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

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

THE QUEEN ON THE APPLICATION OF PRIVACY INTERNATIONAL

Claimant

AND

THE INVESTIGATORY POWERS TRIBUNAL

Defendant

AND

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

and

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Interested Parties

SUMMARY OF THE DEFENDANT'S POSITION

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

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

judgment that it has delivered.

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

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

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

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

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

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

(d) As Laws LJ observed in *R* (*A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 [2010] 2 AC 1 at paragraph 22:

> "It is elementary that any attempt to oust altogether the High Court's supervisory jurisdiction over public authorities is repugnant to the constitution. But statutory measures which confine the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT, whose membership I have described, offers with respect no cause for concern on this score."

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

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

(g) Section 67(8) itself recognises that there may be provision for the Secretary of State to order (or *a fortiori* Parliament to conclude) that there could be an appeal route (other than to the ECtHR), and Parliament is presently considering the introduction of such a route but one that recognises (a) to (f) above.

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

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

JONATHAN GLASSON QC

27 May 2016