UKSC 2018/0004

In The Supreme Court of the United Kingdom

ON APPEAL
FROM THE COURT OF APPEAL (CIVIL DIVISION)
FLOYD, SALES AND FLAUX LJJ

BETWEEN:

THE QUEEN on the application of
PRIVACY INTERNATIONAL

Appellant

- and -

INVESTIGATORY POWERS TRIBUNAL

Respondent

- and -

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

Interested Parties

APPELLANT'S WRITTEN CASE

Summary

1. This appeal raises the question whether s. 67(8) of the Regulation of Investigatory Powers Act 2000 ("**RIPA 2000**") has the effect of wholly prohibiting judicial review of a decision or purported decision of the Investigatory Powers Tribunal ("**the Tribunal**") on any ground, including where the Tribunal has acted *ultra vires*.

2. The resolution of that question turns on two issues, namely:

    2.1. whether s. 67(8) ousts the supervisory jurisdiction of the High Court and the Court of Session[1] as a matter of statutory interpretation; and

    2.2. whether a statute can ever wholly oust the supervisory jurisdiction of the High Court and the Court of Session over a tribunal of limited statutory jurisdiction as a matter of constitutional principle.

3. As to the first issue, the Appellant submits that s. 67(8) properly construed does not oust judicial review of the Tribunal. It is a very long-established principle of the common law that a statute should not be interpreted as ousting judicial review of a statutory tribunal of limited jurisdiction if there is any reasonably tenable construction of the provision which would preserve the supervisory jurisdiction of the High Court. There is no case (other than this one) in which an English court has ever found a statutory formula to be so clear and categorical that it has such an effect.[2]

4. Not only is there a reasonably available interpretation of s. 67(8) which preserves judicial review in this case: it is also the obvious interpretation. That provision uses a formula which is not materially different from that which the House of Lords held not to oust judicial review, in its seminal decision in *Anisminic Ltd v Foreign Compensation*

[1] The position in relation to the Court of Session is considered because the Tribunal's jurisdiction under s. 65 of RIPA 2000 covers the entire United Kingdom (it occasionally sits in Edinburgh) and the Scots law authorities on ouster clauses are of assistance. Where Scotland has national investigatory powers legislation, all challenges must be brought in the Tribunal and are subject to s. 67(8) RIPA. See s. 23 of the Regulation of Investigatory Powers (Scotland) Act 2000. The ouster clause is thus equally applicable to judicial review in England and Wales, Scotland and Northern Ireland.

[2] Attached to this Written Case is a table summarising reported cases in which the question whether a particular statutory provision precludes the High Court from exercising its supervisory jurisdiction has been considered by the Courts of England & Wales, Scotland, and Northern Ireland, as well as the Privy Council. The table sets out, in relation to each authority, (i) the case name and citation, (ii) the relevant statute, (iii) the decision-maker whose decision was challenged, (iv) the text of the provision in question, and (v) a summary of the Court's decision.

Commission [1969] 2 AC 147. The choice by the draftsmen of s. 67(8) of similar wording, without the modifications which *Anisminic* made clear would be required as a minimum for an effective ouster, indicates a clear intention not to oust judicial review. There is accordingly no ouster in this case.

5. In reaching its decision to the contrary, the Court of Appeal[3] placed great weight on the national security caseload of the Tribunal. The Court drew an inference that Parliament had intended that a tribunal hearing sensitive claims against the security and intelligence services should be wholly insulated from any review, regardless of the context or seriousness of the error. That approach was wrong in law, for the following principal reasons:

   5.1. Any such inference is precluded by the draftsman's use of a form of words understood not to oust judicial review. Had Parliament considered that the Tribunal was so exceptional that a complete ouster was required, it would have used crystal clear language to make that intention evident. The use of this well-recognised formula requires the inference that Parliament did not intend to oust judicial review, even taking into account the national security context.

   5.2. The Appellant's construction accords with the policy of RIPA 2000, whereas the Court of Appeal's approach has the potential to harm the protection of national security. The effect of the decision of the Court of Appeal is that if the Tribunal were unlawfully to order the security and intelligence services to disclose material (such as the identity of an agent) which would risk harming national security, the security and intelligence services would have no remedy available to them. The same applies if the Tribunal were to erroneously quash a warrant or to order the destruction of intelligence material. It is not surprising that Parliament did not intend this result, but rather intended the High Court to retain its power to supervise and correct errors made by the Tribunal.

   5.3. There is no policy reason for ousting the High Court's jurisdiction in such cases by reference to the need to protect sensitive information from being disclosed to a litigant. The High Court on a claim for judicial review has ample powers to ensure that sensitive information is protected, and many judicial review

[3] *R (Privacy International) v Investigatory Powers Tribunal* [2018] 1 WLR 2572

proceedings (including the present proceedings) will raise issues that require no reference to any such material.

5.4. In any event, the Tribunal's jurisdiction is not confined to sensitive claims against the intelligence services, but includes a range of other issues, such as the use by local authorities of CCTV and checks by directed surveillance on whether a child lives in the catchment area of a local school. No policy reason for ousting judicial review of all decisions of this type has been identified.

6. The Court of Appeal also emphasised the expertise of the Tribunal's members, which it held gave rise to a "*fair inference*" that Parliament intended the decisions of the Tribunal to be immune from review. That was a further error of law. In particular:

6.1. For the reasons already summarised, construction based on a "*fair inference*" is the wrong approach in the case of a purported ouster clause.

6.2. RIPA only requires that the members of the Tribunal should be lawyers of at least 7 years' standing: Schedule 3 RIPA 2000, paragraph 1. The qualifications of particular office-holders at particular times cannot be a guide to the interpretation of the statute.

6.3. In any event, the quality or status of individual members of the Tribunal is immaterial to the question raised by these proceedings: what matters is the Tribunal's status as a tribunal of limited jurisdiction. The decisions of judges of the highest standing are subject to judicial review by High Court judges when they are exercising a limited jurisdiction: see for example *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249. The principles concerning the strict interpretation of ouster clauses apply no less to judicial tribunals staffed by eminent judges and lawyers than to any other body: see *U v SIAC* [2010] 2 WLR 1012 (heard with *Cart*) at §83 and indeed *Anisminic* itself at 201B.

6.4. The fact that a specialist tribunal like the Tribunal may have particular expertise might be a reason why the High Court may be slow to overturn its decisions in particular cases, as a matter of discretion, where its expertise is relevant to the judgments made. But the expertise of the Tribunal does not justify the complete ouster of the supervisory duty of the High Court and Court

of Session to ensure that the Tribunal acts fairly, lawfully, and within the limits of the powers granted to it by Parliament.

7. As to the second issue, the Appellant submits that as a matter of principle a legislative provision cannot wholly oust the supervisory jurisdiction of the High Court over a statutorytribunal of limited jurisdiction. In particular:

7.1. It is inherent in the rule of law and the separation of powers that laws enacted by Parliament must have an authoritative interpreter. If the law enacted by Parliament is to be given effect, there must be a body which is empowered to identify when a public authority that has been granted limited powers has acted outside the powers conferred on it. This is not a limit on Parliamentary sovereignty but an incident of it. Only a Court of general jurisdiction, such as the High Court or Court of Session can fulfil this role. Such a Court's inherent constitutional role is to ensure that all public bodies act within the limited powers conferred on them by Parliament. See Laws LJ in *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012.

7.2. Although some English judges have accepted (*obiter*) that a complete ouster of judicial review could in principle be drafted, no wording has ever previously been found to be sufficient to achieve that purpose in the United Kingdom. Even where a statute expressly purported to preclude *certiorari* in terms, as in *R v Cheltenham Commissioners* 113 ER 1211 and *Ex Parte Bradlaugh* (1877-78) LR 3 QBD 509, it has been interpreted as leaving intact the power of the High Court to ensure that the laws are implemented correctly, and within the limits imposed by Parliament.

7.3. Further and in any event, the powers of the High Court and Court of Session are guaranteed by constitutional statutes (i.e. the Senior Courts Act 1981 and the Acts of Union 1706-7). In order to be effective, any statute purporting to abrogate judicial review would have to include an express repeal of the constitutional statutes guaranteeing the jurisdiction of the High Court and Court of Session to carry out judicial review. Nothing in s. 67(8) of RIPA effects such a repeal.

8. The traditional approach of the courts, when a party contends that Parliament has created a new body which is immune from judicial control and free to exceed the limits placed on its conduct by Parliament, has hitherto been to avoid the constitutional question, and to determine the matter by an interpretation which is consistent with the preservation of judicial review. That approach could be adopted without difficulty in this case, for the reasons set out above. If the Court takes that course, the second issue identified above will not arise. But in the event that the Court wishes to determine it, the Appellant submits that the right answer is that a provision in a statute which clearly and unambiguously purports entirely to oust the supervisory powers of the High Court or Court of Session over a statutory tribunal of limited jurisdiction is of no effect.

Background: the decisions below

9. The present proceedings arise out of a decision of the Tribunal on preliminary issues of law, made on 12 February 2016. The Appellant and others brought claims challenging the lawfulness of the intelligence services' use of Computer Network Exploitation ("**CNE**") techniques – broadly speaking, the hacking of computers including mobile telephones and network infrastructure – and the adequacy of the legal framework within which such techniques were and are deployed.

10. One of the preliminary issues of law concerned the proper interpretation of s. 5 of the Intelligence Services Act 1994 ("**ISA 1994**"). This provision empowers the Secretary of State to issue a warrant "*authorising the taking of such action as is specified in the warrant in respect of any property so specified*" if he considers, among other things, that such action is necessary for the purpose of assisting the intelligence services in carrying out their functions.

    10.1. The significance of that provision became apparent when the Intelligence Services Commissioner (Sir Mark Waller) disclosed in his 2014 Report that the intelligence services were using it to authorise CNE activity. Sir Mark expressed his concern that the intelligence services and the Secretary of State had adopted an interpretation of s. 5 of ISA 1994 which "*seemed to me arguably too broad or 'thematic'*", under which "*the property does not necessarily need to be specifically identified in advance*".

10.2. The Appellant submitted before the Tribunal that s. 5 of ISA 1994 did not permit the issue of so-called "*thematic*" warrants authorising activity in respect of a broad class of property. It relied on, among other things, the long-established aversion of the common law to general warrants, or any warrant which leaves questions of judgement to the person with authority to execute it rather than the person with authority to issue it. The Appellant argued that the legal principles relating to such warrants, recognised in 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 create a power to issue general warrants.

10.3. The Interested Parties resisted that submission, arguing that the requirement of specification would be met by a general warrant. The Interested Parties contended that a warrant could lawfully be so broad as to authorise CNE activity in respect of (for example) all mobile phones in Birmingham (IPT judgment, §36(iii)).

10.4. The Tribunal heard *inter partes* oral argument on 1-3 December 2015 at a public hearing. The issue of law as to the correct interpretation of s. 5 of ISA 1994 was determined solely on the basis of open legal argument.

10.5. The Tribunal gave judgment on 12 February 2016 (*Privacy International v SSFCA* [2016] UKIP Trib 14_85-CH). The Tribunal upheld the Interested Parties' submissions on this issue, finding at §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 Appellant challenged that decision by these proceedings for judicial review, on the grounds that it was wrong in law and violated Convention rights. On 17 June 2016, Lang J granted permission for judicial review, and directed the hearing of a preliminary issue as to whether the High Court's jurisdiction to hear the claim was ousted by s. 67(8).

12. The underlying substantive issue of law about "thematic" general warrants remains of continuing importance. The property interference power in s. 5 of ISA 1994 will remain in force after coming into force of the Investigatory Powers Act 2016 (indeed, the power has been widened to permit GCHQ and MI6 as well as MI5 to engage in property interference in the British Islands – s. 251 of IPA 2016). The only significant change is that s. 5 will no longer be used for computer hacking – s. 13 and Part 5 of IPA 2016 will be used instead. Therefore, it is highly likely that the warrants that Lang J accepted were arguably unlawful remain in effect today.

The Divisional Court

13. The Divisional Court (the President of the Queen's Bench Division and Leggatt J) gave judgment on the preliminary issue on 2 February 2017: [2017] EWHC 114 (Admin). Formally, the members of the Divisional Court agreed that the claim was precluded by s. 67(8), but granted permission to appeal; in substance, Sir Brian Leveson PQBD and Leggatt J disagreed on that issue but thought it better to advance the case to the Court of Appeal rather than requiring it to be heard again by a differently-constituted Divisional Court (see §62: "*In circumstances where this court at least is not the final arbiter of the law that it applies, nothing would be served by causing the issue to be re-argued before a different constitution*"[4]).

14. The President held that s. 67(8) prohibited any judicial review. His reasons were essentially twofold:

    14.1. Since the Tribunal was already exercising a supervisory jurisdiction over the actions of public authorities and exercising powers of judicial review, there were no "*compelling reasons for insisting that a decision of the tribunal is not immune from challenge*" as there were in Anisminic (§42); and

    14.2. Since the legislation authorised the Secretary of State to create a right of appeal (albeit that the power had never been exercised), the presumption that

[4] For the procedure in cases of a split Divisional Court see the *White Book*, vol. 2 para. 9A-247 and *Cambridgeshire CC v Associated Lead Mills Ltd* [2005] EWHC 1627 (Admin).

Parliament "*could not have intended to make a statutory tribunal wholly immune from judicial oversight*" was not engaged (§43, §45).

15. Leggatt J on the other hand considered that s. 67(8) did not oust judicial review for error of law. His reasons were as follows:

    15.1. The clause had to be interpreted in the context of the well-established importance of the High Court's jurisdiction over statutory tribunals, the purpose of which is to maintain the rule of law by (i) providing a means of correcting legal error and (ii) ensuring that a specialist tribunal does not operate as a "*legal island*" without the possibility of issues of general public importance being determined at a higher level of the court hierarchy (§§44-49);

    15.2. The language of s. 67(8) was "*materially similar*" to the words which had been held by the House of Lords in *Anisminic* to be ineffective to oust the High Court's supervisory jurisdiction, "*as Parliament in enacting RIPA must be taken to have known*" (§§54-55);

    15.3. The fact that Parliament had given the Secretary of State the power to create a right of appeal made no difference, just as the existence of an actual right of appeal had not precluded judicial review in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and in *R (Cart) v Upper Tribunal* [2011] QB 120 (§§56-59); and,

    15.4. While the fact that the Tribunal itself applied judicial review principles might have a bearing on the High Court's exercise of discretion in some cases ("*it would make little or no sense to apply a test of irrationality on top of an irrationality test*"), it did not make it inappropriate for a decision of the Tribunal to be challenged on grounds of procedural irregularity or error of law, so it was not a reason why the High Court's jurisdiction should be ousted altogether (§61).

The Court of Appeal

16. The Appellant appealed. The Court of Appeal (Sales LJ, with whom Floyd and Flaux LJJ agreed) gave judgment on 23 November 2017 dismissing the appeal: [2018] 1 WLR 2572.

17. In giving judgment, Sales LJ accepted (at §25) that the ouster of judicial review in these circumstances would involve "*a substantial inroad upon usual rule of law standards in this jurisdiction*". However, he concluded that the effect of s. 67(8) was nevertheless to oust the courts' jurisdiction. He gave four reasons, namely:

    17.1. that the wording of s. 67(8) was sufficiently different from the wording of the provision in issue in *Anisminic* that in his view it was clear that Parliament had intended to exclude judicial review (§§34-37);

    17.2. that the "*very high*" quality of the membership of the Tribunal meant it was a "*fair inference*" that Parliament intended its decisions to be immune from review (§38);

    17.3. that such an interpretation of s. 67(8) was also supported by the statutory context, namely the creation of "*a tribunal capable of considering claims and complaints against the intelligence services under closed conditions which provided complete assurance that there would not be disclosure of sensitive confidential information about their activities*" (§§42-44); and,

    17.4. that in *R (A) v Security Service* [2009] UKSC 12, [2010] 2 AC 1, Lord Brown had referred *obiter* to s. 67(8) as "*an ouster (and, indeed, unlike that in Anisminic, an unambiguous ouster) of any jurisdiction of the courts over the IPT*", and that was "*of powerful persuasive authority*" (§§46-48).

18. Before both the Divisional Court and the Court of Appeal, the Appellant reserved the right to argue before this Court that, as a matter of constitutional principle, the complete ouster of judicial review of a tribunal of limited jurisdiction could not be achieved by statute.

Background: the Tribunal and its legislative framework

19. The Tribunal is a specialist statutory tribunal of limited jurisdiction created to hear and determine claims and complaints relating to the use of investigatory powers by public authorities including, but not limited to, the intelligence services.

20. RIPA 2000 governs a range of investigatory powers, including the use of directed surveillance (covert but non-intrusive surveillance undertaken for the purposes of a specific investigation or operation) and intrusive surveillance (surveillance carried out in relation to anything taking place on residential premises or in a private vehicle).

21. Part IV of RIPA 2000, entitled "*Scrutiny etc. of investigatory powers and of the functions of the Intelligence Services*", makes provision for statutory Commissioners, Codes of Practice, and (in ss. 65-69) the Tribunal.

22. Section 65(1) establishes the Tribunal expressly as a tribunal of limited jurisdiction, providing: "*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*."

23. The remainder of s. 65 makes detailed provision defining the bounds of the Tribunal's jurisdiction. For example:

    23.1. The effect of ss. 65(2)(a) and (3) is that the Tribunal is "*the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998*" in relation to proceedings against the intelligence services or against "*any other person in respect of any conduct, or proposed conduct by or on behalf of any of those services*".

    23.2. The effect of ss. 65(2)(a), (3)(d), and (5) is that the Tribunal is the only appropriate tribunal for hearing HRA 1998 claims against any other public authority in respect of matters such as interception of post or telecommunications or the use of directed surveillance under Part II of RIPA 2000, provided the relevant conduct takes place in "*challengeable circumstances*" (defined as including situations where the conduct takes place with the authority or purported authority of one of a number of specified statutory warrants or permissions, or where it would not have been appropriate for the conduct to take place without such authority or at least without proper consideration having been given to whether such authority should be sought).

    23.3. The effect of ss. 65(2)(a), (3)(d), (5)(f) and (6) is that the Tribunal is the only appropriate tribunal for hearing HRA 1998 claims in respect of "*any entry on or interference with property*" taking place in challengeable circumstances by or on

behalf of a person holding any position within Her Majesty's forces, any police force, the National Crime Agency or the Commissioners for HMRC.

23.4. The effect of ss. 65(2)(a), 3(d), and 5(ca) is that the Tribunal is the only appropriate tribunal for hearing HRA 1998 claims in respect of surveillance by a "*foreign police or customs officer*" within the meaning of s. 76A of RIPA 2000, a provision which permits such surveillance on a temporary basis if notified to the appropriate UK authority.

23.5. The effect of ss. 65(2)(b) and (4) is that the Tribunal also has jurisdiction to consider and determine "*complaints*" in relation to conduct which a person believes to have taken place in relation to him, his property, his communications, or his use of any postal or telecommunication service, either in challengeable circumstances or by or on behalf of the intelligence services. The jurisdiction to hear complaints is wider than the Tribunal's HRA jurisdiction, and often overlaps with the jurisdiction of the ordinary courts in tort. See, for example, *AKJ v Commissioner of Police of the Metropolis* [2014] 1 WLR 285.

23.6. The effect of s. 65(2)(c) is that the Tribunal has jurisdiction to consider claims that a person has suffered detriment as a result of the statutory prohibition on the use of intercept evidence in court proceedings.

24. Section 67 is titled "*Exercise of the Tribunal's jurisdiction*". It establishes the Tribunal's duties and powers in relation to claims and complaints brought before it.

24.1. Section 67(1) provides that "*it shall be the duty of the Tribunal*" to hear and determine proceedings, or to consider and determine complaints or references, brought before it under s. 65(2).

24.2. Sections 67(2) and (3) provide, among other things, that the Tribunal shall apply "*the same principles as would be applied by a court on an application for judicial review*".

24.3. Sections 67(4)-(6) make provision in relation to frivolous and vexatious claims, limitation, and grant power to make interim orders.

24.4. Section 67(7) sets out the powers of the Tribunal "*on determining any proceedings, complaint or reference*" to make "*any such award of compensation or other order as they think fit*". It also gives examples of such orders, including:

24.4.1. "*an order quashing or cancelling any warrant or authorisation*": s. 67(7)(a); and

24.4.2. "*an order requiring the destruction of any records of information which (i) has been obtained in exercise of any power conferred by a warrant or authorisation; or (ii) is held by any public authority in relation to any person*": s. 67(7)(b).

24.5. Section 67(8) provides: "*Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court*."

24.6. Sections 67(10)-(12) make provision as to the contents of, and procedure for making, such an order. Section 67(9) imposes a "*duty*" on 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)*", but s. 67(9) has never been brought into force.

25. The Tribunal's power in s. 67(7) to make "*any such award of compensation or other order as they think fit*" is unconstrained. The Tribunal has power not only to award compensation, but also to:

25.1. quash or cancel any warrant or authorisation (s. 67(7)(a));

25.2. order the destruction of information howsoever obtained (as it did in, amongst other cases, Belhaj v Security Service [2015] UKIPTrib 13_132-H)[5];

[5] The Tribunal required the destruction of legally privileged material unlawfully obtained by GCHQ ("*the Tribunal has required GCHQ to give an undertaking that the parts of the documents containing legally privileged information will be destroyed or deleted so as to render such information inaccessible to the agency in the future*", determination §13). Similar orders were made in respect of the unlawfully intercepted communications belonging to Amnesty International and the South African Legal Resources Centre in the *Liberty & Privacy International Open Determination* ("*GCHQ is hereby ordered to destroy any of Amnesty*

25.3. make a declaration that certain conduct or types of conduct are unlawful (as in Belhaj above: "… *there be a declaration that since January 2010 the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has contravened Article 8 ECHR and was accordingly unlawful*"); and

25.4. make disclosure of sensitive national security information when upholding a complaint, contrary to the submissions of the security and intelligence services. For example, the Tribunal has made public findings, contrary to the agencies' 'Neither Confirm Nor Deny' policy, that the communications of Amnesty International and the South African Legal Resources Centre were unlawfully intercepted, that privileged material was unlawfully obtained in Belhaj and that Privacy International's data has been unlawfully held and examined by MI5.

26. After these proceedings were commenced, Parliament enacted the Investigatory Powers Act 2016, which introduced a new s. 67A providing for a right of appeal "*on a point of law*" against some (but not all) final decisions of the Tribunal. That provision has not been brought into force. In any event, the proposed right of appeal has no bearing on the issues in this appeal:

26.1. The relevant statutory provision is to be construed in the statutory context applicable when it was made. A subsequent amendment cannot affect the proper interpretation of s. 67(8), *a fortiori* when the amendment post-dates the events with which these proceedings are concerned.

26.2. As a matter of principle, the availability of a statutory right of appeal is relevant to the exercise of the High Court's discretion whether to entertain a claim for judicial review, but not to the fundamental questions of jurisdiction with which this appeal is concerned.

26.3. The right of appeal is not retrospective. The Appellant will not be able to obtain a remedy for the substantive unlawfulness of which it has been a victim. In the meantime, the Tribunal's decision permitting the issue of a general warrant for property interference continues to be applied by the security and intelligence

International Ltd's communications that were retained for longer than the relevant retention time limit", §14 of the Amended Open Determination).

services. Other persons affected are unlikely to be able to seek a remedy, given that a warrant is, for obvious reasons, granted and executed in secret.

26.4. The right of appeal excludes all decisions relating to a "*procedural matter*" (s. 68(4C)(b) of RIPA 2000, as amended). Thus, any complaint about the procedure adopted by the Tribunal will continue to be subject to the ouster clause and will not be subject to appeal. This is similar to the position in SIAC where a substantive decision can be appealed, but a bail decision cannot. The ouster clause will remain relevant, even after the implementation of the right of appeal.

26.5. If the Interested Parties are correct, the only means of correcting the Tribunal's error of law is for the Appellant to wait for the right of appeal to be introduced, then seek to relitigate the identical issue of law before the Tribunal and invite it to grant permission to appeal. That would provide no remedy for past unlawful conduct and would be of doubtful propriety.

The correct approach to the interpretation of ouster clauses

27. Any statutory provision purporting to oust or limit the High Court's supervisory jurisdiction must be construed in accordance with the long-established principle that - if they are capable of being effective at all - such provisions will not be effective in the absence of "*crystal clear*" language (*R (Jackson) v Attorney General* [2006] 1 AC 262 at §159 per Baroness Hale, approved and applied in *R (Evans) v Attorney General* [2015] AC 1787 at §§56, 58 per Lord Neuberger). If a purported ouster provision is "*reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court*" (Lord Reid in *Anisminic* at p. 170C). The principle is a species of the principle of legality, but has been applied with particular rigour in the context of ouster clauses. A number of the cases go further, and suggest that there is no language, regardless of its clarity, which could wholly oust judicial review.

28. This approach to the interpretation of such provisions was clear as early as *Smith, Lluellyn, Commissioners of Sewers* (1669) 1 Mod 44, 86 ER 719. The statute in question in that case had provided that orders of the Commissioners of Sewers were to be binding without Royal assent and "*shall not be reversed but by other commissioners*". The Court of

King's Bench nevertheless invalidated the orders of certain Commissioners and fined them for not obeying the Court's orders.

28.1. Kelynge CJ cited the statutory provision at p. 720 but added: "*Yet it was never doubted, but that this Court might question the legality of their orders notwithstanding*."

28.2. Moreton J added in similar terms: "*If commissioners exceed their jurisdiction, where are such matters to be reformed but in this Court? If any Court in England of an inferior jurisdiction exceed their bounds, we can grant a prohibition.*"

29. The strictness of the principle is evident from R v Moreley (1760) 2 Bur 1041, 97 ER 696.

29.1. The relevant statute prohibited any court from "*intermeddling*" with any proceedings under the Conventicle Act and provided that "*this Act, and all clauses therein contained, shall be construed most largely and beneficially for the suppressing of conventicles, and for the justification and encouragement of all persons to be employed in the execution thereof; and that no record, warrant or mittimus to be made by virtue of this Act, or any proceedings thereupon, shall be reversed, avoided or any way impeached, by reason of any default in form*."

29.2. Notwithstanding that apparent attempt not only to prevent the Courts from reversing, avoiding, or impeaching any decision made under the Act but also to specify the approach that should be adopted in construing that prohibition, Lord Mansfield granted certiorari, holding: "*The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled.*"

29.3. Lord Mansfield thus held that express words preventing a decision from being reversed or avoided were not sufficient, if the statute did not also make specific reference to the High Court's jurisdiction and an intention to remove it.

30. The principle is sufficiently powerful that even statutes which expressly prohibit the grant of a certiorari by the High Court have been held to be ineffective to do so.

30.1. In R v Cheltenham Commissioners (1841) 1 QB 467, 113 ER 1211 at p. 1214, the statute in question provided "*That no order, verdict, rate, assessment, judgment, conviction, or other proceeding touching or concerning any of the matters aforesaid, or*

touching or concerning any offence against this Act, or any by-law or order to be made in pursuance thereof, shall be quashed or vacated for want of form only, or be removed or removable by certiorari, or any other writ or process whatsoever, into any of His Majesty's Courts of Record at Westminster; any law or statute to the contrary thereof in anywise notwithstanding."

30.2. Lord Denman CJ, giving judgment at p. 1214, said: "*the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed.*" As Lord Neuberger noted in *Evans* at §55, Lord Denman CJ's conclusion was robust. It also supports the wider constitutional arguments made below.

30.3. In *Ex parte Bradlaugh* (1878) 3 QBD 509, the statute provided that "*no Information, Conviction, or other Proceeding before or by any of the said Magistrates shall be quashed or set aside, or adjudged void or insufficient, for Want of Form, or be removed by Certiorari into Her Majesty's Court of Queen's Bench*." The statute excluded certiorari and contained an express reference to removing the jurisdiction of the Court of Queen's Bench. A magistrate had made an order for the destruction of obscene books which referred to one of the two conditions for the exercise of the power but not the other.

30.4. Cockburn CJ noted the "*no certiorari*" provision and held: "*This is an objection founded upon an absence of jurisdiction appearing on the face of the order; and I am clearly of opinion that the section does not apply when the application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction*."

30.5. Mellor J agreed, saying: "*It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question*." Certiorari was therefore granted.

31. The older authorities were summarised in *R (Gilmore) v Medical Appeal Tribunal* [1957] 1 QB 574 by Denning LJ.

31.1. The statute in Gilmore provided that a decision of the Medical Appeal Tribunal "*shall be final*".

31.2. Denning LJ surveyed the older cases and drew from them the conclusion that it was "*very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final', certiorari can still issue for excess of jurisdiction or for error of law on the face of the record.*"

32. Scots law is to the same effect. For example:

32.1. In Campbell v Young (1835) 13 S 535 s. 22 of the Hawkers Act provided that "*no conviction made, or decree given under or by virtue of this Act… shall be removed to the Court of Session by advocation…*" Lord Justice-Clerk Boyle at pp. 541-2 held the ouster did not remove the Court of Session's jurisdiction:

> *"We cannot listen to a proposition so monstrous as that, because a party says he acts under the statute he is to do as he pleases. If he deviates from the statute, the exclusion of our jurisdiction is no longer applicable. The legislature, when it gave powers, meant them to be carried into effect as prescribed."*

32.2. In Ashley v Magistrates of Rothesay (1873) 11 M 708[6] s. 34 of the Public Houses Amendment Act 1862 provided that "*…no warrant, sentence, order, decree, judgment or decision made or given by any Quarter Sessions… shall be subject to reduction, advocation, suspension or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than by this Act provided*". Lord President Inglis held that this provision did not prevent review:

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

[6] The decision of the Inner House was affirmed by the House of Lords sub nom. MacBeth v Ashley (1870-1875) LR 2 Sc 352. The ouster clause was not considered on appeal. Lord President Inglis reached the same conclusion in respect of the "*very strong*" ouster in s. 20 of the General Police Act 1862 in Stirling v Commissioners of Police of the Burgh of Turriff (1874) 1 R 935.

review, as I said before, but it is the interference of the Supreme Court for the purpose of keeping inferior Courts within the bounds of their jurisdiction. The Magistrates having exceeded their powers under the statute their order, whatever it may be – or decision – is liable to be set aside."

32.3. In *McDaid v Clydebank DC* 1984 SLT 162 s. 85(10) of the Town and Country Planning (Scotland) Act 1972 provided that no enforcement notice "*except by way of an appeal under this section* [shall] *be questioned in any proceedings whatsoever*". The Inner House (Lord Cameron) held that "*it is trite law that an exclusion of the jurisdiction of the courts can only be effected by the clearest legislative provision*". The ouster clause was ineffective and relief was granted on procedural fairness grounds: "*an alleged finality or exclusion clause … is only effective where compliance with the statutory code has been possible*".

33. Contrary to a submission advanced by the Interested Parties before the Divisional Court, this principle is not applicable only to "*administrative tribunals*". It applies with full force to judicial review by the High Court of decisions of judicial tribunals.

33.1. Certiorari was originally a remedy directed at judicial tribunals, and the applicable principles were developed in that context. As explained by Lord Sumner in *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at p. 160: "*Long before Jervis's Acts statutes had been passed which created an inferior court, and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the court to bring the proceedings before itself by certiorari*."

33.2. Accordingly, many of the cases establishing or applying the principle explicitly justify it by reference to the High Court's power to supervise the proceedings of courts of limited jurisdiction. For example, in *Smith, Lluellyn* the justification for intervening was summarised by Moreton J at p. 720: "*If any Court in England of an inferior jurisdiction exceed their bounds, we can grant a prohibition*".

33.3. More recently, the principle has been applied to a wide variety of courts and tribunals. For example:

33.3.1. *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738 concerned the question whether the High Court's judicial review jurisdiction in respect of decisions of the County Courts had been

ousted by the existence of a statutory right of appeal. The Court of Appeal held that it had not. Lord Phillips MR held at §44: "*The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication*."

33.3.2. *R (Woolas) v Parliamentary Election Court* [2012] QB 1 concerned the decision of two High Court judges sitting in a parliamentary election court. A statutory ouster (providing that their decision was to be "*final to all intents as to the matters at issue on the petition*") was held to be ineffective to preclude judicial review of that decision by the High Court for error of law.

33.3.3. *R (Cart) v Upper Tribunal* [2012] 1 AC 663 concerned whether the Upper Tribunal, designated by statute as a superior court of record and situated "*at the apex of a new and comprehensive judicial structure*" (per Laws LJ in the Divisional Court at §94), was nevertheless susceptible to judicial review by the High Court. The Supreme Court held that it was.

33.3.4. *U v SIAC* [2010] 2 WLR 1012 (heard with *Cart*) concerned the question of whether the Special Immigration Appeals Commission, also designated a superior court of record and benefiting from an express provision purporting to exclude judicial review, was nevertheless susceptible to such review. Laws LJ held that it was, and (at §83) that the ouster provision was "*a no certiorari clause which falls foul of the* Anisminic *principle … SIAC is, and throughout its life has been, amenable to judicial review*". This conclusion was not appealed to the Supreme Court. In order to be "*duly constituted*" SIAC must include at least one current or former holder of high judicial office (paragraph 5(a) of Schedule 1 to the Special Immigration Appeals Commission Act 1997), and all of its work concerns sensitive national security issues.

34. The main principle underlying this approach is the importance to the rule of law of there being an authoritative arbiter of the law capable of (i) preventing public authorities from acting inconsistently with the limits placed upon them by Parliament, and (ii) correcting

errors or distortions and avoiding the development of pockets of erroneous "*local law*" in specialist jurisdictions insulated from the ordinary courts.

35. The first justification is particularly pertinent where, as here, the limits of the tribunal's jurisdiction have been delineated in detail by Parliament in the statute constituting the Tribunal. It would be inconsistent with those provisions for the tribunal to be free to exceed its powers without any external and independent constraint or supervision.

36. The second justification was explained by Baroness Hale in Cart (Supreme Court) at §§42-44, as follows:

> *"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."*

37. The decision of the Tribunal from which these proceedings arise is a good example of those concerns. The Tribunal has an exclusive jurisdiction over many types of claim against the security and intelligence services. It has adopted an interpretation of s. 5 of ISA 1994 which the Appellant submits is contrary to principles of constitutional importance and is of general application, based on centuries of common law authority, and has done so on the grounds that the principles relied upon by the Appellant do not apply in the context of national security in which the intelligence and security services operate. That is a finding explicitly based on the exceptionality of the sphere in which the Tribunal operates, and it ought to be subject to review by the ordinary courts to determine whether it is right.

38. The risk is that the Tribunal is a court "*preoccupied with special problems*". As such, it is more "*likely to develop distorted positions*" and "*strain just those limits with which the*

legislature was most concerned". Thus it "*should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction*" (Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact* (1957) 70 Harvard LR 953 cited with approval by the High Court of Australia in *Kirk v Industrial Relations Commission* [2010] HCA 1 at §64).

Anisminic v Foreign Compensation Commission

39. The House of Lords applied the principles set out above in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, one of the foundations of modern English public law. *Anisminic* has been considered, explained and reaffirmed by the House of Lords and the Supreme Court on a number of subsequent occasions, most recently in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 (10 October 2018). It is of particular significance to this case because of the wording of the statutory formula which was held in *Anisminic* not to preclude judicial review on grounds of error of law, the reasons given for that conclusion and the legislative context in which the decision was made.

40. The case concerned a determination of the Foreign Compensation Commission, a body established under statute to consider and rule upon applications to participate in compensation funds arising from agreements with foreign governments. The statutory framework and factual background were as follows:

    40.1. The Foreign Compensation Act 1950 established a framework within which a compensation fund could be the subject of an Order in Council providing for the Commission to register and determine claims and to distribute the fund to the relevant claimants.

    40.2. The Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 made provision in respect of a compensation fund arising from the nationalisation of the Suez Canal. It set out the criteria which, if satisfied, would allow an applicant to make a claim on the fund. The distribution of the fund between successful applicants was the subject of other provisions; the prior question of an applicant's entitlement to participate was a question of law.

40.3. The legislation provided for the Chairman of the Commission to be appointed by the Lord Chancellor. At the time of the determination in Anisminic, the Chairman was Cyril Montgomery White QC, described by Lord Morris of Borth-y-Gest at p. 175F as "*an eminent Queen's counsel*" (and see also Lord Reid at pp. 171G-H). Lord Wilberforce at p. 207C summarised the nature of the Commission saying: "*its functions are predominantly judicial; it is a permanent body, composed of lawyers, with a learned chairman, and there is every ground, having regard to the number and the complexity of the cases with which it must deal, for giving a wide measure of finality to its decisions.*"

40.4. Section 4(4) of the Foreign Compensation Act 1950 contained the purported ouster clause. 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*."

40.5. Anisminic, an English company, had owned property in Egypt at the time of the sequestration, but had subsequently sold it to an Egyptian organisation. The Commission refused the application on the grounds that the sale of the property meant that it was no longer entitled to participate.

40.6. Anisminic brought proceedings to challenge that refusal on the ground that it was wrong in law. The Commission resisted the claim on the ground (among others) that s. 4(4) prevented any such challenge.

40.7. The underlying dispute concerned the proper interpretation of the concept of a "successor in title" in the context of property which had been sequestered, which (as Lord Reid explained at pp. 174F-175C) was not straightforward.

41. Notably, s. 11(1) and (4) of the Tribunals and Inquiries Act 1958 provided that all previously-enacted ouster clauses were not to be effective to prevent certiorari, with two exceptions. The first exception was s. 4(4) of the Foreign Compensation Act 1950. The second was s. 26 of the British Nationality Act 1948[7]. Section 11(1) provides:

> "*Any provision in an act passed before the commencement of this Act that any order or determination shall not be called into question in any court, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not*

[7] The successor to this provision was conceded not to preclude judicial review in *R (Fayed) v Secretary of State for the Home Department* [1998] 1 WLR 763.

have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus."

42. Notwithstanding the deliberate exclusion by Parliament of s. 4(4) from this statutory provision, the House of Lords held by a majority (Lords Reid, Pearce, Wilberforce and Pearson, with Lord Morris of Borth-y-Gest dissenting) that neither s. 4(4) of the 1950 Act nor s. 11(1) of the Tribunals and Inquiries Act 1958 prevented a challenge to a determination on the grounds of error of law.

42.1. Lord Reid introduced the issue at p. 169F and set out the parties' contentions as to the proper interpretation of s. 4(4): the respondent maintained that it prohibited proceedings in which a determination was questioned, even where the purpose of the proceedings was to establish that the determination was a nullity; the appellants submitted "*that 'determination' 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. Or, putting it in another way, if you seek to show that a determination is a nullity you are not questioning the purported determination – you are maintaining that it does not exist as a determination*."

42.2. At p. 170C-F he referred to the approach that should be adopted in interpreting the legislation:

> "*It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.*
>
> *Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. 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, 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. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others: if that were intended it would be easy to say so."*

42.3. At p. 171-B-G Lord Reid addressed a possible objection to that analysis:

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

42.4. Lord Pearce began at p. 194E-H by addressing the constitutional significance of the High Court's review jurisdiction:

"My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts.

When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal.

Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament."

42.5. He agreed with the core of Lord Reid's analysis at p. 195B-G:

"while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

Further, it is assumed, unless special provisions provide otherwise, that the tribunal will make its inquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error... It is simply an enforcement of Parliament's mandate to the tribunal."

42.6. At p. 199F-H he adopted the same analysis of s. 4(4):

> *"It has been argued that your Lordships should construe "determination" as meaning anything which is on its face a determination of the commission including even a purported determination which has no jurisdiction. It would seem that on such an argument the court must accept and could not even inquire whether a purported determination was a forged or inaccurate order which did not represent that which the commission had really decided. Moreover, it would mean that however far the commission ranged outside its jurisdiction or that which it was required to do, or however far it departed from natural justice its determination could not be questioned. A more reasonable and logical construction is that by "determination" Parliament meant a real determination, not a purported determination. On the assumption, however, that either meaning is a possible construction and that therefore the word "determination" is ambiguous, the latter meaning would accord with a long-established line of cases which adopted that construction. One must assume that Parliament in 1950 had cognisance of these in adopting the words used in section 4 (4)."*

42.7. Lord Wilberforce disclaimed any reliance on a "restrictive interpretation" of s. 4(4) (p. 207C). He said, however:

> *"the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited…*
>
> *Equally, though this is not something that arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as (I do not attempt more than a general reference, since the strength and shade of these matters will depend upon the nature of the tribunal and the kind of question it has to decide) the requirement that a decision must be made in accordance with principles of natural justice and good faith. The principle that failure to fulfil these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in* Ridge v. Baldwin [1964] A.C. 40…
>
> *The courts, when they decide that a "decision" is a "nullity," are not disregarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so, as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed (see the formulation of Lord Sumner in* Rex v. Nat Bell Liquors Ltd. [1922] 2 A.C. 128, 156*). In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. <u>What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed</u>?"*

42.8. Lord Pearson at p. 215B agreed that s. 4(4) "*does not exclude the court's intervention in a case where there is a merely purported determination given in excess of jurisdiction*", although in his view the Commission had construed the legislation correctly (p. 223A).

42.9. The Tribunals and Inquiries Act 1958 (with its express exception for the Foreign Compensation Act 1950) might be thought to confirm Parliament's intent to oust the jurisdiction of the High Court. Nevertheless, it was treated as irrelevant by the House of Lords. Lord Pearce held at p. 201B: "*the fact that this commission was expressly exempted from the provisions of section 11 of the Tribunals and Inquiries Act passed in 1958, though no doubt a tribute to the high standard of the commission and the fact that its chairman was a lawyer of distinction, cannot have any bearing on the construction of the Foreign Compensation Act 1950*".

43. The significance of *Anisminic* for the present case is fourfold.

44. **First**, it reaffirmed that if an apparent ouster of judicial review is reasonably capable of having two meanings, the meaning shall be taken which preserves the ordinary jurisdiction of the court. The clearest possible words are required to remove the jurisdiction and duty of the High Court to ensure that a tribunal keeps within the jurisdictional limits set for it by Parliament.

45. **Secondly**, a statutory provision which stated that "*no determination of the tribunal shall be called in question in any court of law*" was specifically held to be a formulation which did not oust judicial review, as a matter of statutory construction.

46. **Thirdly**, *Anisminic* eliminated any relevant distinction between errors of law within jurisdiction and errors of law resulting in an excess of jurisdiction. Parliament, in giving a tribunal the power to decide certain questions, did so only on the basis that the tribunal would decide them in accordance with the law. After *Anisminic*, any error of law by a tribunal renders its decision outside the powers granted to it by Parliament. This point has been reaffirmed by numerous subsequent decisions interpreting and giving effect to the decision in *Anisminic*. For example:

46.1. In *O'Reilly v Mackman* Lord Diplock said at p. 278:

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

46.2. In *R (Page) v Lord President of the Privy Council* [1993] AC 682 Lord Wilberforce said 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."*

46.3. This principle was again recently reaffirmed by the Supreme Court in *Lumba v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 per Lord Dyson at §66:

> *"A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised.* Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 *established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the* Wednesbury *sense, it is unlawful and a nullity. The importance of* Anisminic *is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see* Boddington v British Transport Police [1999] 2 AC 143, 158D-E."

46.4. In *Eba v Advocate General for Scotland* [2012] 1 AC 710 Lord Hope summarised the current position in English law at §31 ("*Anisminic… abolished the distinction between errors of law that went to jurisdiction only in the strict sense and those that did not*") and applied it to Scots law at §34 ("*… the time has come for it to be declared that* [Watt v Lord Advocate] *is incompatible with what was decided in Anisminic*"). The correct approach is that identified by Lord President Hope in *West v Secretary of State for Scotland* [1992] SC 385 at p. 413:

> *"The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the*

supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law."

46.5. Finally, in Lee v Ashers Baking Company Ltd [2018] UKSC 49 (10 October 2018) the Supreme Court unanimously confirmed the above jurisprudence. Lee concerned a finality provision preventing any further appeal from a decision of the Court of Appeal of Northern Ireland. Lord Mance noted that Lee did not fall within the scope of Anisminic (which was a case about an inferior tribunal of limited jurisdiction): §85. Nevertheless, Anisminic was explained and applied:

46.5.1. Lord Mance noted at §85 that any "*misconstruction by the commission of the scope of its jurisdiction*" including "*acting in bad faith, making a decision which the tribunal had no power to make, failing to give effect to the requirements of natural justice, taking into account something required to be left out of account and refusing to take into account something required to be taken into account were… all… outside the scope of such a finality provision*". The ouster clause in Anisminic was ineffective to prevent judicial review of all categories of legal error.

46.5.2. The Court then strictly construed a finality provision relating to an appeal to the Court of Appeal as not preventing an appeal raising a procedural error. Excluding such an appeal would "*require much clearer words – and they would, clearly, be unusual and surprising words*" §88.

47. **Fourthly**, Anisminic provided an indication of the sort of language that would be required in order to make clear a legislative intention to oust judicial review. As a minimum, any such legislation would need to refer to 'purported determinations' as being immune from challenge, and expressly state that the jurisdiction of the High Court to review decisions is ousted. Several of the speeches in Anisminic expressly relied on

the fact that s. 4(4) referred only to 'determinations' and not 'purported determinations'. See Lord Reid at p. 170A-F, Lord Pearce at p. 199F-H, and Lord Pearson at p. 215B. Lord Wilberforce made the same point at p. 208C, although without placing express significance on the absence of the word 'purported'.

48. In view of the clarity of that point, and the iconic status of the decision in *Anisminic*, any draftsman seeking to draft an effective ouster provision would certainly have had to make reference to the protection of purported decisions from judicial review by the High Court. Conversely, where no such reference is made, the inference is inescapable that an ouster of the High Court's jurisdiction was not intended.

49. Indeed, in *U v SIAC* it was rightly treated as entirely obvious and straightforward that a provision which sought to prevent a "*decision*" from being "*questioned in legal proceedings*" was ineffective to oust judicial review. As Laws LJ held at §83: "*It is a no certiorari clause which falls foul of the* Anisminic *principle… SIAC is, and throughout its life has been, amenable to judicial review for excess of jurisdiction in both senses.*"

Attempts to enact a post-Anisminic ouster

50. The legislative response of Parliament to the decision in *Anisminic* is equally instructive, because it shows that when Parliament did seek to create a form of ouster, it understood perfectly well the significance of the distinction between "determinations" and "purported determinations".

    50.1. The Foreign Compensation Act 1969, enacted after the decision in *Anisminic*, provided:

        50.1.1. at s. 3(2) for a right of appeal on a question of law against a determination of the Commission;

        50.1.2. at s. 3(9): "*Except as provided by subsection (2) above and subsection (10) below, no determination by the Commission on any claim made to them under the Foreign Compensation Act 1950 shall be called in question in any court of law*";

50.1.3. at s. 3(10): "*Subsection (9) above shall not affect any right of any person to bring proceedings questioning any determination of the Commission on the ground that it is contrary to natural justice*"; and,

50.1.4. at s. 3(3): "*In this section 'determination' includes a determination which under rules under section 4(2) of the Foreign Compensation Act 1950 (rules of procedure) is a provisional determination, and anything which purports to be a determination*."

50.2. The reference to "*anything which purports to be a determination*" was intended to meet the analysis of the House of Lords in *Anisminic*. Where ouster was Parliament's intention, an appropriate form of words was available. Its absence from any subsequent provision is evidence that the intention to achieve ouster of judicial review was also absent.

50.3. It does not appear that the ouster clause in the 1969 Act was ever tested, no doubt because it was accompanied by a right of appeal on a question of law.

51. Only once since *Anisminic* has a clause been proposed which expressly sought entirely to oust judicial review of an inferior tribunal, including purported decisions, and actions taken in excess of jurisdiction. 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…"*

52. That clause expressed a clear intention 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. It serves as an instructive example of how that intention could be manifested where it exists. Indeed, the clause squarely confronted the consequences of the decision in *Anisminic*. The list in the proposed subsection (3) had its origins in Lord Reid's speech in *Anisminic*.

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

53.1. The Constitutional Affairs Committee concluded in its Second Report of the 2003-2004 Session at paragraph 70[8]:

> *"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."*

53.2. 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[9], said:

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

53.3. The Law Reform Committee of the Bar Council, in written evidence to the Constitutional Affairs Committee on 16 January 2004[10], 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…*

[8] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21109.htm
[9] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we22.htm
[10] http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we46.htm

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."

53.4. Mr Justice Ouseley (then the President of the Immigration Appeal Tribunal), in evidence to the Constitutional Affairs Committee on 17 November 2003[11], 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."

53.5. The Joint Committee on Human Rights, in its Fifth Report of the 2003-2004 Session[12], 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 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."

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

53.6. Lord Woolf, in the Squire Centenary Lecture delivered on 3 March 2004 ("*The Rule of Law and a Change in the Constitution*")[13], 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. […]*
>
> *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."*

53.7. Lord Steyn said in a speech at the Inner Temple, also on 3 March 2004[14]:

> *"[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."*

53.8. 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."*

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

[14] 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

53.9. Finally, the Chairman of the Bar (Stephen Irwin QC) wrote of the proposed provision in April 2004:

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

54. If the decision of the Court of Appeal is correct, the same criticisms may properly be made about s. 67(8) of RIPA 2000. The criticism of the proposal in 2003 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 the requirement that the intention to exclude judicial review must be clear and unambiguous, and in particular the practical aspect of the principle of legality identified by Lord Hoffmann in *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 at p. 131F: "*the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.*" See also *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 at §§78-82 per Lord Reed, *R (B (Algeria)) v SIAC* [2018] 2 WLR 651 at §29 per Lord Lloyd-Jones and *R (Ingenious Media Holdings) v Revenue and Customs Commissioners* [2016] 1 WLR 4164 at §§19-21 per Lord Toulson.

Other Commonwealth jurisdictions

55. The effectiveness of clauses purporting to limit or exclude the scope of judicial review is an issue that has been extensively litigated across the common law world. Courts in other common law jurisdictions have been equally reluctant to give inferior courts and tribunals free rein to determine the limits of their own jurisdiction, without regard to standards of lawfulness, reasonableness or procedural fairness.

56. With the possible exception of two apartheid-era South African decisions and one Canadian decision (since overruled), courts in other common law jurisdictions have not upheld any complete ouster of judicial review in the absence of a statutory right of appeal. They have often applied the logic of *Anisminic* to ouster clauses which are far more clearly and unambiguously drafted than s. 67(8) of RIPA 2000. By way of example only, the following clauses have been held not to oust judicial review:

56.1. Section 92 of the Industrial Conciliation and Arbitration Act 1908 (New Zealand):

> "*Proceedings in the Court shall not be impeached or held bad for want of form, nor shall the same be removable to any court by certiorari or otherwise; and no award, order or proceeding of the Court shall be liable to be challenged, appealed from, reviewed, quashed or called in question by any Court of judicature on any account whatsoever*."

New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer [1924] NZLR 689 (Supreme Court of New Zealand) at pp. 702-3 per Salmond J. The suggestion that the ouster clause was effective was rejected in emphatic terms, four decades before *Anisminic*:

> "*it is contended… that by this section the Arbitration Court is given jurisdiction to determine conclusively the limits of its own jurisdiction, and that its determination of such a question, even though erroneous in law, is unexaminable by the Supreme Court in any method or in any manner whatever. Doubtless if the words of s. 96 are to be read literally they justify this contention and produce the extraordinary result that the Arbitration Court possesses uncontrolled authority to make in any manner whatever such orders and awards as it thinks fit, in disregard of the limits of its jurisdiction, in infringement of the jurisdiction of other Courts, and in violation of the law of the land, and that all orders and awards so illegally made must by the Supreme Court and all other Courts be recognised and acted on without question as indisputably valid.*
>
> *That Parliament could, if it thought fit, establish in this country such a system of judicial autocracy cannot be doubted, but in order to do so effectually it would be necessary for Parliament to use language so clear and coercive as to be incapable of any other interpretation. In the present case another interpretation is obvious. Section 96 may and should be construed in the same restrictive sense in which statutory provisions taking away the writ of certiorari have always been read…*
>
> *It is true that s. 96…goes in terms far beyond the mere taking away of certiorari… The very same restrictive interpretation… is equally applicable to those additional provisions also… The section means merely that so long as the Court keeps within the limits of the jurisdiction entrusted to it by the Legislature its proceedings within those limits are not subject to the… control of any other court… But as soon as the Arbitration Court goes beyond the limits of the jurisdiction so assigned to it, whether by misinterpretation of the Act… or otherwise… it is subject to the control of the Supreme Court…*
>
> *this controlling authority… is so essential a point of civil freedom and public policy that an intention to take it away in the case of any Court of special or limited jurisdiction cannot be imputed… merely because of the use of general language which is reasonably capable of a mere restricted and reasonable interpretation.*"

56.2. Section 474 of the Migration Act 1958 (Australia):

> "*(1) A privative clause decision:*

(a) is final and conclusive;

(b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section,

"privative clause decision" means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in exercise of a discretion or not) other than decision referred to in subsection (4) or (5)."

Plaintiff S157/2002 v Commonwealth [2003] HCA 2 (High Court of Australia) at §§74-76 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

56.3. Section 179 of the Industrial Relations Act 1996 (Australia)

"*(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.*

…

(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…

(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."

Kirk v Industrial Relations Court [2010] HCA 1 (High Court of Australia) at §§98-104 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. It is notable that this (failed) ouster extended to protect "*a purported decision of the Commission*".

Australia

57. The High Court of Australia has long rejected ouster clauses. A classic no certiorari clause was held to be ineffective to prevent review of an error going to jurisdiction in R v Hickman, ex parte Fox (1945) 70 CLR 598. As Dixon J held, it is logically "*impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the invention that any excess of that authority means invalidity, and yet, at the same time, to*

deprive this Court of authority to restrain the invalid action… by prohibition." Thus, where this is what the legislature appears to have done the court should attempt to resolve the contradiction "*by adopting any interpretation of the provision that is fairly open*" (p. 616).

58. In *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, s. 474 of the Migration Act 1958, set out above, purported to exclude the prerogative writs. The High Court held that this provision was ineffective, applying classic *Anisminic* reasoning: a purported decision outside the jurisdiction of the decision maker was not a decision taken "*under*" the legislation, so did not benefit from the ouster clause:

> "*When regard is had to the phrase "under this Act" in s 474(2) of the Act, the words of that sub-section are not apt to refer either to decisions purportedly made under the Act or […] to decisions of the kind that might be made under the Act. Moreover, if the words of the sub-section were to be construed in either of those ways, s 474(1)(c) would be in direct conflict with s 75(v) of the Constitution and, thus, invalid. Further, they would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71. (at [75])*"

59. The High Court also held that s. 75(v) introduced an "*entrenched minimum provision of judicial review*" and the jurisdiction of the High Court to grant s. 75(v) relief could not be removed by Parliament (at §98, §§103-104). As the majority put it: "*… the ultimate decision-maker in all matters where there is a contest, is this Court… In the end, pursuant to s. 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review*" (§104).

60. In *Kirk v IRC* [2010] HCA 1 the High Court of Australia considered the exceptionally strongly drafted ouster provision in s. 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 <u>any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise</u>.*

61. 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*". It went considerably further than the ouster in the present appeal.

62. The High Court of Australia applied the same technique of analysis as <u>*Anisminic*</u>:

> "*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.*[15] *To grant certiorari on that ground is not to call into question a 'decision' of the Industrial Court…*"

63. Further, the High Court held that the reference to "*a purported decision … on an issue of the jurisdiction of the Commission*" in s. 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). Even an ouster clause excluding review of a purported decision was insufficiently clear to be given legal effect.

64. Finally in <u>*South Australia v Totani*</u> (2010) 242 CLR 1 (High Court of Australia) an ouster clause was ineffective even though it sought to protect a "*purported*" decision as well as one within the powers of the decision maker. Section 41(1) of the Serious and Organised Crime (Control) Act 2008 (Australia) provided:

> *"Except as otherwise provided in this Act, no proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question –*

[15] 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.*"

> *(a) a decision, determination, declaration or order under this Act or purportedly made under this Act;*
>
> *(b) proceedings or procedures under this Act or purportedly under this Act;*
>
> *(c) an act or omission made in the exercise, or purported exercise, of powers or functions under this Act; or*
>
> *(d) an act, omission, matter or thing incidental or relating to the operation of this Act."*

65. Kirk was applied. The context was control orders over members of criminal organisations. Again, the ouster clause was ineffective even though it sought to protect a "*purported*" decision as well as one within the powers of the decision maker in the context of preventative measures concerning serious criminality.[16]

New Zealand

66. The Anisminic principles are applied in interpreting ouster clauses in New Zealand:[17]

66.1. A provision permitting challenges only "*on the ground of lack of jurisdiction*" was considered in Zaoui v Attorney General (No. 2) [2005] 1 NZLR 690. The Court of Appeal held:

> "*Parliament must therefore have intended that the words "except on the ground of lack of jurisdiction" would be construed in light of the approach taken … by the House of Lords 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 (at [179]).*"

66.2. Ouster clauses excluding certiorari or review whilst at the same time granting a right of appeal on questions of law to the ordinary courts have been found to be effective (see e.g. New Zealand Rail v Employment Court [1995] 3 NZLR 179, Ramsay v Wellington District Court [2006] NZAR 136 and Tannadyce Investments v Commissioner of Inland Revenue [2012] 2 NZLR 153). Such provisions are

[16] Further later decisions to similar effect include Public Service Association of South Australia v IRC (2012) 249 CLR 398 (High Court) and Bare v Independent Broad-Based Anti-Corruption Commission (2015) 326 ALR 198 (Court of Appeal of Victoria).
[17] See Joseph, *Constitutional and Administrative Law in New Zealand* (4th ed, 2014), para 22.9.1.

uncontroversial: they provide a means of ensuring that errors can be corrected and the tribunal is kept within its proper jurisdiction.

Canada[18]

67. Since Crevier v Quebec [1981] 2 SCR 220, judicial review for jurisdictional error has been a constitutional guarantee under s. 96 of the British North America Act 1987. Laskin CJ noted that the Courts had hitherto "*been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly*" (p. 237). Nevertheless:

> "*… given that s. 96 is in the British North America Act and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine to determine the limits of its jurisdiction without appeal or other review*" (p.237).
>
> "*It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review*" (p. 238).

68. These principles were affirmed by the Canadian Supreme Court in Dunsmuir v New Brunswick [2008] 1 SCR 190 at §52:

> *"The rule of law requires that the constitutional role of superior courts be preserved… neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction."*

69. In one pre-Crevier case (Woodward Estate v British Columbia [1973] SCR 120) an ouster clause with an unusual ratification and deeming provision (not present in this appeal) was held to be effective. Section 5(2) of the Succession Duty Act 1960 provided:

> *"... the determination of the Minister is final, conclusive, and binding on all persons and, notwithstanding section 43 or 44 or any other provision of this Act to the contrary, is not open to appeal, question, or review in any Court, and any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons."*

Woodward was cited and not followed in Crevier.

South Africa

[18] The Appellant is very grateful for the assistance of the Lowenstein International Human Rights Clinic at Yale Law School for its research and identification of the relevant Canadian authorities.

70. In the pre-apartheid era, the decisions of the Courts followed the well-established common law principles. Ouster clauses were strictly construed and were held not to exclude review. See, for example Union Government v Fakir [1923] AD 466 where there was a detailed provision excluding the Court's supervisory jurisdiction. These were "*strong provisions – stronger than any which I can remember to have seen in any privative statute*". Nonetheless "*a writ of certiorari might properly issue*" (pp. 469-470 per Innes CJ).

71. Even during the apartheid era, the court would sometimes reject an attempt to utilise an ouster clause to prevent judicial review of *ultra vires* action. Such as in Hurley v Minister of Law and Order 1985 (4) SA 709 (D) where the Internal Security Act sought to prevent the courts from "*pronouncing on any action taken in terms of this section*".

72. A more deferential approach was taken to s. 5B of the Public Safety Act 1953, which provided that "*no interdict or other process shall issue for the staying or setting aside of any proclamation… and no Court shall be competent to inquire into or give judgment on the validity of any such proclamation*".

73. In Staatspresident v United Democratic Front 1988 (4) SA 830 (Supreme Court of South Africa), the Court (by a majority) held that s. 5B of the 1953 Act prevented the Court from quashing emergency regulations for vagueness. The decision was followed once, in Natal Indian Congress v State President 1989 (3) SA 588 (D). The Court (Friedman J) expressed strong regret but considered itself bound by an erroneous decision:

> "*I must confess… that I find the reasoning in the minority judgment of Van Heerden JA to accord, with respect, more with what I had always understood the law to be…*" (p. 591D)
>
> "*I regret that the application must fail. I use the word 'regret' advisedly. In general, one of the traditional roles of the Court is to act as a watch-dog against what I might term Executive excesses in the field of subordinate legislation… It is therefore a matter of regret that, in the field of security legislation, the Legislature should have seen fit to remove from the Court the role which… is traditionally one entrusted to it, of fairly and without favour prejudice, safeguarding the interests both of the State and its officers on the one hand and those of its citizens on the other… many of the regulations under consideration in this case were the target of trenchant and well-directed criticisms by Mr Mahomed* [for the claimant]" (p. 594).

74. Nevertheless, even in these cases the ouster was not absolute. The Court considered that it could still intervene to quash regulations that were "*teen elke regsinnige mens se menslikheidsgevoelens*" (contrary to common humanity) on the basis of "*an absence of* bona fides *on the part of the State President*" (p. 591B).

75. In post-apartheid South Africa, no ouster clause has survived the courts' scrutiny. For example, s. 5 of the Powers and Privileges Act 1963 states:

> "*…[U]pon production to the court or Judge by the defendant or accused, of a certificate by the Speaker … stating that the matter in question is one which concerns the privilege of Parliament, the court or Judge shall immediately stay such proceedings, which shall thereupon be deemed to be finally determined*."

76. In *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), the Cape Provincial Division held that, so far as the provision purported to place issues of Parliamentary privilege beyond judicial scrutiny on the *ipse dixit* of the Speaker, it was invalid and unconstitutional (at §40). In particular, Hlophe J held that the clause was contrary to s. 34 of the 1996 constitution, which guarantees access to the courts, and s. 167(3)(a), which provide that no person or organ of the State may interfere with the functioning of the courts (at §41).[19] These aspects of the constitution have been described as codifying the principle of the rule of law.[20]

Ireland

77. The Irish courts have consistently held that even widely-drafted ouster clauses will not protect a decision which is *ultra vires*, including in national security cases. For example:

    77.1. In *State (O'Duffy) v Bennet* [1935] IR 70 at pp.118-9 O'Byrne J held that a broad no-certiorari clause did not prevent the grant of a prohibition against the Constitution (Special Powers) Tribunal, a national security tribunal.

    77.2. Section 9 of the Military Service Pensions Act 1934 provided that findings set out in a referee's report on an application for a military pension are "*final and conclusive and binding on all persons and tribunals whatsoever.*" In *State (McCarthy) v O'Donnell* [1945] IR 126, the Supreme Court nevertheless issued certiorari. Sullivan CJ observed:

> "*The effect of such a provision has been considered in several cases, and it has been held not to apply where there is absence of jurisdiction in the tribunal that made the order in question. … No case has been cited in which such a provision*

[19] The appeal against the decision was dismissed in *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (Supreme Court of Appeal), but this aspect was not considered. The right to "*just administrative action*" under s. 33 of the Constitution (the right to legal, fair and reasonable administrative action) is also a bar to any ouster clause.

[20] See e.g. *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at [61]-[63] per Ngcobo J.

> *has been held applicable where an imperative condition regulating the functions and duty of the tribunal has been disregarded. In such a case the provision is not in my opinion applicable as the tribunal acted in excess of jurisdiction*." (pp. 161-2).

Hong Kong

78. In Hong Kong, privative clauses have never been upheld to oust judicial review for jurisdictional error. The Courts have applied *Anisminic*. The issue has been considered by the courts in the relation to s. 19(3) of the Housing Ordinance, which provides:

> "*No court shall have jurisdiction to hear any application for relief by or on behalf of a person whose lease has been terminated under subsection (1) in connection with such termination*."

79. In *Chan Yik Tung v Hong Kong Housing Authority* [1989] HKCFI 240, the Court of First Instance held that the clause did not oust review of the Hong Kong Housing Authority's decision to issue a notice to quit where it is alleged to have acted in excess of jurisdiction, because the decision would arguably be a nullity (at p.11). Liu J considered that s. 19(3) is "*as robust as, if not more so than that of "shall not be questioned in any court" in Anisminic or "shall not be subject to appeal or liable to be questioned in any court" in the Interception of Communications Act 1985, s.7(8)*" (at p. 8), the precursor to s. 67(8) of RIPA 2000. Liu J noted the "*sound reasons for the courts' ordinary jurisdiction to supervise by judicial review to be jealously guarded*" to avoid "*the tribunal... be*[ing] *made a law unto itself. It would virtually become a potential dictator with uncontrollable given jurisdiction, and the personalities presiding it would become sole judges of the validity of their own decisions. That, needless to say, is repugnant to a coherent legal system*". The judge concluded:

> "*… no court should stand by and allow an attempted encroachment on its power of review unless it is restrained by an unassailably appropriate ouster clause. For the reasons I have given, s.19(3) is not such a clause. It matters not that the language in s.19(3) of the Housing Ordinance is equally clear and could perhaps be said to be even more sweeping than that considered in* Anisminic." (at p. 12)

80. The decision was followed in *Thai Muoi v Hong Kong Housing Authority* [2000] HKCFI 383 at pp. 10-11 per Yeung J. A strongly worded ouster clause has also been found ineffective in *Gurung Bhakta Bahadur v Director of Immigration* [2001] HKCFI 966 (Court of First Instance).

ISSUE 1: THE INTERPRETATION OF S. 67(8)

s. 67(8) RIPA 2000: statutory interpretation

81. Section 67(8) of RIPA 2000 does not exclude judicial review of decisions of the Tribunal. It does not evidence any clear intention to do so in clear and unambiguous words. It is not "*crystal clear*" and is "*reasonably capable of having two meanings*". Indeed, it uses a form of words the material part of which is familiar from the decision in Anisminic and has been authoritatively held not to have the effect of precluding judicial review. This history must be taken to have been known to the draftsman. In the circumstances summarised above, s. 67(8) in fact evinces a clear legislative intention *not* to oust judicial review.

82. The predecessor to s. 67(8) of RIPA 2000 is s. 7(8) of the Interception of Communications Act 1985 ("**IOCA 1985**") which provided that "*the decisions of the* [Interception of Communications] *Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court*".[21] In contrast with the 2003 Immigration Bill, there was no controversy or debate about this provision, or the equivalent provisions in s. 67(8) of RIPA 2000.

83. The comparison between the statutory formulations adopted in Anisminic and in s. 67(8) of RIPA 2000 (and its predecessors) is relevant for two main reasons.

    83.1. **First**, as a matter of general principle, a statutory formulation which has received a clear judicial interpretation should be presumed to have the same meaning if later used in a similar context. That reflects the principle recognised by the House of Lords in Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402 and said in that case to be "*well established*". Barras was recently affirmed and explained by Lord Sumption in R (Belhaj) v DPP [2018] 3 WLR 435 at §19:

> "*The effect of this principle is to treat certain hallowed formulae as terms of art, to be applied like statutory definitions, on the footing that Parliament must have intended to adopt them. The reason for Lord Buckmaster's reference to a 'similar context' is connected with his reference to words 'of doubtful meaning'. The assumption is that the words are not self-explanatory and have derived the meaning given to them on the earlier occasion from their statutory*

[21] Similarly worded provisions were in s. 5(4) of the Security Service Act 1989 and s. 9(4) of ISA 1994.

> *context. Hence the probability that Parliament intended, when it later used the same doubtful expression in the same statutory context, that the meaning would be supplied from the existing judicial dictionary. … It remains good law, provided that one bears in mind that it is no more than a presumption, even in cases where the statutory context is similar in both enactments."*

The relevance of the statutory context is that it assists in supplying the meaning of the words. In the present case, the statutory context is that the words are used in a provision concerning the reviewability of decisions of a tribunal of limited jurisdiction. The fact that a materially similar form of words has been used again in that context gives rise to a presumption that it should be interpreted in the same way.

83.2. **Secondly**, the well-established principle that a provision will not be held to oust the High Court's jurisdiction unless it is crystal clear and cannot bear a different meaning requires consideration of the extent to which the drafter has indicated a clear intention to depart from the effect of previous formulations.

83.3. This is a point of particular significance where the previous decisions in question include a decision as important as *Anisminic*. The decision in *Anisminic* would inevitably have been consulted by any draftsman seeking to compose an effective ouster provision. It is not only a leading case in the field, but also one of the best-known authorities in the whole of public and constitutional law across the common law world. It has been cited many times by the House of Lords and the Supreme Court in other leading cases. Parliament cannot be taken to have been unaware that it establishes that words protecting decisions from being questioned in court will be ineffective to oust judicial review if they do not address "purported" decisions. If Parliament had wished to produce a different result from that in *Anisminic* it would have signalled that intention in the clearest possible terms. In drafting ouster clauses, the draftsman does not work in a vacuum. He or she can be taken to be aware of the constitutional context and the leading decisions of the Courts.

84. Section 67(8) does not evidence any such intention at all. It does not, for instance, provide that no determination "*or purported determination*" shall be called into question, nor does it even use the words "*judicial review*". It contains no express statement that the jurisdiction of the High Court is excluded. It adopts neither (i) the language which was

identified in submissions in *Anisminic* itself as "*the way the intention, when it exists, should be achieved*"[22], nor (ii) the language which Parliament in fact adopted in the Foreign Compensation Act 1969 in response to the decision in *Anisminic*.

85. Section 67(8) differs from the clause considered in *Anisminic* in three respects. None of these indicates the necessary unequivocal intention to oust judicial review.

86. **First**, it makes reference to appeals: "*Shall not be subject to appeal or be liable to be questioned in any court*." That is not a material difference for these purposes, for the following reasons:

86.1. It simply reflects the use of the language of 'appeal' elsewhere in the same subsection, concerning the Secretary of State's power to create a right of appeal.

86.2. In any event, the addition of a reference to the exclusion of appeals cannot have the effect of excluding judicial review. That is clear from the many cases cited by Denning LJ in *Gilmore*; as he concluded in that case at p. 583, there is a well-recognised distinction between "*without appeal*" and "*without recourse to certiorari*". A judicial review is not an appeal.

86.3. A materially similar formulation – "*shall not be subject to appeal to, or review in, any court*" – was considered in *R (Fayed) v Secretary of State for the Home Department* [1998] 1 WLR 763 and was confirmed by the Court of Appeal not to preclude judicial review, applying *Anisminic*: per Lord Woolf MR at p. 771B. Indeed, this was the successor provision to the ouster clause preserved by s. 11(1) of the Tribunals and Inquiries Act 1950 (the other was s. 4(4) of the Foreign Compensation Act 1950). Neither provision excluded judicial review.

[22] See p. 157D-G, which records a quotation from the National Service Mobilization Regulations 1942, a piece of Canadian wartime legislation which gave a public authority power to determine applications and which provided that "*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 subject 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.*" The Appellants are not aware of any challenge to the effectiveness of this provision in the Canadian courts.

87. **Secondly,** s. 67(8) makes reference to a range of matters other than determinations: "*Determinations, awards, orders and other decisions of the Tribunal*". That formulation has no bearing on the issue:

87.1. The use of those words does not evidence any intention that the effect of the provision should differ from *Anisminic*. Rather, it shows that the provision should apply equally to all the various types of decisions which the Tribunal is empowered to make.

87.1.1. A "*determination*" is the Tribunal's final decision on a claim. Section 68(4) provides for the Tribunal to make a statement that they have or have not "*made a determination*" in the complainant's favour. This formulation is used to ensure that where no determination is made in the complainant's favour, this leaves ambiguous whether the complainant was under lawful surveillance or whether there was no surveillance.

87.1.2. "*Awards*" are a reference to the power of the Tribunal under s. 67(7) to make an "*award of compensation*".

87.1.3. "*Orders*" are a reference to the power of the Tribunal to make "*other orders*" including orders quashing or cancelling a warrant or authorisation under s. 67(7).

87.1.4. "*Other decisions*" is a simply catch-all term referring to the other decisions made by the Tribunal such as a procedural decision under s. 68(1) or a requirement to produce documents or information under s. 68(6). It would also include a decision under s.67(4) not to determine a complaint which is frivolous or vexatious, or a decision under s.67(5) not to determine a complaint which is made more than a year after the conduct to which it relates.

87.2. Further, the fact that these additional words were not intended to have any particular significance in relation to ouster is clear from the fact that the same formulation is used in provisions which have nothing to do with ouster, namely:

87.2.1. s. 68(3), which requires the Tribunal to "*secure that every relevant Commissioner appearing to them to have functions in relation to that matter… is kept informed of any determination, award, order or other decision made by the Tribunal with respect to that matter*"; and,

87.2.2. s. 69(2)(i), which provides that procedural rules may "*require information about any determination, award, order or other decision made by the Tribunal… to be provided… to the person who brought the proceedings*".

87.3. In any event the point in Anisminic – that an unlawful determination is not a determination – is not addressed by simply listing more types of decision to which exactly the same logic applies, without addressing the logic itself.

88. **Thirdly,** having listed the types of decision to which s. 67(8) applies, it gives an example in parentheses: "*(including decisions as to whether they have jurisdiction)*". This wording does not indicate an intention to oust judicial review. It is not, as the Court of Appeal appears to have understood it, an oblique reference to the reasoning in Anisminic; it is simply a reference to another type of decision which the provision is intended to encompass:

88.1. The phrase in parenthesis cannot be an attempt to overcome the reasoning in Anisminic, not least because it refers only to "*decisions*" and not "*purported decisions*", but also because the concept of jurisdiction was not central to that reasoning.

88.1.1. As Lord Reid made clear in his speech in Anisminic, the question whether or not a decision is a nullity does not depend on the concept of 'jurisdiction'. He expressly disclaimed any reliance on the concept for these purposes: "*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.*"

88.1.2. As Leggatt J said in the Divisional Court in these proceedings at §55: "*It seems to me that on a realistic interpretation* [Anisminic] *did not decide that every time a tribunal makes an error of law the tribunal makes an error about the scope of its jurisdiction. Rather, it decided that any determination based on an error of law, whether going to the jurisdiction of the tribunal or not, was not a 'determination' within the meaning of the statutory provision. That reasoning, and the underlying presumption that Parliament does not intend to prevent review of a decision which is unlawful, is just as applicable in the present case and is not answered by pointing to the words in brackets.*"

88.2. Rather, the phrase in parentheses addresses a sub-set of decisions made by the Tribunal: those as to whether it has jurisdiction, as opposed to those substantively determining an application. It is therefore irrelevant to this case, which did not concern a decision as to whether the Tribunal had jurisdiction.

88.3. The concept of decisions by a court or tribunal "*as to whether they have jurisdiction*" constituting a specific type of decision would not, as suggested by Sales LJ in the Court of Appeal at §40, introduce an "*esoteric distinction*". On the contrary, it is recognised in many contexts that courts or tribunals may be required to give consideration to whether they have jurisdiction and that their decision on that issue may be treated as qualitatively different from a decision on the merits. For example:

88.3.1. In *R (Zerek) v Fulham, Hammersmith and Kensington Rent Tribunal* [1951] 2 KB 1, the Divisional Court (Lord Goddard, Humphreys CJ and Devlin J) held that a tribunal of limited jurisdiction was entitled to make a decision as to whether it had jurisdiction, and to proceed on that basis to make a decision on the merits.

88.3.2. The same applies to arbitral tribunals. As Devlin J held in *Christopher Brown Ltd v Genossenschaft Oesterreicher Waldbesitzer* [1954] 1 QB 8, arbitrators whose jurisdiction is challenged are not obliged to leave that issue exclusively to a court, even though only a court ultimately has the power to determine it: "*They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that*

they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not" (pp. 12-13).

88.3.3. In *Williams & Glyn's Bank plc v Astro Dinamico Compania Naveria S.A.* [1984] 1 WLR 438 referred to a similar distinction in explaining why a party applying for a stay of proceedings did not thereby submit to the court's jurisdiction to determine the claim on its merits: "*The fallacy is in confusing two different kinds of jurisdiction; the first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the court has jurisdiction of the former kind*" (p. 443B).

88.3.4. Indeed, courts and tribunals are also regularly required by the Brussels Regulations to make decisions as to whether they have jurisdiction. For example, in *Re N (Children) (Adoption: Jurisdiction)* [2016] UKSC 15, [2017] AC 167, Baroness Hale (with whom the rest of the Supreme Court agreed) said at §2: "*in every case with a European dimension (more properly, a Regulation dimension) the courts of this country have to ask themselves whether they have jurisdiction.*"

88.4. The use of this phrase in s. 67(8) reflects, in particular, the fact that the Tribunal's jurisdiction to make a decision may depend on one or more factual findings. It appears to be intended to ensure that those decisions are not to be treated as questions of precedent fact and therefore vulnerable to attack on the merits in the High Court or Court of Session. In particular:

88.4.1. As set out in detail above, ss. 65-69 of RIPA 2000 contain various complex provisions giving the Tribunal its jurisdiction.

88.4.2. Several of those provisions involve questions of fact: for example (under s. 65(5)(ca)) whether surveillance has been carried out "*by a foreign police or customs officer*", or (under ss. 65(5)(f) and 65(5)) whether there has been an entry on or interference with property by "*a person holding any office, rank or position*" with one of the specified bodies.

88.4.3. Because those criteria are factual, if a decision is taken on the basis that the necessary facts are present and it transpires that they are not, the

result would be that the Tribunal has exceeded its jurisdiction and that it had no power to make the decision at all. Accordingly, a decision which is otherwise entirely lawful could be subject to challenge on the basis of a mere factual dispute.

88.4.4. The ordinary principle is that questions going to the jurisdiction of a statutory tribunal are questions of precedent fact, which can be reconsidered by the Court on their merits. The law is summarised in *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557 by Baroness Hale (with whom Lords Hope, Scott, Walker, and Neuberger agreed) at §§29-31:

> *"This doctrine does, as Ward LJ pointed out in the Court of Appeal [2009] PTSR 1011, para 19, have "an ancient and respectable pedigree". Historically, like the remedy of certiorari itself, it was applied to inferior courts and other judicial or quasi-judicial bodies with limited jurisdiction. Thus a tithe commissioner could not give himself jurisdiction over land which had previously been discharged from tithe (*Bunbury v Fuller *(1853) 9 Ex 111); and a rent tribunal could not give itself jurisdiction over an unfurnished letting (*R v Fulham, Hammersmith and Kensington Rent Tribunal, Ex p Zerek *[1951] 2 KB 1). Although of course such a body would have to inquire into the facts in order to decide whether or not to take the case, if it got the decision wrong, it could not give itself a jurisdiction which it did not have.*
>
> *[30] In* R v Secretary of State for the Home Department, Ex p Khawaja *[1984] AC 74, the same principle was applied to the power of the Home Office to remove an "illegal entrant". The existence of the power of removal depended upon that fact. It was not enough that an immigration officer had reasonable grounds for believing the person to be an illegal entrant. As Lord Scarman put it, at p 110: "where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied."*
>
> *[31] This doctrine is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction…"*

88.4.5. The possibility of enacting such protection, and the distinction between that and the exclusion of judicial review generally, was

specifically addressed by Lord Esher MR in *R v Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313:

> *"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more."*

88.4.6. The protection in s. 67(8) of "*decisions as to whether* [the Tribunal has] *jurisdiction*" is intended to (or at least is capable of being construed as intended to) achieve the latter result: Parliament has entrusted the Tribunal with a jurisdiction and with the power to determine for itself whether that jurisdiction is engaged on the facts of a particular case.

88.5. This all makes sense in light of the legislative history. In *R (Khawaja) v SSHD* [1984] AC 74 the House of Lords held that whether an immigration detainee was an illegal entrant was a question of precedent fact:

88.5.1. The Secretary of State had made two orders under s. 33(1) of the Immigration Act 1971 detaining individuals as "*illegal entrants*". In both cases the individuals had obtained leave to enter but the Secretary of State had later concluded that the leave had been obtained by fraud or deception. The allegations of fraud or deception were disputed.

88.5.2. The House of Lords held that whether or not the person was an illegal entrant was a precedent fact that needed to be established to the Court's satisfaction in order for the orders to be upheld.

88.5.3. Their Lordships also commented on the standard of evidence that would be required:

88.5.3.1. Per Lord Scarman at p. 114: "*once the applicant had shown, as each did, that he had entered the United Kingdom with the leave of the immigration officer, the burden of proving that he had obtained leave by deception was upon the executive and the standard of proof was the balance of probabilities.*"

88.5.3.2. Per Lord Wilberforce at p. 105: if the Secretary of State wished to defend the decision in judicial review proceedings, he "*should depose to the grounds on which the decision to detain or remove was made, setting out essential factual evidence taken into account and exhibiting documents sufficiently fully to enable the courts to carry out their function or review*".

88.5.3.3. Per Lord Templeman at p. 128: "*the burden of proving that leave to enter was obtained by fraud and that consequently the entrant is an illegal entrant liable to arrest and expulsion can only be discharged by the immigration authorities manifesting to the satisfaction of the court a high degree of probability. … If the court decides that on the available information fraud on the part of the entrant in obtaining leave to enter the United Kingdom has been made out, the entrant will be liable to be removed from the United Kingdom pursuant to directions by the immigration authorities.*"

88.6. The decision in *Khawaja* in 1984 was presumably unwelcome to the Secretary of State. The first known use of the statutory formula purporting to prevent review of "*decisions* [as to] *jurisdiction*" was in s. 7(8) of the Interception of Communications Act 1985, which was enacted shortly after the decision in *Khawaja*.[23] Parliament, in creating a body whose role included the determination of claims and complaints involving potentially sensitive material (first under the 1985 Act, and later under RIPA 2000), may have wished to ensure that the Tribunal would not be required to litigate issues of precedent fact on the balance of probabilities in the High Court in order to defend its decisions. Section 67(8) is the successor provision in RIPA 2000,

[23] "*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 worded and also protects the Tribunal's decisions from challenge on the grounds of mere error of jurisdictional fact, but not from judicial review otherwise.

89. For all the above reasons, s. 67(8) is certainly capable of bearing a meaning that does not oust judicial review. Indeed, that is the natural meaning of s. 67(8) in light of the long history of the proper approach to the construction of purported ouster clauses. There is no reference in the clause to judicial review, a quashing order, the jurisdiction of the High Court, or any attempt to immunise a purported decision. On the contrary, s. 67(8) appears to evidence an intention to achieve the same result as in *Anisminic*, subject to ensuring that jurisdictional questions under s. 65 are not issues of precedent fact and can only be challenged on the basis of an error of law. The fact that s. 67(8) is capable of being construed in a way which does not exclude judicial review requires that construction to be adopted.

Lord Brown in A v B

90. Although the proper interpretation of s. 67(8) has not previously arisen for decision, it was the subject of an *obiter dictum* by Lord Brown in *A v B* [2010] 2 AC 1, on which the Interested Parties and the Court of Appeal place significant reliance.

91. *A v B* concerned the question whether the Tribunal's first-instance jurisdiction over certain types of claims was exclusive. A claimant brought proceedings against the Security Service in the Administrative Court alleging that the provisions of RIPA 2000 making the Tribunal the "*only appropriate tribunal*" for hearing certain claims under s. 7 HRA 1998 did not exclude the first-instance jurisdiction of the courts in respect of such claims. The House of Lords disagreed, principally because the right to pursue such a claim and the ability to pursue it only in the Tribunal had been enacted as part of the same legislative scheme.

92. In giving the judgment of the Court, Lord Brown commented that *Anisminic* was not of assistance because s. 65(2)(a) merely allocated judicial scrutiny rather than ousting it. He added at §23: "*True it is that section 67(8) of RIPA constitutes an ouster (and, indeed, unlike that in Anisminic, an unambiguous ouster) of any jurisdiction of the courts over the IPT. But that is not the provision in question here and in any event, as A recognises, there is no constitutional (or Article 6) requirement for any right of appeal from an appropriate tribunal*."

93. Sales LJ in the Court of Appeal considered this passage to be "*of powerful persuasive authority*" in support of the conclusion that s. 67(8) clearly and unambiguously ousted judicial review (§§46-48).

94. The Appellant submits that this was an error of approach. No significant weight should be given to that passage, for the following reasons:

94.1. Lord Brown expressly noted that s. 67(8) was "*not the provision in question here*". There had been no consideration in argument of the question whether this provision ousted judicial review. None of the points or authorities set out above were considered in that case.

94.2. Indeed, it was conceded by the Appellant in *A* that s. 67(8) was effective to oust judicial review. The concession is clear from the report of argument at p. 23D: "*The claimant has no way of seeing the case he has to meet and there is no possibility of judicial review*." The point was not disputed by the Respondents.

94.3. The fact that Lord Brown's passing comment was not the result of any analysis or argument is demonstrated by the fact that he was also a member of the Supreme Court which, 18 months later, decided *Cart*, in which Lord Phillips said at §71 that Parliament had not since *Anisminic* "*purported, as it might have done, expressly to preclude the exercise by the High Court of the power of judicial review*". Lord Brown expressed agreement with the reasoning of Lord Phillips without qualification. That reasoning is inconsistent with s. 67(8) being an "*unambiguous ouster*".

Does the statutory context warrant a different conclusion?

95. For the reasons set out above, an analysis of the statutory language strongly supports the conclusion that s. 67(8) was not intended to oust judicial review of decisions of the Tribunal.

96. A primary focus of much of the Interested Parties' case and of the Court of Appeal's decision is to the effect that there is something in the particular legislative context of

RIPA 2000 which means that the statutory language should nevertheless be interpreted as sufficient to oust the High Court's jurisdiction.

97. Four features have been relied upon at different stages in support of such an outcome.

97.1. **First**, the fact that the Tribunal is an expert tribunal, and one with judicial members of "*very high*" quality, such that there is no need to apply a legislative presumption that no ouster was intended (Sales LJ at §38);

97.2. **Secondly**, the fact that the Tribunal considers cases raising potentially sensitive issues of national security, such that Parliament may be presumed to have wished to insulate it entirely from the Courts (Sales LJ at §42-43);

97.3. **Thirdly**, the fact that the Tribunal is itself required to apply judicial review principles, such that it would be odd for the High Court to retain a judicial review jurisdiction (Leveson P at §42); and,

97.4. **Fourthly**, the fact that RIPA 2000 makes provision for the possibility of the Secretary of State creating a right of appeal, such that it would be inappropriate to adopt an interpretative presumption based on the idea that Parliament could not have intended there to be no recourse against an unlawful decision (Leveson P at §43).

98. It must be noted that all four of the above lines of argument depend on the idea that words which (at best) are capable of bearing two meanings can nevertheless be elevated into an effective ouster clause by features of the legislative context.

99. Such an approach is wrong in principle. Had Parliament considered that the context of RIPA 2000 was so exceptional as to require an unprecedented type of ouster clause, it would have drafted a clause in appropriate language to make that intention clear. It is not for the courts to read in to the statute a policy intention for which there is no evidence and which is inconsistent with the wording of the statute. Indeed, Parliament has chosen in s. 67(8) not to use the stronger wording found in the Foreign Compensation Act 1969, Parliament's response to the decision of the House of Lords in Anisminic. As Lord Phillips MR held in Sivasubramaniam at §44, "*The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication.*"

100. Further, the statutory context in *Anisminic* gave significantly stronger indications than anything in this case that Parliament intended s. 4(4) of the Foreign Compensation Act to oust the High Court's jurisdiction to consider a claim for judicial review. Section 11 of the Tribunals and Inquiries Act 1958 expressly saved the Foreign Compensation Act 1950 ouster clause from its general cull of provisions that sought to oust certiorari and the supervisory jurisdiction of the High Court and Court of Session. If anything, the House of Lords in *Anisminic* had a much stronger basis for an argument based on inferred legislative intent.

101. In any event, none of the four matters identified supports the conclusion that s. 67(8) was intended to convey a clear intention to exclude judicial review.

The judicial quality of the Tribunal

102. At §38 of his Judgment, Sales LJ said that his conclusion that s. 67(8) excluded judicial review was supported by the fact that "*The quality of the membership of the IPT in terms of judicial expertise and independence is very high, as set out in Schedule 3 to RIPA*", which gave rise to a "*fair inference*" that "*Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise*". That finding is erroneous.

103. **First**, the point is wrong in fact. Schedule 3 to RIPA imposes no special requirements of "*judicial expertise*". On the contrary, it provides that a person may be appointed to the Tribunal if he or she is eligible for judicial appointment on the basis of having been a practising solicitor, barrister or advocate for 7 years.

104. Although the President of the Tribunal must be a current or former holder of high judicial office, there is no requirement that any decision or type of decision be made by the President (contrast SIAC which must include a current or former holder of high judicial office in order to be properly constituted). It is therefore not a feature of the statutory scheme that decisions of the Tribunal will necessarily be made by individuals who hold or have held any judicial appointment.

105. **Secondly**, and more fundamentally, the quality of the decision-makers in the tribunal is immaterial. The Court's jurisdiction to review the decisions of tribunals does not arise from any qualitative assessment of the 'inferiority' of the members of a tribunal as

compared to the High Court or the Court of Session. It arises from the fact that they are tribunals of limited jurisdiction, and that, in consequence, the High Court and Court of Session have constitutional responsibility for ensuring that they exercise jurisdiction in accordance with the law.

106. The high quality of a tribunal has never been accepted as a basis for construing an ouster provision more liberally than would otherwise be permissible. The decisions of judges of the highest standing are still subject to judicial review when they are exercising a limited jurisdiction. For example:

106.1. In *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249, a decision of Lord Saville, a sitting member of the Judicial Committee of the House of Lords, made in his capacity as Chair of the Bloody Sunday Inquiry, was successfully judicially reviewed. There was no difficulty about a Divisional Court overturning a decision of a member of the House of Lords.

106.2. In *R (Woolas) v Parliamentary Election Court* [2012] QB 1, the decision subject to challenge was made by two sitting High Court Judges. The ouster clause was still held to be ineffective to prevent judicial review of that decision by the High Court.

106.3. In *U v SIAC* [2010] 2 WLR 1012, the legislation provided that SIAC would only be duly constituted if it included at least one member who "*holds or has held high judicial office*". A provision purportedly ousting review of the decisions of that commission was nevertheless held to "*fall foul of the Anisminic principle*": §83.

107. Indeed, this is not even a point of distinction from *Anisminic* itself. That case concerned a "*permanent body, composed of lawyers, with a learned chairman*" exercising "*predominantly judicial*" functions (per Lord Wilberforce at p. 207C), and the Chairman was described in the speeches as "*eminent*" (per Lord Morris at p. 175F) and "*a lawyer of distinction*" (per Lord Pearce at p. 201B).

108. The analysis is not affected by the decision of the House of Lords in *Re Racal Communications Ltd* [1981] AC 374, in which it was held that a statutory provision to the effect that certain decisions of the High Court "*shall not be appealable*" prevented the

Court of Appeal from entertaining an appeal. That case was entirely different for two reasons.

108.1. First, it concerned a challenge to a decision of the High Court. Since the High Court is not a tribunal of limited jurisdiction, very different constitutional considerations apply. As Lord Diplock said at p384: "*The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. Thus there is no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined*." See Lee v Ashers Baking Company Ltd [2018] UKSC 49 (10 October 2018) per Lord Mance at §85.

108.2. Second, it did not concern judicial review. It concerned the power of the Court of Appeal to hear appeals from the High Court. As Lord Salmon pointed out at p386, in relation to the Court of Appeal, "*Its power is to hear and determine an appeal from any decision or order made by the High Court, and this power which is conferred solely by section 27(1) of the Supreme Court of Judicature (Consolidation) Act 1925 is restricted by section 31(1) of the Act of 1925 […]*".[24]

109. Further, the fact that the Tribunal's procedures are, in principle, capable of offering a fair hearing that satisfies Article 6 ECHR is irrelevant to whether Parliament has ousted the jurisdiction of the High Court and the Court of Session to hear a claim for judicial review. This makes the error of equating the fundamental rights protected by the UK constitution and the common law with the minimum regional human rights standards of the European Convention on Human Rights. See Al-Rawi v Security Service [2012] 1 AC 531 at §§47, 69 per Lord Dyson and Kennedy v Charity Commission [2015] AC 455 at §133 per Lord Toulson.

110. Finally and in any event, Sales LJ concluded only that this point gave rise to a "*fair inference*" as to Parliament's intention. Even had there been any basis for such a "*fair*

[24] Lord Diplock also commented *obiter* at p383 that, where Parliament has provided for decisions of "*a court of law*" to be final and conclusive, it may be necessary "*in the case of inferior courts*" to consider "*those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before Anisminic*." If he thereby intended to suggest that purported ousters in respect of bodies with limited jurisdiction which have in some way the character of a 'court of law' should be treated differently from other purported ousters, that suggestion does not represent the law: it is inconsistent with, *inter alia*, the subsequent decisions in U v SIAC and R (Cart) v Upper Tribunal.

inference", which there was not for the reasons set out above, such an "*inference*" would be inadequate to displace the judicial review jurisdiction of the High Court. Nothing less than crystal clear language which cannot be interpreted in any other way would suffice. A further difficulty of relying on such an 'inference' is exposed by the fact that s. 91 of the Police Act 1997 contains materially identical 'ouster' wording in relation to the decisions of Surveillance Commissioners, most of whom have never held high judicial office. It would be illogical if the same form of words is effective in the case of the Tribunal but ineffective in the case of a Surveillance Commissioner.

111. The expertise of the members of the Tribunal may of course be relevant to the manner in which the Court exercises its jurisdiction in a particular case. However, it does not support a conclusion that Parliament intended that the Tribunal's decisions should be immune from review altogether.

The national security context

112. The other major feature of the legislative context relied upon by Sales LJ was the fact that the Tribunal deals with sensitive matters of national security. At §42 he concluded that "*It is clear that Parliament's intention in establishing the IPT and in laying down a framework for the special procedure 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.*" On that basis he concluded that "*To construe section 67(8) as allowing judicial review of determinations and decisions of the IPT would subvert*" that regime by enabling proceedings "*in which no such guarantee applied*".

113. That conclusion is erroneous for the following reasons.

114. **First**, again, the premise is incorrect. The Tribunal's statutory jurisdiction is not limited to "*claims and complaints against the intelligence services*". Much of the Tribunal's case load does not involve the intelligence services or raise issues of national security at all. By way of illustration, the published judgments of the Tribunal have concerned issues such as:

114.1. A local authority's use of directed surveillance to determine whether a family was resident in a particular school catchment area (*Paton v Poole Borough Council* IPT/09/01-05/C).

114.2. A local authority's use of covert CCTV to monitor a person's front door in an attempt to identify whether he was responsible for persistent dog fouling (*X v Local Authority* IPT/03/50/CH).

114.3. A local authority's use of surveillance to determine whether a residential property was being used for business purposes in breach of planning conditions (*Gibbon v Rugby Borough Council* IPT/06/31/CH).

114.4. The Northern Ireland Social Security Agency's actions in sending two benefit fraud investigators to enter the complainants' house posing as prospective purchasers (*B v Department for Social Development* IPT/09/11/C).

114.5. British Transport Police's decision to have an officer covertly observe and photograph a train passenger suspected of sexual offences (*Gary Davies v British Transport Police* [2018] UKIPTrib IPT_17_93_H).

114.6. The use of public CCTV by Thames Valley Police to check whether police officers suspended from duty had spoken to one another (*Newell and Lloyd v Thames Valley Police* IPT/07/18/CH).

115. **Secondly**, the Tribunal's work is not subverted by the possibility of judicial review. Even in cases which do raise sensitive issues of national security and which do require the Tribunal to consider evidence in closed session, there are nevertheless a wide range of issues suitable for review by the High Court which would not require consideration of any such evidence. Indeed, the Tribunal gives considerable emphasis on its website to its ability to determine issues of law in open *inter partes* proceedings:

> "*We are the first court of our kind to establish '*inter partes*' hearings in open court in the security field. These hearings allow us to hear arguments on both sides on the basis of 'assumed facts' without risk to our national security. This means that where there is a substantial issue of law to consider, and without at that stage taking a decision as to whether the allegation in a complaint is true, we invite the parties involved to present issues of law for the Tribunal to decide, which are based on the assumption that the facts alleged in the complaint are true.*

This means that we have been able to hold hearings in public, including full adversarial argument, as to whether the conduct alleged, if it had occurred, would have been lawful. We may then hold 'closed' hearings in private to apply the legal conclusions from the open hearings to the facts."

116. The present case is an example of such arrangements. It arises from an open preliminary hearing conducted on assumed facts and resulting in conclusions on pure issues of law. The Appellant was able to participate and to make submissions on the issues of law despite having no access to any closed material. It is perfectly possible for the Court to consider the same issues of law on the basis of the assumed factual position as set out in the Tribunal's judgment. This is no different from a Court considering a strike-out on the basis of an assumption that facts pleaded by one or other of the parties is true.

117. It should also be noted that the IPT is not the only tribunal which considers closed material. The concern expressed by Sales LJ about undermining a system in which the Tribunal may be required to consider closed material is no less applicable to SIAC. Yet decisions of SIAC are not immune from judicial review. In *U v SIAC* the Divisional Court held that it had jurisdiction to hear a judicial review of SIAC's bail decisions. Decisions on bail in SIAC routinely require consideration of closed material, and did so in that case – indeed, it was SIAC's revocation of bail on the basis of an entirely closed process which was held by the Divisional Court to be unlawful.

118. **Thirdly**, the fact that the Tribunal has the power to make decisions affecting national security militates equally powerfully against the idea that Parliament intended that it should have the power to make unlawful decisions without any possibility of correction:

    118.1. As noted above, the Tribunal's powers include the power to quash or cancel any warrant or authorisation (s. 67(7)). If it did so erroneously, the consequences could involve severe and irreparable harm to UK national security. Parliament cannot be assumed to have intended that there would be no legal means of correcting a grave error of law which could harm national security.

    118.2. The same point applies to other orders which the Tribunal might make, such as an order requiring the destruction or disclosure of information which may be sensitive, or the identification of an agent, which might put national security, and individual lives, at risk. It is no answer to this point to argue that the

Tribunal would have no power to make such orders. The implication of the decision of the Court of Appeal is that any purported order to this effect would have to be conclusively presumed to be valid, and could not be challenged by the intelligence agencies.

118.3. In any event, the mere existence of a natural security context is not a good reason for construing an ouster as valid. In *Attorney General v Ryan* [1980] AC 718 the Privy Council considered the Bahamas Nationality Act 1973, which permitted the Minister to refuse applications for citizenship on national security or public policy grounds and which provided that such decisions "*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).

118.4. Similarly, a specialist tribunal regularly hearing cases about national security in closed session might be thought to be a classic example of a tribunal which is vulnerable to the development of "*local law*", against which the availability of judicial review is an important safeguard (Baroness Hale in *Cart* at §§42-43). Indeed, in *U v SIAC* the ouster clause in the SIAC Act 1997 was rejected by the Divisional Court, a decision which was not appealed.

119. **Fourthly**, in any event the concern about undermining the non-disclosure provisions is not a concern in practice, because the High Court is capable of determining the sorts of issues that arise in judicial review proceedings whilst dealing appropriately with sensitive material, and has a variety of powers available to enable it to do so:

119.1. In *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 the Supreme Court confirmed that the common law permits the High Court to receive closed evidence in proceedings concerning a challenge to a decision of a body that itself has that power. Thus, in a challenge to a decision to grant a warrant on the basis of sensitive material, any information which was considered by the Crown Court in a closed hearing can equally be considered by the High Court on the same basis. No statutory closed material procedure is required. See Lord Mance at §59: "*the only sensible conclusion is that judicial review can and must*

accommodate a closed material procedure, where that is the procedure which Parliament has authorised in the lower court or tribunal whose decision is under review". Here, Parliament has authorised the Tribunal to adopt a closed material procedure where necessary. The High Court therefore has inherent jurisdiction to adopt the same course, if it is necessary to hear a judicial review claim fairly, without risking harm to the public interest. If there is a procedural difficulty with judicial review, the judicial review procedure will operate flexibly. The solution is not to eliminate judicial review altogether.

119.2. In any event, there are other mechanisms for preventing the disclosure of sensitive material, including (i) public interest immunity, (ii) a closed material procedure under the Justice and Security Act 2013, and (iii) *in extremis*, the striking out of the claim as untriable as in *Carnduff v Rock* [2001] 1 WLR 1786; or (iv) applying a presumption of regularity in respect of any part of the decision or evidence which cannot be considered by the High Court, as in *R v Inland Revenue Commissioners, ex parte Rossminster* [1980] AC 952 at pp. 1022H-1023D and *R v Inland Revenue Commissioners, ex parte TC Combs* [1991] 2 AC 283, considered in *Haralambous* at §§48-52.

120. Finally, again this is an argument based on inference as to what Parliament may in all the circumstances have intended. That approach is wrong in principle, for the reasons already stated.

The fact that the Tribunal applies judicial review principles

121. One of the two main contextual factors relied on by Leveson P in the Divisional Court was that the Tribunal is itself required by s. 67 of RIPA 2000 to apply judicial review principles. At §§41-42 he held: "*There is a material difference between a tribunal – such as the Foreign Compensation Commission whose 'determination' was in issue in* Anisminic*, SIAC, or the Upper Tribunal (when dealing with appeals from the First-tier Tribunal) – which is adjudicating on claims brought to enforce individual rights and the IPT which is exercising a supervisory jurisdiction over the actions of public authorities. In the former case there are compelling reasons for insisting that a decision of the tribunal is not immune from challenge and that, if the tribunal follows an unfair process or decides the case on a wrong legal basis, the decision may be subject to judicial review by the High Court. The need, and indeed the*

justification for such judicial review is far less clear where the tribunal (here the IPT) is itself exercising powers of judicial review comparable to those of the High Court."

122. **First**, in so far as he approached the question by reference to whether there was a 'justification for judicial review', that was the wrong approach. The question is whether Parliament has decided to oust judicial review and has done so in a way that is crystal clear and leaves no other reasonably tenable reading of the legislation.

123. **Secondly**, it is wrong to draw a distinction between the Tribunal on the one hand and the Foreign Compensation Commission, SIAC and the Upper Tribunal on the other on the grounds that the latter "*adjudicate on claims brought to enforce individual rights*". A large part of the Tribunal's jurisdiction is a first-instance jurisdiction requiring it to do exactly that: it is the only appropriate tribunal for the determination of a range of claims (including claims for damages) under s. 7 HRA 1998, which are claims based on a statutory tort.

124. **Thirdly**, even if that were wrong, the fact that a public authority itself reviews the acts of other public authorities (including by applying judicial review principles), does not make it inappropriate that its own decisions should be reviewable for example on grounds of procedural irregularity or error of law:

    124.1. Take for example a body, tasked with reviewing the actions of another public body, which makes a decision vitiated by actual bias. It is difficult to see why a challenge to the reviewing body's unlawful decision should be inappropriate simply because that body was itself applying, or purporting to apply, judicial review principles in reviewing the original decision. Unless the decisions of the reviewing body are themselves subject to judicial review there is no way of correcting the failure.

    124.2. The same applies where the error committed by the reviewing body is an error of law. To hold otherwise would be to conclude that Parliament intended that the reviewing body should be free to get the law wrong, take a decision which is entirely irrational, or to take decisions outside its limited area of operation approved by Parliament, a surprising conclusion which would require the clearest words regardless of whether or not the body in question is making a fresh decision or reviewing an existing decision.

The existence of an unimplemented right of appeal

125. The other contextual factor relied upon by Sir Brian Leveson PQBD was the fact that Parliament has made provision in s. 67 for the possibility of a right of appeal. At §45 he held in reliance on that provision: "*In so far as there is a presumption… that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight, it is not engaged in this case*."

126. **First**, the right of appeal has never been implemented. Parliament did not legislate to create a right of appeal; it legislated to give the Secretary of State the option to do so. It must therefore be taken to have anticipated that it was possible that no such right would be created. This is therefore precisely a case about whether Parliament can be taken to have intended by the remaining provisions "*to make a statutory tribunal wholly immune from judicial oversight*".

127. **Second**, in any event, the existence of an appeal procedure in the relevant legislative framework does not exclude the High Court's jurisdiction. In *Cart* and *U v SIAC*, both of the legislative schemes in question had statutory rights of appeal in respect of some of their decisions. That did not prevent judicial review from being available in respect of decisions for which there was no such right.

128. **Third**, even where there is an appeal right in respect of the precise decision in question, that is only relevant to whether the High Court should decline to interfere on the grounds that there is an adequate alternative remedy: *Sivasubramaniam*.

Academic commentary

129. The Appellant has not sought to place before the Court the extensive academic commentary on the Court of Appeal and Divisional Court's judgments. Not all of the commentary is of the same quality. The best summary of the debate in the academy can be found in two articles published in *Public Law*:

    129.1. Dr Tom Hickman (standing counsel to the Investigatory Powers Commissioner and a Reader at UCL, writing in a personal capacity) concludes that the Court of Appeal's decision is incorrect based on a close textual analysis of s. 67(8), the case law since *Anisminic* and the wider statutory scheme ([2018] PL 584).

129.2. In contrast, Robert Craig, a tutor and PhD candidate at Durham, has written agreeing with outcome in the Court of Appeal (albeit not all of its reasoning). Mr Craig argues that "*islands of local law*", including fully autonomous tribunals with authority to make errors of law, are acceptable. He concludes that the "*rule of law does not require one universal law… at most it requires access to independent judicial adjudication*". The difficulties with this position as a matter of principle and practice are obvious, and were set out by Baroness Hale in *Cart*. Indeed, Mr Craig criticises *Cart* and suggests that the approach taken by the Court of Appeal in that case is to be preferred. The author also proposes a return to the historic pre-*Anisminic* distinction between jurisdictional errors and errors of law within the jurisdiction, in the interpretation and application of ouster clauses. He suggests "*Parliament intended the IPT to be able to make errors of law within its jurisdiction*". This analysis is impossible to reconcile with the decisions of the House of Lords and Supreme Court *Cart*, *O'Reilly v Mackman*, *Lumba* and now *Lee v Ashers Bakery*, as well as *Anisminic* itself. Mr Craig does accept that the Court of Appeal's national security reasoning lacks force (fn. 51). See [2018] PL 570).

ISSUE 2: THE CONSTITUTIONAL VALIDITY OF AN UNAMBIGUOUS OUSTER

130. The Appellant submits that there is no statutory provision which could be effective wholly to oust the Court's supervisory power through judicial review over a tribunal of limited jurisdiction.

131. The resolution of this issue is unnecessary if the Appellant's submissions on issue 1 are accepted. However, an understanding of the general constitutional position is relevant to an appreciation of the reasons why the Courts construe ouster clauses so strictly that they are never upheld in practice. Such clauses are incompatible with both meaningful Parliamentary sovereignty and the rule of law.

Parliamentary sovereignty

132. Parliament is sovereign. But that seemingly straightforward statement conceals as much as it reveals. For example, the opinion of Parliament from time to time is not sovereign. A vote as to the meaning of a law would be of no legal effect. Parliament exercises its sovereignty only by primary legislation, through written texts. Even then, Parliament may not bind its successors. Giving meaning to the concept of sovereignty means that Parliament may always change its mind.[25]

133. Similarly, to give effect to Parliamentary sovereignty, and applying the principle of separation of powers, there must be an independent, authoritative interpreter of legislation. The text of primary legislation does not have effect in and of itself. It has to be interpreted in order to give effect to Parliament's intention.

134. To give effect to Parliamentary sovereignty, ultimate control over the interpretation of a statute must be exercised by a court of unlimited jurisdiction, such as the High Court in England and Wales, or the Court of Session in Scotland. A tribunal of limited powers cannot fulfil that role. This is because when Parliament chooses to create a tribunal with limited statutory powers, the tribunal must operate only within the scope of its powers. This reflects Parliament's choice, in the exercise of its sovereign power. A tribunal with power to determine only a limited class of cases would frustrate the will of Parliament if it sought to arrogate to itself the right to make decisions outside that class. Indeed, if a tribunal of limited powers was able to exceed its powers without restraint, Parliament would no longer be sovereign. The limitations Parliament imposed on the tribunal would be ineffective. Only an independent court of unlimited jurisdiction can ensure that Parliament's limits on the jurisdiction of a tribunal are respected.

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[25] There may be other limits to Parliamentary sovereignty. For example, an attempt to abolish judicial review or the Court of Session may well be outside the scope of Parliament's legislative powers. See the discussion in *de Smith's Judicial Review*, 8th Ed at paragraphs 1-026-1-029 of the limits to Parliamentary sovereignty and the *dicta* in Jackson v Attorney General [2006] 1 AC 262 at §9 per Lord Bingham, Baroness Hale at §36, Lord Steyn at §102 and Lord Hope at §107 and in AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at §§50-51 per Lord Hope ("*the rule of law requires that the judges must retain the power to insist the legislation of that extreme kind* [abolishing judicial review] *is not law which the courts will recognise*"). But the Appellant does not seek to question the principle of Parliamentary sovereignty in this appeal. It seeks to explain its boundaries, and why the laws of a sovereign Parliament require an independent interpreter of unlimited jurisdiction to ensure those laws are faithfully implemented.

135. Some hypothetical and real examples illustrate the problem. Assume the Tribunal takes a step exceeding the limited powers granted to it by Parliament, for example:

135.1. the Tribunal decides not to follow a binding authority of the Supreme Court as to the correct interpretation of RIPA;

135.2. when determining complaints, in breach of s. 68(4) of RIPA, the Tribunal informs claimants of the full reasons for its decisions, even where disclosure causes grave harm to the public interest;

135.3. the members of the Tribunal succumb to threats made by agents of a hostile state to make a determination in favour of a claimant;

135.4. the Tribunal takes a decision whilst improperly constituted (e.g. determining cases with only a single member, or with a member whose Royal Charter had expired); or

135.5. the Tribunal hears and purports to determine claims for unfair dismissal allocated by statute to the Employment Tribunal.

136. Like all judicial bodies, the Tribunal is not immune from making errors that would be capable of correction by judicial review. For example, the Tribunal has:

136.1. made a determination in favour of the wrong party (a determination was initially made in favour of the Egyptian Initiative for Personal Rights instead of Amnesty International in *Liberty and Privacy International v GCHQ and others* [2015] UKIPTrib 13/77/H); and

136.2. ordered the destruction of covert surveillance footage and payment of compensation in circumstances where the Tribunal later accepted it had no jurisdiction to do so. See *H v Police Federation of Great Britain* [2005] IPT/03/23/CH and *C v Police* [2006] IPT/03/32/H.

137. The Tribunal also often decides highly contestable issues of law of general application and importance. Two examples suffice:

137.1. The present case was triggered by Sir Mark Waller's public expression of concern as to whether the interpretation of s. 5 of ISA 1994 adopted by the

security and intelligence services was correct. Lang J gave permission for the claim for judicial review.

137.2. In its most recent decision (*Privacy International v SSFCA and others* [2018] UKIPTrib IPT_15_110_CH, 23 July 2018) the members of the Tribunal divided 3-2 on the question of whether the agencies could lawfully share entire bulk datasets of sensitive information about the general population with foreign agencies (e.g. records of the internet usage, telephone calls or location data of the entire population). As the Tribunal noted, this was "… *a matter of the greatest importance. The risk that a partner state may use intelligence from UKIC in a way which would be unlawful is a subject of concern, and may give rise to consideration of Articles 2 and 3* [right to life, torture and inhuman and degrading treatment] *in addition to Article 8* [private and family life, home and correspondence]" (Appendix 1, public extracts from CLOSED judgment at §17). Nevertheless, the dissenting judgments are entirely secret.

138. In each of the above examples, for Parliament's laws to be effective, there must be an independent judicial body with unlimited jurisdiction, which can keep the Tribunal within the four corners of the limited powers it has been given by Parliament. Unless its exercise of power is subject to supervision, the limits imposed on the Tribunal's powers by Parliament would be frustrated.

139. In these circumstances, an 'ouster' clause is just as ineffective as a piece of legislation declaring that Parliament has bound its successors. Rejecting an ouster clause is an incident of Parliamentary sovereignty, not an affront to it. For Parliament to be truly sovereign, it cannot limit its successors. Nor can it destroy the power of the ordinary courts to ensure that bodies created with limited powers keep to the limits that Parliament has imposed on them.

140. Professor A. V. Dicey, a noted enthusiast for Parliamentary sovereignty in its strictest form, was clear that Parliamentary sovereignty under the constitution operates alongside the role of the ordinary courts in interpreting and applying legislation. At the end of his chapter seeking to reconcile Parliamentary sovereignty with the rule of law, in a passage which makes the above points precisely, Dicey said:

> *"The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments. … By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality" (Introduction to the Study of the Law of the Constitution*, 8th Edition[26] p. 273).

141. In contrast, Dicey noted (with strong disapproval) that French *droit administratif* permitted the existence of administrative tribunals over which the ordinary courts had no means of control:

> *"The natural idea of an Englishman is that [a] conflict must be determined by the judicial Courts, i.e. the ordinary judges, for that the judges of the land are the proper authorities to define the limits of their own jurisdiction. This view, which is so natural to an English lawyer, is radically opposed to the French conception… since it must… enable the Courts to encroach on the province of the administration… nor can an Englishman, who recollects the cases on general warrants, deny that our judges have often interfered with the action of the administration… We can thus hardly exaggerate the extent of the authority thus conferred upon the [French] Council [of State]. It has the right to fix the limits of its own power, it could in effect take out of the hands of a judicial Court a case of which the Court was already seised"* (pp. 224-225).[27]

142. Thus:

> *"rule of law… which forms a fundamental principle of the constitution… means… equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption… from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the … tribunaux administratifs of France." (p. 120).*

143. For Dicey, the role of the "*ordinary Law Courts*" was a necessary aspect of a constitutional system which adopts a principle of Parliamentary sovereignty. To ensure that both the

[26] The last edition edited by Professor Dicey.

[27] Dicey may have misunderstood the way that the French system operated. But whether he did so or not, his comments illuminate his view of the fundamental importance of the jurisdiction of the High Court.

rule of law and sovereignty are maintained, the role of the ordinary courts in interpreting and applying legislation is essential. By this means "*powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges*". Only an ordinary court can ensure that limits to the exercise of a power granted by the words of an Act are respected.

144. Baron David Hume reached the same conclusion in respect of Scots law. Any ouster clause must be strictly construed. But even an ouster clause in unambiguous terms cannot constitute a tribunal as the final judge of the extent of its own jurisdiction. Only the Court of Session can fulfil that role:

> *"… the erecting of any such absolutely independent Jurisdiction is contrary to the general, and on the whole the salutary rule of our practice; so the enactment must be positive and peremptory, – free of all manner of ambiguity, – to receive this extraordinary construction. If the terms made use of are in any degree equivocal, as, for instance, if the Statute only say that the Lieutenancy, or that the Justices "shall finally try or determine" the inherent power of the Supreme Court to control all inferior judges, and to rectify what is amiss in their proceedings, shall be held to remain …*
>
> *...even where Statute has in plain and positive terms declared, that there shall be no review of the proceedings of a certain special Judicature in any form, yet still, to have the benefit of that provision, this Judicature must take care to keep within the bounds of its commission, must not exceed its statutory powers, – must not travel out of its territory, or neglect that course of proceeding which is prescribed by the Statute. It is obvious, that no special Judicature can be constituted absolute and uncontrollable judge of the extent and construction of its own charter, and that in excluding the power of review, the Legislature must be held to speak with relation to those proceedings, that are done in pursuance, or in execution of the powers granted by the Act"* (Baron David Hume's Lectures 1786-1822, Vol 5 pp. 270-271).

145. The analysis of Laws LJ in *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012 is to the same effect:

145.1. **First**, "*judicial review is a principal engine of the rule of law*". Judicial review is simply "*the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law*" (§34).

145.2. **Secondly**, the rule of law cannot be achieved if a body of limited powers is permitted to "*be the last judges of the law they have to apply… not... required to respect any other interpretation but their own*". This is because "*statute law has to be mediated by an authoritative judicial source, independent both of the legislature which*

made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. There are of course cases where a decision-making body is the last judge of the law it has to apply. But such bodies are always courts. The prime example is the High Court, which is also the paradigm of such an authoritative source of statutory interpretation" (§36).

145.3. **Thirdly**, this principle is an incident of Parliamentary sovereignty, not a limit on it:

> "*If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another*" (§38).

145.4. **Finally**, the only body that can constitute an authoritative judicial source is a court of unlimited jurisdiction: the High Court, the Court of Session or their *alter ego*. Only such a court can "*fix the limits of* [the] *authority*" of a court with limited powers (§68). Thus SIAC (which takes decisions applying judicial review principles and is required to be chaired by a current or former holder of high judicial office) is subject to judicial review (§§82-86). A tribunal of limited powers must be kept within those powers. Only a court of unlimited ordinary jurisdiction can do that. If it were otherwise, SIAC would not be subject to the law as made by Parliament. As Lord Phillips MR noted in *G v SSHD* [2004] 1 WLR 1349 at §20:

> "*SIAC is a court of very limited jurisdiction. It is not easy to accept that, if SIAC purports to exercise a jurisdiction that does not exist, Parliament has excluded all possibility of putting the matter right. What if section 24 had provided that 'a suspected international terrorist who is detained may not be released on bail'? Would there be no remedy if SIAC purported to grant bail?*"

146. In the Supreme Court [2012] 1 AC 663, Baroness Hale approved the analysis of Laws LJ (§30). Further, she held that the rule of law requires that serious questions of law can be

"*channelled into the legal system*" so that a specialist tribunal does not become "*in reality the final arbiter of the law*"; it must be possible to correct any errors or distortions so that pockets of "*local law*" inconsistent with the general law do not emerge (§§42-43). Lord Phillips noted that since *Anisminic*, Parliament had not purported to limit the High Court's power of judicial review. He noted that Laws LJ's analysis was "*controversial* [but] *hopefully the issue will remain academic*" (§73). Lord Clarke agreed with Baroness Hale (§102). Lords Hope, Rodger, Brown and Dyson agreed with both Baroness Hale and Lord Phillips (§§96-97, 134).

147. Thus when Parliament confers power on a public body it does so to permit that body to act in the public interest for a limited purpose. It is trite law that a public body must fulfil its objects and purposes and not act outside its powers, even where the body has broad discretion conferred upon it. So a power must be used for the purpose for which it is conferred. Even a power said to be "*unfettered*" is limited by the scope of the authorisation granted by Parliament. As Lord Upjohn put it in *Padfield v Ministry of Agriculture* [1968] AC 997 at p. 1060:

> "*…acting lawfully* [the Minister] *has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective* ["unfettered"], *even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives*."

148. These principles are also reflected in the old English 'no certiorari' cases. In many respects, those cases involve legislative provisions clearer and more emphatically aimed at ousting the High Court's jurisdiction than the clause addressed in *Anisminic* and the clause in this case. The Courts emphasised their duty to keep bodies within the limits to their powers:

    148.1. In *Ex parte Bradlaugh* (1878) 3 QBD 509, Mellor J held that a provision expressly excluding certiorari could not apply where there was an absence of jurisdiction because "*The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question*." In those circumstances, Mellor J and Lord Cockburn CJ held that certiorari should be granted.

148.2. Similarly, in R v Cheltenham Commissioners (1841) 1 QB 467, 113 ER 1211, Lord Denman CJ held that certiorari was available notwithstanding its express exclusion by statute, stating: "*the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed*" (p. 1214). This final sentence indicates that *no* statutory provision could have this effect, however it was worded.

149. Parliamentary sovereignty requires the existence of a court of unlimited jurisdiction with power to control tribunals and other bodies with limited powers. Otherwise, Parliament's sovereignty is ineffective.

Implied repeal

150. The same result has been achieved in common law courts in other jurisdictions by an alternative route. In Canada and Australia the courts have rejected aggressively drafted ouster clauses on constitutional grounds:

150.1. Section 96 of the British North America Act 1867[28] provides for the Governor General to appoint judges to the superior courts in each province. In Crevier v Quebec [1981] SCR 220 the Supreme Court of Canada held that s. 96 guarantees the powers of the ordinary courts as the ultimate interpreters of legislation ("*it cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review*" per Laskin CJ at p. 238).

150.2. Section 75 of the Commonwealth of Australia Constitution Act 1900[29] gives the High Court original jurisdiction to hear cases where the Commonwealth is a party or a prerogative writ is sought. This creates a guaranteed right of judicial review, which has subsequently been extended to state courts to avoid "*creat*[ing] *islands of power immune from supervision and restraint*" (Kirk v IRC at (§99)).

[28] An Act of the Westminster Parliament.
[29] Also an Act of the Westminster Parliament.

151. Neither of these statutory provisions for former colonies were novel. They reflected similar legislation putting the High Court of England and Wales on a statutory footing, contained in s. 16 of the Supreme Court of Judicature Act 1873. These provisions are now contained in s. 19 of the Senior Courts Act 1981 ("*there shall be exercisable by the High Court… all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act…*") and the accompanying provisions continuing the judicial review powers of the High Court (ss. 29-31 of the Senior Courts Act 1981).

152. In Scotland, Article 19 of the Acts of Union 1706-7 provide that "*the Court of Session… do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same authority and privileges as before the Union*".

153. Accordingly:

153.1. In Canada and Australia, ouster clauses have been rejected by reference to constitutional provisions creating the ordinary courts of general jurisdiction, as well as ordinary *Anisminic* analysis. Permitting a statutory tribunal with limited powers to be the final arbiter of the scope of its own powers is incompatible with the existence and role of the ordinary courts. Hence, ouster clauses are not given effect.

153.2. The Canadian and Australian constitutional provisions do no more than codify the position identified by Professor Dicey and Baron Hume. Constitutionally and logically, a court of unlimited general jurisdiction is needed to ensure that the words of legislation are given a single authoritative interpretation, that meaning is given effect and that statutory bodies are confined within the scope of the powers given to them.

153.3. There have been similar statutory provisions codifying and guaranteeing the role and functions of the ordinary courts since 1706 in Scotland and 1873 in England and Wales. Those provisions have the same effect as the similar provisions in Canada and Australia: they ensure that the Courts of general unlimited jurisdiction can exercise control over a statutory body with limited powers.

153.4. At a minimum, the Acts of Union and the Judicature Acts (now reflected in the Senior Courts Act 1981) are constitutional statutes (see HS2 [2014] 1 WLR 324 per Lord Neuberger and Lord Mance at §207: "*…we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list.*")

153.5. If the rights granted by a constitutional statute are to be abrogated by Parliament, the constitutional statute must be expressly repealed. See Miller v Secretary of State for Exiting the European Union [2018] AC 61 at §66 approving Thoburn v Sunderland City Council [2003] QB 151 at §§63-64 per Laws LJ:

> "*63. Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's* actual *– not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to Pepper v Hart* [1993] AC 593*. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute.*
>
> *64. This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand.*"

153.6. Nothing in s. 67(8) of RIPA seeks expressly to repeal the jurisdiction of the High Court in the Senior Courts Act 1981 or the Court of Session in the Acts of Union. The same legal analysis as in Canada and Australia therefore also applies in the

UK. Citizens in the United Kingdom are thus in no worse position than those in Canada or Australia. They are not disadvantaged by our lack of a written constitution. The rule of law is maintained by the common law principles regarding constitutional statutes, which leads to the same result ("*and gives us most of the benefits*" per Laws LJ) as if the same provisions were in a written constitution.

Conclusion

154. It is respectfully submitted that the Appellant's appeal should be granted for the following among other

REASONS

BECAUSE s. 67(8) of RIPA 2000 does not oust the supervisory jurisdiction of the High Court and the Court of Session to quash a decision of the Investigatory Powers Tribunal for error of law.

AND BECAUSE Parliament may not by statute oust the supervisory jurisdiction of the High Court and the Court of Session over a court or tribunal of limited statutory jurisdiction.

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19 October 2018

PRIVACY INTERNATIONAL v INVESTIGATORY POWERS TRIBUNAL
DECISIONS OF THE UK COURTS CONCERNING PURPORTED OUSTER CLAUSES

Case	Legislation	Decision-maker	Clause	Outcome
England & Wales				
Smith, Lluellyn, Commissioners of Sewers 86 ER 719; (1669) 1 Mod 44 Court of King's Bench	Statute of Sewers (23 Hen 8 c 5)	Commissioners of Sewers	Orders of the commissioners of sewers "*shall not be reversed but by other commissioners*".	Provision did not exclude certiorari. Kelynge CJ at 720; 45: "*Yet it never was doubted, but that this Court might question the legality of their orders notwithstanding: and you cannot oust the jurisdiction of this Court without particular words in Acts of Parliament. There is no jurisdiction that is uncontroulable by this Court.*" Moreton J at 720; 45: "*If commissioners exceed their jurisdiction, where are such matters to be reformed but in this Court? If any Court in England of an inferior jurisdiction exceed their bounds, we can grant a prohibition.*"
R v Plowright 87 ER 60; (1685) 3 Mod 94 Court of King's Bench	Statute relating to the payment of "chimney money" (16 Car 2 c 3)	Justices of peace	"*That if any question shall arise about the taking of any distress, the same shall be heard and finally determined by one or more justices of the peace near adjoining*"	Provision did not exclude certiorari. Per curiam at 61; 95: "*The statute doth not mention any certiorari, which shews that the intention of the law-makers was, that a certiorari might be brought,*

				otherwise they would have enacted, as they have done by several other statutes, that no certiorari shall lie. Therefore the meaning of the Act must be, that the determination of the justices of the peace shall be final in matters of fact only; as if a collector should affirm that a person has four chimnies when he has but two, or when the goods distrained are sold under the value, and the overplus not returned; but the right of the duty arising by virtue of this Act was never intended to be determined by them."
R v Moreley 97 ER 696; (1760) 2 Burr 1040 Court of King's Bench	Conventicle Act for the suppression of non-conformism (22 Car 2 c 1)	Justices of peace	Section 6: "*no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act: but they shall be finally determined in the Quarter-Sessions only.*" Section 13: "*…no record, warrant or mittimus to be made by virtue of this Act, or any proceedings thereupon, shall be reversed, avoided or any way impeached, by reason of any default in form.*"	Provision did not exclude certiorari. Lord Mansfield at 697; 1042: "*… a certiorari ought to issue. A certiorari does not go, to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled.*"
R v Cheltenham Commissioners 113 ER 1211; (1841) 5 Jur 867	Paving Act (1 & 2 G 4 c cxxi)	Quarter Sessions	The Paving Act empowered commissioners to lay rates, giving to parties grieved an appeal to the Quarter Sessions, whose order was	Provision did not exclude certiorari. Three of 11 magistrates that sat on the Quarter Sessions had a personal

Court of King's Bench			to be final; and no order or rate was to be removed by certiorari.	interest in quashing a rate that had been levied (they being partners in a company that owned the land the subject of the rate). Lord Denman CJ at 1214; 474: "*It is perfectly clear that proceedings, such as those which took place on the second day, cannot be supported in this Court. We have already stated our opinion, that the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed.*"
Ex p Bradlaugh (1878) 3 QBD 509	An Act for Regulating the Police Courts in the Metropolis (2 & 3 Vict c 71)	Metropolitan Police Courts	Section 49: "*no information, conviction, or other proceeding before or by any of the said magistrates, shall be quashed or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench.*"	Provision did not exclude certiorari. Cockburn CJ at 512-513: "*It was contended that the certiorari is taken away by 2 & 3 Vict c 71, s. 49. … I am clearly of opinion that the section does not apply when the application for the certiorari is on the ground that the inferior tribunal has exceeded the limits of its jurisdiction.*"

				Mellor J at 513: *"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."*
R (Gilmore) v Medical Appeal Tribunal [1957] 1 QB 574	s. 36(3) National Insurance (Industrial Injuries) Act 1946	Medical Appeal Tribunal	*"any decision of a claim or question […] shall be final"*	Provision did not oust review for *"error of law on the face of the record"*. Denning LJ at 583: *"[…] the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", certiorari can still issue for excess of jurisdiction or for error of law on the face of the record."*
Anisminic v Foreign Compensation Commission [1969] 2 AC 147	s.4(4) Foreign Compensation Act 1950	Foreign Compensation Commission	*"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."*	Provision did not oust review for any error of law. Lord Reid at 170E: *"I do not think it is necessary or even reasonable to construe the word 'determination' as including*

				everything which purports to be a determination but which is in fact no determination at all."
R (Fayed) v Home Secretary [1998] 1 WLR 763	s.44(2) British Nationality Act 1981	Secretary of State for the Home Department	Decisions *"shall not be subject to appeal to, or review in, any court"*	Court of Appeal agreed with Secretary of State's concession that the provision did not oust judicial review on any ground. Phillips LJ at 788H: *"Mr Richards rightly conceded that the minister's decisions were justiciable. He attached no significance in the present context to the provision purporting to preclude review or appeal."*
R (Sivasubramaniam) v Wandsworth County Court [2002] EWCA Civ 1738	s.54(4) Access to Justice Act 1999	County Court	*"No appeal may be made against a decision of a court under this section to give or refuse permission [to appeal]"*	Provision did not oust judicial review on any ground (subject to considerations of alternative remedy). Lord Phillips MR at [44]: *"The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication."*
R (Cart) v Upper Tribunal; R (U) v SIAC [2010] 2 WLR 1012 – Divisional Court	s.1(3) Special Immigration Appeals Commission Act 1997	SIAC	*"The commission shall be a superior court of record."*	Provision did not oust judicial review on any ground. Laws LJ at [31]: *"The proposition that judicial review is excluded by sections 1(3) and 3(5) is a constitutional*

	s.3(5) Tribunals, Courts and Enforcement Act 2007	Upper Tribunal	*"The Upper Tribunal is to be a superior court of record."*	*solecism. The supervisory jurisdiction (to the extent that it can be ousted at all: itself a question to which I will return) can only be ousted 'by the most clear and explicit words'"*
As above	s.1(4) Special Immigration Appeals Commission Act 1997	SIAC	*"A decision of the commission shall be questioned in legal proceedings only in accordance with (a) section 7, or (b) section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)"*	Provision did not oust judicial review on any ground. Laws LJ at [82-83]: *"It is a no certiorari clause which falls foul of the Anisminic principle."*
R (Cart) v Upper Tribunal [2012] 1 AC 663 – Supreme Court	N/A	Upper Tribunal	N/A	Baroness Hale at [37]: "*there is nothing in the 2007 Act which purports to oust or exclude judicial review of the unappealable decisions of the Upper Tribunal. Clear words would be needed to do this and they are not there."* Lord Phillips at [71]: "*Since [*Anisminic*] Parliament has not purported, as it might have done, expressly to preclude the exercise by the High Court of the power of judicial review.*" And at [89]: "*Parliament has not sought to oust or fetter the common law powers of judicial review of the judges of the High Court and I hope that Parliament will never do so.*"

R (Woolas) v Parliamentary Election Court [2012] QB 1	s.144 Representation of the People Act 1983	Parliamentary Election Court	*"the determination so certified shall be final to all intents as to the matters at issue on the petition"*	Provision did not oust judicial review for error of law. Thomas LJ (giving the judgment of the Court) at [47]: *"the fact that the decision of an election court as a judgment declaring the status of the election is a judgment in rem and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required."*
Scotland				
Campbell v Young (1835) 13 S 535 Court of Session (Inner House, Second Division)	s.22 Hawkers' Act (55 Geo. III. c. 71)	Sheriff	*"no conviction made, or decree given under or by virtue of this Act […] shall be removed to the Court of Session by advocation"*	Provision did not exclude the Court of Session's jurisdiction. Lord Justice-Clerk Boyle at pp541-2: *"We cannot listen to a proposition so monstrous as that, because a party says he acts under the statute he is to do as he pleases. If he deviates from the statute,*

				the exclusion of our jurisdiction is no longer applicable. The legislature, when it gave powers, meant them to be carried into effect as prescribed." *"when the act is set at defiance, I cannot hold the deliverance a judgment under the act at all. Even when a statute debars any interference of the Court in the broadest terms, if the act be departed from, we have not hesitated to grant redress"*
Ashley v Magistrates of Rothesay (1873) 11 M 708 Court of Session (Inner House, First Division)	s.34 Public Houses Amendment Act 1862	Magistrates	*"no warrant, sentence, order, decree, judgment or decision made or given by any Quarter Sessions […] shall be subject to reduction, advocation, suspension or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than by this Act provided"*	Provision did not prevent reduction of an order. Lord President Inglis: *"the present is not a process of review, nor is it in any proper sense a stay of execution. It is a proceeding brought in the Court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior Court, and the jurisdiction of this Court to entertain such an action cannot be doubted, notwithstanding the entire prohibition of review of any kind."*
McDaid v Clydebank DC 1984 SLT 162	s.85(10) Town and Country Planning (Scotland) Act 1972	Planning authority	*"The validity of an enforcement notice shall not, except by way of an appeal under this section, be questioned in any proceedings whatsoever on any of the grounds specified in paragraphs (b) to (e) of subsection (1) of this section."*	Provision did not prevent review. Lord Cameron: *"It is trite law that an exclusion of the jurisdiction of the courts can only be effected by the clearest legislative provision […]*

				The purported enforcement notice was not such a notice as s.84(7) contemplates or prescribes and the respondents have neither power nor authority to serve such a document."
Northern Ireland				
Lee v Ashers Baking Company Ltd [2018] UKSC 49	s.61(7) County Courts (Northern Ireland) Order 1980	Northern Ireland Court of Appeal	*"the decision of the Court of Appeal on any case stated under this article shall be final"*	Provision did not prevent appeal to Supreme Court where the Court of Appeal had made a procedural error. Lord Mance at [88]: *"The finality provision in article 61(7) is therefore focused on the decision on the point of law, not on the regularity of the proceedings leading to it. It would require much clearer words - and they would, clearly, be unusual and surprising words - to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law."*
Privy Council				
Attorney-General v Ryan [1980] AC 718	s.16 Bahamas Nationality Act 1973	Minister of Home Affairs (Bahamas)	*"the decision of the minister […] shall not be subject to appeal or review in any court"*	Provision did not oust review for breach of natural justice. Lord Diplock at 730: *"It is by now well established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision*

				must be one which the decision-making authority, under this Act the minister, had jurisdiction to make. If in purporting to make it he has gone outside his jurisdiction, it is ultra vires and is not a 'decision' under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it a nullity […] *A decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. […] Their Lordships, in agreement with all the judges in the courts below, would therefore conclude that the ouster clause […] 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."*
Brantley v Constituency Boundaries Commission [2015] 1 WLR 2753	s.50(7) Constitution of Saint Christopher and Nevis	Governor-General	*"The question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6) […] shall not be inquired into in any court of law except on the ground that the*	Lord Hodge for the Board at [32]: "*In any event, on the ordinary principles of judicial review, it is arguable that the making of the proclamation would be open to challenge, notwithstanding the*

			proclamation does not give effect to rule 1 in Schedule 2"	*ouster clause, if the power to do so were exercised for an improper purpose"*