IN THE HIGH COURT OF JUSTICE **Claim No. CO/2368/2016**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
London

B E T W E E N:

THE QUEEN on the application of
PRIVACY INTERNATIONAL

Claimant

-and-

INVESTIGATORY POWERS TRIBUNAL

Defendant

-and-

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

Interested Parties

CLAIMANT'S REPLY TO SUMMARY GROUNDS

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1. It is apparent from the Summary Grounds submitted by the Interested Parties and the Defendant that this claim raises strongly arguable grounds for judicial review, which ought to proceed to a full hearing. The Claimant responds briefly below to the arguments put forward in the Summary Grounds.

Amenability to judicial review

2. The Interested Parties make five submissions. The Claimant responds as follows:

   a) First, it is asserted that the express language of section 67(8) RIPA is clear and unambiguous. However, the statutory wording is materially identical to that in *Anisminic* where the ouster clause did not preclude a claim for judicial review. Wording which precludes a challenge to a decision of an inferior court does not impede the High Court in the exercise of its supervisory jurisdiction over a purported "decision" which is vitiated by an error of law.

b) Secondly, the Interested Parties rely on *R (A) v Security Service*. However, that case is not comparable to the current proceedings. A sought to bring a claim in the High Court against the Security Service under the Human Rights Act 1998. Section 65(2)(a) of RIPA states that the Tribunal is the "*only appropriate tribunal*" for such a claim. The Supreme Court held that circumventing the jurisdiction of the Tribunal in respect of such a claim was improper. The different question whether a "decision" of the IPT purporting to exercise that jurisdiction is amenable to judicial review if flawed in law did not arise, and was not decided by the Supreme Court in that case. Lord Brown did comment, *obiter*, that section 67(8) RIPA was an "*unambiguous ouster*", but noted that the Court had heard no argument on the point and said "… *that is not the provision in question here*…"

c) Further the primary issues in this claim, concerning the proper construction of section 5 ISA as a matter of domestic law (regardless of the HRA), are not within the exclusive jurisdiction of the IPT. Both the Administrative Court and the IPT have jurisdiction over such issues: see section 65(2)(b) RIPA.

d) The Interested Parties also rely on the existence of the IPT's special procedures to handle sensitive information. However:

   i) This claim raises pure issues of law only. Such issues can (and therefore must) be argued in open. The arguments below were heard in an open hearing in the IPT, argued *inter partes*, and an open judgment delivered. There is no need for any special closed procedure in this claim for judicial review. See *Bank Mellat v HM Treasury* [2014] AC 700 at [70] per Lord Neuberger ("*the court itself is under a duty to avoid a closed material procedure if that can be achieved*").

   ii) Even if it could be argued that there was such a need, such procedures have now been provided by Parliament in the Justice and Security Act 2013 (enacted after the decision in *A*).

e) Thirdly, the Interested Parties note that the members of the Tribunal include High Court judges and that the test applied is the same as would be applied in

an application for judicial review. This is immaterial to the exercise of the High Court's supervisory jurisdiction over a court of limited jurisdiction. The same arguments did not preclude judicial review of SIAC and of the Upper Tribunal: see *R (Cart) v Upper Tribunal* [2011] QB 120. It should be noted that both SIAC and the Upper Tribunal are designated by statute as superior courts of record. The IPT is not.

f) Fourthly, the Interested Parties claim that the IPT regime is compatible with Article 6 ECHR, citing *Kennedy v United Kingdom* (2011) 52 EHRR 4. This is irrelevant to the question of amenability to judicial review at common law.

g) Fifthly, the Interested Parties rely on the proposals before Parliament in the Investigatory Powers Bill to introduce a limited right of appeal from the IPT to the Court of Appeal, applying a second appeals test. Again, this is irrelevant to the issue of amenability to judicial review, arising in circumstances in which there is currently no statutory right of appeal.

3. The Interested Parties further assert that "*nor is there anything in the offensive and inaccurate suggestion that* [the IPT] is "*staffed by individuals of lesser ability*" (see §56) *than Judges of the High Court*" (§19). No such suggestion has been made. The Interested Parties have misinterpreted the Claimant's reliance on a passage quoted from a High Court of Australia decision. The "*lesser ability*" point was neither applicable, nor relied upon: see paragraphs 56 - 57 of the Statement of Facts and Grounds.

4. The Tribunal's Summary Grounds make similar points on amenability to judicial review. However, the Tribunal is incorrect in suggesting that the IPT has "*exclusive jurisdiction to hear complaints under RIPA*". Many RIPA cases are within the jurisdiction of the ordinary courts. See Lord Brown in *R (A)* at [33] ("*while section 7(1)(a) HRA proceedings have to be brought before the IPT, other causes of action or public law grounds for judicial review need not*"). In any event, this case concerns the interpretation of section 5 ISA, not RIPA (§3(a)).

Error of law

5. The Claimant responds as follows to the submissions of the Interested Parties:

a) The Interested Parties contend that "*it was no part of the IPT's careful reasoning to conclude that the principle of legality could never have any application in the national security sphere*" §21. This does not meet the Claimant's ground of challenge, namely, that the IPT wrongly rejected the applicability of the principle of legality in the present case, by concluding that it was not a legitimate aid to construction because the relevant statute concerned the functions of a Service charged with furthering the interests of national security.

b) Secondly, the Interested Parties argue that the general warrant cases are not relevant because they concern sedition, rather than "*national security threats*". However, seditious libel was a serious crime engaging the protection of national security. In *Entick v Carrington*, Treasury Counsel submitted of the seditious libel "*there can hardly be a greater offence against the State, except actual treason*". That national security was directly in issue was also made clear by the Court ("*we are no advocates for* [seditious] *libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all*").

c) The Interested Parties contend that the requirement of necessity and proportionality saves section 5 ISA. This argument is irrelevant to the question of statutory construction: namely, whether Parliament intended to permit property to be "specified" merely by a generic description, contrary to common law fundamental principles.

d) Thirdly, the Interested Parties say there is no proper comparison between sections 5 and 7 ISA. However, if section 5 was intended to permit a description by class, as expressly provided for in section 7, it is difficult to understand why the draftsman used such different language. The reference to the amendment to

section 7 in 2001 is a bad point. Section 7 was always available to and used by GCHQ, but procedurally the application had to be made to the Secretary of State by SIS until 2001.

e) Fourthly, the Interested Parties have misunderstood the law of warrants. They suggest that "*some judgment is necessary*" because the Claimant accepts that a geographical location ("*1 Acacia Avenue*") or a specific person by physical description rather than name is acceptable (§25). But such a warrant gives no discretion to the officer. If the officer searches 2 Acacia Avenue or the wrong person, the search will have been unlawful. The Claimant's objection is to a warrant that permits a search of anyone the officer suspects of being a member of a particular group, or an entire class of property, with the officer deciding who or what should be searched. That may be either because the warrant itself purports to confer such discretion upon the officer, or because the scale of the activity permitted by the warrant is so large that in practice the officer has significant discretion to decide what searches to carry out in reliance on it.

f) The Interested Parties then contend that it would be "*unlikely*" that a warrant for "*all mobile phones in Birmingham*" would be issued. However, in November 2015 the Secretary of State admitted that there are currently section 94 Telecommunications Act 1984 warrants for the collection of <u>all</u> domestic communications data from UK telephone providers on a continuous rolling basis. It is the Interested Parties' publicly-recorded view that collecting data about everyone in the UK, in order to form a large database that can be interrogated, is a necessary and proportionate activity. See David Anderson QC, *The Big Reveal* ("*the launch of the… Bill was accompanied by a significant avowal. This related to the use by intelligence agencies… of a bulk collection power, applicable to communications data but not to content or internet connection records… The operation of that power had never been made public*").[1]

g) Finally, oversight by the Commissioner is not sufficient to correct an error of law by the IPT. The law as declared by the IPT will bind the Commissioner.

[1] https://terrorismlegislationreviewer.independent.gov.uk/the-big-reveal/#more-2496

Protective Costs Order

6. No good reason has been advanced for a reciprocal cap over the Claimant's costs set at the same level as the amount it is able to afford (§30). Such a cap is contrary to principle and authority. In *R (Buglife) v Thurrock Thames Gateway Development Corporation* [2009] Env LR 18 the Court of Appeal cited the Report of the Working Group on Environmental Justice, chaired by Sullivan J and held at [26]:

> "There is a further point of some potential importance in this appeal. Paragraph 7 of Appendix 3 begins in this way:
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> > "7. There have been worrying examples where the implicit (or even explicit) assumption by the court is that the capped limit on the claimant's costs should somehow reflect the PCO limit imposed on the defendant. This is taken to represent an equitable approach as between the parties. We remind ourselves that this is not the way the Corner House principles are formulated and its adoption is unhelpful in the application of the PCO jurisdiction."
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> We entirely agree that there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount. As just stated, the amount of any cap on the defendant's liability for the claimant's costs will depend upon all the circumstances of the case."

7. The Interested Party makes the error identified by the Court of Appeal in *Buglife*: an assumption that a PCO limit should be the same as the Claimant's capped costs. The Interested Parties are protected from significant costs exposure by the limitation on Treasury Solicitor rates, the narrow issues of law under consideration and the fact that the parties are already well prepared to argue the issues – they have already been canvassed before the IPT.

DINAH ROSE QC

BEN JAFFEY

TOM CLEAVER

BHATT MURPHY

7 June 2016