch 1, Pt II, Vol 32, title Northern Ireland.

**Sub-s (2): Allocated . . . by order**

As to orders allocating proceedings, see further s 66; and as to the exercise of the Tribunal's jurisdiction, see s 67.

**Sub-s (2): Secretary of State**

See the note to s 1.

**Sub-s (5): Conduct to which Chapter II of Part I applies**

See s 21. Chapter II of Pt I of this Act comprises ss 21-25.

**Sub-s (5): Conduct to which Part II applies**

See s 26. Pt II of this Act comprises ss 26-48 and Sch 1.

**Sub-s (6): National Crime Agency; Commissioners for Her Majesty's Revenue and Customs**

See the notes to s 6.

**Sub-s (8): Act of the Scottish Parliament**

See the note to s 63.

**Sub-s (11): High Court; Crown Court; sheriff**

See the notes to s 18.

**Sub-s (11): Justice of the peace**

See the note to s 23A.

**Application**

See the note to s 57.

**Additional information**

See the Introductory Note(s) to this Act.

**Interception of Communications Act 1985**

That Act is mostly repealed by s 82(2), Sch 5.

**Words and phrases judicially considered**

***"only appropriate tribunal"*** This implies that a person may not have the matter heard in a court; the tribunal holds exclusive jurisdiction; see A v B [2009] UKSC 12, [2010] 1 All ER 1149, [2010] 2 AC 1.

It is clear that Parliament intended that human rights proceedings about the establishing or maintaining of relationships by undercover police officers should only be determined by the tribunal under this section. The proposition that sex is the thing that makes all the difference between a case that is sensitive enough to have to be heard in a special tribunal and a case which is not so sensitive is absurd. The reason why the case needs to be heard there is because it relates to undercover operations that arise out of personal or other relationships; see AJA v Comr of Police for the Metropolis, AKJ v Comr of Police for the Metropolis [2013] EWCA Civ 1342, [2014] 1 All ER 882.

**Orders under this section**

No orders have been made under this section.

As to orders under this Act generally, see s 78.

**Definitions**

"civil proceedings": see s 81(1)

"communication": see s 81(1)

"enactment": see s 81(1)

"Her Majesty's forces": see s 81(1)

"intelligence service": see s 81(1)

"interception of communications in the course of their transmission by means of a postal service": see ss 2(5), 81(1)

"interception of communications in the course of their transmission by means of a telecommunication system": see ss 2(5), 81(1)

"interception warrant": see s 81(1)

"justice of the peace": see s 81(1)

"person": see s 81(1)

"police force": see s 81(1)

"postal service": see ss 2(1), 81(1)

"telecommunication system": see ss 2(1), 81(1)

"telecommunications service": see ss 2(1), 81(1)

"wireless telegraphy": see s 81(1)

## Simon Creighton

**From:** Kate Grange QC <Kate.grangeqc@39essex.com>
**Sent:** 28 June 2018 22:44
**To:** Kate Grange QC
**Subject:** FW: Privacy International v IPT

**From:** Kate Grange QC
**Sent:** 16 October 2017 16:24
**To:** curtis.tait@hmcts.gsi.gov.uk
**Cc:** James Eadie QC <JamesEadie@blackstonechambers.com>; Jo Wallwork <Jo.Wallwork@tsol.gsi.gov.uk>; Tom Cleaver <TomCleaver@blackstonechambers.com>; Ben Jaffey <BenJaffey@blackstonechambers.com>; Jonathan Glasson QC <JonathanGlasson@matrixlaw.co.uk>; Dinah Rose QC <DinahRose@blackstonechambers.com>; Mark Scott <M.Scott@bhattmurphy.co.uk>
**Subject:** RE: Privacy International v IPT

Dear Mr Tait,

Further to the e-mail from Mr Jaffey QC dated 10 October 2017 in which he drew the Court's attention to the decision of the Supreme Court in *Lumba* [2012] 1 AC 245, the Interested Parties wish to make the following short points in reply:

1. The case of *Lumba* was addressing the tort of false imprisonment (which is actionable per se) and must be read in that context.

2. Whilst Lord Dyson refers to the *Anisminic* position at §66 and states that any error of law renders a decision ultra vires and a nullity:

    a. That part of his reasoning does not find support in the speech of Lord Walker (who was in the majority on the main issue whether a tort of false imprisonment had been committed on the particular facts of the case). At §193 Lord Walker concluded that the implications of *Anisminic* were still open to debate and had concerns about extending its principles in the false imprisonment context.

    b. It is to be noted that the majority (including Lord Dyson) recognised that not every breach of public law was sufficient to give rise to a cause of action in false imprisonment – see, in particular, Lord Dyson at §68, Lady Hale at §207, Lord Kerr at §248.

    c. The judgments of Lord Phillips, Lord Rodger and Lord Brown (who dissented on the question whether the tort of false imprisonment had been committed on the facts of the case) drew attention to the post-*Anisminic* case law at §§303-306 and §358, including the recognition that ultra vires acts might still have legal consequences and that concepts of "nullity" and "void" are relative and not absolute. The Interested Parties submit that this analysis is consistent with the case law and academic material cited at §§37-39 of its skeleton argument in this appeal, including the speech of Lord Carnwarth in *New London* [A2/Tab 30/§45] , which post-dates the *Lumba* decision.

I would be grateful if you could forward this email to Lord Justices Floyd, Sales and Flaux.

Kind regards,

Kate Grange QC
Counsel for the Interested Parties

**From:** Ben Jaffey [mailto:BenJaffey@blackstonechambers.com]
**Sent:** 10 October 2017 17:59
**To:** curtis.tait@hmcts.gsi.gov.uk
**Cc:** James Eadie QC <JamesEadie@blackstonechambers.com>; Jo Wallwork <Jo.Wallwork@tsol.gsi.gov.uk>; Tom Cleaver <TomCleaver@blackstonechambers.com>; Jonathan Glasson QC <JonathanGlasson@matrixlaw.co.uk>; Dinah Rose QC <DinahRose@blackstonechambers.com>; Kate Grange QC <Kate.grangeqc@39essex.com>; Mark Scott <M.Scott@bhattmurphy.co.uk>
**Subject:** Re: Privacy International v IPT

Dear Mr Tait,

Further to the hearing of this appeal in the Court of Appeal last week, I am writing to draw the Court's attention to the decision of the Supreme Court in *Lumba*.

Lord Dyson for the majority at paragraphs 66 – 71 reaffirms the *Anisminic* position that any material error of law renders a decision of a public authority a nullity, because it is *ultra vires*, and states that this position is not affected by the fact that judicial review is a discretionary remedy, subject to strict time limits. He expressly describes this as the "*correct and principled approach*" (paragraphs 66, 68). At paragraphs 86 – 87, Lord Dyson rejects an attempt to resurrect the pre-*Anisminic* distinction between jurisdictional and other errors of law.

I attach a copy of the decision. I apologise that it was not drawn to the Court's attention during the course of the appeal.

I would be grateful if you could forward this email to Lord Justices Floyd, Sales and Flaux.

Kind regards,

Ben Jaffey QC
Counsel for the Appellant

**From:** Kate Grange QC <Kate.grangeqc@39essex.com>
**Date:** Friday, 6 October 2017 at 15:16
**To:** "curtis.tait@hmcts.gsi.gov.uk" <curtis.tait@hmcts.gsi.gov.uk>
**Cc:** James Eadie QC <JamesEadie@blackstonechambers.com>, Jo Wallwork <Jo.Wallwork@tsol.gsi.gov.uk>, Ben Jaffey <BenJaffey@blackstonechambers.com>, Tom Cleaver <TomCleaver@blackstonechambers.com>, Jonathan Glasson QC <JonathanGlasson@matrixlaw.co.uk>
**Subject:** Privacy International v IPT

Dear Mr Tait,

Further to the hearing of this matter in the Court of Appeal yesterday, the Interested Parties can confirm that they have no further submissions to make on the effect of *AKJ v Commissioner of the Metropolis* [2014] 1 WLR 285.

In addition and in accordance with the request made by Lord Justice Sales, please find attached electronic copies of the Interested Parties' skeleton arguments – both for this court and in the Divisional Court below.

Please could you forward these to Lord Justice Sales (and the other two Judges if they would like the same) and also confirm safe receipt?

Kind regards,

Kate Grange QC

Counsel for the Interested Parties



Chambers of Alison Foster QC & Neil Block QC, 81 Chancery Lane, London WC2A 1DD

Tel: 020 7832 1111 Fax 020 7353 3978

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In the Supreme Court of the United Kingdom

# Notice of appeal

## (or application for permission to appeal)

On appeal from

COURT OF APPEAL (CIVIL DIVISION)

PRIVACY INTERNATIONAL

V

INVESTIGATORY POWERS TRIBUNAL

Appeal number

Date of filing

| 1 | 9 | / | 0 | 1 | 1 | / | 2 | 0 | 1 | 7 |
|---|---|---|---|---|---|---|---|---|---|---|
| D | D | | M | M | M | | Y | Y | Y | Y |

Appellant's solicitors

BHATT MURPHY LTD

Respondent's solicitors

THE TREASURY SOLICITOR, GOVERNMENT LEGAL DEPARTMENT

# 1. Appellant

Appellant's full name: PRIVACY INTERNATIONAL

Original status:
- [x] Claimant
- [ ] Defendant
- [ ] Petitioner
- [ ] Respondent
- [ ] Pursuer
- [ ] Defender

**Solicitor**

Name: SIMON CREIGHTON

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BHATT MURPHY LTD
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Is the appellant in receipt of public funding/legal aid?
- [ ] Yes
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If Yes, please give the certificate number

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## 2. Respondent

Respondent's full name: INVESTIGATORY POWERS TRIBUNAL

Original status

- ☐ Claimant
- ☑ Defendant
- ☐ Petitioner
- ☐ Respondent
- ☐ Pursuer
- ☐ Defender

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Is the respondent in receipt of public funding/legal aid?

- ☐ Yes
- ☑ No

If Yes please give the certificate number

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**Counsel**

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Email:

## 3. Decision being appealed

Name of Court: COURT OF APPEAL, CIVIL DIVISION

Names of Judges: LORD JUSTICE FLOYD, LORD JUSTICE SALES, LORD JUSTICE FLAUX

Date of order/ interlocutor/decision: 23/11/2017 (D D / M M / Y Y Y Y)

ADDITIONAL SHEET

**Counsel**

Name

Address

Telephone no.

Fax no.

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Postcode

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## 2. Respondents' INTERESTED PARTIES

Respondent's full name: SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS AND GOVERNMENT COMMUNICATIONS HEADQUARTERS

Original status

- ☐ Claimant
- ☐ Defendant
- ☐ Petitioner
- ☐ Respondent
- ☐ Pursuer
- ☐ Defender

& INTERESTED PARTIES

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How would you prefer us to communicate with you?

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- ☑ Email
- ☐ Post
- ☐ Other (please specify)

Is the respondent in receipt of public funding/legal aid?

- ☐ Yes
- ☑ No

If 'Yes' please supply the certificate number

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## 3. Decision being appealed

Name of Court:

Names of Judges:

Date of order/ interlocutor/decision: D D / M M / Y Y Y Y

# 4. Permission to appeal

If you have permission to appeal complete **Part A** or complete **Part B** if you require permission to appeal.

**PART A**

Name of Court granting permission

Date permission granted

D D / M M M / Y Y Y Y

Conditions on which permission granted

**PART B**

☑ The appellant applies to the Supreme Court for permission to appeal.

## 5. Information about the decision being appealed

Please set out

- Narrative of the facts
- Statutory framework
- Chronology of proceedings
- Orders made in the Courts below
- Issues before the Court appealed from
- Treatment of issues by the Court appealed from
- Issues in the appeal

Attached in a separate document.

## 6. Grounds of appeal

Grounds of Appeal are attached in a separate document.

Counsel's name or signature:

DINAH ROSE QC, BEN JAFFEY QC and TOM CLEAVER

## 7. Other information about the appeal

Are you applying for an extension of time?

☐ Yes ☑ No

If Yes, please explain why

What order are you asking the Supreme Court to make?

Order being appealed ☑ set aside ☐ vary

Original order ☑ set aside ☐ restore ☐ vary

**Does the appeal raise issues under the:**

Human Rights Act 1998? ☐ Yes ☑ No

Are you seeking a declaration of incompatibility?

☐ Yes ☑ No

Are you challenging an act of a public authority?

☑ Yes ☐ No

If you have answered Yes to any of the questions above please give details below:

The case concerns whether the ouster clause in the Regulation of Investigatory Powers Act 2000 s.67(8) has the effect of preventing a claim for judicial review being brought against the Investigatory Powers Tribunal if it makes an error of law.

Court's devolution jurisdiction?

☐ Yes ☑ No

If Yes, please give details below:

**Are you asking the Supreme Court to:**

depart from one of its own decisions or from one made by the House of Lords?

☐ Yes ☑ No

If Yes, please give details below:

make a reference to the European Court of Justice of the European Communities?

☐ Yes ☑ No

If Yes, please give details below:

Will you or the respondent request an expedited hearing?

☑ Yes ☐ No

If Yes, please give details below:

The Supreme Court is invited to expedite the application for permission to appeal and, if permission is granted, the appeal.

The underlying issue of law raised in the claim for judicial review (which Lang J held was arguable) is of real and continuing importance. The lawfulness of using section 5 of the Intelligence Services Act 1994 to issue a general (or "thematic") warrant was litigated in the IPT because Sir Mark Waller (then the Intelligence Services Commissioner) raised concerns about the lawfulness of this use of the power in his annual report.

The property interference power in section 5 of ISA 1994 will remain in force after the Investigatory Powers Act 2016 has been implemented. Indeed the 2016 Act widens the power 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. Warrants that Lang J accepted were arguably unlawful no doubt remain in effect today. The lawfulness of such warrants (which are necesssarily granted and given effect in secret) is a significant issue of ongoing importance that ought to be resolved as soon as possible.

## 8. Certificate of Service

Either complete this section or attach a separate certificate

The date on which this form was served on the

1st Respondent 19/012/2017 (D D M M M Y Y Y Y)

INTERESTED PARTIES
2nd Respondent 19/012/2017 (D D M M M Y Y Y Y)

I certify that this document was served on

GOVERNMENT LEGAL DEPARTMENT (ASHLEY NEWBURN; JO WALLWORK)

by

SIMON CREIGHTON, BHATT MURPHY LTD

by the following method

EMAIL

Signature

S. CA

## 9. Other relevant information

Neutral citation of the judgment appealed against e.g. [2009] EWCA Civ 95

2017/EWCACiv/1868

References to Law Report in which any relevant judgment is reported.

Subject matter catchwords for indexing.

INVESTIGATORY POWERS TRIBUNAL - JUDICIAL REVIEW - OUSTER CLAUSES - REGULATION OF INVESTIGATORY POWERS ACT 2000, S 67(8)

**Please return your completed form to:**

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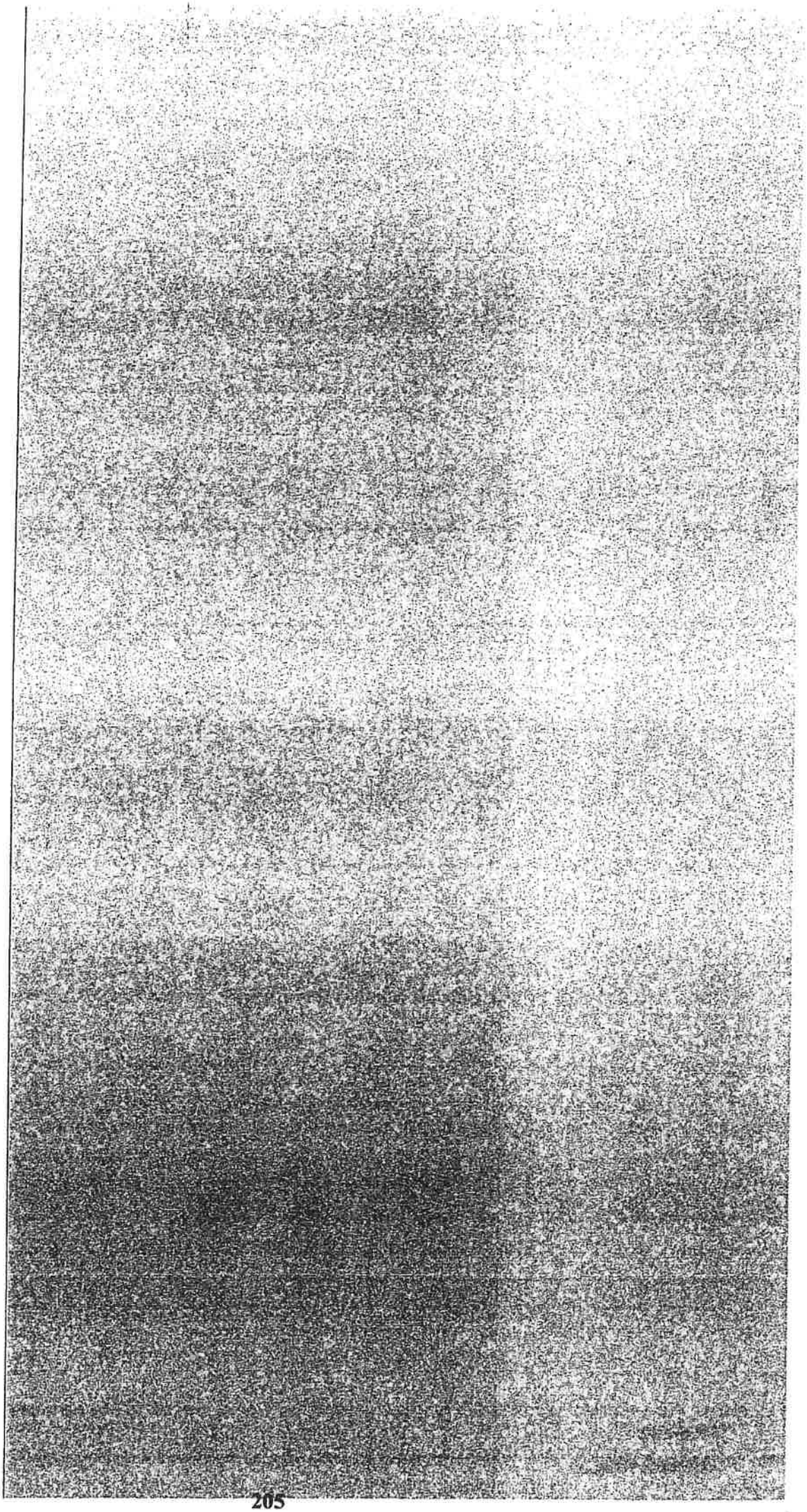

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

C1/2017/0470

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

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## FORM 1: SECTIONS 5 & 6

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## SECTION 5: INFORMATION ABOUT THE DECISION BEING APPEALED

1. On 23 November 2017 the Court of Appeal (Floyd, Sales and Flaux LJJ), held that s.67(8) of the Regulation of Investigatory Powers Act 2000 ("**RIPA 2000**") ousts the High Court's judicial review jurisdiction over the Investigatory Powers Tribunal ("**IPT**").

2. The underlying judicial review proceedings concern the IPT's construction of s.5 of the Intelligence Services Act 1994 ("**ISA 1994**").

3. On 12 February 2016, the IPT gave judgment on issues of law, following an open hearing: *Privacy International v SSFCA* [2016] UKIP Trib 14_85-CH. Amongst other things, the IPT held that s.5 ISA 1994, which empowers the Secretary of State to grant warrants authorising only "*specified*" acts in respect of "*specified*" property, permits the grant of general warrants authorising a broad class of possible activity in respect of a broad class of possible property. In doing so, it held (at §37) that the common law's

abhorrence of general warrants was not a "*useful or permissible aid to construction*" of a power granted to an authority tasked with furthering national security. The IPT also held that its interpretation of the relevant legislation was compatible with Articles 8 and 10 of the European Convention on Human Rights.

4. The Appellant considers these propositions, and the IPT's interpretation of s. 5 ISA 1994, to be wrong in law, and has accordingly sought to invoke the supervisory jurisdiction of the High Court to quash the decision of the IPT.

5. On 9 May 2016, the Appellant commenced judicial review proceedings seeking to challenge the IPT's decision. On 17 June 2016 Lang J granted permission for judicial review, made a Protective Costs Order, and directed the hearing of a preliminary issue as to whether the Court's jurisdiction to entertain the claim was precluded by s.67(8) RIPA 2000.

6. S.67(8) RIPA 2000 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.*" The Secretary of State has not made any order under this section.

7. The Appellant argued that s.67(8) RIPA 2000 did not have the effect of ousting judicial review for error of law.

8. The Divisional Court (Sir Brian Leveson P and Leggatt J) gave judgment on the preliminary issue on 2 February 2017, and dismissed the claim on the ground that s.67(8) RIPA 2000 ousted judicial review. The Court was divided as to the correct result, but Leggatt J (who was minded to conclude that s.67(8) did not preclude judicial review) concurred in the result so as to avoid the need for a re-hearing before a differently-constituted Divisional Court. Permission to appeal was granted.

9. The Court of Appeal heard the appeal on 5 October 2017 and gave judgment on 23 November 2017, dismissing the appeal. The Appellant sought, and was refused, permission to appeal that decision from the Court of Appeal, and now seeks permission to appeal from this Court.

## SECTION 6: GROUNDS OF APPEAL

### A. Summary

10. This proposed appeal raises a question of constitutional law of general public importance, as to the circumstances in which an Act of Parliament is to be interpreted as entirely ousting the High Court's jurisdiction to supervise a tribunal of limited statutory jurisdiction by way of judicial review.

11. The Court of Appeal (Sales LJ, with whom Floyd LJ and Flaux LJ agreed) concluded that s.67(8) RIPA 2000 had the effect of excluding judicial review of any decision of the IPT on any ground.

12. The Appellant submits that in so finding, the Court of Appeal has erred in law. The Court of Appeal's judgment is inconsistent with a long line of authority, culminating in the classic decisions of the House of Lords in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 47 and *O'Reilly v Mackman* [1983] 2 AC 237, and recently reaffirmed by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at paragraph 66, and *R (Evans) v Attorney General* [2015] AC 1787, at paragraphs 54 - 57.

13. If the Court of Appeal's judgment is allowed to stand uncorrected, the IPT is free to act in excess of its jurisdiction, to decline to follow a decision of the Supreme Court as to the interpretation of a statute, to flout the principles of natural justice, or to take decisions tainted by actual bias, and there is no remedy for those whose rights are adversely affected by its unlawful decisions.

14. This is the first time that any statutory provision has been held to have the effect of entirely immunising the decisions of an inferior tribunal of limited jurisdiction from any judicial oversight by the High Court, at least since the development of modern public law. Indeed, the Appellant has not been able to discover any case since the seventeenth century in which a statutory provision, no matter how explicitly drafted, has been found to have such an effect.

15. The reason why the High Court has historically refused to countenance the complete ouster of the prerogative writs or judicial review is that such ouster has very serious implications for the rule of law. It gives a tribunal of limited jurisdiction the power to act as it pleases, without limit or restraint: an outcome inconsistent with the limits on the jurisdiction of such a tribunal which are themselves laid down by Parliament. Moreover, it permits the development of lines of legal authority in such tribunals that may be inconsistent with the law laid down by higher courts. Courts have accordingly strained to interpret any statutory language so as to avoid such an outcome. The importance and breadth of this principle has been stated many times and on the highest authority. It must be taken to have been well-known to Parliament when it enacted RIPA 2000.

16. Notwithstanding this history, and the importance of the principle which underlies it, the Court of Appeal concluded that the wording of s.67(8) is sufficient to make the IPT entirely immune from judicial review: Judgment, §§34-37. In support of that conclusion the Court found that the wording of s. 67(8) was materially different from that considered in *Anisminic*. The Court also relied on the "*very high*" quality of the membership of the IPT (which gave rise to a "*fair inference*" that Parliament had intended it to be immune from review), and on the national security context and the need to ensure that sensitive material is protected from any risk of disclosure in court proceedings.

17. The Appellant submits that in so finding, the Court of Appeal erred in law, as summarised below. In particular:

a) the Court failed to address or give effect to the authorities in which English courts have repeatedly found that even explicitly worded "no certiorari" clauses in statutes do not have the effect of ousting the jurisdiction of the High Court, at least where an inferior court or tribunal has exceeded its jurisdiction;

b) the Court failed properly to apply the decision of the House of Lords in *Anisminic*, in which the House of Lords held that, since any decision of an inferior tribunal tainted by a material error of law (whether or not the error goes to jurisdiction) is a nullity, a statutory provision immunising "decisions" or

"determinations" of such a tribunal from legal challenge is not apt to oust judicial review of *purported* decisions for error of law. That reasoning applies with equal force to the wording of s.67(8) and ought to have led the Court to the same conclusion. The Court was thus wrong to find that there was any material distinction between the statutory language considered in *Anisminic* and that applicable in the present case;

c) the Court was wrong to place any reliance on the 'quality' of the members of the IPT, which is immaterial for the determination of the question in issue; and

d) the Court was wrong to rely on the fact that the IPT deals with sensitive material as a reason for ousting the High Court's jurisdiction. The High Court has ample powers and procedures available to enable it to accommodate such difficulties, and has done so on many occasions. In any event, such a reason could not justify the complete exclusion of the High Court's jurisdiction to supervise the IPT when it acts unlawfully. In the present case, no issue of sensitive material arises, since the challenge which the Appellant seeks to pursue concerns a pure question of law, which was dealt with entirely in open proceedings by the IPT.

18. Further and in the alternative, the Appellant submits that the High Court's power to entertain a claim for judicial review of a decision of an inferior tribunal of limited jurisdiction is a fundamental constitutional principle which cannot be excluded by statute, regardless of the way it is drafted.

## B. The correct approach to ouster clauses

19. It is a constitutional principle applied by the common law for centuries that Parliament is not to be taken to intend to exclude the High Court's supervisory jurisdiction over inferior courts and tribunals (by which is meant courts and tribunals whose jurisdiction is limited by statute), at least in the absence of the clearest possible words to that effect. For example:

a) In *R v Moreley* (1760) 2 Bur 1041, 97 ER 696, at 697, Lord Mansfield considered a statutory provision which prohibited any court from "*intermeddling*" with any

proceedings under the Conventicle Act, and prevented any *"record, warrant or mittimus"* from being *"reversed, avoided or any way impeached"*. Lord Mansfield held that such words did not oust the jurisdiction of the High Court, stating: *"The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled."*

b) In *R v Cheltenham Commissioners* (1841) 1 QB 467, 113 ER 1211, at 1214, Lord Denman CJ considered a statutory provision which expressly prohibited certiorari. Holding that such wording was not sufficient to oust the jurisdiction of the High Court, at least where there had been an excess of jurisdiction, he stated: *"the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute."*

c) In *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] QB 574, Denning LJ surveyed the authorities, and concluded that *"the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal.' It does not mean 'without recourse to certiorari'. It makes the decision final on the facts, but not final on the law."*

20. This principle was reiterated in *Anisminic*. Moreover, in that case the House of Lords rejected the argument that there was any distinction to be drawn between errors of law going to jurisdiction, and any other material error of law. No inferior court or tribunal of limited jurisdiction has jurisdiction to err in law. Any decision or determination of such a tribunal tainted by error of law is thus a nullity. The House of Lords accordingly held that s.4(4) of the Foreign Compensation Act 1950, which stated that a determination of the Commission shall not be called in question in any court of law, did not exclude judicial review of a *purported* determination on grounds of error of law.

21. In short, as Lord Reid said at 170E-F: *"Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination*

*but which is in fact no determination at all."* At 171B-G he provided a non-exhaustive list of errors which would render a determination a nullity, including error of law.

22. As Lord Diplock stated in *O'Reilly v Mackman* at p. 278: *"The breakthrough 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."*

23. *Anisminic* thus makes clear that a statutory provision which states that decisions or determinations shall not be called into question in any court does not have the effect of excluding judicial review on grounds of error of law. This authority must be taken to be known to Parliament when it enacts any statute using similar language.

24. In recent years these principles have been applied to clauses asserted to oust judicial review in the context of a variety of different courts and tribunals of limited jurisdiction. In every case, the clause has been found not to oust judicial review. Examples include the following:

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

b) the Upper Tribunal, which is described by statute as a superior court of record (*R (Cart) v Upper Tribunal* [2012] 1 AC 663);

c) the Special Immigration Appeals Commission, also described by statute as a superior court of record (*U v SIAC* [2011] QB 120);

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).

25. If Parliament may exclude judicial review of a tribunal of limited jurisdiction at all (as to which, see below), the very least that would be required in order to establish a clear Parliamentary intention to prevent the High Court correcting an error of law would be:

a) express provision to the effect that the ouster extends not only to decisions but also to purported decisions of the tribunal of limited jurisdiction. That is necessary to address the central reasoning in *Anisminic*. Without it, there is no reason to think that a different outcome from that in *Anisminic* was intended. Indeed, this is the course that was taken in the Foreign Compensation Act 1969, which followed the decision of the House of Lords in *Anisminic*.

b) express reference to excluding judicial review, rather than court proceedings in general. *Cheltenham Commissioners* and *Ex parte Bradlaugh* show that an express reference to removing certiorari is not sufficient, but it is certainly necessary.

c) express confirmation that even errors of law by the IPT may not be corrected by the High Court. That is a highly significant consequence; it means the IPT is a body which purports to determine a party's legal rights but which may do so otherwise than in accordance with the law. Because of the significance of that outcome, it must be spelt out if the statute is to be construed as authorising it.

26. Without at the very least express statutory wording in relation to those three matters, it would not be clear that Parliament was confronting the interference with the rule of law inherent in such an exclusion of judicial review, and accepting the political cost of doing so, as the principle of legality requires: *R (Simms) v SSHD* [2000] 2 AC 115 per Lord Hoffmann at 131.

## C. The Court of Appeal's reasons

27. In giving judgment, Sales LJ accepted (at §25) that the ouster of judicial review in these circumstances would involve *"a substantial inroad upon usual rule of law standards in this jurisdiction"*. However, he concluded that the effect of the provision in question was nevertheless to oust the courts' jurisdiction. He gave four reasons:

a) that the wording of s.67(8) was sufficiently different from the wording of the provision in issue in Anisminic that it was said to be clear that Parliament had intended to exclude judicial review (§§34-37);

b) that the "*very high*" quality of the membership of the IPT meant it was a "*fair inference*" that Parliament intended its decisions to be immune from review (§38);

c) that such an interpretation of s.67(8) was also supported by the statutory context, namely the creation of "*a tribunal capable of considering claims and complaints against the intelligence services under closed conditions which provided complete assurance that there would not be disclosure of sensitive confidential information about their activities*" (§§42-44); and,

d) that in R (A) v Security Service [2009] UKSC 34, [2010] 2 AC 1, Lord Brown had referred to s.67(8) as "*an ouster (and, indeed, unlike that in Ansiminic, an unambiguous ouster) of any jurisdiction of the courts over the IPT*", and that was "*of powerful persuasive authority*" (§§46-48).

28. It is submitted that each of these reasons is flawed, for the reasons summarised below.

*Issue 1: Construction of s.67(8)*

29. Sales LJ set out at §19 what he understood to be the jurisprudential basis for the courts' approach to ouster clauses, namely the importance to the rule of law of an individual being able to "*get before a court or tribunal to determine a complaint*". That misstates what the rule of law requires in this context.

30. In nearly all of the cases concerning ouster clauses, there was no dispute that the applicant was able to have his complaint determined by a court or tribunal. The issue was whether the High Court, as a court of general and unlimited jurisdiction may correct courts or tribunals of limited jurisdiction as and when they fall into error. As Baroness Hale said in R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663 at [42-43], the rule of law requires that serious questions of law can be "*channelled into the legal system*" so that a specialist tribunal does not become "*in reality the final arbiter of the law*";

it must be possible to correct any errors or distortions so that pockets of *"local law"* inconsistent with the general law do not emerge. Moreover, as Laws LJ noted in Cart in the Divisional Court, the role of the High Court as the authoritative interpreter of statutes is an aspect of parliamentary sovereignty [2011] QB 120 at [37-40]. In the absence of the High Court's power authoritatively to interpret the law and correct legal errors by tribunals of limited jurisdiction, such tribunals may exceed the jurisdiction granted to them by Parliament with impunity. This in itself would be contrary to Parliament's intention in bestowing a limited jurisdiction upon them.

31. In concluding that s.67(8) showed a clear intention by Parliament to immunise the IPT from review even in respect of errors of law, Sales LJ relied on the words in parenthesis: *"including decisions as to whether they have jurisdiction"* (§34).

32. These words were not intended to address the reasoning in Anisminic, and are in any event inadequate to do so:

a) S.65 RIPA 2000 contains complex provisions defining the scope of the IPT's jurisdiction. Numerous factual disputes could arise as to whether a case falls inside or outside those provisions. For example, there could be a dispute about whether a person accused of carrying out surveillance was or was not in fact *"a foreign police or customs officer"* (s.65(5)(ca)), or whether an act complained of did or did not in fact relate to *"the interception of communications in the course of their transmission"* (s.65(5)(b)).

b) The words in parenthesis are concerned with ensuring that decisions by the IPT as to whether it has jurisdiction cannot be challenged on the facts – i.e. that a decision cannot be overturned on the grounds that the jurisdictional facts which gave the IPT power to hear a particular case were not in fact correct.

c) That submission was made by the Appellant in the Court of Appeal (skeleton argument, paragraph 48(f)), but the Court of Appeal did not address it.

d) Further, as is clear from Lord Reid's judgment in Anisminic at 170-171 (quoted above), the core of the reasoning in that case was that a determination which is

vitiated by an error of law is not a determination or a decision at all. S.67(8) RIPA 2000 does not exclude any review of purported determinations or decisions of the IPT, including purported (but erroneous) decisions as to whether they have jurisdiction. It thus contains the same limit on its scope as the provision considered in *Anisminic*, and is insufficient to oust judicial review for the same reason.

e) The outcome of *Anisminic* did not depend on any conclusion that the relevant determination was a determination as to whether or not the Foreign Compensation Commission had jurisdiction. On the contrary, Lord Reid expressly disclaimed any reliance on the concept of jurisdictional error, at p. 171.

*Issue 2: Quality of the IPT's members*

33. Sales LJ held at §38 that his interpretation of s.67(8) was supported by the fact that "*The quality of the membership of the IPT in terms of judicial expertise and independence is very high, as set out in Schedule 3 to RIPA*", making it a "*fair inference*" that "*Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise*". This was a further error of law.

34. The quality of the decision-makers in the tribunal is immaterial to the question before the Court. The relevant fact is that the decision is made by a tribunal of limited statutory jurisdiction. This means that recourse to the High Court is necessary both in order to ensure that there is a single body of law with a single authoritative interpretation, and to ensure that the tribunal whose powers have been limited by Parliament has not acted in excess of those powers, which would itself subvert the intention of Parliament. The 'quality' of the members of the tribunal is nothing to the point. Indeed, it is invidious to suggest that it is only necessary for the High Court to have a supervisory jurisdiction over courts of some undefined 'poorer quality'.

35. The high quality of a tribunal has never been accepted as a basis for an ouster. For example:

a) *Anisminic* concerned a decision of a commission which was presided over by "*an eminent Queen's Counsel*" (Cyril Montgomery White QC), and consisted entirely of lawyers (see [1969] 2 AC 223).

b) In *R (Woolas) v Parliamentary Election Court* [2012] QB 1 the decision subject to challenge was made by two sitting High Court Judges; the ouster clause was still held to be ineffective to prevent judicial review of it by the High Court.

c) SIAC is invariably chaired by a High Court Judge. Judges up to and including Court of Appeal level sit in the Upper Tribunal. Both SIAC and the Upper Tribunal are described by statute as "superior courts of record". Both are nevertheless subject to judicial review (*Cart*).

36. In any event, schedule 3 to RIPA provides that the eligibility criterion for appointment to the IPT is 7 years' professional standing as a lawyer. Although the President must be a current or former holder of high judicial office, there is no requirement that any decision or type of decision be made by the President. It is therefore not a feature of the statutory scheme (unlike some of those considered above) that decisions of the IPT will be made by individuals who hold or have held a senior judicial appointment.

37. Moreover, this reasoning, based on what Sales LJ referred to as a "*fair inference*" as to Parliament's intention to oust judicial review, is itself legally flawed. The case law shows that the High Court will not permit its jurisdiction to be ousted by "*fair inference*". Nothing less than express language of the utmost clarity and specificity will suffice (if, indeed, the total ouster of judicial review is possible at all).

*Issue 3: Risk of disclosure of sensitive material*

38. Sales LJ held at §§42-44 that his interpretation was also supported by the statutory context, namely Parliament's intention "*to set up a tribunal capable of considering claims and complaints against the intelligence services under closed conditions which provided complete assurance that there would not be disclosure of sensitive confidential information about their activities.*"

39. This reasoning constitutes a further error of law. The fact that the IPT considers sensitive confidential material cannot support a conclusion that Parliament intended to oust judicial review in the absence of explicit language of the type identified above. Had Parliament concluded that the sensitivity of the matters dealt with by the IPT required so extraordinary a constitutional measure, it was incumbent on it to say so in crystal clear terms, in accordance with the principle of legality. As in relation to the 'quality' of the decision-maker, Sales LJ has here sought to use the substantial national security caseload of the IPT as the basis for an inference as to the intention of Parliament. Such inferences are impermissible in this context.

40. In any event, the fact that the IPT deals with sensitive material is not a good reason for concluding that Parliament intended to oust judicial review. The High Court is capable of determining the sorts of issues that arise in judicial review proceedings whilst dealing appropriately with sensitive material, and has a variety of powers available to enable it to do so.

41. If a particular issue raised in judicial review proceedings were such that it required consideration of such material, there are mechanisms for ensuring its protection, such as public interest immunity, or (now) a closed material procedure under the Justice and Security Act 2013. In extremis, the Court has the option of considering whether to strike out a claim as untriable. See *Carnduff v Rock* [2001] 1 WLR 1786.

42. Sales LJ pointed out at §8 that the IPT Rules require the IPT to preserve the confidentiality of material even if the public interest favours its disclosure, whereas in the ordinary courts *"there is at least a possibility that the court might order disclosure"*. However, the High Court does not readily disclose material which has any genuine national security sensitivity. In any event, the same point applies to SIAC, but did not prevent the Divisional Court in *U v SIAC* from construing the ouster clause in that case as insufficient to preclude judicial review.

43. This argument is particularly weak in the context of this claim, in which the Claimant seeks to challenge a decision of the IPT on a pure question of law, made following an open hearing, and where no sensitive material is involved. At the most, considerations

relating to sensitive material might go to the exercise by the High Court of its discretion as to what cases to entertain, and what relief to give. They cannot justify the complete ouster of the Court's jurisdiction.

*Issue 4: Lord Brown's comment in R(A)*

44. Finally, Sales LJ relied on the *obiter dictum* of Lord Brown in R (A) v Director of Establishments of the Security Service [2009] UKSC 12, [2010] 2 AC 1: "*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 [...]*" [23].

45. However, not only was this provision not in question in R (A), as Lord Brown notes in the passage above, but it was in fact conceded in that case that s.67(8) was effective to oust judicial review. The concession is clear from the report of argument at p. 23D: "*The claimant has no way of seeing the case he has to meet and there is no possibility of judicial review.*" The point was therefore not argued.

46. Moreover, Lord Brown was a member of the Supreme Court which, 18 months later, decided R (Cart) [2012] 1 AC 663. In that case, Lord Phillips said at [71] that Parliament had not since Anisminic "*purported, as it might have done, expressly to preclude the exercise by the High Court of the power of judicial review*". Lord Brown expressed agreement with the reasoning of Lord Phillips, without qualification.

47. In all these circumstances, the passing comment made by Lord Brown in R (A) carries no significant weight, and Sales LJ erred in law in relying on it.

48. Further, the reliance of the Court of Appeal on the *dictum* of Lord Brown from a case in which the issue was not argued is itself a good reason why permission to appeal to the Supreme Court would be appropriate in this case. This important question requires proper consideration by this Court on the basis of full argument.

**Complete ouster of judicial review is unconstitutional**

49. If necessary, the Appellant will submit that s.67(8) is ineffective to oust judicial review, regardless of its wording, because it would contravene a fundamental constitutional principle for Parliament to legislate so as to wholly exclude the power of the High Court to review decisions of tribunals of limited jurisdiction.

50. In *Ex parte Bradlaugh*, Mellor J held that a provision expressly excluding certiorari could not apply where there was an absence of jurisdiction because *"The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."* That would be a constitutionally unthinkable outcome. In those circumstances, Mellor J and Lord Cockburn CJ held that certiorari should be granted.

51. Similarly, in *R v Cheltenham Commissioners*, Lord Denman CJ held that certiorari was available notwithstanding its express exclusion by statute, holding: *"the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed."*

52. The issue of "no certiorari" clauses was addressed by Parliament in the Tribunals and Inquiries Act 1958, in which Parliament abolished all such clauses. It purported to retain only two "ouster" clauses, both of which have subsequently been held to be ineffective: one was the provision considered in *Anisminic*; the other (as incorporated into a later Act) was considered in *R (Fayed) v SSHD* [1998] 1 WLR 763.

53. Since the 1958 Act and *Anisminic*, Parliament has made no attempt to enact any clear provision excluding judicial review or otherwise conferring on any tribunal or authority the power to act unlawfully. The only such provision that has been proposed, in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2003, provoked enormous Parliamentary and public concern as to its constitutional implications and was not enacted.

54. In the modern era, Laws LJ expressed the view in U v SIAC that Parliament did not have the power to oust judicial review. He explained this as an incident of Parliamentary sovereignty, and not a limit upon it:

> *"38. If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source* [Laws LJ went on to hold that SIAC was not such a source, despite being a superior court of record chaired by a High Court Judge] *cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another."*

It is submitted that the analysis of Laws LJ in this passage is correct.

**Conclusion**

55. For all these reasons, the Appellant invites the Court to grant permission to the Appellant to appeal the decision of the Court of Appeal that s.67(8) of RIPA ousts the jurisdiction of the High Court to hear the Appellant's claim for judicial review of the IPT.

**DINAH ROSE QC**

**BEN JAFFEY QC**

**TOM CLEAVER**

**Bhatt Murphy**

**18 December 2017**

In the Supreme Court of the United Kingdom

# Notice of objection / Acknowledgement

R (on the application of Privacy International)

V

Investigatory Powers Tribunal (Respondent)
& Secretary of State for Foreign and Commonwealth Affairs and Government Communications Headquarters (Second Respondents)

Appeal number: UKSC/2018/0004

Date of filing: 12 / APR / 2018
D D M M M Y Y Y Y

Name of respondent:

Investigatory Powers Tribunal

Respondent's solicitors:

Government Legal Department
DX 123242 Kingsway 6

Name of appellant:

Privacy International

Appellant's solicitors:

Bhatt Murphy
DX 46806 Dalston

## 1. Respondent

Respondent's full name: Investigatory Powers Tribunal

The respondent was served with the

- [ ] application for permission to appeal
- [x] notice of appeal
- [ ] application

On date: 29 / MAR / 2018 (D D / M M / Y Y Y Y)

The respondent intends to ask the Court to:

- [ ] refuse to grant permission to appeal
- [ ] order the appellant to give security for costs if permission to appeal is granted
- [x] dismiss the appeal
- [ ] give the respondent permission to cross-appeal
- [ ] allow the appeal for reasons which are different from, or additional to, those given by the court below
- [ ] Other *(please specify)*

The respondent wishes to receive notice of any hearing date and to be advised of progress. The respondent's details are:

### Solicitor

Name: Miss Ashley Newburn, Government Legal Department

Address: One Kemble Street
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Telephone no: 202 7210 4577

Fax no: 202 7210 3410

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Postcode: WC2B 4TS

Ref: Z1200671/AHN/B4

Email: ashley.newburn@governmentlegal.gov.uk

How would you prefer us to communicate with you?

- [ ] DX
- [x] Email
- [ ] Post
- [ ] Other *(please specify)*

Counsel

Name: Jonathan Glasson QC

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Griffin Building, Gray's Inn
London

Telephone no.: 020 7404 3447
Fax no.: 020 7404 3448
DX no.: 400 Chancery Lane

Postcode: W C 1 R 5 L N

Email: JonathanGlasson@matrixlaw.co.uk

Counsel

Name:

Address:

Telephone no.:
Fax no.:
DX no.:

Postcode:

Email:

## 2. Certificate of Service

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Other: 12/APR/2018 (D D M M M Y Y Y Y) (SECOND RESPONDENTS)

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Simon Creighton (Bhatt Murphy-Appellant); Josephine Wallwork (GLD, 2nd Resp)

by

Ashley Newburn (for the Treasury Solicitor) at GLD

by the following method

Email

Signature: ANewburn (FOR THE TREASURY SOLICITOR)

## 3. Other information about the respondent

☐ The respondent is in receipt of public funding/legal aid

Certificate number

☐ The respondent is applying for public funding/legal aid

## 4. Information about the respondent's case

Set out here the respondent's grounds of appeal, reasons why permission to appeal should be refused or why the appeal should be allowed. Include information to explain what the respondent intends to ask the Court to do.

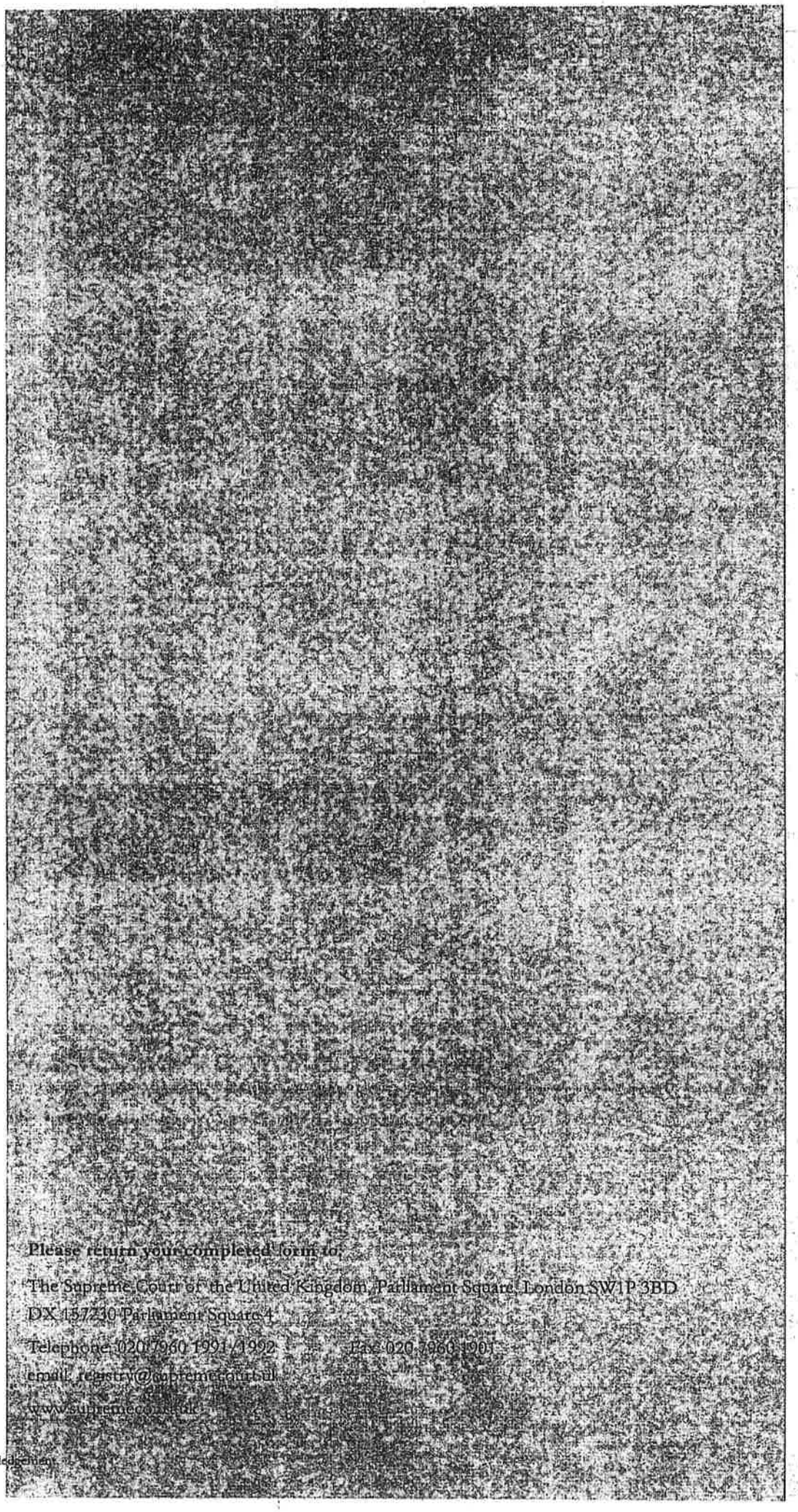
Please see attached the First Respondent's Note.

Is the respondent seeking a declaration of incompatibility?

☐ Yes ☑ No

☐ The respondent will seek to raise issues under the Human Rights Act 1998 *(please give brief details)*

☐ The respondent will ask the court to make a reference to the European Court of Justice *(please give brief details)*



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UKSC 2018/0004

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL, CIVIL DIVISION

**BETWEEN:**

**THE QUEEN on the application of**

**PRIVACY INTERNATIONAL**

Appellant

**-and-**

**THE INVESTIGATORY POWERS TRIBUNAL**

First Respondent

**-and-**

**(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**

**(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS**

Second Respondents

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# FIRST RESPONDENT'S NOTE

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1. This Note has been prepared on behalf of the First Respondent, the Investigatory Powers Tribunal ("the IPT").

**The IPT's role in these proceedings**

2. In the hearings before the Divisional Court and the Court of Appeal the IPT made plain that it would not make any submissions in relation to the impugned judgment concerning s.5 of the Intelligence Services Act 1994. The IPT sought to adopt a non-adversarial role

to assist the court and to that end, it submitted detailed Notes in relation to its statutory functions and the way in which it operates. The IPT will maintain that approach before the Supreme Court.

**The legislative scheme**

3. Section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA") recognises that there may be provision for the Secretary of State to order (or *a fortiori* Parliament to conclude) that there could be an appeal from the IPT. The Investigative Powers Act 2016 provides for such an appeal using the "second tier" appeal test approved by the Supreme Court in *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 in relation to the Upper Tribunal.

4. This new provision means that a complainant as well as a respondent to a complaint can appeal against determinations of the IPT falling within Section 68(4)[1] and 68 (4C)[2] of RIPA – i.e. final determinations as well a final decision on a preliminary issue. No appeal can be brought in relation to a decision concerning a procedural matter.

5. In September 2017 the Secretary of State issued for consultation a new set of procedural rules for the IPT which will give effect to the appeal rights introduced by s.242 of the Investigatory Powers Act 2016 and which also reflects the IPT's developed procedural practice. It is envisaged that the appeal rights and the new rules will come into force later this year.

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[1] Section 68(4) provides: "(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
(a) a statement that they have made a determination in his favour; or
(b) a statement that no determination has been made in his favour."

[2] This provides:

"(4C) Where the Tribunal make any decision which—

(a) is a final decision of a preliminary issue in relation to any proceedings, complaint or reference brought before or made to them, **and**

(b) is neither a determination of a kind mentioned in subsection (4) nor a decision relating to a procedural matter,

they must give notice of that decision to every person who would be entitled to receive notice of the determination under subsection (4) or (4A)." (Emphasis added)

6. The new appeal right means that future decisions of the IPT on points of law (including any challenge to the power under s.5 of the Intelligence Services Act 1994, as amended by s.251 of the Investigatory Powers Act 2016) would be capable of being appealed.

**Conclusion**

7. In the premises it is submitted that the ouster clause in RIPA falls to be construed within the context that in this sensitive area the legislature provided for there to be an appeal and has now done so.

**JONATHAN GLASSON QC**

**Matrix Chambers**

**12 April 2018**

In the Supreme Court of the United Kingdom

# Notice of objection / Acknowledgement

Privacy International

v

Investigatory Powers Tribunal (1st Respondent)

Secretary of State for Foreign and Commonwealth Affairs & Government Communications Headquarters (2nd Respondents)

Appeal number: UKSC/2018/0004

Date of filing: 11/APR/2018 (D D / M M M / Y Y Y Y)

Name of respondent

SofS for Foreign and Commonwealth Affairs & GCHQ

Respondent's solicitors

Government Legal Department (Team N1)

Name of appellant

Privacy International

Appellant's solicitors

Bhatt Murphy Ltd

## 1. Respondent

Respondent's full name: SofS for Foreign and Commonwealth Affairs and GCHQ

The respondent was served with the

- [ ] application for permission to appeal
- [x] notice of appeal
- [ ] application

On date: 29/APR/2018 (D D M M M Y Y Y Y)

The respondent intends to ask the Court to:

- [ ] refuse to grant permission to appeal
- [ ] order the appellant to give security for costs if permission to appeal is granted
- [x] dismiss the appeal
- [ ] give the respondent permission to cross-appeal
- [ ] allow the appeal for reasons which are different from, or additional to, those given by the court below
- [ ] Other *(please specify)*

The respondent wishes to receive notice of any hearing date and to be advised of progress. The respondent's details are:

**Solicitor**

Name: Josephine Wallwork, Government Legal Department, Team N1

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DX no:

Postcode: WC2B 4TS

Ref: Z1613447/JEP/N1

Email: jo.wallwork@governmentlegal.gov.uk

How would you prefer us to communicate with you?

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- [x] Email
- [ ] Post
- [ ] Other *(please specify)*

Counsel

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Telephone no.: 0207 583 1770

Fax no.:

DX no.:

Postcode: EC4Y 9BW

Email: clerks@blackstonechambers.com

Counsel

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81 Chancery Lane
LONDON

Telephone no.: 0207 832 1111

Fax no.:

DX no.:

Postcode: WC2A 1DD

Email: clerks@39essex.com

## 2. Certificate of Service

Either complete this section or attach a separate certificate

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Appellant: 11/APR/2018 (D D M M M Y Y Y Y)

Other: 11/APR/2018 (D D M M M Y Y Y Y)

I certify that this document was served on

Simon Creighton/Bhatt Murphy (Appellant); Ashley Newburn/GLD (1st Respondent)

by

Jo Wallwork, GLD

by the following method

email

Signature

## 3. Other information about the respondent

☐ The respondent is in receipt of public funding/legal aid

Certificate number

☐ The respondent is applying for public funding/legal aid

**Information about the respondent's case**

Set out here the respondent's grounds of appeal, reasons why permission to appeal should be refused or why the appeal should be allowed. Include information to explain what the respondent intends to ask the Court to do.

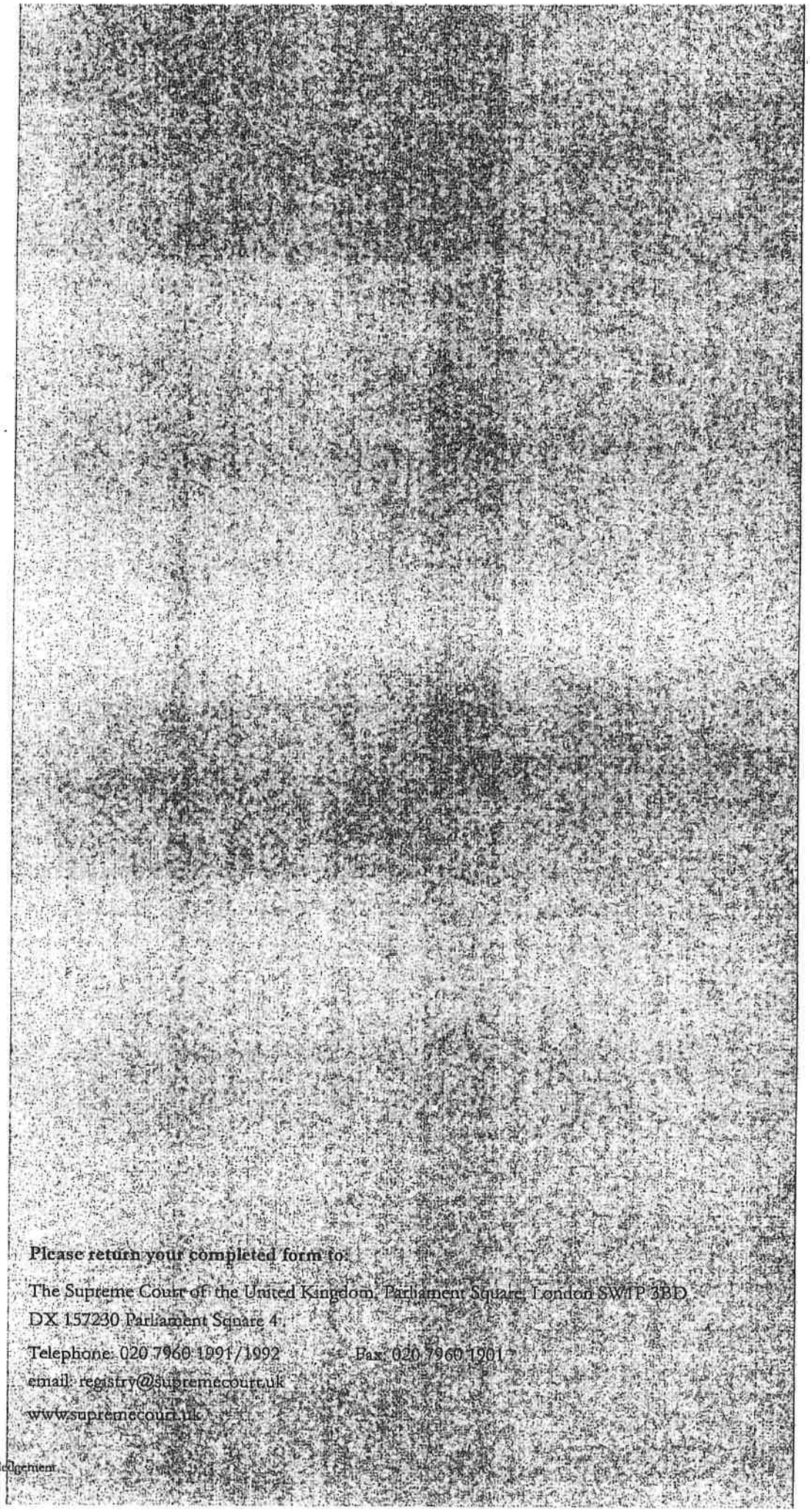
The 2nd Respondent asks the Court to dismiss the appeal for the reasons set out in the attached document (which sets out the arguments that the 2nd Respondent advanced at the permission to appeal stage – in its Notice of Objection).

Is the respondent seeking a declaration of incompatibility?

☐ Yes ☑ No

☐ The respondent will seek to raise issues under the Human Rights Act 1998 *(please give brief details)*

☐ The respondent will ask the court to make a reference to the European Court of Justice *(please give brief details)*



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UKSC2018/0004

(C1/2017/0470)

IN THE SUPREME COURT

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL, CIVIL DIVISION

BETWEEN:

THE QUEEN on the application of

PRIVACY INTERNATIONAL

Appellant

-and-

INVESTIGATORY POWERS TRIBUNAL

1st Respondent

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

2nd Respondents

---

# 2ND RESPONDENTS' REASONS IN SUPPORT OF DISMISSAL OF THE APPEAL

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## Introduction

1. This document restates the substantive points which were made in the Written Objections document which was attached to the Notice of Objection filed by the 2nd Respondents (who were at that point named as Interested Parties).

2. As the Court of Appeal made clear (Sales LJ giving the only judgment, with which Flaux LJ and Floyd LJ agreed), this case turned on a short point of statutory construction in relation to the Regulation of Investigatory Powers Act 2000 (RIPA); the determination of which came down to the clear language used in s.67(8) of RIPA when read in its very particular legislative context[1].

3. Following a detailed and careful review of the statutory scheme governing the IPT and the case law on ouster clauses, the Court of Appeal unanimously concluded that s.67(8) did

[1] See judgment of Sales LJ at §§24 & 26.

oust the jurisdiction of the High Court in any application for judicial review of the IPT. In reaching that conclusion the Court of Appeal endorsed the reasoning of the President of the QBD in the Divisional Court [2017] EWHC 114 (Admin); [2017] 3 All E.R. 1127, which this Court is also invited to read when determining this permission application.

4. Prior to dealing with the Appellant's four criticisms of the judgment of Sales LJ, it is to be noted that the Appellant has not fairly summarised his reasoning in §27 of the Grounds of Appeal. The four points made by the Appellant are a gross oversimplification of his judgment, which began with a careful review of the structure and functions of the IPT and with reference to the detailed judgment of the President of the QBD (at §§5-15). That was integral to Sales LJ's interpretation of s.67(8), as he explained at §12 of the judgment – "*the procedural regime governing the IPT and its differences from that applicable to the ordinary courts at the time RIPA was enacted are significant features of the legislative context in which section 67(8) of RIPA falls to be considered*". The sophistication of that contextual analysis is not fully acknowledged or addressed in the Appellant's Grounds of Appeal.

5. Sales LJ took into account the "*highly restrictive approach*" to the interpretation of ouster clauses which is adopted by the courts; an approach which reflects the fundamental importance of the rule of law, consistent with the application of the principle of legality (see §§19-21 and 25 of the judgment). He emphasised the need for clear and explicit words to oust the jurisdiction of the High Court given the "*strong presumption that in promulgating statutes Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution*" (§21) and particularly in respect of claims regarding the "*lawfulness of action taken by the intelligence services, the police and others*" (§25).

6. But, despite acknowledging the need for considerable caution, he nevertheless concluded that:

    a. The language of s.67(8) was clear and unambiguous. It was materially different from the language considered by the House of Lords in *Anisminic*[2] – the words in

[2] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

parenthesis being of particular importance, which were not present in section 4(4) of the 1950 Act considered in that case (see §§33-41)[3].

b. The Appellant's suggested interpretation, particularly of the words in parenthesis, made no sense and would lead to esoteric distinctions which had "*never been part of public law*" (see §§34-37 and, in particular, §39).

c. It was implicit in the express language used by Parliament that the IPT could be trusted to make sensible decisions on e.g. questions of law and that was "*nothing implausible about this*" given "*the quality of its membership*" (see §38).

d. The linguistic points were strongly supported by the statutory context in which s.67(8) appears. It was clear that Parliament's intention in establishing the IPT and laying down the framework of special procedural rules which govern it, was to set up a Tribunal capable of considering complaints under closed conditions and with complete assurance that there would not be disclosure of sensitive confidential information (§§5-12, 42-45).

e. To construe s.67(8) as ineffective to oust judicial review would subvert Parliament's clear intention and would mean that "*despite the elaborate regime put in place to allow the IPT to determine claims against the intelligence services in a closed procedure while guaranteeing that sensitive information about their activities is not disclosed, judicial review proceedings could be brought in which no such guarantee applied.*" (§43-44).

f. It was significant "*how far the subversion of Parliament's purpose would go*" given that there is no neat, absolute distinction between points of law and points of fact in judicial review proceedings. Any judicial review claims would require the reviewing court to examine all the evidence which was before the decision making body and the rules on Public Interest Immunity (PII) did not afford the same protection as Rule 6(1) of the IPT Rules (§44);

g. The Supreme Court decision in *A v Director of the Security Service* [2010] 2 AC 1 ('*A v B*') was powerful persuasive authority for s.67(8) as an "*unambiguous ouster*"; a conclusion which the Supreme Court reached following a considered and careful review of RIPA and the IPT regime (§§46-48).

---

[3] Section 67(8) reads as follows: "*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.*" By contrast, the ouster clause in *Anisminic* read as follows: "*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.*'

7. As to the four specific Grounds of Appeal (see §§29-48 of the Appellant's Grounds), the 2nd Respondents' position can be summarised as follows:

**Issue 1: Construction of s.67(8)**

8. Sales LJ did not misstate what the rule of law requires in this context (see §§29-30 of the Appellant's Grounds). As is evident from a fair reading of his judgment, in particular at §§19-21, 25 and 38, and from what was said by the President of the QBD at §24 of the Divisional Court judgment (which specifically highlighted the "local law" concern), he fully understood the impact on the rule of law which such clauses might have. His pithy summary of what the rule of law requires at §29 does not reveal a misunderstanding of its implications in this context.

9. Sales LJ also did not err in law when he distinguished s.67(8) from the ouster clause in *Anisminic*, including in his interpretation of the words in parenthesis. The Appellant's suggestion at §32(b) of the Grounds of Appeal that such words are directed to whether jurisdiction can be challenged "on the facts" is wholly untenable and would result in absurd distinctions being drawn between errors about jurisdictional facts and errors of law relevant to jurisdiction. As Sales LJ explained, there is no justification for introducing such esoteric distinctions and Parliament cannot be taken to have intended the same. Had it intended to do so then it can be expected to have used very different language.

10. There is also no merit in the suggestion that Parliament should have used the phrase "purported determination" in s.67(8) if it had wanted to exclude judicial review post-*Anisminic*. As Sales LJ made clear, the words in parenthesis render that unnecessary; the drafter of s.67(8) has expressly averted to the possibility of the IPT making an error of law going to its jurisdiction (see §34) and, in any event, sections 67 and 68 of RIPA, including sections 68(4) and (5) demonstrate that the word "determination" in the Act means a determination in both senses (see §41).

**Issue 2: Quality of the IPT's members**

11. It is an oversimplification of Sales LJ's reasoning to state that the high quality of the IPT was accepted by him as a basis for the ouster clause. On a proper reading of §38 of his judgment it is clear that Sales LJ was considering the composition of the Tribunal as part of checking his conclusions about the clarity of the language and whether it could have

been Parliament's intention to confine decision-making to the IPT. The point he makes is that its membership is entirely consistent with his interpretation of the express language Parliament has used; it is not being advanced as a freestanding reason why judicial review should not lie.

**Issue 3: Risk of disclosure of sensitive material**

12. Sales LJ was entirely justified in highlighting the highly sensitive nature of IPT proceedings and the very specialist procedures it adopts when considering whether it can have been Parliament's intention to permit judicial review without any bespoke rules which would protect sensitive material. That was a point made by Lord Dyson in *A v B* in the Court of Appeal (in a passage quoted by Lord Brown at §14):

> "*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.*" (emphasis added)

13. As is evident from the decision of the Supreme Court in *A v B*, the statutory context is a central aid to construction and particularly important when interpreting the provisions of RIPA, which formed part of a single legislative scheme which was introduced simultaneously with the Human Rights Act 1998 and the Civil Procedure Rules 2000.

14. At the time that RIPA was introduced there was no ability of the High Court to consider closed material in civil proceedings, including in judicial review proceedings. That only came about with the introduction of the Justice and Security Act 2013 and therefore, cannot have been within the contemplation of Parliament when RIPA was enacted. As emphasised by Sales LJ, any applications for PII do not provide the same protection for sensitive material as section 6(1) of the IPT Procedure Rules which contains no balancing of the public interest in disclosure (see §§7-9 and §§42-44 of Sales LJ's judgment).

15. In those circumstances, there was no error of law in the approach which Sales LJ adopted in §§42-44 of the judgment. The Appellant has no answer to his conclusion that there is no neat division between points of law and points of fact in judicial review proceedings and that it would be wholly unsatisfactory for challenges to such sensitive subject matter to be heard by a Court without powers equivalent to those carefully set out in RIPA and the IPT Rules.

**Issue 4: Lord Brown in *A v B***

16. Finally, there can be no criticism of Sales LJ for concluding that the decision of the Supreme Court in *A v B* was "*powerful persuasive authority*" as to the proper interpretation and effect of s.67(8). Although the primary issue in that appeal was whether the IPT had exclusive jurisdiction to hear certain claims under section 7 of the HRA 1998, section 67(8) was one of the provisions of RIPA "*most central to the arguments*" (see Lord Brown at §14) and the Supreme Court unanimously concluded that the provision clearly and unambiguously excluded the application of judicial review to decisions of the IPT. The Supreme Court also concluded that conferring final jurisdiction on the IPT - a body of like standing and authority to the High Court and subject to special procedures apt for its unique task - was "*constitutionally inoffensive*"[4].

17. Accordingly, to the extent that Sales LJ relied on Lord Brown's views in *A v B* about the effectiveness of the ouster in s.67(8) of RIPA, he was entitled to do so. The decision is important both in demonstrating the proper approach to the interpretation of RIPA and as to the clear meaning of the ouster itself.

**Complete ouster unconstitutional**

18. There is no merit in the Appellant's alternative case that a complete ouster of judicial review of an inferior tribunal is "unconstitutional" and can never be sanctioned by Parliament (see §§49-54 of the Appellant's Grounds). There is a clear and well-established line of authority which makes plain that Parliament can, by the use of appropriate language, provide that a tribunal is to be the final arbiter of the law it has to determine and that a decision on a question of law shall be considered final and not subject to challenge either by way of appeal or judicial review. See, in particular:

    a. *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at 583:

        "*I find it very well settled that the remedy by certiorari is never to be taken away by statute except by the most clear and explicit words.*"

    b. *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths at 693H:

[4] *A v B* at §23 per Lord Brown (with whom all the other members of the Supreme Court agreed), citing Laws LJ in the Court of Appeal **[A2/Tab 22]**.

*"The decision in Re A Company [1981] AC 374 shows that Parliament can by the use of appropriate language provide that a decision on a question of law whether taken by a judge or some other form of tribunal shall be considered final and not be subject to challenge either by way of appeal or judicial review."*

c. *Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §40 (with whom Lords Phillips, Hope, Brown, Clarke and Dyson agreed), citing Lord Wilberforce *Anisminic* at 207B where she stated:

> *"it does of course lie within the power of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer: "the position may be reached, as the result of statutory provisions, that even if they make what the courts might regard as decisions wrong in law, these are to stand.""*

19. The decisions referred to at §§50-51 of the Appellant's Grounds of Appeal do not come close to undermining the clear statements set out above, either in terms of the clarity of the proposition expressed or the seniority of the author. In addition, on a proper reading of the judgment of Laws LJ in the Divisional Court in *Cart*[5], he was not saying that Parliament could never oust judicial review (see §54 of the Appellant's Grounds). The point he was addressing in §§28-42 of his judgment was whether judicial review could be ousted by a deeming provision i.e. statutory implication, because of the designation of a court as a Superior Court of Record. As is evident from §31 of his judgment, he expressly accepted that "*the supervisory jurisdiction... can only be ousted by the most clear and express words*" citing the passage from Denning LJ in *Gilmore* set out at paragraph 21(a) above. Accordingly his judgment is not authority for the proposition that it would be unconstitutional for Parliament to oust judicial review by the use of clear and express words.

**April 2018**

**JAMES EADIE QC**

**KATE GRANGE QC**

[5] [2010] 2 WLR 1012

# Judicial Review
## Claim Form

In the High Court of Justice
Administrative Court

**Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.**

| For Court use only | |
|---|---|
| Administrative Court Reference No. | CO/2368/2016 |
| Date filed | 09/05/2016 |


**SECTION 1 Details of the claimant(s) and defendant(s)**

Claimant(s) name and address(es)

name
Privacy International

address
62 Britton Street
London
EC1M 5UY

Telephone no.
020 3422 4321

Fax no.

E-mail address
caroline@privacyinternational.org

Claimant's or claimant's solicitors' address to which documents should be sent.

name
Bhatt Murphy

address
27 Hoxton Square
London
N1 6NN

Telephone no.
020 7729 1115

Fax no.
020 7729 1117

E-mail address
m.scott@bhattmurphy.co.uk

Claimant's Counsel's details

name
Dinah Rose QC, Ben Jaffey and Tom Cleaver

address
Blackstone Chambers
Temple
London
EC4Y 9BW

Telephone no.
020 7583 1770

Fax no.

E-mail address
clerks@blackstonechambers.com

1st Defendant

name
Investigatory Powers Tribunal

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name
Investigatory Powers Tribunal

address
PO Box 33220
London
SW1H 9ZQ

Telephone no.
020 7035 3711

Fax no.

E-mail address
info@ipt-uk.com

2nd Defendant

name

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name

address

Telephone no.

Fax no.

E-mail address

**SECTION 2 Details of other interested parties**

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name
Secretary of State for Foreign and Commonweal

address
c/o Government Legal Department
One Kemble Street
London
WC2B 4TS

Telephone no.
020 7210 3000

Fax no.

E-mail address
james.bowling@governmentlegal.gov.uk

name
Government Communication Headquarters

address
c/o Government Legal Department
One Kemble Street
London
WC2B 4TS

Telephone no.
020 7210 3000

Fax no.

E-mail address
james.bowling@governmentlegal.gov.uk

**SECTION 3 Details of the decision to be judicially reviewed**

Decision:
Judgment in Claims 14/85/CH and 14/120-126/CH

Date of decision:
12 February 2016

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name
Investigatory Powers Tribunal

address
PO Box 33220
London
SW1H 9ZQ

**SECTION 4 Permission to proceed with a claim for judicial review**

I am seeking permission to proceed with my claim for Judicial Review.

| | | |
|---|---|---|
| Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)? | ☐ Yes | ☑ No |
| Are you making any other applications? If Yes, complete Section 8. | ☑ Yes | ☐ No |
| Is the claimant in receipt of a Community Legal Service Fund (CLSF) certificate? | ☐ Yes | ☑ No |
| Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application. | ☑ Yes | ☐ No |
| Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below. | ☐ Yes | ☑ No |

The Defendant does not have the legal power to change the Decision, as it is the final judgment of a statutory tribunal.

| | | |
|---|---|---|
| Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below. | ☑ Yes | ☐ No |

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below. ☑ Yes ☐ No

Article 8

**SECTION 5 Detailed statement of grounds**

☐ set out below ☑ attached

**SECTION 6 Aarhus Convention claim**

I contend that this claim is an Aarhus Convention claim ☐ Yes ☑ No

If Yes, indicate in the following box if you do not wish the costs limits under CPR 45.43 to apply.

If you have indicated that the claim is an Aarhus claim set out the grounds below

**SECTION 7 Details of remedy (including any interim remedy) being sought**

(1) Quashing of the Decision;
(2) Declaratory relief as to the scope of section 5 Intelligence Services Act 1994;
(3) Alternatively, a declaration of incompatibility in respect of that section.
(4) Remission to the Tribunal for reconsideration of its determination.

**SECTION 8 Other applications**

I wish to make an application for:-

A Protective Costs Order limiting the Claimant's adverse costs liability to £15,000, for the reasons set out in the Grounds and attached Witness Statement.
Determination within a certain timescale, for the reasons set out in Form N463.

**SECTION 9 Statement of facts relied on**

Please see attached.

**Statement of Truth**

I believe (The claimant believes) that the facts stated in this claim form are true.

Full name Mark Scott

Name of claimant's solicitor's firm Bhatt Murphy

Signed _____ Position or office held Partner

Claimant ('s solicitor)

(If signing on behalf of firm or company)