SECTION 10 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

☑ Statement of grounds	☐ included	☑ attached
☑ Statement of the facts relied on	☐ included	☑ attached
☐ Application to extend the time limit for filing the claim form	☐ included	☐ attached
☑ Application for directions	☐ included	☑ attached

☑ Any written evidence in support of the claim or application to extend time

☑ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision

☑ Copies of any documents on which the claimant proposes to rely

☐ A copy of the legal aid or CSLF certificate *(if legally represented)*

☑ Copies of any relevant statutory material

☑ A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

☐ a copy of the removal directions and the decision to which the application relates	☐ included	☐ attached
☐ a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case	☐ included	☐ attached
☐ a detailed statement of the grounds	☐ included	☐ attached

Reasons why you have not supplied a document and date when you expect it to be available:-

Signed _____ Claimant ('s Solicitor)_____

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
London

Claim No.

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 COMMUNICATION HEADQUARTERS

Interested Parties

STATEMENT OF FACTS AND GROUNDS

Suggested pre-reading:

Judgment of Investigatory Powers Tribunal, 12 February 2016

Report of the Intelligence Services Commissioner for 2014, Section 4iii (pp17-19)

A. Summary

1. This claim for judicial review raises two important issues of law:

   a) Is the Investigatory Powers Tribunal amenable to judicial review?

   b) Does section 5 of the Intelligence Services Act 1994 permit the issue of a 'thematic' computer hacking warrant authorising acts in respect of an entire class of property or people, or an entire class of such acts?

2. Computer hacking (known within the security and intelligence services as 'CNE', computer network exploitation) is a highly intrusive activity. When deployed against an

individual's computer or telephone, CNE can achieve results that are at least as intrusive as if the targeted individual were to have his house bugged, his home searched, his communications intercepted and a tracking device fitted to his person.

3. The degree of intrusion was summarised by Chief Justice Roberts in *Riley v California* in the Supreme Court of the United States. The basic point is that "*a cell phone search would typically expose to the government far more than the most exhaustive search of a house...*" As Roberts CJ explained:

> "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier..."

4. Further, CNE techniques can be deployed against entire networks of communications infrastructure, giving access to numerous computers at once. The consequence is the ability to gain bulk access to the data of very large numbers of people. CNE may also be used to alter commonly used computer software.

5. The Claimant brought proceedings in the IPT challenging various aspects of the use of CNE by GCHQ as contrary to domestic law and the European Convention on Human Rights. One of the aspects of the challenge was that:

a) Section 5 ISA 1994, the statutory power relied upon as justifying CNE within the British Islands[1], only 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*";

b) The Intelligence Services Commissioner (Sir Mark Waller) had disclosed in his 2014 Report [C/7/278] that the agencies had used 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*"; and,

c) Section 5 was not capable of supporting that broad interpretation.

6. In support of that argument, the Claimant 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 the warrant rather than the person with authority to issue it. The Claimant 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. The Claimant also relied on Article 8 of the European Convention on Human Rights.

7. The Government's position was that warrants of the type which had been held to be unlawful in *Entick*, *Money* and *Wilkes* are permissible under the power which Parliament had enacted in s. 5 ISA 1994.

8. On 1-3 December 2015, the IPT held an open hearing to determine issues of law and gave judgment on 12 February 2016 [C/5]. The IPT accepted the Government's submissions. It held at paragraph 37 [C/5/195]:

> "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

[1] Defined in schedule 1 to the Interpretation Act 1978 as meaning the United Kingdom, the Channel Islands, and the Isle of Man.

principal functions is to further the interests of UK national security, with particular reference to defence and foreign policy."

9. In essence, the IPT decided that the principle of legality, a long-established principle of construction in cases where it is alleged that legislation has interfered with important rights, does not apply to legislation concerning matters of national security. The IPT went as far as to hold that the common law abhorrence of a general warrant was not even a *"permissible aid to construction"* of a statutory power designed to *"further the interests of UK national security"*.

10. It is submitted that that proposition is wrong in law. The principle that *"fundamental rights cannot be overridden by general or ambiguous words [...] because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"* (per Lord Hoffmann in R v SSHD ex parte Simms [2000] 2 AC 115 at 131) is at least as necessary in the context of national security as in any other context. The fact that the powers conferred in ISA 1994 are necessarily exercised in secret makes it all the more important that any grant of a power to interfere with fundamental rights is clear on the face of the statute so that its implications can be assessed. S.5 ISA 1994, in authorising the issue of warrants to take specified action in respect of specified property, should not be construed as permitting broad authorisations of whole classes of activity at once with no real specification at all.

11. That conclusion is also required by Article 8 of the Convention, together with s.3 Human Rights Act 1998. Article 8 requires that any interference with a person's private and family life, home, or correspondence must be *"in accordance with the law"*. The case law makes clear that the power to engage in such interference must be subject to safeguards. If a 'thematic warrant' can ever comply with Article 8[2], strong and effective independent safeguards would be required. At the very least, the case law indicates that the decision as to necessity and proportionality be placed in the hands of an independent judicial authority, or a body which is independent of the executive.[3] In order to properly assess

[2] As to which the Claimants expressly reserve their position, given the substantial pending litigation on related issues before the ECtHR and the CJEU.

[3] See Szabo and Vissy v Hungary (Application No 37138/14, 12 January 2016), §69, and Kennedy v United Kingdom (2011) 52 EHRR 4, §160. Independent judicial authorisation is also required in other circumstances.

necessity and proportionality, the independent decision maker must be able to scrutinise the individualised suspicion that attaches to each target of the interference - the identified individuals, property or set of premises. Otherwise, that discretion would be passed to those implementing the warrant. S.5 ISA 1994 (as interpreted by the IPT) lacks any such safeguards; it permits the issue of warrants by the Secretary of State for a whole class of activity or range of property without judicial or independent approval. Accordingly, if the section had the wide scope which the IPT concluded it did, the United Kingdom would be in breach of Article 8. S.3 HRA 1998, which requires that legislation be read and given effect in a way which is compatible with the Convention rights. S. 5 therefore requires a narrow interpretation in order to avoid such a breach.

B. Facts

12. CNE is a powerful and intrusive surveillance technique. It therefore requires strong safeguards over its use. The key features of CNE are as follows:

a) **First**, the amount of information that can be derived through CNE techniques is large, and the nature of that information can be extremely sensitive. While interception of communications will result in the acquisition of information which an individual has chosen to communicate over a network, CNE may obtain information that a user has chosen not to communicate, for instance:

i) photos or videos stored on the device;

ii) documents;

iii) address book;

iv) location, age, gender, marital status, finances, ethnicity, sexual orientation, education and family; and

v) information collected through activation of the device's microphone or camera without the user's consent.

b) The agencies have the technological capability to acquire all such information from a user's device. David Anderson QC in his report *A Question of Trust* refers to documents disclosed by Edward Snowden which explain several of these capabilities used by GCHQ: *"a programme called NOSEY SMURF which involved implanting malware[4] to activate the microphone on smart phones, DREAMY SMURF, which had the capability to switch on smart phones, TRACKER SMURF which had the capability to provide the location of a target's smart phone with high-precision, and PARANOID SMURF which ensured malware remained hidden."* [C/9/347]

c) **Secondly,** CNE involves an active intrusion into a device or network. CNE techniques are not limited to the acquisition of information; they can be used to amend, add, modify or delete information, or to instruct the device to act or respond differently to commands.

d) **Thirdly,** CNE allows for intrusion on a large scale. As well as specific devices, CNE can be used against networks of computers, or network infrastructure such as websites or internet service providers.

e) CNE can also be used against software, altering widely-used programs. For example, it appears that GCHQ has sought to modify or reverse-engineer commercially available software such as anti-virus software, having sought and apparently obtained a warrant under s.5 ISA 1994 authorising *"all continuing activities which involve interference with copyright or licensed software"* [C/10/350, 351/§7]

f) **Fourthly,** CNE may leave users vulnerable to further damage:

   i) Malware installed on a device can be used by third parties with similarly intrusive effects or worse.

   ii) The process necessary to install the malware without alerting the user or his security software may result in or preserve security vulnerabilities that could be exploited by third parties.

[4] A portmanteau word: malicious software.

iii) If the CNE takes place on a large scale - for instance in relation to network infrastructure, software, or common security protocols - it weakens security for all users, increasing the risk of exploitation by a third party.

C. Legal Framework

13. The detailed legal framework is set out at Annex 2 below. The key provisions are sections 5 and 7 ISA 1994.

14. Section 5 ISA provides:

> "(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 the Security Service, the Intelligence Service or 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, as the case may be,—
>
> (i) the Security Service in carrying out any of its functions under the 1989 Act; or
>
> (ii) the Intelligence Service in carrying out any of its functions under section 1 above; or
>
> (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 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. [...]

(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 1(2)(c) or 3(2)(c) above may not relate to property in the British Islands. [...]"

15. Section 7 ISA provides:

"(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. [...]

(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. [...]"

16. In summary:

a) Section 5 establishes a regime which can authorise interference with property within the British Islands, and which requires the issue of a warrant which must specify the action to be taken and the property in respect of which it will be taken; and,

b) Section 7 establishes a regime which cannot ordinarily authorise interference with property within the British Islands, but which simply requires an "*authorisation*" which may identify the authorised acts by "*description*".

c) Parliament therefore used clear words to grant permission for a class authorisation under section 7. No such words appear in section 5.

D. Thematic warrants

17. Because the activities of the agencies are necessarily conducted in secret, the manner in which section 5 ISA 1994 has been applied and the warrants which have been issued under it are largely secret. The Claimant, the public and the Courts are therefore reliant on the limited information which has been disclosed pursuant to (i) the review and reporting mechanisms which operate in relation to the agencies' activities, and (ii) the unauthorised disclosure of documents by the former NSA contractor Edward Snowden.

18. The issue of construction of section 5 ISA before the Court was accurately identified and properly brought to public attention by Sir Mark Waller, the Intelligence Services Commissioner, in his 2014 Report, published on 25 June 2015 [C/7/278]:

> "• 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".

19. Sir Mark Waller noted that the agencies' interpretation was *"very arguable"*. He accepted *"in practical terms the national security requirement"*, but went on:

> "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. Thus I have made it clear:
>
> - a Secretary of State can only sign the warrant if they are able properly to assess whether it is necessary and proportionate to authorise the activity
> - the necessity and proportionality consideration must not be delegated
> - property warrants under the present legislation should be as narrow as possible; and
> - exceptional circumstances where time constraints would put national security at risk will be more likely to justify 'thematic' warrants.
>
> This has led to one of the agencies withdrawing a thematic property warrant in order to better define the specified property."

20. It is clear from Sir Mark Waller's report that the agencies contend that s.5 ISA 1994 does not require that the property *"be specifically identified in advance"*, and have acted upon their interpretation.

21. The Claimants do not know how many warrants have been issued in reliance upon that interpretation.

22. An indication of the type of warrants which may have been issued in reliance on that interpretation, however, is given by a GCHQ warrant renewal application dated 13 June 2008 which was disclosed by Edward Snowden [C/10/350]. The application says:

a) At paragraph 1: *"GCHQ seek a renewal of warrant GPW/1160 issued under section 5 of the Intelligence Services Act 1994 in respect of interference with computer software in breach of copyright and licensing agreements."*

b) At paragraph 4: GCHQ's activity *"may involve modifying commercially available software [....] These actions, and others necessary to understand how the software works,*

may represent an infringement of copyright. The interference may also be contrary to, or inconsistent with, the provisions of any licensing agreement between GCHQ and the owners of the rights in the software."

c) At paragraph 7: *"The purpose of this warrant is to provide authorisation for all continuing activities which involve interference with copyright or licensed software, but which cannot be said to fall within any other specific authorisation held by GCHQ and which are done without the permission of the owner."*

d) At paragraph 16 (the full text of the section under the heading 'Risk Assessment'): *"The risk of any interference such as that described in paragraph 4 becoming apparent to the owner of copyright or licensing rights is negligible."*

23. It appears from that application that GCHQ sought and had previously been granted a general warrant permitting GCHQ to interfere with any computer software whatsoever, by any author, and in any circumstances.

E. Decision of the IPT

24. The IPT noted the concern that had been expressed by Sir Mark Waller, and at paragraph 35 set out the Claimants' submissions, including:

a) that the common law is hostile to general warrants *"as is well known from the seminal Eighteenth Century cases"*, and that the principle of legality requires that *"fundamental rights cannot be overridden by general or ambiguous words"*;

b) that s.5 was enacted in different terms from s.7, with the former requiring a warrant which specified the acts to be carried out and the property to be interfered with, and the latter containing no such requirement; and,

c) that s.5 requires that it *"be possible to identify the property/equipment at the date of the warrant"*, so that the Secretary of State can consider whether the specific intrusion proposed is justified.

25. At paragraph 36 it set out the Government's submissions, including:

a) that the common law cases were *"at best of marginal relevance"* because they related to limitations on common law powers;

b) that the wording of s.7 was irrelevant to the construction of s.5 because it is a *"different provision [...] and is not in direct contrast with, or alternative to, s.5"*; and,

c) that the requirement of s.5 was *"for the actions and property to be objectively ascertainable"*, regardless of whether they are ascertainable by the Secretary of State at the time he or she decides to issue the warrant: *"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."*

26. The IPT concluded at paragraph 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."

27. At paragraph 38 it held that the test for whether a warrant complied with the requirement of specification was: *"Are the actions and the property sufficiently identified?"*

28. At paragraph 39 it contrasted the terms of s.5 ISA 1994 with the Evidence (Proceedings in Other Jurisdictions) Act 1975 (not cited by or the subject of submissions by either party), which provides that a letter of request must be 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."*

29. At paragraphs 44 and 45 it held:

> "44. Given the width of meaning contained in the words 'action' and 'wireless telegraph' 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 being 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."

30. Finally, at paragraph 47 it held:

"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."

F. Summary of the IPT's conclusions

31. The IPT's analysis permits 'thematic' warrants of exceptional breadth. If the IPT were correct, it would be permissible in principle to issue a section 5 warrant to authorise property interference/CNE in the UK over:

a) "all mobile telephones in the United Kingdom";

b) "all computers used by anyone suspected by officials to be a member of a drug gang";

c) "all copies of Microsoft Windows used by a person in the UK who is suspected of having travelled to Turkey in the last year"; or

d) "all software obtained or used by GCHQ" (as, it appears from the very limited documents available to the Claimant, is the scope of the warrant which GCHQ sought in June 2008).

32. The effect of the IPT's decision is that a warrant can now be granted in 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)

33. On that interpretation, the decision as to whether a particular item of property falls within the description would be wholly for the person executing the warrant. The Secretary of State would retain no control over it, and because the terms of the warrant are secret there could be no real public scrutiny of how it has been applied. Further, evidence obtained through the actions authorised by the warrant would be admissible in Court, even though it had not been obtained with a judicial warrant.

G. Submissions

34. The IPT's expansive interpretation of section 5 ISA is wrong in law.

35. First, it collapses the careful distinction made by Parliament between a section 5 'warrant' and a section 7 'authorisation'.

a) Section 7 permits an authorisation of *"acts of a description"* or *"acts undertaken in the course of an operation so specified"* or acts affecting *"persons of a description so specified"*. It therefore expressly permits the general authorisation of an entire operation, or a class of conduct. No similar wording permitting the authorisation of such wide classes or thematic operations is present in section 5.

b) The fact that Parliament adopted different formulations in relation to parallel powers in the same Act is relevant to how those formulations should be interpreted. If it had been intended that a warrant issued under section 5 could lawfully relate to property of a specified description, rather than specified property, there is no reason why the same formulation (and in particular the reference to "*description*") would not have been used in both section 5 and section 7.

c) The IPT's reliance on the terms of the Evidence (Proceedings in Other Jurisdictions) Act 1975 is misplaced. The fact that a different statute passed 29 years earlier used the words "*particular documents specified*" is far less relevant to the interpretation of s.5 than the fact that ISA 1994 itself adopted two different formulations in respect of two powers, one of which is exercisable by GCHQ within the United Kingdom and one of which is not.

36. Secondly, a 'thematic' warrant is a general warrant. It leaves the decision as to which property is to be interfered with (and what interference is to be carried out) to the person executing the warrant, rather than the person charged with the power to issue it. Hostility towards general warrants is a long-established principle of the common law, and so Parliament is only taken to have granted powers to issue a 'thematic' warrant if clear words are used, thus overriding the limits long respected by the common law on the proper scope of state interference with property within the jurisdiction:

a) Under the principle of legality, Parliament is taken not to have interfered with fundamental rights, unless it uses clear words. See *R v SSHD, ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But 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. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language

> or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

b) Although *Simms* concerned Article 10 of the European Convention on Human Rights, the effect of the principle is not limited to Convention rights, or even to 'rights' at all. As Lord Hobhouse said in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [44]:

> "The context in which Lord Hoffmann was speaking was human rights but the principle of statutory construction is not new and has long been applied in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law."

c) A general warrant allows state officials, with no limits on time or place, to investigate a broad class of undesirable *conduct* (typically sedition in the 1700s, or a threat to national security now), rather than intrude on a specified *suspect* or *place*. In 1644, Coke condemned general warrants, as did Sir Matthew Hale in 1736. Hale explained that a "*general warrant to search in all suspected places is not good*" and "*not justifiable*" because it gave such discretion to mere Crown servants "*to be in effect the judge*" (History of the Pleas of the Crown, p. 150). Blackstone agreed, citing *Money v Leach* ("*a general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's uncertainty, for it is the duty of the magistrate and ought not to be left to the officer, to judge the ground of suspicion...*" (*Commentaries* Book IV, p. 288)).

d) Most of the leading common law property interference cases concern general warrants. The context was very similar to that of the present case. Often, it was argued that (to use modern language) there was an urgent threat to national security which required urgent action. In *Entick v Carrington*, it was argued of the seditious libel to which the warrant related that "*there can hardly be a greater offence against the State, except actual treason*". It may have been necessary and

proportionate to issue a warrant covering an entire operation rather than specified property. But the common law did not accede:

i) In *Huckle v Money* (1763) 2 Wilson 205, 95 ER 768 Lord Pratt CJ noted that: *"To enter a man's house by virtue of a nameless* [i.e. without specifying a named subject] *warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject"*. □

ii) In *Wilkes v Wood* (1763) Lofft 1, 98 ER 489 the Lord Chief Justice said: *"The defendants claimed a right, under precedents, to force persons houses, break open escrutores*[5]*, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."*

e) In the absence of clear and express words, Parliament has not departed from the traditional limits on search and seizure within the UK, recognised as basic tenets of the common law in numerous celebrated cases and distinguished commentaries. The proper limits of a warrant are therefore those long recognised by the common law.[6]

f) Examples of the relevant limits are set out in the table at **Annex 1**. There is nothing objectionable in a warrant that defines its target by reference to a specified person or premises, rather than the specific items of property

[5] In the modern world, escrutores have been replaced by computers and smartphones.

[6] The prohibition on general warrants was also incorporated into the Fourth Amendment to the US constitution ratified in 1792 (*"no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"*). This was the response to the wide use of writs of assistance, the standard form of general warrants in colonial America. Aware of the dangers of general warrants, the Virginia Declaration of 1776 also expressly forbade general warrants as *"grievous and oppressive"*. The Massachusetts constitution of 1780 followed – requiring *"special designation of the persons or objects of search, arrest or seizure"*.

themselves. But legislation should not readily be construed as permitting a covert general warrant within the UK, in the absence of clear words.

g) Finally, if section 5 is ambiguous, reference to Hansard assists:

i) Sections 5(1) and 5(2) ISA are based on sections 3(1) and 3(2) of the Security Service Act 1989, which permitted 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"*. In promoting the Security Service Bill, John Patten MP, the Minister of State for Home Affairs, explained to Parliament that a warrant issued under this power could only authorise *"action in respect of a named property, and both the action and the name of the property must be on the warrant"* (HC Deb 17 January 1989 vol 145, col 269, underlining added).

ii) Equally, the Claimants have found nothing in the Parliamentary debates leading to the passing of the ISA to suggest that Parliament contemplated that a section 5 warrant could authorise interference with a class of property, specified by a broad description, as opposed to a specified item of property.

37. As set out above, the IPT's reasoning consisted of essentially two elements:

a) First, at paragraph 37, it rejected the relevance of the common law cases concerning warrants, holding: *"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."*

b) Second, at paragraph 39, it held that *"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 simply one of sufficiency of identification."*

38. As to the first proposition:

a) The purpose of the principle of legality is to ensure that important rights are not abrogated by a statute whose *"full implications [...] may have passed unnoticed in the democratic process"* (per Lord Hoffmann in Simms).

b) There is no good reason why that principle should cease to apply simply because the context of the statute is national security. In Ahmed v HM Treasury [2010] 2 AC 534, a case concerning the freezing of assets belonging to individuals reasonably suspected of involvement in terrorism, the principle was applied with full force:

i) In the Court of Appeal the Treasury made submissions concerning the effect of general or ambiguous words in the United Nations Act 1946, and stressed *"the preventative nature of the regime introduced by the Security Council and the importance of avoiding terrorism"*; Sir Anthony Clarke held at [48]: *"For my part, I would not accept those submissions. I can see that the widest possible power might be desirable from the Government's point of view. I can also see that the public might take the same view. However, the principles which I have just stated are of fundamental importance."*

ii) The Supreme Court agreed. For example, Lord Hope expressly held at [75] that any interference with property required clear legislative words, citing the general warrant cases: *"the right to peaceful enjoyment of his property, which could only be interfered with by clear legislative words*: Entick v Carrington (1765) 19 State Tr 1029 , 1066, *per Lord Camden CJ... these rights are embraced by the principle of legality, which lies at the heart of the relationship between Parliament and the citizen. Fundamental rights may not be overridden by general words. This can only be done by express language or by necessary implication"*. Arguments that national security cases should be treated differently were firmly rejected [79-80], noting the *"dangers that lie in the uncontrolled power of the executive"*.

39. As to the second proposition:

a) S.5 ISA 1994 requires that the action and the property be "*specified*" in the warrant. Set against the background of the common law restrictions on powers of search and seizure, that clearly means that the person issuing the warrant must decide which specific property is to be the subject of the interference and confine the warrant to that property.

b) That is reinforced by the fact that s.7 contains no such requirements, instead contemplating that an 'authorisation' may be given in respect of "*acts of a description specified in the authorisation*" (emphasis added). S.5 does not provide that a warrant may be issued in respect of 'property of a description specified in the warrant'; it requires that the property be specified.

c) The IPT ignored the comparison between s.5 and s.7 ISA 1994 and instead relied on an unhelpful analogy with s.5 ISA 1994 and the Evidence (Proceedings in Other Jurisdictions) Act 1975, concluding that the absence of the word "*particular*" in s.5 ISA 1994 means that the requirement to specify property is simply a requirement to give a description.

d) That provision is not a useful aid to the construction of s.5, and in any event it does not outweigh the conclusion which is compelled by (i) the principle of legality, (ii) the importance to the common law that search and seizure powers be tightly circumscribed, (iii) the clarity of the words of s.5, and (iv) the fact that s.5 does not contain the much more general formulation adopted in s.7.

Article 8 ECHR

40. The interpretation of s.5 ISA 1994 for which the Claimant contends is also required by Article 8 ECHR, under which Member States must maintain certain minimum safeguards in relation to intrusive powers of surveillance.

41. The principle of legality applies to Convention rights as well as fundamental common law rights; as noted above, *Simms* concerned Article 10 ECHR. Further, s.3 HRA 1998 requires: "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*"

42. Article 8 ECHR imposes significant safeguards which Member States must implement in relation to powers of surveillance. For example, in *Weber & Saravia v Germany* (2008) 46 EHRR SE5, the ECtHR recognised six "*minimum safeguards*" which "*should be set out in statute law*" in order for a secret surveillance power to be compliant (§95). Moreover, in *Szabo & Vissy v Hungary* (Application 37128/14, 12 January 2016), the ECtHR indicated that "*The guarantees required by the extant Convention case-law on interception need to be enhanced*" in view of the impact of "*cutting-edge technologies*" on the scale and effect of such interception.

43. In particular, Article 8 ECHR does not permit the issue of a warrant authorising modern forms of intrusive electronic surveillance without prior authorisation by a court or other authority which is structurally and functionally independent of the authority seeking access. Moreover, that independent authority must be presented with evidence of individualised suspicion in order to be able to assess the necessity and proportionality of the interference proposed.

a) In *Weber* (above), the relevant power could only be exercised with prior authorisation, or in urgent cases *ex post facto* approval, from an independent commission: see §115.

b) In *Telegraaf Media* (Application No 39315/06, 22 November 2012), an interception of journalists' communications was held to violate Articles 8 and 10 ECHR because, although it was authorised by a Minister, it was done "*without prior review by an independent body with the power to prevent or terminate it*" (§100).

c) In *Szabo* (above), the ECtHR made clear at [77] that "*supervision by a politically responsible member of the executive, such as the Minister of Justice, does not provide the necessary guarantees*". Further, an independent authorising authority must be presented "*with a sufficient factual basis for the application of secret intelligence gathering measures which would enable the evaluation of the necessity of the proposed measure – and this on the basis of an individualised suspicion regarding the target person*" [71]. Without such evidence of individualised suspicion, to be assessed by an independent authority, the ECtHR concluded at [71] that an "*appropriate*

proportionality test" could not be carried out. It noted at [69] that the earlier case of Kennedy v United Kingdom (2011) 52 EHRR 4, in which the ECtHR had held that a regime of interception warrants was compatible with Article 8, had concerned a tightly circumscribed power - noted by the ECtHR in Kennedy at [160] as requiring the identification of one specific person or set of premises as the subject of the warrant - and was therefore not applicable where the power could potentially *"be taken to enable so-called strategic, large-scale interception"*.

d) The case law of the CJEU in relation to Articles 7 and 8 of the EU Charter (which are analogous to Article 8 ECHR) similarly makes clear that any interference with personal data must be accompanied by certain minimum safeguards: see Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources [2015] QB 127 at [54-55] and Schrems v Data Protection Commissioner [2016] 2 WLR 873 at [91]. In particular, in Digital Rights Ireland, the CJEU held that Directive 2006/24 was invalid on grounds including (at [62]): *"Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions."*

44. If the power in s.5 ISA 1994 were as broad as the IPT has held, it would allow broad CNE operations to be authorised by the Secretary of State, in secret, with no judicial or independent authorisation either before or after the fact. That would be incompatible with Article 8 ECHR.

45. Further, if (as the IPT concluded) s.5 ISA 1994 permitted the Secretary of State to issue warrants leaving any discretion or matter of subjective judgment to the person executing the warrant, an intrusive act by that individual would not in substance have been authorised even by the Secretary of State, let alone by a judicial or independent body. That outcome is incompatible with Article 8 ECHR.

46. Nor is there any adequate *ex post* judicial supervision: the Intelligence Services Commissioner has no power to refer any warrant or excessive use of section 5 to the IPT, nor any power to disclose errors or misuse to the victim.

47. Accordingly, s.5 ISA 1994 must be construed as not permitting the issue of warrants of the type set out in the second part of Annex 1.

48. Alternatively, if the Court concludes that the statute cannot be read consistently with the requirements of Article 8, the Claimant seeks a declaration of incompatibility.

49. The requirement for prior judicial or independent authorisation was not argued in the IPT, because the IPT had held in a previous case (*Liberty and Privacy International v GCHQ* [2015] HRLR 2) that Article 8 did not require such authorisation. However, (i) the Claimant expressly reserved its position in the present proceedings as to the correctness of that decision (skeleton argument, footnote 8), and indeed is challenging it before the ECtHR, and (ii) in any event, the decision in *Szabo* (delivered in January 2016) makes clear that such authorisation is required.

H. 'Ouster clause'

50. Section 67(8) of RIPA 2000 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."

51. The Claimant anticipates that the Defendant or the Interested Parties may contend that the effect of s.67(8) is to oust the Court's jurisdiction to hear this claim, on the basis that the IPT is not amenable to judicial review.

This is the first case in which the Administrative Court has been invited to hear argument as to the effect of section 67(8). In *A v B* [2009] EWCA Civ 24 the Court of Appeal considered whether the Tribunal had exclusive jurisdiction over a claim by a former member of the Security Service who wished to publish his memoirs.

a) Laws LJ commented at [22] that there was nothing constitutionally improper about a supervisory jurisdiction over the Security Services being exercised by a specialist tribunal, rather than the Courts. This is entirely correct, so far as it goes. But Laws LJ did not consider whether an error of law *by the Tribunal* could be corrected by way of judicial review. Laws LJ did not cite or consider the effect of section 67(8).

b) In the Supreme Court, Lord Brown (for the Court) adopted Laws LJ's analysis. He also commented, *obiter*, that section 67(8) was an "*unambiguous ouster*", but this appears to have been based on a concession by *A*. Lord Brown also noted that the Court had heard no argument on the point: "*...but that is not the provision in question here...*"

52. Section 67(8) does not oust the supervisory jurisdiction of the High Court to hear a claim for judicial review of a purported decision of the IPT which is in error of law. It is well established that a decision in error of law is an act in excess of jurisdiction, and is therefore void. Such a purported 'decision' can therefore be challenged by way of judicial review. An 'ouster clause' does not prevent this. See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and de Smith's *Judicial Review*, 7th Ed. at para. 4-031.

53. In *Anisminic*, the 'ouster clause' was almost identical to section 67(8) of RIPA 2000. The only difference between the *Anisminic* 'ouster clause' and the RIPA version is the addition of the words "*(including decisions as to whether they have jurisdiction)*".

54. These additional words make no difference here. If the additional words in parentheses mean anything at all, they only seek to oust the supervisory jurisdiction of the Administrative Court in a case where the Tribunal has to decide whether it has jurisdiction to hear a particular case. There is no dispute that the Tribunal had jurisdiction to decide the issues set out above. The Tribunal was not making a decision in this case as to "*whether they have jurisdiction*", but instead making an erroneous and thus void 'decision' on a question of law. Like the 'ouster clause' in *Anisminic*, section 67(8) of RIPA only prohibits judicial review of an actual decision. It does not deal with a

case where, because the Tribunal acted unlawfully, on a proper analysis there is no valid decision at all.

55. In any event, as a matter of constitutional principle, an attempt to oust the jurisdiction of the High Court in favour of an inferior tribunal will fail. The High Court is the only English and Welsh court with unlimited original jurisdiction. As a basic constitutional principle, its jurisdiction cannot be abrogated: *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

56. The reasons why common law courts approach ouster clauses with such concern are well understood. The risk is that "*a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned*". The basic principle is therefore that a "*tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction*". See Jaffe *Judicial Review: Constitutional and Jurisdictional Fact* (1957) 70 *Harvard Law Review* 953 cited with approval by the High Court of Australia in *Kirk v IRC* [2010] HCA 1 at [64], dismissing an attempt to rely on an ouster clause far wider than section 67(8).

57. The present case is a good example of those concerns. The Tribunal has jurisdiction over claims against the intelligence and security services. It has rejected a principle of fundamental constitutional importance and general application concerning the interpretation of Acts of Parliament 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 sphere in which the Tribunal operates, and it has produced a clear error of law which the courts ought to correct.

I. Protective Costs Order

58. Finally, the Claimant seeks a Protective Costs Order on the grounds that the litigation raises issues of general public importance, and the Claimant will be unable to proceed

with the claim unless it is so protected. See the witness statement of Barry Kernon, the Claimant's Treasurer, at [B/1].

59. Proceedings before the IPT are conducted without the risk of costs following the event of an adverse determination. 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 Claimant's legal team acted *pro bono* in the IPT. The Claimant was therefore able to raise the issue before the IPT without any costs risk.

60. However, the Claimant now seeks an authoritative determination from the High Court as to whether one important aspect of the IPT's decision is wrong in law.

61. 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."

62. The first and second criteria are clearly satisfied. The claim raises issues of general public importance as to the extent of the powers of the security and intelligence services to carry out computer hacking. That issue has been of real public concern since the Snowden disclosures revealed something of the extent and scope of that activity. It is likely that the public and most of Parliament were unaware that s.5 ISA 1994, an Act concerning interferences with specified property enacted when computers were much less common and held far less data than today, was being used as the sole legal basis for wide-ranging 'thematic' CNE operations in the United Kingdom, including apparently for a general authorisation permitting interference with intellectual property and contractual rights in software. 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.

63. The third criterion is also plainly satisfied; the Claimant is a charity and has no private interest in the outcome of the litigation.

64. As to the fourth and fifth criteria:

a) As set out in Mr Kernon's witness statement, the majority of the Claimant's funds are restricted for use for particular purposes. Its unrestricted income in the year ending 31 January 2016 was £65,954 [B/1/6/§14]. In addition to bearing the costs of court fees and copying, it is able to risk £10,000 of its unrestricted funds as a contribution towards any costs order made in the proceedings, and anticipates a further £5,000 being raised externally for that purpose through fundraising activities. It therefore seeks an order prospectively capping its adverse costs liability at £15,000.

b) As Mr Kernon says at paragraph [B/1/10/§35], the Claimant's trustees have concluded that it will not be able to proceed with the litigation unless its costs are so capped. In view of the financial information he presents, that is a reasonable conclusion. The result would be that an important issue of legal principle will not be determined.

c) Finally, the Claimant'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.

J. Conclusion

65. The Court is invited to grant permission and a protective costs order, and in due course quash the IPT's declaration as to the proper scope of section 5 ISA, substituting a correct declaration as to the law under section 31(5) of the Senior Courts Act 1981.

DINAH ROSE QC

BEN JAFFEY

TOM CLEAVER

Blackstone Chambers

BHATT MURPHY

9 May 2016

Annex 1: Proper limits to the use of section 5 ISA

Scenario	Within s5 ISA?	Comments
Mobile phone with serial number ABC123	Yes	
Mobile phone used by Smith	Yes	
All mobile phones used by Smith	Yes	May cover more than one item of property, expressly described in the warrant
All mobile phones used by Smith or Bloggs	Yes	May cover more than one person's property, expressly described in the warrant
All mobile phones used by the blonde-haired man approximately 5ft 10 tall (name unknown) seen leaving 1 Acacia Avenue at midday on 1 December 2015	Yes	May not know the true identity of person, but property is objectively ascertainable. An interference with the wrong person's property would be unlawful
All mobile phones used by persons who at today's date are on the FCO Syrian diplomatic list	Yes	Persons are objectively ascertained at point of warrant grant. No more than shorthand for a list of names in a schedule
All computers at 1 Acacia Avenue	Yes	May be described by reference to a set of premises
All computers at 1 and 2 Acacia Avenue	Yes	May cover more than one person's property, expressly described in the warrant

All mobile phones used by suspected members of Al-Qaeda	No	Leaves decision and discretion as to intrusion to official, not the Secretary of State authorising a warrant.
All mobile phones used by suspected associates of members of Al-Qaeda	No	Leaves decision as to intrusion to official.
"All continuing activities which involve interference with copyright or licensed software, but which cannot be said to fall within any other specific authorisation held by GCHQ and which are done without the permission of the owner"	No	Indeterminate class. Leaves decision as to what property will be intruded in to official, and cannot be determined at time of warrant issue. This is an authorisation of an *operation*, permissible under section 7 ISA, but not section 5.
All mobile telephones in Birmingham	No	Indeterminate class. Cannot determine from warrant the property to which it will be directed.
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)	No	Leaves decision as to intrusion to official. A general warrant authorising an *operation* not a search of specified property.

Annex 2 – Legislative Framework

Intelligence Services Act 1994

66. Section 3(1)(a) ISA provides that GCHQ's functions include *"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"*. Section 3(2) ISA stipulates that these functions are exercisable only in the interests of national security, the economic well-being of the United Kingdom, or the prevention or detection of serious crime.

67. Section 4(2)(a) ISA provides that one of the duties of the Director of GCHQ is to secure 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"*.

68. Section 5 ISA provides:

> "(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 the Security Service, the Intelligence Service or 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, as the case may be,—
>
> ...
>
> (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 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."

69. Section 5(3) ISA provides that a warrant authorising interference with property within the British Islands can only be issued to GCHQ for its functions in respect of national security or the economic well-being of the UK. Within the UK, the Security Service handles the prevention and detection of serious crime, although GCHQ may in practice act on its behalf in actually carrying out interference.

70. In relation to section 5 warrants, section 6 ISA provides:

a) at section 6(1), that warrants may only be issued under the hand of the Secretary of State or, in urgent cases, certain other officials;

b) at section 6(2), that warrants issued by the Secretary of State expire after six months unless renewed;

c) at section 6(3), that the Secretary of State may renew a warrant for 6 months at any time;

d) at section 6(3), that the Secretary of State shall cancel a warrant *"if he is satisfied that the action authorised by it is no longer necessary"* (Section 6(4)).

71. In contrast, section 7 ISA provides:

"(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.

...

(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."

Section 7 also sets out provisions for the issue, renewal and cancellation of warrants, which broadly mirror those for warrants issued under section 5.

72. The power under section 7 to authorise acts outside the British Islands is much broader than the power in section 5. In particular:

a) Section 7 is not limited to actions in respect of property or wireless telegraphy. It could be (and is) used to authorise a variety of other activities, including the recruitment of agents and the payment of bribes or inducements.

b) Section 7(4) permits the authorisation of acts by reference to a description of people or a class of operations, rather than merely in relation to *"specified"* property.

Police Act 1997

73. The ISA powers are very similar to the property interference powers available to the police under Part III of the Police Act 1997. The power to authorise interference is exercisable by senior police officers in their area, or more widely in certain cases:

a) section 93(1)(a) provides: *"Where subsection (2) applies, an authorising officer may authorise ... the taking of such action, in respect of such property in the relevant area, as he may specify ..."*;

b) section 93(2) establishes two cumulative criteria: first, that the authorising officer believes *"that it is necessary for the action specified to be taken for the purpose of preventing or detecting serious crime"*, and second, that the authorising officer believes *"that the taking of the action is proportionate to what the action seeks to achieve"*; and

c) the Act also provides for authorisations to be reviewed by independent judicial Commissioners appointed under section 91, and makes specific provision in relation to the protection of legally privileged information: sections 97 and 98.

N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/2368/2016
Claimant(s) *(including ref.)*	PRIVACY INTERNATIONAL
Defendant(s)	THE INVESTIGATORY POWERS TRIBUNAL
Interested Parties	THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (1) AND GOVERNMENT COMMUNICATIONS HEADQUARTERS

Name and address of person to be served

name
PRIVACY INTERNATIONAL

address
62 BRITTON STREET
LONDON
EC1M 5UY

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☐	complete sections B, C, D and F
2. I intend to contest part of the claim	☐	
3. I do not intend to contest the claim	☐	complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☑	complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	☐	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]	☐	A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no.

Fax no.

E-mail address

name

address

Telephone no.

Fax no.

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see attached Note of Defendant's Position.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☐ No

If Yes, please set out your grounds for denial in the box below.

SECTION F

*delete as appropriate

*~~(I believe)(The defendant believes) that the facts stated in this form are true.~~

*I am duly authorised by the defendant to sign this statement.

(If signing on behalf of firm or company, court or tribunal) Position or office held: CASE HANDLER ON BEHALF OF THE TREASURY SOLICITOR

(To be signed by you or by your solicitor or litigation friend) Signed: Treasury Solicitor

Date: 23 MAY 2016

Give an address to which notices about this case can be sent to you

name: GOVERNMENT LEGAL DEPARTMENT

address: One Kemble Street
London WC2B 4TS

Telephone no.: 020 7210 3097

Fax no.: 020 7210 3410

E-mail address: andrew.poole@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

name: JONATHAN GLASSON QC

address: MATRIX, GRIFFIN BUILDING, GRAYS INN, LONDON WC1R 5LN

Telephone no.: 02074043447

Fax no.: +44 (0) 20 7404 3448

E-mail address: jonathanglasson@matrixlaw.co.uk

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, over the page), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

- Administrative Court in **London**

  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- Administrative Court in **Birmingham**

  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- Administrative Court in **Wales**

  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE **CO/2368/2016**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

THE QUEEN ON THE APPLICATION OF PRIVACY INTERNATIONAL

Claimant

AND

THE INVESTIGATORY POWERS TRIBUNAL

Defendant

AND

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

and

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Interested Parties

SUMMARY OF THE DEFENDANT'S POSITION

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1. The Investigatory Powers Tribunal ("the IPT") does not intend to make any submissions in relation to the impugned judgment concerning to s.5 of the Intelligence Services Act 1994.[1] It would be inappropriate for it to comment any

[1] [2016] UKIP Trib 14_85-CH

further on the judgment that it has delivered.

2. The IPT stands ready however to assist the Court in relation to the manner in which it performs its statutory functions and the potential implications for its work should the Court conclude, contrary to the express terms of s.67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA")[2], that it is arguable that the Tribunal is amenable to judicial review.

3. In construing s.67(8) of RIPA and considering the issue as to whether it is arguable that the IPT is amenable to judicial review, the Court's attention is drawn to a number of relevant factors:

(a) The IPT was created by Parliament to have exclusive jurisdiction to hear complaints under RIPA and designed in such a way as to ensure that disputes even "*in the most sensitive of intelligence cases can be properly determined*" (see Lord Brown in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 at paragraph 14 where he sets out a number of the particular unique statutory provisions governing the IPT);

(b) Paragraph 2 of Schedule 3 to RIPA provides that the President of the IPT is required to be someone who holds or has held high judicial office. Other members must have held a relevant legal qualification for at least ten years. The current President and Vice-President are both serving High Court Judges. The IPT's members investigate and adjudicate upon highly sensitive matters of national security and the IPT has developed considerable expertise in this area.

(c) The European Court of Human Rights ("the ECtHR"), having noted the terms of s.67(8) of RIPA at §77, unanimously upheld the lawfulness of the Tribunal's procedural regime in *Kennedy v. UK* (2011) 52 EHRR 4, at §§184-191.

[2] This 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."

(d) As Laws LJ observed in *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 [2010] 2 AC 1 at paragraph 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 confine 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."

(e) There is no constitutional (or Article 6 ECHR) requirement for any right of appeal from an appropriate tribunal (see Lord Brown in R *(A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 at § 24);

(f) Without prejudice to the terms of s.67(8) itself, it is to be noted that many of the statutory provisions governing the IPT would indicate that it would not be amenable to judicial review (for example s.68(4) mandates the IPT to give no reasons when it provides a statement that they have made no determination in the complainant's favour).

(g) Section 67(8) itself 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 route (other than to the ECtHR), and Parliament is presently considering the introduction of such a route but one that recognises (a) to (f) above.

4. To assist the Court at this stage, the IPT appends to its Acknowledgement of Service the IPT's report for 2011-2015 that was recently published. This sets out an overview of the IPT's work as well as a discussion of the Tribunal's statutory basis and of the unique way in which the IPT works.

5. Given the Defendant's non-adversarial position in this litigation, it makes no submissions in relation to the Claimant's application for a protected costs order.

JONATHAN GLASSON QC

27 May 2016

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/2368/2016
Claimant(s)	PRIVACY INTERNATIONAL
Defendant(s)	INVESTIGATORY POWERS TRIBUNAL
Interested Parties	(1)SECRETARY OF STATE FOR FOREIGN & COMMONWEALTH AFFAIRS (2) GCHQ Ref: Z1613447/JEP/N1

Name and address of person to be served

name
Privacy International

address
c/o Bhatt Murphy Solicitors
DX 36626
FINSBURY

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim.	☑	} complete sections B, C, D and E
2. I intend to contest part of the claim.	☐	
3. I do not intend to contest the claim.	☐	complete section E
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and E
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and E

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name	**name**
address	**address**
Telephone no. / **Fax no.**	**Telephone no.** / **Fax no.**
E-mail address	**E-mail address**

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see attached.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

SECTION E The Interested Parties

*delete as appropriate

[~~I believe~~][~~The defendant believes~~] that the facts stated in this form are true.
[I am duly authorised by the defendant to sign this statement]

(if signing on behalf of a firm or company, court or tribunal)

Position or office held
Lawyer

(To be signed by you or by your solicitor or litigation friend)

Signed J Wallwork.

Date
27/05/2016

Give an address to which notices about this case can be sent to you.

name
Josephine Wallwork

Address
The Treasury Solicitor
One Kemble Street
London WC2B4TS

Phone no.
(0)20 7210 3426

Fax no.

E-mail address
jo.wallwork@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

name

address

Telephone no.

Fax no.

E-mail address

Completed forms, together with a copy, should be lodged with the Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL, within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

CO/2368/2016

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

SUMMARY GROUNDS OF DEFENCE OF THE INTERESTED PARTIES

[References in square brackets are to the page numbers in the JR bundle served by the Claimant.]

Introduction

1. On 12 February 2016 the Investigatory Powers Tribunal (IPT) gave judgment in the linked 'Privacy' and 'Greennet' complaints[1] both of which related to GCHQ's "Computer Network Exploitation" ('CNE') activities.

2. After receiving detailed pleadings and evidence and after hearing three days of oral argument in December 2015, the IPT set out its conclusions on a number of preliminary issues concerning the lawfulness of CNE, including its compatibility with Arts. 8 and 10 ECHR. 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[2]. Following the preliminary issues judgment in February 2016, the IPT made *"no determination in favour"* in respect of each of the complainants, in accordance with the statutory provisions in s.68(4) of the Regulation of Investigatory Powers Act 2000 ('RIPA'), and notified them by letter dated 9 March 2016.

3. In these judicial review proceedings, the Claimant contends that:

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[1] IPT/14/85/CH and IPT/14/120-126/CH.
[2] Mr Robert Seabrook QC, Mr Charles Flint QC and The Hon Christopher Gardner QC

a. the IPT is a body which is amenable to judicial review;
b. the IPT erred in law when it considered the proper interpretation of s.5 of the Intelligence Services Act 1994 ('the ISA') which provides for the issuing of warrants for the interference with, *inter alia*, property in the United Kingdom where that is necessary for the purpose of assisting GCHQ in carrying out its statutory functions (including eg. for the protection of national security); and, more generally and contrary to the IPT's conclusion, that the statutory scheme, for the issuing of s. 5 ISA warrants, as interpreted by the IPT, is incompatible with Art. 8 ECHR[3].

4. The Interested Parties submit that neither of these points are properly arguable.

Section 67(8) of RIPA 2000

5. Section 67(8) of RIPA 2000 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."*

6. Five submissions are made. **First**, the express language of s.67(8) is clear and unambiguous:

   a. 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.
   b. That wording 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 this section, in contradistinction and in addition to an appeal which is also precluded.
   c. The words in parenthesis also support that conclusion. They make clear that it matters not whether a challenge is on the grounds of excess of jurisdiction or decisions within jurisdiction (to the extent that those concepts remain of relevance post-*Anisminic*[4]). The section is thus evidently also intended to, and does, exclude all such public law challenges.

7. **Secondly**, the Supreme Court's judgment in *R (A) v Director of Establishments of Security Service* [2010] 2 AC 1 (see copy attached), supports that interpretation. The Supreme

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[3] For the avoidance of doubt, none of the Claimant's factual allegations about the use of and/or the intrusiveness of CNE activities should be assumed in these proceedings. An accurate summary of what has and has not been confirmed publicly by GCHQ appears in §5 and §9 of the IPT's judgment [C/178 & 180-181] and in the witness statements of Mr Ciaran Martin, Director General of Cyber Security at GCHQ[3] (copies of which are attached herewith). As is evident from those materials, a number of assumed facts in the IPT proceedings were the subject of the Neither Confirm Nor Deny (NCND) principle. In addition, it has been the practice of successive Governments to adopt a NCND stance in relation to any information derived from any alleged leak regarding the activities or operations of the Intelligence Services insofar as that information has not been separately confirmed by an official statement by the UK Government - and in the IPT proceedings that included the document which appears at C/350-354 of the Claimant's bundle.

[4] [1969] 2 AC 147

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) of the Human Rights Act 1998 ('the HRA') against any of the intelligence services. (Lord Brown gave the judgment of the Court, with whom all other members of the Supreme Court agreed.)

8. Having set out the *"legislative provisions most central to the arguments"*, which included s.67(8) of RIPA 2000 (see §3 and §5), the Supreme Court emphasised the specialist nature of the IPT regime. At §14, 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)

9. 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, which was not a court of inferior jurisdiction, but was a specialist tribunal with special procedures apt for the subject matter in hand, did not take away a pre-existing common law right to the court and so did not amount to an ouster of the ordinary jurisdiction of the courts;

c. Parliament had not ousted judicial scrutiny of the acts of the intelligence services, it had simply *allocated* that scrutiny to the IPT.

10. At §§23-24, the Supreme 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:

> *"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)

11. The Supreme Court was therefore satisfied that the IPT was a judicial body of like standing and authority to the High Court and one which operated subject to a highly specialist regime. The IPT is not a body which Parliament ever intended would be subject to judicial review.

12. **Thirdly**, if any further support were needed for that conclusion, it is to be found in the following other aspects of the IPT regime, in addition to those emphasised by the Supreme Court at §14 of *A* (see §8 above):

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 (§1(1) of Sch. 3 to RIPA) and the President of the Tribunal must hold or have held high judicial office (§2(2) of Sch. 3 to RIPA). The fact that High Court Judges sit in the IPT is a *"powerful factor"* in ascertaining whether in substance it should be subject to judicial review (see *R v Cripps ex p Muldoon* [1984] QB 68, *R (Cart) v Upper Tribunal* [2011] QB 120 and *R (Woolas) v Parliamentary Election Court* [2012] QB 1 at §33).

b. When the Tribunal considers any complaints under s.65(2)(a) and 65(2)(b) it is the duty of the Tribunal to:

> *"apply the same principles for making their determination in those proceedings 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).

It is therefore clear that Parliament has allocated such public law challenges exclusively to the IPT and has instructed the IPT to act as though it were the High Court in an application for judicial review.

13. Thus, having regard to its constitution, jurisdiction and powers, the IPT cannot properly be regarded as inferior to the High Court such that it is amenable to judicial review - see *Cart* per Laws LJ at §§40, 69-70.

14. **Fourthly,** the IPT regime has been 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"*.

15. **Fifthly,** it is to be noted that legislative changes to introduce a right of appeal are currently under specific consideration by Parliament in the Investigatory Powers Bill, which had its first and second readings in the House of Commons on 19 May 2016. Clause 208 of the Bill provides as follows:

> *"208 Right of appeal from Tribunal*
> *(1) After section 67 of the Regulation of Investigatory Powers Act 2000 insert –*
>
> *"67A Appeals from the Tribunal*
>
> ***(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,...*

(5) An appeal under this section –
(a) is to be heard by the relevant appellate court, but
(b) may not be made without the leave of the Tribunal or, if that is refused, of the relevant appellate court.

(6) 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..."
(emphasis added)

16. The Explanatory Notes to Clause 208 state as follows at §§516-518:

"Currently there is no domestic route of appeal from a decision or determination of the Investigatory Powers Tribunal, with Claimant's having to pursue appeals to the European Court of Human Rights if they wish to challenge a decision. This clause amends RIPA to introduce a domestic appeal route from decisions and determinations of the Investigatory Powers Tribunal on a point of law, to the Court of Appeal in England and Wales.... Regulations will detail the criteria to be considered by the Investigatory Powers Tribunal when determining the relevant appellate court.

Where there is a point of law, the decision on whether to grant permission to appeal will be taken by the Investigatory Powers Tribunal in the first instance. If the Tribunal refuses to grant permission to appeal, this decision may be reviewed by the appeal court.

The Tribunal or appellate court must not give permission to appeal on a point of law unless the appeal would raise an important point of principle or practice or they consider that there are other compelling reasons to grant permission to appeal, such as that it would be in the wider public interest."

17. Had it been the case that decisions of the IPT were already challengeable on a point of law by way of judicial review, then these amendments would be unnecessary.

18. In addition, it is to be noted that the proposed basis upon which appeals from the IPT will proceed in future is by applying what has been termed the *"second tier appeals criteria"* test (see *Cart* in the Supreme Court [2012] 1 AC 663 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 Clause 208(6). 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.

19. The Claimant's Grounds advance no properly arguable points capable of meeting the analysis above. In particular:

    a. It is wrong to suggest that the ouster clause in *Anisminic* was *"almost identical"* to s.67(8) of RIPA 2000. The Supreme Court expressly considered that point and concluded that they were not the same - the clause in *Anisminic* was *"ambiguous"* in contrast to s.68(7). Not only is the scope of the two clauses very different, but context is important. In *Anisminic*, the House of Lords was considering an ouster

clause in respect of an inferior tribunal, where there was no suggestion that it exercised powers on a par with the High Court. For the reasons given by the Supreme Court in *A*, the IPT's position is fundamentally different.

b. The IPT is not an *"inferior tribunal"* (see §55 of the Claimant's Grounds). Nor is there anything in the offensive and inaccurate suggestion that it is *"staffed by individuals of lesser ability"* (see §56) than Judges of the High Court.

c. It follows therefore that none of the concerns set out at §56 of the Claimant's Grounds arise here - the IPT is a specialist tribunal of like standing and authority to the High Court and as such is *"constitutionally inoffensive"* (see Laws LJ in *A*[5] (consistent with what he stated at §40 of *Cart* - cited with approval by the Supreme Court at §23 of *A*).

Did the IPT err in law in its conclusions on the scope of s.5 ISA warrants?

20. Without prejudice to the matters set out above, there is no merit in the suggestion that the IPT erred in law in its approach to the construction of s.5 ISA warrants.

21. **First**, it is mischaracterisation of the IPT's decision to assert that the IPT *"rejected a principle of fundamental constitutional importance"* i.e. the "principle of legality" - as asserted at §9, §37 and §57 of the Claimant's Grounds. Nowhere in the operative paragraphs setting out its reasoning do the IPT state that the principle of legality does not apply to matters of national security. That was not what the IPT decided. Whilst the IPT did (rightly) conclude 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 ISA (see §37 of the judgment), it was no part of the IPT's careful reasoning to conclude that the principle of legality could never have any application in the national security sphere.

22. In any event, the principle of legality is a rule of statutory interpretation which means that fundamental rights cannot be overruled by general or ambiguous statutory words. As stated by Lord Dyson in *AJA v Commissioner of Police of the Metropolis* [2014] 1 WLR 285, it is an important tool of statutory interpretation and *"no more than that"*. As he made clear *"when an issue of statutory interpretation arises, ultimately the question for the court is always to decide what Parliament intended"* (see §28). That is precisely what the IPT did in this instance, as is evident from §§37-47 of the judgment.

23. **Secondly**, the IPT was right when it concluded that the Eighteenth Century cases about general warrants were not useful in the interpretation of s.5 ISA. Instead the IPT held that *"the words should be given their natural meaning in the context in which they are set"* (see §37). There was no error of law in that approach.

    a. The context in *Huckle v Money*[6] and *Wilkes v Wood*[7] was very different. It concerned political libels[8]; these were not national security threats of the kind for which a s.5 ISA warrant is issued.

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[5] [2009] EWCA Civ 24

[6] (1763) 2 Wilson 205, 95 ER 768

[7] (1973) Lofft 1, 98 ER 489

[8] in a publication called The North Briton - *Wilkes* at 490 *Huckle* at 768, final paragraph

b. There was no requirement on the Minister granting the warrants in *Huckle* and *Wilkes* to consider whether they were necessary and proportionate. The delegation of a power to search the property of a widely defined class is of course of more concern where there is no check on the grant of that power by reference to whether it is necessary and proportionate to grant it. Section 5 ISA does not have that problem - it may allow interference with the property of a wide class, but only if the Minister has concluded that it is necessary and proportionate to do so.

c. Further, the vice with the general warrants in *Wilkes* was that the warrant was so wide that they provided *"a discretionary power...to messengers to search wherever their suspicions may chance to fall"* (see 498). Properly considered *Wilkes* and *Huckle* are not authorities for the proposition that a warrant cannot relate to a wide class; rather it must not confer so wide a discretion on those carrying out the warranted activity to search wherever they choose.

24. **Thirdly**, the IPT's decision does not lead to the collapse of the distinction between s.5 ISA warrants and s.7 ISA authorisations. The IPT accepted the submission of the Interested Parties that s.7 ISA is a different provision which relates to the *"authorisation of acts outside the British Islands"* i.e. s.7 is broad because it covers a range of acts that may need to be authorised outside the UK and therefore does not fall to be directly contrasted with s.5 ISA[9]. That is clear, not least from the fact that only in 2001 was s.7 amended to add the power for GCHQ to seek a s.7 authorisation abroad and consequently there was no such contrast between s.5 and s.7 of the ISA so far as GCHQ were concerned at the date of the passage of RIPA (see §36(ii) and §37 of the IPT judgment)[10].

25. **Fourthly**, the Claimant accepts that it is not necessary for the intelligence agencies to identify a named individual or a specific item of property at the time of applying for the warrant. Whilst the Claimant submitted to the IPT that *"identification cannot depend upon the belief suspicion or judgment of the officer acting under the warrant"* (see §35(iii) of the IPT decision), even on the Claimant's own case, some judgement is necessary. So, for example, the Claimant accepts that property could be specified by reference to a geographical location (eg. 1 Acacia Ave - see their Annex 1 at A/39). That is already a description i.e. a specification linked to property and it would not be clear which persons or which equipment would fall within it at the date of the warrant. In addition, the Claimant accepts that it would be permissible to describe the person eg. colour of hair etc. (see 5th row at Annex 1) but that involves a judgement at the most basic level i.e. is this the person or not?

26. In those circumstances, the IPT was correct to conclude its analysis by stating that it is necessary for the warrant to be as specific as possible in relation to the property to be covered, 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 (see §47). Contrary to the Claimant's submissions at §31 that does not mean eg. that it would be permissible to authorise property

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[9] The language of s7: uses *"acts of a description specified"* in s7.4 which does suggest that things can be specified by description. That on no view implies that *'specified'* can only be by reference to particular, identified property (eg. A's computer).

[10] As to the suggestion that recourse to Hansard is appropriate - see §36(g) of the Claimant's Grounds, as recorded in the IPT judgment at §35(iv) both parties agreed at the hearing that this was of no assistance and in any event there is no ambiguity which would permit its use.

interference over *"all mobile telephones in the United Kingdom"* or *"all computers used by anyone suspected to be a member of a drug gang"*. As made clear by the Interested Parties at the hearing, whilst a warrant covering *"all mobile phones in Birmingham"* could be sufficiently specified, it would be unlikely to be either consistent with necessity or proportionality or with GCHQ's statutory obligations (see §36(iii) of the judgment at C/195).

27. **Finally**, it is important to be clear about the proper limits of the IPT's actual decision. The IPT judgment gives general guidance about the scope of warrants under s.5 ISA. However, 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). It also made clear 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 who brought this issue to public attention in his 2014 Report and who himself has made five recommendations about the use of what might be termed thematic warrants, as set out at [C/279]. In particular, the Commissioner has indicated that any warrants which might be considered to be thematic should be highlighted in the list which is provided for his selection during his inspections. In those circumstances, given the cautious approach of the IPT and the day to day oversight provided by the Commissioner, there is no proper basis on which the High Court could or should be drawn into this arena. It is plainly not the case that there is no independent oversight of the powers in s.5 ISA as alleged in §§44 and 46 of the Claimant's Grounds.

Article 8 ECHR

28. At §§40-49 of the Grounds the Claimants assert that Art. 8 of the ECHR does not permit the issuing of a warrant authorising modern forms of electronic surveillance without prior authorisation by a Court. These points are not only without merit, but were not raised before the IPT in the CNE proceedings. In the IPT proceedings in *Liberty/Privacy* [2015] HRLR 2, in which the main judgment was handed down on 5 December 2014 (i.e. approx 15 months ago), the IPT held that prior judicial authorisation was not required (see §151). Even if the IPT was amenable to judicial review (which it is not), they cannot justify a challenge to the IPT's February 2016 judgment in the CNE proceedings.

29. In addition, it is incorrect to suggest that the ECtHR judgment in *Szabo & Vissy v Hungary* (Application 37128/14, 12 January 2016) makes clear that such authorisation is required. At §77 the ECtHR stated:

> *"The Court recalls that in Dumitru Popescu (cited above, §§70-73) it expressed the view that either the body issuing authorisations for interception should be independent or there should be control by a judge or an independent body over the issuing body's activity. Accordingly, in this field, control by an independent body, normally a judge with special expertise, should be the rule and substitute solutions the exception, warranting close scrutiny (see Klass and others, cited above, §§42 and 55). **The ex ante authorisation of such a measure is not an absolute requirement per se, because where there is extensive post factum judicial oversight, this may counterbalance the shortcomings of the authorisation** (see Kennedy, cited above, §167)."* (emphasis added)

Protective Costs Order

30. If, contrary to the above submissions, the Court grants permission, the Court will need to be satisfied that this judicial review is of general public importance and that the public interest requires these issues to be resolved, if a protective costs order is to be made (see *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at §74). It is submitted that in light of (1) the careful guidance given in the IPT judgment about s.5 ISA warrants and (2) the ongoing oversight by the Commissioner in this specific area (see §32 above), that criterion is not satisfied. Further and/or alternatively if a PCO is made limiting the Claimant's costs to £15,000 (as has been proposed), then there should be a reciprocal cap on the Interested Parties' costs liability at the same level.

27 May 2016

JAMES EADIE QC
KATE GRANGE

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
London

Claim No. CO/2368/2016

B E T W E E N:

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

CLAIMANT'S REPLY TO SUMMARY GROUNDS

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1. It is apparent from the Summary Grounds submitted by the Interested Parties and the Defendant that this claim raises strongly arguable grounds for judicial review, which ought to proceed to a full hearing. The Claimant responds briefly below to the arguments put forward in the Summary Grounds.

Amenability to judicial review

2. The Interested Parties make five submissions. The Claimant responds as follows:

   a) First, it is asserted that the express language of section 67(8) RIPA is clear and unambiguous. However, the statutory wording is materially identical to that in *Anisminic* where the ouster clause did not preclude a claim for judicial review. Wording which precludes a challenge to a decision of an inferior court does not impede the High Court in the exercise of its supervisory jurisdiction over a purported "decision" which is vitiated by an error of law.

b) Secondly, the Interested Parties rely on *R (A) v Security Service*. However, that case is not comparable to the current proceedings. A sought to bring a claim in the High Court against the Security Service under the Human Rights Act 1998. Section 65(2)(a) of RIPA states that the Tribunal is the "*only appropriate tribunal*" for such a claim. The Supreme Court held that circumventing the jurisdiction of the Tribunal in respect of such a claim was improper. The different question whether a "decision" of the IPT purporting to exercise that jurisdiction is amenable to judicial review if flawed in law did not arise, and was not decided by the Supreme Court in that case. Lord Brown did comment, *obiter*, that section 67(8) RIPA was an "*unambiguous ouster*", but noted that the Court had heard no argument on the point and said "*... that is not the provision in question here...*"

c) Further the primary issues in this claim, concerning the proper construction of section 5 ISA as a matter of domestic law (regardless of the HRA), are not within the exclusive jurisdiction of the IPT. Both the Administrative Court and the IPT have jurisdiction over such issues: see section 65(2)(b) RIPA.

d) The Interested Parties also rely on the existence of the IPT's special procedures to handle sensitive information. However:

i) This claim raises pure issues of law only. Such issues can (and therefore must) be argued in open. The arguments below were heard in an open hearing in the IPT, argued *inter partes*, and an open judgment delivered. There is no need for any special closed procedure in this claim for judicial review. See *Bank Mellat v HM Treasury* [2014] AC 700 at [70] per Lord Neuberger (*"the court itself is under a duty to avoid a closed material procedure if that can be achieved"*).

ii) Even if it could be argued that there was such a need, such procedures have now been provided by Parliament in the Justice and Security Act 2013 (enacted after the decision in *A*).

e) Thirdly, the Interested Parties note that the members of the Tribunal include High Court judges and that the test applied is the same as would be applied in

an application for judicial review. This is immaterial to the exercise of the High Court's supervisory jurisdiction over a court of limited jurisdiction. The same arguments did not preclude judicial review of SIAC and of the Upper Tribunal: see *R (Cart) v Upper Tribunal* [2011] QB 120. It should be noted that both SIAC and the Upper Tribunal are designated by statute as superior courts of record. The IPT is not.

f) Fourthly, the Interested Parties claim that the IPT regime is compatible with Article 6 ECHR, citing *Kennedy v United Kingdom* (2011) 52 EHRR 4. This is irrelevant to the question of amenability to judicial review at common law.

g) Fifthly, the Interested Parties rely on the proposals before Parliament in the Investigatory Powers Bill to introduce a limited right of appeal from the IPT to the Court of Appeal, applying a second appeals test. Again, this is irrelevant to the issue of amenability to judicial review, arising in circumstances in which there is currently no statutory right of appeal.

3. The Interested Parties further assert that *"nor is there anything in the offensive and inaccurate suggestion that* [the IPT] is *"staffed by individuals of lesser ability"* (see §56) *than Judges of the High Court"* (§19). No such suggestion has been made. The Interested Parties have misinterpreted the Claimant's reliance on a passage quoted from a High Court of Australia decision. The *"lesser ability"* point was neither applicable, nor relied upon: see paragraphs 56 - 57 of the Statement of Facts and Grounds.

4. The Tribunal's Summary Grounds make similar points on amenability to judicial review. However, the Tribunal is incorrect in suggesting that the IPT has *"exclusive jurisdiction to hear complaints under RIPA"*. Many RIPA cases are within the jurisdiction of the ordinary courts. See Lord Brown in *R (A)* at [33] (*"while section 7(1)(a) HRA proceedings have to be brought before the IPT, other causes of action or public law grounds for judicial review need not"*). In any event, this case concerns the interpretation of section 5 ISA, not RIPA (§3(a)).

Error of law

5. The Claimant responds as follows to the submissions of the Interested Parties:

a) The Interested Parties contend that *"it was no part of the IPT's careful reasoning to conclude that the principle of legality could never have any application in the national security sphere"* §21. This does not meet the Claimant's ground of challenge, namely, that the IPT wrongly rejected the applicability of the principle of legality in the present case, by concluding that it was not a legitimate aid to construction because the relevant statute concerned the functions of a Service charged with furthering the interests of national security.

b) Secondly, the Interested Parties argue that the general warrant cases are not relevant because they concern sedition, rather than *"national security threats"*. However, seditious libel was a serious crime engaging the protection of national security. In *Entick v Carrington*, Treasury Counsel submitted of the seditious libel *"there can hardly be a greater offence against the State, except actual treason"*. That national security was directly in issue was also made clear by the Court (*"we are no advocates for* [seditious] *libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all"*).

c) The Interested Parties contend that the requirement of necessity and proportionality saves section 5 ISA. This argument is irrelevant to the question of statutory construction: namely, whether Parliament intended to permit property to be "specified" merely by a generic description, contrary to common law fundamental principles.

d) Thirdly, the Interested Parties say there is no proper comparison between sections 5 and 7 ISA. However, if section 5 was intended to permit a description by class, as expressly provided for in section 7, it is difficult to understand why the draftsman used such different language. The reference to the amendment to

section 7 in 2001 is a bad point. Section 7 was always available to and used by GCHQ, but procedurally the application had to be made to the Secretary of State by SIS until 2001.

e) Fourthly, the Interested Parties have misunderstood the law of warrants. They suggest that *"some judgment is necessary"* because the Claimant accepts that a geographical location (*"1 Acacia Avenue"*) or a specific person by physical description rather than name is acceptable (§25). But such a warrant gives no discretion to the officer. If the officer searches 2 Acacia Avenue or the wrong person, the search will have been unlawful. The Claimant's objection is to a warrant that permits a search of anyone the officer suspects of being a member of a particular group, or an entire class of property, with the officer deciding who or what should be searched. That may be either because the warrant itself purports to confer such discretion upon the officer, or because the scale of the activity permitted by the warrant is so large that in practice the officer has significant discretion to decide what searches to carry out in reliance on it.

f) The Interested Parties then contend that it would be *"unlikely"* that a warrant for *"all mobile phones in Birmingham"* would be issued. However, in November 2015 the Secretary of State admitted that there are currently section 94 Telecommunications Act 1984 warrants for the collection of <u>all</u> domestic communications data from UK telephone providers on a continuous rolling basis. It is the Interested Parties' publicly-recorded view that collecting data about everyone in the UK, in order to form a large database that can be interrogated, is a necessary and proportionate activity. See David Anderson QC, *The Big Reveal* (*"the launch of the... Bill was accompanied by a significant avowal. This related to the use by intelligence agencies... of a bulk collection power, applicable to communications data but not to content or internet connection records... The operation of that power had never been made public"*).[1]

g) Finally, oversight by the Commissioner is not sufficient to correct an error of law by the IPT. The law as declared by the IPT will bind the Commissioner.

[1] https://terrorismlegislationreviewer.independent.gov.uk/the-big-reveal/#more-2496

6. No good reason has been advanced for a reciprocal cap over the Claimant's costs set at the same level as the amount it is able to afford (§30). Such a cap is contrary to principle and authority. In *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2009] Env LR 18 the Court of Appeal cited the Report of the Working Group on Environmental Justice, chaired by Sullivan J and held at [26]:

> "There is a further point of some potential importance in this appeal. Paragraph 7 of Appendix 3 begins in this way:
>
> > "7. There have been worrying examples where the implicit (or even explicit) assumption by the court is that the capped limit on the claimant's costs should somehow reflect the PCO limit imposed on the defendant. This is taken to represent an equitable approach as between the parties. We remind ourselves that this is not the way the Corner House principles are formulated and its adoption is unhelpful in the application of the PCO jurisdiction."
>
> We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case."

7. The Interested Party makes the error identified by the Court of Appeal in *Buglife*: an assumption that a PCO limit should be the same as the Claimant's capped costs. The Interested Parties are protected from significant costs exposure by the limitation on Treasury Solicitor rates, the narrow issues of law under consideration and the fact that the parties are already well prepared to argue the issues - they have already been canvassed before the IPT.

DINAH ROSE QC

BEN JAFFEY

TOM CLEAVER

BHATT MURPHY

7 June 2016

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/2368/2016

In the matter of an application for Judicial Review

THE QUEEN

on the application of

PRIVACY INTERNATIONAL

Claimant

versus

INVESTIGATORY POWERS TRIBUNAL

Defendant

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

Interested Parties

NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgements of service filed by the Defendant and Interested Parties;

Order by the Honourable Mrs Justice Lang DBE

1. Permission to apply for judicial review is hereby granted.
2. The preliminary issue, namely, whether the Defendant's decision is amenable to judicial review, is to be determined at an oral hearing to be listed in either July or October 2016, having regard to the availability of counsel.
3. The requirements in CPR 54.14 for the Defendant and Interested Parties to file detailed grounds and evidence shall be stayed until after the determination of the preliminary issue, when further directions will be given if the issue has been determined in favour of the Claimant.
4. The Claimant's total liability to pay the costs of the Defendant and Interested Parties shall be limited to £15,000.
5. The Defendant's total liability to pay the costs of the Claimant shall be limited to £15,000.
6. The Interested Parties' total liability to pay the costs of the Claimant shall be limited to £15,000.
7. Costs reserved.

Observations:

In my view, the Claimant's grounds for judicial review of the Defendant's decision are arguable. However, I have a real doubt as to whether this court has jurisdiction to determine the substantive claim (though I could not characterise the Claimant's submission on jurisdiction as unarguable). Because of the subject-matter of the substantive claim, and its complexity, I consider the question of jurisdiction ought to be determined first, as a preliminary issue.

I consider that the Claimant has met the criteria for a protective costs order. As the Defendant and the Interested Parties are adopting very different roles in this judicial review claim, it is appropriate for them to be subject to separate costs limits. The combined costs limit of £30,000 reflects the significantly greater resources available to the Defendant and the Interested Parties.

Case management directions for the preliminary issue only

- The Claimant must file and serve a skeleton argument not less than 14 days before the date of the hearing.
- The Defendant and any Interested Party must file and serve a skeleton argument not less than 7 days before the date of the hearing.
- The Claimant must lodge a joint bundle of authorities not less than 3 days before the date of the hearing.

Listing Directions
The application is to be listed for 1 day; the parties are to provide a written estimate within 7 days of service of this order if they disagree with that estimate.

Case NOT suitable for hearing by a Deputy High Court Judge [x]

Signed: **Mrs Justice Lang DBE** **17/06/2016**

The date of service of this order is calculated from the date in the section below

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Notes for the Claimant

To continue the proceedings a fee is payable.

For details of the current fee please refer to the Administrative Court fees table at http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court. Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out. To form to make an application for remission of a court fee can be obtained from the Justice website http://hmctsformfinder.justic.gov.uk/HMCTS/Form Finder.do

You are reminded of your obligation to reconsider the merits of your claim on receipt of the defendant's evidence.

For completion by the Administrative Court Office

Sent / Handed to the Claimant, Defendant and any Interested Party / the Claimant's, Defendant's, and any Interested Party's solicitors on (date): 17/06/2016

Solicitors:
Ref No: MPS/FBT/002295

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref: CO/2368/2016

In the matter of an application for Judicial Review

The Queen on the application of

PRIVACY INTERNATIONAL

RECEIVED
05 AUG 2016

versus

INVESTIGATORY POWERS TRIBUNAL

Interested Parties:
(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS
(2) GOVERNMENT COMMUNICATION HEADQUARTERS

On the application for permission to apply for judicial review

Following consideration of the documents lodged by the parties

Order by the Honourable Mr Justice Irwin

1. The application to vary the Order of Lang J is refused.

2. The preliminary issue should be listed before a Divisional Court not later than the week commencing 24 October 2016.

3. The case management directions of Lang J stand.

Observations

I do see virtue in the Preliminary Issue in this case. If the outcome is a ruling that there is no jurisdiction, a great deal of time and cost will be saved. If the outcome is that there is jurisdiction, then directions can be given to proceed rapidly to the substantive issue, with an extension of time for appeal in relation to the preliminary issue, and by that means little or no time will be lost and a coherent single appeal process established.

I see no reason to disturb the PCO.

This seems to me a suitable case for a Divisional Court, given the implications.

Signed [signature] 2 JHI 2016

The date of service of this order is calculated from the date in the section below

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Sent to the claimant, defendant and any interested party / the claimants, defendants, and any interested party's solicitors on (date):

- 4 AUG 2016

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

Claim No. CO/2368/2016

B E T W E E N:

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

CLAIMANT'S SKELETON ARGUMENT ON PRELIMINARY ISSUE

For hearing: 2 November 2016, 1 day

A. Introduction

1. The preliminary issue raises an important question of law: is a decision of the Investigatory Powers Tribunal amenable to judicial review? Does the 'ouster clause' in section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA") prevent the High Court from correcting an error of law made by the IPT?

2. A decision of the IPT is amenable to judicial review. Applying the principles in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, the ouster clause does not prevent judicial review of a decision of the Tribunal where it errs in law.

3. Lang J concluded that the Claimant had (a) an arguable case that the IPT had got the law wrong; and (b) granted a Protective Costs Order. If the Court has no jurisdiction to hear this claim, a significant error of law may go uncorrected.

B. The IPT proceedings and the substantive claim for judicial review

4. 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).

5. The potential intrusiveness of CNE, as illustrated by what could be accessed by hacking a mobile phone, was summarised by Chief Justice Roberts in *Riley v California* in the Supreme Court of the United States: *"A cell phone search would typically expose to the government far more than the most exhaustive search of a house..."* As Roberts CJ explained:

> "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video — that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier..."

6. 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.

7. The Claimant 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 Claimant contended in the proceedings that Section 5 did not support that broad interpretation.

8. The Claimant 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 Claimant 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 Claimant also relied on Articles 8 and 10 of the European Convention on Human Rights.

9. The Government's position was that warrants of the type which had been held to be unlawful in *Entick*, *Money* and *Wilkes* are entirely permissible under the power which Parliament had enacted in s. 5 ISA.

10. 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."

11. The IPT did not hold that the common law relating to general warrants had changed, nor that the principles recognised in those seminal cases were wrong, but rather that the nature of the ISA as a statute conferring powers relating to national security meant that those cases and principles were irrelevant to its interpretation. In essence, the IPT decided that the principle of legality, a long-established principle of construction in cases where it is alleged that legislation has interfered with important rights, does not

apply to legislation concerning matters of national security. The IPT went as far as to hold that the common law abhorrence of a general warrant was not even a *"permissible aid to construction"* of a statutory power designed to *"further the interests of UK national security"*.

12. That proposition is wrong in law. The principle that *"fundamental rights cannot be overridden by general or ambiguous words [...] because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"* (per Lord Hoffmann in *R v SSHD ex parte Simms* [2000] 2 AC 115 at 131) is at least as necessary in the context of national security as in any other context.

13. The effect of the IPT's decision is that a covert warrant can 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.

C. Statutory framework

RIPA 2000

14. 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."

15. 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:

> "(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, or 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."

IOCA 1985, SSA 1989 and ISA 1994

16. 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".

17. 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."

18. All three provisions were repealed by RIPA.

D. *Anisminic* and subsequent authority

19. 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 to 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*".

20. 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.

21. 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 II* [1997] AC 225 at pp. 232-233 per Lord Cooke.

22. 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.""

23. 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."

24. 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

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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 judges of the High Court, this is not a requirement for appointment save for the office of President of the Tribunal. See Schedules 1 and 3 to RIPA.

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

E. Other actual and proposed 'ouster clauses'

25. 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"*.

26. 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."*

27. 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."*

28. 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.

[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.

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

30. 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..."

31. 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]

32. 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:

[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

"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."

c) The Law Reform Committee of the Bar Council, in written evidence to the Constitutional Affairs Committee on 16 January 2004[7], said:

"There is one provision in this Bill which is of overriding significance. Clause 10 of the Bill seeks to oust the jurisdiction of the Courts, preventing any review of decisions by the proposed new Tribunal.

This provision is wholly repugnant. If passed into law it would threaten the integrity of our legal system and compromise the role of our Judiciary. It would set a frightening precedent, encouraging the Executive to oust the jurisdiction to review Government or official actions in other areas. [...]

However it is dressed up, the attempt to oust this jurisdiction represents an attempt to protect irrational or unlawful decisions, or decisions made beyond the legal power of the decider. [...]

The legal profession is united in its opposition to the Clause."

d) Nicholas Blake QC, who represented the Bar at the Constitutional Affairs Committee's hearings on the Bill, said in a briefing note[8]:

"the proposed clause 11 to the Bill contains the most draconian ouster clause ever seen in Parliamentary legislative practice. [...]

It is a clause that will operate far beyond asylum decisions, and provides a precedent for exempting the executive and administrative tribunals from seeking to understand, apply or be governed by the law. This is a matter of great constitutional consequence. [...]

Access to independent courts is an integral part of democracy. Inferior tribunals are not courts and cannot be transmuted into them by a legislative magic wand. They have an expert and valuable role to perform but like the executive itself, their decisions must be subject to the scrutiny of the higher courts at the instigation of the losing party. The full system of binding precedent means that no case can be arbitrarily cut off by statute from review by the next level, condemning inferior courts to apply

[7] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we46.htm
[8] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21109.htm#n54

precedents that may need re-examination. Constitutional government should recognise this principle in the laws it promotes. This form of ouster clause undermines the principle and threatens the entire basis of our constitutional arrangement. This is why the debate on ouster clauses is of significance and far broader than asylum."

e) Mr Justice Ouseley (then the President of the Immigration Appeal Tribunal), in evidence to the Constitutional Affairs Committee on 17 November 2003[9], said:

> "so extensive an ouster clause is without precedent [...]
>
> To the Courts is allocated the necessary task of reviewing the lawfulness of the decisions of lower Tribunals and the lawfulness of the executive's acts and decisions. An unwritten constitution only works on the basis of an acceptance by each component of the differing and important roles of the others. The ouster clause is inconsistent with those constitutional conventions. As a matter of constitutional principle, higher judicial oversight of lower Tribunals and even more so of executive decisions should be retained."

f) Professor Vernon Bogdanor, in a letter to The Times published on 9 January 2004, wrote that the clause was *"a constitutional outrage, and almost unprecedented in peacetime"*.

g) The Joint Committee on Human Rights, in its Fifth Report of the 2003-2004 Session[10], said:

> "57 [...] Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. Clause 11 of the Bill seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration. [...]
>
> 58. Apart from the fact that the rule of law is a fundamental principle inherent in human rights law, it is inherent in the fundamental law of the British constitution. It includes the civil right of everyone within the jurisdiction of the United Kingdom to have unimpeded access to the ordinary courts to test the legality not only of administrative decisions

[9] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we08.htm
[10] http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/35/3504.htm

but also of the decisions of inferior tribunals. That is an essential element in the British system of government under law. [...]

71. We have carefully considered the Government's arguments, but consider that it could be strongly argued that the ouster of judicial review of tribunal decisions contemplated by clause 11 has not been justified by any argument advanced by the Government. There is real danger that this would violate the rule of law in breach of international law, the Human Rights Act 1998, and the fundamental principles of our common law."

h) Lord Woolf, in the Squire Centenary Lecture delivered on 3 March 2004 (*"The Rule of Law and a Change in the Constitution"*)[11], said:

"This clause is undoubtedly unique in the lengths to which it goes in order to prevent the courts from adjudicating on whether the new appeal tribunal has acted in accordance with the law. As the House of Commons Constitutional Affairs Committee stated in its report of 26 February:

> "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. This is particularly true when life and liberty may be at stake."

The provision has to be read to appreciate the lengths to which the Government has gone to try and exclude the possibility of intervention by the courts. Extensive consultation took place with myself and other members of the judiciary before the Bill was introduced. We recognised that there was a problem of abuse to be tackled. However, our advice was that a clause of the nature now included in the Bill was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law.

We advised that the clause was unlikely to be effective and identified why. The result was that clause 11 was extended to close the loopholes we had identified, instead of being abandoned as we had argued. The only concession that appears to have been made to our representations has been to give the complainant the right to ask for an internal review. In addition, we argued that ouster was not necessary and that action could be taken which was more likely to be effective than a clause of this nature. Importantly, we pointed out that the danger of the proposed ouster clause was that it could bring the judiciary, the executive and the legislature into conflict. Apparently this was of little concern.

[11] http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/judicial/speeches/lcj030304.htm

Since the Bill was introduced, the clause has been criticised by distinguished constitutional lawyers and, last week, by Lord Mackay the former Lord Chancellor. [...]

In discussions which have taken place between the judiciary and the Government, there have been attempts to justify the clause, but these are specious and unsatisfactory. It is particularly regrettable that the Lord Chancellor and Secretary of State should find it acceptable to have responsibility for promoting this clause.

I understand that the Lord Chancellor has recently said that the clause is not intended to exclude *habeas corpus*. In view of the language of the clause this surprises me. It also surprises me because, if the clause does not exclude *habeas corpus*, then I would have thought it inevitable that it will, in practice, lead to an increase in delay. This is because the right to apply for *habeas corpus* does not involve the safeguard of a requirement as to leave. It also surprises me that the Government does not see it as inconsistent to promote a clause designed to exclude the courts from performing their basic role of protecting the rule of law at the same time that it is introducing the present constitutional reforms. Their actions are totally inconsistent and I urge the Government to think again as the cross-party Constitutional Affairs Committee recommends. There is still time. The implementation of the clause would be a blot on the reputation of the Government and undermine its attempts to be a champion of the rule of law overseas. I trust the clause will have short-shrift in the Lords, but, even then, the attempt to include it in legislation could result in a loss of confidence in the commitment of the Government to the rule of law.

I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution. Immigration and asylum involve basic human rights. What areas of government decision-making would be next to be removed from the scrutiny of the courts? What is the use of courts, if you cannot access them? It was for this reason that a prison governor was found to be in contempt for interfering with a prisoner's access to the courts [Raymond -v- Honey]. Professor Sir William Wade, who is alas not here tonight because of illness, describes the right of access to the courts as 'the critical right' in the great text book he edits with Dr Forsyth. The response of the government and the House of Lords to the chorus of criticism of clause 11 will produce the answer to the question of whether our freedoms can be left in their hands under an unwritten constitution."

i) Lord Steyn said in a speech at the Inner Temple, also on 3 March 2004[12]:

> "[The clause] will preclude judicial review on the ground of lack of jurisdiction, irregularity, error of law, breach of natural justice and any other matter. These are the very areas in which the higher courts have repeatedly been called upon to assert the sovereignty of law. The Bill attempts to immunise manifest illegality. It is an astonishing measure. It is contrary to the rule of law. It is contrary to the constitutional principle on which our nation is founded that Her Majesty's courts must always be open to all, citizens and foreigners alike, who seek just redress of perceived wrongs."

j) Lord Mackay of Clashfern, speaking in the House of Lords on 15 March 2004, said:

> "In my submission, [the clause] is a serious affront to the rule of law. Let me take a breach of natural justice. What the House of Commons has been asked to affirm by the Government—and has affirmed —is that the High Court should be prevented from intervening, even where there is a clear breach of natural justice on the part of the tribunal. But for that, the present law would of course allow the High Court to intervene to correct that breach of natural justice. That is what is required to be affirmed by each House of Parliament passing the Bill—that the High Court is precluded from intervening to put right a clear breach of natural justice by a tribunal. In my submission, that strikes right at the very heart of the rule of law. Anyone who read the Bill should have appreciated that.
>
> I therefore find it disturbing, to say the least, that the Government thought it right to invite the House of Commons to pass the Bill in that form."

k) The Chairman of the Bar (Stephen Irwin QC) wrote in The Barrister magazine, Issue 20 (April 2004):

> "Clause 11 is a disgrace. It is unfit for a democracy. It is incredible that it is proposed in the UK."

33. 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

[12] Quoted in the Bar Council's evidence to the Constitutional Affairs Committee at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/276/276we08.htm

what Lord Hoffmann said in R (Simms) v Secretary of State for the Home Department [2000] 2 AC 115: *"the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words."*

F. Academic commentary

34. There has been much academic commentary on Anisminic, but relatively little conclusive opinion on the likely effects of subsequent clauses which purport to render certain decisions immune from questioning in any court.

a) Sir John Laws (*Is the High Court the guardian of fundamental constitutional rights?* [1993] PL 78) noted that in Anisminic the House of Lords *"overrode the apparently plain words of an ouster clause"* and that *"since that case, clauses purporting to oust certiorari have almost fallen into disuse, though there are interesting examples in the British Nationality Act and the Interception of Communications Act."* He went on: *"In the end, however, Anisminic is a case about statutory construction, not the metaphysic of nullity. To oust the court's power of review is necessarily to put some party above the law, or, at least, to make it and not the court the judge of what the law is, which is the same thing. The courts will presume against the conferment of such a power."*.

b) Dr Ivan Hare ('Separation of Powers and Error of Law', *The Golden Metwand and the Crooked Cord,* 1998) concluded, in reliance on Anisminic and Page, that s.7(8) IOCA was ineffective to prevent judicial review for error of law. *"If (as follows from Anisminic) such a clause only applies to errors of law within a body's jurisdiction and if (as held in Page) there is no longer any such category of decision, the clause is redundant. [...] Section 7(8) of the Interception of Communications Act 1985 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.' According to Page, this clause will have no effect on the courts' power to review the Tribunal's decisions for error of law."* He added: *"It would be much more difficult for the court to circumvent the type of ouster inserted in the Foreign Compensation Act 1969, s.3 after Anisminic. The Act states that 'anything which purports to be a determination' of the Commission shall*

not be called into question in any court of law. The problem does not really arise under the 1969 Act because a right of appeal to the Court of Appeal is provided on questions of jurisdiction or the construction of Orders in Council."

c) Dr Stephanie Palmer (*Tightening secrecy law: the Official Secrets Act 1989* [1990] PL 243 at p. 250) analysed the Security Service Act 1989 and commented in respect of its ouster clause (which, as set out above, was the same as that in IOCA): *"It is unclear whether the courts would review a decision of the Tribunal in spite of the clause which purports to oust their jurisdiction. In Anisminic Ltd v Foreign Compensation Commission, the House of Lords extended the doctrine of ultra vires to minimise the effect of a similar ouster formula. However, in matters concerned with the security services, judges may be reluctant to flout these very clear parliamentary instructions excluding their jurisdiction. Yet this would leave the Tribunal as the sole judge of the validity of its own acts. Such a result is hardly consistent with the rule of law."*

d) Sir William Wade ('British Restriction of Judicial Review – Europe to the Rescue', *Judicial Review in International Perspective*, 2010) referred to the formulae in the Foreign Compensation Act 1969 (*"anything which purports to be a determination"*) and in IOCA 1985 (*"including any decisions as to their jurisdiction"*) and said: *"It would be interesting to know what the draftsmen of such clauses suppose that their effect will be. Mr Mohamed Fayed and his brother succeeded in obtaining judicial review of the Home Secretary's decision to refuse them British citizenship in the face of a provision in the Act that the decision 'shall not be subject to appeal to, or review in, any court'. Counsel for the Home Secretary conceded that this ouster clause would not bar judicial review for any legal error, and the court, citing Anisminic and later authority, confirmed that this was right. [...] It needs to be recognised that there can be abuse of legislative power, just as of any other power, and that to cut off access to the courts is such an abuse and is legitimately disallowed by the law."*

e) Conversely, Professor Mark Elliott (*The ultra vires doctrine in a constitutional setting: still the central principle of administrative law*, CLJ 1999, 58(1), p129) wrote: *"Some ouster provisions enacted since the Anisminic decision seek to circumvent the reasoning employed in that case by, for example, providing that even 'purported*

determinations' or decisions 'as to jurisdiction' are not reviewable. It may well be that such clauses would, if put to the test, be held to evince a legislative intention which is sufficiently clear to preclude judicial review. It would then be the duty of the courts to enforce those provisions."

f) Finally (albeit that there was no analysis of the effect of the Anisminic decision), Ian Leigh wrote in *A tappers' charter?* (PL 1986, Spring, 8-18) as to the effect of IOCA: *"The Tribunal's procedure manifestly breaches the rules of natural justice since the applicant may (and almost certainly will) be denied knowledge of the information forwarded by the authorities to the Tribunal and is not entitled to reasons for the Tribunal's decisions. Any judicial review of the Tribunal's findings is precluded by section 7(8) which exempts not only the Tribunal's decisions but also 'any decisions as to their jurisdiction' from being questioned in any court. Bearing these factors in mind, there is a certain irony in section 7(4), which enjoins the Tribunal to review the Secretary of State's issue of a warrant or a certificate 'applying the principles applicable by a court on an application for judicial review'."*

g) Notably, each of the above analyses concerned not the precise clause in issue in the present case (which refers to "*decisions as to whether they have jurisdiction*"), but the clause in the predecessor legislation (which referred to "*decisions as to their jurisdiction*"). The distinction is important, as explained below.

G. Commonwealth authority

Australia

35. 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.

36. 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"*.

37. 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.[13] To grant certiorari on that ground is not to call into question a 'decision' of the Industrial Court..."

38. 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

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

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[13] 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."*

> "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."

40. 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."*

H. *Obiter dicta*

41. 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..."*

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

> "The question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6)... shall not be enquired into in any court of law..."

43. 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..."

I. Submissions

44. The ouster clause in *Anisminic* was materially identical to section 67(8) of RIPA 2000 save for the addition in RIPA of the phrase *"(including decisions as to whether they have jurisdiction)"*.

45. Absent the words in parentheses, the position would be precisely the same as in Anisminic. If the IPT made an error of law, it acted in excess of its power and its (purported) decision would be a nullity. There would be no 'decision' to which section 67(8) could attach. Such a purported 'decision' can therefore be challenged by way of judicial review. The 'ouster clause' at issue in Anisminic would not prevent this.

46. That being so, the only relevant question is whether the difference between that clause and section 67(8) results in a different outcome; in other words, whether the decision impugned by the Claimant is a "*decision as to whether* [the IPT has] *jurisdiction*".

47. On the plain and ordinary meaning of the words, it clearly is not. The decision under challenge is a decision that, as a matter of law, s.5 ISA 1994 empowers the Secretary of State to issue a broad or 'thematic' warrant which is not limited to any specific property. That is in no sense a "*decision as to whether* [the IPT has] *jurisdiction*"; it is a ruling as to the scope of the Secretary of State's powers to grant a warrant under primary legislation.

48. If the provision is placed in its legislative context, the point is clearer still. As set out above s.65 sets out extremely complex provisions 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.

49. Indeed, this makes good practical sense. Section 67(8) is not simply an 'ouster clause'. It empowers the Secretary of State by order to *create* a right of appeal. The words in parentheses confirm that a right of appeal could be created against a decision of the

Tribunal to reject a case for want of jurisdiction under section 65, as well as against a substantive finding.

50. 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.

51. 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.

52. The only basis on which the Defendant could argue that judicial review of the IPT's decision is excluded by s.67(8) is that the reference to "*jurisdiction*", without more, evidences a clear intention to exclude any review. That would be unfounded:

a) First, judicial review can only be excluded by the clearest words: *R (Gilmore) v Medical Appeal Tribunal*, above.

b) Secondly, a mere reference to "*jurisdiction*" does not begin to address the reasoning in *Anisminic*.

i) As Lord Reid made clear in his speech, 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."

ii) As Lady Hale said in R (Cart) v Upper Tribunal [2012] 1 AC 663: *"the distinction was given its quietus by the majority in the Anisminic case not least because the word 'jurisdiction' has many meanings ranging from the very wide to the very narrow."*

c) Thirdly, if the distinction does survive, then - because of the need to construe narrowly any restriction on the right of access to the courts - the exclusion in s.67(8) of review in respect of decisions as to whether the IPT has jurisdiction can only relate to what Lord Reid called the *"narrow and original sense of the tribunal being entitled to enter on the inquiry in question"*, with the result that other challenges (for instance on the grounds of error of law) are not excluded.

d) In that regard it is very significant that Parliament, in enacting s.67(8), did not adopt the concept of *"purported decisions"*, wording which (i) goes to the heart of the reasoning in Anisminic and (ii) was adopted by Parliament in the Foreign Compensation Act 1969 when it presumably did wish to limit judicial review. Nor did Parliament include any reference to *"nullity, defect or irregularity of the proceedings"*, the terms that had been adopted in the Canadian wartime

regulations which were cited in Anisminic as an illustration of "*the way the intention, when it exists, should be achieved*".

e) Finally, 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 outrage 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 "*astonishing measure*" and accepted the political cost.

f) Indeed, the only Parliamentary material relevant to the provisions concerning the IPT demonstrates the opposite. In April 1985, when the original clause (in what became IOCA) was proposed, the justification advanced for that clause by the Minister of State for the Home Office (David Waddington MP) was that a court would not be able to determine an appeal on the merits because in order to do so it would have to disclose sensitive material to an applicant[14]:

> "If a court had jurisdiction in these matters, there would be no question of its being able to proceed according to the laws of natural justice, because there could be no question of its being able to allow the complainant to know of the information which was the basis of the defence case. There has to be a tribunal because, if there were not one, the court would have to be required not to proceed according to the rules of natural justice. It seems to us infinitely preferable, in these circumstances, to have a tribunal rather than a court.
>
> Having had to have a tribunal because one could not allow the complainant, in the first instance, to go to a court, one could not possibly end up with a tribunal which has a special procedure which does not allow the complainant to know the evidence that is stacked against him, and then allow that same applicant to go on appeal to the court and discover that which one had been careful not to allow him to discover before the tribunal.
>
> That is why we must have a provision in the Bill excluding the jurisdiction of the courts. Without that provision, we should end up with the absurdity of the courts having jurisdiction to hear the appeal but having to have special rules of procedure. That really would not be right.

[14] http://hansard.millbanksystems.com/commons/1985/apr/03/the-tribunal#column_1269

> The 1985 White Paper said: It would clearly be neither sensible nor acceptable to establish means whereby those involved in serious crimes or espionage could learn the basis on which their activities had come to notice; or—perhaps even more damaging—could in some cases confirm whether their activities had come to notice at all. That is why there has got to be a tribunal with these special procedures conducting its proceedings in private and not revealing to the complainant information passed on to it."

g) There was no suggestion that the clause was necessary in order to immunise the IPT from review of any errors of law, or any impugnable defects of procedure; on the contrary, the justification was the need to prevent a court reconsidering the facts relating to an applicant's complaint - which is precisely what the clause achieves.

53. Finally, the national security and public interest context does not affect the application of *Anisminic*:

a) In *Attorney General v Ryan* [1980] AC 718 the Privy Council applied *Anisminic* to section 16 of the Bahamas Nationality Act 1973 ("*the decision of the Minister on any such application* [for registration as a citizen of the Bahamas, which could be refused on national security or public policy grounds] *shall not be subject to appeal or review in any court*"). Applying *Anisminic*, the Privy Council "*conclude*[d] *that the ouster clause in section 16... does not prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is ultra vires*" (p. 730).

b) In *R v SSHD, ex p Fayed* [1998] 1 WLR 763 the Court of Appeal applied *Anisminic* and *Ryan* to the ouster clause in section 44(2) of the British Nationality Act 1981 ("*the decision... shall not be subject to appeal to, or review in, any court*") and held that judicial review was nevertheless available on procedural fairness grounds.

Consequences

54. There are no practical difficulties with judicial review of the IPT. Indeed, claims under RIPA are not the exclusive preserve of the IPT. Many RIPA cases are within the jurisdiction of the ordinary courts. See Lord Brown in *R (A)* at [33] ("*while section 7(1)(a)*

HRA proceedings have to be brought before the IPT, other causes of action or public law grounds for judicial review need not").

55. No secrecy issues arise. This claim raises issues of law only. The arguments in the IPT were heard in a public hearing, argued *inter partes*, and an open judgment was delivered. There is no need for any special procedure in this claim for judicial review. Even if there was such a need, such procedures have been provided by Parliament in the Justice and Security Act 2013.

56. In contrast, if section 67(8) does oust judicial review, the IPT would be able to make serious errors of law without the possibility of correction. By way of example, the IPT could, without any remedy:

a) decide not to follow the judgments of the Supreme Court or House of Lords on the interpretation of RIPA (e.g. *McE v Prison Service of Northern Ireland* [2009] 1 AC 908 on the protection of legal professional privilege); or

b) breach the Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) by disclosing information in a manner that is prejudicial to national security or the continued discharge of the functions of the intelligence services (contrary to Rule 6(1))[15].

It is doubtful that Parliament contemplated such a result, in the absence of the clearest words.[16]

Policy

57. 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

[15] In this scenario, the Security and Intelligence Services would be unable even to apply to the High Court for interim relief to prevent the disclosure of information until the issue of principle had been resolved.
[16] The Claimant argues that s.67(8), properly construed, does not have that effect. It reserves the right to argue that, even if it did, the Courts should decline to give effect to it, for the reasons given by Lord Woolf MR in *Droit public – English style* [1995] PL 57 and Lord Steyn in *Comments* [2004] Judicial Review 107.

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."

58. The same point was made in relation to the proposed ouster clause in the 2003 Bill. For example, the then Chairman of the Bar said in his oral evidence to the Constitutional Affairs Committee:

> "what could be created by this clause is a local legal culture sealed off, to a considerable extent, from the rest of the legal culture, sealed off from review, as if under a glass bowl [...]
>
> This area generates heat, and that has an effect, particularly where a smallish group of people operate on a specialist area under pressure. It can be very political and it can be very intense on them, and I have great sympathy for them; but if they do not have the safety valve of a proper accessible system for judicial review, then I am very concerned as to what kind of local culture will grow under that bowl and under that heat [...]"

59. 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 Claimant 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. Lang J has granted permission. The substantive question of law is arguable. There is a real prospect (to put it no higher) that the IPT has erred in law, in a case with significant wider consequences.

J. Conclusion

60. The Court is invited to declare that the IPT is amenable to judicial review.

BEN JAFFEY

TOM CLEAVER

Blackstone Chambers

BHATT MURPHY

19 October 2016

IN THE HIGH COURT OF JUSTICE **CO/2368/2016**

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

BETWEEN

THE QUEEN ON THE APPLICATION OF
PRIVACY INTERNATIONAL

Claimant

AND

THE INVESTIGATORY POWERS TRIBUNAL

Defendant

AND

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

Interested Parties

DEFENDANT'S NOTE
FOR THE PRELIMINARY ISSUE HEARING

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1. This Note has been prepared on behalf of the Defendant, the Investigatory Powers Tribunal ("the IPT"), to assist the Court in relation to the preliminary issue hearing that has been listed for 2 November 2016. The preliminary issue for consideration at

that hearing is whether the IPT is amenable to judicial review.

2. As the IPT indicated in its Acknowledgement of Service, the IPT does not intend to make any submissions in relation to the impugned judgment concerning to s.5 of the Intelligence Services Act 1994.[1] It would be inappropriate for it to comment any further on the judgment that it has delivered.

3. As to the question of jurisdiction and the amenability of the IPT to judicial review, the IPT has submitted this Note to assist the Court in relation to the IPT's history and statutory functions as well as the manner in which it performs its statutory functions.

The history of the IPT

4. 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).

5. 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 ten years (see paragraph 1 of Schedule 3 to RIPA).

6. 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] [2016] UKIP Trib 14_85-CH

[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

7. 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. Since that report, three additional judicial members have been appointed to the IPT: Sweeney, Singh and Edis JJ.

8. The IPT's members are drawn from Scotland and Northern Ireland as well as England and Wales. 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.

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 relating to it."[3]

[3] 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

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.

(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."

Oversight of powers exercised under RIPA

12. 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 and the system of authorisations required under RIPA.

The Commissioners

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

(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 a number of other public authorities (Section 59 RIPA). The current Commissioner is the Rt. Hon 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.

The Intelligence and Security Committee

14. 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 Committee was originally established by the Intelligence Services Act 1994, and was recently reformed, and its powers reinforced, by the Justice and Security Act 2013. The Committee 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 Committee 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. The Committee 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.[4]

Authorisations

[4] See page 3 of its 2015-2016 Annual Report.

15. Intrusive powers under RIPA 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 must be granted only if the particular power sought is in all the circumstances: (a) lawfully available; (b) necessary; and (c) proportionate.

The Tribunal's procedures

16. 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.

17. 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."[5]

18. 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 under a section 8(1) warrant (section 67(7) RIPA).

19. 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), and Parliament is presently considering the introduction of such a route[6]. The proposed provisions will set a high threshold to be met before an appeal may be brought and clearly limit the decisions that may be

[5] 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.

[6] See clause 243 of the Investigatory Powers Bill

appealed (thus, for example, there would be no appeal from a decision relating to a procedural matter[7]).

20. In the event that a claim before the IPT in relation to the one of the SIAs is successful, the IPT is required to make a report to the Prime Minister (section 68(5) of RIPA).

Procedural Rules

21. 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:

> "(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."

22. 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."

[7] See the proposed new s.64(C) of RIPA that would be inserted by virtue of clause 243 of the Bill.

23. 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 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*"[8] in such proceedings.

24. 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 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;

[8] Paragraph 7

(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).

25. 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 (see further below).

26. 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."

27. In Applications Nos IPT/01/62 and IPT/01/77, 23 January 2003, 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.

28. 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)."

29. 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."

30. In *Kennedy v United Kingdom* (2011) 52 EHRR. 4 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."[9]

The IPT's evolving procedures for dealing with sensitive materials

31. 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."[10] (Emphasis as per original)

32. 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.[11] 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.

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[9] Paragraph 196

[10] See page 12. The IPT set out guidance in relation to the role of Counsel to the Tribunal in *Liberty/Privacy (No.1)* [2014] UKIPTrib 13/77-H; [2015] 3 All ER 142, paragraphs 8-10

[11] 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.

Recent judgments

33. The IPT maintains a website[12] which, as well as containing guidance for potential complainants, also contains most of the IPT's 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.

34. 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] UKIPTrib15_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 that since 2003 the complainant had been the subject of a campaign of harassment by members of the Security Service, acting in their official capacity; and

(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.

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

The nature and volume of complaints to the IPT

Organisations to which complaints related

35. 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.[13]

36. 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.[14]

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

> "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."[15]

The volume of complaints

38. The volume of complaints to the IPT has risen from 95 in its first year to over 250 in 2015.[16] 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,

[13] See figure 3 on p.20 of the IPT's 2011-2015 report

[14] See also Chapter 3 of the IPT's 2010 report which is appended to this Note at Appendix A.

[15] Page 20 of the 2011-2015 IPT Report for 2011-2015

[16] See para 4.2 of Chapter 4 of the IPT Annual Report for 2011-2015.

referred to above.[17]

39. 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.

40. 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

41. 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 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."[18]

42. 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*".[19]

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[17] See para 4.3 of Chapter 4 of the IPT Annual Report for 2011-2015.

[18] See para 4.10 of Chapter 4 of the IPT Report for 2011-2015

[19] Figure 1, p.18

43. 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*"

44. In the last few months, two complainants whose complaints had been dismissed as being frivolous and vexatious have sought to challenge the IPT's decision in the High Court. The first sought judicial review against the IPT as well as the Metropolitan Police Service[20] and the second sought to injunct the IPT as well as the Undercover Policing Inquiry, the SIAs, the Ministry of Defence and a number of other defendants.[21]

Complaints resulting in a "no determination"

45. 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

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[20] *R (oao) Christopher Rumanrace v IPT and Metropolitan* Service, CO/3654/2016, permission decision not yet made. A copy of the claim form is appended to this Note at Appendix B.

[21] *Mandy Richards v IPT, Undercover Policing Inquiry, MI5, MI6 and others*, HQ16X03179, application dismissed by Globe J on 19 October 2016. A copy of the application is appended to this Note at Appendix C.

[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.

into account in considering the complaint.[23]

Representation of complainants

46. 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.

Conclusions

47. 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 in a finding by the Court that the IPT was amenable to judicial review.

48. The Claimant has argued that those would be met by s.6 of the Justice and Security Act 2013[24], but those provisions are an incomplete answer to such difficulties. The Justice and Security Act 2013 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).

49. Unrepresented complainants seeking to challenge the dismissal of their complaints as

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[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*. 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.*"

[24] See para 54 of the Claimant's Skeleton Argument

being frivolous or vexatious is also likely to place a considerable burden on the Court's resources. The two recent attempted challenges referred to above give an indication of those difficulties. For example, the *Mandy Richards* claims have resulted in two separate hearings, one before Dove J and the other before Globe J.

50. Finally it is to be noted that Section 67(8) of RIPA recognises that there may be provision for the Secretary of State to order that there could be an appeal from the IPT. Parliament is presently considering the introduction of such a route in the Investigatory Powers Bill: a 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.

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Griffin Building
Grays Inn
London WC1R 5LN

26 October 2016

3. STATISTICS

The table below shows the number of complaints received by the Tribunal during 2010. The volume of complaints received in 2010 increased to 164 as compared to 157 the previous year and 136 in 2008. The total number of complaints received in 2010 represents an increase of 4% and 18% respectively compared to the 2009 and 2008 totals. The volume of complaints received is evenly spread over the first three quarters of the year, however there is a noticeable upwards trend in the final quarter of the year, where the Tribunal received 54 complaints.

Table 1: Number Of Complaints Received Per Quarter 2010	
2010 Quarter	**Number**
Jan-Mar	39
Apr-Jun	36
Jul-Sep	35
Oct-Dec	54
Total	164

Chart 1: Number Of Complaints Received Per Quarter 2010

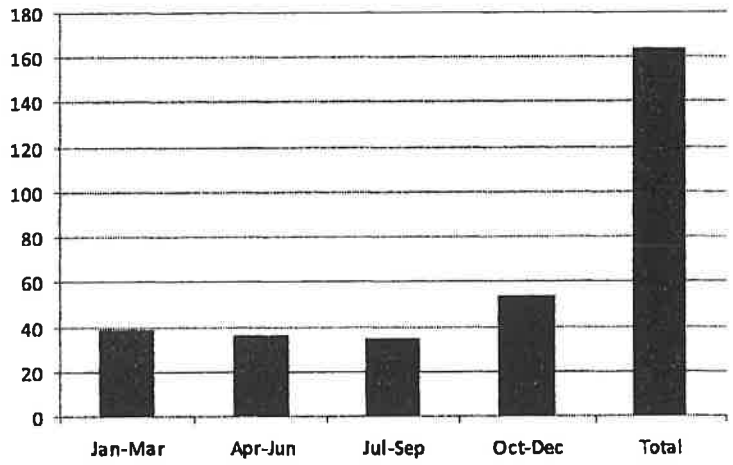
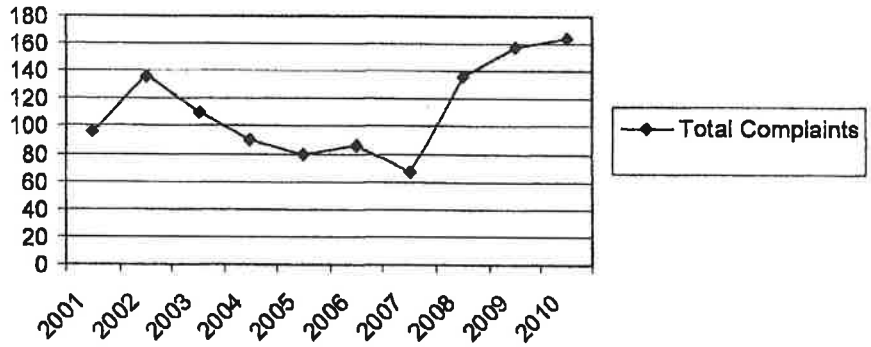


Table 2: Number Of Complaints Received Annually Since 2001	
Calendar Year	**Number Of Complaints**
2001	95
2002	137
2003	110
2004	90
2005	80
2006	86
2007	66
2008	136
2009	157
2010	164

Chart 2: Annual Complaints Received since IPT Inception



Both Table and Chart 2 provide an interesting historical illustration of the number of complaints received by the Tribunal since its inception in 2000. The maximum number of complaints received in a single year was in 2010, when 164 complaints, were received. Complaint numbers have been on an upward trajectory since an all-time low of 66 in 2007. The steepest increase in complaints was between 2007 and 2008, which represented an 105% increase in numbers from 66 to 136 complaints.

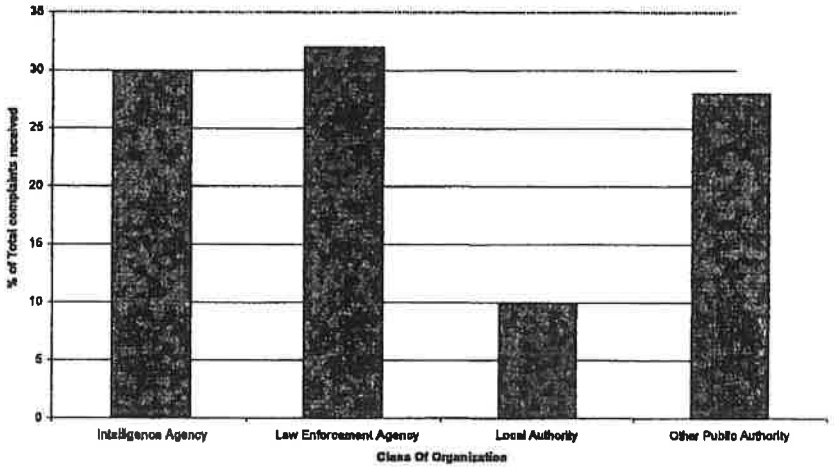
Organisations to which complaints related in 2010

The Table and Chart presented give information about the types of organisations that were the subject of complaints during the year. It is important to note that the IPT rules dictate any valid complaint received by the Tribunal i.e. one that is within jurisdiction, refers to conduct not longer than a year ago and is not deemed frivolous or vexatious must be investigated. An investigation or receipt of a complaint cannot be equated to any accusation of levels of wrongdoing on the part of a public authority unless the Tribunal makes a ruling in favour of the complainant.

Table 3

Public Authority	Complaints Received (%)
Intelligence Agency (i.e SIS, GCHQ or MI5)	30
Law Enforcement Agency (i.e. Police Force, SOCA)	32
Local Authority (i.e. Local Council)	10
Other Public Authority (i.e. DWP)	28

Chart 3: Organizations Subject To Complaints 2010



Notwithstanding the above caveat, it is interesting to see that out of the complaints investigated, there existed a relatively even spread across the kinds of organisations that were the subject of complaints. Local authorities received far fewer complaints than intelligence agencies, law enforcement agencies and miscellaneous public authorities. 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. The Tribunal has procedures to handle such cases. However the decrease compared to previous years of complaints received against local authorities is interesting. Much of the negative media coverage around the advancement of the 'surveillance state' and misrepresentations of RIPA has referred to local authority use of RIPA powers, with reference made to the IPT finding in favour of a complainant in the 'Poole' Judgment. There appear, however, to be far fewer complaints against local authorities in 2010 compared to previous years. This may be due to improvements in RIPA authorisation practices in local authorities or less appetite in the press for negative media reporting of RIPA.

A number of complainants continue to approach the IPT to investigate complaints that commonly do not fall within its jurisdiction. The IPT in such cases advises the complainant that organisations such as the Independent Police Complaints Commission, where possible The Information Commissioner's Office, the Adjudicator's Office, the Police Ombudsman for Northern Ireland and the ordinary courts may be the correct place to take their complaint but in relation to the IPT it is out of jurisdiction.

Subject matter of complaints in 2010

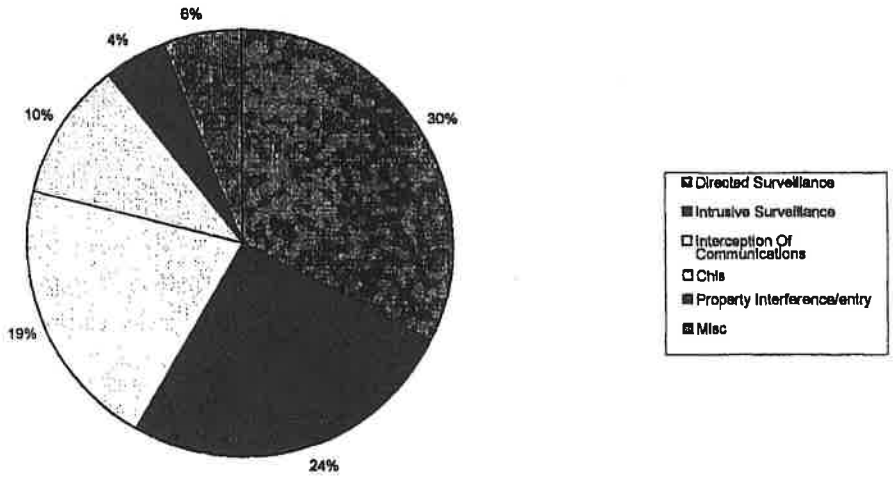
The Table and Chart below provide information on the subject matter of complaints reviewed by the Tribunal during 2010. Once again, it is important for the reader to note that the IPT rules dictate any valid complaint received by the Tribunal must be investigated. Therefore, in a similar fashion to the wide range of organisations against whom a claim could be made, it is wholly plausible (and indeed often the case) that a complainant may allege a wide range of intrusive conduct, ranging from directed surveillance to property interference against a public authority. This in no way reflects the amount, if any, of conduct, lawful or unlawful, that may be occurring.

Table 4: Type Of Conduct Alleged In 2010 Complaints

Type Of Alleged Conduct	Number Of Complaints
Directed Surveillance	49
Intrusive Surveillance	39
Interception Of Communications	31
Covert Human Intelligence Source (CHIS)	16
Property Interference/Entry	7
Misc	9

A total of 13 complaints received in the year were not able to be classified

Chart 4: Conduct Forming Basis Of Complaints In 2010



Once again, it is noteworthy that the majority of complaints received by the Tribunal refer to allegations of improper conduct in relation to directed surveillance, intrusive surveillance and to a slightly lesser extent the interception of communications. There were far fewer complaints at 10%, 4% and 6% respectively in relation to the recruitment or use by public authorities of Covert Human Intelligence Sources (CHIS), entry on or interference with property, or miscellaneous conduct.

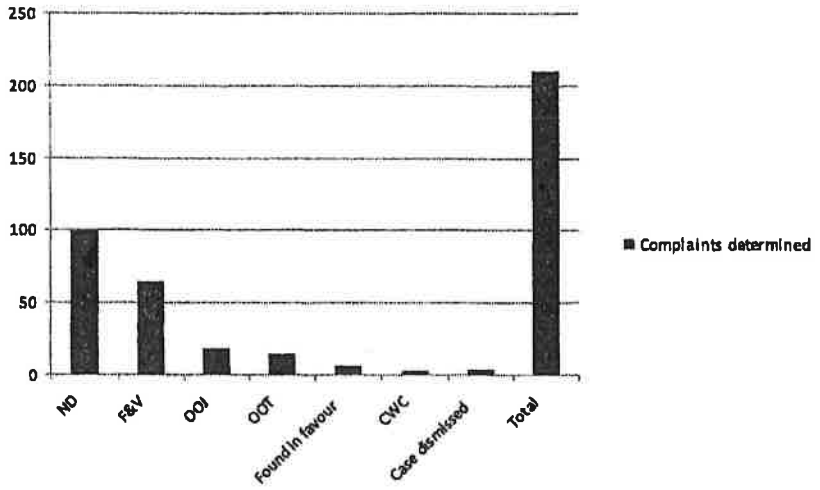
4 Rulings and outcomes 2010

Table 5: Outcomes Of 2010 Complaints	
Outcome Of Claim	**Number**
No Determination[1]	99
Out Of Jurisdiction[2]	18
Out Of Time[3]	15
Frivolous or Vexatious[4]	65
Case Dismissed[5]	4
Cwc[6]	3
Found In Favour[7]	6
Total	210

The Tribunal determined 210 complaints in 2010 which incorporated a number carried over from previous years.

Notes	
1	No determination in favour of the complainant: If no determination is made in favour of the complainant that may mean 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 the Act. The provisions of the Act do not allow the Tribunal to disclose whether or not the complainant are, or have been, of interest to the security, intelligence or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.
2	Out of Jurisdiction: This ruling means that after careful consideration by at least two Members the Tribunal has ruled that under Rule 13(3)(c) of the Investigatory Powers Tribunal Rules 2000, the Tribunal has no power to investigate the complaint.
3	Out of Time: In such cases after careful consideration by at least two Members the Tribunal rules that under Rule 13(3)(b) of the Investigatory Powers Tribunal Rules 2000, the complaint is out of time and the time limit should not be extended.
4	Frivolous or vexatious: the Tribunal concludes in such cases that the complaint is obviously unsustainable and/or that it is vexatious, usually in the sense that it is a repetition of an earlier complaint or complaints previously dealt with, and thus falls within the provisions of Rule 13(3)(a), such that, pursuant to s67(4) of RIPA, the Tribunal has resolved to dismiss the claim.
5	Case dismissed: The Tribunal has resolved to dismiss the complaint (due to a defect such as the failure by a complainant to sign the form)
6	CWC: Complainant withdrew the complaint.
7	The Tribunal has ruled in favour of the complainant

Chart 5 Complaints Determined in 2010



A breakdown of the 210 complaints determined in 2010 is presented above. It shows that in 99 cases (47%) the Tribunal made a ruling of no determination in favour of the complainant. In essence, as detailed in the glossary provided, this meant that if any RIPA conduct was occurring, this was correctly authorised or that no such conduct was occurring. The next highest category of outcome, at 31%, were those claims the Tribunal determined were frivolous or vexatious, followed by claims deemed out of jurisdiction (9%) and out of time (7%). 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 procedures it has established over its ten-year history. The justification and history of these policies and procedures is considered in depth in the 'How the Tribunal Works' section that follows. Decisions on whether a claim is out of time, jurisdiction or frivolous or vexatious are only made if two or more Members are in agreement as to the reasons for determining such an outcome.

cial Review
laim Form

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

In the High Court of Justice
Administrative Court

For Court use only	
Administrative Court Reference No.	CO/3654/2016
Date filed	08/07/2016

HIGH COURT OF JUSTICE ★ 21 JUL 2016 ★ LONDON ADMINISTRATIVE COURT

SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name: CHRISTOPHER RAMNARACE

address: [redacted]

Telephone no.: 07961202848

Fax no.:

E-mail address: CHRISRAM2011Z@OUTLOOK.COM

Claimant's or claimant's solicitors' address to which documents should be sent.

name:

address:

Telephone no.:

Fax no.:

E-mail address:

Claimant's Counsel's details

name:

address:

Telephone no.:

Fax no.:

E-mail address:

1st Defendant

name: INVESTIGATORY POWER TRIBUNAL

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name:

address: INVESTIGATORY POWERS TRIBUNAL
P.O BOX 33220
LONDON SW1 9QQ

Telephone no.: 02073558711

Fax no.:

E-mail address: INFO@IPT-UK.COM

2nd Defendant

name: METROPOLITAN POLICE
DPS

Defendant's or (where known) Defendant's solicitors' address to which documents should be sent.

name:

address: DIRECTORATE OF PROFESSIONAL STANDARDS DPS COMPLAINTS SUPPORT TEAM 22nd FLOOR EMPRESS STATE BUILDING EMPRESS APPROACH DALE ROAD LONDON SW6 1TR

Telephone no.:

Fax no.:

E-mail address: DPSMAILBOX-CST@MET.POLICE.UK

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: ~~Claire~~ Rev. ALMA PARKINSON
SHANDI RAMNARACE NADIA RAMNARACE JHON RAMNA

address: [redacted]

Telephone no.: [redacted]

Fax no.:

E-mail address:

name: RESIDENTIS

address: [redacted]

Telephone no.:

Fax no.:

E-mail address:

SECTION 3 Details of the decision to be judicially reviewed

Decision: INVESTIGATIVE POWER SAY THERE IS ISAFAMIN EVIDENCE DECISION DATED 10-7-2015 METROPOLITAN POLICE SAY THERE IS NO INFORMATION EVIDANCE AND SAY THAT SECURITY SERVICES HAVE NOT BEEN TARGETING ME AND I AM NOT WANTED BY ANY LAW ENFORCEMENT IN UK FAMILY COURT HIGH HOLBOD SOLICITOR LOST MY COURT FILE AND I HAS NOT HAPPY WITH

Date of decision: DECISION MADE THIS WOMEN WHEN ON TO CONSPIRE WITH OTHERS TO COMMIT MURDER TO AVOID JUSTICE WITH COVER UPS BY THE POLICE SHE KNEW WITE TO HAVE OFFICE ABOUT MY FAMILYS DETAILS WERE BEING GIVEN OUT TO MEMBERS OF THIS GANG BY SECURITY SERVICES HAVE BEEN COVERD COURTESY WATCHING ME AND FAMILY

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name: INVESTIGATIVE POWERS TRIBUNAERL
METROPOLITAN POLICE
PRINCIPAL FAMILY COWT HIGH HOLBON
THE HOME OFFICE

address: PO BOX 33220 London SW1H 9ZQ
DPS COMPLAINTS SUPPORT TEAM 22 FLOOR EMPRESS STATE BUILDING EMPRESS APPROACH LILLIE ROAD LONDON SW6 1TR

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

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

Privacy home invasion by an authorised police officer in my property ~~see~~ right to fair trail right to life freedom of movement all my human right have been violated by security services for something i dont know and are accussing me of

SECTION 5 Detailed statement of grounds

☐ set out below ☐ attached

iam not happy with the decision made by police they have more than enough evidence to convict the person i reported to them and at time they say i write to them and didnt respond back because i was in hospital not in london my matters are still ongoing investigative powers made a quick decesion and my matters are still ongoing the family court i had to accept a decision which i didnt want because my solictor didnt turn up my file went missing and this person went on to commit crimes against me

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

iam asking for an extion on a decision made by investigative powers.

SECTION 7 Details of remedy (including any interim remedy) being sought

i want compensation for all that i have been through
i want all recourds of this case to be disdroyed supposed to held by security services some fake story made up by my ex partner and some of her relatives and police officer that was seen at my property the very same person planted what ever it was then collect it in i want a public appology from security services i want them to admit that the very same person that made up a story was my ex partner how i had taked court before for blackmail threats to dna test i want them to admit she is member of a gang that scam people sell drugs and that is not the first time she did this she also got her ex husband stabbed i also want to leave uk and tha

SECTION 8 Other applications

I wish to make an application for:- nobody have the right look up any off my personal details police or security services to make up storys i want them to admit police no this women and have been lying to me covering up her actions because she might be a police informent well that is a lie and plus she is part of gang a jamaican gang that use the british borns running scams selling drugs killing people using the informant name to scapgoat justice and police turn a blind eye

i want them to admit members of this jamaican gang have access to british borns passport numbers using them to bring friends from jamaica to uk then enrolling them in the police informent scene knowing they are criminals and murders how can crimans be part of justice system that i remember murder have taken

SECTION 9 Statement of facts relied on

in 2012 i moved to a new apartment flat 4 Block peabody ESTATE Rosendale Road SE24 9EQ By April 2018 i was getting reports of people entering my property i used to come home finding my door unlocked from the bottom Strange people in the stairwell one day i walked passed them it was three women one was my niebour one said thats a dead man one said be quit when i turned round the one that said it looked down on her phone my niebour had this man that used to come and see her he drove a black golf gti June 2018 11th i came in my loks on my door off when in heard a commotion downstairs looked outside saw the person that used to come see my Neibour with a white man with blond hair found later he was a police officer a white women with black hair found out later she was police officer and a few jamaican men talking about iam upstairs they had guns and they kill me i phoned the police they didnt come so i ran out got to my mums house two days later i was going to my sisters car and they were following us i dont know how they was doing it but somebody was giving out my sisters phone number and mine for these illagaly follow me around and harrass that same day i ended up in hospital because i was stressed out and police were doing nothing specialy brixton police and the reason i already pointed out before all this happend i had taken an ex partner to court for trying to blackmail me trying to extort me to collect government funds using a child i found she was a prostitute she didnt have stay in country she new i was popular in camberwell and well respected by many so she started to slander my name with lies to take the heat off her because people no she is a slag whore and part of gang jamaican criminals that use the british for things when they cant get what they want they try to get them killed they have link to somebody in the police now puts them on informent payroll this is all an act just to stop them getting arrested for selling drugs and other criminals acts they bring other gang members from jamaica to do the same thing using british peoples passport numbers she never turned up for court her name Dhalia cox i made reports to police now again about all this women was doing but they did nothing but they knew there lies too [redacted] back to the hospital i went there 2018 June 18 because i was stressed long story short came out dec 2014 october 2014 security services trying to take my in st georges hospital asking me about now i saw break into flat before trying to take my doctor was trying to because they was pressuring for him to do it one containing blood now i have suspected help of all for something i dont know - 1

Statement of Truth

I believe (The claimant believes) that the facts stated in this claim form are true.

Full name Chris Ramnarine

Name of claimant's solicitor's firm _____

Signed _____ Position or office held _____

Claimant ('s solicitor) (If signing on behalf of firm or company)

SECTION 10 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

☐ Statement of grounds	☐ included	☐ attached
☐ Statement of the facts relied on	☐ included	☐ attached
☐ Application to extend the time limit for filing the claim form	☐ included	☐ attached
☐ Application for directions	☐ included	☐ attached

☐ Any written evidence in support of the claim or application to extend time

☐ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision

☐ Copies of any documents on which the claimant proposes to rely

☐ A copy of the legal aid or CSLF certificate *(if legally represented)*

☐ Copies of any relevant statutory material

☐ A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

☐ a copy of the removal directions and the decision to which the application relates	☐ included	☐ attached
☐ a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case	☐ included	☐ attached
☐ a detailed statement of the grounds	☐ included	☐ attached

Reasons why you have not supplied a document and date when you expect it to be available:-

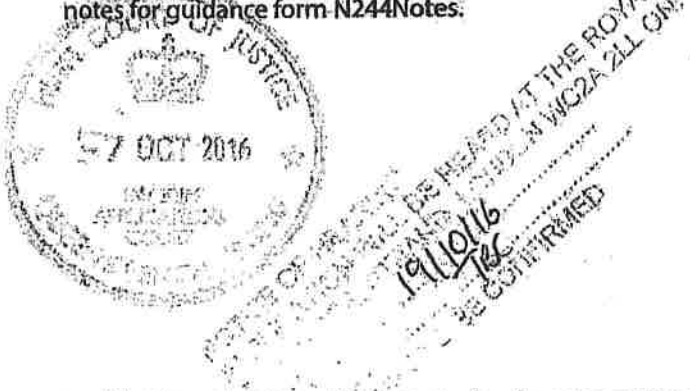
Waiting for further information for case to come back from the family court high holborn

Signed _____ Claimant ('s Solicitor)_____

N244

Application notice

For help in completing this form please read the notes for guidance form N244Notes.



Name of court	Claim no.
RCJ - Queen's Bench Div	HQ16X03179
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
	HWF-[ ][ ][ ]-[ ][ ][ ]
Warrant no. (if applicable)	
Claimant's name (including ref.) Mandy Richards	
Defendant's name (including ref.) IPT, UCPI, Met Police, MI5, MI6, Hackney Council, Armed Forces, Progress, The NHS, Royal Mail & others	
Date	

1. What is your name or, if you are a legal representative, the name of your firm?

   Mandy Richards

2. Are you a ☑ Claimant ☐ Defendant ☐ Legal Representative

   ☐ Other *(please specify)*

   If you are a legal representative whom do you represent? N/A

3. What order are you asking the court to make and why?

   Injunction against the named parties

4. Have you attached a draft of the order you are applying for? ☐ Yes ☐ No

5. How do you want to have this application dealt with? ☑ at a hearing ☐ without a hearing

   ☐ at a telephone hearing

6. How long do you think the hearing will last? 3 Hours [ ] Minutes

   Is this time estimate agreed by all parties? ☐ Yes ☐ No

7. Give details of any fixed trial date or period: N/A

8. What level of Judge does your hearing need? High Court Judge

9. Who should be served with this application? IPT, UCPI, Met Police & others as named

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

See attachment for list of Respondents and addresses

10. What information will you be relying on, in support of your application?

☑ the attached witness statement

☑ the statement of case

☑ the evidence set out in the box below

If necessary, please continue on a separate sheet.

As Claimant I have been liaising with each of the named agencies directly for urgent support given the evidence set out and the identified current risk of serious harm – please refer to the Evidence Bundle submitted. I have for over 18 months asked the police and others, where specifically appropriate to their agency, to look into the reported incidents as they have occurred pertaining to 'malicious and unlawful interception, monitoring and manipulation of my communications and activities, unethical sharing of information disruption to my personal, professional and political life, home intrusions, car tampering, electrical tampering, bike tampering and domestic disturbances, environmental pollutants and NHS malpractice resulting in a potentially lethal risk of harm to my person and to my health.
Given that the means of direct inquiry have been exhausted without satisfactory response or resolution, that related incidents have escalated and the subsequent serious risk of harm has been exacerbated causing further serious personal injury and domestic disturbance following these requests for support, I now seek this Injunction and ask that the Respondents be called upon to take the following urgent action in respect of on-going investigations and in order to acknowledge and mitigate against the current serious risk of harm as outlined. [Cont.d on separate sheets]

Statement of Truth

(I believe) (The applicant believes) that the facts stated in this section (and any continuation sheets) are true.

Signed M. Richards Dated 7/10/16

Applicant('s ~~legal representative)('s litigation friend~~)

Full name Mandy Marie Richards

Name of applicant's legal representative's firm N/A

Position or office held N/A

(If signing on behalf of firm or company)

11. Signature and address details

Signed N/A Dated 7/10/16

Applicant('s ~~legal representative's)('s litigation friend)~~

Position or office held

(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

[redacted]

Postcode N16 9PF

	If applicable
Phone no.	07941630164
Fax no.	
DX no.	
Ref no.	

E-mail address	mandymarierichards@gmail.com

(1) Full list of Defendants and Service Addresses

1. IPT (Investigatory Powers Tribunal), PO Box 33220, London, SW1H 9ZQ
2. UCPI (Undercover Police Inquiry), PO Box 71230, London NW1W 7QH
3. Metropolitan Police c/o Sir Bernard Hogan-Howe, New Scotland Yard, Broadway, London SW1H 0BG
4. MI5 via The Treasury Solicitor, Government Legal Department, Litigation Group, 1 Kemble Street, London WC2B 4TS
5. MI6, SIS via The Treasury Solicitor, Government Legal Department, Litigation Group, 1 Kemble Street, London WC2B 4TS
6. Hackney Council, Chief Executive, via Mr D Kilcoyne (Counsel)
7. The Army via The Treasury Solicitor, Government Legal Department, Litigation Group, 1 Kemble Street, London WC2B 4TS
8. Progress, Third Floor, 11 Tufton Street, London, SW1P 3QB
9. Royal Mail via Luke Ryan, Senior Legal Adviser, Litigation, Royal Mail Group Legal, Level 1, One Broadgate, London EC2M 2QS
10. Peabody, c/o Chief Executive, 45 Westminster Bridge Road, SE1 7JB
11. Department of Health - Right Hon Jeremy Hunt MP, Secretary of State for Health, Richmond House, 79 Whitehall, London, SW1A 2NS re: Systemic Failings across the NHS with specific reference to Claimant's care under the following commissioned service providers:

    11.1 Mildmay Practice, Green Lanes Mildmay Medical Practice, 2a Green Lanes, London, N16 9NF
    11.2 Homerton University Hospital NHS Foundation trust, Trust Offices, Homerton Row, London, E9 6SR.
    11.3 Whittington Hospital NHS Trust, Trust Offices, Magdala Avenue, London N19 5NF
    11.4 University College London Hospitals NHS Foundation Trust, Trust Offices, 250 Euston Road, London NW1 2PG
    11.5 Guys & St Thomas' Hospital, Trust Offices, Guy's Hospital, Great Maze Pond , London, Greater London, SE1 9RT
    11.6 Kings College Hospital, Trust Offices, Denmark Hill London SE5 9RS
    11.7 Royal Free Hospital NHS Foundation Trust, Trust Offices, Pond Street, London NW3 2QG

12. Virgin Media via Daniel Goodkin, 4 Pump Court, Temple, London EC4Y 7AN
13. UK Power Network Ltd via Ian Helme (Counsel), 1 Brick Court
14. Npower, Windmill Hill Business Park Whitehill Way, Swindon, Wiltshire, SN5 6PB
15. Thames Water Utilities Ltd, via Pitmans Solicitors, No.1 Royal Exchange, London, EC3V 3DG

CO/2368/2016

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

SKELETON ARGUMENT OF THE INTERESTED PARTIES FOR HEARING OF PRELIMINARY ISSUE 2 NOVEMBER 2016

[References in square brackets are to the page numbers in the JR bundle served by the Claimant.]

Introduction

1. The question for determination in this preliminary issue hearing is whether the Investigatory Powers Tribunal ('IPT') is amenable to judicial review.

2. In these proceedings the Claimant seeks to judicially review the decision of the IPT dated 12 February 2016 in which it gave judgment in the linked 'Privacy' and 'Greennet' complaints[1] both of which related to GCHQ's "Computer Network Exploitation" ('CNE') activities. In that judgment the IPT set out its conclusions on a number of preliminary issues concerning the lawfulness of CNE, including its compatibility with Arts. 8 and 10 ECHR. The constitution of the IPT consisted of two High Court Judges (Burton J and

[1] IPT/14/85/CH and IPT/14/120-126/CH **[168]**.

Mitting J as President and Vice President respectively) and three senior QCs[2]. Following the preliminary issues judgment in February 2016, the IPT made "*no determination in favour*" in respect of each of the complainants[3].

3. Judicial review proceedings were issued by the Claimant on 9 May 2016. Having considered the Acknowledgements of Service and Summary Grounds filed by the Defendant and the Interested Parties, Lang J indicated that she had "*real doubts*" as to whether the Court had jurisdiction to determine the substantive claim and therefore ordered that the question of jurisdiction ought to be considered first as a preliminary issue[4]. Despite attempts by the Claimant to have that order set aside, it was affirmed by Irwin J on 4 August 2016.

4. It is the Interested Parties' submission that s.67(8) of the Regulation of Investigatory Powers Act 2000 ('RIPA')[5] clearly and unambiguously excludes the application of judicial review to decisions of the IPT. That was the unanimous conclusion of the Supreme Court in *A v Director of the Security Service* [2010] 2 AC 1 ('*A v B*'). As the Court held, the IPT sitting apart from the tribunals and court system is "*constitutionally inoffensive*"[6]. As one part of a carefully balanced system of oversight of the acts of the Security and Intelligence Agencies ('SIAs'), Parliament has allocated scrutiny of complaints about such acts to a specialist investigatory tribunal. That specialist tribunal is of like standing and authority to the High Court, and has been given special procedures, apt for that unique task. The ECtHR has upheld the compatibility of its procedures with Art 6 ECHR[7]. – In these circumstances, it is submitted that this Court should follow the decision in *A v B* and dismiss the claim for judicial review.

5. As to the substantive merits of the judicial review claim, the Court has ordered that these issues be stayed pending determination of the preliminary issue (see §3 of Lang J's Order). However the Claimant has sought to raise those issues in this hearing, and seeks

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[2] Mr Robert Seabrook QC, Mr Charles Flint QC and The Hon Christopher Gardner QC.

[3] in accordance with the statutory provisions in s.68(4) of the Regulation of Investigatory Powers Act 2000 ('RIPA'), and notified them by letter dated 9 March 2016.

[4] See Order dated 17 June 2016.

[5] Which states: "*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.*"

[6] *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.

[7] *Kennedy v United Kingdom* (2011) 52 EHRR 4.

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. Any determination of the preliminary issue in favour of the Claimant could have serious consequences (beyond this claim) in terms of the amenability of the IPT to judicial review. In those circumstances, the nature of this particular substantive challenge can be no more than an example of the range of decisions which might be challenged if the Claimant's position was to be accepted.

b. In any event, the Claimant has grossly mischaracterised the IPT's decision in this case since 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. That was not what the IPT decided. 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 **[195]**). It was no part of the IPT's careful reasoning to conclude that the principle of legality could never have any application in the national security sphere.

c. Further it is important to be clear about the proper limits of the IPT's actual decision. The IPT judgment gives general guidance about the scope of warrants under s.5 ISA and 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 **[195]**). It also made clear that any warrant should be "*as specific as possible*" in relation to the property covered by the warrant (§47 **[197]**). The day to day oversight for such matters rests with the Intelligence Services Commissioner (as explained at §27 of the Interested Parties' Summary Grounds). It is untenable to suggest (see §§44 and 46 of the Claimant's Grounds) that there is no independent oversight of the powers in s.5 ISA.

6. These submissions have been divided into the following sections:

A. The relevant statutory framework establishing and governing the IPT
B. Recent examples of the IPT's decisions
C. Section 67(8) of RIPA – submissions
D. Response to the Claimant's submissions

[8] as asserted at §9, §37 and §57 of the Claimant's Grounds and see §§4-13 of the Claimant's skeleton argument.

A) The relevant statutory framework establishing and governing the IPT

Single legislative scheme

7. On 2 October 2000 a *"single legislative scheme"*[9] came into existence consisting of the Human Rights Act 1998 ('the HRA'), RIPA and the Civil Procedure Rules 2000[10]. 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.

Establishment and constitution of the IPT

8. 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).

Jurisdiction

9. The IPT's jurisdiction is broad. 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.

10. 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)).

Interface with the Commissioners

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[9] 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.

[10] Those rules, inter alia, contained provisions governing claims under s.7 of the HRA at CPR 7.11 (see *A v B* at §3).

11. 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.'*[11] The relevant Commissioner then reports to the Prime Minister, at least on an annual basis.[12] 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'*).[13]

12. 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 Intelligence Services Act 1994 ('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)).

13. The current Intelligence Services Commissioner is Sir Mark Waller. The current Interception Commissioner is Sir Stanley Burnton.

Procedure

14. 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)).

15. Subject to those Rules, the Tribunal 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 RIPA (regarding the existence and use of intercept material) is disapplied.

16. As explained in the Tribunal's 2011-2015 Report:

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[11] RIPA, s.60(1).

[12] *ibid*, s.60(2) and (3).

[13] *ibid*, s.60(4) and (5).

"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)

17. Central to the IPT's judicial oversight is the duty of disclosure in IPT proceedings which is imposed on the Government (the duty 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."

18. 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 concluded that r.9(6) of the Rules was *ultra vires* the rule-making power in s.69 of RIPA on the basis that it was not appropriate for all IPT hearings to be held in private. Further, 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). It follows that, 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 **[178-181]**).

19. In addition, 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.

20. 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 may 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.

21. 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."*

22. 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."

23. In terms of the role of Counsel to the Tribunal (CTT), in a number of recent IPT cases, 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*) [14]. That process also occurred in the Privacy proceedings which are the subject of this complaint, as is evident from e.g. §11(ii) of the IPT's judgment **[182]**.

Remedial discretion

24. 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[15].

    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[16]. It means that after considering the case

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[14] 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.

[15] *"(7) Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include–*
(a) an order quashing or cancelling any warrant or authorisation; ...
(b) an order requiring the destruction of any records of information which–
(i) has been obtained in exercise of any power conferred by a warrant or authorisation; or
(ii) is held by any public authority in relation to any person."

[16] For a recent 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.

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)[17], 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)[18] .

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.

Other oversight bodies

25. 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

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[17] 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.*"

[18] 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.

their activities, policies, expenditure, administration and operations. This Committee is currently chaired by the Rt. Hon. Dominic Grieve QC MP.

B. Recent examples of the IPT's operation

26. 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[19]. That has prompted a number of high-profile challenges in the IPT brought by NGOs or individuals/companies allegedly affected by the SIAs' activity[20]. .

27. In the ***Liberty/Privacy*** 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. However, it declared that in light of the disclosure the regime was now in accordance with the law.

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[19] See the foreword to the report at page 1.

[20] 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.

28. 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."*

29. 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).

30. 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.

31. 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.

32. Most recently on 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[21]. 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 December 2016 (which will also consider EU law issues).

33. 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) simply do not possess. It also sits within a carefully crafted

[21] See §18 of the IPT judgment.

scheme of checks and balances which work together to provide important oversight of the exercise of sensitive intelligence gathering powers.

C. Section 67(8) of RIPA 2000 –submissions

34. Section 67(8) of RIPA 2000 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."***

35. Five submissions are made about the effect of this provision. **First,** its express language is clear and unambiguous:

    a. 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.

    b. That wording 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.

    c. The words in parenthesis also support that conclusion. They make clear that it matters not whether a challenge is on the grounds of excess of jurisdiction or decisions within jurisdiction (to the extent that those concepts remain of relevance post-*Anisminic*[22]). The section is thus evidently also intended to, and does, exclude all such public law challenges.

36. In those circumstances Parliament has included the necessary *"clear and explicit words"* which make plain that judicial review is excluded – see *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at 583, *Anisminic* per Lord Wilberforce at 207B and Lord Pearce at 194D-E and *Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §30, §37 and §40 and Lord Phillips at §71.

37. As stated by Baroness Hale in *Cart*, with reference to the speech of Lord Wilberforce in *Anisminic* (at p207B):

> *'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*

[22] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 – discussed further below.

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)[23]

38. This is not a situation where judicial review has been removed by statutory implication or by a deeming provision. That was the position in *Cart* where the Secretary of State sought to argue that the Special Immigration Appeals Commission (SIAC) was immune from the judicial review jurisdiction because it was designated a "*superior court of record*". 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 in the Divisional Court [2010] 2 WLR 1012 at §§31-32). Here the position is different. Parliament plainly intended that this very specialist tribunal should not be subject to an appeal or to questioning in any judicial review proceedings.

39. **Secondly**, the Supreme Court's judgment in *A v B* [2010] 2 AC 1, strongly supports that interpretation. 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) of the HRA against any of the intelligence services.

40. Lord Brown gave the judgment of the Court, with whom all other members of the Supreme Court agreed. The Court set out the "*legislative provisions most central to the arguments*", and 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, 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***

[23] See also Lord Griffiths in *R v Hull University Visitor ex parte Page* [1993] AC 682 – in a passage which is not quoted at §23 of the Claimant's skeleton - at 693H-694E where he stated "*...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....If it is thought that the exclusive jurisdiction of the visitor has outlived its usefulness, which I beg to doubt, then I think that should be swept away by Parliament and not undermined by judicial review.*"

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)

41. At §§21-24 the 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.

42. 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)

43. The Supreme Court was therefore satisfied that the IPT was a judicial body of like standing and authority to the High Court and one which operated subject to a highly specialist regime. The IPT is not a body which Parliament ever intended would be subject to judicial review.

44. **Thirdly**, even absent the express terms of s.67(8), which provide a complete answer to this preliminary issue, 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. That is apparent from certain other aspects of the IPT regime, in addition to those emphasised by the Supreme Court at §14 of *A v B*:

    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 (§1(1) of Sch. 3 to RIPA) and the President of the Tribunal must hold or have held high judicial office (§2(2) of Sch. 3 to RIPA). 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. When the Tribunal considers any complaints under s.65(2)(a) and 65(2)(b) it is the duty of the Tribunal to: *"apply the same principles for making their determination in those proceedings 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). It is therefore clear that Parliament has allocated such public law challenges to the IPT (and that such jurisdiction is exclusive for s.7(1) HRA challenges) and has instructed the IPT to act as though it were the High Court in an application for judicial review. In those circumstances, it is inappropriate for proceedings determined by application of judicial review principles to be themselves the subject of judicial review.

    c. Parliament has been very 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 in Section

B above, the statutory scheme limits the nature of its determinations, including confining such determination 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; constraints which Parliament clearly thought appropriate in this very special context.

d. 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[24]. 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.

e. The IPT is not part of Her Majesty's Courts and Tribunal Service. In his 2001 Report of the Review of Tribunals (§3.11), Sir Andrew Leggatt explained this as follows:

> *"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 relating to it."*

f. 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) also sets it apart from other Courts or tribunals[25].

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[24] 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*.

[25] It is to be noted that a tribunal's constitutional relationship with Parliament can be an important factor – see *Woolas* at §§48-53.

45. As noted by Dyson LJ in the Court of Appeal in *A v B* (in a passage expressly endorsed by the Supreme Court at §14) *"having established 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"* (§48). And yet that is precisely what the Claimant would have this court conclude, namely that the High Court can review the decision-making of the IPT in circumstances in which it is equipped with none of the special powers and procedures which are necessary in this specialist area. But, having regard to its constitution, jurisdiction and powers, the IPT cannot properly be regarded as inferior to the High Court such that it is amenable to judicial review – see *Cart* per Laws LJ at §§40, 69-71.

46. **Fourthly**, the IPT regime has been 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 procedures that it operates and that surround it are compatible with Article 6 ECHR:

> *"...the Court highlights the extensive jurisdiction of the IPT to examine any complaint of unlawful interception. Unlike in many other domestic systems, any person who suspects that his communications have been or are being intercepted may apply to the IPT. The jurisdiction of the IPT does not, therefore, depend on notification to the interception subject that there has been an interception of his communications. The Court emphasises that the IPT is an independent and impartial body, which has adopted its own rules of procedure. The members of the tribunal must hold or have held high judicial office or be experienced lawyers. In undertaking its examination of complaints by individuals, the IPT has access to closed material and has the power to require the Commissioner to provide it with any assistance it thinks fit and the power to order disclosure by those involved in the authorisation and execution of the warrant of all documents it considers relevant. In the event that the IPT finds in the applicant's favour, it can, inter alia, quash any interception order, require destruction of intercept material and order compensation to be paid. The publication of the IPT's legal rulings further enhances the level of scrutiny afforded to secret surveillance activities in the United Kingdom."* (§167)

47. **Fifthly**, it is to be noted that legislative changes, the effect of which would be to *introduce* a right of appeal, are currently under specific consideration by Parliament in the Investigatory Powers Bill. The Bill had its first and second readings in the House of Commons on 19 May 2016. The Report Stage in the House of Lords was completed on 19 October 2016. The Third Reading in the House of Lords will take place on 31 October 2016. Clause 243 of the Bill provides as follows[26]:

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[26] This version (dated 19 October 2010) follows amendments at the House of Lords Report Stage.

"243 Right of appeal from Tribunal

(1) After section 67 of the Regulation of Investigatory Powers Act 2000 insert –
"67A Appeals from the Tribunal

(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).[27]

(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 the 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."

(2) In section 67 of that Act (no appeal from the Investigatory Powers Tribunal except as provided by order of the Secretary of State) –

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[27] It is to be noted that decisions relating to procedural matters would not attract an appeal on a point of law - see Clause 243(3) and new s.68(4C).

(a) in subsection (8) for "Except to such extent as the Secretary of State may by order otherwise provide," substitute "Except as provided by virtue of section 67A,", and
(b) omit subsections (9) to (12)."

9. The Explanatory Notes[28] to this clause provide as follows:[29]

> ***" Right of appeal from the Tribunal***
>
> *531 Currently there is no domestic route of appeal from a decision or determination of the Investigatory Powers Tribunal, with claimants having to pursue appeals to the European Court of Human Rights if they wish to challenge a decision. This clause amends RIPA to introduce a domestic appeal route from decisions and determinations of the Investigatory Powers Tribunal on a point of law, to the Court of Appeal in England and Wales, the Court of Session or the Court of Appeal in Northern Ireland. Regulations will detail the criteria to be considered by the Investigatory Powers Tribunal when determining the relevant appellate court.*
>
> *532 Where there is a point of law, the decision on whether to grant permission to appeal will be taken by the Investigatory Powers Tribunal in the first instance. If the Tribunal refuses to grant permission to appeal, this decision may be reviewed by the appeal court.*
>
> *533 The Tribunal or appellate court must not give permission to appeal on a point of law unless* ***the appeal would raise an important point of principle or practice or they consider that there are other compelling reasons to grant permission to appeal, such as that it would be in the wider public interest."***

48. In addition, it is to be noted that the proposed basis upon which appeals from the IPT will proceed in future is by applying what has been termed the "*second tier appeals criteria*" test (see *Cart* in the Supreme Court [2012] 1 AC 663 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 Clause 243(7). 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.

D. Response to the Claimant's submissions

49. The Claimant asserts that s.67(8) is "*materially identical*" to the ouster clause in *Anisminic;* and is therefore insufficiently clear to exclude the operation of judicial review. It is said that any error of law on the part of the IPT would render the decision a "*nullity*" which

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[28] These Explanatory Notes relate to the version of the Investigatory Powers Bill as brought from the House of Commons to the House of Lords on 8 June 2016 (HL Bill 40).

[29] It is to be noted that the numbering has changed following the amendments made at the Committee Stage in the House of Lords.

would mean there was no "*decision*" to which s.67(8) could attach (see §§44-55 of the Claimant's skeleton). The Claimant also points to a number of other statutory contexts which, it is said, support the contention that the words which have been used in s.67(8) are inadequate to render decisions immune from questioning in any court (see §§25-32, §§35-43 of the Claimant's skeleton).

50. In response, **first** the Claimant's submissions proceed on an incorrect reading of s.67(8). In particular and contrary to §44 of the Claimant's skeleton, it is wrong to suggest that the ouster clause in *Anisminic*[30] was "*materially identical*" to s.67(8) of RIPA:

    a. 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 §23).

    b. It is submitted (if necessary and with respect), that they were correct to do so. 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, as is plain on the face of s.67(8) which states "*shall not be subject to appeal or be liable to be questioned in any court*". For the reasons explained in §35(c) above, the words in parenthesis in s.67(8) are important 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 determine the particular matter. Consequently it is not right to assert that the words in parenthesis are the only difference between the two provisions.

51. **Secondly,** the Claimant's approach ignores the statutory context in which s.67(8) is properly to be read. The context of the relevant statutory scheme "*provides the colour and background to the words used*"[31]. As is evident from the analysis of the Supreme Court decision in *A v B*, the statutory context and the "*elaborate set of rules*" governing IPT proceedings[32] were of importance in considering the exclusivity of the Tribunal's jurisdiction.

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[30] In *Anisminic* the question was whether a decision made by the Foreign Compensation Commission under the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1959 (which was superseded by a similar Order, SI 1962 No. 2187) could be challenged in the courts. Those Orders in Council were made under powers in the Foreign Compensation Act 1950. That Act contained the following provision at section 4(4): '*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.*'

[31] See Bennion on Statutory Interpretation 6th Edition at p540 and the cases cited therein.

[32] Per Lord Dyson in the Court of Appeal in *A v B* at §48.

52. The Claimant's submissions contain minimal references to the statutory scheme governing the IPT and little acknowledgement of the critical differences between the IPT and inferior courts or tribunals. In *Anisminic*, the House of Lords was considering an ouster clause in respect of an inferior (administrative) tribunal, where there was no suggestion that it exercised powers on a par with the High Court. For the reasons given by the Supreme Court in *A v B* (see §23), the IPT's position is fundamentally different. As the Supreme Court noted and as explained in Part C of these submissions, the constitution, jurisdiction and powers of the IPT and its relationship with other bodies, all point in one direction – namely that it is a judicial body of like standing and authority to the High Court which is "*constitutionally inoffensive*" and offers "*no cause for concern*"[33]

53. Similarly, it is nothing to the point that some Courts and academics have expressed concerns at the prospect of judicial review being ousted in respect of inferior tribunals and executive decision-making[34]. That was the proposal in Clause 10 (Section 108A) of the Asylum and Immigration (Treatment of Claimants) etc. Bill 2003 (see §§30-33 of the Claimant's skeleton). As is clear from Clause 108A and Schedule 4 to the Bill, the proposal was for the Immigration and Asylum Tribunal – comprised of e.g. advocates of at least 7 years standing, to be immune from judicial review. There is no proper analogue between those bodies/decision-makers and the IPT. Thus, even if this draft legislation (which was never enacted) has any interpretive significance (which it does not), there is no proper comparison with the IPT.

54. Whilst there may have been some academic debate (particularly in the years immediately following *Anisminic*) about the likely effects of ouster clauses (see §34 of the Claimant's skeleton), the position has moved on. As made clear by the Supreme Court in *Cart* and *A v B*, it does lie within the power of Parliament to provide that a tribunal (especially where it is of like standing and authority to the High Court) shall be the ultimate arbiter of the law it has to administer (see Section C above).

55. **Thirdly** the Claimant's 'absolutist' approach of categorising the IPT's decision as "*void*" and therefore incapable of having any legal effect (which is based predominantly on case law and academic articles from the 1980s/1990s[35]), ignores important developments in public law which post-date *Anisminic*.

56. The position used to be that the Courts would attempt to draw a distinction between jurisdictional and non-jurisdictional errors. In the case of the former, these were considered *ultra vires*, i.e. acts in excess of jurisdiction where the decisions were

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[33] Per Laws LJ in *A v B* – cited with approval by the Supreme Court at §23.

[34] For example, the case of *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763 referred to at §34(d) of the Claimant's skeleton concerned a decision by the Secretary of State to refuse citizenship – it was not a case confining jurisdiction to a judicial body of like standing and authority to the High Court and operating subject to special procedures.

[35] See §§19-23 and §§34 of the Claimant's skeleton.

considered *void ab initio* and incapable of ever having produced a legal effect. In the case of the latter, 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*"[36]. 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.

57. 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.

    a. The position is helpfully 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.*"[37]

    b. As stated by Professor Wade, in a passage which was 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.*"[38].

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[36] 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.

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

[38] Wade and Forsyth, Administrative Law (11th Edn) at p251.

c. The same approach is evident from the speech of 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)

d. Professor Paul Craig has explained the position as follows:

> *"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."*[39] [40]

58. In asserting that a decision made in error of law by the Tribunal is a "*nullity*" and merely a "*purported decision*" to which s.67(8) could not attach, the Claimant is seeking to revive the "*void/voidable*" distinction. That amounts, in effect, to a proposition 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:

    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.

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[39] Paul Craig 'Administrative Law' 7th Edition 2012 at 24-011 p749

[40] It is to be noted that in the article by John Laws quoted at §34(a) of the Claimant's skeleton he made plain 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."

59. Accordingly, in interpreting s.67(8), it is submitted that the Court should not proceed on the basis that the absolutist approach advocated by the Claimant is accurate. Unlawful public law decisions are not "*void*" or to be treated, without more, as retrospectively without legal effect and that, in turn, means that there need be no reference to "*purported decisions*" in s.67(8) in order for that provision to be effective (see §45, §51, §52(d) of the Claimant's submissions)

60. **Fourthly** the Claimant is wrong to contend that the "*only relevant question*" is whether the decision impugned by the Claimant is a "*decision as to whether [the IPT has] jurisdiction*" (see §§46-52 of the Claimant's skeleton).

61. As set out above, these words, which appear in parenthesis in s.67(8) have to be considered in the context of the provision as a whole and in the wider context of the Act. In addition, the Claimant's analysis omits any reference to the word "*including*" in the section. The section reads:

> "*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.*" (emphasis added)

On the Claimant's analysis it is only decisions as to whether the IPT has jurisdiction which could conceivably be excluded. But the express wording is clear that this is merely an example and it follows that other decisions are also caught by the provision.

62. The Claimant also asserts that "*jurisdiction*" in this context could, at most, only relate to what Lord Reid 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 (see §52). But, if that interpretation were right then 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* (as appears to be acknowledged at 32(b)(ii) of the Claimant's skeleton). Baroness Hale was clear 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.*"

63. 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.

64. **Fifthly,** the Commonwealth authorities (from Australia and New Zealand)[41] are of little assistance in this context:

a. In Australia the constitutional position is fundamentally different because the written constitution provides for the Supreme Courts to be superintendant 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 §37 of the Claimant'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[42].

c. It is also to be noted that the context in *Kirk* was an industrial court of *"limited power"*[43]. 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 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[44].

65. **Sixthly** it is wrong to state that *"there are no practical difficulties with judicial review of the IPT"* (see §54 of the Claimant's skeleton). In support of that contention the Claimant seeks to rely upon the fact that this particular challenge concerns a point of statutory interpretation, which does not require special closed procedures to be determined[45].

66. The first answer is that this poses the wrong question . The correct question is what is the correct interpretation of the relevant legislative provision; and that is not answered

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[41] See §§35-40 and §51 of the Claimant's skeleton.

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

[43] See §107 of the judgment.

[44] 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.

[45] It is to be noted that the claim which was brought before the IPT in this case was a complaint falling within the IPT's exclusive jurisdiction in s. 65(2)(a) of RIPA i.e. it was a complaint under Arts 8 and 10 ECHR. That can be seen from the Claimant's Re-Amended Grounds at e.g. §6 **[75]**, §41C **[94]-[95]**. The argument about the breadth of warrants under s.5 of the ISA 1994 arose in the context of whether the interference with the Claimant's rights was "in accordance with the law"/"prescribed by law" under Articles 8(1) and 10(1) ECHR. Those were not complaints which could have been brought in the Administrative Court for the reasons given by the Supreme Court in *A v B*.

by pointing to an asserted lack of practical difficulties. The legislative choice is likely to have had as much to do with policy and appropriateness, as practicality.

67. In any event, it is obvious that the determination of this preliminary issue in favour of the Claimant could have wider consequences beyond this particular claim. As set out earlier in these submissions, the IPT operates in a highly specialist area and in circumstances where sensitive material may be relevant to much of its decision-making. For example, the Claimant has acknowledged that decisions whether or not the IPT has jurisdiction to consider a particular complaint may be *"fact sensitive involving consideration of sensitive material"* (see §15 of the Claimant's skeleton); and it is frequently the case that issues before the Tribunal will involve mixed questions of fact and law, such as whether the operation of particular powers are proportionate under Articles 8 and 10 ECHR.

68. It follows that if the IPT is held to be amenable to judicial review in the manner contended for by the Claimant, it will open up all aspects of the IPT's decision-making including in areas where sensitive material is relevant.

69. 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 cannot have been within the contemplation of Parliament when s.67(8) was enacted, as is demonstrated by the Hansard passage at §52(f) of the Claimant's skeleton.

70. 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 & Mohummed 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.

71. **Finally**, the Claimant contends that there are strong policy considerations which militate in favour of judicial review of the IPT. Those policy justifications are said to stem from the fact that, as a specialist tribunal, there is a greater risk that the IPT may depart from established legal norms by developing a form of "*local law*"[46]. 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*[47], 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.

72. In addition, as explained by the authors of De Smith[48], 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. In circumstances, as here, where the Parliamentary intention is clear and express, that intention should be upheld. It is properly for Parliament to decide what, if any, forms of appeal or review are appropriate from this specialist tribunal.

26 October 2016

JAMES EADIE QC
KATE GRANGE

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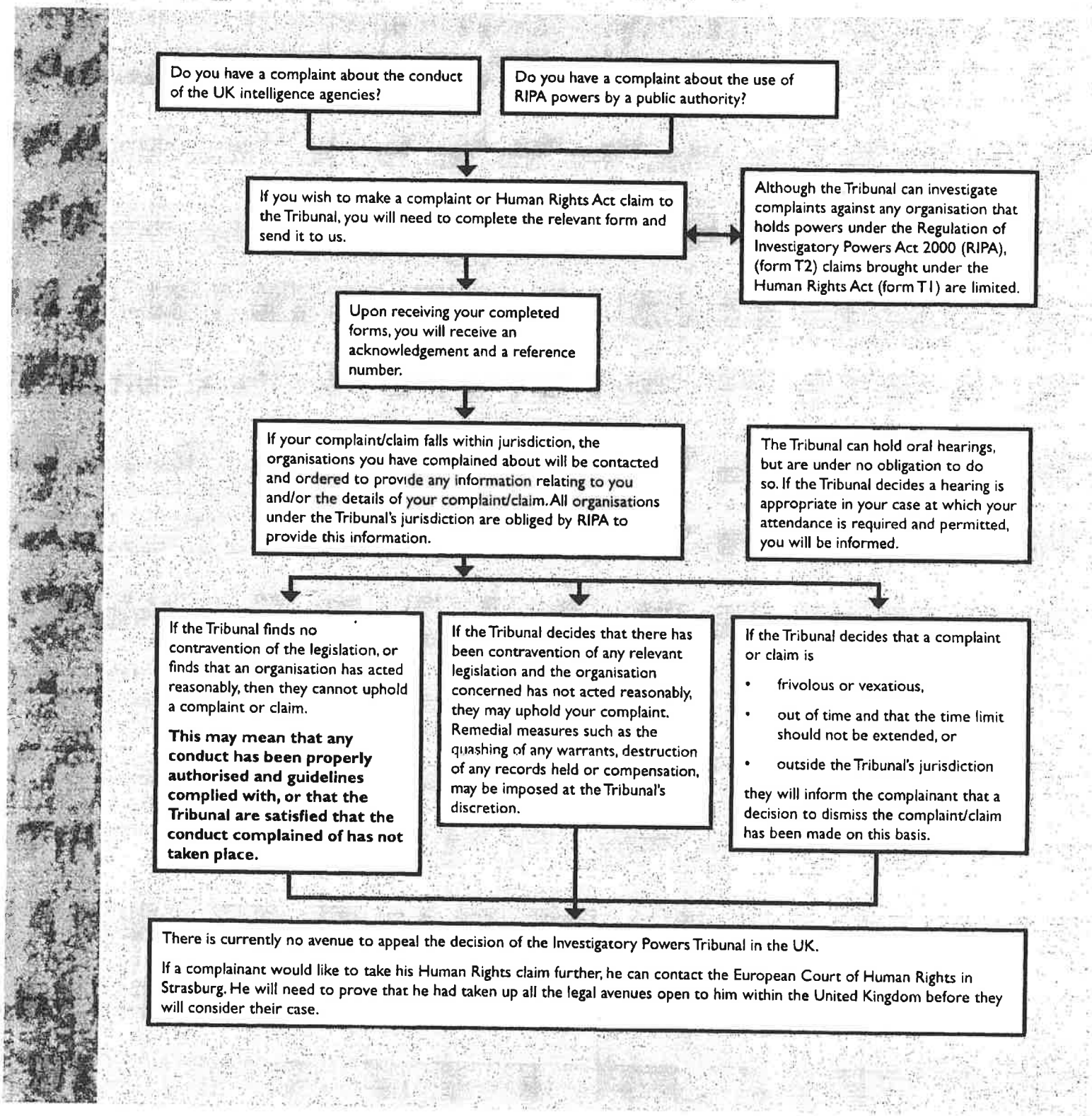
[46] See §57-59 of the Claimant's skeleton.

[47] In the Court of Appeal at §48.

[48] See 4-044 7th Edition.

Investigatory Powers Tribunal



The Regulation of Investigatory Powers Act 2000 (RIPA) established an independent Tribunal, the Investigatory Powers Tribunal (IPT) to consider all complaints and Human Rights Act claims (hereafter complaints) which fall within its jurisdiction. In October 2000 the IPT replaced the Interception of Communications Tribunal, the Security Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997 (concerning police interference with property). All conduct that was covered by past legislation, as well as some that was not, can now be investigated under RIPA. The Tribunal is a statutory creation with limited jurisdiction and special procedures. Its jurisdiction and powers are entirely governed by RIPA and the subordinate legislation made under it. The Tribunal can only consider complaints that fall within its jurisdiction.

The relevant sections of the IPT Rules 2000 are summarised in Annex B of this report, and are available on the IPT website (www.ipt-uk.com) or in Statutory Instrument 2000 No.2665.

The legislative basis of the Tribunal within RIPA is detailed on pages 3-5 of this report. The main purpose of RIPA is to ensure that relevant investigatory powers, many of which represent significant intrusions into the private lives of citizens, are used in accordance with human rights laws. These powers are:

- the interception of communications
- the acquisition of communications data (eg billing data),
- intrusive surveillance (on residential premises / in private vehicles),
- covert surveillance in the course of specific operations and
- the use of covert human intelligence sources (agents, informants, undercover officers).

For each of these powers, the Act will ensure that the law clearly covers

- the purpose for which they may be used,
- which authorities can use the powers,
- who should authorise each use of the power;
- the use that can be made of the material gained,
- independent judicial oversight and
- a means of redress for the individual who has been subject to the use of the powers.

Complaints against public authorities with RIPA powers (extract from section 65 of the Regulation of Investigatory Powers Act 2000 establishing the IPT)

(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;

(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, or 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;

d. the Serious Organised Crime Agency;

(da) the Scottish Crime and Drug Enforcement Agency; or

e. the Commissiors 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 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.

(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.

CONTENTS

Report of the Investigatory Powers Tribunal

1. MEMBER BIOGRAPHIES

The IPT has been privileged to have as Members throughout its history a succession of distinguished legal figures. Previous Tribunal Members have included Sir David Calcutt QC (Died in 2005), Sir John Pringle (Retired 2006), William Carmichael (Retired Feb 2008), Peter Scott QC (Retired April 2010) and Sir Richard Gaskell (Retired September 2011). Their contribution has been greatly appreciated.

The IPT currently comprises seven members, including the President Lord Justice Mummery and Vice-President Mr. Justice Burton. All members of the Tribunal are appointed by HM The Queen, and must be senior members of the legal profession. Both the President and Vice-President must hold or have held high judicial office. Appointments are made for terms of five years, after which members may stand down or declare themselves available for reappointment.

Sir John Mummery (President)

The Rt Hon Lord Justice Mummery was appointed a Lord Justice of Appeal in October 1996. He was born in Kent, educated at Dover County Grammar School, and Pembroke College, Oxford from 1959 - 63 (MA, BCL: Winter Williams Prize in Law ; Hon Fellow, 1989). He was called to the Bar at Gray's Inn (Atkin Scholar) in 1964. He was elected a Bencher in 1985 and Treasury Junior Counsel in Charity Matters, 1977 – 81, in Chancery 1981 – 89. He served as a Recorder in 1989.

Further he has been a member of the Senate of Inns of Court and Bar from 1979 to 1981. He was a Member of the Justice Committee on Privacy and the Law from 1967 – 70. Sir John has been a Judge of the High Court of Justice, Chancery Division from 1993 – 1996, President of the Employment Appeal Tribunal 1993-1996 and the President of the Investigatory Powers Tribunal since its inception in 2000.

Sir Michael Burton (Vice-President)

Mr Justice Burton was a Scholar at Eton College and then at Balliol College, Oxford, where he read Classics and then Law, obtaining his MA. He was a lecturer in law at Balliol from 1970 to 1973. He was called to the Bar in 1970, became a QC in 1984, and was appointed a High Court Judge in 1998. He had a busy commercial practice in the Queen's Bench Division, Chancery Division, Commercial Court and Employment Courts, in a wide variety of fields of Law. He was Head of Littleton Chambers from 1991 to 1998. He appeared as Counsel not only in the UK and Luxembourg, but also in Hong Kong, Singapore, Bermuda, Brunei and the United States. He sat for a number of years as a Deputy High Court Judge in the Queen's Bench and Chancery Divisions, and as an arbitrator and mediator. Since his appointment as a High Court Judge he has sat in Queen's Bench and Chancery Divisions, Commercial Court, Administrative Court, Family Division, Revenue List and the Employment Appeal Tribunal, of which he was President from October 2002 to December 2005, and remains a nominated judge. He is the Chairman of the Central Arbitration Committee pursuant to the Employment Relations Act 1999. He has been Vice-President of the IPT since 2000, and was previously President of the Interception of Communications Tribunal. Until January 2011 he was Chairman of the High Court Judges Association. He is Vice-Treasurer of Gray's Inn (Treasurer 2012) and a Bencher, as well as an Honorary Fellow of Goldsmith's College.

Robert Seabrook QC

Robert Seabrook QC was called to the Bar in 1964 and took silk in 1983. His wide-ranging experience crosses jurisdiction. In recent years he has concentrated on clinical negligence, medical disciplinary work and substantial matrimonial finance and property cases. He was educated at St. Georges College, Harare, Zimbabwe and University College, London (LL.B). He has been a Deputy High Court Judge and served as the Chairman of the Bar of England and Wales in 1994, Leader of South Eastern Circuit (1989-9) and a Member of the Criminal Justice Consultative Council (1995-2002). In addition he has served as a Recorder (1985-2007). Mr Seabrook was a Member of the Interception of Communications Tribunal (1996-1999) and has been a Member of the Investigatory Powers Tribunal (2000 -present).

Charles Flint QC

Charles Flint QC is a commercial barrister and mediator specialising in banking and financial services. He is rated by the independent legal directory Chambers UK 2011 as the leading QC in Financial Services. Charles has wide experience in general commercial law having practised in all divisions of the High Court. He now specialises in financial services regulation and acts as a mediator in banking and financial services disputes. He is recognised by Chambers UK 2011 as a leading mediator in financial services. He has been a member of the Tribunal since 2009.

Sir Anthony Holland

Sir Anthony was appointed to the IPT in July 2009. Sir Anthony was also appointed as the Financial Services Complaints Commissioner on 3rd September 2004. The position of Complaints Commissioner was created by the Financial Services and Markets Act 2000 to provide an independent means by which the regulated community could have an independent adjudication on complaints against the Financial Services Authority.

Sir Anthony has served as the Chairman of a Social Security Appeal Tribunal, President of the Law Society (1990-91), Governor of the College of Law (1991-97), on the Council of JUSTICE (British Section of the International Commission of Jurists, 1991), as Chairman of the Executive Board of JUSTICE (1996-99), member of the Council of the Howard League for Penal Reform (1992), member of the Criminal Injuries Compensation Appeals Panel (2000-2005), Chairman of the Northern Ireland Parades Commission (2000-2005) and Chair of the Northern Ireland Legal Services Commission (2004-2007). Sir Anthony has also been Chairman of the Standards Board for England (2001-2008). His appointments in the financial services industry include the Chairman of the Securities and Futures Authority (1993) and Principal Ombudsman to the Personal Investment Authority Ombudsman Bureau (1997-2000).He is a member of the Board of the Pension Protection Fund (appointed July 2010). In January 2011, he was appointed a lay member of the Speaker's Committee for the Independent Parliamentary Standards Authority.

Christopher Gardner QC

Mr Gardner has been a member of the IPT since 2009. He has practiced both as a Barrister (called 1968) and Queen's Counsel (1994) from Lamb Chambers, Temple (where he remains an Associate Member) in all forms of contractual and tortious dispute, professional negligence, sports injuries, product liability, insurance, health & safety, personal injury and clinical malpractice.

His Judicial/Arbitration/Mediation experience includes commercial and construction contracts, professional negligence, assessment of damages, employment, fundamental human rights, judicial review, legal & beneficial property interests, boundary disputes, planning, probate, trade marks, fishery rights, and interpretation of statutes. Christopher is a Fellow of the Chartered Institute of Arbitrators (1999), Fellow of the Society for Advanced Legal Studies (1999), Fellow of the Royal Society of Medicine (2000), Court Assistant to the Worshipful Company of Arbitrators (2008). Christopher was Appointed Chief Justice of the Turks and Caicos Islands, British West Indies (2004-2007) and is Chief Justice of the Falkland Islands, South Georgia, South Sandwich, British Antarctic Territory and British Indian Ocean Territory (2007).

Susan O'Brien QC

Susan O'Brien QC was appointed to the IPT in 2009. Before being called to the Scots Bar, she was a solicitor for 6 years. She took silk in 1998. She is rated by the independent legal directory "Chambers UK" 2012 as a Band 1 silk in Scotland for personal injury claims, in which she now specialises. She is instructed to act for the pursuer in a wide variety of cases where the injured person seeks damages, particularly for catastrophic brain injuries or psychiatric injury. She has extensive experience of industrial disease and abuse claims. She has also acted in many cerebral palsy claims for babies injured following mismanaged births. As standing junior counsel for the Home Office from 1992-1998, she conducted numerous judicial review hearings, mostly concerning immigration and asylum, and she continues to be instructed in public law cases as senior counsel. She has considerable experience of human rights law.

Ms O'Brien conducted an inquiry for Edinburgh and Lothian Child Protection Committee: she co-wrote the Caleb Ness Report, published 2003. She was a Reporter for the Scottish Legal Aid Board from 1999-2005. She was appointed by the Lord President to be a legal assessor for the General Teaching Council for Scotland, advising on disciplinary proceedings, from 2005-2010. The Minister for Public Health in Scotland appointed her as convenor for appeals relating to the Dentists' Vocational Training Board from 2008-2010. She was elected as Chairman of Faculty Services Ltd, which is a senior office bearer's post within the Faculty of Advocates, and served in that office from 2005-2007. She had judicial experience of criminal cases as a part-time Sheriff from 1995-1999, and she has been a part-time Employment Judge since 2000.

Sheriff Principal John McInnes QC LLD DL (An obituary)

Sheriff Principal John McInnes QC LLD DL, who died on 12 October 2011 after a short illness, was a member of the Investigatory Powers Tribunal from its inception 10 years ago. He brought to the varied and challenging work of the IPT invaluable knowledge and relevant experience previously acquired by him as a member and vice-president of the Security Services Tribunal and the Intelligence Services Tribunal, which were replaced by the IPT.

John's broad base of legal practice and judicial office in Scotland, his sense of fairness and his sound judgment made him a highly valued member of the IPT. He helped to make major improvements in its operation and administration by his careful attention to detail. He sat on the hearings of most of its leading cases and his contribution to its decisions and rulings was substantial.

All the members and staff of the IPT will greatly miss his wise advice, his unstinting support, his good sense and his congenial company. Their sympathy goes out to his widow, Elisabeth, and to their son and daughter.

2. OVERVIEW

Between 1st January and 31st December 2010 the IPT received 164 complaints. Whereas this is the first official IPT report, total numbers of complaints have been published previously in the respective annual reports of the Intelligence Services and Interception of Communications Commissioners. The 164 complaints received in 2010 represents a 4% increase on the 157 complaints received in 2009 and an 18% increase on the 136 complaints received in 2009. Individual complainants submit a significant number of overall complaints however between 5 and 10% of complaints are on average submitted by solicitors on behalf of complainants. It is important to note that the use of legal representation has no impact on the determination of a complaint.

The numbers of complaints received by the IPT has increased steadily from a total of 95 received during the first fifteen months of the Tribunal to December 2001. A number of reasons may be postulated for this increase, ranging from more public authorities and indeed members of the public becoming aware of the Tribunal as a legal recourse, to the enacting of Part II and Chapter I Part II of RIPA.

Background to the Tribunal

Section 65 of RIPA establishes a Tribunal which will investigate, subject to its jurisdiction and relevant procedures, complaints and Human Rights Act claims against any public authority with RIPA powers in England and RIP(S)A powers in Scotland. The Tribunal came into operation in October 2000 with the enactment of RIPA. The IPT Rules were published at the same time and are summarised in Annex B to this report. The IPT is reactive as opposed to proactive in that Tribunal Member's powers derive from receiving a complaint or claim. The Tribunal is a court making judicial decisions and as with any court it can only consider the complaints that are brought before it. Once a complaint is investigated, the Tribunal determines it by applying the same principles as a court on an application for judicial review

The Tribunal can only consider complaints/claims within legislation In his 2001 Report of the Review of Tribunals, Sir Andrew Leggatt outlined some of the unique features of the IPT, stating:

"3.11 There is one exception among citizen and state Tribunals. This Tribunal 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 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.

3.12 Subject to Tribunal rules made by the Secretary of State the Tribunal is entitled to determine its own procedure.

3.13 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."

3. STATISTICS

The table below shows the number of complaints received by the Tribunal during 2010. The volume of complaints received in 2010 increased to 164 as compared to 157 the previous year and 136 in 2008. The total number of complaints received in 2010 represents an increase of 4% and 18% respectively compared to the 2009 and 2008 totals. The volume of complaints received is evenly spread over the first three quarters of the year, however there is a noticeable upwards trend in the final quarter of the year, where the Tribunal received 54 complaints.

Table 1: Number Of Complaints Received Per Quarter 2010

2010 Quarter	Number
Jan-Mar	39
Apr-Jun	36
Jul-Sep	35
Oct-Dec	54
Total	164

Chart 1: Number Of Complaints Received Per Quarter 2010

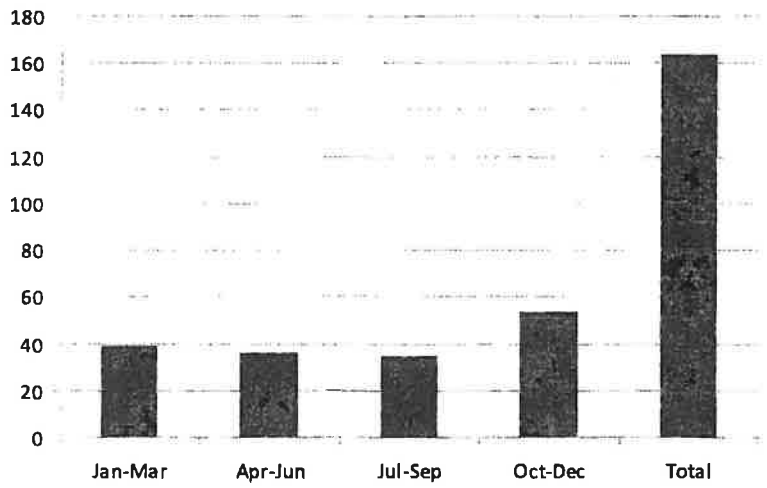
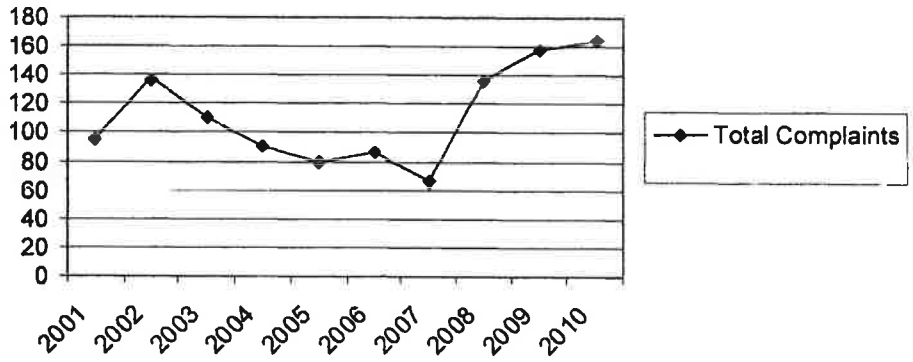


Table 2: Number Of Complaints Received Annually Since 2001	
Calendar Year	**Number Of Complaints**
2001	95
2002	137
2003	110
2004	90
2005	80
2006	86
2007	66
2008	136
2009	157
2010	164

Chart 2: Annual Complaints Received since IPT Inception



Both Table and Chart 2 provide an interesting historical illustration of the number of complaints received by the Tribunal since its inception in 2000. The maximum number of complaints received in a single year was in 2010, when 164 complaints, were received. Complaint numbers have been on an upward trajectory since an all-time low of 66 in 2007. The steepest increase in complaints was between 2007 and 2008, which represented an 105% increase in numbers from 66 to 136 complaints.

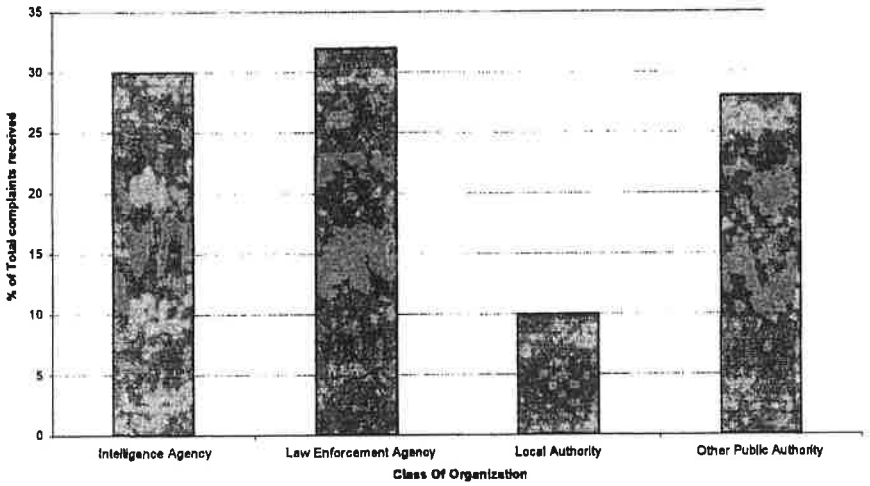
Organisations to which complaints related in 2010

The Table and Chart presented give information about the types of organisations that were the subject of complaints during the year. It is important to note that the IPT rules dictate any valid complaint received by the Tribunal i.e. one that is within jurisdiction, refers to conduct not longer than a year ago and is not deemed frivolous or vexatious must be investigated. An investigation or receipt of a complaint cannot be equated to any accusation of levels of wrongdoing on the part of a public authority unless the Tribunal makes a ruling in favour of the complainant.

Table 3

Public Authority	Complaints Received (%)
Intelligence Agency (i.e SIS, GCHQ or MI5)	30
Law Enforcement Agency (i.e. Police Force, SOCA)	32
Local Authority (i.e. Local Council)	10
Other Public Authority (i.e. DWP)	28

Chart 3: Organizations Subject To Complaints 2010



Notwithstanding the above caveat, it is interesting to see that out of the complaints investigated, there existed a relatively even spread across the kinds of organisations that were the subject of complaints. Local authorities received far fewer complaints than intelligence agencies, law enforcement agencies and miscellaneous public authorities. 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. The Tribunal has procedures to handle such cases. However the decrease compared to previous years of complaints received against local authorities is interesting. Much of the negative media coverage around the advancement of the 'surveillance state' and misrepresentations of RIPA has referred to local authority use of RIPA powers, with reference made to the IPT finding in favour of a complainant in the 'Poole' Judgment. There appear, however, to be far fewer complaints against local authorities in 2010 compared to previous years. This may be due to improvements in RIPA authorisation practices in local authorities or less appetite in the press for negative media reporting of RIPA.

A number of complainants continue to approach the IPT to investigate complaints that commonly do not fall within its jurisdiction. The IPT in such cases advises the complainant that organisations such as the Independent Police Complaints Commission, where possible The Information Commissioner's Office, the Adjudicator's Office, the Police Ombudsman for Northern Ireland and the ordinary courts may be the correct place to take their complaint but in relation to the IPT it is out of jurisdiction.

Subject matter of complaints in 2010

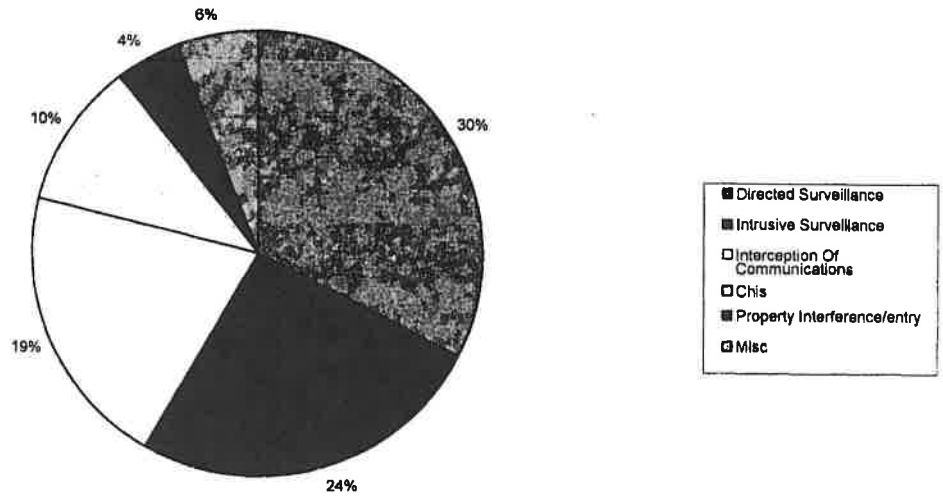
The Table and Chart below provide information on the subject matter of complaints reviewed by the Tribunal during 2010. Once again, it is important for the reader to note that the IPT rules dictate any valid complaint received by the Tribunal must be investigated. Therefore, in a similar fashion to the wide range of organisations against whom a claim could be made, it is wholly plausible (and indeed often the case) that a complainant may allege a wide range of intrusive conduct, ranging from directed surveillance to property interference against a public authority. This in no way reflects the amount, if any, of conduct, lawful or unlawful, that may be occurring.

Table 4: Type Of Conduct Alleged In 2010 Complaints

Type Of Alleged Conduct	Number Of Complaints
Directed Surveillance	49
Intrusive Surveillance	39
Interception Of Communications	31
Covert Human Intelligence Source (CHIS)	16
Property Interference/Entry	7
Misc	9

A total of 13 complaints received in the year were not able to be classified

Chart 4: Conduct Forming Basis Of Complaints In 2010



Once again, it is noteworthy that the majority of complaints received by the Tribunal refer to allegations of improper conduct in relation to directed surveillance, intrusive surveillance and to a slightly lesser extent the interception of communications. There were far fewer complaints at 10%, 4% and 6% respectively in relation to the recruitment or use by public authorities of Covert Human Intelligence Sources (CHIS), entry on or interference with property, or miscellaneous conduct.

4 Rulings and outcomes 2010

Table 5: Outcomes Of 2010 Complaints

Outcome Of Claim	Number
No Determination[1]	99
Out Of Jurisdiction[2]	18
Out Of Time[3]	15
Frivolous or Vexatious[4]	65
Case Dismissed[5]	4
Cwc[6]	3
Found in Favour[7]	6
Total	210

The Tribunal determined 210 complaints in 2010 which incorporated a number carried over from previous years.

Notes

1 No determination in favour of the complainant: If no determination is made in favour of the complainant that may mean 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 the Act. The provisions of the Act do not allow the Tribunal to disclose whether or not the complainant are, or have been, of interest to the security, intelligence or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.

2 Out of Jurisdiction: This ruling means that after careful consideration by at least two Members the Tribunal has ruled that under Rule 13(3)(c) of the Investigatory Powers Tribunal Rules 2000, the Tribunal has no power to investigate the complaint

3 Out of Time: In such cases after careful consideration by at least two Members the Tribunal rules that under Rule 13(3)(b) of the Investigatory Powers Tribunal Rules 2000, the complaint is out of time and the time limit should not be extended.

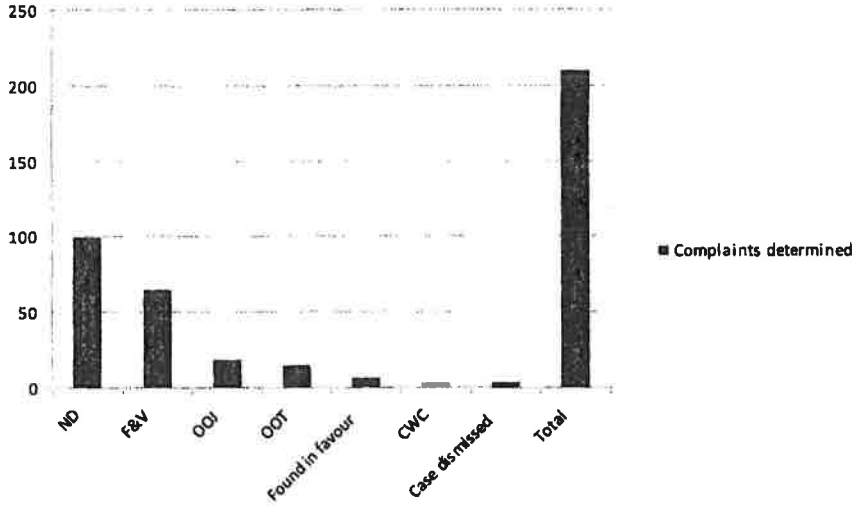
4 Frivolous or vexatious: the Tribunal concludes in such cases that the complaint is obviously unsustainable and/or that it is vexatious, usually in the sense that it is a repetition of an earlier complaint or complaints previously dealt with, and thus falls within the provisions of Rule 13(3)(a), such that, pursuant to s67(4) of RIPA, the Tribunal has resolved to dismiss the claim.

5 Case dismissed: The Tribunal has resolved to dismiss the complaint (due to a defect such as the failure by a complainant to sign the form)

6 CWC: Complainant withdrew the complaint.

7 The Tribunal has ruled in favour of the complainant

Chart 5 Complaints Determined in 2010



A breakdown of the 210 complaints determined in 2010 is presented above. It shows that in 99 cases (47%) the Tribunal made a ruling of no determination in favour of the complainant. In essence, as detailed in the glossary provided, this meant that if any RIPA conduct was occurring, this was correctly authorised or that no such conduct was occurring. The next highest category of outcome, at 31%, were those claims the Tribunal determined were frivolous or vexatious, followed by claims deemed out of jurisdiction (9%) and out of time (7%). 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 procedures it has established over its ten-year history. The justification and history of these policies and procedures is considered in depth in the 'How the Tribunal Works' section that follows. Decisions on whether a claim is out of time, jurisdiction or frivolous or vexatious are only made if two or more Members are in agreement as to the reasons for determining such an outcome.

4. HOW THE TRIBUNAL WORKS

A. Procedures to enhance open justice

Part one of the Government Justice and Security Green Paper proposes a range of options to address the current lack of a robust procedure for handling sensitive material in 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 IPT's policies and procedures have evolved throughout its history to balance the principles of open justice for the complainant with a need to protect sensitive material.

Open Inter Partes Hearings:

For example, during the course of investigating a complaint which could theoretically involve undisclosed sensitive material the Tribunal may decide to hold an oral hearing to consider points of law such as occurred in Vincent Frank-Steiner v. The Data Controller of SIS (**IPT/06/81**). Such hearings are ordinarily held on the basis of assumed (or agreed) facts.

This was something of a departure from the original Investigatory Powers Tribunal Rules 2000 (No.2665), which provide that:

- Rule 9 of which stated that, although the Tribunal "shall be under no duty to hold oral hearings....they may do so in accordance with this rule".
- Rule 9(6) of which was clear and unqualified in this context, and outlined that 'The Tribunal's proceedings, including any oral hearings, shall be conducted in private.'
- Rule 6(2)(a) of which went even further to say that the Tribunal may not even disclose to the Complainant or to any other person the fact that the Tribunal have held, or propose to hold, a separate oral hearing under rule 9(4). The fact of an oral hearing was to be kept private, even from the other party. The Tribunal were originally given very little discretion in the matter.

However, in **IPT/01/62** and **IPT/01/77**, the complainants asked the Tribunal to hold the hearing in public and the Tribunal considered this point as a preliminary issue. The Tribunal concluded that the public, as well as the parties to the complaint, has a right to know that there is a dispute about the interpretation and validity of the law.

The Tribunal therefore decided that, subject to the general duty imposed by Rule 6 (1) to prevent the disclosure of sensitive information, it can exercise discretion.

The Tribunal recognises the potential conflict between, on the one hand, the interests of the complainants in securing maximum information and openness and, on the other hand, the interests of national security and other public interests. A proper balance must be struck between them. It remains within the power of the Tribunal to hold separate and closed hearings should the sensitive material require it to do so.

Commitment to Open Rulings:

Following this commitment to hold hearings in open, the Tribunal has gone further and published some of its rulings on its website, this despite the original rules stating that no document or information, nor the fact that any document or information has been provided, can be disclosed. In the case of **IPT/01/62** and **IPT/01/77** the Tribunal decided that the Rules do not, subject to the general duty imposed by Rule 6(1), prevent the Tribunal from notifying and publishing their rulings of law on a complaint. That procedure runs no risk of disclosure of any information to any extent, or in any manner, that is contrary to or prejudicial to the matters referred to in section 69(6)(b) of RIPA and rule 6(1) or to the NCND policy.

Both of these procedures, and in fact all Tribunal procedures, have been accepted by the European Court of Human Rights as ECHR-compliant in the case of Kennedy v The United Kingdom (Application No 26839/05) (**IPT/01/62**).

Confidentiality

At this point in time, the limitations placed on the Tribunal regarding disclosure make it difficult to provide insight into its work but it is this same limitation that enables the Tribunal to consider highly sensitive material within a necessary ring of secrecy. There are stringent confidentiality restrictions laid out in section 69(6)(b) of RIPA which precludes disclosure by the IPT of sensitive information. Express restrictions on the disclosure of information to any third party are also contained in Rule 6.

The Tribunal is therefore restricted in what it can disclose during the course of its investigations. The rules state that no information or documents provided to the Tribunal, or the fact that they have been provided, can be disclosed. This is an essential component of the protection of the most secret of Government material. The Tribunal is therefore limited to only assuring complainants that an investigation is still ongoing.

To balance this, however, the same confidentiality restrictions also extend to complainants. During its inquiries, the Tribunal can only disclose the complainant's name, address, and date of birth to the organisation they are complaining about. It needs to disclose this information to enable record searches to be made to see if any information is held. The Tribunal needs the complainant's permission to disclose any further details regarding their complaint. The complainant can give this permission by ticking the relevant confidentiality box on the IPT complaints forms. Although complainants do not have to give this permission, the Tribunal may not be able to conduct as thorough an investigation if they do not consent to these details being disclosed.

Subject to this general duty, the Tribunal's commitment to open justice has been set out previously. Furthermore, where the Tribunal make a determination in favour of a complainant, they will (subject to the general duty imposed by Rule 6(1)) provide a summary of that determination including any findings of fact.

Neither Confirm nor Deny policy (NCND):

It has been the long-standing policy of successive Governments to give a "neither confirm nor deny" response to questions about matters that are sensitive on national security grounds (the "NCND policy"). This is the standard response given where it is not desired to disclose whether or not one of the intelligence agencies is in possession of any documents or knowledge. This NCND response, if appropriate, is well established and lawful. Its legitimate purpose and value has been ratified by the Courts, and re-iterated by this Tribunal in the cases of **IPT/01/77** and **IPT/06/81**.

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 likely 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.

It is therefore not within the remit of the Tribunal to confirm or deny whether or not a warrant or authorisation has been issued against a member of the public. It's purpose is to ascertain whether legislation has been complied with and organisations have acted reasonably. If a complaint is upheld, the Tribunal may decide to disclose details of any conduct. If a complaint is not upheld, complainants will not be told if any conduct has been taken against them or not.

B. The effective investigation and administration of complaints

If a complaint falls within the jurisdiction of the Tribunal, then (subject to subsections 67(4) (frivolous or vexatious) and (5) (out of time)) it has a duty to investigate that complaint and, following that investigation, to determine it by applying the same principles as a court on an application for judicial review. In doing this, and uniquely to any court or Tribunal the IPT is empowered to develop its own practices and procedures and has done so based on the principles of open justice throughout its history.

A summary of how the Tribunal handles complaints is set out in the flow chart on the front page of this report. There is in principle no set process nor time limit for responding to a particular complaint. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the applicant or the organisation which is the subject of the complaint. The Tribunal is aware that complainants want to receive the outcome of their complaint as quickly as possible and the small IPT secretariat strives to achieve the highest standards of efficiency and diligence in the administration of complaints.

Recent developments such as a revamped IPT website (www.ipt-uk.com) which gives much more information than ever before on the working procedures of the Tribunal, in addition to a facility to submit complaints online, will only add to these high standards.

The Tribunal regularly itself inspects confidential and secret files, and has the power, and has exercised it, to instruct (i) Special Counsel - an 'amicus curiae' – to advise the Tribunal (ii) a Special Investigator to enquire into detailed facts and allegations and report to the Tribunal.

To assist in its investigation of complaints, all organisations holding powers under RIPA are required by section 68(6) of the Act to provide all information requested by the Tribunal. Further to this, the Tribunal can demand clarification or explanation of any information provided. RIPA stipulates that all organisations and individuals concerned must provide the Tribunal with such assistance as it requires.

In practice, such are the strengths of impartial relationships between the Tribunal, the intelligence agencies, and public authorities with RIPA powers, that the Tribunal has always enjoyed full and frank disclosure of relevant, often sensitive material from all parties. This is in no small part due to the strength of the procedures developed by the Tribunal to protect this sensitive material.

In addition, the Interception of Communications Commissioner, the Intelligence Services Commissioner and all Surveillance Commissioners are required to give the Tribunal all such assistance as the Tribunal may require in investigating and determining complaints. [1]

Limitations:

The Tribunal may investigate any claims that fall within its jurisdiction, as outlined in the relevant section of this report. It cannot, however, consider complaints against the public authorities outlined below, who are subject to other complaints mechanisms and oversight.

Conduct of the Police:

The Tribunal cannot consider complaints regarding the conduct of the Police or Serious Organised Crime Agency (SOCA) not relating to covert RIPA and Police Act activities. This would be for the Independent Police Complaints Commission (in England and Wales), Police Ombudsman for Northern Ireland or Police Complaints Commissioner for Scotland.

The Tribunal has no jurisdiction to investigate complaints about private individuals or companies unless the complainant believes they are acting on behalf of an intelligence agency, law enforcement body or other public authority covered by RIPA.

Employment Related Surveillance:

In the case of C v The Police **(IPT/03/32)** the Tribunal determined that employers investigating their staff suspected of misconduct does not fall for this Tribunal to consider even if that employer has RIPA powers. Although this means that the Tribunal cannot consider this type of complaint, it does not mean that covert surveillance activities by employers is unaffected by law. There are other ways this can be challenged if it engages Article 8 (right to respect for private or family life), or if it breaches some other specific statutory requirement, common law or contract, namely in the ordinary courts.

If, for instance, someone works in the private sector and believes that he or she has been subjected to surveillance by a private investigator at the instance of his or her employer, this is not something the Tribunal can consider. The special procedures of this Tribunal are not required to hear and determine such complaints.

Human Rights Act Claims:

Under RIPA claims brought to the Tribunal under the Human Rights Act are limited to the following organisations:

- any of the Intelligence Services
- any of her majesty's forces
- any UK police force
- Serious Organised Crime Agency (SOCA)
- The Scottish Crime and Drug Enforcement Agency
- The Commissioner for Her Majesty's Revenue and Customs

The Tribunal will consider if any of the above organisations has breached a complainant's human rights as a result of any conduct they may have carried out, which falls under the auspices of RIPA.

1 As set out in RIPA s57(3) 59(3) and s107(5)(b) of the Police Act 1997

If a complainant's Human Rights Act claim relates to any other organisation, the Tribunal is not the appropriate place to take such a claim, and the complainant is advised to seek the appropriate legal advice.

Time Limit:

The Tribunal is not obliged to investigate conduct which occurred more than one year ago. If a complainant would like the Tribunal to consider a complaint of conduct which occurred outside these timescales, they must provide an explanation for the delay in submitting their complaint. The Tribunal can only consider such complaints if it considers it reasonable to do so. They will therefore consider the explanation along with the details of the complaint, and make a decision on whether it should be investigated.

Interception:

The Tribunal can consider complaints from anyone who thinks they may have been subject to interception by public authorities under RIPA.

The intentional interception of communications without lawful authority is a criminal offence and therefore a matter for the police and prosecuting authorities.

There is a new offence of unintentional unlawful interception and complaints about this can be referred to the Interception of Communications Commissioner.

Remedies:

The Tribunal has at its disposal a range of remedies, just as wide as those available to an ordinary court hearing and deciding an ordinary action for the infringement of private law rights. However, unlike Rule 10 of the Tribunal Procedure (First-Tier Tribunal) General Regulatory Chamber Rules 2009 (SI No.1976), there is no express power to award costs in s67(7) of RIPA nor in the Rules.

Regulation of Investigatory Powers Act 2000 (RIPA)

67(7 Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include--

a. an order quashing or cancelling any warrant or authorisation; and

b. an order requiring the destruction of any records of information which--

(i) has been obtained in exercise of any power conferred by a warrant or authorisation; or
(ii) is held by any public authority in relation to any person."

The Investigatory Powers Tribunal Rules 2000 (SI No 2665)

12 (1) Before exercising their power under section 67(7) of the Act, the Tribunal shall invite representations in accordance with this rule.

(2) Where they propose to make an award of compensation, the Tribunal shall give the complainant and the person who would be required to pay the compensation an opportunity to make representations as to the amount of the award.

(3) Where they propose to make any other order (including an interim order) affecting the public authority against whom the section 7 proceedings are brought, or the person whose conduct is the subject of the complaint, the Tribunal shall give that authority or person an opportunity to make representations on the proposed order."

In its Ruling in relation to W v Public Authority (**IPT/09/134**) the Tribunal concluded that it had no power to award costs in favour of a respondent against a complainant who has withdrawn his complaint.

C. Validation of IPT procedures

The IPT was established to ensure that the UK meets article 13 of the European Convention on Human Rights (ECHR). Article 13 of the ECHR states:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

In the case of Kennedy v The United Kingdom (application No 26839/05), the court held unanimously that there has been no violation of Article 13 of the Convention.

> *"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."*

Exclusive Jurisdiction:

In the case of R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12 the Supreme Court ruled that the IPT does hold exclusive jurisdiction in Human Rights Act claims against the Intelligence Agencies.

Independence:

No Government department, nor indeed any organisation, can intervene in a Tribunal investigation or influence its decisions. The IPT is empowered to develop its own practices and procedures and these do not have to be approved by anyone outside the Tribunal. The Tribunal President has ultimate responsibility for all decisions; he is not required to seek approval from anyone outside the IPT or from government ministers.

Judicial independence is now officially enshrined in law under the Constitutional Reform Act 2005

D. Does the Tribunal ever find in favour of complainants?

There is a common misconception in the media that the Tribunal is a 'star chamber' that both meets in secret and never rules in favour complainants. The assertion is thus that it does not provide an effective control on RIPA powers or an effective remedy to complainants. The purpose of the preceding section has been to outline how the Tribunal policies and procedures have developed to balance the need for transparency and open justice with the protection of sensitive material. In summary, the answer to the question posed above is that the Tribunal have on ten occasions upheld complaints against public authorities. You will in the section that follows find summaries of key cases ruled on by the Tribunal, some of which include rulings in favour of complainants. The remaining cases can be found on the IPT website www.ipt-uk.com.

5. KEY RULINGS

Vincent C Frank-Steiner v The Secret Intelligence Service (SIS) (IPT/06/81)

Mr Justice Burton, Peter Scott QC and Sir Richard Gaskell (26/02/08)

Introduction

This hearing took place in public to consider the lawfulness of the policy of SIS (MI6) to keep its records secret. The Complainant made a Human Rights Act claim under Article 8 and a complaint concerning conduct believed to have taken place "by or on behalf" of SIS.

If a complaint was made, the IPT had the power and duty to consider and supervise the conduct of SIS, in this case being its refusal to disclose whether there were any documents, and if there were any, to allow inspection of them. The IPT also had the right to inspect any files which SIS might have held in relation to this complaint.

The Case

Dr Vincent Frank-Steiner challenged the lawfulness of SIS's refusal to release information to him about his uncle by marriage, Mr Rosbaud . The Complainant claimed that Mr Rosbaud[2] was a spy for Britain during the war.

SIS argued that if any records existed they would still not be released under s3(4) of the Public Records Act 1958 (PRA) and the Lord Chancellor's blanket exemption.

The hearing was an appropriate case to be held in public because, for the purpose of the hearing, it was assumed that SIS did hold relevant documents, and arguments were made on that basis. This was a hypothetical assumption only and gave away no actual information, thus preserving the long standing policy of "neither confirm nor deny" (NCND). There was no challenge by the Complainant to the propriety of the NCND policy.

Summary

Although the Complainant did not challenge the NCND policy, he did argue that if documents did exist and ought to be disclosed it was unlawful for SIS to rely on this policy. Subject to certain caveats, the Intelligence Services Act (ISA) places on SIS a duty to disclose records under the PRA. ISA also sets out that SIS can only obtain or disclose information if it is necessary in the interests of national security or in relation to another purpose set out in ISA. It was therefore not arguable that SIS was in a position to disclose information unless it would be contrary to national security to do so.

For the purpose of this complaint it was reasonable to assume that if it could be shown that SIS ought to have disclosed the assumed papers under the PRA then they ought to be disclosed to the Complainant.

SIS referred to a statement by the Foreign Secretary on 12 February 1998 and emphasised the unshakeable commitment never to reveal the identity of people who cooperate with SIS indefinitely. "Not only would the trust be undermined but in many cases the risk of retribution can extend beyond a single generation." Using hypothetical facts SIS were able to explain why they believe they have an obligation of secrecy towards an agent working for them and why this continues after the death of the agent.

2 Mr Rosbaud's wife was the sister of the Complainant's father.

The judgment outlined the Tribunal's natural reluctance to accept blanket assertions. The terms of the blanket exemption were not in the public domain but the Tribunal challenged this during the hearing and SIS subsequently supplied them. One of exemptions stated:

"The Lord Chancellor, in exercise of the power conferred on him by the proviso to section 3(4) of the Public Records Act 1958, and having received the opinion of the persons responsible for the records and been informed of the facts, hereby approved the retention of the public records specified in the attached schedule (B), being security, intelligence and related records created between 1972 and 1981, until the end of the year 2022."

It was plain to the Tribunal that the exemptions are on the face of it absolute.

On examining the respective policies of Security Service and SIS regarding documents placed in the public domain, the Tribunal was satisfied that there was no inconsistency between the two services.

Outcome

The Article 8 complaint was dismissed. Article 8 guarantees the right to respect for private and family life. Amongst other things the IPT was persuaded by the argument that the family member in question was long dead and had never formed part of the complainant's household.

In regard to the complaint by way of judicial review, the Tribunal concluded that it would investigate if any relevant papers exist in SIS. If none exist then a "no determination" NCND would be appropriate. If papers do exist then the Tribunal would consider whether (a) it was reasonable for SIS to conclude that it did not have grounds to disclose the papers in the interest of national security or (b) it was reasonable for SIS not to transfer such documents to the National Archives. If the Tribunal was satisfied on both counts then a "no determination" NCND would again be appropriate.

In carrying out its inspection of any documents that might exist the Tribunal would bear in mind submissions from the Complainant and SIS.

On 4th April 2008 the Tribunal informed Dr Vincent Frank-Steiner that no determination had been made in favour of his complaint.

Ms Cherie Booth QC for the **Complainant. Mr Jonathan Crow QC** and **Mr Ben Hooper for the Respondent**

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

DETERMINATION IN THE MATTER OF (IPT/07/02) and (IPT/07/18)

Mr Justice Burton, Sheriff Principal McInnes, Robert Seabrook QC (02/12/2009)

Liability Decision (2/12/09)

Telephone Billing Data

Both Complainants complained about the use of the telephone billings which the Tribunal had already concluded was lawfully obtained. The Tribunal concluded that disclosure, in the circumstances of disciplinary proceedings, was not conduct taking place in challengeable circumstances and accordingly, the Tribunal had no jurisdiction to entertain such complaints.

CCTV

The complaint in **IPT/07/18/CH** in respect of directed surveillance by the use of public CCTV.

The Tribunal was satisfied that this surveillance was authorised by the relevant officer in circumstances of some perceived urgency. However, there was a material mistaken belief on the part of both the officer seeking and the officer granting this authorisation, in that neither of them knew that shortly before the surveillance was authorised the Crown Prosecution Service (CPS) had taken the decision not to prosecute. The Tribunal judged this to be a material mistake, capable of invalidating the authorisation. There may be circumstances in which the degree of urgency is such that a material mistake will not invalidate an authorisation, but the Tribunal did not consider this to be such a case.

It was not submitted by the Respondent that the authorisation for surveillance would have been sought or granted if the officers in question had known of the CPS's decision.

The Outcome

There was accordingly an interference with the Complainant's privacy contrary to Article 8, not justifiable in law. The extent of such interference was that for a short period the public CCTV was directed at the Complainant. The Tribunal requested written submissions from both the Complainant and the Respondent as to the appropriate remedy in relation to this finding.

This is the decision on remedy following the Tribunal's decision to uphold the complaint in respect of directed surveillance by using existing public CCTV against the Complainant.

Remedy Decision (8/2/2010)

1. That the relevant CCTV recording be destroyed.

2. That there be a declaration that by virtue of such CCTV coverage of the Complainant there was a breach of his Article 8 right to respect for his private life.

3. That no further remedy was appropriate.

Reasons

1. TThe Complainant's privacy was only marginally infringed by directing existing CCTV towards him for a short period.

2. The CCTV coverage was authorised, albeit in the mistaken belief referred to in the determination of the complaint. Had that belief not been mistaken, then the surveillance would have been lawful and proportionate.

3. No case for compensation is made. The Tribunal was satisfied that none of the Complainant's injured feelings, nor the financial and other implications to which he referred, in any way flowed from or could be related to the CCTV.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

Mrs Paton and others v Poole Borough Council (IPT/09/01, 02, 03, 04 and 05)

Lord Justice Mummery, Mr Justice Burton, Sheriff Principal McInnes QC and Mr Peter Scott QC (29th July 2010).

Introduction

This determination is in favour of the Complainants. The Council were unable to establish that the surveillance was necessary for the permitted purpose or was proportionate.

On 10 February 2009 the Tribunal received 5 almost identical complaints from 2 adults and 3 children of the same family. The children were aged between 3 and 10. The complaints were of unlawful directed surveillance between 10 February and 3 March 2008 carried out by Poole Council to identify the family place of residence on 11 January 2008 to determine if it was within a school catchment area. The school was popular and oversubscribed.

Findings of Facts

Following a complaint by members of the public that Mrs Paton had used a fraudulent address to obtain a school place for one of her children, the Council applied for directed surveillance authorisation on 8 February 2008. This was authorised by the Head of Legal and Democratic Services on 17 April 2008. It was applied for to help the council to establish the address of the youngest child because the parents owned two properties and one was outside the catchment area.

To qualify for a place at the school the child had to live in the catchment area as at 11 January 2008. The family moved between the two properties but returned to the catchment area in September 2007 moving out again in March 2008 before the school year started.

The Authorisation

The Tribunal found that there was a factual basis for the Council's concern about the accuracy of the application for a school place for one of the children and for further investigation by the Council of where the complainants were ordinarily resident at the relevant date (11 January 2008).

Before dealing with the issues relating to the grant of authorisation, the Tribunal noted four points about the application for such authorisation:

1. The application asserted that the information and documents supplied to the Council were "fraudulent" but the purpose of the surveillance was to discover whether or not that was the fact.

2. The application makes reference to the "permanent" home address but the test to be applied for schools admissions is "ordinary residence."

3. All five complainants were identified as targets of surveillance including three young children. Each individual was entitled to separate consideration. None of the children were believed to have committed or were threatening to commit any crime or disorder.

4. The relevant date to determine ordinary residence was 11 January 2008. The relevant date had passed before the authorisation was given. If proper consideration had been given to this fact alone then the application for authorisation might never have been granted.

The Surveillance

The surveillance was undertaken by an education officer starting on 10 February 2008 and then daily until 3 March 2008. Mostly this involved driving by the two residences but also following Mrs Patton and her children in her car and monitoring the property from a parked car. The education officer concluded that the family home was at the address outside the catchment area. However, the Council concluded that on balance at 11 January 2008 the Complainants lived within the catchment area.

Summary

The Tribunal asked themselves three questions relating to the authorisation of the directed surveillance:

1. For what purpose was the authorisation sought and granted?

In its application for surveillance the Council did not identify a crime to be prevented or detected but prior to authorisation there were discussions which concluded that this could be an offence under the Fraud Act 2006. The only sanction given for providing misinformation in a school application was denial of a place at the school. The purpose of the surveillance was therefore to detect if the family were living in the catchment area by obtaining evidence which could be put to the parents. The Tribunal concluded that the Council had not established that the surveillance was for the purpose of preventing or detecting crime. No determination was made by the Tribunal as to the possible relevance of the Fraud Act 2006 or other aspects of the criminal law in another case.

2. Did the person granting the surveillance believe it was necessary on the grounds of preventing or detecting crime?

The entire family was placed under surveillance but no separate consideration was given to the children. For the father and the three children there was clearly no actual or potential criminal offence. The tribunal concluded that consideration should have been given to this and to the use of other measures to obtain the information prior to authorisation.

3. Did the person granting the surveillance believe that is was proportionate to what was being sought to be achieved?

As children were targets of the surveillance and the relevant date had already passed, the Tribunal concluded that the surveillance was not proportionate and could not reasonable have been believed to be proportionate.

Article 8

The Tribunal concluded that the Council has acted in a way which is incompatible with the Complainants' Article 8 rights.

Remedy

As invited by the Complainants the Tribunal made the following order as to remedies:

(1) A declaration that

(a) the authorisation applied for and granted on 8 February 2008 and acted on by the Council did not comply with the requirements of RIPA and was invalid; and

(b) the Complainants have been unlawfully subjected to directed surveillance;

(2) That their findings and their determination be published.

(3) That their full findings and determination be sent to the Chief Surveillance Commissioner for information, the Office of Surveillance Commissioners having made an Inspection Report dated 26 June 2008 (Assistant Commissioner HH Lord Colville of Culross).

The Complainants did not ask the Tribunal to make any financial award in their favour.

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com

William & Alana Brown vs. Department for Social Development (DSD:Northern Ireland) (IPT/09/11/C)

Mr Justice Burton, Sheriff Principal John McInnes QC and Susan O' Brien QC (8/2/2010).

INTRODUCTION

This Judgment deals with the determination of the Tribunal, pursuant to s67 (7) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), of the issue of remedy in relation to a previous finding in favour of the Complainants Mr and Mrs Brown, made by the Tribunal on 20th July 2010. This determination was made on the basis of written evidence and submissions.

The Tribunal had ruled that a specific authorisation of a 'test purchase operation', made within the context of a series of authorisations related to an investigation into allegedly overpaid social security benefits to the Complainants, did not in fact fall within the provisions of RIPA. The investigation by DSD (the Respondent) had eventually concluded that the Complainants had been overpaid benefits due to their misrepresentation of facts and that certain benefit payments and allowances would be disallowed, and further they would need to repay sums to DSD totalling £11,000.

THE CASE

The Tribunal had ruled that surveillance involving entry by officers of the Department for Social Development onto the Complainant's property between 1525 to 1600 on 23rd May 2006, was "not in accordance with the law" within Article 8(2) of the Human Rights Act 1998 (HRA) and so was not justified. The Tribunal therefore examined the issue of remedy in accordance with s.8 of the HRA.

The Tribunal received written submissions on remedies from both parties, and the respondent submitted copies of relevant authorities.

The Tribunal, in summary, made the following findings of fact:

- The Complainants were the joint owners of a house in Coleraine, Northern Ireland and for several years had been in receipt of social security benefits. At that time, the Second Complainant was receiving benefits on the basis that she was resident elsewhere as a single person. The Complainants had decided to sell the house and invited members of the public interested in purchasing the property to view it.
- The Respondent had legitimate powers to grant authorisations under s.28 of RIPA to enable its fraud investigation officers to conduct directed surveillance on individuals suspected of fraud. The Benefits Investigation Service (BIS) of DSD had suspected the Complainants of benefit fraud
- BIS organized surveillance of the First Complainant on 10 occasions prior to 23rd May 2006, for which the correct RIPA authorisations had been obtained. On 23rd May 2006, two officers from the Respondent's fraud unit had called on the Complainants' house posing as prospective purchasers and had been shown round the house by Mrs Brown.
- Soon after 23rd May 2006, a file review by the Respondent had led to a senior manager concluding that the two investigators had gained access to the house without lawful authorisation. The same manager subsequently advised police that the evidence obtained through this unlawful surveillance, which consisted of notes written by the fraud officers, could not be used as part of the ongoing investigation.

- The incorrect authorisation was based on the erroneous assumption by BIS officers that the Complainants' property was a "public place" on account of its being open to viewing by potential house purchasers. The correct procedures had been followed for applying for a directed surveillance authorisation in a 'public place'. The Tribunal had concluded that the fraud officers did not wish to breach RIPA provisions and the authorisation, although unlawful, was granted in error. Furthermore, BIS had reviewed its internal guidelines and practices after the incident and taken various measures to ensure such an error would be repeated.
- The Tribunal also found that the Complainants did not lose any benefits or suffer any financial loss through the unlawful surveillance. The visit lasted 35 minutes, and due to its arrangement as an inspection by a potential purchaser, the officers did not film the premises and were accompanied by Mrs Brown at all times.

THE ISSUE OF REMEDY

The Complainants' solicitors had sought, in addition to the quashing of warrants and authorisations, destruction of records and an apology, compensation which was suggested to be £100,000 for each of the Complainants. The Respondent's key submission was that, in accordance with s8(3) and (4) of the HRA, the Tribunal had to determine whether it was necessary in this case to award damages as 'full and fair satisfaction' to the Complainants, and if so, the quantum of damages, taking into account the approach of the European Court of Human Rights in such cases.

The Respondent contended that the guidance of the Court of Appeal per Lord Woolf LCJ in **Anufrijeeva v Southwark LBC** [2004] QB 1124 at 52-53 established that the remedy of damages played a much less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations, where often the only remedy claimed was damages. The concern, as per Lord Woolf LCJ, was '..to bring the infringement (of an individual's human rights to and end and any question of compensation will be of secondary if any importance...'.

Further, in **R (Greenfield) v Secretary of State for the Home Department** [2005] 1 WLR 673 by the House of Lords per Lord Bingham at 9, Paragraph 17, Lord Bingham pointed out that sums awarded as damages in civil cases for Article 6 violations were 'noteworthy for their modesty', and he reached the same conclusion as Lord Woolf LCJ, coupled with a clear indication that UK courts should look to Strasbourg and not to domestic precedents in relation to breaches of Article 8.

After having considered submissions on the issue of remedy the Tribunal concluded that, in summary:

- Although the invasion of privacy constituted entry into the Complainants' home, consented to by Mrs Brown as a result of deception that the Fraud Officers were potential house purchasers, it was a very limited invasion conducted under the supervision of the second Complainant.
- No pecuniary loss was suffered by the Complainants. At the material time the Complainants would have been willing to show the house to potential purchasers.
- BIS and by extension DSD were acting in the course of an otherwise appropriate investigation in which a number of authorisations for directed surveillance had been correctly obtained. The officers believed they had authorisation, and, had the authorisation been lawful, such conduct as inspecting a private property would have been reasonable and proportionate.
- There was no evidence of suffering of anxiety or stress by the Complainants. If such anxiety or stress did occur this related to their understandable concern at being the subject of a legitimate investigation which resulted in the disallowance of benefit and orders for repayment.

In reaching its decision the Tribunal referred to the guidance given by s8(3) and (4) of the HRA and **Anufrijeva** and **Greenfield**, in addition considering the Strasbourg authorities in respect of non-pecuniary loss when no evidence of distress and frustration had been provided. No award had been made for non-pecuniary loss

in violation of Article 8 cases such as **Heglaz** v **Czech Republic** [2009], where sustained surveillance of a claimant's mobile phone had occurred. Further, the Tribunal considered damages awarded in cases where distress had purported been caused by one-off intrusion in the claimant's home. In **Taner Kilic vs Turkey** ECtHR 70845/01, the violation of Article 8 consisted of a subtantial search of the applicant's home and office and seizure or copy of documents. It was noted that the claim was for €20,000 and €2000 was awarded.

Outcome

The central issue for the Tribunal was to consider, in the context of this case, whether the finding of a breach of Article 8 was, in the absence of any accompanying compensation, sufficient to afford just satisfaction. The Tribunal ruled that as no pecuniary loss was suffered, and no evidence was submitted to support any case for distress in respect of the showing round for 35 mins by the Second Complainant of individuals she believed to be house purchasers, there should be no award in respect of the first Complainant, as he was not present at the material time. The Tribunal further concluded that, since the Article 8 violation was based upon the Second Complainant's occupation of the house, on the basis that she was claiming benefits in respect of her residence elsewhere as a single person, she was precluded from seeking compensation for distress for invasion of her privacy at "home", and no compensation was awarded.

The Tribunal considered two further issues; quashing the authorisation and an award of costs. On the first, the Tribunal concluded that it was appropriate to quash the authorisation of directed surveillance of 23rd May 2006 and to order the destruction of any notes made on the day, although no use had been made of them in the investigation. In relation to the award of costs, the Tribunal concluded that if it had had jurisdiction (referring to **W v Public Authority IPT/09/134**), it would not have awarded costs. The Complainants had sought and obtained, at a stage when little cost had been incurred, a finding in their favour, and had then proceeded, in a process which had caused the Respondent to expend substantial costs, and obtained no further relief. The Tribunal was satisfied that this was not an appropriate case to exercise jurisdiction vis a vis costs and thus none were awarded.

Messrs Kevin R Winters & Co of Belfast for the **Complainants. Mr Jason Coppel** of Counsel for the **Respondent.**

Note

This summary is provided to assist in understanding the Tribunal's ruling. It does not form part of the reasons for the decision. The full Ruling is the only authoritative document and is available at www.ipt-uk.com.

6. RESPONSE TO JUSTICE AND SECURITY GREEN PAPER

The Tribunal welcomes the Government's recently-published Justice and Security Green Paper. The challenges it seeks to address are not new; whereas in the past the production of a PII Certificate by the Executive would be sufficient simply to exclude sensitive material from public disclosure in a court, the situation has changed significantly in recent years. There has been a significant increase in the number of civil claims where Government has had to withdraw, often at significant cost in financial settlements, from actions due to the lack of a robust mechanism for handling sensitive material in court. In these situations cases cannot be contested fairly on both sides, Judges are having to deliver judgments without full access to key information and the public is left without clear, independent rulings based on the full facts of a case.

The report outlines the procedures developed by the Tribunal throughout its history to overcome the dual challenge of handling sensitive material whilst balancing open justice. Furthermore, the Tribunal has sought where possible, in line with the principle of using 'tried and tested techniques' advocated by Government in the Green Paper, to share its learning in handling sensitive material. This is what the Tribunal feels best qualified to do, and this response is limited to the consideration of the 'enhancing procedural fairness' and 'safeguarding material' sections, rather than 'strengthening intelligence oversight'.

In summary, the Tribunal is a judicial body established to hear and determine ECHR and HRA based claims against the conduct of the Agencies and Public Authorities with RIPA powers. It is important to note that the Tribunal is a judicial body which works in many ways as an extension of the mainstream court system, rather than a Government Department or part of the Agencies. In addition to its exclusive jurisdiction over such claims against the Agencies is its role in considering complaints by individuals against Public Authorities with RIPA powers. The Tribunal thus forms a central component of intelligence oversight in the UK. The Tribunal does not expect either primary function of the Tribunal outlined above to change as a result of the proposals outlined in the Green Paper.

Throughout its history the Tribunal has sought to balance demands for open justice with the necessary protection of sensitive material. The Tribunal's Rules enable it to adjudicate on ECHR based proceedings without breaching the 'Neither Confirm Nor Deny' policy principle or revealing sensitive techniques and capabilities that would prejudice national security. That said, the Tribunal has been sufficiently flexible in its interpretation of its Rules (in particular Rule 9) to hold open hearings. For example, in the cases of **IPT/01/77** and **IPT/06/81** open hearings were held as the Tribunal concluded that the public, as well as parties, had the right to know that there was a dispute about the interpretation and validity of a point of law. Such hearings, if they could theoretically involve disclosure or discussion of sensitive material, are held on the basis of assumed facts, and regularly involve adversarial argument by legal representatives, where appropriate. Furthermore the Tribunal has sought where possible, and with the agreement of Parties, to publish some of its judgments. In such cases, the Tribunal has concluded that the publications of rulings of law on a complaint neither discloses information that may be prejudicial to national security nor contravenes the 'Neither Confirm nor Deny' policy. Clearly a balance does need to be struck between the interests of open justice for complainants and protecting sensitive information. It therefore remains within the power of the Tribunal to hold ex parte hearings should the need to protect sensitive information arise. Procedures to protect sensitive information are strengthened by the restrictions laid out in s.69 of RIPA, which preclude disclosure by the Tribunal of any information or documents, or the fact that they have been provided, to any third party.

The Government proposes in the Green Paper to expand the jurisdiction of the ordinary courts to enact closed material procedures (CMPs) for all civil cases that may require the disclosure of sensitive material. If this approach is to be adopted in place of an expansion of the Tribunal's remit, consideration will need to be given to the cases in which the Government is a defendant in a claim of tort brought by an individual. In criminal proceedings or in a SIAC case, the Government may in the event not be permitted by a court to rely

on information unless it is prepared to disclose it: but if it is not prepared to disclose such information, it may still be able to pursue the prosecution or complaint without it, or may have to abandon the prosecution or complaint. In civil proceedings, however, where the Government is a defendant, there is no such option.

Although the Green Paper quite rightly addresses the need to strengthen the Special Advocate system, both in terms of numbers and intelligence analysis training, further thought must be given to the legal support that will be required by Special Advocates over and above the provision of Junior Counsel. A civil claim in which the Government is a defendant requires a very different approach from a criminal prosecution or a SIAC complaint in which the Government is the complainant. Situations will arise where Special Advocates, by their very nature only qualified to advocate for the defendant in court, will not be equipped with the knowledge or experience required to investigate or establish, or pursue perceived deficiencies in, the quantum of sensitive information held or disclosed by the relevant Agency or Government Department that is relevant to the case. In such situations, there will be a need for security cleared, experienced and, most importantly, trusted individuals to investigate what sensitive information is being held by the Agency and whether this needs to be disclosed in the closed proceedings. This would typically be the role of a solicitor or investigator in the majority of civil cases. However, the costs, procedural and national security issues around engaging such a large group of security-cleared investigators would be significant.

A potential solution to this significant issue could, however, be for the Tribunal to undertake this fact-finding role. The Tribunal envisages that, as part of the case management stage discussed in the Green Paper, Judges in a civil court could refer factual issues for determination by the Tribunal or could request the Tribunal to investigate and report on factual issues. This would not be a particularly new arrangement; the Tribunal's members regularly inspect secret material and have previously exercised their power to both instruct Special Counsel (an amicus curiae) to advise the Tribunal and an investigator to inquire into the facts surrounding the complaint.

The use of the Tribunal in this role would have a number of advantages

- The Tribunal Members and Secretariat have considerable background knowledge in relation to the working of the intelligence agencies, and experience of investigating complaints about the exercise Agencies' intrusive powers.
- The use of the resources of the Tribunal would not require further individuals to be security cleared to review classified documents.
- The Tribunal already possesses all the statutory powers necessary to investigate complaints against the intelligence agencies effectively.
- As a judicial body, to whom the intelligence agencies are already answerable under RIPA, the Tribunal is likely to have greater moral authority than special advocates or security cleared solicitors to secure speedy cooperation by the agencies in disclosing relevant documents.
- The Tribunal has the trust and confidence of the Agencies.

The Tribunal suggests that the answer to the question at para 2.71 of the Green Paper is that there is scope for considering a change to the existing role of the IPT, by expanding its powers in order to enable it to accept requests for assistance with the handling of sensitive material, where these have been made by a court at a case management stage.

Furthermore, the Tribunal is likely to be a less costly means of dealing with the review of sensitive material held by the Agencies. The part time members of the Tribunal are only called upon as and when required, and the salaries of the judicial members are already funded by Ministry of Justice. The resources of the Tribunal Secretariat would naturally need to be increased if a substantial volume of casework were to be remitted to the Tribunal in the fashion proposed.

APPENDIX A: FREQUENTLY ASKED QUESTIONS

Can I complain on someone's behalf?

Any complaint or claim must be brought by the person concerned (including any organisation and association or combination of persons). They may receive help in completing the form and it can be submitted by a representative, but the form and any additional statements must be signed by the complainant/claimant.

Although the Tribunal Rules require the forms to be signed by the complainant, a form signed by a parent or guardian in respect of a complaint by a child or vulnerable adult is acceptable.

The Tribunal cannot accept single applications on behalf of more than one person because the Tribunal is required to make a determination in relation to each complaint falling within its jurisdiction*. Each case is investigated separately and conduct may be found to relate to one complainant but not others who are linked to that complaint and the final determination may be different. For this reason the Tribunal finds it necessary to keep a separate file in relation to each application which is made to it.

*Which is not out of time and which is neither frivolous nor vexatious.

Will the Tribunal tell me if my phone has been intercepted?

It is not the Tribunal's function to tell complainants whether their telephones have been tapped, or if they have been the subject of other activity. It's purpose is to ascertain whether legislation has been complied with and organisations have acted reasonably. If your complaint is upheld, the Tribunal may decide to disclose details of any conduct. If your complaint is not upheld, you will not be told if any conduct has been taken against you or not.

Will making a complaint or claim to the Tribunal cost me anything?

No. The Tribunal's investigation of complaints and claims is free of charge and it does not have the power to award costs against a complainant who has withdrawn his complaint. The government has an obligation to provide all the resources required by the Tribunal to enable it to carry out its functions. However, if you decide to submit your complaint and claim through a solicitor or other representative, the Tribunal cannot refund any costs you may incur as a result.

How long will I have to wait before the Tribunal makes its decision?

The Tribunal has no set time limit for responding to complaints or claims. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the applicant or the organisation complained about.

Will I be contacted by the organisation that is the subject of my complaint or claim?

All complaints and claims are dealt with through the Tribunal. The organisations that are the subject of a claim or complaint make all their responses to the Tribunal for its consideration. You will not be contacted directly without your consent by any organisation in relation to your complaint or claim.

Will I receive information about the progress of my complaint/claim?

The Tribunal is restricted in what it can disclose during the investigation of a complaint or claim. The Tribunal Rules state that no information or documents provided to the Tribunal, nor the fact that any have been provided, can be disclosed. The Tribunal can therefore only assure you that an investigation is still ongoing.

Is the Tribunal independent of government?

Yes. No government department can intervene in a Tribunal investigation or influence its decisions. The Tribunal makes its determinations based entirely on the evidence before it and on the same principles as judicial review.

How do I know the agency will provide all information requested of it?

All organisations holding powers under RIPA are required by section 68(6) of the Act to provide all information requested by the Tribunal. Further to this, the Tribunal can demand clarification or explanation of any information provided, order an individual to give evidence in person, inspect an organisation's files, or take any other action it sees fit. RIPA stipulates that all organisations and individuals concerned must provide the Tribunal with such assistance as it requires.

APPENDIX B: SUMMARY OF IPT RULES

A full version of the Investigatory Powers Tribunal Rules 2000, made under s.69 of RIPA, appear in Statutory Instrument No. 2665. Readers are encouraged to refer to this version rather than the summary of key points below. The full Rules are available on the IPT website www.ipt-uk.com under the ' links section'.

Rule	Summary
Part I	
1	**Citation and commencement** 2nd October 2000
2	**Interpretation**
3	**Application of Rules** The Rules apply to Complaints and claims
4	**Exercise of Tribunal's jurisdiction** Jurisdiction may be exercised within the UK by any two or more members
5	**Functions exercisable by single member** A list of the limited decisions which can be taken by only one member
6	**Disclosure of Information** The confidentiality restrictions placed on the Tribunal. The Tribunal is required by rule 6(1) 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.
Part II	
7	**Bringing section 7 proceedings** How to make a Human Rights Act claim (T1 form)
8	**Making a complaint** How to make a complaint (T2 form)
9	**Forms of hearing and consideration** If the Tribunal decide to hold a hearing this must be in private. This rule was examined in the case of **IPT/01/62** and **IPT/01/77** and the Tribunal determined that it was ultra vires (beyond the power) of section 69 of RIPA. The Tribunal have therefore decided that, subject to the general duty imposed by Rule 6(1) to prevent the disclosure of sensitive information, the Tribunal can exercise discretion and hold open inter partes hearings.
10	**Representation** If someone is invited to make representation at an oral hearing they can do this themselves or they can be represented by a lawyer who falls within the categories given. Alternatively they can be represented by someone else if the Tribunal gives permission.
11	**Evidence** Uniquely the Tribunal can receive evidence in any form including evidence that would not be admissible in a court of law. Witnesses can be required to give evidence on oath but no one can be compelled to give evidence at an oral hearing.
12	**Remedies** This Rule regarding remedies should be read with s67(7) of the Act. Remedies available to the Tribunal are summarised in page 23 of this report.
13	**Notification to the complainant** This section allows the Tribunal to provide information to a complainant when a determination is made in their favour subject to rule 6(1).

APPENDIX C: IPT COSTS

The total amount of fees claimed by Members of the Tribunal in 2010 was £63,078. The Tribunal claimed a total of £5983.00 in expenses in 2010

Members' terms and conditions state that their appointment is non-salaried and non-pensionable. A member of the Tribunal who is not a salaried judicial-holder will receive a daily fee of £785.00. The daily fee is equivalent to that paid to a Deputy High Court Judge and is reviewed annually in line with the recommendations of the Senior Salaries Review Body for the Judiciary. Additional payment(s) can also be made for attendance at full Tribunal meetings, attendance at oral hearings and file review visits to those agencies and authorities empowered under the legislation against whom complaints are lodged.

Both the President and Vice President are serving High Court Judges and therefore receive no additional payment for their work on the Tribunal.

INVESTIGATORY POWERS TRIBUNAL

REPORT

2011-2015

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Report of the Investigatory Powers Tribunal

This Report covers the period from 1st January 2011 to 31st December 2015 with additional significant cases decided in Spring 2016 and factual updates in Summer 2017

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Foreword from the President

I am pleased, as President of the Investigatory Powers Tribunal since September 2013, to introduce our first Report since 2010. In doing so, I pay tribute to my predecessor Sir John Mummery who retired in September 2013, and whose Vice-President I had the privilege to be since we were both appointed upon the introduction of the Tribunal in 2000.

Since the 2010 Report, the last two years in particular have seen considerable changes in the workload and the day-to-day working of the Tribunal. In part due to the recent well publicised and unauthorised Snowden disclosures and in part due to the greater interest in the Tribunal by Non-Governmental Organisations (NGOs) such as Liberty, Privacy International and Amnesty International, there have been far more claims relating to the Security and Intelligence Agencies (SIAs). These previously occupied a much smaller proportion of our time, although we have continued to receive complaints and claims in respect of law enforcement agencies and local and public authorities.

Apart from the content of our considerations, the other noticeable change is in the number of the Tribunal's public hearings. Although it is obviously essential for the Tribunal to carry out its work in private, where the material genuinely justifies the need to keep it confidential on grounds, among others, of national security, we have striven to hold hearings in public, wherever possible. These cover both interlocutory (preliminary) and full hearings.

All this means that a Report is now timely. I trust that this Report will not merely provide an up-to-date account of our work, but will increase the understanding of a Tribunal which has an important role to perform in the oversight of those privileged to exercise special investigatory powers, and to provide the public with a means of redress should those powers be exercised unlawfully.

During the last 18 months, a particularly important development in the Tribunal's work is that it has held a considerable number of *open hearings in public* ('open') and delivered eight reasoned judgments in open. This has been achieved not, I believe, at the expense of any risk to national security, but by so far as possible developing the device of hearing cases on the basis of 'assumed facts'. This means that without making any decision in the first instance as to whether the facts alleged by complainants are true, where appropriate the Tribunal invites the parties to formulate and agree issues of law for the Tribunal to decide *upon the assumption* that they are true This has enabled hearings to take place in public with full adversarial argument as to whether, assuming the facts, any such conduct as a claimant alleged to have occurred, by, for example, the SIAs, would have been lawful. Following this, *closed hearings may be held in private* ('closed'), when the legal conclusions of the Tribunal can be applied to the facts that it determines to be true.

In this respect we are in a better position even than the Commissioners, who have the right and duty to exercise far more sweeping investigations, but do not have the benefit of adversarial argument to resolve these issues. It also goes a long way to meeting what has been rightly been described by the Intelligence and Security Committee of Parliament (Report, 2015) as "the practical difficulties of making a case that will be heard in secret". In this respect I believe we are pioneers, and a number of other similar bodies in other countries have expressed interest in following our lead.

Part of what I believe to have been the successful operation of this approach has been the Tribunal's advantage of being able to call on the assistance of able and conscientious Counsel to the Tribunal. With their help we have been able to encourage Respondents such as the SIAs, to make open much of what had previously remained closed. In doing this the Tribunal adopts

a rigorous approach to the requirements and also the limits of Rule 6 of the Tribunal Rules, which stipulates that *"the Tribunal should 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 wellbeing of the United Kingdom or the continued discharge of the functions of any of the intelligence services".*

This has led in a number of cases, referred to in Chapter 5, to the disclosure of rules and procedures under which the SIAs have operated, which were not previously in the public domain. Thus in the **Liberty/Privacy** cases, the **Lucas, Jones** case and the **Privacy/GreenNet** case, this has enabled the Tribunal to consider in open the lawfulness of those procedures in the light of domestic and European authority, and on the whole to endorse them, at least since the date when they were disclosed to the public. In the **Belhadj** case the result of that disclosure was an acceptance by the Government that existing procedures needed to be changed, since they had not complied with the European Convention of Human Rights.

I believe that the Tribunal's methods generally work well. I trust they have gained the confidence of those applying to us, and that they are recognised as fair and sensible by those organizations we investigate as a result of the applications made to us. It is of course worth emphasising that the Tribunal can only investigate complaints made to it. It does not have any kind of roving brief; but the fact that so many of our recent cases have been brought by NGO's, and on the basis of assumed facts, has meant that we have been able to give broad consideration to the questions brought before us: be they concerned with interception warrants under Section 8 of the Regulation of Investigatory Powers Act (RIPA), to computer exploitation or 'hacking', to questions of legal professional privilege, parliamentary immunity or to the police investigations into the event which came to be known as 'Plebgate'.

I also believe that the Tribunal now has public confidence, and has earned it. This has been in large part thanks to the hard work and conscientiousness of my fellow Tribunal Members, and of its staff. Some of these have departed during the past years, but I thank them all for their commitment to the Tribunal's work, and for their dedication to ensuring that those members of the public, or bodies, who apply to it are given the protection which our oversight is intended to secure.

Time does not stand still, and there are now publicised proposals for new legislation covering a number of difficult issues. We look forward as a Tribunal to continuing to perform our role in the light of what Parliament determines.

Sir Michael Burton,

President

Chapter 1. Overview, and background to the Tribunal

Overview

1.1 The Tribunal is an independent court. It decides complaints under the Investigatory Powers Act 2000 (RIPA) and claims under the Human Rights Act 1998 (HRA). These are allegations of unlawful intrusion by public bodies, including the Security and Intelligence Agencies (SIAs), the Police and local authorities: see Appendix A for a full list of the public bodies concerned. In simple terms, RIPA is the statute and main source of law that establishes and regulates the power of public bodies to intrude upon the privacy of members of the public; and it provides an avenue of complaint when unlawful conduct of this kind is believed to have taken place (for convenience, in this Report complaints and claims will be referred to as 'complaints').

These powers of intrusion may be summarised as follows:

* The interception of communications;
* The acquisition of communications data (e.g. billing data);
* Directed surveillance, which means covert surveillance in the course of a specific investigation or operation;
* Intrusive surveillance, which means covert surveillance carried out in relation to anything taking place on residential premises or in a private vehicle;
* The use of covert human intelligence sources (agents, informants, and undercover officers. A covert human intelligence source is known as a 'CHIS'.)

1.2 The Act provides that these powers may only be exercised if they are necessary, for example, in the interests of national security, for the purpose of preventing or detecting crime or disorder, in the interests of economic well being of the UK, or for the purpose of protecting public health. Moreover, before they can be exercised they must be assessed as proportionate to the action to be taken, and the following matters should have been clearly identified and in place:

* The purpose for which they may be used;
* Which authorities can use the powers;
* Who should authorise each use of the power;
* The use that can be made of the material gained;
* The availability of independent judicial oversight; and
* A means of redress for the individual who has been subject to the abuse of these powers.

1.3 The SIAs have other powers pursuant to Sections 5 and 7 of the Intelligence Services Act 1994, which can also be considered, investigated and ruled upon by the Tribunal, if complaint is made to it (see summary of the **GreenNet** judgment Chapter 5.13, below)

1.4 Acts of Parliament seek to achieve these supervisory aims with a substantial body of oversight. There are four key levels or pillars of oversight, of which the Tribunal is one:

1. **Authorisations:** Intrusive powers should only be exercised upon the authority of a warrant or an authorisation given by a "designated person" with authority to do so. Applications to use these powers must be scrutinised with great care, for they must be granted

only if the particular power sought is in all the circumstances: (a) lawfully available; (b) necessary; and (c) proportionate.

2. **The Commissioners:** The role of the Commissioners is to provide oversight of the way in which all public authorities in the United Kingdom carry out covert surveillance. They visit relevant public authorities, interview officers who authorize covert techniques, examine paperwork and give advice as to compliance with the law. These techniques are governed by Part III of the Police Act 1997 and Parts II and III of RIPA. There are three Commissioners, all of whom are, or have been, eminent and very senior judges.

* Interception of Communications Commissioner: responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces and other public authorities. (Section 57 RIPA). The current Commissioner is the Rt. Hon. Sir Stanley Burnton.

* The Intelligence Services Commissioner: responsible for providing independent judicial oversight of the conduct of the SIAs (SIS, also known as MI6, Security Service (MI5), Government Communications Headquarters (GCHQ)) and the MOD (Section 59 RIPA). The current Commissioner is the Rt. Hon. Sir Mark Waller.

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

3. **Intelligence and Security Committee of Parliament.** This is a statutory Committee (see Intelligence Services Act 1994 and Justice and Security Act 2013) comprising distinguished Parliamentarians who have further responsibility for the oversight of the SIAs (MI5, MI6, and GCHQ) and other parts of the UK intelligence community. These duties include overseeing their activities, policies, expenditure, administration and operations. This Committee is currently chaired by the Rt. Hon. Dominic Grieve QC MP.

4. **The Investigatory Powers Tribunal (hereafter referred to as 'the Tribunal' or 'IPT')** The Tribunal was established by RIPA (Sections 65-69) to consider, and if necessary, investigate, any complaints made by members of the public (including NGO's) who believe that they have been the victim of unlawful action under RIPA, or that their rights have been breached by any unlawful activity under RIPA or wider human rights infringements in breach of the Human Rights Act 1998. The Tribunal then decides if the complaint has been justified, making one of a number of possible Orders (see Chapter 4).

Background to the Tribunal

1.5 Section 65 of RIPA establishes a Tribunal which will investigate, subject to its jurisdiction and relevant procedures, complaints and Human Rights Act claims against any public authority with RIPA Powers in England and RIPSA Powers in Scotland. For Section 65, see Appendix B. In October 2000 the Tribunal (IPT) replaced the Interception of Communications Tribunal Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997 (concerning police interference with property). The Tribunal came into operation in October 2000 with the enactment of RIPA. At the same time its Rules were published. All conduct which was covered by past legislation, as well as some that was not, can now be investigated under RIPA.

1.6 The Tribunal is a statutory creation with limited jurisdiction, for its jurisdiction and powers are entirely governed by RIPA and the subordinate legislation made under it. These limitations are discussed in Chapter 2 under that heading. A summary list of public authorities with RIPA powers appears in [Appendix A] to this Report. In addition, the Tribunal is essentially reactive

as opposed to proactive, in that its powers derive from receiving a claim or complaint. It is a court and as with any court it can only consider the complaints that are brought before it. Once a complaint has been investigated, the Tribunal determines it by applying the same principles as a court on an application for judicial review.

1.7 Under Section 68 of RIPA, the Tribunal is entitled to determine its own procedures. The legislation that forms the basis of the Tribunal and the rules by which it operates (together with relevant internet links) are listed in Chapter 6. The main purpose of RIPA is to ensure that relevant investigatory powers, many of which represent significant intrusions into the private lives of citizens, are used in accordance with human rights laws.

Validation of IPT procedures

1.8 The Tribunal was established to ensure that the UK meets Article 13 of the European Convention on Human Rights (ECHR). This Article states:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

In the case of **Kennedy v The United Kingdom (2010) 29 BHRC 341 ECtHR,** the European Court of Human Rights in Strasburg held unanimously that there has been no violation of Article 13 of the Convention, saying:

> "Having regard to its conclusions in respect of Article 8 (*right to respect for family and private life*) and Article 6.1 (*right to a fair trial*) 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."

Chapter 2. How the Tribunal Works

2.1 The Tribunal as an independent court has a number of characteristics that distinguish it from other courts and tribunals. One of its unique characteristics as a court is that, where appropriate, it is able to follow through any questions which might arise, by ordering an investigation, with which the public body concerned is compelled to co-operate. 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 relating to it."

2 2 **Some further noteworthy characteristics of the Tribunal:**

* The Tribunal can order, receive and consider evidence in a variety of forms, even if the evidence may be inadmissible in an ordinary court. This is what is meant by an investigation.

* The Tribunal is free of charge and the applicant does not have to hire a lawyer. Even if he/she loses the case, the Tribunal has never awarded costs to the public authority being complained about, and it is unlikely it would do so. Generally, the Tribunal will not make an order against a losing party for reimbursement of the costs incurred by the opposing party.

* The Tribunal can provide confidentiality to protect the claimant and the fact that he/she has made a complaint. It is anxious not to discourage people from coming forward to make a complaint, who might be apprehensive about possible repercussions.

* The Tribunal can also protect the identities of other people if harm is likely to be caused. It has done so, for instance, by giving anonymity to witnesses who would, for good reason, not in other circumstances give evidence.

* The Tribunal can review material that may not otherwise be searchable, and obtain evidence where the applicant acting alone could not. It is able to do this because it has the power to do so, and is required to keep from disclosure sensitive operational material given by the SIAs. It therefore has greater freedom to look at this kind of material than the ordinary courts

* 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.

* Like a court, the Tribunal has wide powers to make remedial orders and awards of compensation. For instance, it can stop activity, quash authorisations, order material to be destroyed and grant compensation to the extent necessary to give due satisfaction.

* Since the Tribunal is generally required to keep from disclosure sensitive operational material given by SIAs, the complainant may not be aware of what it has seen and will not be entitled to hear or see it, just as, unless a complainant consents, documents supplied by him or her to the Tribunal will not be disclosed (see Chapter 2.17-18 below)

* There is currently no domestic avenue of appeal or review against the Tribunal's decisions. (However, it is possible to challenge a ruling of the Tribunal by making an application to the European Court of Human Rights in Strasbourg).

Members (also see Report, Chapter 7)

2.3 The Tribunal's decision-makers and those with the power to order investigations are its Members. At present there are eight Members. They are all lawyers of experience and standing, presided over by the President or Vice-President, who are High Court Judges. The Members are assisted in their task by a Secretariat, whose duties include the preparation of files in respect of each complaint and carrying out essential administrative work.

Complaints which the Tribunal can consider

2.4 The Tribunal can consider any complaint by a person who believes that he or she:

* *Has been the victim of unlawful interference by public authorities using covert techniques regulated under RIPA.*

A complaint can be about any interference which the complainant believes has taken place against him, his property or communications. This includes interception, surveillance and interference with property. The public authorities include SIAs, military and law enforcement agencies as well as a range of Government Departments, regulators and local authorities; or

* *Has been the victim of a Human Rights violation*

Claims can relate to the use of covert techniques by intelligence, military and law enforcement agencies and to a wider range of human rights breaches believed to have been committed by the SIA's.

As stated above, the SIAs are: Secret Intelligence Service (or 'MI6') the Security Service (sometimes called 'MI5'), and GCHQ (the Government Communications Headquarters). 'Military' includes army, navy and air force, and law enforcement includes both national and territorial Police forces.

2.5 The first type of complaint (interference by public authorities) may also be made to the ordinary courts instead of the Tribunal, but the Tribunal has additional powers of investigation which a court does not have. In cases of Human Rights breaches involving the SIAs, the Tribunal is the only forum that can decide the complaint.

2.6 A decision that the Tribunal will not investigate a claim (see Chapter 4.1 below) will be made by two Members of the Tribunal. Once accepted, all complaints of whatever nature must always be considered and decided by at least two Members of the Tribunal. If difficult issues of law are involved the Tribunal will normally convene a panel of up to five Members.

Procedures to enhance open justice

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.

Open 'Inter-Partes' Hearings ('Open')

2.9 Accordingly, during the course of investigating a complaint which could theoretically involve undisclosed sensitive material the Tribunal may decide to hold an oral hearing to consider points of law, such as occurred in 2008 in the case of **Vincent Frank-Steiner v The Data Controller of SIS (IPT/06/81).** As has been mentioned such hearings may be held on the basis of assumed (or agreed) facts.

2.10 There has been an important development of the Tribunal's practices in this respect. The original Investigatory Powers Tribunal Rules 2000 (No.2665) provide that:

* Rule 9(2): Although the Tribunal "shall be under no duty to hold oral hearings ... they may do so in accordance with this rule".

* Rule 9(6) of which was clear and unqualified in this context, and outlined that 'The Tribunal's proceedings, including any oral hearings, shall be conducted in private.'

* Rule 6(2)(a) went even further, to say that the Tribunal may not even disclose to the Complainant or to any other person the fact that the Tribunal has held, or propose to hold, a separate oral hearing under rule 9(4). The fact of an oral hearing was to be kept private, even from the other party. The Tribunal were originally given very little discretion in the matter.

2.11 However, in **IPT/01/62 and IPT/01/77**, the Complainants asked the Tribunal to hold the hearing in public and the Tribunal considered this and other points of law point as a preliminary issue. In a public hearing on 22 January 2003, the Tribunal concluded that the public, as well as the parties to the complaint, have a right to know that there is a dispute about the interpretation and validity of the law. This was the first time the Tribunal sat in public, and it decided that, subject to the general duty imposed by Rule 6 (1) to prevent the disclosure of sensitive information, it can exercise its discretion in favour of holding an open hearing:

> "As no risk of prejudice to the NCND policy or to any other aspect of national security or the public interest is present, the Tribunal have decided to exercise their discretion

under Section 68(1) of RIPA to allow the hearing to be made public by means of the transcripts and also to make public the reasons for their rulings on the legal issues argued".

Commitment to Open Justice

2.12 Following this commitment to hold hearings in open when possible, the Tribunal has gone further and published its significant rulings on its website, providing that this runs no risk of disclosure of any information "to any extent, or in any manner that is contrary to or prejudicial" to the matters referred to in Section 69(6)(b) of RIPA and Rule 6(1) or to the NCND policy. Its reasoned judgments are all on the Tribunal's website (REF) and reported by the British and Irish Legal Information Institute (Bailii) with official citation numbers, and a number can also be found reported in the Law Reports

2.13 The Tribunal recognises the potential and sometimes highly sensitive conflict between the interests of complainants in securing all relevant information and, where they arise, concerns of national security and other public interests. A proper balance must be struck between them. It therefore remains within the power of the Tribunal to hold separate open and closed hearings, should the circumstances, including the nature of the material, require it to do so.

2.14 In the case of **Kennedy v The United Kingdom (2010) 29 BHRC 341 ECtHR (IPT/01/62)** these procedures, and in fact all the Tribunal's procedures, have been accepted by the European Court of Human Rights as ECHR-compliant

2.15 Finally, with regard to open hearings the Tribunal wishes to acknowledge the manner in which able solicitors and counsel on both sides, together with Counsel to the Tribunal, have conducted them. Their submissions of law, and the skill with which they have been argued and presented have been of the greatest assistance. Even if complainants have not been successful in securing the outcome they have sought they have on occasion – and without any compromise to national security – advanced the cause of transparency by achieving the open disclosure of practices which had hitherto been unknown.

Confidentiality

2.16 The matters which form the subject of complaints to the Tribunal often trigger statutory limitations which are placed upon the information that it may or may not disclose. These limitations may make it difficult to provide the reader with insight into the work of the Tribunal; but these restrictions enable the Tribunal to review highly sensitive material which cannot be in the public domain. Stringent confidentiality restrictions are set out in Section 69(6)(b) of RIPA which preclude disclosure by the Tribunal of sensitive information. Express restrictions on the disclosure of information to any third party are also contained in Rule 6. It is essential to gain an understanding of this Rule in order to appreciate the constraints under which the Tribunal operates. It would therefore be helpful for the reader to be aware of its main provisions.

"*Disclosure of Information.*

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.

(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."

2.17 As stated, the Tribunal is therefore restricted in what it can disclose during the course of its investigations. The Rules state that no information or documents provided to the Tribunal, or the fact that they have been provided, can be disclosed. This is an essential component of the protection of the most secret of Government material. The Tribunal is therefore limited to giving assurance to complainants that an investigation is still ongoing.

2.18 To balance this, however, as we have mentioned, the same confidentiality restrictions also extend to complainants. During its inquiries, the Tribunal can only disclose the complainant's name, address, and date of birth to the organisation they are complaining about. It needs to disclose this information to enable record searches to be made to see if any information is held. The Tribunal needs the complainant's permission to disclose any further details regarding their complaint. The complainant can give this permission by ticking the relevant confidentiality box on the IPT complaints forms. Although complainants do not have to give this permission, the Tribunal Members may not be able to conduct as thorough an investigation as they would wish, if they do not consent to these details being disclosed.

2.19 Subject to this general duty, the Tribunal's commitment to open justice has been set out previously. Also, where the Tribunal makes a determination in favour of a complainant, it will (subject to the general duty imposed by Rule 6(1)) provide a summary of that determination to the complainant, including any findings of fact.

Neither Confirm nor Deny policy (NCND)

2.20 GCHQ has explained the policy as follows: "It has been the policy of successive UK Governments to neither confirm nor deny whether they are monitoring the activities of a particular group or individual, or hold information on a particular group or individual, or have had contact with a particular individual. Similarly, the long-standing policy of the UK Government is to neither confirm nor deny the truth of claims about the operational activities of the Intelligence Services, including their intelligence-gathering capabilities and techniques." This NCND response, where appropriate, is well established and lawful. Its legitimate purpose and value has been ratified by the Courts, and re-iterated by this Tribunal in the cases of **IPT/01/77 and IPT/06/81**

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.

2.22 It is therefore not within the remit of the Tribunal to confirm or deny whether or not a warrant or authorisation has been issued against a member of the public, unless it is subsequently found to be unlawful. The purpose of the Tribunal is to ascertain whether legislation has been complied with and whether organisations have acted reasonably. If a complaint is upheld, the Tribunal may decide to disclose details of any conduct. If a complaint is not upheld, complainants will not be told whether or not any action has been taken against them.

Independence

2.23 Judicial independence is now officially enshrined in law under the Constitutional Reform Act 2005. No Government department, nor indeed any organisation, can intervene in a Tribunal investigation or influence its decisions.

2.24 If a complaint is within the jurisdiction of the Tribunal, then (subject to subsections 67(4) (if it is 'frivolous' or 'vexatious' – these are the words used by Parliament), subsection (5) (out of time) or other express determination by the Tribunal, it has a duty to investigate that complaint and, following that investigation, to decide it by applying the same principles as a court on an application for judicial review. The Tribunal President has ultimate responsibility for all decisions; he is not required to seek approval from anyone outside the Tribunal or from Government Ministers.

Effective investigation and administration of complaints

2.25 In the performance of its duties, and uniquely to any court or tribunal, the IPT is empowered to develop its own practices and procedures, and has done so based on the principles of open justice throughout its history.

2.26 The Tribunal regularly itself inspects confidential and secret files. It has the power, and has exercised it, to instruct (i) Counsel to the Tribunal – as an 'amicus curiae' – to advise the Tribunal; and, in appropriate circumstances, (ii) a Special Investigator to enquire into detailed facts and allegations and report to the Tribunal.

2.27 To assist in its investigation of complaints, RIPA stipulates that all organisations holding powers under the Act are required (by Section 68(6)) to provide any information requested by the Tribunal. The Tribunal can also demand clarification or explanation of the information provided. The Interception of Communications Commissioner, the Intelligence Services Commissioner and all Surveillance Commissioners must also give the Tribunal such assistance as the Tribunal may require in investigating and determining complaints. The Tribunal wishes to take this opportunity to thank the Commissioners for the assistance they have given. 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.

Human Rights Act Claims

2.28 Under RIPA, claims brought solely under the Human Rights Act are limited to the following organisations:

Any of the Intelligence Services (SIAs)

Any of Her Majesty's forces

Any UK police force

The National Crime Agency (NCA)

The Scottish Crime and Drug Enforcement Agency

The Commissioner for Her Majesty's Revenue and Customs

2.29 The Tribunal will consider if any of the above organisations has breached a complainant's human rights as a result of any conduct they may have carried out, which falls under the auspices of RIPA. In the case of **R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12** the Supreme Court ruled that the Tribunal holds exclusive jurisdiction in Human Rights Act claims against the SIAs.

2.30 If a complainant's Human Rights claim relates to any other organisation, the Tribunal is not the appropriate place to make such a claim, and the complainant is advised to seek legal advice.

Interception

2.31 The Tribunal can consider complaints from anyone who thinks they may have been subject to interception by public authorities under RIPA.

2 32 The intentional interception of communications without lawful authority is a criminal offence and therefore a matter for the police and prosecuting authorities. For the information of the reader, under the RIPA 'Monetary Penalty Notice Regulations', which came into force on 16 Jun 2011, *unintentional* electronic interception, which does not relate to trying to put into effect an interception warrant, is now the domain of the Interception of Communications Commissioner. He alone can investigate a complaint, and if appropriate, exact a monetary penalty when this occurs.

Limitations

2.33 The Tribunal may investigate RIPA claims that fall within its jurisdiction, as outlined in this Report. It cannot, however, consider complaints against public authorities which are subject to other complaints mechanisms and oversight. The Tribunal cannot therefore consider complaints regarding the conduct of the Police or NCA which does not relate to activities referred to in the statute. These would be for the Independent Police Complaints Commission (in England and Wales), Police Ombudsman for Northern Ireland or Police Complaints Commissioner for Scotland.

2.34 The Tribunal has no jurisdiction to investigate complaints about private individuals or companies unless the complainant believes they are acting on behalf of an intelligence agency, law enforcement body or other public authority covered by RIPA.

Time Limit

2 35 The Tribunal is not obliged to investigate conduct which occurred more than one year prior to the submission of the complaint. If a complainant would like the Tribunal to consider a complaint of conduct that occurred outside this timescale, they must provide an explanation for the delay in submitting their complaint. The Tribunal can only consider such complaints if it considers it fair and reasonable to do so. It will therefore consider the explanation along with the details of the complaint, and make a decision on whether it should be accepted and investigated, and for what period

Employment Related Surveillance

2.36 In the case of **C v The Police (IPT/03/32)** the Tribunal determined that employers investigating members of their staff who were suspected of misconduct does not fall for it to consider, even if that employer has RIPA powers. The Tribunal cannot consider this type of complaint, but this does not mean that covert surveillance activities by employers is unregulated by law. If for example, someone who works in the private sector believes that he or she has been subjected to surveillance by a private investigator at the instigation of his or her employer, this is not something the Tribunal can consider; but if the conduct engages Article 8 (right to respect for private or family life), or breaches some other specific statutory requirement, common law or contract, it can be challenged in the ordinary courts.

Remedies

2.37 The Tribunal has at its disposal a range of possible remedies, as wide as those available to an ordinary court which is hearing and deciding an ordinary action for the infringement of private law rights. However, unlike Rule 10 of the Tribunal Procedure (First-Tier Tribunal) General Regulatory Chamber Rules 2009 (SI No.1976), there is no express power to award costs in Section 67(7) of RIPA, nor in the Rules. The Tribunal has only awarded costs on one occasion: see Chatwani & Others v the National Crime Agency in Chapter 5.

2.38 Apart from compensation, other orders that may be made by the Tribunal include—

* An order quashing or cancelling any warrant or authorisation; and

* An order requiring the destruction of any records of information which (i) have been obtained in exercise of any power conferred by a warrant or authorisation; or (ii) are held by any public authority in relation to any person.

Expenditure

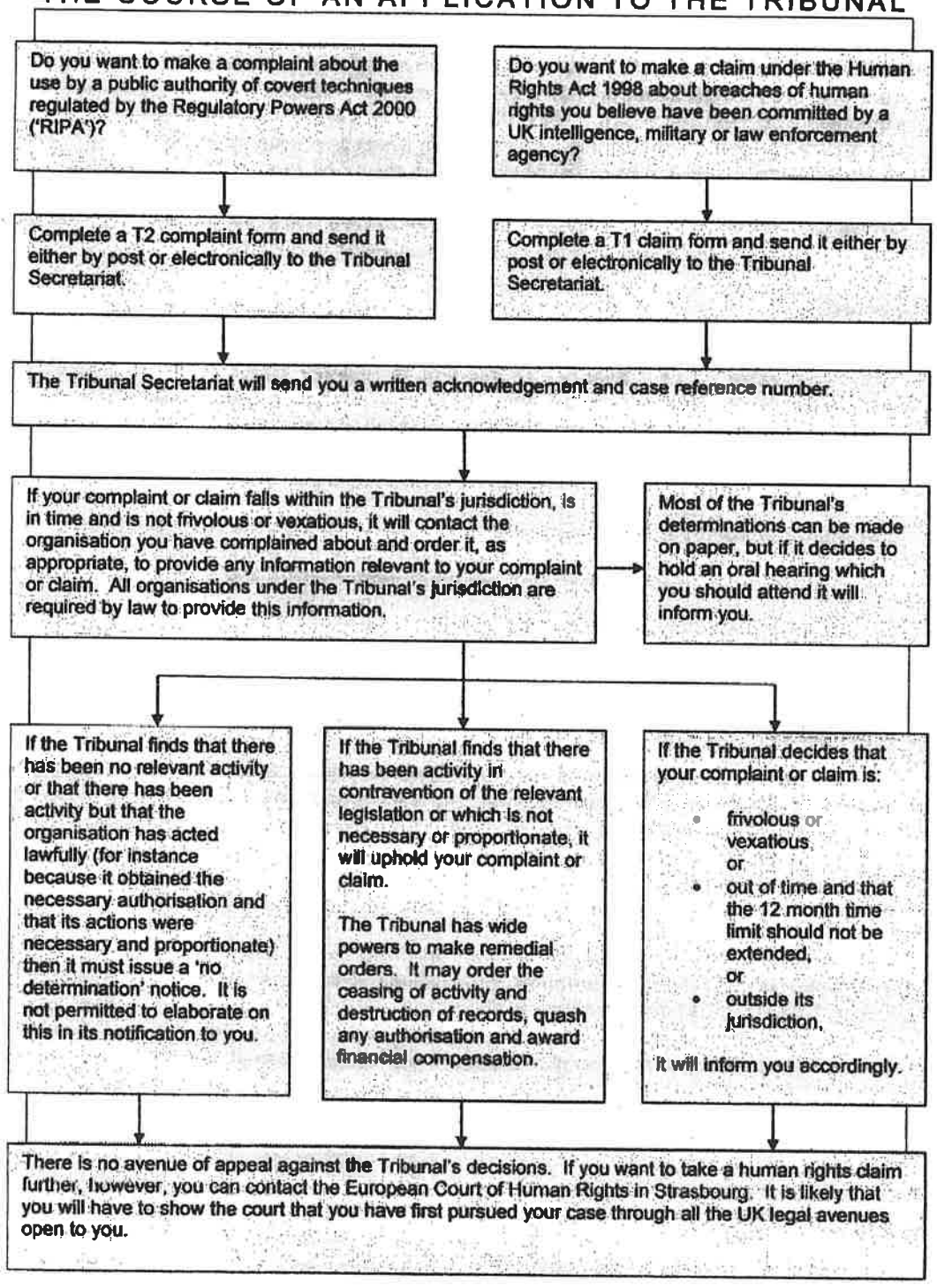
2.39 The costs of the Tribunal are met by the Home Office, its sponsor Department which under RIPA is required to support its work, and the Foreign Office. The Tribunal is under an obligation to spend public money in line with procurement practice set out by the Cabinet Office. However, it is operationally independent, and it has been established with guarantees to ensure that it is a fully independent and impartial court. It is not answerable to Government or any Government Minister for any of the decisions it takes in the cases before it.

2.40 Members' fees, travel and subsistence vary from year to year. Members' terms and conditions state that their appointment is non-salaried and non-pensionable. A member of the Tribunal who is not a salaried judicial-holder will receive a daily fee equivalent to that paid to a Deputy High Court Judge. This is reviewed annually in line with the recommendations of the Senior Salaries Review Body for the Judiciary. Both the President and Vice President are serving High Court Judges and therefore receive no additional payment for their work on the Tribunal.

Flow chart

2.41 A summary of how the Tribunal handles complaints is set out in the flow chart below. There is in principle no set process, nor time limit, for responding to a particular complaint. This is because all cases vary in scope and detail and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the complainant, or the organisation which is the subject of the complaint. Complainants want to learn the outcomes of their complaints as quickly as possible, and the small Secretariat strives to achieve the highest standards of efficiency in administering them

THE COURSE OF AN APPLICATION TO THE TRIBUNAL



Chapter 3. Frequently Asked Questions

Does the Tribunal ever find in favour of complainants?

3.1 There is a common misconception in some parts of the media that the Tribunal is a 'star chamber' that always meets in secret and never rules in favour of complainants. This portrait implies that the Tribunal does not provide an effective control on RIPA powers or an effective remedy to complainants. The purpose of the preceding Chapter has been to outline how the Tribunal policies and procedures have developed to balance the need for transparency and open justice with the protection of sensitive material. In summary, the answer to the question posed above is that the Tribunal has upheld complaints against public authorities. During the period of this Report the Tribunal has for the first time, made a determination in favour of a Claimant in a case brought against one or all of the SIAs. Pursuant to Section 68 (5) RIPA the Tribunal wrote to the Prime Minister in July 2015 reporting its findings, giving a detailed explanation of its judgments in Liberty/Privacy and Belhadj & Others. Chapter 5 of the Report sets out summaries of these and other key cases ruled on by the Tribunal, some of which include rulings in favour of complainants. The remaining cases can be found on the 'IPT website': www.ipt-uk.com

Can I complain on someone's behalf?

3.2 Any complaint or claim must be brought by the person concerned (including any organisation and association or combination of persons). They may receive help in completing the form and it can be submitted by a representative. However, the Tribunal Rules require that the form and any additional statements must be signed by the complainant. The exception is signature by a parent or guardian in respect of a complaint by a child or vulnerable adult.

The Tribunal cannot accept single applications on behalf of more than one person. This is because it is required to make a determination in relation to each complaint falling within it's jurisdiction. It may find that conduct relates to one complainant but not others who are linked to that complaint and the final determination may be different.

How can I complain about surveillance or phone interception when the whole point of this kind of activity is that I do not know it is happening?

3.3 You are only required to *believe* that covert activity has taken place. You do not have to have evidence proving it in order to bring a case before the Tribunal, although it will help your case if you provide as much information as you can about the circumstances which lead you to the belief that covert action has been taken against you. The way the Tribunal is set up and the powers it has mean it is uniquely placed to facilitate the making and answering of a complaint. It is able to investigate, obtain and protect evidence on behalf of all parties to the complaint.

Will the Tribunal tell me if I have been under surveillance or my phone has been intercepted?

3.4 No. It is not the Tribunal's function to tell complainants whether their telephones have been tapped, or if they have been the subject of other activity. Its purpose is to ascertain whether legislation has been complied with and organisations have acted proportionately. If your complaint is upheld, the Tribunal may be able to disclose details of any unlawful conduct taken against you. If your complaint is not upheld, you will not be told whether any conduct has been taken against you.

Can I complain about the activities of individuals, private investigators or companies?

3.5 Under RIPA the Tribunal has no jurisdiction in these cases - unless the individuals, investigators or companies are tasked by a public authority covered by the RIPA regime. For instance, a local authority might contract out surveillance activities or ask individuals to carry

out surveillance on its behalf. In such a case the Tribunal will have jurisdiction to hear complaints.

Is there a time limit?

3.6 Yes. The Tribunal is not required to consider complaints made more than a year after the relevant activity took place. However, the Tribunal can and does exercise its discretion and extend this time if is it 'equitable' (fair), or reasonable in all the circumstances of the case.

Who actually makes the decisions in a case?

3.7 Decisions are made by a minimum of two Tribunal Members, who are required to be legally qualified as set out in RIPA.

The decisions they make include decisions whether applications are out of time, out of jurisdiction or frivolous or vexatious.

How are cases actually heard?

3.8 Within certain limits, the Tribunal can determine its own procedures. How it investigates and determines a complaint depends on the complaint before it. All determinations are made applying judicial review principles and most are made on paper without the need for oral hearings.

Is the Tribunal independent of Government?

3.9 Yes. The Tribunal is a fully independent and impartial court. No Government Department or public authority can intervene in a Tribunal investigation or influence its decisions. The Tribunal makes its determinations based entirely on the evidence before it and operates on the same principles as in judicial review cases.

How do I know the agency (SIA) will provide all information requested of it?

3.10 All public authorities investigated by the Tribunal are under a statutory obligation under RIPA Section 68(6) to provide the Tribunal with anything it requires in the course of its investigation. The Tribunal can demand clarification or explanation of any information provided, order an individual to give evidence in person, inspect an organisation's files, or take any other action it sees fit. The Tribunal can also require the various Commissioners who supervise the intelligence agencies and others to provide it with any assistance it requires for its investigations.

How long will I have to wait before the Tribunal makes its decision?

3.11 The Tribunal has no set time limit for responding to complaints or claims. This is because all cases vary in scope and detail, and each one is dealt with on its own merits. The amount of time taken can also depend on the responses received to the Tribunal's enquiries, which may lead to more information being sought from the complainant or the organisation complained about.

Will I be contacted by the organisation that is the subject of my complaint or claim?

3.12 All complaints and claims are dealt with through the Tribunal. The organisations that are the subject of a claim or complaint make all their responses directly to the Tribunal for its consideration. You will not be contacted by any organisation in relation to your complaint.

Will I receive information about the progress of my complaint/claim?

3.13 The Tribunal is restricted in what it can disclose during the investigation of a complaint or claim. The Tribunal Rules state that no information or documents provided to the Tribunal, nor the fact that any have been provided, can be disclosed. Until final determination, therefore,

the Tribunal can only inform you that an investigation is still ongoing. If the conduct you complain of is found to have occurred, and to have been unlawful, you will receive a determination in your favour. You will then receive as much information as can be supplied, without (where relevant) putting national security at risk (and see the case of Belhadj, Chapter 5.9 below).

Will making a complaint or claim to the Tribunal cost me anything?

3.14 No. The Tribunal's investigation of complaints and claims is free of charge. You do not need to hire a lawyer, but are at liberty to do so. However, if you decide to submit your complaint through a solicitor or other representative, the Tribunal will not normally refund any costs you may incur as a result. Legal aid is not available to fund any representation in the Tribunal.

Can I appeal the Tribunal's decision or ask for it to be reconsidered?

3.15 There is currently no domestic right of appeal from a decision of the Tribunal to any UK court. The only route of appeal is to the ECtHR. If, once your case has been decided, you are able to produce new evidence that was not previously submitted, then a new complaint must be made. In this event the Tribunal may require you to explain why this evidence was not available to you when you made your earlier complaint.

Can claimants visit the Tribunal's Offices or deliver material to the Tribunal in person?

3.16 No. For security reasons no such visits may take place, and all correspondence must be addressed to the Tribunal's P.O Box, 33220 London SW1H 9ZQ.

Chapter 4. Outcomes and Statistics

4.1 When a complaint has been made to the Tribunal there are seven possible outcomes:

Figure 1 Outcomes

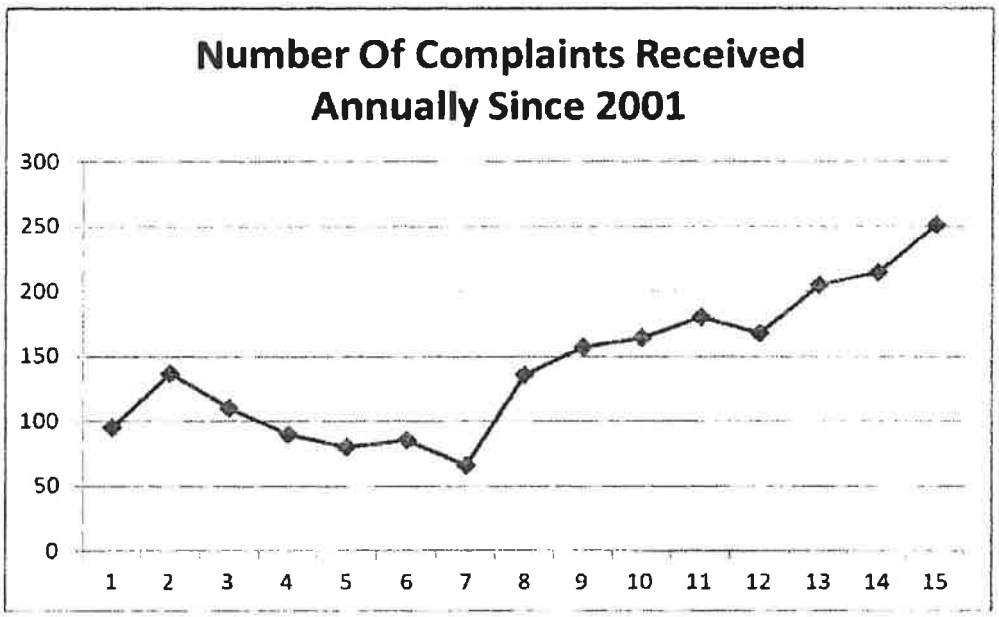
Decisions available to the Tribunal	
1	**No determination in favour of the complainant:** This means that after considering the case and requiring any necessary investigation, EITHER the Tribunal is satisfied that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, OR that there has been some official activity which is not in contravention of the Act, and cannot be criticised as disproportionate. The provisions of the Act 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.
2	**Out of Jurisdiction**: This ruling means that after careful consideration by at least two Members, the Tribunal has ruled that under Rule 13(3)(c) of the IPT Rules 2000, the Tribunal has no power to investigate the complaint.
3	**Out of Time**: In such cases after careful consideration by at least two Members the Tribunal rules that under Rule 13(3)(b) of the Investigatory Powers Tribunal Rules 2000, the complaint is out of time and the time limit should not be extended.
4	**Frivolous or vexatious**: The 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, and thus falls within the provisions of Rule 13(3) (a), such that, pursuant to Section 67(4) of RIPA, the Tribunal has resolved to dismiss the claim.
5	**Case dismissed**: The Tribunal has resolved to dismiss the complaint, for example, due to a defect such as the failure by a complainant to sign the form or comply with a request for information (after due warning).
6	**CWC**: Complainant withdrew the complaint.
7	**The Tribunal has ruled in favour of the complainant.** In this event, it is open to the Tribunal to grant a remedy (as above). Sometimes the finding alone may be all that is necessary or appropriate.

Volume of Complaints

4.2 The numbers of complaints received by the Tribunal has increased steadily since its inception. The Tribunal can only consider and determine cases complainants choose to put before it, but there are a number of possible reasons for this increase. These are in part due to the Snowden leaks in 2013, but also to cases being brought by NGOs, more power being held by public authorities, amendments to RIPA that have widened the jurisdiction of the Tribunal and members of the public becoming increasingly aware of the Tribunal as a legal recourse. The combination of these factors has meant that the volume of complaints to the Tribunal has risen from 95 in its first year to over 250 in the last full year of this report.

4.3 For the purposes of this Chapter none of the complaints that are the direct result of the recent online Privacy International campaign in 2015 have been included. This is so that a better understanding of trends can be seen and years compared more appropriately. The Privacy International campaign has led to approximately 660 related individual complaints against the SIAs. These cases arise out of the judgments of the Tribunal in the Liberty/ Privacy cases Numbers 1 and 2 described in Chapter 5.7 and 5.8 below.

Figure 2 Complaints received



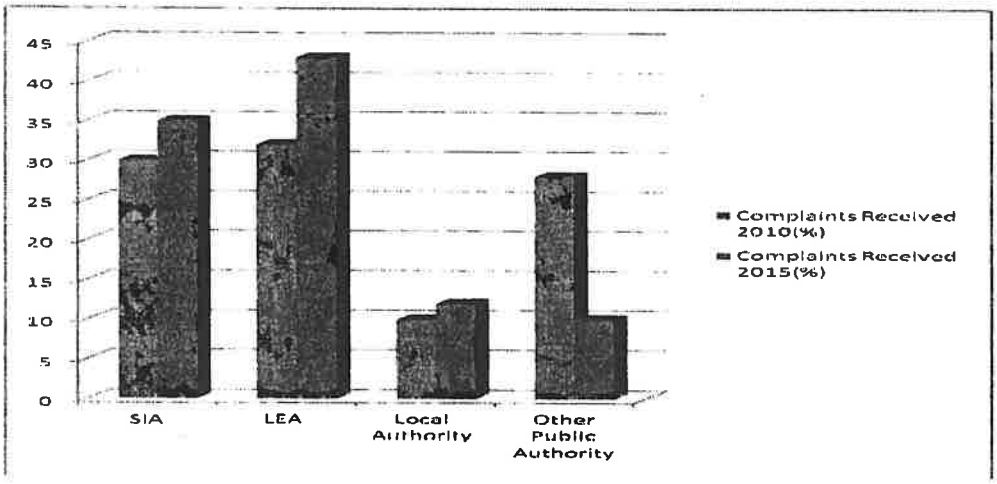
Organisations to which complaints related in 2010 and 2015

4.4 The Table and Chart below give information about the types of organisations that were the subject of complaints during these years. It is important to note that the Tribunal Rules dictate that, in the absence of any express order of the Tribunal, any valid complaint received by the Tribunal (i.e. one that is within its jurisdiction, generally refers to conduct taking place not longer than a year before the complaint, and is not deemed frivolous or vexatious) must be investigated. The mere fact of an investigation or receipt of a complaint must not be seen as any indication of unlawful behaviour. Unlawful activity on the part of a public authority only arises if the Tribunal makes a ruling in favour of the complainant.

Figure 3 Organisations

Public Authority	Complaints 2010 (%)	Complaints 2015 (%)
SIAs (MI6, MI5 or GCHQ)	30	35
Law Enforcement Agency (LEAs) (Police Force, NCA)	32	43
Local Authority	10	12
Other Public Authority e.g. Department for Work and Pensions	28	10

Figure 4 Year on year comparison



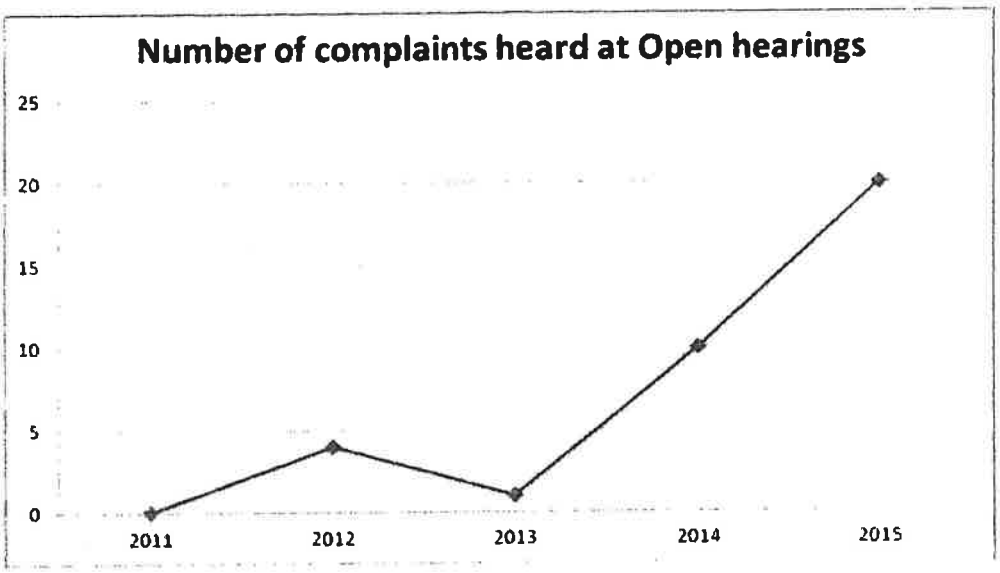
4.5 There remains a relatively even spread across the types of organisation which are the subject of complaints. Local authorities, however, received far fewer complaints than SIAs, law enforcement agencies and miscellaneous public authorities, and these have continued to decline perhaps in part due 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 site the Police and SIAs as general bodies. As stated above, these figures do not include the recent Privacy International campaign-related claims.

Hearings

4.6 During the period of this report there has also been an increase in the number of Open hearings held by the Tribunal, particularly in relation to complaints brought by NGOs, where issues of law have been raised. However nothing in RIPA or the Tribunal Rules contains an absolute right for either party before the Tribunal to either an *inter partes* hearing or a separate oral hearing without the other party. The decision to hold an oral hearing in a particular case is at the discretion of the Tribunal. It does not have to do so, but if it considers it would assist the case, it may in accordance with Rule 9 of the Tribunal Rules.

4.7 In 2015 the Tribunal sat on 15 occasions in open court, relating to 20 complaints. The Tribunal will endeavour to announce open court proceedings in advance via its website.

Figure 5 Increase in Open hearings



4.8 As is evident from the nature of the Tribunal's jurisdiction and as is expressly recognised in RIPA and the Tribunal Rules, material about secret interception and surveillance operations pose special procedural considerations for the Tribunal. The Tribunal regularly inspects material of the highest security classification which, if disclosed, could harm national security and law enforcement operations which protect the country from terrorists, organised criminals and hostile action by other states. If they are to be used effectively, the interception of communications and covert surveillance must be secret. Accordingly the Tribunal does not give statistics for closed hearings as it is prevented from doing so by Rule 6(2)(a).

Figure 6 Number of Complaints Received and Outcome by Year

NUMBER OF COMPLAINTS RECEIVED AND OUTCOME BY YEAR	NEW CASES RECEIVED	CASES DECIDED	DECISION BREAKDOWN
2011	180	196	86 (44%) were ruled as 'frivolous or vexatious'
			72 (36%) received a 'no determination' outcome
			20 (10%) were ruled out of jurisdiction
			11 (6%) were ruled out of time
			3 (2%) were withdrawn
			2 (1%) were judged to be not a valid complaint
			2 (1%) were found in favour
2012	168	191	100 (52.5%) were ruled as 'frivolous or vexatious'
			62 (32.5%) received a 'no determination' outcome
			14 (7%) were ruled out of jurisdiction
			9 (5%) were ruled out of time
			5 (2.5%) were withdrawn
			1 (0.5%) were judged to be not a valid complaint
2013	205	161	85 (53%) were ruled as frivolous or vexatious
			50 (31%) received a 'no determination' outcome
			17 (10%) were ruled out of jurisdiction, withdrawn or not valid
			9 (6%) were ruled out of time
2014	215	201	104 (52%) were ruled as frivolous or vexatious
			53 (26%) received a 'no determination' outcome
			36 (18%) were ruled out of jurisdiction, withdrawn or not valid
			8 (4%) were ruled out of time
2015	251	219	101 (47%) were ruled as frivolous or vexatious
			65 (30%) received a 'no determination' outcome
			38 (17%) were ruled out of jurisdiction, withdrawn or not valid
			7 (3%) were ruled out of time
			8 (4%) were found in favour

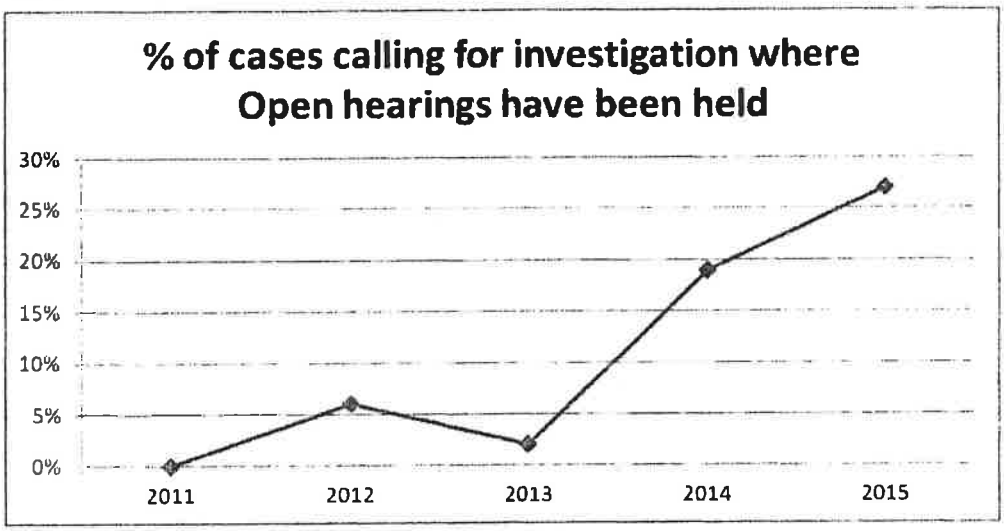
Breakdown of Complaints Determined

4.9 A breakdown of the complaints determined in the period of this report is presented at Figure 6. This shows that of the cases decided in the year 2015, 47% of complaints were ruled as 'frivolous or vexatious' and 30% received a 'no determination' outcome; another 17% were ruled out of jurisdiction, withdrawn or not valid; and 3% were ruled out of time. This means that in 97% of the complaints made of unlawful RIPA conduct either no activity at all was occurring or such activity as did occur was lawfully authorised.

4.10 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 of complaints received by the Tribunal during the period of this report and their outcome. Figure 1 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.

4.11 Of the cases investigated by the Tribunal that are not out of jurisdiction, out of time, deemed frivolous or vexatious under Section 67(4) or dismissed for an administrative reason, there has been a dramatic rise in the number of open hearings. This reflects the Tribunal's commitment to open hearings as indicated above. It demonstrates that in 27% of complaints decided by the Tribunal in 2015, and not falling into one of the above categories, a hearing was held in open court.

Figure 7 Percentage of Open hearings



Please note: Any differences between the above statistics and those published in previous years are the result of corrections that have now been made.

Chapter 5. Key Decisions

5.1 The summaries below represent key decisions of the Tribunal since the last Report was published in 2010. These are provided to assist in understanding the Tribunal's rulings, and are not authoritative. Full copies of the judgments referred to are available on the Tribunal website at www.ipt-uk.com

W v Public Authority: Judgment dated 01/02/2011 ref IPT/09/134

5.2 The Tribunal's ruling deals with the issue of the payment of costs in a case where, although the Complainant withdrew their application, the Respondent (a public authority) sought recovery of costs

The Complainant made a complaint against the Respondent in October 2006. After initial investigations, the Tribunal set a timetable for hearings, and the attendance of witnesses. Then the date for the first hearing was set. Much work was entailed in the process, and the Respondent incurred costs in relation to preparation for that hearing (including Counsel's fees) in the sum of some £5,700.

In advance of this hearing the Complainant was directed by the Tribunal to serve submissions in writing, but he failed to do so. When further enquiries were made as to why, his response was to inform the Tribunal that he was formally withdrawing his complaint.

The issue being decided in this case was limited to whether costs can (and if so should) be awarded to (i) a respondent against a complainant; (ii) upon a withdrawal by the complainant. The Tribunal concluded that there was no power to award costs in the circumstances of the individual case. (Contrast the case of Chatwani at 5.10 below).

Mr & Mrs B v Department for Social Development ('DSD'): Judgment dated 29/07/2011 ref IPT/09/11/C

5.3 The Tribunal made a finding in favour of a husband and wife upon their joint complaint against the Northern Ireland DSD. The DSD did not dispute that they mistakenly authorised surveillance to allow DSD officers to enter the complainants' property. The circumstances were that two officers of the Northern Ireland Social Security Agency's Benefit Investigation Service, on behalf of the Respondent, entered the house owned by the Complainants, posing as potential house purchasers, and remained in the property for 35 minutes. This took place in the course of an investigation into allegedly overpaid social security benefits and allowances, which was the subject of a series of surveillance authorisations. There was a specific authorisation of this action, by way of a "test purchase operation", but such authorisation did not fall within the provisions of RIPA.

The Complainants brought proceedings by way of a complaint against the Respondent, pursuant to Section 65(4) of RIPA. They did not fill in a separate form alleging breach of the Human Rights Act 1998 (HRA), in the terms of Section 65(2)(a), but the Tribunal proceeded on the understanding that breach of Article 8 of the European Convention of Human Rights ('ECHR') was the substance of the complaint.

The Complainants sought, in addition to the quashing of warrants/authorisations, destruction of records and an apology, plus compensation in a sum which was put at a "significant six-figure sum" for each of the Complainants. The Tribunal ordered the quashing of the authorisation and the destruction of any notes of the surveillance, and stated that the surveillance was a breach of the Complainants' Article 8 rights. However, the Tribunal concluded that no pecuniary loss was established and made no award of compensation.

Mr Vaughan v South Oxfordshire District Council: Judgment dated 04/07/2012 ref IPT/12/28/C

5.4 This case raised an important point of principle as to whether council tax home inspections constitute surveillance.

After examining the definition of 'surveillance' and 'covert' the Tribunal concluded that there was no surveillance within the meaning of the legislation. Under Section 26(9) surveillance is covert only if it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place. On this issue the focus of the case was on the manner in which the observation or monitoring of the Complainant was carried out. The Tribunal concluded that in the circumstances the surveillance carried out by the Council was not covert.

BA and others v Cleveland Police: Judgment dated 05/07/2012 ref IPT/11/129/CH, IPT/11/133/CH and IPT/12/72/CH

5.5 In this case the Tribunal examined the conduct of the Police in placing a covert device into the house of a vulnerable adult, with her consent, which resulted in the arrest of one of her carers.

The patient, who was only mobile by the use of a personal motorised chair, owned the flat. She discovered that items belonging to her were going missing, and believed that one or more of the carers were responsible, although she was unable to identify which of them. They all had unrestricted access to her flat, and the patient supervised their access save for when she was in bed, which was of course for much of the time, particularly at night. In late January 2010 her social worker reported the matter to the Police. The Cleveland Police considered a number of strategies, including the arrest of all carers, which was rejected as being disproportionate. CCTV equipment was installed with the patient's consent.

On 4 July a case for holding DVDs belong to the patient was found to be missing. On 16 July footage was removed from the device which showed the First Claimant perusing the patient's personal documents, then taking the case and peeling the patient's identity label off it.

The Tribunal was satisfied that, although the conduct was not protected by Section 27 RIPA, there was no breach of Section 32(2); and Section 65(7) makes it clear that there can be conduct not covered by an authorisation which still falls to be tested by this Tribunal. That subsection makes it plain that there will or may be cases in which the Tribunal may find it appropriate for the conduct to take place without an authorisation, although it will be expected that "at least" there will have been "proper consideration" as to whether such authorisation should be sought. In this case there was such proper consideration, and the conduct proceeded. The Tribunal was satisfied that, although the conduct was not protected by a surveillance authorisation, there was no unlawful activity or breach of Article 8.

A Complaint of Surveillance: Judgment dated 24/07/2013 ref IPT/A1/2013: Reported in [2014] 2 AER 576

5.6 In order to investigate a complaint of unlawful surveillance the Tribunal held a hearing in open court regarding paragraph 2.29 of the Surveillance Code of Practice.

A preliminary point of law arose in connection with a complaint under RIPA. The complaint was of unlawful surveillance. In order to determine the complaint, it was necessary for the Tribunal to decide whether the covert recording of a "voluntary declared interview" of the complainant amounts to "surveillance" for the purposes of Part II of RIPA.

The Tribunal considered whether a participant in a "voluntary declared interview" was entitled to complain that its being covertly recorded was an infringement of his Article 8 rights. The interviewer was simply asking questions, and observing and listening to the answers voluntarily given by the interviewee. The Tribunal declared that the covert making of a

recording of a voluntary declared interview in the course of an investigation or operation is not surveillance within the meaning of Part II of the RIPA. A record of the questions and answers made by the interviewer, either manually or by a device, in the course of the voluntary interview could not reasonably be regarded as an infringement of Article 8 rights.

Liberty/Privacy No 1: Judgment dated 05/12/2014 ref IPT/13/77/H IPT13/92/CH IPT/13/168-173/H IPT/13/194/CH IPT/13/204/CH: Reported in [2015] 3 AER 142

5.7 On the basis of assumed facts, the Tribunal considered the lawfulness of the alleged receipt by the Security Services of intercept from two interception programmes operated by the Security Services of the United States, Prism and Upstream, and of the regime of interception by the UK Security Services pursuant to warrants issued under Section 8 (4) of RIPA. The Tribunal concluded that the Section 8 (4) regime was lawful and Human Rights compliant. As for Prism and Upstream, the Tribunal concluded that prior to the proceedings and the judgment of the Tribunal there had been inadequate disclosure of the regime to be compliant with Article 8, but that since the disclosures recorded in the Tribunal's judgment of 5/12/2014 it had been compliant, with one possible exception (which was reserved for further argument: see 5.8 below).

The following Paragraphs of the Tribunal's judgment represent a summary of its main findings:

> "157. The legislation in force and the safeguards to which we have referred are intended to recognise the importance of, and the need to maintain, an acceptable balance between (a) the interests of the State to acquire information for the vital purposes of national security and the protection of its citizens from terrorism and other serious crime, and (b) the vital interests of all citizens to know that the law makes effective provision to safeguard their rights to privacy and freedom of expression, together with appropriate and effective limits upon what the State does with that information.
>
> 158. Technology in the surveillance field appears to be advancing at break-neck speed. This has given rise to submissions that the UK legislation has failed to keep abreast of the consequences of these advances, and is ill fitted to do so; and that in any event Parliament has failed to provide safeguards adequate to meet these developments. All this inevitably creates considerable tension between the competing interests, and the 'Snowden revelations' in particular have led to the impression voiced in some quarters that the law in some way permits the Intelligence Services carte blanche to do what they will. We are satisfied that this is not the case.
>
> 159. We can be satisfied that, as addressed and disclosed in this judgment, in this sensitive field of national security, in relation to the areas addressed in this case, the law gives individuals an adequate indication as to the circumstances in which and the conditions upon which the Intelligence Services are entitled to resort to interception, or to make use of intercept."

Liberty/Privacy No 2: Judgment dated 06/02/2015 ref IPT/13/77/H etc as above: Reported in [2015] 3 AER 212

5.8 This judgment dealt with the outstanding matter from Liberty/Privacy No 1. Further disclosures by the Security Services now resolved the position. The Tribunal accordingly declared that, prior to the disclosures made and referred to in the earlier judgment and this judgment, the regime governing the soliciting, receiving, storing and transmitting by UK authorities of private communications of individuals located in the UK which had been obtained by US authorities pursuant to Prism and/or on the Claimants' case Upstream, contravened Articles 8 or 10 of the Convention, but that the regime now complied with the Convention.

By an Amended Open Determination dated 22 June 2015 the Tribunal in Liberty/Privacy No's 1 and 2 made a determination in favour of Amnesty International and the Legal Resources

Centre of South Africa that there had been breaches of procedure by GCHQ such as to amount to an infringement of their rights under Article 8 of the Convention, but made no order for compensation in their favour.

Belhadj & Others v the Security Service & Others: Judgment dated 29/04/2015 ref IPT/13/132-9/H IPT/14/86/CH

5.9 The Claimants issued applications on the basis that there might have been (and for the purpose of an open hearing *were assumed to have been*) interception by the Respondents of their legally privileged information ("LPP"). After disclosure by the Respondents in the proceedings of their previously unpublished procedures for dealing with intercepted LPP, and upon the concession by the Respondents just prior to a five-day fixed hearing, the Tribunal made the following Orders:

> "UPON the Respondents conceding that from January 2010, the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has not been in accordance with the law for the purposes of Article 8(2) of the ECHR and was accordingly unlawful;
>
> AND UPON the Security Services and GCHQ confirming that they will work in the forthcoming weeks to view their policies and procedures in the light of the [new] draft Interception Code of Practice and otherwise:
>
> IT IS ORDERED that there be a declaration that since January 2010 the regime for the Interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has contravened Article 8 GCHR, and was accordingly unlawful".

The Tribunal then held both a closed hearing to consider whether there had In fact been interception of the Claimants' LPP and an open hearing to consider the consequences if such were the case; and on the same day they published (i) their reasoned judgment in respect of the submissions made by the parties at the open hearing, and (ii) their open determination of the result of the closed hearing in the light of those conclusions.

The Tribunal concluded, contrary to the Respondents' submissions, that it would undermine public confidence in the Tribunal if its findings that there had been unlawful conduct by the SIAs were not made public. The Respondents had argued that it would be possible for the Tribunal to find in favour of the Complainants, and yet make a 'no-determination' finding. The Tribunal disagreed. It determined that there had been a breach of the Article 8 rights of one of the Complainants, in respect of two documents. It directed, subject to the terms of its order, that these should be destroyed, but did not award any compensation. The Tribunal further ordered that these findings should be made public.

Chatwani & Others v National Crime Agency (NCA): Judgment dated 20/07/2015 ref IPT/15/84-88/CH: Reported in [2015] Lloyds Report (Financial Crime) 659

5.10 The Complainants, members of the Chatwani and Tailor families, sought a declaration that an authorisation for property interference and for the installation of covert listening devices at the headquarters of companies owned and/or controlled by the Complainants was unlawfully obtained, and sought the return of the material obtained by the Respondent under those warrants, and destruction of work product derived from them.

Officers had entered the premises of the Complainants with the benefit of the search warrant, and searched for and removed items. Those of the Complainants who were present were arrested and interviewed at the police station, and eight separate listening devices were installed covertly in five different locations. The premises were securely protected by CCTV cameras. It would not have been possible to affect covert entry without the powers given by the search warrant, so that the opportunity was taken, at the time when they had lawfully entered the premises, to disable the CCTV, in order that the devices could be installed in "a sterile environment", so as to enable their installation without being observed.

The Respondent's plan was to execute the search warrant, arrest the Complainants and interview them, without revealing the totality of the case which the Respondent had against them, and then release them to return back to the premises, which would by then have been fitted with the listening devices.

The Tribunal concluded that, detailed as the property interference application was (as compared with the search warrant), it was deficient in an important respect, namely that it failed to record that there was indeed a likelihood of capture of LPP material, given the nature of the Plan (which was itself not fully disclosed.) Given the responsibility upon the Authorising Officer and the relevant Commissioner to consider such applications, those applying for them must take care, and greater care than was taken in this case, to comply with their vital duty of candour.

The Tribunal found in favour of the Complainants, and ordered that the Property Interference Authorisation be quashed. The Tribunal at first determined that the Complainants should not be awarded their costs, but due to the Respondent's failure thereafter to comply in timely fashion with the Tribunal's orders, an order for costs was later made against it. This was the first time the Tribunal has made an order for costs.

Caroline Lucas MP, Baroness Jones of Moulsecoomb and George Galloway v SIS, GCHQ and Secretaries of State for the Home Department and Foreign Affairs: Judgment dated 14/10/2015 ref IPT/14/79/CH. IPT/14/79/CH IPT/14/80/CH, IPT/14/172/CH: Reported in [2017] 1 AER 283

5.11 The Tribunal considered the existence and status of the Harold Wilson Doctrine ('the Wilson Doctrine'). This was born out of a statement made on 20 June 1966 by the then Prime Minister to the House of Commons to the effect that the telephones of MPs (later extended to Peers) would not be tapped, i.e. apparently giving to Parliamentarians immunity from interception.

The Tribunal concluded that the Wilson Doctrine was not an absolute one. It did not apply to prevent the issue of interception warrants under Section 8(4) of RIPA i.e. as opposed to deliberately targeted warrants under Section 8(1); nor did it apply to incidental interception of Parliamentarians' communications. It further ruled that in any event the Doctrine has no legal effect.

However, the Tribunal noted that the SIAs do in fact already have codes and guidance (disclosed in the proceedings), which impose considerable preconditions and precautions before Parliamentarians' communications could be accessed, with which they are obliged to comply. It concluded that the regime for the interception of Parliamentarians' communications complies with the Convention.

News Group Newspapers Limited and Others v The Metropolitan Police Commissioner: Judgment dated 17/12/2015 ref IPT/14/176/8: Reported in [2016] 2 AER 48

5.12 The case arose out of the event known as 'Plebgate', and the subsequent investigation by the Metropolitan Police as to how there came to be leaks of the contemporaneous police records and a subsequent purported report by a member of the public who turned out to be a police officer, which involved serious allegations both against a member of the Government and members of the Police Force. Such investigations included authorisations under Sections 2122 of RIPA for the obtaining of call data of three Sun journalists and the Sun news desk, which in the event led to the disclosure of the identity of the officer who had leaked the documents and of the source of the purported report by the alleged member of the public. This led to the convictions of one officer and dismissal from the force of others.

The Tribunal concluded that three of the applications were in accordance with RIPA, but that one was unnecessary and disproportionate. It concluded, however, that the practice adopted of applying under RIPA for disclosure of a journalist's source did not comply with the

Convention, and that the appropriate course now was, save in emergencies, to apply for judicial pre-authorisation pursuant to Section 9 of the Police and Criminal Evidence act 1984 ("PACE"), in accordance with the new 2015 code. As the three authorisations were made lawfully at the time in compliance with RIPA, the Respondent was protected by s.6 (2) (b) of the Human Rights Act, but the Fourth Complainant's authorisation should be quashed, and he was entitled to a remedy.

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.

Privacy International, GreenNet & Others v GCHQ and the Secretary of State for Foreign and Commonwealth Affairs. Judgment dated 12/2/16 ref IPT/14/120-126/Ch, IPT/14/85/CH

5.13 The Tribunal considered the Claimants' allegations (which were *for the purposes of the hearing assumed to be true*) as to the activities of GCHQ in carrying out Computer Network Exploitation (CNE), colloquially 'hacking', pursuant to warrants under Sections 5 and 7 of the Intelligence Services Act 1994. The Tribunal was asked to consider a number of issues of law, based on assumed facts, as to whether such activity was or would be (subject to the legality, proportionality and necessity of any particular warrant, or conduct under it, on the facts) lawful in accordance with domestic law and Articles 8 and 10 of the ECHR.

The Tribunal concluded that acts of CNE pursuant to such warrants by GCHQ would in principle be lawful both before and after the amendment of Section 10 of the Computer Misuse Act 1990 in 2014. The Tribunal considered and gave guidance as to how specific a Section 5 warrant would have to be in its description of the property in respect of CNE, and concluded that warrants compliant with such guidance would be lawful both at domestic law and so as to comply with the Convention.

The Tribunal considered the Covert Surveillance Property Interference Code (as amended from time to time since 2002) and the draft 2015 Equipment Interference Code of Practice, which in practice had been in effect since February 2015, and concluded that the regime governing the operation of Section 5 warrants, both before and after February 2015, complied with Articles 8 and 10 of the ECHR. In relation to a Section 7 warrant concerning the authorisation of acts outside the British Islands, there was an issue as to whether the Convention would apply, at least in the absence of particular facts relating to an individual case, and the Tribunal therefore reached no conclusion that the Section 7 regime was non-compliant with the Convention. In relation to the specific issue of the adequacy of dealing with legal and professional privilege, the Tribunal concluded that the CNE regime had been compliant with the Convention since February 2015 (see also the Belhadj decision at 5.7 above as to the position prior to February 2015).

Chapter 6. Legislation, Rules and Codes of Practice

6.1 The Tribunal's work – the consideration, investigation and determination of a complaint or claim - is defined by four main sources. They have already been referred to in the course of this Report. The purpose of this Chapter is simply to describe these in outline. Links to each of them are set out in Annex C.

1. The Regulation of Investigatory Powers Act 2000 (RIPA)

6.2 **Part I** is concerned with the interception of communications, their content and the acquisition and disclosure of communications data. Oversight of these activities is the province of the Communications Commissioner.

Part II provides the basis for the authorisation and use of covert surveillance (both directed and intrusive) and anyone who becomes a covert human intelligence source (CHIS). This Part regulates the use of intelligence gathering techniques and provides safeguards for the public against unnecessary and disproportionate invasion of privacy.

Part III contains provisions to enable law enforcement agencies to require the disclosure of protected and encrypted data, including encryption keys (or passwords). This came into force in 2007, after Parliament had approved a Code of Practice to cover the use of this power.

Part IV provides for the independent judicial oversight of the above, as summarised in Chapter 2 of this Report. This Part includes the appointment of the Commissioners and the establishment and make-up of the Tribunal. In relation to the Tribunal, it covers, amongst others, the following matters:

* What sort of cases it can consider (its 'jurisdiction');
* The obligations of organisations and individuals required to provide information to assist it in its decision-making;
* The right of the Secretary of State to make Rules regarding the Tribunal;
* The disclosure of information to the Tribunal;
* Aspects of any hearings the Tribunal believes necessary;
* What the Tribunal must tell the person bringing the complaint.

Statutory Instrument 2000 No. 2665, made under Section 69 of RIPA, sets out:

* How the Tribunal should proceed in its investigations and determinations;
* How it should receive evidence;
* In what circumstances it may disclose material provided to it;
* How it should determine proceedings, including oral hearings;
* How it should notify a complainant of the outcome.

This Part also provides for the provision and use of Codes of Practice to regulate the exercise and performance of the various powers set out in Parts I-III (see below).
Part V deals with various miscellaneous and supplementary matters. The provision most relevant to this Report is that Section 74 refers specifically to the requirement of proportionality, in that requests for authorisations must be proportionate 'to what the action seeks to achieve'.

2. Human Rights Act, 1998 (HRA)

6.3 The Human Rights Act 1998 (HRA) incorporates the European Convention on Human Rights (ECHR) whose Articles spell out the *universal* human rights that everyone is entitled to enjoy. Schedule 1 to the Act lists full the range of human rights or freedoms which are protected in UK law.

It will be recalled from Chapter 1.7 (above) that the Tribunal was established in order to ensure that the UK complies with Article 13 of ECHR. This provides that everyone whose rights and freedoms are violated *"... shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

Most rights recognised by the HRA and ECHR, such as the right to life and the prohibitions on torture or inhuman or degrading treatment, are absolute. This means that there are no conditions or mitigations by which public authorities can make them lawful.

At one time Article 6 (*Right to a fair trial*) was raised before the Tribunal, given that complainants were denied access to some material being considered by it; but these procedures have been validated by the European Court of Human Rights in the case of Kennedy (Chapter 1).

The two Articles which are now most likely to be invoked by a complainant before the Tribunal are Articles 8 and 10. However, the rights protected by these Articles are not absolute, but qualified. This means that they may be infringed by public authorities, but only if, in the circumstances of the case, the infringement is correctly balanced against the wider public interest; and in each case the wider public interest must be described. This may include national security, the prevention or detection of crime, and the protection of public health. These Articles read as follows (for the purposes of this Report, the qualifications are underlined):

> *Article 8: Right to respect for family and private life.*
>
> "1. Everyone has the right to respect for his private and family life, his home and his correspondence
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
>
> *Article 10: Freedom of expression*
>
> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or

rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

6.4 A person can complain to the Tribunal if they believe they have been the victim of unlawful action by a public authority breaching the HRA. A public authority acts unlawfully if either: It fails to obtain lawful authority or is no lawful authority is possible for infringing a person's human rights, or if it breaches those rights by incorrectly balancing them against the public interest.

6.5 The Tribunal is only able to hear and determine human rights claims involving allegations of the unlawful use of covert techniques regulated by RIPA by the authorities listed in Chapter 2.28 (above). These include the SIAs, armed forces, any UK police force and the NCA. If the HRA claim relates to any other organisation, the Tribunal is not the appropriate place to make such a claim, and the complainant is advised to seek legal advice.

3. The Rules

6.6 Statutory instrument 2000 No.2665, made under Section 69 of RIPA, sets out the rules of the Tribunal. These relate to:

* How the Tribunal should proceed in its investigations and determinations;
* How it should receive evidence;
* In what circumstances it may disclose material provided to it;
* How it should determine proceedings, including oral hearings;
* How it should notify a complainant of the outcome.

In the course of this Report extensive reference has been made to the Rules. There are 13 Rules in all. For the convenience of the Reader the following is a brief summary of the relevant Rules.

Rules 4 and 5 spell out the jurisdiction of the Tribunal Members to hear complaints. Rule 4 deals with the powers that may be exercised by two or more Members; Rule 5 deals with the powers that may be exercised by one member.

Rule 6, which deals with the restrictions on the disclosure of information, has already been described in detail in Chapter 2 of this Report.

Rules 7 and 8 govern the requirements of a complaint, staying what a complaint form must contain, and that it must be signed by the complainant. The Tribunal may require a complainant to "supply further information, or make written representations on any matter." (For the convenience of complainants, their complaints may now be submitted on-line, and the Tribunal is now prepared to accept electronic signatures.)

Rule 9 governs the Tribunal's powers to receive written representations, or hold oral hearings.

Rule 10 relates to the ability of the parties to be represented before the Tribunal.

Rule 11 provides that "the Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law".

Rule 12 deals with the Tribunal's ability to grant remedies, including compensation, to an injured party.

Rule 13 deals with the manner in which the Tribunal may notify complainants of its determinations.

4. Codes of Practice

6.7 Codes of practice include guidance for authorised public authorities making an application or utilising any of the special investigatory powers available to them under RIPA or similar legislation. They help such public authorities assess and understand whether, and in what circumstances, it is appropriate to use such powers. The Codes also provide guidance on what procedures need to be followed by them in each case. All Codes must be approved and debated in both Houses of Parliament and published. Public authorities are required by law to comply with them. The RIPA legislation is complex; it is not an easy statute to understand. In his 2013 Annual Report, Sir Anthony May, a past President of the Queen's Bench Division and then Interception of Communications Commissioner, described Part I of the Act as "difficult legislation, and the reader's eyes glaze over before reaching the end ..." He went on to say "The Codes of Practice are more accessible and contain a fairly readable account of the requirements and constraints."

6.8 The updated Interception of Communications Code of Practice 2016 reflects developments in the law since the Code was brought into force in 2002. The Equipment Interference Code of Practice 2016 explains the circumstances and procedures that must be followed before SIAs can interfere with electronic equipment, such as computers. It also describes the rules that must apply to the processing, retention, destruction and disclosure of any information obtained by interference. They also provide more information on the safeguards that apply to the security and law enforcement agencies' exercise of interception powers. Development of these new Codes of Practice has coincided with, and in some cases anticipated or resulted from, the scrutiny of the previous Codes by the Tribunal.

Chapter 7. Tribunal Members

7.1 The Tribunal currently comprises eight members, including the President Mr Justice Burton and Vice-President Mr Justice Mitting.

Legislative requirements for membership

7.2 All Members of the Tribunal are appointed by HM The Queen, and must be senior members of the legal profession. This means:

* A person who has held high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005) or is or has been a member of the Judicial Committee of the Privy Council; or

* A person who satisfied the judicial appointment eligibility condition on a seven year basis (under the Tribunals, Courts and Enforcement Act 2007); or

- An advocate or solicitor in Scotland of at least ten years' standing; or

- A member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least ten years' standing.

7.3 Both the President and Vice President must satisfy the first of these criteria; they must hold or have held high judicial office.

7.4 Appointments are made for terms of five years, after which Members may stand down or declare themselves available for reappointment.

7.5 A Member of the Tribunal is called upon to review Tribunal cases, to sit on Tribunal oral hearings and to undertake any other prescribed duties as the need arises. The frequency of reviewing case files and sittings depends upon the workload of the Tribunal and on the commitments of the office holder.

Present Members

Sir Michael Burton (President)

Sir Michael Burton was a scholar at Eton College and then at Balliol College, Oxford, where he read Classics and then Law, obtaining his MA: he was a lecturer in law at Balliol from 1970 to 1973. He was called to the Bar in 1970, became a QC in 1984, and was appointed a High Court Judge in 1998. He had a busy commercial practice in the Queen's Bench Division, Chancery Division, Commercial Court and Employment courts, in a wide variety of fields of Law, and sat for many years as a Recorder and Deputy High Court Judge. He was Head of Littleton Chambers from 1991 to 1998.

Since his appointment as a High Court Judge he has sat in Queen's Bench and Chancery Divisions, Commercial Court, Administrative Court, Family Division, Revenue List and the Employment Appeal Tribunal, of which he was President from October 2002 to December 2005, and remains a nominated judge. He was Chairman of the High Court Judges Association from 2010-11. He has been since 2000 the Chairman of the Central Arbitration Committee, pursuant to the Employment Relations Act 1999. He was Treasurer of Gray's Inn in 2012 and remains a Bencher, and is an Honorary Fellow of Goldsmiths College, University of London He is editor of Civil Appeals (2nd Ed Sweet & Maxwell 2013). He was Vice-President of the Investigatory Powers Tribunal from its inception in 2000 until appointed its President in October 2013.

Sir John Edward Mitting (Vice-President)

Educated at Downside & Trinity Hall, Sir John took silk in 1987 and became a Recorder in 1988. In 1994 he was appointed a deputy High Court Judge, becoming a High Court Judge in 2011.
He became a nominated judge of the Administrative Court in 2002, and between 2007-2012 was President of the Special Immigration Appeals Tribunal. He was appointed Vice President of the Tribunal in 2015

Charles Flint QC

Charles Flint QC is a former head of Blackstone Chambers. He specialises in financial services regulation and acts as a mediator in banking and financial services disputes. He is a non-executive director of the Dubai Financial Services Authority, a deputy chairman of the Bar Mutual Indemnity Fund Limited, a member of the Club Financial Control Panel of the Union of European Football Associations and President of the National Anti-Doping Panel. He has been a Member of the Tribunal since 2009.

Christopher Gardner QC

Christopher Gardner has been a Member of the Tribunal since 2009. He practised both as a barrister (called 1968) and Queen's Counsel (1994) from Lamb Chambers, Temple in all forms of contractual and tortious dispute, professional negligence, sports injuries, product liability, insurance, health & safety, personal injury and clinical malpractice. He was appointed a Recorder in 1993 and is a Chartered Arbitrator and Accredited Mediator.

He is a Fellow of the Chartered Institute of Arbitrators (1999), Fellow of the Society for Advanced Legal Studies (1999), Fellow of the Royal Society of Medicine (2000) and Fellow of the Commonwealth Judicial Education Institute (2013). He was appointed Chief Justice of the Turks and Caicos Islands, British West Indies, from 2004-2007 and was Chief Justice of the Falkland Islands, South Georgia, South Sandwich, British Antarctic Territory and British Indian Ocean Territory from 2007- 2015.

Sir Richard McLaughlin

Sir Richard served as High Court judge during a 40-year legal career in Northern Ireland. He held office as a Judge of the Supreme Court of Judicature of Northern Ireland from 1999 to his retirement in 2012. In addition, he was deputy Chair of the Boundary Commission for Northern Ireland, Chair of Servicing the Legal System, Member of the Judicial Studies Board and Chair of the Bar Council of Northern Ireland. He is a Fellow of the Chartered Institute of Arbitrators, LL.B, Queen's University Belfast 1970, LL.M University of Strathclyde 1997. He was appointed to the Tribunal in September 2014.

Susan O'Brien QC

Susan O'Brien QC is the Chair of the Scottish Child Abuse Inquiry. She was in practice at the Scottish Bar until 2015, where she specialised in personal injury and medical negligence. Prior to calling to the Bar, she was a solicitor for 6 years, and as junior counsel she acted for various government departments in judicial reviews. She was a part-time Employment Judge from 2000 to 2015, and a part-time Chairman of Pension Appeal Tribunals from 2012 to 2015. She was a part-time Sheriff from 1995-1999. She was a member of the panel of legal assessors for the General Teaching Council of Scotland from 2005-2010, and a Reporter for the Scottish Legal Aid Board 1999-2005. She was Chair of the Caleb Ness Inquiry for Edinburgh and Lothian Child Protection Committee, which reported in 2003. She was an elected office bearer of the Faculty of Advocates when she was Chairman of Faculty Services Ltd from 2005-2007. She is a Governor of Heriot-Watt University. She was appointed to this Tribunal in 2009.

Robert Seabrook QC

Robert Seabrook QC was called to the Bar in 1964 and took silk in 1983. His wide-ranging experience crosses jurisdictions. In recent years he has concentrated on the fields of clinical negligence, medical disciplinary work and substantial matrimonial finance and property cases.

He was educated at St Georges College, Harare, Zimbabwe and University College London (LL.B). He has been a Deputy High Court Judge, Chairman of the Bar of England and Wales 1994, Leader of South Eastern Circuit 1989-92, member of the Criminal Justice Consultative Council (19952002). In addition he has served as a Recorder (1985-2007).

Mr Seabrook was a Member of the Interception of Communications Tribunal (1996-1999) which pre-dated the Investigatory Powers Tribunal and has been a Member of this Tribunal since 2000.

Professor Graham Zellick CBE QC

Graham Zellick read law at Cambridge (MA, PhD) and was then Ford Foundation Fellow at the Stanford Law School in California. He became Professor of Public Law at Queen Mary and Westfield College and later served as Drapers' Professor of Law, Head of the Department of Law and Dean of the Faculty of Laws. He was Principal of the College from 1990 to 1998 and Vice-Chancellor and President of the University of London for six years before becoming Chairman of the Criminal Cases Review Commission. From January 2009 to August 2015, he was the first President of the Valuation Tribunal for England.

Professor Zellick is a Master of the Bench and former Reader of the Middle Temple, an Honorary Fellow of the Society for Advanced Legal Studies, Fellow of the Academy of Social Sciences and an Honorary Fellow of Gonville and Caius College, Cambridge.

He was editor of *Public Law* and founding editor of *European Human Rights Reports*, was one of the first Electoral Commissioners, a member of the Criminal Injuries Compensation Appeals Panel, the Competition Appeal Tribunal, the Data Protection Tribunal and the Lord Chancellor's Legal Aid Advisory Committee. Professor Zellick was appointed to the Tribunal in January 2013.

Past Members

Sir John Mummery

The Rt Hon Lord Justice Mummery was appointed a Lord Justice of Appeal in October 1996 He was born in Kent and educated at Dover County Grammar School; Pembroke College, Oxford 1959 - 63 (MA, BCL: Winter Williams Prize in Law ; Hon Fellow, 1989). He was called to the Bar at Gray's Inn (Atkin Scholar), in 1964. He served as a Bencher in 1985 and Treasury Junior Counsel : in Charity Matters, 1977 - 81 : Chancery 1981 - 89 : He served as a Recorder, 1989.

Further he has been a member of the Senate of Inns of Court and Bar, 1979 - 81. He was a Member of the Justice Committee on Privacy and the Law, 1967 - 70 ; Sir John has been a Judge of the High Court of Justice, Chancery Division; from 1993 – 1996, President of the Employment Appeal Tribunal, a Lord Justice of Appeal from 2000 and the President of this Tribunal from its inception in 2000 until his retirement from both positions in September 2013.

Dame Sue Carr

Dame Sue Carr is a judge of the High Court of Justice, Queen's Bench Division. She was called to the Bar in 1987, became Queen's Counsel in 2003 and was appointed a Recorder in 2009. She was chairman of the Professional Negligence Bar Association in 2007 and 2008 and chairman of the Conduct Committee of the Bar Standards Board from 2008 to 2010 before becoming head of her chambers in 2012. In April 2011 she was appointed Commissioner to the Disciplinary Board for counsel intervening in proceedings before the International Criminal

Court at The Hague. She was appointed a High Court Judge on 14 June 2013. She is a governing Bencher of the Honourable Society of the Inner Temple and a member of the board of the Judicial College. She was appointed to the Tribunal in February 2014. She resigned from the IPT in January 2016 upon her appointment as Presiding Judge of the Midland Circuit.

Sir Richard Gaskell

Sir Richard Gaskell was born in 1936 and knighted in 1989. He was a former President of the Law Society, member of the Security Service Tribunal between 1989 and 2000, the Intelligence Services Tribunal between 1994 and 2000 and was a Member of this Tribunal from 2001 until his retirement in 2011.

Sir Anthony Holland

Sir Anthony was appointed to the Tribunal in July 2009. Sir Anthony was also appointed as the Financial Services Complaints Commissioner on 3rd September 2004 for a three-year term. He was re-appointed as the Complaints Commissioner for a further three years from 3rd September 2007 and has been recently re-appointed for a further three years from 3rd September 2010. He has served as the Chairman or Governor of a number of bodies and was President of the Law Society (1990-91). Sir Anthony is a member of the Board of the Pension Protection Fund (appointed July 2010). In January 2011, he was appointed a lay member of the Speakers Committee for the Independent Parliamentary Standards Authority. He retired in July 2014.

Sheriff Principal John McInnes QC LLD DL

Sheriff Principal John McInnes QC LLD DL was a member of the Investigatory Powers Tribunal from its inception until his death on 12 October 2011.

His Honour Geoffrey Rivlin QC

His Honour Geoffrey Rivlin QC was appointed a Circuit Judge in 1989, and a Senior Circuit Judge (Senior Resident Judge at Southwark Crown Court) in 2004. In 2008 he became Hon. Recorder of the City of Westminster, retiring from the Bench in 2011. As a judge he also sat as a Deputy High Court Judge and a judge in the Court of Appeal (Criminal Division). Since retiring from the Bench he has acted as Adviser to the Director of the Serious Fraud Office and chaired a Bar Council Report on the Criminal Bar. He was appointed to the Tribunal in January 2013 and retired in November 2015.

Sir Philip Sales

The Rt. Hon Sir Philip Sales was appointed First Treasury Junior Counsel (Common Law) in 1997. He became a QC in 2006 and continued to act in the re-named post of First Treasury Counsel until his appointment to the High Court, Chancery Division in 2008. He was an Assistant Recorder, 1999–2001; Recorder, 2001–08; and Deputy High Court Judge, 2004–08. He has been a member of the Competition Appeal Tribunal since 2008 and was appointed Vice-President of the Investigatory Powers Tribunal in 2014. He was Deputy Chair of the Boundary Commission for England, 2009-2014. He was appointed to the Tribunal in February 2014, he resigned from this Tribunal when he was appointed a Lord Justice of Appeal in the autumn of 2014.

Appendix A Public Bodies

Public Authorities with access to Communications Data under Chapter II of Part I RIPA 2000

- Intelligence Services
- Territorial Police Forces of England, Wales, Northern Ireland & Scotland
- British Transport Police
- National Crime Agency
- The Commissioners for Her Majesty's Revenue and Customs
- The Home Office (Immigration Enforcement)
- Ministry of Defence Police
- Royal Air Force Police
- Royal Military Police
- Royal Naval Police
- Gambling Commission
- Gangmasters Licensing Authority
- The Information Commissioner
- Office of Communications
- Police Ombudsman for Northern Ireland
- Serious Fraud Office
- Financial Conduct Authority
- Prudential Regulation Authority
- Independent Police Complaints Commission
- Police Investigations and Review Commissioner
- The Ministry of Justice - National Offender Management Service
- Northern Ireland Office - Northern Ireland Prison Service
- Criminal Cases Review Commission
- Scottish Criminal Cases Review Commission
- Department of Transport:
    - Air Accident Investigation Branch
    - Marine Accident Investigation Branch
    - Rail Accident Investigation Branch
- Department for Transport Maritime Coastguard Agency
- Fire & Rescue Authorities
- Ambulance Services / Trusts
- Health & Safety Executive

- Department for Health - Medicines & Healthcare Products Regulatory Agency
- DWP – Child Maintenance Group
- Health & Social Care Business Services Organisation – Central Services Agency (Northern Ireland)
- Office of Fair Trading / Competition and Markets Authority
- NHS Protect
- NHS Scotland Counter Fraud Services
- The Department of Enterprise Trade and Investment (Northern Ireland)
- Local Authorities
- Local Authorities

The following Public authorities had their powers removed on 12/02/15 through (SI 2015/228)

- Civil Nuclear Constabulary
- Port of Dover Police
- Port of Liverpool Police
- Royal Mail Group
- Environment Agency
- Scottish Environment Protection Agency
- Food Standards Agency
- Charity Commission
- Department of Agriculture & Rural Development (Northern Ireland)
- Department for Business Innovation Skills
- Department for Environment Food & Rural Affairs
- Department of the Environment Northern Ireland
- Pensions Regulator

Appendix B Section 65 of RIPA

Complaints against public authorities with RIPA powers (extract from Section 65 of the Regulation of Investigatory Powers Act 2000 establishing the IPT)

(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) [or (4A)], 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, or proposed conduct, by or on behalf of any of those services;

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

[(ca) they are proceedings relating to the provision to a member of any of the intelligence services of information recorded in an individual's entry in the National Identity Register;

(cb) they are proceedings relating to the acquisition, storage or use of such information by any of the intelligence services; 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

[(4A) The Tribunal is also the appropriate forum for a complaint if it is a complaint by an individual about what he believes to be—

(a) the provision to a member of any of the intelligence services of information recorded in that individual's entry in the National Identity Register; or

(b) the acquisition, storage or use of such information by 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;

[(d) the Serious Organised Crime Agency;

[(da) the Scottish Crime and Drug Enforcement Agency;] or]

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

(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 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.

[(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 Judiciary 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.

Appendix C Legislation, Rules and Codes of Practice – Links

Relevant Primary Legislation

The Regulation of Investigatory Powers Act 2000 ('RIPA')
http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga_20000023_en.pdf

The Regulation of Investigatory Powers (Scotland) Act 2000 ('RIP(S)A')
http://www.legislation.gov.uk/asp/2000/11/pdfs/asp_20000011_en.pdf

The Human Rights Act 1998

http://www.legislation.gov.uk/ukpga/1998/42/contents

The Police Act 1997

http://www.legislation.gov.uk/ukpga/1997/50/pdfs/ukpga_19970050_en.pdf

The Intelligence Services Act 1994

http://www.legislation.gov.uk/ukpga/1994/13/pdfs/ukpga_19940013_en.pdf

The Security Service Act 1989
http://www.legislation.gov.uk/ukpga/1989/5/pdfs/ukpga_19890005_en.pdf

Relevant Secondary Legislation

Statutory Instrument 2000 No. 2665 [see below under Part IV, and under Rules]

The Investigatory Powers Tribunal Rules 2000
http://www.legislation.gov.uk/uksi/2000/2665/pdfs/uksi_20002665_en.pdf

Statutory Instrument 2010 No.521 "The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010"
http://www.legislation.gov.uk/uksi/2010/521/pdfs/uksi_20100521_en.pdf

Statutory Instrument 2010 No.480 "The Regulation of Investigatory Powers (Communications Data) Order 2010"
http://www.legislation.gov.uk/uksi/2010/480/pdfs/uksi_20100480_en.pdf

Scottish Statutory Instrument 2010 No.350 "The Regulation of Investigatory Powers (Prescription of Offices etc and Specification of Public Authorities) (Scotland) Order 2010"

http://www.legislation.gov.uk/ssi/2010/350/pdfs/ssi_20100350_en.pdf

NI Statutory Rule 2002 No.292 "Regulation of Investigatory Powers (Prescription of Offices, Ranks and Positions) Order (Northern Ireland) 2002"
http://www.legislation.gov.uk/nisr/2002/292/pdfs/nisr_20020292_en.pdf

Codes of Practice

Interception of Communications
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496064/53659_CoP_Communications_Accessible.pdf

Acquisition and Disclosure of Communications Data

https://www.gov.uk/government/publications/code-of-practice-for-the-acquisition-and-disclosure-of-communications-data

Covert Surveillance and Property Interference
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384975/Covert_Surveillance_Property_Interrefernce_web__2_.pdf

Covert Human Intelligence Sources
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384976/Covert_Human_Intelligence_web.pdf

Investigation of Protected Electronic Information
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97959/code-practice-electronic-info.pdf

Equipment Interference

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/496069/53693_CoP_Equipment_Interference_Accessible.pdf

RIP(S)A Scottish Codes of Practice

Covert Surveillance
http://www.scotland.gov.uk/Resource/Doc/47034/0025783.pdf

Covert Human Intelligence Sources
http://www.scotland.gov.uk/Resource/Doc/47034/0025782.pdf

Independent Oversight

Interception of Communications Commissioner

http://www.iocco-uk.info/

Intelligence Services Commissioner

http://intelligencecommissioner.com/

Chief Surveillance Commissioner

https://osc.independent.gov.uk/

Surveillance Camera Commissioner

https://www.gov.uk/government/organisations/surveillance-camera-commissioner

Parliamentary Oversight

Intelligence and Security Committee of Parliament

http://isc.independent.gov.uk/

Other Complaints Bodies

Information Commissioner's Office

http://ico.org.uk/

The Adjudicator's Office

http://www.adjudicatorsoffice.gov.uk/

Independent Police Complaints Commission

http://www.ipcc.gov.uk/

Police Investigations and Review Commissioner

http://pirc.scotland.gov.uk/

Police Ombudsman for Northern Ireland

http://www.policeombudsman.org/

Local Government Ombudsman

http://www.lgo.org.uk/

Scottish Public Services Ombudsman

http://www.spso.org.uk/

European Court of Human Rights

http://www.echr.coe.int/Pages/home.aspx?p=home

Appendix D Acronyms and Abbreviations

The following is a list of acronyms or abbreviations common to the jurisdiction of the Tribunal, some of which are used in this Report

Bailii: British and Irish Legal Information Institute

CCTV: Closed Circuit Television

CHIS: Covert human intelligence sources

CJEU: Court of Justice of the European Union

CNE: Computer Network Exploitation

CSPs: Communications Service Providers

CTSA 2015: Counter Terrorism and Security Act 2015

DRIPA 2014: Data Retention and Investigatory Powers Act 2014

DP: Designated Person

DPA 1998: Data Protection Act 1998

DPI: Deep Packet Inspection

ECA 1972: European Communities Act 1972

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

EU Charter: European Union Charter of Fundamental Rights

GCHQ: Government Communications Headquarters

GPS: Global Positioning System

HMRC: Her Majesty's Revenue and Customs

HRA 1998: Human Rights Act 1998

IOCA 1985: Interception of Communications Act 1985

IOCCO: Interception of Communications Commissioner's office

ISP: Internet service provider

IP: Internet Protocol

IP address: Internet Protocol address

IPT: Investigatory Powers Tribunal

ISA 1994: Intelligence Services Act 1994

ISC: Intelligence and Security Committee of Parliament

ISCom: Intelligence Services Commissioner

ISP: Internet Service Provider

LPP: Legal Professional Privilege

MI5: Security Service

MI6: Secret Intelligence Service

MoD: Ministry of Defence

NCND: Neither confirm nor deny

NCA: National Crime Agency

NGO: Non-governmental organisation

OSC: Office of Surveillance Commissioners

OSCT: Office for Security and Counter-Terrorism

PACE: Police and Criminal Evidence Act 1984

PSNI: Police Service of Northern Ireland

RIPA: Regulation of Investigatory Powers Act 2000

RIP(S)A: Regulation of Investigatory Powers (Scotland) Act 2000

SIAs: Security and Intelligence Agencies

SPoC: Single Point of Contact

SSA 1989: Security Service Act 1989

TA 1984: Telecommunications Act 1984

WTA 2006: Wireless Telegraphy Act 2006

INVESTIGATORY POWERS TRIBUNAL

Statistical Report

2016

www.ipt-uk.com

OUTCOMES AND STATISTICS 2016

In this report the Investigatory Powers Tribunal ("the IPT") publishes figures for complaints received and determined during the period 1st January and 31 December 2016.

When a complaint has been made to the IPT there are seven possible outcomes:

Figure 1 Possible outcomes of complaints to the IPT

Possible outcomes of complaints	
1	**No determination in favour of the complainant:** This 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 activity but it is not in contravention of the relevant legislation (i.e. the Regulation of Investigatory Powers Act 2000 ("the Act"), the Intelligence Services Act 1994 or the Police Act 1997) or "conduct" of the intelligence services, and so cannot be determined to be unlawful. The provisions of the Act do not allow the Tribunal to disclose whether or not complainants are, or have been, of interest to the Secret Intelligence Agencies ("the SIAs") or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.
2	**Out of Jurisdiction**: This ruling means that after careful consideration by at least two Members, the Tribunal has ruled that under Rule 13(3)(c) of the Investigatory Powers Tribunal Rules 2000 ("the IPT Rules"), the IPT has no power to investigate the complaint.
3	**Out of Time**: In such cases, after careful consideration by at least two Members, the IPT rules that under Rule 13(3)(b) of the IPT Rules, the complaint is out of time and the time limit should not be extended.
4	**Frivolous or vexatious**: The IPT 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, and thus falls within the provisions of Rule 13(3) (a), such that, pursuant to Section 67(4) of the Act, the IPT has resolved to dismiss the claim.
5	**Case Dismissed:** The IPT has resolved to dismiss the complaint, for example, the complainant has failed to comply with a request for information (after due warning).
6	**CWC**: Complainant withdrew the complaint.
7	**The Tribunal has ruled in favour of the complainant.** In this event, it is open to the Tribunal to grant a remedy (as above). Sometimes the finding alone may be all that is necessary or appropriate.

Volume of Complaints

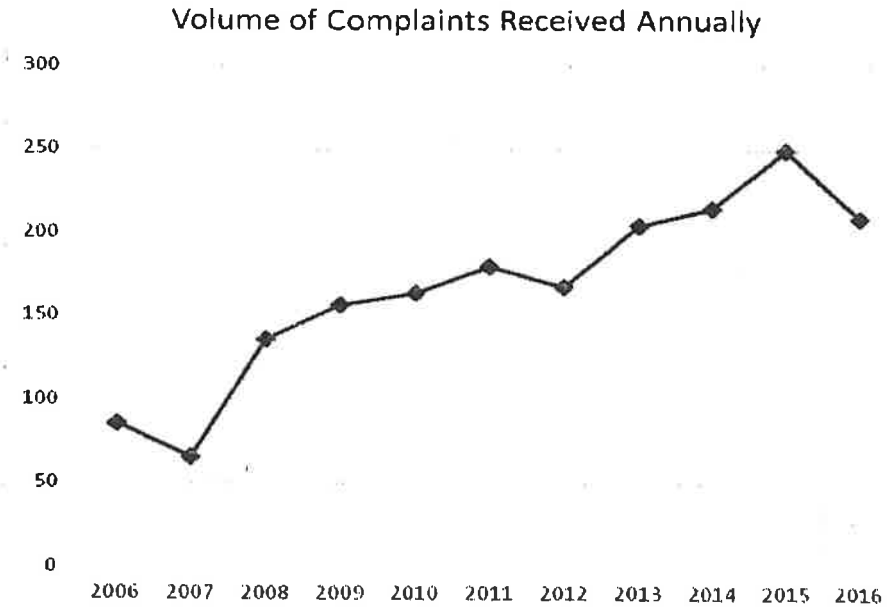
The volume of complaints to the IPT has risen from 95 in its first year to 209 new complaints received in 2016. In 2015 the IPT received 250 new complaints.[1]

For the purposes of this statistical report the figure of 209 new complaints in 2016 does not include complaints that are the direct result of the online Privacy International campaign that followed the IPT's judgement 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. That campaign has led to 665 individual complaints in all against the Secret Intelligence Agencies (the SIAs). The Tribunal held an OPEN public hearing on 15 April 2016 to consider those complaints and the judgment that followed (dated 16 May 2016) can be found here: http://www.ipt-uk.com/docs/Human_Rights_Watch_FINAL_Judgment.pdf

To be a valid complaint it must be (a) within jurisdiction as set out by the Act, (b) generally referring to conduct taking place not longer than a year before the complaint[2], and (c) not deemed frivolous or vexatious.

In 2015 the IPT received 250 cases with an additional 368 cases as a result of Privacy International campaign, thereby increasing the yearly total to 618. In 2016 the IPT received 209 cases with an additional 297 cases as a result of the Privacy International Campaign, thereby increasing the yearly total to 506.

Figure 2 Complaints Received over the last 10 years



[1] That figure does not include complaints received as part of the Privacy International campaign that is referred to in the report.

[2] The IPT has a discretion to extend that time limit

Organisations to which complaints related in 2016

Figure 3 below give information about the types of organisations that were the subject of complaints during the last three years.

It is important to remember that the IPT Rules dictate that, in the absence of any express order of the Tribunal, any valid complaint received by the Tribunal must be investigated. The mere fact of an investigation or receipt of a complaint cannot therefore be seen as any indication of unlawful behaviour. Unlawful activity on the part of a public authority only arises if the Tribunal makes a ruling in favour of the complainant.

It is also worth noting that 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 powers under the Act.

Finally it is to be noted that the figures below do not include the recent Privacy International campaign-related claims.

Figure 3 Organisations

Public Authority	2010 (%)	2015 (%)	2016 (%)
Secret Intelligence Agencies (MI6, MI5 or GCHQ)	30%	35%	35%
Law Enforcement Agency (LEAs) (Police Force, NCA)	32%	43%	44%
Local Authority	10%	12%	8%
Other Public Authority e.g. Department for Work and Pensions	28%	10%	13%

Hearings

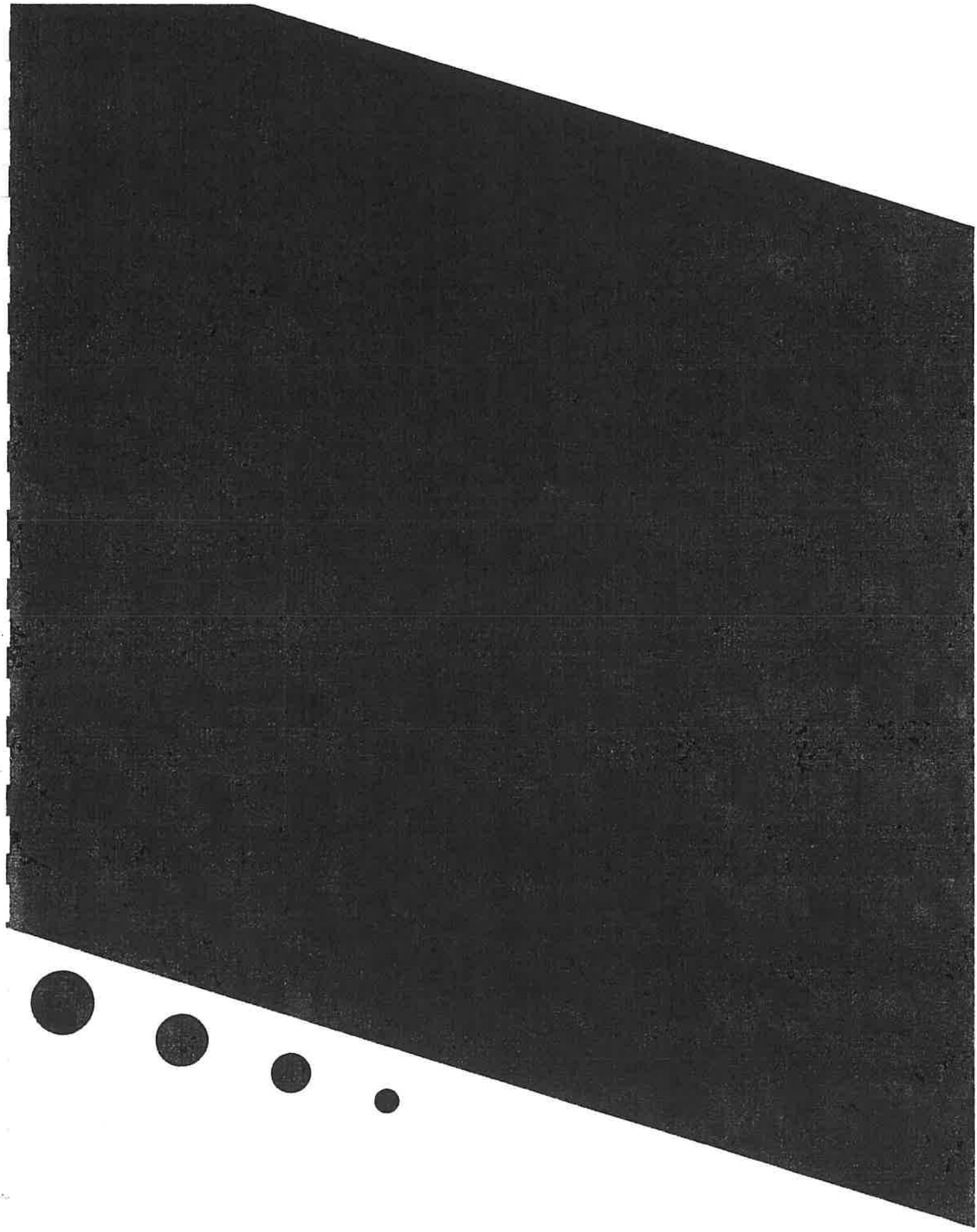
In 2016 the IPT sat on 11 occasions in open court. Those OPEN *inter partes* hearings related to 4 complaints. In addition the Tribunal also sat in April 2016 to consider 10 complaints as representative of 663 complaints which were a direct result of the online Privacy International campaign referred to above.

Figure 4 **Number of Complaints Received and Outcome by Year**

Year	New Cases Received	Cases Decided	Decision Breakdown
2012	168	191	100 (52.5%) were ruled as 'frivolous or vexatious'
			62 (32.5%) received a 'no determination' outcome
			14 (7%) were ruled out of jurisdiction
			9 (5%) were ruled out of time
			5 (2.5%) were withdrawn
			1 (0.5%) were judged to be not a valid complaint
2013	205	161	85 (53%) were ruled as frivolous or vexatious
			50 (31%) received a 'no determination' outcome
			17 (10%) were ruled out of jurisdiction, withdrawn or not valid
			9 (6%) were ruled out of time
2014	215	201	104 (52%) were ruled as frivolous or vexatious
			53 (26%) received a 'no determination' outcome
			36 (18%) were ruled out of jurisdiction, withdrawn or not valid
			8 (4%) were ruled out of time
2015	251 [3]	219	101 (47%) were ruled as frivolous or vexatious
			65 (30%) received a 'no determination' outcome
			38 (17%) were ruled out of jurisdiction, withdrawn or not valid
			7 (3%) were ruled out of time
			8 (4%) were found in favour
2016	209 [4]	230	120 (52%) were ruled as frivolous or vexatious
			58 (25%) received a 'no determination' outcome
			26 (11%) were ruled out of jurisdiction, withdrawn or not valid
			11 (5%) were ruled out of time
			15 (7%) were found in favour

[3] Plus 367 from the Privacy International worldwide campaign; 618 in total

[4] Plus 297 from the Privacy International worldwide campaign; 506 in total



Investigatory Powers Tribunal

Statistical Report 2016

www.ipt-uk.com

Tribunals for Users One System, One Servic

Report of the Review of Tribunals by Sir Andrew Leggatt

March 2001

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Chapter Three - A more coherent system

3.1 *This chapter concludes that the current, dispersed arrangements for the administration of tribunals would effectively preclude the reforms which we recommend to the services provided to users. It therefore makes recommendations for a single Tribunals System. The System should include tribunals administered by local authorities, as well as tribunals which deal with disputes between individual parties.*

3.2 Most tribunals are entirely self-contained, and operate separately from each other, using different practices and standards. It is obvious that the term "tribunal system" is a misnomer. Since each tribunal has evolved as a solution to a particular problem, adapted to one particular area, this lack of coherence might not matter if it could be said that decisions were of good quality, and consistent; that enough information, advice and support was available to use tribunals adequately; that the services provided were delivering what they were supposed to; and that the significant amount of money tribunals were costing was well spent.

3.3 What we have learned about tribunals has convinced us that no such assurance could properly be given. We think radical changes are necessary, and justified.

The current position

3.4 A clear majority of those who responded to the Consultation Paper felt that the current systems of administrative support were not meeting the needs of tribunals and users. In some they do not provide the support and help which users need to prepare and present cases themselves. It appears to be not only users themselves who are confused by the differing requirements of the current collection of tribunals. We were told on many of our visits that solicitors and other advisers regularly failed to appreciate the peculiarities of individual tribunals' practice, and that it tended to

be only a few specialist firms in each jurisdiction which gave a truly effective service.

3.5 We recommend a programme of improvements to information, tribunal procedure, case management, member recruitment and training and IT, each element of which we consider necessary if tribunals are to meet the needs of the modern user, and, amongst other things, achieve the necessary equality of arms. That programme could not be taken forward, in the absence of much greater co-ordination of tribunals and their administration, without wholly disproportionate expenditure of resources by the tribunals and their administration, and wasteful duplication of effort by departments, since each would need to develop the necessary skills.

3.6 For example, the Government has committed itself to making all its services available electronically by the year 2005. Many tribunals have only very basic, or no, IT support. Providing the information and access systems we consider necessary will be a major enterprise within that timescale. The chances of meeting the target, and improving services to the user, would be greatly increased, and the cost diminished, by a unified effort. Similarly, in our discussions with representatives of the Judicial Studies Board, it was emphasised that it was close to impossible to develop a coherent approach to training in the inter-personal skills needed to conduct tribunal hearings effectively within the current unsystematic arrangements.

3.7 Those improvements, and the other elements in our programme of reform, require a greater degree of coherence than now, and an organisation which promotes the effective operation of each individual element of the Tribunals System as well as the System as a whole. That will require wholly new kinds of effort, even with the twelve tribunals already administered by the Lord Chancellor's Department. They may have a greater degree of independence than other tribunals, but they are still very far from showing true coherence in their approach to cases, or — despite real recent improvements — in management systems and approach.

A single system

3.8 The overriding aim should be to present the citizen with a single, overarching structure. **[5]** It would give access to all tribunals. Any citizen who wished to appeal to a tribunal would only have to submit the appeal, confident in the knowledge that one system handled all such disputes, and could be relied upon to allocate it to the right tribunal. This would be a considerable advance in clarity and simplicity for users and their advisers. The single system would enable a coherent, user-focussed approach to the provision of information which would enable tribunals to meet

the claim that they operate in ways which enable citizens to participate directly in preparing and presenting their own cases.

3.9 It would also help by creating a clearer and simpler system for the development of the law. As things now stand, tribunals are not able to set precedents, although some of those which hear appeals from first-tier tribunals are making arrangements for designating those cases which appear to be particularly authoritative or significant. The arrangements for appealing from tribunals have developed piece-meal, and show little logic. The relationship with the supervisory and appellate jurisdictions of the ordinary courts (described in greater detail in **Chapter Six**) is often confusing. We consider this a significant failing. Tribunals have developed a characteristic approach to managing hearings, and taking decisions. We think they should be charged with developing the law in a consistent way.

Disputes between the citizen and the state

3.10 Most tribunals are concerned with the resolution of disputes between the citizen (whether an individual or a corporation) and the state. Some are concerned with appeals against decisions within a statutory scheme: the oldest and the largest systems respectively deal with liability to deliver taxation, and entitlement to welfare benefits. Others consider such matters as the rights to immigration or asylum status, or detention under the Mental Health Act. Many other tribunals involve appeals against decisions of central or local regulatory bodies (often themselves independent of Government but an essential part in the delivery of overall Government policies). These disputes should form the heart of the Tribunals System. They include the areas where users stand to gain most from the more focussed approach to the provision of information, the training of members, and the development of consistent procedural approaches which we recommend. The detailed design of the System will, however, need to take account of the diverse origins of these bodies, the expert knowledge which lawyers and other members will have to have of often formidably complicated areas of the law, and wide varieties in the weight and complexity of cases. In **Chapter Six**, we propose a flexible and broad grouping of the current tribunals by subject-matter, which we consider will foster the growth of greater consistency throughout the System, and preserve the necessary expertise and flexibility which have been perhaps the major strengths of the current collection of tribunals.

Investigatory Powers Tribunal

3.11 There is one exception among citizen and state tribunals. This tribunal 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. **[6]** So although the chairman 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.[12] Subject to tribunal rules made by the Secretary of State the tribunal is entitled to determine its own procedure.[13] 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.

THE CITIZEN AND LOCAL GOVERNMENT

3.12 Local authorities are currently responsible for four citizen and state tribunals:

(a) Exclusion Appeal Panels and Admission Appeal Panels. Admission appeals are made against admission authorities, either Local Education Authorities in the case of all community and voluntary controlled schools in their area, or school governing bodies in the case of foundation and voluntary aided schools. We see no reason why standards should differ because of the nature of the admission authority. All admission appeals are covered by these recommendations.

(b) Valuation Tribunals.

(c) The Parking Appeals Service in London and the National Parking Adjudication Service outside.

(d) For the present, Housing Benefit and Council Tax Review Boards. The Child Support Pensions and Social Security Act 2000 will repeal these current arrangements, and introduce a right of appeal to an appeal tribunal, administered by the Appeals Service. This is due to be implemented in July 2001.

3.13 Concerns over these tribunals are all but identical to those expressed over central government tribunals. In particular, all four rely, directly or indirectly, on local authorities for administration and funding, despite the fact that local authorities have an interest in the outcome of individual cases. As these tribunals deal with local government, rather than central government issues, it would be possible to treat them as distinct from other citizen and state tribunals, and either maintain their existing arrangements or group

Home Office

Investigatory Powers Tribunal
Consultation: Updated Rules

September 2017

Ministerial Foreword

The Investigatory Powers Act 2016 concluded its Parliamentary passage on 16 November 2016 and received Royal Assent on 29 November 2016. The Act brought together powers already available to the security and intelligence agencies and law enforcement to obtain communications and data about communications. It ensures that these powers – and the safeguards that apply to them – are clear and understandable. It radically overhauls the way these powers are authorised and overseen, including through the creation of a powerful new Investigatory Powers Commissioner to oversee how these powers are used. And it ensures the powers are fit for the digital age.

The Act provides world-leading transparency and privacy protection. It received unprecedented and exceptional scrutiny in Parliament and was passed with cross-party support. There should be no doubt about the necessity of the powers that it contains or the strength of the safeguards that it includes.

One of the additional safeguards provided for by the Act is a new right of appeal from decisions and determinations of the Investigatory Powers Tribunal (IPT) in circumstances where there is a point of law that raises an important point of principle or practice, or where there is some other compelling reason for allowing an appeal.

The Government is taking forward work to implement this further safeguard. In particular, we intend to update the rules governing the IPT. This is both to reflect this new right of appeal, and to take into account other changes to IPT practice – which has evolved over the years since the rules came into force in 2000.

I am pleased to confirm that the IPT is content with the draft update to the rules.

We are now consulting on the proposed changes to the rules. I thought that in line with the cross party spirit of the establishment of the IPA, it was important to gather wider views on these changes. All responses are welcome and will be carefully considered.

Ben Wallace MP

Minister of State for Security

Contents

Scope of the consultation

Topic of this consultation:	This consultation is on updated rules governing proceedings and complaints at the IPT.
Scope of this consultation:	This consultation seeks representations on the draft updated rules.
Geographical scope:	UK wide

Basic Information

To:	Representations are welcomed from past, current or potential complainants and respondents at the IPT and their representatives, as well as professional bodies (legal and otherwise), interest groups and the wider public.
Duration:	6 weeks, closing on Friday 10 November 2017
Enquiries and responses:	IPTrules@homeoffice.gsi.gov.uk Please indicate in your response whether you are content for it to be published, with or without attributing it to you/your organisation.
After the consultation:	Following the consultation period, responses will be analysed and the draft rules revised as necessary. They will then be laid before Parliament for approval.

Background

Getting to this stage:	The oversight framework for investigatory powers helps to ensure that public authorities act in ways that are compatible with the Human Rights Act 1998. The IPT was established in October 2000 under the Regulation of Investigatory Powers Act 2000

	(RIPA). It provides a right of redress for anyone who believes they have been a victim of unlawful action by a public authority improperly using covert investigative techniques. The IPT is also the appropriate forum to consider claims brought against the security and intelligence agencies alleging the infringement of human rights. Section 69 of RIPA provides for the Secretary of State to make rules regulating IPT proceedings, subject to approval by Parliament. The Investigatory Powers Tribunal Rules 2000 came into force on 2 October 2000. The Investigatory Powers Act 2016 (IP Act) provides a new framework for the use of a number of crucial investigatory powers by the security and intelligence agencies, law enforcement and other public authorities. The IP Act also updates the oversight framework for the use of these powers more generally, including by making provision for a new Investigatory Powers Commissioner (IPC). The IPC will take over all the functions of Intelligence Services Commissioner, the Interception of Communications Commissioner and the Chief Surveillance Commissioner. The IP Act makes amendments to the RIPA provisions governing the IPT. Detail on one of these changes and the reasons for this related consultation are covered in the following sections.

What are rules?

The Investigatory Powers Tribunal Rules 2000 set out, in greater detail than RIPA, the procedures the IPT should follow. They include further detail on:

- How the Tribunal should proceed in its investigations and determinations.
- How it should receive evidence.
- In what circumstances it may disclose material provided to it.
- How it should determine proceedings, including oral hearings.
- How it should notify a complainant of the outcome.

Subject to these rules, the IPT can determine its own procedures.

Why are we consulting?

Section 242 of the IP Act amends RIPA to provide a right of appeal from decisions and determinations of the IPT on points of law that raise an important point of principle or practice, or if there is some other compelling reason for granting leave to appeal. Where permission to appeal is granted, they will be determined by either the Court of Appeal in England and Wales (CoA) or the Court of Session in Scotland (CoS). (The Home Secretary will make regulations to specify the criteria the IPT should consider when determining the most relevant appeal court.) The Northern Ireland Assembly did not provide legislative consent to enable relevant appeals to be determined by the Court of Appeal in Northern Ireland (CoA NI), but RIPA, as amended by the IP Act, will provide a power to add the CoA NI at a later stage should consent be provided.

The Government believes it should update the rules of the IPT, which have not been amended since 2000. Most obviously, the rules need to be updated to reflect the fact that there will be a right of appeal once the relevant provision of the IP Act has been commenced. But the rules are also out-of-date in a number of other ways. The Government therefore intends to update the rules more broadly so that they better reflect current IPT practice.

RIPA specifies that before the rules are formally made, the UK Government should consult with Scottish Ministers. The Government is taking forward this requirement. But it also wants to take the opportunity to consult more broadly on its proposed changes to the rules.

The Government has consulted and worked with the IPT on the draft set of updated rules that are being considered in this consultation. The IPT is content with the proposed changes. The President of the IPT has published a letter to the Home Secretary – available via the IPT website – www.ipt-uk.com – welcoming the consultation.

Parliament must approve the updated rules before they come into force.

The draft revised Investigatory Powers Tribunal Rules

The main changes made in these draft rules are:

- Rule 6 (existing rule 5) – This provides that further functions of the IPT may be exercised by a single member of the IPT (sub-paragraphs (h) and (j) to (m)).

- Rule 7 (existing rule 6) – The addition of a process for circumstances where a respondent refuses to consent to disclosure but the IPT considers disclosure is required.

- Rule 10 (existing rule 9) – Updated to reflect the existing practice that IPT hearings are held in open where possible, but retaining the ability to hold a hearing in absence of the complainant or respondent when necessary.

- Rule 12 – A new rule which seeks to provide some detail on the role of Counsel to the IPT. Paragraphs 12(2)(e) and (3) provide for the possibility that a point of law could arise in a closed hearing, which may be subject to appeal (ensuring there is a mechanism to bring this to the attention of a complainant).

- Rule 15 (existing rule 13) – Updated to reflect fact that notification of decisions and determinations should be provided to both the complainant and respondent (in line with amendments introduced by the IP Act and existing practice).

- Part 3 – Rules 16 and 17 – This new part provides for the making and determination of applications to the IPT for leave to appeal (in preparation for the new right of appeal, which the Government intends to bring into force by the end of this year).

We welcome any comments on the revised draft rules, in particular those aspects where changes are proposed.

978-1-78655-427-7 Investigatory Powers Tribunal Consultation: Updated Rules Electronic 13/09/2017

This publication is available at www.gov.uk/government/publications

Any enquiries regarding this publication should be sent to us at IPTrules@homeoffice.gsi.gov.uk.

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The Rt Hon Amber Rudd
Home Secretary

Date: 29th September 2017

Dear Home Secretary

INVESTIGATORY POWERS TRIBUNAL RULES PUBLIC CONSULTATION

The Investigatory Powers Tribunal has welcomed the opportunity to advise on the draft of the new Rules which you are issuing today for consultation.

As a judicial body handling sensitive material, the Tribunal's policies and procedures have been carefully developed and have evolved since its creation with the aim of balancing the principles of open justice for the complainant with a need to protect such sensitive material. The current Rules[1] were first issued in 2000 and the draft Rules reflect some of the ways in which the Tribunal's practice has evolved and developed in the last seventeen years.

The Investigatory Powers Act 2016 introduced a right of appeal from the Tribunal's decisions and, as well as making provision for the making and determination of applications for the Tribunal for leave to appeal, the draft Rules contain a number of significant other changes. They include:

- an explicit power for the Tribunal to direct a respondent to disclose documents or information to a complainant[2];
- the removal of rule 9(6) of the Rules which required the Tribunal's proceedings to be conducted in private (a requirement which the Tribunal had some years ago ruled to be ultra vires in any event[3]);
- a requirement that the Tribunal must endeavour so far as is possible to conduct open adversarial proceedings[4] (a requirement which reflects the Tribunal's consistent practice in any event[5]); and
- a description of the circumstances in which the Tribunal may appoint Counsel to the Tribunal and the functions which it may ask such Counsel to perform.[6]

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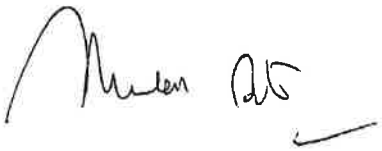
[1] The Investigatory Powers Tribunal Rules 2000 (2000 No. 2665)
[2] Rule 7(7)
[3] See the Tribunal's decision in Applications Nos IPT/01/62 and IPT/01/77, 23 January 2003
[4] Rule 10(6)
[5] In 2016 for example the Tribunal held 11 days of OPEN, *inter partes*, hearings
[6] Rule 12. This reflects the guidance the Tribunal gave in relation to the role of Counsel to the Tribunal in *Liberty/Privacy*

The Tribunal's caseload has increased significantly since its inception. The volume of complaints to the IPT has risen from 95 in its first year to 209 new complaints received in 2016.[7] I append to this letter a detailed analysis of the Tribunal's caseload over time which I hope will be of assistance when the draft Rules are considered by Parliament as well as by the public.

The draft Rules provide a solid basis for the Tribunal to continue its important work in providing rigorous oversight of the intrusive powers exercised by public authorities under the Regulation of Investigatory Powers Act 2000 as well as the Investigatory Powers Act 2016. The members of the Tribunal look forward to the forthcoming consultation period on the draft Rules and, while believing that the proposed draft Rules meet the requirements of the Tribunal and the needs and expectations of those using it, welcomes the views of all those who choose to comment on the proposals.

Yours sincerely



The Hon. Sir Michael Burton
Tribunal President

(No.1) [2014] UKIPTrib 13/77-H; [2015] 3 All ER 142, paragraphs 8-10

[7] This figure does not include a further 297 complaints received in 2016 as a result of the Privacy International campaign following the IPT's judgement 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