Case No: C1/2017/0470

Neutral Citation Number: [2017] EWCA Civ 1868

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEENS BENCH DIVISION)
SIR BRIAN LEVESON PQBD AND MR JUSTICE LEGGATT
CO23682016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2017

Before:

LORD JUSTICE FLOYD
LORD JUSTICE SALES
and
LORD JUSTICE FLAUX

- -

Between:

The Queen on the Application of:

Privacy International	**Appellant**
- and -	
Investigatory Powers Tribunal	**Respondent**
1) Secretary of State for Foreign and Commonwealth Affairs	**Interested Parties**
2) Government Communication Headquarters	

- -

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

Hearing date: 05 October 2017

- -

Judgment

Lord Justice Sales:

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

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

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

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

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

The structure and functions of the IPT

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

> " 5. It is no accident that RIPA (establishing the IPT) came into force at the same time as the Human Rights Act 1998 and the Civil Procedure Rules (described as "a single legislative

scheme": see *A v Director of the Security Service ('A v B')* [2010] 2 AC 1; [2009] EWCA Civ 24 and [2009] UKSC 12 per Laws LJ (at [14]) and Dyson LJ (at [48]) in the Court of Appeal echoed by Lord Brown in the Supreme Court at [21]. The Explanatory Notes to RIPA identified that the main purpose of the Act was to ensure that investigatory powers (including, for example, the interception of communications and the carrying out of surveillance) were "used in accordance with human rights".

6. The IPT effectively replaced the Interception of Communications Act Tribunal, the Security Services Act Tribunal and the Intelligence Services Act Tribunal which now exist only in relation to complaints made before 2 October 2000. These tribunals (established by the Interception of Communications Act 1985, the Security Services Act 1989 and the 1994 Act [the Intelligence Services Act 1994] respectively) were repealed by RIPA and contained almost identical ouster provisions. Thus, section 7(8) of the 1985 Act provides:

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

Similarly, section 5(4) of the 1989 Act and section 9(4) of the 1994 Act provide:

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

7. The IPT also replaced the complaints provision of Part III of the Police Act 1997 (concerning police interference with property). It stands apart from other tribunals and is not part of Her Majesty's Courts and Tribunal Service on the basis that (according to Sir Andrew Leggatt in his Report of the Review of Tribunals at para 3.11) "it is wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service". Sir Andrew went on:

> "The Tribunal's powers are primarily investigatory, even though it does also have an adjudicative role. Parliament has provided that there should be no appeal from the tribunal except as provided by the Secretary of State."

8. The membership of the IPT is made up of the President, the Vice President, three other judges (all five of whom are judges of the High Court) and other distinguished lawyers including representatives from Scotland and Northern Ireland. Its remit is established by section 65 of RIPA (as amended) in these terms:

"(1) There shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint.

(2) The jurisdiction of the tribunal shall be—

(a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;

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

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

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

(3) Proceedings fall within this subsection if—

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

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

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

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

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

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

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

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

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

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

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

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

(d) other conduct to which Part II applies;

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

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

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

(a) any of the intelligence services;

(b) any of Her Majesty's forces;

(c) any police force;

(ca) the Police Investigations and Review Commissioner;

(d) the National Crime Agency;

(f) the Commissioners for Her Majesty's Revenue and Customs;

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

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

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or

(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;

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

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

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

(a) an interception warrant or a warrant under the Interception of Communications Act 1985;

(b) an authorisation or notice under Chapter II of Part I of this Act;

(c) an authorisation under Part II of this Act or under any enactment contained in or made under an Act of the Scottish Parliament which makes provision equivalent to that made by that Part;

(d) a permission for the purposes of Schedule 2 to this Act;

(e) a notice under section 49 of this Act; or

(f) an authorisation under section 93 of the Police Act 1997.

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

(10) In this section–

(a) references to a key and to protected information shall be construed in accordance with section 56;

(b) references to the disclosure or use of a key to protected information taking place in relation to a person are references to such a disclosure or use taking place in a case in which that person has had possession of the key or of the protected information; and

(c) references to the disclosure of a key to protected information include references to the making of any disclosure in an intelligible form (within the meaning of section 56) of protected information by a person who is or has been in possession of the key to that information;

and the reference in paragraph (b) to a person's having possession of a key or of protected information shall be construed in accordance with section 56.

(11) In this section "judicial authority" means–

(a) any judge of the High Court or of the Crown Court or any Circuit Judge;

(b) any judge of the High Court of Justiciary or any sheriff;

(c) any justice of the peace;

(d) any county court judge or resident magistrate in Northern Ireland;

(e) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge of the Crown Court or of a justice of the peace."

9. I have set out the remit of the IPT extensively in order to identify the range of its activities and the responsibility of the Secretary of State to allocate work to it (as to which see section 66(1) of RIPA). Alongside its work, there is further and additional oversight of the authorities which is provided by the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Chief Surveillance Commissioner (two of whom being retired members of the Court of Appeal, the third a retired Lord Chief Justice of England and Wales). Their activities fit into the work of the IPT which has power to require a relevant Commissioner to provide it with all such assistance as it thinks fit (section 68(2) of RIPA) and, in relation to every person holding office under the Crown, to disclose "all such documents and information as the Tribunal may require for the purposes of enabling them to exercise the jurisdiction conferred on them by section 65 or otherwise to exercise or perform any power or duty conferred on them by RIPA." (section 68(6)(a) and (b) of RIPA).

10. The way in which the IPT exercises its jurisdiction, its procedure and its powers (which include the right to award compensation) are prescribed by sections 67 and 68 of RIPA having been tailored to the sensitive subject matter with which it deals. As to procedure, RIPA permits the Secretary of State to make rules regulating the exercise by the IPT of its jurisdiction and any matters preliminary or incidental to, or arising out of, the hearing or consideration of any matter brought before the IPT (section 69(1) of RIPA). The Investigatory Powers Tribunal Rules 2000 ("the Rules") allow the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law": see r.11(1).

11. The IPT is also able to consider material which, for reasons of national security, cannot be disclosed in open proceedings. This can relate either to the internal arrangements and safeguards operated by the relevant intelligence services or to facts relevant to the individual complaint or complainant. With the benefit of what has been learnt in closed session and full argument, the IPT can probe whether what has been disclosed in closed hearing can and should be disclosed in an open hearing and thereby publicised: see *Liberty/Privacy (No. 1)* [2014] UKIP Trib 13, [2015] 3 All ER 142 at [46]. In the same case, challenges to the fairness of the hearing were dealt with in these terms (at [50(ii)]):

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

12. For the purposes of this challenge, it is unnecessary to rehearse the procedure adopted by the IPT in any greater detail. Suffice to say that these procedures were considered by the European Court of Human Rights in *Kennedy v United Kingdom* (2011) 52 EHRR 4 which concluded that an effective remedy had been afforded in accordance with Article 13 of the ECHR, expressing itself in these terms (at [18]):

"Having regard to its conclusions in respect of Article 8 and Article 6§1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications."

13. Before parting from this analysis of structure, it is important to add that an alternative mechanism of resolving disputes has been developed by the IPT; this involves proceeding on the basis of assuming the facts alleged. The process was described in the Investigatory Powers Tribunal Report 2011-2015 in these terms:

"2.7 The Closed Material Procedures have been introduced in the civil courts in order to handle civil cases where the Government may need to rely on sensitive material to justify an executive action. As a judicial body handling similarly sensitive material, the Tribunal's policies and procedures have been carefully developed and have evolved with the aim of balancing the principles of open justice for the complainant with a need to protect sensitive material. The approach of hearing a case on the basis of assumed facts has proved to be of great value.

2.8 *Assumed facts:* This means that, without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to *assume for the sake of argument* that the facts asserted by the claimant are true; and then, acting upon that assumption, decide whether they would constitute lawful or unlawful conduct. This has enabled hearings to take place in public with full adversarial argument as to whether the conduct alleged, if it had taken place, would have been lawful and proportionate. Exceptionally, and where necessary in the interests of public

> safety or national security, the Tribunal has sat in closed (private) hearings, with the assistance of Counsel to the Tribunal, to ensure that points of law or other matters advanced by the complainants are considered."
>
> 14. Mr Jaffey [appearing for the appellant below] relies on the fact that the IPT has found a mechanism whereby it can conduct proceedings in public as demonstrating that open justice (with, he argues, concomitant rights of appeal) can clearly be available through the mechanism adopted by the IPT.
> ….
>
> 15. The relevant provisions are contained in section 67 which, on its face, deals with the extent to which decisions of the IPT can be challenged and the responsibilities of the Secretary of State in relation to certain appeals. The relevant provisions are:
>
> "(8) Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.
>
> (9) It shall be the duty of the Secretary of State to secure that there is at all times an order under subsection (8) in force allowing for an appeal to a court against any exercise by the Tribunal of their jurisdiction under section 65(2)(c) or (d).
>
> (10) The provision that may be contained in an order under subsection (8) may include—
>
> (a) provision for the establishment and membership of a tribunal or body to hear appeals;
>
> (b) the appointment of persons to that tribunal or body and provision about the remuneration and allowances to be payable to such persons and the expenses of the tribunal;
>
> (c) the conferring of jurisdiction to hear appeals on any existing court or tribunal; and
>
> (d) any such provision in relation to an appeal under the order as corresponds to provision that may be made by rules under section 69 in relation to proceedings before the Tribunal, or to complaints or references made to the Tribunal.
>
> (11) The Secretary of State shall not make an order under subsection (8) unless a draft of the order has been laid before Parliament and approved by a resolution of each House."'

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

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

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

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

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

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

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

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

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

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

Factual Background

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

> "The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."

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

29. In *O'Reilly v Mackman* [1983] 2 AC 327, at 278C-F, Lord Diplock (with whom the other members of the appellate committee agreed) referred to the "landmark decision" of *Anisminic* and said that it had "liberated English law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction"; now, any error of law by the tribunal would be taken to go to its jurisdiction.

30. In *R v Lord President of the Privy Council, ex p. Page* [1993] AC 682 the House of Lords affirmed the view, as derived from *Anisminic*, that after that decision "it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires"; with the consequence that "in general any error of law made by an administrative tribunal or inferior court can be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47. All the members of the Supreme Court agreed with the judgment of Lord Brown of Eaton-under-Heywood JSC. At [14] Lord Brown explained the special problems to which claims against the intelligence services give rise, referred to relevant restrictive provisions of RIPA and the Rules "regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination)", and said:

> "All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined. None of them are

> available in the courts. This was the point that so strongly attracted Dyson LJ in favour of [the Director's] case in the court below. As he pithily put it: [Lord Brown then quoted with approval the part of para. [48] in Dyson LJ's judgment set out in italics above]".

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

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

Lord Justice Flaux:

50. I agree.

Lord Justice Floyd:

51. I also agree.