IN THE HIGH COURT OF JUSTICE **Claim No. CO/2368/2016**

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

B E T W E E N:

THE QUEEN on the application of

PRIVACY INTERNATIONAL

Claimant

-and-

INVESTIGATORY POWERS TRIBUNAL

Defendant

-and-

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

Interested Parties

CLAIMANT'S SKELETON ARGUMENT ON PRELIMINARY ISSUE

For hearing: 2 November 2016, 1 day

A. Introduction

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

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

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

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

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

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

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

6. Section 5 of the Intelligence Services Act 1994 empowered the Secretary of State to authorise "*the taking […] of such action as is specified in the warrant in respect of any property so specified*" in respect of property in the British Islands. The reference to "*action*" is wide enough to encompass the activity involved in carrying out CNE.

7. The Claimant was prompted to bring proceedings in the IPT by disclosures suggesting that the security and intelligence services use CNE techniques to gain access to potentially millions of devices, including computers and mobile phones. During the proceedings, the Intelligence Services Commissioner (Sir Mark Waller) published his 2014 report, in which he indicated that the agencies had been using section 5 "*in a way which seemed to me arguably too broad or 'thematic'*", and that the agencies had advanced

and acted upon an interpretation of section 5 under which "*the property does not necessarily need to be specifically identified in advance*". Sir Mark Waller rightly brought the agencies' (hitherto secret) interpretation of section 5 to public notice precisely so that it could be challenged. The Claimant contended in the proceedings that Section 5 did not support that broad interpretation.

8. The Claimant relied on, amongst other things, the long-established hostility of the common law to 'general warrants', or any warrant which leaves questions of judgment to the person with authority to execute it rather than the person with authority to issue it. The Claimant argued that that principle, recognised in celebrated cases such as *Entick v Carrington* (1765) 2 Wilson KB 275, *Money v Leach* (1765) 3 Burr 1742 and *Wilkes v Wood* (1763) Lofft 1, should not be taken to have been displaced by Parliament in the absence of clear words, and that a statutory power to take specified action in respect of specified property did not meet the necessary threshold to overturn that principle. The Claimant also relied on Articles 8 and 10 of the European Convention on Human Rights.

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

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

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

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

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

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

13. The effect of the IPT's decision is that a covert warrant can may be granted in materially identical terms to those granted in the general warrant cases (e.g. a "*strict and diligent search for the… authors printers and publishers of the aforesaid seditious libel intitled The North Briton… and them or any of them having found, to… seize… their papers*" (*Money v Leach* (1765) 3 Burrow 1742, 97 ER 1075), purely by virtue of Parliament's decision in 1994 to empower the Secretary of State to grant a warrant authorising specified action in respect of specified property.

C. Statutory framework

RIPA 2000

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

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

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

> "(2) The jurisdiction of the Tribunal shall be–
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under

subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;

(b) to consider and determine any complaints made to them which, in accordance with subsection (4), are complaints for which the Tribunal is the appropriate forum;

(c) to consider and determine any reference to them by any person that he has suffered detriment as a consequence of any prohibition or restriction, by virtue of section 17, on his relying in, or for the purposes of, any civil proceedings on any matter; and

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

(3) Proceedings fall within this subsection if–

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

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

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

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

(4) The Tribunal is the appropriate forum for any complaint if it is a complaint by a person who is aggrieved by any conduct falling within subsection (5) which he believes–

(a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service or telecommunication system; and

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

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

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

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

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

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

(d) other conduct to which Part II applies;

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

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

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

(a) any of the intelligence services;
(b) any of Her Majesty's forces;
(c) any police force;
(ca) the Police Investigations and Review Commissioner;
(d) the National Crime Agency;
(f) the Commissioners for Her Majesty's Revenue and Customs;

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

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

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or
(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;

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

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

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

(8) The following fall within this subsection–

(a) an interception warrant or a warrant under the Interception of Communications Act 1985;
(b) an authorisation or notice under Chapter II of Part I of this Act;
(c) an authorisation under Part II of this Act or under any enactment contained in or made under an Act of the Scottish Parliament which makes provision equivalent to that made by that Part;
(d) a permission for the purposes of Schedule 2 to this Act;
(e) a notice under section 49 of this Act; or
(f) an authorisation under section 93 of the Police Act 1997.

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

(10) In this section–
(a) references to a key and to protected information shall be construed in accordance with section 56;
(b) references to the disclosure or use of a key to protected information taking place in relation to a person are references to such a disclosure or use taking place in a case in which that person has had possession of the key or of the protected information; and
(c) references to the disclosure of a key to protected information include references to the making of any disclosure in an intelligible form (within the meaning of section 56) of protected information by a person who is or has been in possession of the key to that information;
and the reference in paragraph (b) to a person's having possession of a key or of protected information shall be construed in accordance with section 56.

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

IOCA 1985, SSA 1989 and ISA 1994

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

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

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

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

18. All three provisions were repealed by RIPA.

D. *Anisminic* and subsequent authority

19. In *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, Anisminic sought compensation from the Foreign Compensation Commission. The Commission had to construe an Order to determine whether to the claim for compensation was established. Section 4(4) of the Foreign Compensation Act 1950 provided "*the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law*".

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

21. The effect of *Anisminic* is (and was, at the time RIPA was enacted) well-established: errors of law by a tribunal render its decision *ultra vires*. A misdirection in law makes the (purported) decision a nullity. See *Boddington v British Transport Police* [1999] 2 AC 143 at p. 154 per Lord Irvine LC and *R (Williams) v Bedwellty JJ* [1997] AC 225 at pp. 232-233 per Lord Cooke.

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

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

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

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

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

24. These principles have since been applied to:

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

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

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

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

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

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

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

E. Other actual and proposed 'ouster clauses'

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

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

27. Their Lordships did not comment specifically on that provision, but Lord Reid said at 170D: "*No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery*[3]*, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law.*"

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

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

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

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

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

action of the Tribunal was a nullity by reason of—

(i) lack of jurisdiction,

(ii) irregularity,

(iii) error of law,

(iv) breach of natural justice, or

(v) any other matter…"

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

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

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

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

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

[4] http://hansard.millbanksystems.com/lords/2004/mar/15/asylum-and-immigration-treatment-of#S5LV0659P0_20040315_HOL_315
[5] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21109.htm
[6] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we22.htm

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

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

> "There is one provision in this Bill which is of overriding significance. Clause 10 of the Bill seeks to oust the jurisdiction of the Courts, preventing any review of decisions by the proposed new Tribunal.
>
> This provision is wholly repugnant. If passed into law it would threaten the integrity of our legal system and compromise the role of our Judiciary. It would set a frightening precedent, encouraging the Executive to oust the jurisdiction to review Government or official actions in other areas. […]
>
> However it is dressed up, the attempt to oust this jurisdiction represents an attempt to protect irrational or unlawful decisions, or decisions made beyond the legal power of the decider. […]
>
> The legal profession is united in its opposition to the Clause."

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

> "the proposed clause 11 to the Bill contains the most draconian ouster clause ever seen in Parliamentary legislative practice. […]
>
> It is a clause that will operate far beyond asylum decisions, and provides a precedent for exempting the executive and administrative tribunals from seeking to understand, apply or be governed by the law. This is a matter of great constitutional consequence. […]
>
> Access to independent courts is an integral part of democracy. Inferior tribunals are not courts and cannot be transmuted into them by a legislative magic wand. They have an expert and valuable role to perform but like the executive itself, their decisions must be subject to the scrutiny of the higher courts at the instigation of the losing party. The full system of binding precedent means that no case can be arbitrarily cut off by statute from review by the next level, condemning inferior courts to apply

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

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

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

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

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

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

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

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

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

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

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

> "This clause is undoubtedly unique in the lengths to which it goes in order to prevent the courts from adjudicating on whether the new appeal tribunal has acted in accordance with the law. As the House of Commons Constitutional Affairs Committee stated in its report of 26 February:
>
> > "An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake."
>
> The provision has to be read to appreciate the lengths to which the Government has gone to try and exclude the possibility of intervention by the courts. Extensive consultation took place with myself and other members of the judiciary before the Bill was introduced. We recognised that there was a problem of abuse to be tackled. However, our advice was that a clause of the nature now included in the Bill was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law.
>
> We advised that the clause was unlikely to be effective and identified why. The result was that clause 11 was extended to close the loopholes we had identified, instead of being abandoned as we had argued. The only concession that appears to have been made to our representations has been to give the complainant the right to ask for an internal review. In addition, we argued that ouster was not necessary and that action could be taken which was more likely to be effective than a clause of this nature. Importantly, we pointed out that the danger of the proposed ouster clause was that it could bring the judiciary, the executive and the legislature into conflict. Apparently this was of little concern.

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

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

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

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

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

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

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

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

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

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

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

33. The criticism of that attempt to exclude judicial review in respect of decisions of a Tribunal, and the fact that the Government ultimately abandoned the attempt in the face of Parliamentary and public opposition, provide a clear illustration of the importance of

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

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

F. Academic commentary

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

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

b) Dr Ivan Hare ('Separation of Powers and Error of Law', *The Golden Metwand and the Crooked Cord*, 1998) concluded, in reliance on *Anisminic* and *Page*, that s.7(8) IOCA was ineffective to prevent judicial review for error of law. "*If (as follows from Anisminic) such a clause only applies to errors of law within a body's jurisdiction and if (as held in Page) there is no longer any such category of decision, the clause is redundant. […] Section 7(8) of the Interception of Communications Act 1985 provides: 'The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.' According to Page, this clause will have no effect on the courts' power to review the Tribunal's decisions for error of law.*" He added: "*It would be much more difficult for the court to circumvent the type of ouster inserted in the Foreign Compensation Act 1969, s.3 after Anisminic. The Act states that 'anything which purports to be a determination' of the Commission shall*

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

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

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

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

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

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

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

G. Commonwealth authority

Australia

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

> "(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal…
>
> (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

> (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
>
> > (a) the Full bench of the Commission in Court Session, or
> >
> > (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision
>
> (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

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

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

> "105. … 'decision' should be read as a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions, that reading of the section follows from the constitutional considerations that have been mentioned. Section 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error.[13] To grant certiorari on that ground is not to call into question a 'decision' of the Industrial Court…"

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

New Zealand

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

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

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

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

H. *Obiter dicta*

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

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

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

43. The Board held at [32], citing *Anisminic*, that:

> "… on the ordinary principles of judicial review, it is arguable that the making of the proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for an improper purpose…"

I. Submissions

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

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

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

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

48. If the provision is placed in its legislative context, the point is clearer still. As set out above s.65 sets out extremely complex provisions determining whether or not the Tribunal has jurisdiction to hear a particular issue. Numerous disputes could arise as to whether a case fell inside or outside those provisions: for example, there could be a dispute about whether a person accused of carrying out surveillance was or was not "*a foreign police or customs officer*" (s.65(5)(ca)), or whether an act complained of did or did not relate to "*the interception of communications in the course of their transmission*" (s.65(5)(b)). The effect of the words "*(including decisions as to whether they have jurisdiction)*" is to make clear that a lawful decision by the IPT that it had or did not have jurisdiction – for instance, because it concluded on the facts that the person carrying out the surveillance was not a foreign police officer but a civilian – is not to be impugnable. Those words have no effect on the ability of the Courts to review *unlawful* decisions.

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

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

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

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

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

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

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

i) As Lord Reid made clear in his speech, the question whether or not a decision is a nullity does not depend on the concept of "*jurisdiction*": "*It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consequences

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

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

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

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

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

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

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

Policy

57. The reasons why the High Court hears claims for judicial review about errors of law made by other courts and tribunals (even where the decisions are made by a tribunal including High Court judges) were identified by Lady Hale in *Cart* at [42-43]. Specialist

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

jurisdictions, however expert and skilled, ought not be the final arbiter of the meaning of the law:

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

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

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

59. The present case is a good example of those concerns. The IPT has jurisdiction over many claims against the intelligence and security services. It has rejected what the Claimant suggests is a principle of constitutional importance and general application concerning the interpretation of Acts of Parliament (the principle of legality) on the

grounds that that principle is unsuited to the context of national security in which the intelligence and security services operate. That is a distorted position as to the exceptionality of the area in which the IPT operates. Lang J has granted permission. The substantive question of law is arguable. There is a real prospect (to put it no higher) that the IPT has erred in law, in a case with significant wider consequences.

J. Conclusion

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

BEN JAFFEY

TOM CLEAVER

Blackstone Chambers

BHATT MURPHY

19 October 2016