UKSC 2018/0004

In The Supreme Court of the United Kingdom

ON APPEAL

FROM THE COURT OF APPEAL (CIVIL DIVISION)

FLOYD, SALES AND FLAUX LJJ

BETWEEN:

THE QUEEN on the application of

PRIVACY INTERNATIONAL

Appellant

– and –

INVESTIGATORY POWERS TRIBUNAL

Respondent

– and –

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Interested Parties

CASE FOR THE INTERESTED PARTIES

TREASURY SOLICITOR

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A. INTRODUCTION

1. Section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA") 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."*

2. It is submitted that s.67(8) prevents the High Court from entertaining a claim for judicial review of a decision of the Investigatory Powers Tribunal ("IPT"). That that was Parliament's intention was the conclusion of the Court of Appeal in this case. It was also the unanimous conclusion of the Supreme Court in *A v Director of the Security Service* [2010] 2 AC 1 ("*A v B*") where the Court recognised the specialist context in which the IPT operates and concluded that conferring final jurisdiction on the IPT - a body of like standing and authority to the High Court and subject to special procedures apt for its unique task - was *"constitutionally inoffensive"*.

3. The conclusion that there is nothing constitutionally offensive about these legislative arrangements is plainly correct. Parliament does not, as the Appellant suggests, lack competence to legislate in this way – its sovereignty remains the dominant constitutional principle. Nor does the rule of law drive any other conclusion. Executive action is overseen by a judicial body that is both independent of the Executive and capable of providing an authoritative interpretation of the law.

B. THE INVESTIGATORY POWERS TRIBUNAL

Overview of IPT and key features

4. At the time that these judicial review proceedings were issued (May 2016), RIPA was in force and had not been amended by the Investigatory Powers Act 2016 ("IPA 2016"). This court is therefore principally concerned with the RIPA regime as it stood at that time. As discussed further below, a new right of appeal from the IPT is shortly due to be introduced pursuant to the IPA 2016.

5. The IPT is a special Tribunal which was established under RIPA and with jurisdiction to examine, among other things, the conduct of the Security Service, the Secret Intelligence Service ("SIS") and the Government Communications Headquarters ("GCHQ") – collectively known as the Security and Intelligence Agencies ("SIAs"). It is an important part of a careful system of checks and balances which Parliament has put in place and which are designed to provide oversight into the lawfulness of the activities of the SIAs and other public bodies in matters relating to powers of intrusion.

6. It sits alongside other inquisitorial bodies charged with overseeing and investigating the use of sensitive powers (including the Parliamentary Intelligence and Security Committee ("ISC")). Its relationship e.g. with the Commissioners[1], and, in certain circumstances with the Prime Minister, sets it apart from other Courts or tribunals.

7. The bespoke regime was evidently created having regard to the nature of the subject matter it deals with, involving highly sensitive material and activities which need to be kept secret in the public interest (and much of which would be damaging to national security if put into the public domain). That regime fulfils

[1] See §§19-23 below.

the twin objectives of ensuring independent scrutiny of the SIAs and other public bodies using intrusive powers, whilst ensuring the confidentiality of sensitive material.

8. As Sir Andrew Leggatt noted in his 2001 Report of the Review of Tribunals (§3.11), the IPT does not form part of Her Majesty's Courts and Tribunal Service:

> *"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."*

Single legislative scheme

9. On 2 October 2000 a *"single legislative scheme"*[2] came into existence consisting of the Human Rights Act 1998 ("the HRA"), RIPA and the Civil Procedure Rules 2000[3]. 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"*. That included making provision for the IPT with functions and jurisdiction in relation to those matters.

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[2] 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.

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

10. The IPT effectively replaced the Interception of Communications Act Tribunal, the Security Service Act Tribunal and the Intelligence Services Act Tribunal which now exist only in relation to complaints made before 2 October 2000. These tribunals (established by the Interception of Communications Act 1985, the Security Service Act 1989 and the 1994 Act respectively) contained almost identical ouster provisions. Thus, s.7(8) of the 1985 Act provides: "*The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.*" Similarly, s.5(4) of the 1989 Act and s.9(4) of the 1994 Act provide: "*The decisions of the Tribunal and the Commissioner under that Schedule (including decisions as to their jurisdictions shall not be subject to appeal or liable to be questioned in any court.*"

Establishment and constitution of the IPT

11. The IPT was established by s.65(1) of RIPA. Members of the IPT must either hold or have held high judicial office[4], 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)[5].

12. At the time the Privacy IPT complaint in these proceedings was dealt with in 2015/2016, the President of the IPT was Burton J and the Vice President was Mitting J and they both sat in the determination of the complaint, together with three senior QCs[6]. The current President is Singh LJ.

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[4] The current members of the IPT include a number of serving High Court Judges (Edis J, Sweeney J) and Sir Richard McLaughlin, former High Court Judge of Northern Ireland.

[5] The IPT's first President was Mummery LJ. Recently, Singh LJ was appointed President on 27 September 2018, talking over from Burton J.

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

Jurisdiction

13. The IPT's jurisdiction is broad and is governed by s.65 of RIPA. That jurisdiction covers the SIAs and also other public bodies (including e.g. the police, the National Crime Agency (NCA), Commissioners for HMRC) where they are exercising certain intrusive powers including e.g. directed or intrusive surveillance or the use of covert human intelligence sources. Section 65 of RIPA defines the IPT's jurisdiction by reference to the nature of the claim, the type of authorisation given and/or the public authority involved.

14. The following aspects of the IPT's jurisdiction are to be noted:

    a. It 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).

    b. It 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).

15. Where the IPT 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)).

16. The time period for any complaint to the IPT under s.65(2)(b) is one year, with a discretion to extend time where it is equitable to do so in all the circumstances (s.67(3)(c)). The time limit mirrors that in the HRA.

17. The question of whether the IPT has jurisdiction to consider certain proceedings/complaints may be a complex one and can turn on questions of fact and/or law. For example, in *C v The Police* IPT/03/32/H the IPT considered a complaint by a retired police officer who alleged that there had been unlawful covert surveillance in breach of Art. 8 ECHR by his former police force. The essential facts were agreed, but the IPT held that it had no jurisdiction to consider his complaint because there was no *"directed surveillance"* which satisfied the sual and surprising words – to conclude that a focused provision li[7] (see §74 of the determination and see ss.65(3)(d) and 65(5)(c) of RIPA).

18. In terms of the balance of the IPT's workload, it is evident from the IPT's Reports (see 2011-2015 Report[8] and 2016 Statistical Report[9], **Appendix 445-495, 496-501**) that the majority of the IPT's work relates to the complaints against the SIAs or other law enforcement agencies, including the police and the NCA – in 2016 this was 35% and 44% of the IPT's work respectively, with Local Authorities and other public authorities (e.g. Department for Work and Pensions) making up 8% and 13% respectively[10].

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[7] The purpose of Part II of RIPA is to provide a legal framework, to regulate the use of surveillance by public authorities in compliance with Art. 8 of the ECHR – see §18 of the decision.

[8] At p20.

[9] At p3.

[10] In the 2011-2015 Report it states at p20: *"Local authorities...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."*

Interface with the Commissioners

19. 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 and functions. In practice, the Commissioners conduct regular detailed inspections of the SIAs, including inspecting paperwork relevant to e.g. warrants or authorisations. The Commissioners have to hold or have held high judicial office or are or have been a member of the Judicial Committee of the Privy Council[11].

20. Every member of the intelligence services has a duty to co-operate 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.'*[12] The relevant Commissioner then reports to the Prime Minister, at least on an annual basis.[13] 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'*).[14] [15]

21. 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

[11] See e.g. ss.57(5) and 59(5) of RIPA.
[12] RIPA, s.60(1).
[13] *ibid*, s.60(2) and (3).
[14] *ibid*, s.60(4) and (5).
[15] In addition to their regular inspections, the Commissioner has power to (and does) investigate specific issues. Thus, the Interception Commissioner undertook "extensive investigations" into media stories derived from material said to have been disclosed by Edward Snowden, insofar as they concerned allegations of interception by UK agencies. The conclusions of those investigations were set out in the Interception Commissioner's 2013 Annual Report, especially Section 6.

Services Commissioner (see ss.59-60 of RIPA) to provide it with assistance in connection with any investigation of any matter by the IPT, or otherwise for the purposes of its consideration or determination of any matter (see also s.59(3)). The IPT 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 IPT in respect of that matter (s.68(3)).

22. For a recent example of the IPT's engagement with the Commissioners in the context of the complaints it considers – see *Belhaj & Others v Security Service & Others* [2015] UKIPTrib 13-132-H, judgment 29 April 2015, where the IPT exercised its power to require assistance from the Interception of Communications Commissioner to confirm that the evidence relevant to the complaints of the Claimants was accurate and complete (see §7). The Commissioner was also asked to retain parts of documents for secure keeping at the end of the proceedings; parts which GCHQ had undertaken to destroy or delete (§13).

23. Prior to the coming into force of the Investigatory Powers Act 2016 ('the IPA 2016') (which post-dates these judicial review proceedings) the Intelligence Services Commissioner was Sir John Goldring and the Interception Commissioner was Sir Stanley Burnton[16]. It was one of the previous Intelligence Services Commissioners, Sir Mark Waller, who brought the issue of "thematic warrants" under s.5 of the ISA 1994 to public attention in his 2014 Report (see §33 of the judgment of the IPT in the *Privacy* case [2016] UKIP Trib 14-85-CH

[16] The IPA 2016 now provides for the appointment of a single Investigatory Powers Commissioner (see s.227), together with such other judicial commissioners as the Prime Minister considers necessary, who must keep under review (including by way of audit, inspection and investigation) the exercise by public authorities of statutory functions relating to inter alia, interception of communications and equipment interference – see s.229 of the IPA 2016. In March 2017 the Prime Minister appointed Fulford LJ as the first Investigatory Powers Commissioner.

Appendix p49) and who made a number of recommendations about the use of such warrants, including specifying that any warrants which might be considered to be thematic should be highlighted in the list which was provided for his selection during his inspections.

Procedure

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

> *"The Tribunal adopts an inquisitorial process to investigate complaints in order to ascertain what has happened in a particular case. This is in contrast to the wholly adversarial approach followed in ordinary court proceedings."* (§2.2 **Appendix p454**)

25. The IPT's procedure is governed by ss.67-69 of RIPA and the Rules made under s.69. When making Rules pursuant to s.69, the Secretary of State is to have regard, in particular, to the need to ensure that complaints are *"properly heard and considered"* (s.69(6)(a)). Subject to those Rules, the 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[17].

26. In IPT proceedings a duty of disclosure 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

[17] S.17 was repealed on 27 June 2018 by the Investigatory Powers Act 2016 (IPA 2016). However the position under that Act is the same: § 4 of Schedule 3 to the IPA 2016 disapplies the prohibition in s. 56 of the IPA 2016.

practice, that means that there is wide-ranging disclosure provided to the IPT 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."*

27. 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 and see the explanation provided at §§2.7-2.8 of the IPT Report 2011-2015).

28. Consistently with its specialist functions, the IPT is able to consider matters which, e.g. for reasons of national security, cannot be disclosed in the 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.

29. The position was summarised as follows by Sales LJ in the Court of Appeal at §7:

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

30. The IPT's 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 e.g. 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.

31. As the IPT explained at §7 and §46(iii)-(iv) of its 5 December 2014 judgment in the *Liberty/Privacy* proceedings [2014] UKIP Trib 13, [2015] 3 All ER 142, 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."*

32. By considering the closed material, the IPT is able to ensure that the public hearings are appropriately targeted at the right issues, thereby 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 2014 judgment in *Liberty/Privacy*:

> *"We do not accept that the holding of a closed hearing, as we have carried out, is unfair. It accords with the statutory procedure, and facilitates the process referred to at §45 and §46 above. This enables a combination of open and closed hearings which both gives the fullest and most transparent opportunity for hearing full arguments inter partes on hypothetical or actual facts, with as much as possible heard in public, and preserves the public interest and national security."*

33. In a number of recent IPT cases, CTT has performed a similar function to that of a Special Advocate. That has included reviewing the closed disclosure provided to the IPT 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*)[18]. 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.

Remedial discretion

34. The IPT's remedial discretion is also very broad and includes the following special features:

[18] 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.

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[19].

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 ('NCND') policy[20]. It means that after considering the case and requiring any necessary investigation, either 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 IPT, 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 do not allow the IPT to disclose whether or not complainants are, or have been, of interest to the SIAs or law enforcement agencies. Nor is the IPT permitted to disclose what evidence it has taken into account in considering the complaint.

d. Subject to the general duty imposed on the IPT pursuant to r.6(1)[21], if the IPT makes a determination in favour it shall provide the complainant with a summary of that determination, including any findings of fact.

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[19] *"(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."

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

[21] 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*

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)[22].

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 IPT 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

35. The IPT sits as one of a number of oversight bodies, all of which work together to ensure that the activities of the SIAs and other public bodies exercising intrusive powers are properly scrutinised. The interface between the Tribunal and the Commissioners has already been referred to above.

36. Those bodies include the ISC (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 the IPT judgment in *Liberty/Privacy* at §121. This comprises distinguished Parliamentarians who have further responsibility for the oversight of the SIAs (MI5, MI6, and GCHQ) and other parts of the UK intelligence community including overseeing their activities, policies, expenditure, administration and operations. This Committee is currently chaired by the Rt. Hon. Dominic Grieve QC MP.

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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."

[22] 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.

Appeal provisions

Existing appeal provisions in RIPA

37. Section 67(9) of RIPA provides that the Secretary of State must, by order, make provision for appeals from the IPT in certain categories of case (not engaged in the present context)[23]. It is clear from s.67(9), when read with s.67(10) of RIPA, that Parliament envisaged that there would be special arrangements and procedures for any such appeals from the IPT. In particular, s.67(10) expressly provides that any order allowing for an appeal may make provision for *"the establishment and membership of a tribunal or body to hear appeals"* (s.67(10)(a)) and may include provisions corresponding to the IPT's specialist procedure rules (as provided for by s.69 of RIPA) in relation to any such appeals (see s.67(10)(d)).

Investigatory Powers Act 2016 - new appeal provisions

38. Section 243 of the IPA 2016 amends ss.65-67 of RIPA such that the IPT will have jurisdiction regarding claims brought against public authorities in respect of all the powers provided for in the new 2016 Act. That section is largely in force. However the commencement has been staggered to reflect the coming into force of those powers, some of which (e.g. Part 3 authorisations for obtaining communications data) are yet to come into force.

39. A new appeal right from IPT decisions is also soon to be introduced. Section 242 of the IPA 2016, which introduces a new s.67A into RIPA, provides for an appeal from the IPT on a point of law in respect of certain kinds of determinations[24], in circumstances where the *"second tier appeals criteria"* is satisfied (see *R (Cart) v Upper Tribunal* [2012] 1 AC 663 in the Supreme Court at §52 per Lady Hale and

[23] Those provisions have not, to date, been brought into force.

[24] i.e. those of a kind mentioned in s.68(4), or any decision of a kind mentioned in s.68(4C) - namely a final decision on a preliminary issue, excluding a decision relating to a procedural matter.

§129 per Lord Dyson) i.e. it is not any error of law which will justify an appeal from the IPT, but only one falling within the restricted tests set out in s.67A(7) of RIPA[25].

40. The new s.67A is not yet in force. The IPT Rules are being updated in advance of the appeal route becoming operational. Whilst it was previously anticipated that the appeal route would be commenced before the end of 2017, there has been a delay pending a consultation on the updated IPT rules (the consultation closed on 10 November 2017) and consideration of responses to that consultation. The Government's response to the consultation was published on 11 October 2018 and the draft Rules were laid before Parliament the same day. An update can be provided at the hearing in December on the commencement of the new appeal route.

Recent examples of the IPT's operation

41. As explained in the IPT's Report for 2011-2015, there have been considerable changes in the workload and day to day operation of the IPT[26]. That has prompted a number of challenges in the IPT brought by NGOs or individuals/companies allegedly affected by the SIAs' activity[27].

42. A recent example of such a challenge is the *Liberty/Privacy* case in which the Tribunal sat as a tribunal of five, including two High Court Judges. It considered the legality of two regimes referred to as "*the Intelligence Sharing Regime*" and "*the*

[25] i.e. the appeal would raise an important point of principle or practice, or there is another compelling reason for granting leave.
[26] See the foreword to the report at page 1.
[27] 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.

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 ECHR Articles (Arts. 8, 10 and 14) and the 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's 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 Art. 8 rights.

43. In its 5 December 2014 judgment [2015] 3 All ER 142, the IPT concluded that the two regimes were lawful and consistent with Arts. 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.

44. 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) Regime. 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."*

Endorsement of the IPT regime by ECtHR

45. The IPT regime was endorsed by the ECtHR in Kennedy v United Kingdom [2011] 52 EHRR 4, in which the extensive jurisdiction of the IPT and the considerable restrictions applied by it in order to safeguard secret information, were found to be compatible with Art. 6 ECHR. Nothing was said in that case to indicate any Art.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."* Yet the ECtHR concluded 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 Art. 6 ECHR (see §167).

46. More recently the IPT was again endorsed in Big Brother Watch & Others,[28] judgment dated 13 September 2018. That complaint consisted of a series of challenges brought by a number of human rights organisations under Arts. 8, 6

[28] See Application no. 58170/13: Big Brother Watch and Others v. The United Kingdom Application No. 58170/13; Application no. 62322/14: Bureau of Investigative Journalism & Alice Ross v. the United Kingdom, Application no. 24960/15: 10 Human Rights Organisations v. the United Kingdom.

and 10 ECHR, some of which (but not all) overlapped with the subject matter of the complaints in the IPT in the *Liberty/Privacy* proceedings.

47. In terms of the substantive complaints, in a lengthy judgment the ECtHR held that the s.8(4) Regime violated Art. 8 as there was insufficient oversight both of the selection of Internet bearers for interception and the filtering, search and selection of intercepted communications for examination, and the safeguards governing the selection of *"related communications data"* for examination were inadequate. In reaching this conclusion, the Court found that the operation of a bulk interception regime did not, in and of itself, violate the Convention, but noted that such a regime had to respect criteria set down in its case-law. The Court also held, by six votes to one, that: the regime for obtaining communications data from communications service providers violated Art. 8 as it was not in accordance with the law; and that both the bulk interception regime and the regime for obtaining communications data from communications service providers violated Art. 10 as there were insufficient safeguards in respect of confidential journalistic material. It further found that the regime for sharing intelligence with foreign governments did not violate either Arts. 8 or 10; and unanimously rejected complaints made by the third set of applicants under Art. 6 (right to a fair trial), about the domestic procedure for challenging secret surveillance measures, and under Art. 14 (prohibition of discrimination).

48. The ECtHR also concluded that the IPT was effective as a domestic remedy *"capable of offering redress to applicants complaining of both specific incidences of surveillance and the general Convention compliance of surveillance regimes"* (§265). Consequently, any complaints made by applicants to the ECtHR (and falling within the exclusive jurisdiction of the IPT) would be declared inadmissible if those complaints had not been raised in the IPT first, unless they could show that there existed special circumstances absolving them from the requirement to

exhaust it as a domestic remedy[29]. In reaching that conclusion, the ECtHR conducted a thorough review of the recent case law of the IPT (including the *Liberty/Privacy* proceedings); specifically noting the extent to which the IPT played a crucial role in scrutinising and elucidating closed material which was of central relevance to the challenges it was considering. At §255-256 the Court stated:

> *"For example, in the Liberty proceedings the IPT played a crucial role first in identifying those aspects of the surveillance regimes which could and should be further elucidated, and then recommending the disclosure of certain "below the waterline" arrangements in order to achieve this goal. It could therefore be said that the IPT, as the only tribunal with jurisdiction to obtain and review "below the waterline" material, is not only the sole body capable of elucidating the general operation of a surveillance regime; it is also the sole body capable of determining whether that regime requires further elucidation.*
>
> *This "elucidatory" role is of invaluable assistance to the Court when it is considering the compliance of a secret surveillance regime with the Convention. The Court has repeatedly stated that it is not its role to determine questions of fact or to interpret domestic law. That is especially so where domestic law is complex and, for reasons of national security, the State is not at liberty to disclose relevant information to it. Given the confidential nature of the relevant documentation, were applicants to lodge complaints about secret surveillance with this Court without first raising them before the IPT, this Court would either have to become the primary fact-finder in such cases, or it would have to assess necessity and proportionality in a factual vacuum. This difficulty is particularly apparent in respect of those complaints not considered by the IPT in the Liberty proceedings; in particular, the Chapter II complaint and the complaint about the receipt of non-intercept material from foreign intelligence services. The Court has before it very limited information about the scope and operation of these regimes and it could therefore only consider these complaints if it were either to accept the applicants' allegations as fact, or to attempt to conduct its own fact-finding exercise. In such cases, therefore, it is particularly important that the domestic courts, which have access to the confidential documentation, first strike the "complex and delicate balance" between the competing interests at stake."*

[29] On the facts of some of the particular cases before them the Court found that such special circumstances did exist – see §§267-268.

49. At §§258-261, the ECtHR noted the extent to which, when the IPT had found particular interception or surveillance regimes to be incompatible with the Convention, it was able to bring about rectification of defects and influence changes in the law and in relevant policy. The effectiveness of the IPT was also underlined by the fact that it could, as a matter of EU law, make an order for reference to the CJEU, as it had in the case of case of *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* IPT/15/110/CH.

C. APPROACH TO INTERPRETATION OF "OUSTER CLAUSES"

General principles of statutory interpretation

50. The general principle of interpretation is that legislation should be given its plain and ordinary meaning: per Lord Bingham in *R (Jackson) v Attorney General* [2006] 1 AC 262 at §29:

> *"a careful study of the statutory language, read in its statutory and historical context and with the benefit of permissible aids to interpretation, is the essential first step in any exercise of statutory interpretation."*

51. The court's constitutional task is to give effect to Parliament's intention. A focus on, and loyalty to, the statutory language is central to this constitutional role. As Lord Nicholls said in *R v Secretary of State for the Environment, Transport and Regions, ex p Spath Holme Ltd* [2001] 2 AC 349:

> *"statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration."*

52. The *"statutory purpose and the general scheme by which it is to be put into effect"* are of central importance to ascertaining Parliament's intention and *"represent the context in which individual words are to be understood"*: *Bloomsbury International Ltd v*

Department for the Environment, Food and Rural Affairs [2011] 1 WLR 1546 per Lord Mance at §10 (see also per Lord Bingham in R (on the application of Quintavalle) v Secretary of State for Health [2003] 2 AC 68 at §8).

53. The relevance and importance of statutory context to interpretation was noted by the President in his judgment in the Divisional Court below (§40):

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

Approach to interpretation of "ouster clauses"

54. The court's approach to the interpretation of statutory provisions limiting review of inferior courts and tribunals (i.e. courts and tribunals whose jurisdiction is limited by statute) is in accordance with the general principles of statutory interpretation set out above.

55. In particular, review of the relevant case law dating back to the 17th Century in which the courts have considered clauses purporting to oust judicial review, shows that, whilst the courts will carefully scrutinise a statutory provision which purports to exclude the High Court's supervisory jurisdiction, what is required for a clause to be effective depends on a range of factors, including the language of the provision, the institutional features of the inferior court or tribunal and the consequences of excluding the High Court's supervisory jurisdiction in the specific statutory context. The question is always whether Parliament intended to exclude judicial review.

56. The courts will carefully scrutinise cases where the exclusion of judicial review raises rule of law concerns about Executive action i.e. where Parliament has excluded any independent judicial oversight of an Executive or administrative decision: – see, for example *Attorney General v Ryan* [1980] AC 718, *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763 and *R (Evans) v Attorney General* [2015] AC 1787.

57. This is the sort of ouster clause contemplated by Baroness Hale in *R (Jackson) v Attorney General*, as is clear when the passage at §159 of her judgment – relied upon by the Appellant (Written Case, §27) – is read in full:

> *"The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."*

This passage was approved by Lord Neuberger in *R (Evans) v Attorney General* [2015] AC 1787, at §56 and 58. He applied it to a provision which he found would have the *"remarkable effect"* of enabling *"a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it"*.

58. The Appellant cites these cases in support of *"long-established principle"* that Parliament is not to be taken to intend to exclude the High Court's supervisory jurisdiction in the absence of the *"crystal clear"* language (Written Case, §27). However, particularly where the court is considering bodies exercising judicial functions, ouster clauses are interpreted by reference to careful examination of the language of the provision and having regard to all aspects of the statutory scheme, including the precise nature and powers of the court or tribunal. Such

cases have not been, and are not properly to be, decided merely by some presumption against ouster clauses.

59. Different considerations apply, for example where the court is confronted with clauses excluding review of a court of law. In re Racal [1981] AC 374 Lord Diplock stated that *"the break-through made by Anisminic ... was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished"* (p.383B-C). He went on to distinguish cases where the decision-making power is conferred on a judicial body, stating at p.383E-G:

> *"But there is no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption. ... upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide."*[30]

60. This passage was recently endorsed and applied by the Supreme Court in Lee v Ashers Baking Company Ltd [2018] 3 WLR 1294. The issue was whether s.61(7) of the County Courts (Northern Ireland) Order 1980, providing that *"the decision of the Court of Appeal on any case stated under this article shall be final"*, precluded appeal where the Court of Appeal had erred in failing to give effect to a request

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[30] In reaching this conclusion, Lord Diplock endorsed (at p.384B-D) the dissenting judgment of Geoffrey Lane LCJ in Pearlman v. Keepers and Governors of Harrow School [1979] Q.B. 56, in which he stated (at p.76C-D): *"I am, I fear, unable to see how that determination, assuming it to be an erroneous determination, can properly be said to be a determination which he was not entitled to make. The judge is considering the words in the Schedule which he ought to consider. He is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion upon a difficult question. It seems to me that, if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law."*

from the Attorney General under the Northern Ireland Act 1998 (as amended) to refer to the Supreme Court a devolution issue which had arisen. Lord Mance, with whom all other members of the Court agreed, held that as the Northern Ireland Court of Appeal is a superior court, the situation did not fall within the scope of *Anisminic*: §85-87. He noted that the question was one of interpretation, before going on to provide the following analysis, at §88:

> *"Article 61(1) and (7), read together, provide for the decision of the Court of Appeal on a case stated relating to the correctness of "the decision of a county court judge upon any point of law" to be final. They contemplate the finality of the Court of Appeal's decision with regard to the correctness of the county court judge's decision on the point of law raised by the case stated. The finality provision in article 61(7) is therefore focused on the decision on the point of law, not on the regularity of the proceedings leading to it. It would require much clearer words - and they would, clearly, be unusual and surprising words - to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law. Suppose the Court of Appeal had refused to hear one side, or the situation was one where some apparent bias affected one of its members. This sort of situation cannot have been contemplated by or fall within article 61(7). Likewise, I consider that a failure to admit the Attorney General's request for a reference and to await its disposition, before ruling on a case stated, constitutes a procedural error, in respect of which an appeal must still be possible, if significant injustice would otherwise follow, notwithstanding the finality provision in article 61(7)."*

This passage provides an illustration of the courts interpreting a finality clause, not by reference to any presumption; but rather by close analysis of the language of the provision in question, as well as having regard to the nature and powers of the court and the consequences of excluding review by a higher court in the specific statutory context.

61. The Appellant suggests (Written Case, §108) that *In re Racal* is distinguishable from the present case because it concerned a challenge to *"a court of unlimited jurisdiction"*. There are differences between the statutory schemes in that case and the present. However, the differences are not as stark as the Appellant suggests.

In re Racal concerned a decision of a High Court judge made in the exercise of the statutory jurisdiction conferred upon him by s.441(1) of the Companies Act 1948 (see p.379G-H). In that sense, the Judge was acting as an inferior court, albeit one vested with all the powers of a superior court of record.

62. What was determinative in these cases was the status of the court and Parliament's evident intention about the scope for challenge, having regard to its constitution, jurisdiction and powers, not whether it was inferior in the sense that its powers derived from statute. That same, nuanced, approach can be seen in other cases.

63. For example, in *R v Cripps, ex p Muldoon* [1984] QB 68 the question was whether a local election court established pursuant to the Representation of the People Act 1949 should be subject to judicial review. The statute contained no clause purporting to oust judicial review. The issue was whether it was appropriate for the election court to be amenable to judicial review having regard to the fact that it was (a) to be constituted by a Queen's Bench judge and (b) vested by statute with the *"same powers, jurisdiction and authority as a judge of the High Court"*. Goff LJ, who gave judgment for the Divisional Court, concluded at p.87B-F that resolution of this question required examination of *"all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court"* to determine whether *"the tribunal in question should properly be regarded in all the circumstances as having a status so closely equivalent to the High Court that the exercise of power of judicial review by the High Court is for that reason inappropriate."*

64. Similarly, in *R v Greater Manchester Coroner, ex parte Tal* [1985] QB 67, the court was not concerned with a provision purporting to oust judicial review of the coroner's court. It was common ground that the coroner's court was a court of

inferior jurisdiction to the High Court.[31] The case focused on the earlier decision of *R v Surrey Coroner, ex parte Campbell* [1982] QB 661 in which the Divisional Court, relying on Lord Diplock in *In re Racal*, stated that inferior courts and tribunals were only amenable to judicial review in cases of error of law on the face of the record. Goff LJ stated that the effect of *Anisminic* was to render obsolete the requirement that an error of law must appear on the face of the record (p.82D) and held that *Campbell* had been wrongly decided. However, having held that the principle established by *Anisminic* – that there is only a single category of error of law – applied to inferior courts as well as inferior tribunals, he went on to add the following caveat, at p.82G-H: *"Nevertheless we do not wish to be understood as expressing any opinion that the principle will apply with full force in the case of every inferior court."*

65. The Appellant cites (Written Case, §33.3) a number of cases as illustrations of the "principle" that ouster clauses will be ineffective in the absence of "crystal clear" language. Only one of these cases (*Woolas*) concerned a purported ouster clause, the others being concerned with whether the nature of the jurisdiction exercised by the court or tribunal in question was such as to preclude the exercise of the High Court's supervisory jurisdiction.

66. In all of these cases, whether or not the High Court's judicial review jurisdiction was excluded (whether by statutory provision or by implication) was determined by reference to careful examination of the nature of the court, its jurisdiction and its powers, not by reference to the principle suggested by the Appellant.

67. *R (Woolas) v Parliamentary Election Court* [2012] QB 1 is the only case of those cited by the Appellant which involved scrutiny of a finality clause. The relevant

[31] Section 6 of the Coroners Act 1887 itself conferred on the High Court wide powers to quash the inquisition on an inquest.

provision provided that a certified determination of the election court *"shall be final to all intents as to the matters at issue on the petition"*. Thomas LJ, giving the judgment of the court, explained that the case should be determined by examining *"all the characteristics of the court in question in order, not to dignify it with a name or status, but to ascertain whether in substance it should be subject to the judicial review jurisdiction of the High Court"*.[32] He then set out the factors relevant to the decision including: the powers of the parliamentary election court §31-§32; the composition of the court §33; the effect of provisions relating to the power to state a special case for the decision of the High Court §37-§40; and, the constitutional relationship between the election court, the House of Commons and the High Court §48-§53. He weighed all those factors to *"discern the policy Parliament intended in the legislation"*, before concluding, at §54:

> *"It is a significant factor that the judges of a parliamentary election court are judges of the Queen's Bench Division and we are only a Divisional Court of the Queen's Bench Division. However, there are two important factors that point to the opposite conclusion. First, the jurisdiction of the election court is limited. Second, the legislation has always allowed for a reference to the High Court on an issue of law ... These two factors together with the evident policy of the legislation has led us to the conclusion that the relationship of a parliamentary election court to the High Court is such that it should be regarded as an inferior tribunal so that its actions can be the subject of judicial review"*.

68. The question in R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475 was whether s.54(5) of the Access to Justice Act 1999 – which introduced a requirement, in most cases, to obtain permission to appeal from a decision of a district judge to a circuit judge – implicitly precluded the possibility of judicial review of decisions of county court judges to grant or refuse permission to appeal. Importantly, the relevant Act did not contain any clause purporting to oust the High Court's supervisory jurisdiction. The Court of Appeal rejected the

[32] Thomas LJ at §18 citing Laws LJ in R (Cart) v Upper Tribunal [2011] QB 120 at §70.

argument that the ability to judicially review such decisions had been removed by statutory implication: §44. It went on to say, however, that the Administrative Court should dismiss such challenges summarily in the exercise of their discretion on the ground that this was Parliament's intention when enacting s. 54(5), at §54:

> *"Parliament has put in place an adequate system for reviewing the merits of decisions made by district judges and it is not appropriate that there should be further review of these by the High Court".*

69. The question in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 was whether decisions of the Upper Tribunal could be amenable to judicial review. Importantly, the Tribunals, Courts and Enforcement Act 2007 did not contain any clause purporting to oust the High Court's supervisory jurisdiction. Rather, as with *Tal* and *Muldoon*, the issue was whether the fact that the Upper Tribunal was described by statute as a *"superior court of record"* and was vested with a statutory jurisdiction equivalent to the judicial review jurisdiction of the courts, meant that it was not amenable to judicial review. The Supreme Court's decision – that the Upper Tribunal should be amenable to judicial review only on second tier appeal grounds – turned on careful analysis of the statutory scheme.[33] On the one hand, the court noted that Parliament had not sought to oust or fetter the judicial review powers of the judge[34]; nor had it provided that the Upper Tribunal should be permitted to make mistakes of law.[35] On the other hand it was clear from the statutory scheme, under which a superior court or tribunal reviewed decisions of an inferior court or tribunal, that common law judicial review should be restricted.[36]

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[33] As noted by Lord Phillips PSC at §89 *"The size and the jurisdiction of the judiciary is determined by statute".*

[34] Lady Hale at §37; Lord Phillips PSC at §89; Lord Dyson JSC at §110.

[35] Lady Hale at §40.

[36] Lady Hale at §57; Lord Phillips PSC at §89; Lord Clarke at §105; Lord Dyson JSC at §§122-123.

70. In U v SIAC [2010] 2 WLR 1012, Laws LJ concluded that ss.1(3) and 1(4) of the Special Immigration Appeals Commission Act 1997 did not have the effect of immunising SIAC from judicial review. Section 1(3) was a deeming provision which stated that SIAC was a superior court of record and was not sufficient to preclude judicial review. Section 1(4) which provided that its decisions should only be questioned in certain legal proceedings was *"...a no certiorari clause which falls foul of the Anisminic principle. There is no basis for any autonomous immunity arising under the common law. SIAC is, and throughout its life has been, amenable to judicial review for excess of jurisdiction in both senses. It cannot be taken to be an alter ego of the High Court"* (§83). Laws LJ distinguished SIAC's position from the Upper Tribunal, which he found to be an *"authoritative, impartial and independent judicial source for the interpretation and application of the relevant statutory texts"* (§94). The conclusion that SIAC was susceptible to judicial review was therefore based on interpretation of the particular statutory provisions in their particular legislative context.

The early case law

71. The Appellant refers to a number of older cases (Written Case, §§28-30) as illustrations of the early application of a strict approach to the interpretation of ouster clauses. The earlier authorities demonstrate that the need for express words *"or the evident meaning of an Act of Parliament"*[37] was considered to be the logical corollary of the common law origins of the High Court's supervisory jurisdiction: the jurisdiction is available unless taken away by express statutory provision: see Abbott CJ in R v Cashiobury Hundred Justices [1923] 3 Dow. & Ry. 35: *"certiorari always lies, unless it is expressly taken away"*.[38] These cases do not

[37] Berkley v Bragge [1754] 1 Keny 80.

[38] See also Berkley v Bragge [1754] 1 Keny 80, per Wright J who stated: *"There can be no doubt but the King has a right, an inherent common law right, an antecedent right, to have a certiorari; if so, it cannot be*

provide support for the proposition that such a clause will not be effective in the absence of "*crystal clear*" language.

72. The Appellant's reliance on *Smith, Lluellyn, Commissioners of Sewers* [1669] 1 Mod 44, 86 ER 719 and *R v Moreley* [1760] 2 Bur 1041, 97 ER 696 (Written Case, §27), in support of this principle is problematic. Neither case comes close to suggesting a need for "*crystal clear words*". The requirement is simply that there is express legislative provision removing certiorari: *Smith* at p.45 and *R v Morley* [1760] 2 Bur 1041 at p.1042. Moreover, the circumstances in both cases are far removed from the RIPA/IPT context. In *Smith*, the Court was concerned with the Commissioners of Sewers. In *R v Moreley*, the analysis focused on the role of Justices of the Peace and the interpretation of provisions of the Conventicle Act for suppression of non-conformism (22 Car 2 c 1). In addition, as is clear from counsel's arguments in *Moreley* (at p.1042), there was a previous authority which had found that the Court was able to grant certiorari despite the legislative provision purporting to remove it.

73. The Appellant places great emphasis on *R v Cheltenham Commissioners* [1841] 1 QB 467 and *Ex parte Bradlaugh* [1878] 3 QBD 509 as examples of the principle being "sufficiently powerful" to render statutes expressly prohibiting the grant of certiorari ineffective (Written Case, §30).

74. However, **first**, the scope of these decisions is limited. In both cases, the conclusion that 'no certiorari' clauses were ineffective turned on the assessment that, under the relevant statutes, the courts had lacked jurisdiction to make the

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taken from him, but by Act of Parliament. Has this been done by any Act of Parliament? It is provided by the Statute of 12 Car. 2, not that no certiorari shall issue, but, that it shall not supersede, &c. That is vastly different."

impugned decision. There is nothing to suggest that Parliament is unable to confer on a statutory decision-maker, the power to finally determine questions of law and thereby exclude judicial review. For example, in *Cheltenham Commissioners*, Lord Denman CJ explained the basis of the court's authority as being to ensure decisions of the inferior tribunal were taken in pursuance of statute (see p.474 and p.472). Thus, anticipating the logic of the majority in *Anisminic*, the certiorari clause did not bite on the decisions falling outwith the court's jurisdiction. Similarly, in *Ex parte Bradlaugh* the court focused on the absence of jurisdiction on the part of the Police Courts (see Cockburn CJ at p.512). Neither case comes close to suggesting that 'no certiorari' clauses are outside Parliament's power.

75. **Secondly**, judgments in both cases contemplated the possibility that there could be circumstances where a 'no certiorari' clause was effective[39]. In *Cheltenham Commissioners*, Patteson J expressly cautioned against any general approach which would render 'no certiorari' clauses ineffective stating, at p.478:

> *"The certiorari is not taken away in cases where the decision itself is impeached as being invalid on the ground of malversation. Many attempts have lately been made – indeed there is a perpetual endeavour – to get rid of clauses which take away certiorari, by impugning the jurisdiction. Such attempts we ought carefully to watch; otherwise the clauses would be rendered nugatory. But here, the charge being malversation, the certiorari is not taken away."*

76. **Thirdly**, the treatment of these decisions in subsequent authorities provides weak support for the Appellant's assertion that Parliament can *never* legislate to exclude the power of the High Court. For example, both cases were cited by Lord Denning in *Gilmore* (at p.586) where he expressly referred to them in

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[39] Cockburn CJ in *Bradlaugh*: *'It was contended that the certiorari is taken away by 2 & 3 Vict. C. 71, s. 49. I entertain very serious doubts whether that provision does not apply only to matters in respect of which jurisdiction is given by that statute, and not to matters in which jurisdiction is given by subsequent statutes; but it is not necessary to deal with that point'*

support of the proposition that despite the use of express words, certiorari could still be available in certain circumstances. However those remarks were obiter[40] and he went on to say: *"I do not pause to consider these cases further; for I am glad to notice that modern statutes never take away in express words the right to certiorari* ***without substituting an analogous remedy****"* (emphasis added) i.e. he acknowledged that it lay within the purview of Parliament to provide the remedy in another forum.

77. Although a 'no certiorari' clause may be insufficiently clear to evidence Parliament's intention to exclude the High Court in some circumstances, that is not the same as saying that Parliament could *never* exclude judicial review. For example, in *Anisminic*, Lord Pearce (at p.200) characterises *Ex parte Bradlaugh* as leading authority for the proposition that *'"no certiorari" clauses do not oust the courts where there is an absence of jurisdiction'*. However as Lord Pearce's subsequent comments show, it does not mean that Parliament *cannot* legislate to exclude judicial review:

> *"Had Parliament intended to make a departure in 1950 from the more reasonable construction previously given for so many decades to no certiorari clauses, it must have made the matter more clear."*[41]

78. **Fourthly**, these authorities must be read against the clearly expressed conclusion in a number of cases that Parliament does indeed have the ability to legislate to exclude judicial review with the use of sufficiently clear words (see **§108** of this Written Case).

79. **Finally**, both cases have to be understood in their particular historical context. As explained by Denning LJ in *Gilmore* (at p.586), historically 'no certiorari'

[40] Cf. Romer LJ at p.587 and Parker LJ at p.588

[41] And see also to similar effect, Laws LJ in *Cart* [2010] 2 WLR 1012 at §32.

clauses in old statutes, including those in *Cheltenham Commissioners* and *Ex parte Bradlaugh* *"were passed chiefly between 1680 and 1848, in the days when the courts used certiorari too freely and quashed decisions for technical defects of form"*. The context is very different from that of the IPT. Moreover, the wording is different: for instance, in *Cheltenham Commissioners*, the clause in question was little more than a finality clause, which, as already noted, represents a very different formulation to the present.

The Scottish case law

80. Scottish case law is also to the effect that the exclusion or limitation of judicial review is determined by close scrutiny of the statutory scheme, not by reference to any presumption that limitations on access to the High Court's supervisory jurisdiction in such circumstances would be contrary to Parliament's intention.

81. A common thread in the Scottish cases cited by the Appellant (Written Case, §32) is that the Court will examine carefully the language of the ouster clause in question.

a. In *McDaid v Clydebank District Council* [1984] SLT 162, Lord Cameron held that the wording of the ouster in question (s. 85(10) of the Town and Country Planning (Scotland) Act 1972) did not preclude the court's intervention when it was analysed within the context of the legislation as a whole (at 167):

> *"In my view the Lord Ordinary in his ground of decision, based on an application of the wording of s. 85(10), overlooked the fact that the subsection itself is to be interpreted in the context of the code of appeal which obviously proceeds on the initial and basic assumption that the code is one which could, so far as related to the specific grounds set out in the subsection itself, be operated by the person concerned".*

Lord Cameron went on expressly to countenance the possibility that Parliament could exclude the jurisdiction of the courts with appropriately clear language (at 167):

> *"It is trite law that an exclusion of the jurisdiction of the courts can only be effected by the clearest legislative provision ... To deprive a person of a legal right - in this case the right of appeal to the Secretary of State specifically given by Parliament - is a serious matter, but it becomes doubly so if at the same time and by the same action recourse to the courts is to be denied a citizen aggrieved by the breach by an executive authority of its statutory duty. Such a grave deprivation could only be brought about by the plainest legislative provision and in the clearest and most unambiguous terms. In my opinion no such legislative intention can be derived from consideration of the language of s. 85 and the petitioners' right to invoke the jurisdiction of the courts for a remedy has not been displaced."*

b. In *Ashley v Magistrates of Rothesay* [1873] 11 M 708, the Court's conclusion was that the proceedings did not fall within the terms of the ouster (s. 34 Public Houses Amendment Act 1862), per Lord President at p.716:

> *"Now the plain answer to the objection founded upon this section is, that the present is not a process of review, nor is it in any proper sense a stay of execution. It is a proceeding brought in the Court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior Court, and the jurisdiction of this Court to entertain such an action cannot be doubted, notwithstanding the entire prohibition of review of any kind. This is not review, as I said before".*

c. In *Campbell v Young* [1835] 13 S 535, the Court found that the ouster provision was ineffective because, on the facts, there had been a complete lack of jurisdiction. Lord Medwyn noted at p. 542:

> *"I would not have found much objection if the justices had convicted, and pronounced judgment in terms of the statute. What gives us jurisdiction is, that there was no proper warrant of imprisonment. There is not so much,*

either irregularity or excess of power, as a total want of power under the statute; and, on that ground, I am adhering".

Anisminic

82. In *Anisminic v Foreign Compensation Commission* [1962] 2 AC 147, the House of Lords considered an application for a declaration that preliminary determinations by the Foreign Compensation Commission ("FCC") were wrong in law and nullities. The FCC argued that s.4(4) of the Foreign Compensation Act 1950 ("FCA 1950") deprived the High Court of jurisdiction to hear the case. Their Lordships were divided on both the merits of the appeal and the effect of s.4(4). Notwithstanding the diversity of approaches, a common thread that runs through all of the speeches is that the effect of the relevant ouster provision is a question of statutory construction, in common with all the other cases discussed above concerning ouster clauses. The case established the following propositions.[42]

83. **First,** five of their Lordships (Lords Reid, Morris, Pearce, Wilberforce and Pearson) agreed that s.4(4) of the FCA 1950 protected every determination which the FCC had the power to make. It did not protect any determination that was outside the power of the tribunal. In other words, they agreed that a determination resulting from an error which had been remitted to the decision-maker by legislation was protected by a statutory provision which precluded the determination being called into question in any court of law. Their Lordships adopted different terminology in their analysis, but the conclusion was the same.

    a. For Lord Reid, the concept of a nullity was central to his conclusion that the ouster clause was ineffective: 'no certiorari' clauses do not oust the

[42] See Professor David Feldman, "*Anisminic in Perspective*" in Satvinder Juss and Maurice Sunkin (eds), Landmark Cases in Public Law (Oxford 2017).

jurisdiction of the court because a decision outside the permitted area of decision making is a nullity: p.170D-F. He clearly concluded, however, that s. 4(4) would protect a determination which the FCC had the power to make, stating, at p.170E, that *"Undoubtedly such a provision protects every determination which is not a nullity"*. Having made the point that, having correctly entered on the inquiry in question, a tribunal can act outside its permitted area by making public law errors, he stated, at p.171E:

"But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in Reg. v. Governor of Brixton Prison, Ex parte Armah [1968] A.C. 192, 23 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, ***then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.***" (Emphasis added).

b. Lord Wilberforce preferred to avoid words such as *"jurisdiction"*, *"error"* and *"nullity"*, observing that they *"create many problems"* (207A). For him, the ineffectiveness of the ouster clause flowed from the limits of the statutory decision maker's powers, not the characterisation of a decision as a *"nullity"*. Like Lord Reid, however, he emphasised that s.4(4) would preclude review of a decision taken within the tribunal's power, or – as he described it – within the tribunal's *"permitted field"*, stating, at p.207B-C and E-H:

"It is now well established that specialised tribunals may, depending on their nature and on the subject-matter, have the power to decide questions of law, and the position may be reached, as the result of statutory provision, that even if they make what the courts might regard as decisions wrong in law, these are to stand.
[...]
Although, in theory perhaps, it may be possible for Parliament to set up a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country. The question, what is the tribunal's proper area, is one which it has always been permissible to ask and to answer, and it must follow that

examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability upon its decisions. ***These clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal.***" (Emphasis added)

c. Lord Pearce also drew on the concept of jurisdiction, stating, at p.195 F-G, that: "*If it directs itself to the right inquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction*".[43] He expressly contemplated that an ouster clause could be effective to preclude review of a decision within jurisdiction, stating, at p.199E: "*The above principle may, however, be affected by the existence (as here) of an ouster or no certiorari clause.*"

d. Lord Morris stated, at p.181 B-C:

"*The provisions of section 4(4) of the Act do not, in my view, operate to debar any inquiry that may be necessary to decide whether the commission has acted within its authority or jurisdiction. The provisions do operate to debar contentions that the commission while acting within its jurisdiction has come to wrong or erroneous conclusions. [...] There would be no difficulty in raising any matter that goes to the right or power of the commission to adjudicate (see Reg. v. Bolton (1841) 1 QB 66). What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make.*"

e. Lord Pearson agreed with Lord Reid, Lord Pearce and Lord Wilberforce – see p.215B-C.

84. **Secondly,** it unanimously held that in order to decide whether an error fell outside the power of the tribunal, one had to construe the empowering legislation to determine whether the legislation remitted to the decision-maker power to decide the matter in relation to which the error occurred.

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[43] See also p.199 E-F.

a. Lord Reid described (p.173H) the *"crucial question in this case"* as what inquiries the FCC was empowered to make under Art. 4(1)(b)(ii) of the Foreign Compensation (Egypt) Determination and Registration of Claims Order in Council. He went on to say (p.174D-E):

"If the commission were entitled to enter on the inquiry whether the applicants had a successor in title, then their decision as to whether T.E.D.O. was their successor in title would I think be unassailable whether it was right or wrong: it would be a decision on a matter remitted to them for their decision. The question I have to consider is not whether they made a wrong decision but whether they inquired into and decided a matter which they had no right to consider".

b. Lord Wilberforce stated (p.206H) that *"the solution of this case is to be looked for in the thickets of subsidiary legislation"*. He went on to explain that the scope of the tribunal's powers was a question of statutory construction for the court, stating at p. 209F-210B:

"The extent of the interpretatory power conferred upon the tribunal may sometimes be difficult to ascertain and argument may be possible whether this or that question of construction has been left to the tribunal, that is, is within the tribunal's field, or whether, because it pertains to the delimitation of the tribunal's area by the legislature, it is reserved for decision by the courts. Sometimes it will be possible to form a conclusion from the form and subject-matter of the legislation. In one case it may be seen that the legislature, while stating general objectives, is prepared to concede a wide area to the authority it establishes: this will often be the case where the decision involves a degree of policy-making rather than fact-finding, especially if the authority is a department of government or the Minister at its head. I think that we have reached a stage in our administrative law when we can view this question quite objectively, without any necessary predisposition towards one that questions of law, or questions of construction, are necessarily for the courts. In the kind of case I have mentioned there is no need to make this assumption. In another type of case it may be apparent that Parliament is itself directly and closely concerned with the definition and delimitation of certain matters of comparative detail and has marked by its language the intention that these shall accurately be observed."

c. See Lord Morris to similar effect at p.182 D-F:

"In all cases similar to the present one it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its

terms of reference? What was its remit? What were the questions to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or not the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists ... The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, upon an examination of their own particular facts and particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal."

d. See also Lord Pearce at p.195A and E-G and Lord Pearson at p.215B-C.

85. **Thirdly,** by a majority of four to one (Lord Morris dissenting), it held that the FCC had gone outside its jurisdiction, notwithstanding the fact that it had properly embarked on the inquiry, by determining a question over and above that remitted to it in the empowering legislation: per Lord Reid at p.171B-D, per Lord Wilberforce at p.210C-E, per Lord Pearce at p.199H and per Lord Pearson at p.215B-C (agreeing with Lord Reid, Lord Pearce and Lord Wilberforce).

86. It was in relation to this issue that Lord Reid stated, at p.171C-D *"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 curse of the inquiry which is of such a nature that its decision is a nullity"*, before giving as examples various forms of procedural error. This passage – which has been picked up in subsequent cases as providing the basis for the proposition that there is a single category of public law error, all of which render a decision a nullity – was obiter dictum, being irrelevant to the narrow issue the House of Lords had to decide (namely, whether a decision denying eligibility for compensation for failure to comply with a condition the legislation did not impose, was outside the jurisdiction of the FCC).

87. **Finally,** by a majority of three to one (Lord Pearson and Lord Morris dissenting), it held that Art. 4(1) of the Order in Council did not require the FCC to inquire, when the applicant was himself the original owner, whether he had a successor in title. So the FCC had determined a question which was not remitted to it: per Lord Reid at p.173 H, per Lord Pearce at p.205F-G; per Lord Wilberforce at p.214 E-F.

88. The Appellant seeks to derive four propositions from *Anisminic*, none of which is supported by a correct reading of the case.

89. **First**, it is said (Written Case, §44) that *Anisminic* establishes that if an apparent ouster of judicial review is reasonably capable of having two meanings, the meaning shall be taken which preserves the ordinary jurisdiction of the court. This proposition did not, however, have the support of a majority of the court. It is taken from the passage in Lord Reid's speech set out at §42.2 of the Appellant's Written Case. Lord Pearce makes a point to like effect in the passage set out at §42.6 of the Appellant's Written Case. As noted by the Appellant (Written Case, §42.7), Lord Wilberforce disclaimed reliance on a restrictive interpretation of s.4(4).

90. **Secondly**, it is said (Written Case, §45) that *Anisminic* held that a statutory provision which stated that *"no determination of the tribunal shall be called in question in any court of law"* did not oust judicial review, as a matter of statutory construction. This too is incorrect. The House of Lords unanimously agreed that s.4(4) of the FCA 1950 protected every determination which the FCC had the power to make, but did not protect any determination that was outside its power.

91. The same point applies to the Appellant's fourth point (Written Case, §47) that *Anisminic* gave an indication that the sort of language required to oust judicial review would need to refer to *"purported determinations"* as being immune from

challenge and expressly state that the jurisdiction of the High Court to review decisions is ousted. The House of Lords decided in *Anisminic* that the clause was unable to protect determinations that were outside of the FCC's jurisdiction or "*permitted area*". It did not say that the provision was unable to prevent review by the High Court.

92. **Thirdly**, it is said (Written Case, §46) that *Anisminic* eliminated any relevant distinction between errors of law within jurisdiction and errors of law resulting in an excess of jurisdiction and that after *Anisminic* any error of law by a tribunal renders its decision outside the powers granted to it by Parliament. This submission proceeds on the basis that *Anisminic* establishes that any decision of an inferior tribunal tainted by error of law is a nullity and therefore a statutory provision which excludes review of "*decisions*" or "*determinations*" does not oust judicial review of purported decisions for error of law.

93. The suggestion that *Anisminic* established that all errors of law render decisions of a statutory decision maker outside the powers granted to it by Parliament, with the implication that a statutory provision which states that a "*decision*" or "*determination*" shall not be called into question in a court of law, is ineffective in relation to decisions tainted by error of law, is not supported by the reasoning of the majority in that case.

94. It is also inconsistent with the development in subsequent case law of a general presumption of validity. Whilst pre-*Anisminic* the Courts would attempt to draw a distinction between void and voidable errors, as noted by the editors of De Smith's *Judicial Review* "*the erosion of the distinction between jurisdictional errors and non-jurisdictional errors ...correspondingly eroded the distinction between void and*

voidable decisions"[44]. The conceptual notion that void acts were never of any legal effect was unsustainable in practice, being fundamentally at odds with the settled public law principles that a decision remains valid unless set aside by a court of competent jurisdiction. As a result, in modern 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.[45]

95. The Appellant relies on the decisions of the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237, *R (Page) v Lord President of the Privy Council* [1993] AC 682 and the Supreme Court decisions in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at §66, *Eba v Advocate General for Scotland* [2012] 1 AC 710 and *Lee v Ashers Baking Company* as support for its reading of *Anisminic* as establishing that all errors of public law render a decision a nullity. However, there was little analysis in these cases of what *Anisminic* says about the legal implications of public law error and it is far from clear that the decisions support a reading of *Anisminic* as establishing that proposition.

96. In *O'Reilly*, Lord Diplock referred solely to the reasoning of Lord Reid, stating that the decision *"liberated English public law from the fetters that the courts had theretofore imposed upon themselves...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"*. Lord Diplock therefore provided clear endorsement for the principle that there is no distinction between error of law going to jurisdiction and other material error of law. However, his speech does

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[44] See De Smith's *Judicial Review* 8th Edition at §4-062 including the cases cited at footnote 198 including Lord Radcliffe in *Smith v East Elloe RDC* [1956] A.C. 736; Lord Denning in Lovelock (1980) 40 P. & C.R. 336 *"The plain fact is that, even if such a decision as this is 'void' or a 'nullity', it remains in being unless and until some steps are taken before the courts to have it declared void"*, *Hoffmann-La Roche* [1975] AC 295 at p.366 per Lord Diplock and see also *Anisminic* at p.171 per Lord Reid.

[45] The position is summarised at §4-063 of De Smith's *Judicial Review* 8th Edition.

not provide the same support for the suggestion that all errors of law render a decision without legal effect. Although Lord Diplock referred to *Anisminic* as finding that a *"purported "determination" not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity"*[46], he went on to note that decisions in excess of jurisdiction are only void ab initio *"provided that its validity was challenged timeously in the High Court by an appropriate procedure"* and that a failure to challenge within time means that a decision will be given effects in law of a valid decision; clear recognition of the presumption of validity.[47]

97. The Appellant (Written Case, §46.2) relies on a passage from the speech of Lord Brown-Wilkinson in *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 (incorrectly attributed to Lord Wilberforce) as supporting a conclusion that any error of law renders the decision of an inferior court or tribunal outside the powers granted to it by Parliament. However, Lord Brown-Wilkinson expressly endorsed Lord Diplock's statement in *In re Racal* as making clear that *"where a decision-making power had been conferred on a court of law ... no such presumption could exist: on the contrary where Parliament had provided that the decision of an inferior court was final and conclusive the High Court should not be astute to find that the inferior court's decision on a question of law had not been made final and conclusive, thereby excluding the jurisdiction to review it"*.[48]

98. The decision in *Lumba* serves as a good illustration of the uncertainty that remains about the implications of *Anisminic*. As noted by Lord Walker in that case (§193), the *"full implications"* of the *Anisminic* decision are *"still open to*

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[46] P.278D-F

[47] P.283E-F

[48] P.703D-H. Lord Brown-Wilkinson went on to apply the reasoning of Lord Diplock in *Racal* to the case of a university visitor, stating that there was *"no relevant distinction between a case where a statute has conferred such final and conclusive jurisdiction and the case where the common law has for 300 years recognised that the visitor's decision on questions of fact and law are final and conclusive and are not to be reviewed by the court"*. See to similar effect Lord Griffith at p.693E-694B.

debate". In particular, as noted by Lord Brown in his dissenting judgment (§357-358), the question of whether, and if so what, legal consequences follow from the unlawful act of public body remain a matter of some controversy. The Appellant relies on a passage at §66 of the lead judgment of Lord Dyson in *Lumba*, in which he states that *Anisminic* established that there was a single category of errors of law, all of which rendered an Executive act ultra vires, unlawful and a nullity. However, in addition to those dissenting on the merits (Lord Brown, with whom Lord Rodger agreed, and Lord Phillips) two members of the majority disagreed with Lord Dyson's suggestion that all errors of law render an Executive act a nullity: see Lord Walker at (§193) and Lord Kerr at §248-§249, who described Lord Walker's analysis of the existence of a power to detain as "compelling".

99. It is correct (Written Case, §46.4) that Lord Hope summarised the current position in English law in his judgment in *Eba v Lord Advocate*. But that summary is not to be found by reading §31 in isolation. Lord Hope went on (at §32), to focus on the following passage from Lord Reid's speech, *"which indicate precisely where the boundary lies between what is open to review and what is not"*:

> *"But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".*

100. As Lord Hope made clear at §33-34 of his judgment, the public law legacy of *Anisminic* is the abandonment of the distinction between jurisdictional and other errors of law as the basis for determining the grounds on which decision-making may be open to review. Lord Hope did not say, however, that all public law errors would have the consequence of rendering a decision a "nullity" or susceptible to review. On the contrary, he went on to endorse the position adopted by the Supreme Court in *Cart*, accepting that errors of law on the part of the Upper Tribunal could stand uncorrected.

101. Finally, in *Lee v Ashers Baking Company* Lord Mance did not engage, in his passing reference to *Anisminic* at §§85-86, with the legal implications of public law error. As set out at paragraphs §60 above, the significance of Lord Mance's judgment in that case is the fact that the finality clause in question was construed not by reference to any presumption, but rather by careful analysis of the legislative provision and statutory scheme.

102. It is submitted that the correct position in principle is that the implications of public law error are determined by reference to careful consideration of the statutory scheme, and against the backdrop of a general presumption of validity. As in *Anisminic*, the question is whether Parliament conferred on a statutory tribunal power to make a decision that is wrong in law inside "*the permitted field*". The appellant is therefore wrong to suggest that the effect of the House of Lords' decision in *Anisminic* is that any decision of an inferior tribunal tainted by error of law is a nullity and therefore a statutory provision which excludes review of decisions or determinations cannot oust judicial review of purported decisions or determinations for error of law.

Attempts to enact a post-*Anisminic* ouster

103. At §§50-54 of the Appellant's Writen Case reliance is placed on attempts post-*Anisminic* to create a form of ouster – in the context of the Foreign Compensation Commission and in respect of decisions by the Asylum and Immigration Tribunal.

104. Neither of these examples is helpful. The context in both cases was very different to the present and neither scheme was tested in the courts – the relevant clause in the Asylum and Immigration (Treatment of Claimants) etc. Bill 2003

never having been enacted. As stated by the President in the Divisional Court below, at §32:

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

105. It is therefore 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. In terms of the 2003 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 draft legislation (which was never enacted) has any interpretive significance (which it does not), there is no proper comparison with the IPT.

D. PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW

106. The Appellant's case is that all statutory provisions which exclude the High Court's supervisory jurisdiction over decisions of courts and tribunals of limited jurisdiction are incompatible with Parliamentary sovereignty (despite being enacted by Parliament) and the rule of law. It is said that such clauses are never upheld in practice.

107. In fact, what the cases show is that:[49]

a. There is a clear and consistent line of authority (at least from the 17th to the 21st century) to the effect that Parliament can exclude judicial review, provided it uses clear words. The question of whether it has done so is a question of interpretation. Parliamentary sovereignty requires the courts to give effect to these decisions, if on interpretation that is found by the courts to have been Parliament's intention.

b. On a number of occasions the court has concluded that there is nothing *"constitutionally offensive"*[50] in Parliament allocating or channelling the supervisory jurisdiction (including finally determining questions of law) to a body which is not a superior court but which exercises equivalent powers. The core concern of the rule of law is that there is access to an independent and impartial judicial body to provide an authoritative interpretation of the law and to ensure that the Executive branch of government carries out its functions in accordance with the law. The High Court is not the only judicial body capable of fulfilling this core requirement.

Parliamentary sovereignty

108. The courts have consistently emphasised that Parliament, being sovereign, can limit or remove the High Court's supervisory jurisdiction by a statute making clear that such was the intention of Parliament. Statements to this effect can be traced from the earliest authorities (see e.g. *R v Plowright* 87 ER 60; [1685] 3 Mod 94[51], *Berkley v Bragge* [1754] 1 Keny 80[52], *R v Moreley* [1760] 2 Bur 1041[53], *R v Jukes*

[49] See the attached table (**Annex 1**) summarising cases dating back to the 17th century in which the courts have considered clauses purporting to oust judicial review.

[50] *A v B* per Laws LJ at §22; *Gilmore* per Denning LJ at p.586.

[51] The Court of King's Bench held that it had jurisdiction to consider a challenge to a decision of Justices of the Peace on the basis that *"the statute doth not mention any certiorari, which shews that the*

[1800] 8 Term Rep. 542[54], *R v Cashiobury Hundred Justices* [1823] 3 Dow. & Ry. 35[55]) through to the most recent decisions of the Supreme Court (*Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §40, citing Lord Wilberforce *Anisminic* at p.207B[56]). See also *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at p.583, *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths at p.693H.

109. As the editors of De Smith's *Judicial Review* explain[57], there are good functional reasons why Parliament might wish to modify or replace the High Court's common law judicial review jurisdiction:

> *"The standard judicial review procedure has been found to be inadequate for dealing with the needs of claimants and defendants in some contexts or the pure number of applications has created pressure to remove certain jurisdictions from the already heavily-burdened Administrative Court. In relation to immigration and asylum*

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intention of law-makers was, that a certiorari might be brought, otherwise they would have enacted, as they have done by several other statutes, that no certiorari shall lie. Therefore the meaning of the Act must be, that the determination of the justices of the peace shall be final in matters of fact only...". It is noted that comparison was made with other statutes of the time which specifically excluded 'certiorari' in clear terms.

[52] *"There can be no doubt but the King has a right, an inherent common law right, an antecedent right, to have a certiorari; if so, it cannot be taken from him, but by Act of Parliament. Has this been done by any Act of Parliament? It is provided by the Statute of 12 Car. 2, not that no certiorari shall issue, but, that it shall not supersede, &c. That is vastly different. Writs of certiorari, it was rightly said by Mr Yates, are in the nature of writs of error, and are good, though they don't supersede. There is no other statute then but that of 13 Geo. 2, and it seems admitted, and must be so, that no antecedent right, or prerogative, can be taken away, but by the express words, or the evident meaning of an Act of Parliament; only one case has been mentioned to the contrary, and that was on the Statute of Additions, which Mr Attorney General rightly explained, by observing, that the question was about indictments, which are at the King's suit only, so that he was virtually, though not nominally included"*

[53] *"The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled".*

[54] Lord Kenyon CJ: *'the certiorari being a beneficial writ for the subject, could not be taken away without express words'.*

[55] Abbott CJ: *'certiorari always lies, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute'.*

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

[57] De Smith's *Judicial Review* 8th Edition at §17-003.

matters, the perceived need for expedition and finality of litigation has been given priority by modifications to the standard procedure. In relation to some planning, compulsory purchase and regulatory decisions, the need for a speedy resolution to doubts about legality has been accommodated in a special procedure. In relation to homelessness decisions, the need for cheaper, more accessible local justice has prevailed over preserving the High Court's monopoly over the grounds and remedies of judicial review."

110. The Appellant suggests that a clause which ousts the High Court's supervisory power over a court or tribunal of limited jurisdiction is inconsistent with Parliament's sovereignty. It is said that to give effect to Parliamentary sovereignty there must be an independent, authoritative interpreter of legislation (Written Case, §133). The short answer to that point is that the IPT is both an independent and authoritative interpreter of the law. Parliament is sovereign to decide what type of court or tribunal should fulfil that role in a particular context.

111. It is also said that ultimate control over the interpretation of a statute must be exercised by a court of unlimited jurisdiction because only a court of unlimited jurisdiction can ensure bodies created with limited powers keep to the limits that Parliament has imposed on them.

112. However, there is no reason in constitutional, rule of law or Parliamentary sovereignty terms to preclude legislative choices about which judicial body has the power to make final decisions. Finality accepts the possibility of judicial error. That possibility is to be weighed against the policy considerations in favour of finality – a judgement that is ultimately, and properly, for the legislature. This is thus not an issue that can turn on courts being of limited or unlimited jurisdiction – as is evident from the fact that appellate courts may have limits placed on their jurisdiction.

113. Moreover, it will always be open to a party to ask the court (of unlimited jurisdiction) to interpret statutory provisions which oust, reallocate or otherwise limit the High Court's common law judicial review jurisdiction. The fact of these proceedings illustrates this point. The courts below interpreted RIPA to determine the scope of the powers remitted by Parliament to the IPT. The Court of Appeal concluded that Parliament had conferred on the IPT not only the power to determine claims but also to decide: preliminary points of law on the way to making determination on a claim (§36); what fairness or natural justice requires in relation to some aspect of its procedure, including whether a member of the IPT should recuse himself or herself (§37). As explained by Sales LJ (§38):

> *"It is implicit in reading section 67(8) in this way that Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise and need to be decided for the purpose of making determinations on claims or complaints made to it."*

114. This is the task that, for example, the Supreme Court undertook in *Cart*. It interpreted the Tribunals, Courts and Enforcement Act 2007 and concluded that Parliament had intended that the Upper Tribunal should finally determine issues of law remitted to it, save where the second tier appeal criteria were satisfied. In reaching this conclusion, the Supreme Court recognised that review would not be available in all cases in which the Upper Tribunal had fallen into legal error.

The rule of law

115. The Appellant suggests that clauses which exclude the High Court's supervisory jurisdiction over decisions of courts and tribunals of limited jurisdiction are incompatible with the rule of law in two respects.

116. First, it is said that access to the High Court's supervisory jurisdiction is a requirement of the rule of law because *"only an ordinary court can ensure that limits to the exercise of a power granted by the words of an Act are respected"* (Written Case, §§141-143). This point has been answered above at §§113-114.

117. Secondly, it is said (Written Case, §146) that inferior courts or tribunals cannot provide the authoritative and independent mediation of the law as required by the rule of law.

118. However, as Lord Reed explained in *R (UNISON) v Lord Chancellor* [2017] 2 WLR 409, at §68, the principal concern of the rule of law is that there be access to courts to check on the exercise of Executive decision-making:

> *"68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.* ***That role includes ensuring that the executive branch of government carries out its functions in accordance with the law.*** *In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade."* (emphasis added)

119. As observed by Laws LJ in his judgment in the Divisional Court in *R (Cart) v Upper Tribunal* [2011] QB 12, at §32, the key institutional features required to fulfil this rule of law function are that a body is both independent and authoritative:

> *"The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. There are of course cases where a decision-making body is the last*

judge of the law it has to apply. But such bodies are always courts. The prime example is the High Court, which is also the paradigm of such an authoritative source of statutory interpretation."

120. The High Court, when exercising its inherent supervisory jurisdiction, is not the only body capable of fulfilling this fundamental requirement of the rule of law; a point made by Laws LJ in Cart at §39-§40:

"39. As I have said, the paradigm for such an authoritative source is the High Court, which is independent of the legislature, the executive, and any other decision-makers acting under the law; and is the principal constitutional guardian of the rule of law. In section IV(2)(a) below I discuss the historic primacy of the High Court's predecessor, the Court of King's Bench. To offer the same guarantee of properly mediated law, any alternative source must amount to an alter ego of the High Court; and indeed there are instances where the authoritative source is another court, such as the Court-Martial Appeal Court and the Restrictive Practices Court (see the reference at paragraph 71 below to R v Cripps, ex parte Muldoon [1984] 1 QB 68). But the general principle is clear. The rule of law requires that statute should be mediated by an authoritative and independent judicial source; and Parliament's sovereignty itself requires that it respect this rule.

40. None of this, of course, is to say that Parliament may not modify, sometimes radically, the procedures by which statute law is mediated. It may impose tight time limits within which proceedings must be brought. It may provide a substitute procedure for judicial review, as it has by a regime of statutory appeals in fields such as town and country planning, highways, and compulsory purchase: where, however, the appeal body remains the High Court. It may create new judicial authorities with extensive powers. It may create rights of appeal from specialist tribunals direct to the Court of Appeal. The breadth of its power is subject only to the principle I have stated."

121. This point was also emphasised by the Supreme Court in A v B (discussed in more detail below). The conclusion there reached was that it was *"constitutionally inoffensive"* to confide the jurisdiction to a judicial body of like standing and authority to the High Court. The analogy was drawn with cases (such as Farley v Secretary of State for Work and Pensions (No. 2) [2006] 1 WLR 1817) where Parliament had ***allocated*** decision-making to a specialist body providing an effective means of challenge.

122. It is therefore unsurprising that (as noted by Laws LJ in §40 of his judgment in *Cart*, cited above) there are numerous examples where Parliament has vested the High Court with exclusive statutory powers of review of an administrative decision.[58] In such cases, Parliament has replaced the High Court's common law judicial review powers with limited statutory powers of review. These statutory review procedures do not sit alongside the High Court's inherent judicial review jurisdiction, but rather displace it:

a. These provisions have been held to preclude judicial review after a time limit has expired: see *R v Secretary of State for the Environment ex parte Ostler* [1977] QB 122. That case concerned an application for an order quashing a road scheme and compulsory purchase order. The relevant legislation (Highways Act 1959, sch 2, §§2 and 4) vested the High Court with statutory authority to entertain challenges to the validity of these decisions, but otherwise provided that such matters "*shall not, either before or after it has been made or confirmed, be questioned in any legal proceedings whatever*". The Court of Appeal held that, notwithstanding the similarities to the language of s.4(4) of the FCA 1950 considered in *Anisminic*, the case could be distinguished because of the availability of a statutory route of appeal. The Court also emphasised the policy underlying the preclusive clause, namely to ensure that any challenges to a compulsory purchase order be made promptly: p.136 C-D.

b. In *R (Hillingdon LBC) v Secretary of State for Transport* [2017] EWHC 121 (Admin) Cranston J held that the High Court lacked jurisdiction to entertain a common law judicial review of a decision falling within the scope of s.13 of

[58] See, for example, the provisions in the Planning Act 2008, ss. 13, 118; the Town and Country Planning Act 1990, ss.287, 288 and 289; the Local Government and Planning Act 1980 Sch.32, Pt.I, §4; the Medicines Act 1968 s.107.

the Planning Act 2008. The Court held (§48) that s.13 had the effect of "*suspending*" the right of access to the court and the power of the court to perform its judicial review jurisdiction. There was not, however, a basis for giving s.13 a narrow meaning. The Court concluded that the clause was akin to the allocation of jurisdiction clauses considered in *Farley* and *A v B* – regulating the time rather than the forum in which a public law challenge could be brought – and should therefore be given its ordinary and natural meaning: §§47-48.

c. In *R (Application of Blue Green London Plan) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 495 (Admin), Ouseley J held that the High Court had no residual common law power to extend the statutory time limit prescribed by s.118 of the Planning Act 2008 for a judicial review challenge to a development consent order.

123. In the planning context, the courts have not hesitated to give effect to statutory provisions displacing the High Court's common law jurisdiction. No-one could sensibly suggest that the re-allocation of the High Court's common law supervisory jurisdiction in this way was constitutionally offensive.

124. In summary, another judicial body may fulfil the constitutional functions of interpreting the law and oversight of the Executive, provided that it is both independent and authoritative. The test of such independence and competence is not the source of the powers of review, but rather the institutional features of the body created to exercise the power of review.

125. A further concern of the rule of law is that the law should, so far as is practical, be consistently interpreted and applied. As noted by Baroness Hale and Lord

Dyson in *Cart*[59], the ability to appeal or judicially review a decision of an inferior court or tribunal furthers this rule of law concern by reducing the risk that serious errors of law go uncorrected or of development of "local law".

126. It is well established, however, that there is no absolute constitutional requirement for appeal or review of the decision of an inferior court or tribunal; a point expressly made by Lord Brown in *A v B*, who noted in relation to s.67(8) that "*there is no constitutional (or article 6) requirement for any right of appeal from an appropriate tribunal*": §24. For example, there is no requirement that decisions of the High Court, when exercising a limited, statutory jurisdiction as opposed to its common law supervisory jurisdiction, are amenable to appeal or judicial review. Yet, it has never been suggested that excluding a right of appeal from a species of High Court decision is open to "local law" objection.[60]

127. The Supreme Court in *Cart* held that the rule of law does not impose an absolute requirement that there is an appeal or review of an inferior court or tribunal. The Court concluded that appeal or review of a decision of the Upper Tribunal was not necessary in all cases and was not proportionate: see §51 per Lady Hale, §89

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[59] Per Lady Hale's at §§42-43 and Lord Dyson at §

[60] See, for example, *In re Racal* [1981] AC 374, where Lord Diplock held, p.383 E-G, that a decision of the High Court in exercise of a statutorily conferred jurisdiction (as opposed to its common law jurisdiction) could not be challenged by way of judicial review, despite the absence of any right of appeal, noting: "*Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all*". See also *Sheffield City Council v Kenya Aid Programme* [2014] QB 62, where the Court of Appeal considered the implications of s. 28A of the Senior Courts Act 1981, which precludes appeals by way of case stated from the magistrates' court in non-criminal cases. The claimant sought to pursue parallel judicial review proceedings alongside the statutory appeal to the High Court on the basis that the case raised a point of law of sufficient importance that it might be appropriate for the Court of Appeal to be able to consider it. The Court of Appeal refused permission on the basis that the clear parliamentary intention of ss.18(1)(c) and 28A(4) was that "*case stated appeals which would otherwise have been of sufficient importance to proceed to the Court of Appeal* [i.e. if the second appeals criteria were applied] *should none the less be subject to final determination in the High Court*": §§53-58. The Court of Appeal went on to state, however, that "*it may be that, in a truly exceptional case, such a claim could be allowed to proceed*".

per Lord Phillips and §§122-124 per Lord Dyson. As explained by Lord Dyson at §122, what the rule of law requires depends on careful analysis of the status and functions of the court or tribunal in question and the statutory scheme within which decisions are taken.

128. Lord Dyson went on to say there were three reasons why unrestricted judicial review of unappealable decisions of the Upper Tribunal was neither proportionate nor necessary for maintaining the rule of law: first, the status and functions of the Upper Tribunal; secondly, the fact that the Tribunals, Courts and Enforcement Act 2007 provided a structure for review of First-tier Tribunal decisions within the tribunal system; and, thirdly, the countervailing policy concern to make the best use of limited judicial resources: §123-124. Lord Brown emphasised the strength of this countervailing policy concern, stating at §100:

> *"The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff".*

129. Further, Art. 6 ECHR does not guarantee a right of appeal from a decision of a court (whether in a criminal or non-criminal case[61]). In Kennedy v United Kingdom, cited above, the EtCHR found the IPT to be compatible with Art. 6 ECHR, specifically noting at §77 of its judgment that there was "*no appeal from a decision of the IPT*". It nonetheless held that the IPT's procedures were compatible with Art 6 ECHR: see §167, and see to similar effect §§509-510 of Big Brother Watch, cited above.

130. There is thus no support for the Appellant's contention that it is an absolute requirement of the rule of law that "*serious questions of law*" come before a High Court so that a court or tribunal of limited jurisdiction should not be completely

[61] See e.g. Delcourt v Belgium (1970) 1 EHRR 355 at §25.

cut off from the Court system (Appellant's Grounds, §30 and see Appellant's Case at §§34-38). The Appellant refers to §§42-43 of Lady Hale's judgment in *Cart*. However, Lady Hale's starting point in *Cart* was that Parliament can legislate to exclude judicial review, provided it uses clear words to do so, as made clear at §37 and §40 of her judgment. She also accepted that, in most cases, the desirability of review of tribunal decisions by a superior court may give way to policy concerns about the use of limited judicial resources. To elevate her concerns about the development of "local law" to a "*principle*" that this cannot occur is an incorrect reading of her judgment.

131. In summary, what the rule of law requires depends on careful analysis of the status and functions of the court or tribunal in question and the statutory scheme within which decisions are taken. The possibility of review by superior courts may give way to other policy considerations; and whether it should do so is ultimately for Parliament to decide.

Academic commentary

132. The Appellant has drawn attention to some academic commentary on ouster clauses at §129 of its Written Case. As to that, the importance of looking at the language of the particular provision in its particular statutory context is supported by Mark Elliot (Professor of Public Law at Cambridge University)[62]. In a recent article on the interpretation of ouster clauses Professor Elliot observed that apparent divergences in the approach to ouster clauses across the cases are explained by differences in statutory context. This, he suggests, explains the effectiveness of the ouster clause in *R v Secretary of State for the Environment ex*

[62] *'Through the Looking-Glass? Ouster clauses, statutory interpretation and the British constitution'* (Legal Studies Research Paper Series, Paper No. 4/2018)

parte Ostler, notwithstanding the marked similarity in wording to the ouster considered in *Anisminic*:

> *"The better view, therefore, is that the contemporary reason for the effectiveness of Ostler-style ouster clauses is attributable not to the notion that they displace the inherent judicial review jurisdiction in respect only of certain ("jurisdictional") errors, but to the fact that the while displacing that jurisdiction in respect of all reviewable errors, any affront to constitutional principle is diminished by creation of a statutory power of review.*
>
> *This serves as a clear illustration, then, of the critical role played by context in the construction of ouster clauses. As already noted, the ouster clauses under consideration in (on the one hand) Anisminic and (on the other hand) Smith and Ostler were textually similar. However, the fact that the clauses in the latter two cases were accompanied by further provisions investing the High Court with statutory powers of review made all the difference."*

133. He went on to express support for the reasoning of the Court of Appeal in this case, suggesting it *"further illustrates the way in which constitutional context can influence judicial construction of ouster clauses".*

Implied repeal

134. The Appellant suggests (§§150-153 of the Appellant's Written Case) that Art. 19 of the Acts of Union 1706-7 and ss.19 and 29-31 of the Senior Courts Act 1981 ("SCA 1981") are constitutional provisions and therefore immune from implied repeal.

135. This new submission proceeds from a misunderstanding of the SCA 1981 and the nature of the common law judicial review jurisdiction. As explained by the Supreme Court in *General Medical Council v Michalak* [2017] 1 WLR 4193 (Lord Kerr giving the judgment of the Court) at §§32-33:

> *"32. The appellants' case misconstrues both section 31(1) of the Senior Courts Act and section 120(7) of the Equality Act 2010. It rests on a misunderstanding of the*

nature of judicial review. Judicial review is not a procedure which arises "by virtue of" any statutory source. Its origins lie in the common law. As Laws LJ said in R (Beeson) v Dorset County Council [2002] EWCA Civ 1812:

> *"The basis of judicial review rests in the free-standing principle that every action of a public body must be justified by law, and* ***at common law*** *the High Court is the arbiter of all claimed justifications." (at para 17) [emphasis added]*

See also the observations of Lady Hale in R (Cart) v The Upper Tribunal [2011] UKSC 28; [2012] 1 AC 663, para 37:

> *"... the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law - that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise.*

33. Section 31 of the Senior Courts Act did not establish judicial review as a procedure, but rather regulated it. The remedies remain the same as those under the prerogative writs. All that section 31 does is to require that applications for judicial review be brought by way of a new procedure under the rules of court."

136. The same logic must apply to s.19(2)(b); it does not constitute the common law judicial review jurisdiction.

137. As to the position in Scotland, the supervisory jurisdiction of the Court of Session post-dates the Acts of Union and the abolition of the Scottish Privy Council. It was left to the Court of Session to develop its supervisory jurisdiction through the common law – see e.g. West v Scottish Prison Service 1992 SCLR 504[63]. In those circumstances, Art. 19 does not constitute the source of the Court of Session's supervisory jurisdiction.

138. There is thus no inconsistency between these provisions of the SCA 1981 and the Acts of Union and a provision which ousts, reallocates or otherwise limits the supervisory jurisdiction of the High Court or the Court of Session. Were that not

[63] And see also *The Laws of Scotland: Stair Memorial Encyclopaedia (Administrative Law Reissue)* at §§2 & 4.

the case then the decision e.g. of the Supreme Court in *Cart* would have been different. There was no express repeal of the SCA 1981 in that case and yet it was held that judicial review of a decision of the Upper Tribunal was not necessary or proportionate in all cases and would only lie on second-tier appeals criteria grounds (see **§69** above). Similarly, in the Scottish context, the decision in *Eba v Lord Advocate* made no reference to Art. 19 of the Acts of Union. Yet the Supreme Court held that the availability of judicial review was restricted and only available where the second appeals criteria were satisfied (see §§99-100 above).

139. In any event, the Appellant's argument takes them nowhere. This is not a case of implied repeal. On the contrary, the wording of s.67(8) of RIPA specifically excludes judicial review such as to be clear and unambiguous. Thus, even if it could be said that these are *"rights granted by a constitutional statute"* (which is not accepted), the words which have been used are specific enough to meet the test as set out in the passage from the judgment of Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 cited at §153.3 of the Appellant's Case.

E. THE PROPER INTERPRETATION OF SECTION 67(8) RIPA

140. It is submitted that the effect of s.67(8) is to exclude the jurisdiction of the High Court in any application for judicial review of the IPT. This was the conclusion reached by the President in the Divisional Court, a unanimous Court of Appeal and a unanimous Supreme Court in *A v B*:

a. **First**, the wording of s.67(8) was evidently intended to, and on its natural meaning does, exclude the application of judicial review to decisions of the IPT.

b. **Secondly**, this interpretation promotes and gives effect to the purpose of RIPA – to enable the investigation, consideration and ruling on sensitive and

difficult issues connected with the exercise by the SIAs of their statutory powers on the basis of full evidence about their activities whilst ensuring that sensitive confidential information about those activities is not disclosed.

c. **Thirdly**, a number of features of the IPT regime – such as the powers of the IPT, its composition and its relationship with the High Court – support an interpretation of s.67(8) as excluding judicial review.

d. **Fourthly**, the exclusion of judicial review of decisions of the IPT is *"constitutionally inoffensive."* Indeed, the regime established by RIPA ensures that there is effective oversight of the exercise by SIAs of their statutory powers. It does so by channelling all issues to a bespoke tribunal, having at its disposal a panoply of special powers which the ordinary courts do no possess, thereby ensuring a degree of oversight of the SIAs that would not be available in the ordinary courts.

The natural meaning of s. 67(8)

141. Section 67(8), on its natural meaning, excludes all challenges to decisions of the IPT, save to the extent that appeals are authorised by the Secretary of State. The wording makes clear that this exclusion covers more than just appeals. The scope of the preclusion is governed by the final words of the section: *"shall not be subject to appeal or liable to be questioned in any court of law"*. These words are deliberately broad and split out the concept of judicial review – which falls within the words *"liable to be questioned in any court of law"* – from *"appeal"*.

142. As Sales LJ explained, in s.67(8) the Parliamentary draftsman has very evidently tracked every species of IPT decision-making – mirroring the language of *"determinations"*, *"awards"* and *"orders"* which have specific meanings in ss.67-68 of RIPA (see §35 of his judgment). *"Decisions"* is a compendious concept which

covers all the things the IPT might decide and is another indicator of the breadth of the words – as particularly emphasised by the words in parentheses.

143. Those words in parentheses in s.67(8) – i.e. *"(including decisions as to whether they have jurisdiction)"* – set the clause apart from other purported ouster clauses, including that which featured in *Anisminic*. As Sales LJ noted at §40, when using these words, Parliament was legislating against the backdrop of a well-established public law principle, that all errors of law relate to jurisdiction. These words thus make plain that Parliament has conferred on the IPT the power to finally decide all questions going to its jurisdiction, including even basic questions as to whether or not it has jurisdiction to embark on the determination of a matter.

144. Before the Court of Appeal, the Appellant suggested that the words in parentheses were confined to decisions as to whether or not the Tribunal has jurisdiction to hear a particular issue (CoA skeleton §48(f)) and that the effect of these words was 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"*. Sales LJ explained why this interpretation was inconsistent with both the words chosen by Parliament and the purpose of the IPT regime:

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

As Sales LJ noted, if the Appellant's interpretation was right, 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.[64]

145. 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 makes an error in the course of decision-making). Both will be excluded by the provision.

146. The result is the same even if the Appellant is correct in suggesting that "*jurisdiction*" as used in the words in parentheses, should be interpreted in the narrow, pre-*Anisminic* sense (i.e. in the sense described by Lord Reid at p.171C "*the narrow and original sense of the tribunal being entitled to enter on the inquiry in question*"). Even on this interpretation, it is clear from the use of the word "*including*" that the preclusion is broad because Parliament is merely giving an example of the type of error which is excluded. Even a fundamental error as to whether the IPT was entitled to embark on the inquiry in question is precluded i.e. they are given exclusive "*kompetenz kompetenz*".

147. Further it would be surprising, to say the least, if challenges affecting jurisdiction in the narrow, pre-*Anisminic* sense were not susceptible to review, whilst some other species of challenge not affecting jurisdiction were.

148. Before this court, the Appellant now seeks to attribute an even narrower meaning to the words in parentheses, suggesting that they are concerned with

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[64] Baroness Hale was of the view that returning to such "*technicalities of the past*" would be a retrograde step (§40). Similarly, Lord Dyson referred to the distinction as "*artificial and technical*" (§111), citing with approval the editors of De Smith's *Judicial Review* 6th Edition (2007) at 4-046: "*It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based on foundations of sand. Much of the super-structure had already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply, lawful, whether or not jurisdictionally lawful.*"

"ensuring that jurisdictional questions under s.65 are not issues of precedent fact and can only be challenged on the basis of an error of law" (Written Case, §89). But the words which Parliament has chosen to use are inconsistent with it having intended to draw difficult distinctions between errors of law going to jurisdiction and errors of fact going to jurisdiction and there would be no logical or policy basis for excluding the former but not the latter. These difficulties are well illustrated by the example given by the Appellant in its skeleton below – a decision by the IPT as to whether an act complained of did or did not relate to *"the interception of communications in the course of their transmission"* within the meaning of s.65(5)(b) could clearly raise questions of both fact and law. Indeed it is evident from a review of the IPT's past decision-making that the jurisdictional gateways identified in s.65 of RIPA will often involve mixed questions of fact and law (see e.g. *C v The Police* IPT/03/32/H discussed at §17 above). It is inconceivable that Parliament would have intended to exclude judicial review of such a decision on the basis of a factual determination whilst allowing such a challenge on a question of law.

149. Moreover, it would be odd, to say the least, for Parliament to put errors of law going to jurisdiction outside the reach of the provision, but make errors of fact going to jurisdiction within it. That ignores the fact that the boundary between fact and law can be difficult and particularly so in this particular context where the facts will remain largely (if not exclusively) in closed, as Parliament can be taken to have anticipated when RIPA was enacted. A recent example of that is to be found in the IPT's judgment in the *Liberty/Privacy* complaints which considered the Art. 8 ECHR compatibility of the intelligence sharing and interception regimes. As part of that consideration, the IPT considered *"below the*

waterline" safeguards when determining whether the regime contained sufficient safeguards against abuse (as part of the Art. 8(2) analysis)[65].

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

151. Finally, as to the suggestion that there is some significance to the timing of the decision of the Court of Appeal in *R (Khawaja) v SSHD* [1984] AC 74 (dealing with challenges on the grounds of precedent fact in immigration decisions involving "illegal entrants") and the introduction of the Interception of Communications Act 1985 (see Written Case, §88.5-88.6), this is pure speculation on the Appellant's part. The Appellant has not been able to point to anything in the legislative history of the 1985 Act to suggest that this immigration decision influenced the legislation in this very different context.

Differences between s.67(8) and *Anisminic*

152. The Appellant contends that s.67(8) does not exclude review of "*purported*" determinations or decisions of the IPT on grounds of error of law because a decision or determination vitiated by an error of law is not a determination or

[65] As made clear by the IPT at §32 of its Note for the Divisional Court (**Appendix, page 356**), 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.

decision at all. As explained at §§91-101 above, this is not a correct understanding of *Anisminic* or the subsequent cases. That approach is seriously at odds with conventional public law principles and the presumption that a decision is valid unless set aside by a court of competent jurisdiction.

153. Accordingly, there need be no reference to *"purported decisions"* in s.67(8) in order for that provision to be effective. The question is whether Parliament intended to confer on the IPT power to make final decisions, including the possibility that it might err in law. For the reasons explained above, that is precisely what the words in parentheses make clear. As noted by Sales LJ at §34:

> *"the drafter of section 67(8) has expressly adverted to the possibility of the IPT making an error of law going to its jurisdiction or power to act, by the words in parenthesis in that provision. Therefore, at least so far as the word "decision" is concerned, it is not tenable to apply the simple distinction relied upon in Anisminic in the context of section 4(4) of the 1950 Act between a "determination" and a purported determination, in the sense of a determination made without jurisdiction. In section 67(8), the word "decision" is stated to include a decision which (if judicial review or any appeal were available) might be found to have been made without jurisdiction because of an error of law on the part of the IPT, that is to say, if one wants to use this phrase a purported decision."*

154. Thus, correctly understood, not only is use of the word *"purported"* unnecessary to exclude review of errors of law, the use of the word would be inconsistent with Parliament's clear intention: to confer on the IPT the power to make decisions about their jurisdiction that are valid, notwithstanding errors of law or fact, unless successfully appealed in accordance with the appeal provisions provided for by RIPA.

155. As the Supreme Court noted in *A v B* (see further below), the two clauses are not the same – s. 67(8) was *"unambiguous"*, in contrast to the clause in *Anisminic* (see §23). The key differences are as follows:

a. In RIPA Parliament has made plain that all aspects of the IPT's decision-making (tracking the language of RIPA) shall not be challenged whether by way of appeal or by way of questioning in any Court. 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[66].

b. In s.67(8) Parliament has included important words in parentheses (which did not feature in *Anisminic*) i.e. *"(including decisions as to whether they have jurisdiction)"*.

c. The statutory context in *Anisminic*, as compared with RIPA/IPT, is fundamentally different (as discussed in detail below). There was no suggestion in *Anisminic* that the FCC was of like standing and authority to High Court and there was nothing equivalent to the security context and the very specialist powers and processes (unmirrored in the High Court) which are operated by the IPT. Nor was there any suggestion that the FCC in *Anisminic* was part of a carefully crafted scheme (of which the IPT is one part) of oversight over the actions of public authorities.

The statutory context of s.67(8)

156. As explained in detail above, the IPT regime was established to allow claims against the intelligence services and other public bodies exercising intrusive powers, to be determined on the basis of full evidence about their activities, whilst ensuring that sensitive confidential information about those activities would not be disclosed. Parliament evidently and understandably concluded that such cases are not suitable for determination through the normal court process.

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

Instead, a carefully crafted regime – including a bespoke tribunal which has at its disposal a panoply of specialist powers which ordinary courts (including the High Court) do not possess – was created by Parliament to deal with them. It also sits within a carefully crafted scheme of checks and balances which work together to provide important oversight of the exercise of sensitive intelligence gathering powers.

157. An interpretation of s. 67(8) as restricting the means by which decisions of the IPT may be challenged in the High Court is fundamental to achieving this purpose - and that purpose would be positively subverted if the Appellant's interpretation were correct. As Sales LJ stated at §§43-44:

> *"43. Interpretation of section 67(8) as set out above gives it a meaning which promotes this purpose. To construe section 67(8) as allowing judicial review of determinations and decisions of the IPT would subvert it. It would mean that despite the elaborate regime put in place to allow the IPT to determine claims against the intelligence services in a closed procedure while guaranteeing that sensitive information about their activities is not disclosed, judicial review proceedings could be brought in which no such guarantee applied.*
>
> *44. It is worth emphasising how far the subversion of Parliament's purpose would go, if the construction urged by the appellant were correct. There is no neat, absolute division between points of law and points of fact in judicial review proceedings. For example, it is open to a claimant who brings such proceedings to allege that a public body has made a decision which is irrational or disproportionate, having regard to all the evidence in the case. It is open to a claimant to allege that a decision has been made which is unsupported by any evidence or which is contradicted by evidence in the case. Such claims may require the reviewing court to examine all the evidence which was before the decision-making body. As observed above, the operation of the rules on public interest immunity in court proceedings does not afford the same guarantee of non-disclosure of information damaging to the public interest as rule 6(1) of the Rules."*

158. It is also no answer to say that the High Court has available to it powers which would permit it to deal "appropriately with closed material" (Appellant's Case §119).

159. **First**, the Justice and Security Act 2013 ('JSA 2013') was not in existence in 2000 and therefore cannot have been within the contemplation of Parliament when RIPA and s.67(8) was enacted.

160. In any event, there is a mismatch between the IPT's powers and those which the Administrative Court could exercise under the JSA 2013. The closed material the IPT can consider is broad (and includes e.g. material which would be damaging to the prevention or detection of serious crime)[67]. In contrast, the JSA 2013 only applies to closed material which is *"damaging to the interests of national security"* (s.6(11) JSA 2013).

161. **Secondly**, the decision in *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 can be distinguished. An integral part of the reason why a closed material procedure (CMP) was able to be accommodated by the judicially reviewing court in that case[68] was because of *"Parliament's evident understanding and intention as to the basis on which judicial review should operate [i.e. with a CMP]"* see §59 per Lord Mance's at p.271H. But the position is different in the RIPA/IPT regime where s.67(8) has made clear Parliament's contrary intention, namely that decisions of the IPT are not to be challenged in judicial review proceedings at all, whether with a CMP or otherwise. There was no such equivalent to s.67(8) in the statutory regimes being considered in *Haralambous*.

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[67] 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).

[68] Where there were challenges to warrants under PACE 1984, or applications for the retention of seized property under s.59 of the Criminal Justice and Police Act 2001.

162. **Thirdly**, and in any event, the *Haralambous* development in the case law could not have been reasonably anticipated by Parliament when RIPA was enacted in 2000. As stated by Lord Reid in *Rookes v Barnard* [1964] AC 1129: *"In construing an Act of Parliament we are attempting to find the intention of Parliament. We must find that intention from the words which Parliament has used, but these words must be construed in the light of the facts known to Parliament when the Act was passed. One assumes that Parliament knows the law, but if the law is notoriously uncertain we must not attribute to Parliament prescience of what the law will ultimately be held to be."*[69]

163. In terms of the use of CMPs, Lord Dyson's speech in *Al-Rawi v Security Service* [2012] 1 AC helpfully summarises the case law in which the use of some form of CMP had been considered (see §§51-59). All of those cases post-date RIPA by several years and a number were criminal cases. As Lord Dyson explained, none of those cases provided support for the proposition that a court could entertain a CMP, absent statutory authority to do so and the Supreme Court was clear in *Al-Rawi* that a CMP was not appropriate even in judicial review proceedings – see §62, 67, 69 (per Lord Dyson). Following *Al-Rawi*, the court addressed judicial review proceedings specifically in *R (AHK) v Secretary of State for the Home Department* [2014] Imm AR 32 (Ouseley J) and concluded that it was not open to the court to hold a CMP.

164. Whilst there were cases which suggested that a "presumption of regularity" might be applied (see *R v Inland Revenue Commissioners ex parte Rossminster* [1980] AC 592[70]) and some cases (post-dating RIPA) where the claim had simply been struck out as untriable (per *Carnduff v Rock* [2001] 1 WLR 1786 and see also *AHK*), none of those provided for substantive adjudication of the merits of a judicial review by reference to closed material, as might be necessary to properly

[69] And see also Lord Devlin at p.1216.

[70] See also the line of cases discussed in *Haralambous* at §§48-49.

determine a judicial review of an IPT decision. As Lord Mance stated in *Haralambous*, the result reached in the *Rossminster* line of authority was "unattractive" because it could deprive judicial review of "any real teeth" (§52).

165. In addition, the use of Public Interest Immunity ("PII") could not reasonably have been anticipated given the sensitive material which is integral to the IPT's work, since if a PII application is upheld, the consequence is that the closed material is excluded from the court's consideration[71].

166. **Fourthly**, there are very strong pointers in the RIPA regime that Parliament did not envisage that a CMP could be adopted, absent statutory authority to do so. In particular, the appeal provisions in s.67(9), when read with s.67(10) of RIPA, make clear that any appellate tribunal or body may need to have equivalent protections and powers corresponding to those operated by the IPT, including its specialist rules, as provided for in s.69 of RIPA. That strongly suggests that Parliament did not anticipate challenges from IPT decisions being able to be heard by bodies which did not have the same specialist statutory powers.

167. To that end it is important to note two particular features of the IPT regime which protect the sensitive material it is designed to handle and which make it highly unlikely Parliament would have envisaged that a CMP (without bespoke statutory authority/rules) could be operated by any reviewing court. Under Rule 6(1) the IPT has an express 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"*. This is reinforced by Rule 6(2) and

[71] See, for example, *CF & Mohammed v Security Service & Others* [2014] 1 WLR 1699 at §§52-62 and *Ignaoua v Secretary of State for the Home Department* [2014] EWHC 1382 (Admin) at §32.

6(3) the effect of which is that no disclosure can be made by the IPT to a complainant unless the consent of the relevant person providing the information or document has been given. In addition, and as discussed at §34 above, the IPT's determinations are framed in a way which preserves the neither confirm nor deny policy (see s.68(4)), and so as not to damage the public interest by permitting those who have been the subject of lawful operation of intrusive powers to discover whether they have been of interest e.g. to the SIAs or law enforcement agencies. As Sales LJ emphasised in the Court of Appeal (see §8), in contrast to what occurs in the ordinary courts, including where there are applications for PII, the IPT is not entitled to balance the public interest in non-disclosure against an individual litigant's interest in having the evidence disclosed to him.

168. These particular features of the IPT regime make plain that Parliament would not have anticipated in 2000 that judicial review of a body specifically empowered to consider (and protect) sensitive material would have been possible or practicable.

169. **Finally**, in terms of the statutory context, the Appellant places significant reliance on the fact that the jurisdiction of the Tribunal goes beyond the SIAs and extends to (Written Case §§23, 112-114) e.g. local authorities' use of intrusive powers including directed surveillance (§114). Whilst the Appellant is right to point out the breadth of the IPT's jurisdiction, this is nothing to the point in terms of the proper interpretation of s.67(8). The common theme across all of the bodies falling within the umbrella of the IPT's jurisdiction, is the exercise of powers of intrusion, which, if lawfully conducted, have to remain covert if they are to be effective in the public interest. RIPA is the statute that establishes and regulates such covert powers and e.g. in Part II of RIPA sets out a permissive regime which does not mandate action by a public authority, but provides public authorities

with a way to demonstrate that their conduct is lawful and compliant with Art. 8 ECHR. Such powers can only be exercised lawfully 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 the economic well-being of the UK or for the purpose of protecting public health. It follows that Parliament's evident intention was to provide a body which was capable of overseeing the lawful operation of such powers, whilst having the necessary specialist procedures in place to keep such material secure, where necessary in the public interest. It follows that the points made by Sales LJ at §42 of his judgment are equally applicable whether the IPT is considering complaints against the SIAs or e.g. local authorities, exercising these intrusive powers.

Important features of the IPT regime

170. As well as promoting the statutory purpose, there are also contextual features of the IPT regime which point to an interpretation of s. 67(8) as excluding judicial review.

The powers of the IPT

171. The breadth of the powers conferred on the IPT support this conclusion. For example, Parliament has been specific about the types of determinations which can be made by the IPT at the conclusion of its proceedings, recognising the importance of maintaining secrecy in the work of the SIAs. As set out at §34 above, the statutory scheme limits the nature of its determinations; including confining them to a statement that there is *"no determination in favour"* in appropriate circumstances (s.68(4)). That again points to Parliament's clear intention that the scheme should be a final and conclusive one, since other courts

(including the High Court) would not be subject to the same statutory constraints.

172. In addition, 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[72]. 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.

Composition of the court

173. Members of the Tribunal must either hold or have held high judicial office, or be a qualified lawyer of at least 7 years' standing[73] and the President of the Tribunal must hold or have held high judicial office[74]. 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 p.84C-D.

The standing of the IPT

174. The IPT is not part of Her Majesty's Courts and Tribunal Service (see §8 above). Its relationship with the Commissioners and with the Prime Minister in certain circumstances (see e.g. s.68(5) RIPA) and the fact that it sits alongside e.g. the ISC, sets it apart from other Courts or tribunals[75]. It is one important part of a multi-faceted scheme of checks and balances and it does not sit alone in holding public bodies exercising intrusive powers to account.

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[72] 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*.

[73] §1(1) of Sch. 3 to RIPA.

[74] §2(2) of Sch. 3 to RIPA.

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

The status of the IPT as a body of like standing to the High Court

175. As noted by the President in his judgment at first instance (§41), Parliament has created in the IPT a body of like standing to the High Court to provide a similar oversight function in relation to the SIAs as the High Court would in relation to ordinary branches of the Executive[76]. The establishment of a body of like standing and authority to the High Court, but subject to special procedures apt for the specialist and unique context in which it operates – is entirely consistent with the exclusion of judicial review of decisions of the IPT. By contrast, the availability of judicial review of decisions of the IPT would be straightforwardly inconsistent with this approach, duplicating the oversight of the SIAs whilst subverting the special protections provided by the IPT and RIPA regime.

Relationship between the IPT and the High Court

176. Another key feature of the regime under RIPA is that Parliament has made provision in s. 67 for challenging decisions of the IPT by way of an appeal in specified cases.

177. Section 67(9) of RIPA provides that the Secretary of State must, by order, make provision for appeals from the IPT in certain categories of case (not engaged in the present context) (see §15 of the judgment)[77]. As highlighted by the President in the Divisional Court at §34 of his judgment, such provision "*would not have*

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[76] See to similar effect Laws LJ in A v B at §41 cited by Lord Brown SJC in A v B.

[77] Those provisions have not, to date, been brought into force. However that is not relevant to the construction of RIPA at the time it was enacted. As stated in *Bennion on Statutory Interpretation* (6th edn) at section 231 "*Nothing that happens after an Act is passed can affect the legislative intention at the time it was enacted*" – p.654. As *Bennion* also states, uncommenced legislative provisions may be relevant – or indeed integral – to Parliament's intention when enacting legislative scheme. They therefore remain relevant to the construction. See, for example: Re S (infants) [1977] Fam 173, at p.177 per Omrod J: "*It is undoubtedly embarrassing to the exercise of a discretionary power to find on the statute book a provision which appears to be an expression of the views of Parliament on a relevant matter, which is not to become effective until some later and indeterminate date. In circumstances such as these, the judge cannot be criticised for, at least, bearing in mind the philosophy behind such a provision.*"

been necessary had there been a wider route of challenge open, not only in those cases but also in every other case". The fact that there were routes of appeal against certain IPT decisions made it unlikely that Parliament would have envisaged that its decision-making would be subject to judicial review on a much wider basis. Put another way, it is improbable that, in providing this appeal route, Parliament intended merely to open the door to appeals on the facts in those categories of case, in circumstances where (on the Appellant's case) errors of law could already be corrected by means of judicial review.

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

179. In summary, it is submitted that Parliament deliberately and carefully constructed a system for judicial oversight of exercise of statutory powers by the SIAs that is not amenable to review by the High Court.

Consistency of the IPT regime with the rule of law

180. Parliament took great care to create in the IPT those features required to fulfil the central requirements of the rule of law, namely access to an independent impartial and authoritative judicial body to ensure actions of the SIAs (and other public bodies exercising intrusive powers) are in accordance with the law. That the IPT satisfies all of these requirements will be clear from the features set out above, including the qualifications required of members of the IPT and the fact that the IPT is required by ss. 67(2) and 67(3)(c) of RIPA, when exercising its functions, to apply the same principles *"as would be applied by a court on an application for judicial review"*.

181. It is also of note that there are significant advantages of the IPT regime, including for complainants. These include the following (see the IPT Report 2011-2015 at pp.6, 15-17 **Appendix p.454, 463-465**):

a. The time limit for applying to the IPT (1 year) is more generous than that which would ordinarily apply in judicial review proceedings and is subject to an equitable discretion to extend (s.67(3)(c)) (see §16 above);

b. The Tribunal is free of charge and even if an individual loses a case, the Tribunal has never awarded costs to the public authority being complained about (see IPT Report 2011-2015 at p.6);

c. In terms of confidentiality, the Tribunal needs the complainant's permission to disclose any details about the complaint and can only disclose the complainant's name, address and date of birth to the organisation they are complaining about (see IPT Report 2011-2015 at p10 and the provisions of Rule 6 of the IPT Rules). It can also protect the identities of other people if harm is likely to be caused. It has done so, for example, by giving anonymity to witnesses who would, for good reason, not in other circumstances give evidence (see IPT Report 2011-2015 p.6, 9-10).

d. 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.

182. As to any concerns about the development of "local law", these are met, not least by the specialist constitution and powers of the IPT and its place in a carefully balanced scheme of oversight:

a. The danger of "local law" is one which, if it realistically exists, is a policy judgement for Parliament. But the policy intention behind the exclusivity of the IPT is clear – there needs to be a specialist tribunal which has the powers to oversee the work of the SIAs and it is inappropriate for that body to be overseen by bodies without equivalent powers. As Dyson LJ noted in *A v B*[78], 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.
b. In this particular specialist context, that danger is significantly mitigated by the IPT being of like standing and authority to the High Court (i.e. sitting with one, and sometimes two, High Court Judges).
c. It is also mitigated by the other systems of oversight which are built into the regime, including by the Commissioners, the ISC and under the RIPA regime itself, in terms of e.g. the warrantry safeguards which must be satisfied for SIA activity to be carried out.
d. In practice the development of the Art. 8 ECHR case law is also heavily influenced by the Strasbourg case law and there is a dialogue between the IPT (as the bespoke domestic tribunal) and Strasbourg (and the CJEU); as is

[78] In the Court of Appeal at §48.

evident from the recent *Big Brother Watch* (and *Privacy International*) cases (see §§46-49 above).

The decision of the Supreme Court in *A v B*

183. In *A v B* [2010] 2 AC 1 the Supreme Court considered whether RIPA (and in particular s.65(2)(a)) had conferred exclusive jurisdiction on the IPT to hear claims under s.7(1) HRA against any of the intelligence services. Lord Brown gave the judgment of the Court, with whom all other members of the Supreme Court agreed. As noted by the President at §27 of his judgment, the Court set out the *"legislative provisions most central to the arguments"*. These included s.67(8) of RIPA 2000 (see §3 and §5). The Court then emphasised the specialist nature of the IPT regime. At §14 (quoted by the President at §27) they stated:

> *"There are, moreover, powerful other pointers in the same direction. Principal amongst these is the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination). There are, however, a number of counterbalancing provisions both in RIPA and the Rules to ensure that proceedings before the IPT are (in the words of section 69(6)(a)) "properly heard and considered". Section 68(6) imposes on all who hold office under the Crown and many others too the widest possible duties to provide information and documents to the IPT as they may require. Public interest immunity could never be invoked against such a requirement. So too sections 57(3) and 59(3) impose respectively upon the Interception of Communications Commissioner and the Intelligence Services Commissioner duties to give the IPT "all such assistance" as it may require. Section 18(1)(c) disapplies the otherwise highly restrictive effect of section 17 (regarding the existence and use of intercept material) in the case of IPT proceedings. And rule 11(1) allows the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law". **All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases,***

disputes can be properly determined. None of them are available in the courts. This was the point that so strongly attracted Dyson LJ in favour of B's case in the court below. As he pithily put it, *ante, p 19, para 48:*

"It seems to me to be inherently unlikely that Parliament intended to create an elaborate set of rules to govern proceedings against an intelligence service under section 7 of the 1998 Act in the IPT and yet contemplated that such proceedings might be brought before the courts without any rules." (emphasis added)

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

a. RIPA, the HRA and the Civil Procedure Rules had come into force at the same time as part of a *"single legislative scheme"*.

b. The exclusive jurisdiction given to the IPT did not take away a pre-existing common law right to access the courts and, for that reason, did not amount to an ouster of the ordinary jurisdiction of the courts anyway.

c. Parliament had not ousted judicial scrutiny of the acts of the intelligence services, it had simply *allocated* that scrutiny to the IPT. The IPT was not a court of inferior jurisdiction. It was rather a specialist tribunal with special procedures apt for the subject matter in hand.

185. 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)

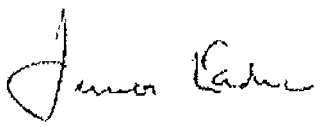
186. Even if the Supreme Court's conclusions on s.67(8) were *obiter* (see the President at §30), they are highly persuasive given that s.67(8) was one of the legislative provisions most central to the arguments in that case (see §3 and §5).

F. CONCLUSIONS

187. It is submitted that the appeal should be dismissed for the following amongst other reasons:

(1) The Court of Appeal correctly held that that s.67(8) prevents the High Court from entertaining a claim for judicial review of a decision of the IPT.

(2) There is nothing constitutionally offensive about legislative arrangements whereby Parliament reallocates the High Court's judicial review jurisdiction to a judicial body that is both independent of the Executive and capable of providing an authoritative interpretation of the law.



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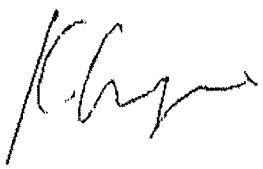

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1 November 2018

ANNEX 1: TABLE OF AUTHORITIES

Case	Clause (if applicable)	Statement as to Parliament's Ability to Exclude or Limit Review
Smith, Lluellyn v Commissioners of Sewers 86 ER 719; [1669] 1 Mod 44 Court of King's Bench	Statute of 23 Hen. 8 c.5: Orders of the Commissioners of sewers *'shall not be reversed but by other commissioners'*	Kelynge CJ at 720, 45: *'Yet it was never doubted, but that this Court might question the legality of their orders notwithstanding: and you cannot oust the jurisdiction of this Court without particular words in Acts of Parliament. There is no jurisdiction that is uncontroulable by this Court'*
R v Plowright 87 ER 60; [1685] 3 Mod 94 Court of King's Bench	Statute 16 Car 2 c. 3: *'That if any question shall arise about the taking of any distress, the same shall be heard and finally determined by one or more justices of the peace near adjoining, & c.'*	The Court at 95: *'The statute doth not mention any certiorari which shews that the intention of the law-makers was, that a certiorari might be brought, otherwise they would have enacted, as they have done by several other statutes, that no certiorari shall lie'*
Berkley v Bragge [1754] 1 Keny 80	Statute of 12 Car. 2 This was reported by Ryder CJ at 84 - 85: *'The next objection arises from the two clauses in the latter end of the Acts of 12 Car. 2, c. 23 and 24, whereby it is expressly enacted, that no certiorari shall supersede any order made by the justices in pursuance of those Acts'*	Wright J at 102: *'There can be no doubt but the King has a right, an inherent common law right, an antecedent right, to have a certiorari; if so, it cannot be taken from him, but by Act of Parliament. ... and it seems admitted, and must be so, that no antecedent right, or prerogative, can be taken away, but by the express words, or the evident meaning of an Act of Parliament'*
R v Moreley [1760] 2 Bur 1041	Conventicle Act for the Suppression of Non-Conformism (22 Car 2 c 1): Section 6: *'that no other Court whatsoever shall intermeddle with any cause or causes*	The Court at 1042: *'The jurisdiction of this court is not taken away, unless there be express words to take it away: this is a point settled'*

	of appeal upon this act: but they shall be finally determined in the quarter-sessions only' Section 13: *'... no record, warrant, or mittimus to be made by virtue of this Act, or any proceedings thereupon, shall be reversed, avoided or any way impeached, by reason of any default in form'*	
Rex v Jukes [1800] 8 Term Rep. 542	The report is somewhat unclear but it would seem that the precise words of the full provision were not included in the report of the decision. However see the report of counsel's arguments noted at 543: *'B. Morice then objected: that the defendant having elected to appeal to the sessions, the certiorari was in effect taken away by the act, because it is said that the determination of the session should be final (c)'* The citation at (c) refers to 's. 9'	Kenyon CJ at 544 – 545: *'for the certiorari being a beneficial writ for the subject could not be taken away without express words; and he thought it was much to be lamented in a variety of cases that it was taken away at all'*
Rex v Cashiobury Hundred Justices [1823] 3 Dow. & Ry. 35	The report of the case is brief and there is no full outline within the report of the precise terms of any ouster clause.	The Court noted at 35: *'The Court said, on the authority of Rex v Liston (a), that unless the objection appeared on the face of the conviction itself, no notice could be taken of it. And referring generally to penal statutes, they observed that this was the governing principle with respect to the writ of certiorari, and the right of appealing to the Sessions, namely, that certiorari always lies, unless it is expressly taken away, and an appeal never lies unless it is expressly given by the statute'*

R v Cheltenham Commissioners [1841] 1 QB 467, 113 ER 1211	Paving Act (1 & 2 G. 4, c. Cxxi) Section 134: *'the determination of the said justices in their said General Quarter Sessions, or adjournment thereof, shall be final, binding and conclusive to all intents and purposes whatsoever'* See also Section 136	The Court contemplated that there were circumstances in which Parliament could validly legislate to exclude certiorari. Patteson J at 478: *'Many attempts have lately been made – indeed there is a perpetual endeavour – to get rid of clauses which take away certiorari, by impugning the jurisdiction. Such attempts we ought carefully to watch; otherwise the clauses would be rendered nugatory'*
Ex Parte Bradlaugh [1878] 3 QBD 509	An Act for Regulating the Police Courts in the Metropolis (2 & 3 Vict c 71) Section 49: *'no information, conviction, or other proceeding before or by any of the said magistrates, shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench'*	As with *Cheltenham Commissioners*, the Court contemplated that there were circumstances in which Parliament could validly legislate to exclude certiorari. Cockburn CJ at 512: *'It was contended that the certiorari is taken away by 2 & 3 Vict. C. 71, s. 49. I entertain very serious doubts whether that provision does not apply only to matters in respect of which jurisdiction is given by subsequent statutes; but it is not necessary to deal with that point'*
R v Chancellor of St. Edmundsbury and Ipswich Diocese, Ex p White [1948] 1 KB 195	This did not turn on an ouster but the Court considered the degree to which it had jurisdiction to grant a certiorari in relation to an ecclesiastical court	Wrottesley LJ at 212: *'It is not as though the ecclesiastical courts were a new jurisdiction created by Act of Parliament administering the common law; to such courts, it is clear that certiorari would lie, unless expressly excluded'*
Smith v East Elloe RDC [1956] AC 736	Part IV of Schedule I to the Acquisition of Land (Authorisation Procedure) Act 1946, Section 16: *'Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part*	Viscount Simonds at 750 – 751: *'I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it*

	III of this Schedule shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph'	*quite impossible to qualify the words of the paragraph in the manner suggested … What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words'*
R v Medical Appeal Tribunal ex parte Gilmore [1957] 1 QB 574	S. 36(3) National Insurance (Industrial Injuries) Act 1946: *'Except as provided by this Part of this Act or by the Family Allowances Act, 1945, as applied by paragraph (b) of subsection (1) of this section, any decision of a claim or question as provided by the foregoing provisions of this section shall be final'*	Denning LJ at 583: *'It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is no enough. That only means "without appeal"'* Parker LJ at 588: *'It is an important jurisdiction, and though no doubt Parliament has the power in any case to deprive the courts of this supervisory jurisdiction it could, as I conceive the position, only do so by clear words'*
Anisminic v Foreign Compensation Commission [1969] 2 AC 147	S. 4(4) of the Foreign Compensation Act 1950 *'the determination by the commission of any application made to them under this Act shall not be called in question by any court of law'*	Lord Wilberforce at 207: *'It is now well established that specialised tribunals may, depending on their nature and on the subject-matter, have the power to decide questions of law, and the position may be reached as the result of statutory provision, that even if they make what the courts might regard as decisions wrong in law, these are to stand'*
McDaid v Clydebank DC [1984] SLT 162	s. 85(10) Town and Country Planning (Scotland) Act 1972: *'The validity of an enforcement notice shall not, except by way of an appeal under this section, be questioned in any proceedings whatsoever on any of the grounds specified*	Lord Cameron at 167: *'It is trite law that an exclusion of the jurisdiction of the courts can only be effected by the clearest legislative provision … To deprive a person of a legal right - in this case the right of appeal to the Secretary of State specifically given by Parliament - is a serious matter, but it becomes doubly so if at the same time and by the same*

	in paragraphs (b) to (e) of subsection (1) of this section'	*action recourse to the courts is to be denied a citizen aggrieved by the breach by an executive authority of its statutory duty. Such a grave deprivation could only be brought about by the plainest legislative provision and in the clearest and most unambiguous terms.*
R v Hull University Visitor ex parte Page [1993] AC 682	The Court did not consider the terms of an ouster as such; instead it focused on the exclusivity of the jurisdiction of 'visitor of the university'	Lord Griffiths at 693: *'But despite this general rule Parliament can if it wishes confine a decision on a question of law to a particular inferior court and provide that the decision shall be final so that it is not to be challenged either by appeal or by judicial review'* Lord Griffiths at 693 – 694: *'The decision in In re A Company shows that Parliament can be 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'*
R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475	S. 54(4) Access to Justice Act 1999: *'No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court)'*	Lord Phillips at paragraph 44: *'Nearly 50 years ago Denning LJ stated in R v Medical Appeal Tribunal ex parte Gilmore [1957] 1 QB 574 at p.585 that "the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words". All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication'*
R (Jackson) v Attorney General [2006] 1 AC 262	The focus of the case was in relation to a different question of constitutional importance rather than that of the interpretation of ouster clauses as such.	Baroness Hale at paragraph 159: *'The concept of parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century (I appreciate that Scotland may have taken a different view)*

		means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny'
R (Cart) v Upper Tribunal (Div Court); R (U) v SIAC [2010] 2 WLR 1012	S. 1(3) Special Immigration Appeals Commission Act 1997: *'The commission shall be a superior court of record'* S. 3(5) Tribunals, Courts and Enforcement Act 2007: *'The Upper Tribunal is to be a superior court of record'* S. 1(4) Special Immigration Appeals Commission Act 1997: *'A decision of the commission shall be questioned in legal proceedings only in accordance with (a) section 7, or (b) section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)'*	Laws LJ at paragraph 31: *'In my judgment the proposition that judicial review is excluded by sections 1(3) and 3(5) is a constitutional solecism. The supervisory jurisdiction (to the extent that it can be ousted at all: itself a question to which I will return) can only be ousted "by the most clear and explicit words": see per Denning LJ in R v Medical Appeal Tribunal, Ex p Gilmore [1957] 1 QB 574, 583'*
R (Cart) v Upper Tribunal ; R (U) v SIAC [2011] QB 120	As above	Sedley LJ at paragraph 20: *'In our judgment, as in that of the Divisional Court, the supervisory jurisdiction of the High Court, well known to Parliament as one of the great historic artefacts of the common law, runs to statutory tribunals both in their old and in their new incarnation unless ousted by the plainest possible statutory language. There is no such language in the 2007 Act. The statute*

		invests with standing and powers akin to those of the High Court a body which would otherwise not possess them precisely because it and the High Court are not, and are not meant to be, courts of co-ordinate jurisdiction.'
R (Cart) v Upper Tribunal (Supreme Court) [2012] 1 AC 663	S. 3(5) Tribunals, Courts and Enforcement Act 2007: *'The Upper Tribunal is to be a superior court of record'*	Baroness Hale at paragraph 37: *'there is nothing in the 2007 Act which purports to oust or exclude judicial review of the unappealable decisions of the Upper Tribunal. Clear words would be needed to do this and they are not there. The argument that making the Upper Tribunal a superior court of record was sufficient to do this was killed stone dead by Laws LJ and has not been resurrected'* Baroness Hale at paragraph 40: *'Thirdly as Lord Wilberforce pointed out, at p 207, it does of course lie within the power of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer: "the position may be reached, as the result of statutory provisions, that even if they make what the courts might regard as decisions wrong in law, these are to stand". But there is no such provision in 2007 Act. There is no clear and explicit recognition that the Upper Tribunal is to be permitted to make mistakes of law.'*
R (Woolas) v Parliamentary Election Court [2012] QB 1	S. 144(1) Representation of the People Act 1983: *'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*	Thomas LJ at paragraph 47: *'However, the fact that the decision of an election court as a judgment declaring the status of the election is a judgment in rem and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that*

	was void, and the determination so certified shall be final to all intents as to the matters at issue on the petition'	*Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required.'*
Lee v Ashers Baking Company Ltd [2018] 3 WLR 1294	s. 61(7) County Courts (Northern Ireland) Order 1980: *'the decision of the Court of Appeal on any case stated under this article shall be final'*	Lord Mance at paragraph 88: *'It would require much clearer words – and they would, clearly, be unusual and surprising words – to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law'.*

ANNEX 2

COMPARATIVE LAW

1. In §§55 to 80 of their Written Case, the Appellants have drawn attention to decisions in six different jurisdictions in an attempt to demonstrate that the courts in other common law countries have been *'equally reluctant'* to give inferior tribunals the ability to determine the limits of their own jurisdiction (§55).

2. In general, recourse to these decisions does not assist. First, many of those decisions are explained by a significantly different constitutional framework which impacts upon the courts' approach towards ouster clauses. Secondly, none of those decisions relates to a body remotely comparable to the IPT and the specialist RIPA regime within which it sits.

Australia

3. The position in Australia is different because of certain express guarantees in its written Constitution. As the Court noted in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, at §98, two fundamental constitutional principles underpin the approach to privative clauses:

> *"First, the jurisdiction of this Court to grant relief under s. 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s. 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction".*[1]

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[1] Cited by the Court in *Kirk v IRC* [2010] HCA 1 at §95.

4. At §103, the Court went further and held that s. 75(v) of the Constitution introduced *'an entrenched minimum provision of judicial review'*.

5. However, the Court emphasised that these positions were particular to the Australian constitutional context. This is clear when the quotations which the Appellant cites at §59 of their Written Case are considered in full (from §§103-104 of the decision):

> *"There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada ...*
>
> *In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s. 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review."*

6. These written constitutional guarantees are at odds with the UK position and, in particular, with the consistent recognition in UK law that Parliament has the ability to remove or limit judicial review with appropriately clear words. Consequently, any meaningful comparison is difficult, as was recognised in Kirk v IRC [2010] HCA 1 (§66) more generally in terms of the development of public law: *"there can be no automatic transposition to Australia of the principles that developed in England in relation to the availability of certiorari and prohibition. The constitutional context is too different to permit such a transposition'*. As the Court acknowledged in Kirk (§100), in the Australian constitutional context there is a continued *"need for and utility of the distinction between jurisdictional and non-jurisdictional error"*; a distinction which (as noted in Kirk at §65) is no longer maintained as a matter of English law.

7. In addition, the examples cited by the Appellant are distinguishable from the IPT and the bespoke statutory framework surrounding it. For instance, in *Kirk*, the context was an industrial court with *'limited power'*,[2] whereas in *Public Service Association of South Australia v IRC* [2012] 249 CLR 398, the Court had to consider the position of the Full Commission of the Industrial Relations Commission of South Australia.

8. Although the decision in *South Australia v Totani* [2010] 242 CLR 1 concerned provisions in the Serious and Organised Crime (Control) Act 2008 (which are closer to the security context in which the IPT operates), the Court applied the constitutional approach outlined in *Kirk*[3] to the privative clause in question. Further, the wider legislation in dispute was vastly different from that of RIPA 2000 and the safeguards therein. In *Totani*, the statutory framework and s. 14(1) in particular, was seen as threatening the position of the judiciary, including the independence of courts and judges[4].

New Zealand

9. In New Zealand the decision in *Attorney-General v Zaoui* [2005] 1 NZLR 960 demonstrates that the approach can also be informed by constitutional principles. For example, Glazebrook J emphasised the importance of s. 6 and s. 27(2) of the New Zealand Bill of Rights Act 1990 ('BORA'), at §§101 and105:

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2 See §107 of the decision.

3 See §128 of the decision.

4 See §4, where French CJ notes: *"Section 14(1) requires the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court. The SOCC Act thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the Constitution is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all State courts by Ch III of the Constitution so that they may take their place in the integrated national judicial system of which they are part".*

> "[101] *The approach to privative clauses is now well established in New Zealand. Subject to statutory context, material errors of law are generally considered to be jurisdictional errors. The errors asserted here are material errors of law ...*
>
> [105] *in the absence of clear words to the contrary (and here all the indica point the other way), the combination of s. 6 and 27(2) of BORA would in any event require the Court to construe "lack of jurisdiction" as including material errors of law and hold, accordingly, that review is not barred by s. 19(9)"*

10. In the absence of any further legislative intention,[5] the words had an established meaning informed by these overarching principles.

11. The context in these New Zealand cases is again very different. Zaoui related to a decision of an *'Inspector-General'*; a quasi-executive decision maker. Ramsay v Wellington District Court [2006] NZAR 136 concerned provisions of the Accident Insurance Act 1998 whereas New Zealand Rail Ltd v Employment Court [1995] 3 NZLR 179 dealt with clauses in the Employment Contracts Act 1991.

12. It is also to be noted that the ouster clauses in question in cases such as Ramsay v Wellington District Court [2006] NZAR 136 and Tanndyce Investments v Commissioner of Inland Revenue [2012] 2 NZLR 153 (§66.2 of the Appellant's case) are far removed from the language in RIPA. For example, in Ramsay, the provision laid down a *"prescribed procedure"* concerning challenges to decisions made under the Act concerning rights of compensation; it was not a provision which generally excluded the jurisdiction of the High Court (see §30).

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[5] For further emphasis of this point see paragraph 32 of Ramsay v Wellington District Court [2005] NZCA 196: *"The courts will then approach the interpretation of the privative provision on the basis that, in the absence of clear language from Parliament, it was not intended to exclude judicial review of particular decisions that did not fall within the scope of the statutory appellate process"*. See also the decision in New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer [1924] NZLR 689 at p. 702: *"That Parliament could, if it thought fit, establish in this country such a system of judicial autocracy cannot be doubted, but in order to do so effectually it would be necessary for Parliament to use language so clear and coercive as to be incapable of any other interpretation"*.

Canada

13. The position in Canada is again strongly influenced by the particular constitutional framework. In Crevier v Quebec [1981] 2 SCR 220, the position flowed from the constitutional guarantee in s. 96 of the British North America Act:

> *"...where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court"*[6]

14. Later in Dunsmuir v New Brunswick [2008] 1 SCR 190, the Court again emphasised this constitutional position in emphatic terms (§31):

> *"The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect ... The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the Constitution Act, 1867".*

15. In Crevier the case focused on the position of the Professions Tribunal and in Dunsmuir, the role of an adjudicator following an employment dispute.

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[6] See p. 234 of the decision. See also De Smith's *Judicial Review* 8th Edn. at §4-083: *"Since Crevier v Quebec (Attorney General) and MacMillan Bloedel Ltd v Simpson, accepting that judicial review of administrative action at least for jurisdictional error is a constitutionally guaranteed right (arising out of ss. 96 – 101 of the Constitution Act 1981), a right that cannot be removed by either the provincial legislature or Federal Parliament, there is no incentive to enact privative clauses that have as their objective the total removal of access to judicial review".*

South Africa

16. The approach in South Africa, particularly in the post-Apartheid era, has also been different to that applied in UK law.

17. The starting point is the written Constitution. The impact of this and the role which the legislature is given is explained by the Court in *De Lille v Speaker of the National Assembly* [1998] 3 SA 430(C) (at §30):

> *"Ours is no longer a Parliamentary state. It is a Constitutional state founded on the principles of supremacy of the Constitution and the rule of law. A new political and Constitutional order has been established in South Africa. The new Constitution shows a clear intention to break away from the history of Parliamentary sovereignty".*

18. The contrast with UK law and the UK constitutional order is clear. The presence of certain constitutional guarantees within the written Constitution mean that the role of the Legislature and its ability to curtail judicial review is restricted. *De Lille* demonstrates this clearly. At §§40 – 41 the Court highlighted that s. 5 of the Powers and Privileges Act violated (for example) s. 34 of the Constitution (*"which guarantees access to courts"*)[7].

19. Further, the Appellant also cites a number Apartheid and pre-Apartheid era cases. However these do not assist, principally given the contexts are so different to the present case. In *Union Government v Fakir* [1923] AD 466, the case concerned the statutory scheme surrounding an Immigration Officer and/or Immigration

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[7] The editors of De Smith's *Judicial Review* 8th Edn. at §4-094 note that: *"In relation to ouster clauses, the right of access to court in s. 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or ... another independent and impartial tribunal". This right probably makes direct and unambiguous ouster clauses unconstitutional".*

Board, whereas in *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D), the decision-maker in question was a member of the police force.

Ireland

20. As with the above jurisdictions, the Irish cases cited need to be seen within their broader constitutional context. As the editors of De Smith's *Judicial Review* 8th Edn. note at §4-087:

> *"Judicial reluctance to uphold ouster clauses is reinforced by the Constitution, and it has been held that "[s]ave to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court".*

21. This is clearly at odds with the consistent emphasis in UK law that Parliament can restrict judicial review. In addition, the Irish cases do not assist for two reasons.

22. **First**, and as with the other jurisdictions, the contexts are very different from the present. In *State (McCarthy v O'Donnell)* [1945] IR 126, the Court was concerned with the Military Service Pensions Act 1934 and the decision of a Referee in relation to applications for a military pension. In *State (O'Duffy) v Bennett* [1935] IR 70, the Court was concerned with a very particular tribunal which, although broadly speaking fell within the national security context, displayed a number of contrasting features to the IPT. For instance, O'Byrne J noted at 118:[8]

> *"It is true that, within the limits of its jurisdiction, the Tribunal has extensive and possibly unprecedented powers. It is provided by clause 7, sub-clause 1, of the Article that, whenever the Tribunal finds any person guilty of an offence mentioned in the Appendix to the Article, the Tribunal may, in lieu of the punishment provided by law (other than the Article) for such offence, sentence such person to suffer any greater punishment (including the penalty of death) if in the opinion of the Tribunal such greater punishment is necessary of expedient".*

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[8] See also dissenting judgment Hanna J, at 97 for an outline of some of these features.

23. **Secondly**, the nature of the analysis in these cases does not assist. In O'Donnell, Sullivan CJ cited the decision in Ex parte Bradlaugh in order to support his conclusion that *'the effect of such a provision has been considered in several cases, and it has been held not to apply where there is absence of jurisdiction in the tribunal that made the order in question'* (at p.161). The limits of Ex parte Bradlaugh have already been outlined in the main Case (§§74-79). Further, O'Byrne J in O'Duffy specifically noted that his interpretation of the ouster clause was based on the inclusion of the particular formulation in question; words which are not to be found in s.67(8).[9]

Hong Kong

24. The position in relation to Hong Kong is somewhat different from the other jurisdictions mentioned above, albeit the utility of these decisions remains questionable in the current context.

25. First, all of the Hong Kong decisions cited are first instance decisions and not the product of their higher courts.

26. Secondly, in Chan Yik Tung v Hong Kong Housing Authority [1989] HKCFI 240, Liu J eschewed any approach of general application, noting at 3:

> *'An ouster clause is often the primary source for testing whether or not the tribunal's decision is immune from judicial review. Evidently, each case must be judged on its own facts'*

27. Thirdly, Liu J was clear about the ability of Parliament to restrict the Court's jurisdiction provided clear and comprehensive language was used (at page 6):

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[9] At pp.118 – 119 – that formulation being *"in the execution of its jurisdiction or powers under this Article"*.

"There are sound reasons for the courts' ordinary jurisdiction to supervise by judicial review to be jealously guarded ... Without which, the tribunal could be made a law unto itself ... ***It is therefore a cardinal principle that the courts' ordinary jurisdiction to review should not be whittled down except by clear and comprehensive language"*** (emphasis added)[10]

28. Fourthly, although the Appellant relies on the decision in *Thai Muoi v Hong Kong Housing Authority* [2000] HKCFI 383, Yeung J had to consider the same ouster as in *Chan Yik Tung* and ultimately decided to follow the previous judgment of Liu J (at 10 -11). However, it is to be noted that Yeung J did not exclude the possibility of an ouster clause being effective (at 6):

"Despite the aforesaid observation, clauses which seek to oust the power of the court to review the decisions of a lower court or an administrative tribunal on question of law are never given effect to save in the most exceptional circumstances" (emphasis added)[11]

29. Finally, *Chan Yik Tung* and *Thai Muoi* concerned the decisions of the Hong Kong Housing Authority whereas *Gurung Bhakta Bahadur v Director of Immigration* [2001] HKCFI 966 related to judicial review proceedings against a Director of Immigration and Chief Executive in Council[12].

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[10] See also Liu J at p.12: *"Irrespective of the nature of the partial exclusion, no court should standby and allow an attempted encroachment on its power of review unless it is restrained by an unassailably appropriate ouster clause"*.

[11] See also Hartmann J at p.9 in *Gurung Bhakta Bahadur v Director of Immigration* [2001] HKCFI 966: *"there is a common law presumption (made historically to secure the rule of law) that access to the courts is not to be denied in a statutory instrument* ***save by the clearest language"*** (emphasis added).

[12] Hartmann J noted at p. 13 that the Chief Executive in Council was an example of an *"administrative tribunal"*.