IN COURT OF APPEAL (CIVIL DIVISION) **C1/2017/0470/A**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

DIVISIONAL COURT (SIR BRIAN LEVESON PQBD AND LEGGATT J)

BETWEEN

THE QUEEN ON THE APPLICATION OF

PRIVACY INTERNATIONAL

Appellant

AND

THE INVESTIGATORY POWERS TRIBUNAL

Respondent

AND

SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (1)

GOVERNMENT COMMUNICATIONS HEADQUARTERS (2)

Interested Parties

RESPONDENT'S NOTE

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*References to the Appeal Bundle are given as [**tab A/1**], as appropriate.*

1. This Note has been prepared on behalf of the Respondent, the Investigatory Powers Tribunal ("the IPT"), to assist the Court of Appeal in relation to the appeal against the judgment of the Divisional Court in which it found that the IPT was not amenable to judicial review.

2. The Note sets out the IPT's history and statutory functions as well as the manner in

which it performs its statutory functions. It is largely based on a similar Note that was submitted to the Divisional Court[1], but has been updated, principally to reflect developments in the oversight regime introduced by the Investigatory Powers Act 2016 and, in particular, the introduction of a domestic right of appeal from the decisions of the IPT.

The history of the IPT

3. The IPT was established by the Regulation of Investigatory Powers Act 2000 ("RIPA"). The IPT effectively replaced the Interception of Communications Act Tribunal, the Security Services Act Tribunal and the Intelligence Services Act Tribunal which are now defunct except in relation to complaints made before 2 October 2000.[2] The IPT also replaced the complaints provision of Part III of the Police Act 1997 (concerning police interference with property).

4. The President and Vice-President of the IPT are appointed by HM the Queen by Letters Patent. They are required to hold or to have held high judicial office (see paragraph 2 of Schedule 3 to RIPA). The members of the IPT are similarly appointed by HM the Queen by Letters Patent. They are required to have held the relevant legal qualification for at least ten years (see paragraph 1 of Schedule 3 to RIPA).

5. The IPT's first President and Vice-President were Mummery LJ and Burton J. On the retirement of Mummery LJ, Burton J was appointed President and Sales J (as he then was) was appointed as the Vice-President. Subsequently Mitting J was appointed to replace Sales J as the Vice-President.

6. Current members of the IPT include 3 serving High Court Judges (Edis, Singh and Sweeney JJ) as well as a retired judge of the High Court in Northern Ireland (Sir Richard McLaughlin).[3]

[1] As the IPT indicated in its Acknowledgement of Service, the IPT did not intend to make any submissions in relation to the impugned judgment concerning to s.5 of the Intelligence Services Act 1994 even if the Divisional Court had found that the Tribunal was amenable to judicial review. It would obviously have been inappropriate for the IPT to comment any further on the judgment that it has delivered.

[2] See ss 70, 82(2) and Schedule 5 of RIPA and the Regulation of Investigatory Powers Act 2000 (Commencement No 1 and Transitional Provisions) Order 2000 SI 2000/2543

[3] A list of the IPT's current members is contained at Chapter 7 of the IPT's 2011-2015 report which was annexed

7. The IPT's members are drawn from Scotland and Northern Ireland as well as England and Wales, reflecting the fact that the IPT has a UK wide jurisdiction. It usually sits in London but last year sat in Edinburgh to hear the case of *David Moran and others v Police Scotland* [2016] UKIPTrib15_602-CH.

8. The IPT's members are supported by a small secretariat who assist in the administration related to the investigation of each complaint.

9. The IPT's powers under RIPA are primarily investigative. Much of its work is paper based, with its members directing investigations of complaints and adjudicating upon the outcome of the investigations. The vast majority of complaints made to the Tribunal do not lead to a hearing and instead are determined on paper.

10. Although it is called a Tribunal, the IPT is not part of 'Her Majesty's Courts and Tribunal Service'. In his 2001 Report of the Review of Tribunals (Paragraph 3.11) Sir Andrew Leggatt explained this, outlining some of the exceptional features of the Tribunal:

> "There is one exception among citizen and state tribunals. This Tribunal (IPT) is different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other tribunals. It is therefore wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service. So although the chairman [of the Tribunals system] is a Lord Justice of Appeal and would be the senior judge in the Tribunals System, he would not be in a position to take charge of it.
>
> The Tribunal's powers are primarily investigatory, even though it does also have an adjudicative role. Parliament has provided that there should be no appeal from the tribunal except as provided by the Secretary of State.
>
> Subject to tribunal rules made by the Secretary of State the Tribunal is entitled to determine its own procedure. We have accordingly come to the conclusion that this Tribunal should continue to stand alone; but there should apply to it such of our other recommendations as are relevant and not inconsistent with the statutory provisions relating to it."[4]

to the IPT's Acknowledgement of Service in these proceedings [see **tab B/6**].

[4] Report of the Review of Tribunals by Sir Andrew Leggatt: "Tribunals for Users - One System, One Service", available at http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm

The statutory scheme

11. The IPT was established by s.65 of RIPA:

"65 **The tribunal**

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

(2) The jurisdiction of the tribunal shall be—

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

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

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

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

(3) Proceedings fall within this subsection if—

(a) they are proceedings against any of the intelligence services …
(b) they are proceedings against any other person in respect of any conduct, proposed conduct, by or on behalf of any of those services;
(c) they are proceedings brought by virtue of section 55(4); or
(d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5).

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

(a) to have taken place in relation to him, to any of his property, to any communications sent by or to him, or intended for him, or to his use of any postal service, telecommunications service or telecommunication system; and
(b) to have taken place in challengeable circumstances or to have been carried out by or on behalf of any of the intelligence services.

(5) Subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is–
(a) conduct by or on behalf of any of the intelligence services;
(b) conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system;
(c) conduct to which Chapter II of Part I applies;
(ca) the carrying out of surveillance by a foreign police or customs officer (within the meaning of section 76A);
(d) other conduct to which Part II applies;

(e) the giving of a notice under section 49 or any disclosure or use of a key to protected information;
(f) any entry on or interference with property or any interference with wireless telegraphy.

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

(a) any of the intelligence services;
(b) any of Her Majesty's forces;
(c) any police force;
(ca) the Police Investigations and Review Commissioner;
(d) the National Crime Agency;
(f) the Commissioners for Her Majesty's Revenue and Customs;
and section 48(5) applies for the purposes of this subsection as it applies for the purposes of Part II.

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

(a) it takes place with the authority, or purported authority, of anything falling within subsection (8); or
(b) the circumstances are such that (whether or not there is such authority) it would not have been appropriate for the conduct to take place without it, or at least without proper consideration having been given to whether such authority should be sought;
but, subject to subsection (7ZA), conduct does not take place in challengeable circumstances to the extent that it is authorised by, or takes place with the permission of, a judicial authority.

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

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

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

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

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

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

12. Section 243 of the Investigative Powers Act 2016 amends s.65-67 of RIPA. The result is that the IPT will have jurisdiction regarding claims brought against public authorities in respect of all the powers provided for in the 2016 Act. A date has not yet been set for when s.243 will be brought into force.

Oversight of powers exercised under RIPA, Intelligence Services Act and the Police Act Part III

13. The IPT acts as one of the main pillars of oversight of the powers exercised under RIPA. Those include the Commissioners, the Intelligence and Security Committee of Parliament and the system of authorisations required under RIPA.

The Commissioners

14. The Commissioners provide oversight of the way in which all public authorities in the United Kingdom carry out covert surveillance.

15. Until the Investigatory Powers Act 2016 comes into force, oversight is provided by:

(a) *The Interception of Communications Commissioner:* responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by the three Security and Intelligence Agencies (SIAs), police forces and other public authorities. (Section 57 RIPA). The current Commissioner is the Rt. Hon. Sir Stanley Burnton.

(b) *The Intelligence Services Commissioner*: responsible for providing independent judicial oversight of the conduct of the SIAs and the Ministry of Defence (Section 59 RIPA). The current Commissioner is the Rt. Hon Sir John Goldring, who was appointed in January 2017 to succeed Sir Mark

Waller.

(c) *The Chief Surveillance Commissioner and Assistants:* they are responsible for overseeing the conduct of covert surveillance and covert human intelligence sources (other than the SIAs) by public authorities. (Police Act 1997 and Sections 62 and 63 RIPA). The current Chief Commissioner is The Rt. Hon. the Lord Judge.

16. The Investigatory Powers Act 2016 will replace those Commissioners with the newly created office of the Investigatory Powers Commissioner (IPC) who will be supported in carrying out his functions by other Judicial Commissioners. No-one may be appointed as the IPC or as a Judicial Commissioner unless they have held a judicial position at least as senior as a high court judge.[5] Section 229 of the Investigatory Powers Act gives a wide remit to the IPC to oversee the way public authorities intercept communications, acquire or retain communications data or carry out equipment interference. The IPC will undertake, with the assistance of the Judicial Commissioners and staff, the functions currently undertaken by the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Surveillance Commissioners. The IPC and other Judicial Commissioners will have discretion as to how they must fulfill their functions, but this must include audits, inspections and investigations.

17. In March 2017, the Prime Minister approved the appointment of Fulford LJ as the first Investigatory Powers Commissioner. It was announced that Fulford LJ would start to establish his office immediately and that he would commence his statutory functions "in due course".[6]

The Intelligence and Security Committee of Parliament

18. The Intelligence and Security Committee of Parliament ("ISC") is a statutory committee of Parliament that has responsibility for oversight of the UK intelligence community. The ISC was originally established by the Intelligence Services Act 1994

[5] S.227 of the Investigatory Powers Act 2016
[6] https://www.gov.uk/government/news/investigatory-powers-commissioner-appointed-lord-justice-fulford

and was recently reformed, and its powers reinforced, by the Justice and Security Act 2013.[7] The ISC oversees the intelligence and security activities of the UK, including the policies, expenditure, administration and operations of the Security Service (MI5), the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ). The ISC also scrutinises the work of other parts of the UK intelligence community, including the Joint Intelligence Organisation and the National Security Secretariat in the Cabinet Office; Defence Intelligence in the Ministry of Defence; and the Office for Security and Counter-Terrorism in the Home Office.

19. The ISC consists of nine Members drawn from both Houses of Parliament. The Chair is elected by its Members. The Members of the Committee are subject to Section 1(1)(b) of the Official Secrets Act 1989 and are given access to highly classified material in carrying out their duties. The Committee sets its own agenda and work programme. It takes evidence from Government Ministers, the Heads of the intelligence Agencies, officials from the intelligence community, and other witnesses as required. The Committee is supported in its work by an independent Secretariat and an Investigator. It also has access to legal, technical and financial expertise where necessary. The Committee makes an annual report to Parliament on the discharge of its functions. [8]

Authorisations

20. Intrusive powers under RIPA, the Intelligence Services Act 1994 and the Police Act Part III may only be exercised upon the authority of a warrant or an authorisation given by a "designated person" with statutory authority to do so. They must be granted only if the particular power sought is in all the circumstances lawfully available.

The Tribunal's procedures

21. Section 68 of RIPA provides for the IPT's procedure. Under section 68(2), the IPT has the power to require a relevant Commissioner to provide it with all such assistance (including the Commissioner's opinion as to any issue falling to be determined by the IPT) as it thinks fit. Section 68(6) and (7) requires those involved in the authorisation

[7] This is reflected in a Memorandum of Understanding between the ISC and the Prime Minister.
[8] See page 3 of its 2015-2016 Annual Report.

and execution of an interception warrant to disclose or provide to the IPT all documents and information it may require.

22. Section 68(4) deals with reasons for the IPT's decisions and provides that:

> "Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
>
> (a) a statement that they have made a determination in his favour; or
>
> (b) a statement that no determination has been made in his favour."[9]

23. The IPT has the power to award compensation and to make such other orders as it thinks fit, including orders quashing or cancelling any and orders requiring the destruction of any records obtained, for example, under a section 8(1) warrant (section 67(7) RIPA).

24. In the event that a claim before the IPT in relation to a warrant, authorisation or other permission given or granted by a Secretary of State is successful, the IPT is required to make a report to the Prime Minister (section 68(5) of RIPA).

Procedural Rules

25. Section 69(1) of RIPA provides that the Secretary of State may make rules regulating any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings before it. Under section 69(2), such rules may:

> "(c) prescribe the form and manner in which proceedings are to be brought before the Tribunal or a complaint or reference is to be made to the Tribunal;
>
> ...
>
> (f) prescribe the forms of hearing or consideration to be adopted by the Tribunal in relation to particular proceedings, complaints or references ... ;
>
> (g) prescribe the practice and procedure to be followed on, or in connection with, the hearing or consideration of any proceedings, complaint or reference (including, where applicable, the mode and burden of proof and the admissibility of evidence);
>
> (h) prescribe orders that may be made by the Tribunal under section 67(6) or (7);
>
> (i) require information about any determination, award, order or other decision made by the Tribunal in relation to any proceedings, complaint or reference to be provided (in

[9] In 2015 the IPT gave a ruling in relation to the proper interpretation of this provision in the context of a claim brought by Mr Belhadj and others in relation to the alleged interception of legally privileged material – see *Belhadj & Others vs. the Security Service, SIS, GCHQ, Home Office and FCO* IPT/13/132-9/H.

addition to any statement under section 68(4)) to the person who brought the proceedings or made the complaint or reference, or to the person representing his interests."

26. Section 69(6) provides that in making the rules the Secretary of State shall have regard to:

"(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and

(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

27. The Secretary of State has adopted rules to govern the procedure before the IPT in the form of the Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) ("the Rules"). The Rules cover various aspects of the procedure before the IPT. As Laws LJ commented in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 they represent a "*series of provisions elaborating special procedures clearly fashioned to accommodate the particular considerations, not least those of national security, which are likely to arise*"[10] in such proceedings.

28. As regards disclosure of information, Rule 6 provides:

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

(2) Without prejudice to this general duty, but subject to paragraphs (3) and (4), the Tribunal may not disclose to the complainant or to any other person:

(a) the fact that the Tribunal have held, or propose to hold, an oral hearing under rule 9(4);

(b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing;

(c) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act (or provided voluntarily by a person specified in section 68(7));

(d) any information or opinion provided to the Tribunal by a Commissioner pursuant to section 68(2) of the Act;

[10] Paragraph 7

(e) the fact that any information, document, identity or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (b) to (d).

(3) The Tribunal may disclose anything described in paragraph (2) with the consent of:

(a) in the case of sub-paragraph (a), the person required to attend the hearing;

(b) in the case of sub-paragraphs (b) and (c), the witness in question or the person who disclosed or provided the information or document;

(c) in the case of sub-paragraph (d), the Commissioner in question and, to the extent that the information or opinion includes information provided to the Commissioner by another person, that other person;

(d) in the case of sub-paragraph (e), the person whose consent is required under this rule for disclosure of the information, document or opinion in question.

(4) The Tribunal may also disclose anything described in paragraph (2) as part of the information provided to the complainant under rule 13(2), subject to the restrictions contained in rule 13(4) and (5).

(5) The Tribunal may not order any person to disclose any information or document which the Tribunal themselves would be prohibited from disclosing by virtue of this rule, had the information or document been disclosed or provided to them by that person.

(6) The Tribunal may not, without the consent of the complainant, disclose to any person holding office under the Crown (except a Commissioner) or to any other person anything to which paragraph (7) applies.

(7) This paragraph applies to any information or document disclosed or provided to the Tribunal by or on behalf of the complainant, except for the statement described in rule 7(2)(a) and (b) or, as the case may be, rule 8(2)(a) and (b).”

29. It is noted that Rule 6 (1) requires the IPT to ensure that it does not permit the disclosure of information that would be contrary to “*the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services*”: this is a wider definition of categories to be protected than that contained in section 6 of the Justice and Security Act 2013 (see further below).

30. Rule 9 deals with the forms of hearings and consideration of the complaint:

“(1) The Tribunal's power to determine their own procedure in relation to section 7 proceedings and complaints shall be subject to this rule.

(2) The Tribunal shall be under no duty to hold oral hearings, but they may do so in accordance with this rule (and not otherwise).

(3) The Tribunal may hold, at any stage of their consideration, oral hearings at which the complainant may make representations, give evidence and call witnesses.

(4) The Tribunal may hold separate oral hearings which:

(a) the person whose conduct is the subject of the complaint,

(b) the public authority against which the section 7 proceedings are brought, or

(c) any other person specified in section 68(7) of the Act,

may be required to attend and at which that person or authority may make representations, give evidence and call witnesses.

(5) Within a period notified by the Tribunal for the purpose of this rule, the complainant, person or authority in question must inform the Tribunal of any witnesses he or it intends to call; and no other witnesses may be called without the leave of the Tribunal.

(6) The Tribunal's proceedings, including any oral hearings, shall be conducted in private."

31. In Applications Nos IPT/01/62 and IPT/01/77, 23 January 2003, the IPT held that rule 9(6) of the 2000 Rules, requiring the tribunal's proceedings to be conducted in private, was ultra vires section 69 of RIPA as being incompatible with article 6 of the ECHR which guarantees the right to a fair hearing before an independent and impartial tribunal; but "*in all other respects the 2000 Rules are valid and binding on the tribunal and are compatible with articles 6, 8 and 10 of the Convention"*(para 12 of the decision).

32. The taking of evidence is addressed in Rule 11:

"(1) The Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law.

(2) The Tribunal may require a witness to give evidence on oath.

(3) No person shall be compelled to give evidence at an oral hearing under rule 9(3)."

33. Rule 13 provides guidance on notification to the complainant of the IPT's findings:

"(1) In addition to any statement under section 68(4) of the Act, the Tribunal shall provide information to the complainant in accordance with this rule.

(2) Where they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact.

...

(4) The duty to provide information under this rule is in all cases subject to the general duty imposed on the Tribunal by rule 6(1).

(5) No information may be provided under this rule whose disclosure would be restricted under rule 6(2) unless the person whose consent would be needed for disclosure under that rule has been given the opportunity to make representations to the Tribunal."

34. In *Kennedy v United Kingdom* (2011) 52 EHRR. 4 the European Court of Human Rights considered the IPT's procedures and concluded that the applicant had been afforded an

effective remedy in accordance with article 13 ECHR:

> "Having regard to its conclusions in respect of Article 8 and Article 6 § 1 above, the Court considers that the IPT offered to the applicant an effective remedy insofar as his complaint was directed towards the alleged interception of his communications."[11]

The IPT's evolving procedures for dealing with sensitive materials

35. In its 2011-2015 Report, the IPT explained:

> "As a judicial body handling similarly sensitive material, the Tribunal's policies and procedures have been carefully developed and have evolved with the aim of balancing the principles of open justice for the complainant with a need to protect sensitive material. The approach of hearing a case on the basis of assumed facts has proved to be of great value.
>
> 2.8 *Assumed facts:* This means that, without making any finding on the substance of the complaint, where points of law arise the Tribunal may be prepared to *assume for the sake of argument* that the facts asserted by the claimant are true; and then, acting upon that assumption, decide whether they would constitute lawful or unlawful conduct. This has enabled hearings to take place in public with full adversarial argument as to whether the conduct alleged, if it had taken place, would have been lawful and proportionate. Exceptionally, and where necessary in the interests of public safety or national security, the Tribunal has sat in closed (private) hearings, with the assistance of Counsel to the Tribunal, to ensure that points of law or other matters advanced by the complainants are considered."[12] (Emphasis as per original)

36. In recent cases, the IPT has proceeded to give judgment on issues of law not only on the basis of assumed facts but also on the basis of significant pre-hearing disclosure that has been made by the SIAs following an OPEN and CLOSED disclosure process, where the interests of the claimants are advanced in CLOSED by Counsel to the Tribunal.[13] Those disclosure exercises have resulted in significant "avowals" of particular types of activity by the SIAs that have informed the IPT's rulings on preliminary issues of law.

[11] Paragraph 196

[12] See page 12. The IPT set out guidance in relation to the role of Counsel to the Tribunal in *Liberty/Privacy (No.1)* [2014] UKIPTrib 13/77-H; [2015] 3 All ER 142, paragraphs 8-10

[13] See para 5 of the judgment in *Privacy International and GreenNet v The Secretary of State for Foreign and Commonwealth Affairs and others* 14/120-126/CH and IPT 14/85/CH and most recently *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIPTrib 15_110-CH at para 13.

Recent judgments

37. The IPT maintains a website[14] which, as well as containing guidance for potential complainants, also contains the IPT's open judgments since its inception. A summary of key judgments given by the IPT since 2010 is contained in Chapter 5 of its 2011-2015 Report.

38. Since that report the IPT has also given judgment in

(a) *Human Rights Watch and others v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib15_165-CH, a ruling concerning the worldwide campaign by Privacy International following the IPT's judgments in *Liberty/Privacy Nos 1 and 2* UKIP Trib 13/77- H, [2015] 1 Cr. App. R 24, [2015] 3 All ER 142, 212;

(b) *David Moran and others v Police Scotland*, UKIP Trib 15_602-CH, a judgment concerning complaints arising out of the obtaining by Police Scotland of four relevant authorisations under Part 1 Chapter 2 (Acquisition and Disclosure of Communications Data) (ss 21-25) of RIPA;

(c) *Kerr v The Security Service* [2016] UKIP Trib 15_134-C, a preliminary issue judgment concerning a complaint that since 2003 the complainant had been the subject of a campaign of harassment by members of the Security Service, acting in their official capacity;

(d) *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 15_110-CH, where the IPT found that the obtaining by the SIAs of bulk communications data under s.94 of the Telecommunications Act 1984 and the obtaining of bulk personal datasets was contrary to Article 8 ECHR and was consequently unlawful until 2015; and

(e) *Dias and Matthews v Chief Constable of Cleveland* [2017] UKIPTrib15_586-CH, where two former police officers in the Cleveland Police Force brought a complaint

[14] http://www.ipt-uk.com/default.asp

against the Chief Constable of Cleveland Police alleging that the acquisition of their communications data had been unlawful. The Tribunal determined that the applications for and approvals of the obtaining of communications data relating to the claimants were unlawful and should be quashed.

The nature and volume of complaints to the IPT

Organisations to which complaints related

39. In 2015 the majority of complaints (43%) received by the IPT related to law enforcement agencies (such as the police and the National Crime Agency), closely followed by complaints relating to the SIAs (35%). In 2015 12% of the complaints received by the IPT related to local authorities and 10% to other public authorities such as the Department of Work and Pensions.[15]

40. Those figures are broadly similar to 2010 – where 32% of all complaints received by the IPT related to law enforcement agencies, 30% to the SIAs, 28% to other public authorities and 10% to local authorities.[16]

41. In its 2011-2015 report, the IPT commented:

> "There remains a relatively even spread across the types of organisation which are the subject of complaints. Local authorities, however, received far fewer complaints than SIAs, law enforcement agencies and miscellaneous public authorities, and these have continued to decline perhaps in part due to the changes in authorisation procedures. In practice, there is a tendency on the part of complainants who may suspect they are subject to intrusive powers, but are unsure about the public authority involved, to allege unlawful conduct against all public authorities with RIPA powers, but especially to cite the Police and SIAs as general bodies."[17]

The volume of complaints

42. The volume of complaints to the IPT has risen from 95 in its first year to over 250 in 2015.[18] Not counted in that figure for 2015 are the 660 individual complaints brought as a result of the IPT's judgment in *Liberty/Privacy International (No 1) and (No 2)*

[15] See figure 3 on p.20 of the IPT's 2011-2015 report

[16] See also Chapter 3 of the IPT's 2010 report which is appended to this Note at Appendix A.

[17] Page 20 of the 2011-2015 IPT Report for 2011-2015

[18] See para 4.2 of Chapter 4 of the IPT Report for 2011-2015.

[2014] UKIP Trib 13/77-H [2015] 3 All ER 142 and [2015] 3 AER 212, referred to above.[19]

43. Chapter 4 of the IPT's 2011-2015 Report sets out a detailed analysis of the complaints that have been referred to the IPT over four years: see in particular figure 6 at p.22 of the report.

44. Just under half of the complaints received in 2015 were ruled as "frivolous or vexatious" whilst 30% received a "no determination" statement in accordance with section 68 (4) (b) of RIPA. Those figures are broadly similar to figures for previous years – in 2011 for example 44% of all complaints were ruled as "frivolous or vexatious" and 36% of all complaints resulted in a "no determination" outcome.

Frivolous and vexatious complaints

45. In its 2011-2015 Report, the IPT states:

> "The Tribunal has robust procedures for determining whether complaints are frivolous and vexatious, out of jurisdiction and out of time, as dictated by the Rules, and these have been established over its 16-year history. The history and justification of these policies and procedures is considered in depth in Chapter 2. Decisions on whether a claim is out of jurisdiction, out of time, or frivolous or vexatious are only made if two or more Members are in agreement as to the reasons for determining such an outcome. Figure 6 shows the number of complaints received by the Tribunal during the period of this report and their outcome. Figure 1 [on page 18] explains what those outcomes mean in greater depth. The number of cases judged by the Tribunal to be 'frivolous or vexatious' has remained high since it began its work in 2000."[20]

46. In its report for 2011-2015, the IPT explains that a finding that a complaint is frivolous or vexatious is made where "*[t]he Tribunal concludes in such cases that the complaint is obviously unsustainable and/or that it is vexatious. A complaint is regarded as obviously unsustainable if it is so far-fetched or lacking in foundation as to justify this description. A complaint is regarded as vexatious if it is a repetition or repeated repetition of an earlier obviously unsustainable complaint by the same person*".[21]

[19] See para 4.3 of Chapter 4 of the IPT Report for 2011-2015.

[20] See para 4.10 of Chapter 4 of the IPT Report for 2011-2015

[21] Figure 1, p.18

47. In instances where a complaint is dismissed as being frivolous and vexatious, the complainant receives a notice in accordance with section 67(4) of RIPA which provides that "*The Tribunal shall not be under any duty to hear, consider or determine any proceedings, complaint or reference if it appears to them that the bringing of the proceedings or the making of the complaint or reference is frivolous or vexatious*." The decision provided to the complainant is issued pursuant to Rule 13(3)(1) of the Rules which states that a complainant is to be notified where the IPT has made a determination "*that the bringing of the section 7 proceedings or the making of the complaint is frivolous or vexatious*".

48. In the last year, two complainants whose complaints had been dismissed as being frivolous and vexatious have sought to challenge the IPT's decision in the High Court.

49. One of the complainants sought judicial review against the IPT as well as the Metropolitan Police Service. In that case, *R (oao) Christopher Ramanrace v IPT and Metropolitan* Service, CO/3654/2016, the application for permission was eventually refused on 31 October 2016 as being totally without merit.

50. The other complainant sought to injunct the IPT as well as the Undercover Policing Inquiry, the SIAs, the Ministry of Defence and a number of other defendants. In that case, *Mandy Richards v IPT, Undercover Policing Inquiry, MI5, MI6 and others*, HQ16X03179, the application was dismissed by Globe J on 19 October 2016. Two days later the complainant issued a further set of proceedings which were eventually struck out as being entirely without merit on 24 March 2017 following a hearing that took most of the day – see the judgment of Nicol J [2017] EWHC 560 (QB).

Complaints resulting in a "no determination"

51. A "no determination" notice under section 65 (4) of RIPA is issued where, after full consideration and investigation, the IPT is satisfied that there has been no conduct in relation to the complainant by any relevant body which falls within the jurisdiction of the Tribunal, or that there has been some activity under RIPA which is not in

contravention of the Act, and cannot be criticised as unlawful. In many (but not all[22] instances) the provisions of RIPA and the Rules do not allow the Tribunal to disclose whether or not complainants are, or have been, subject to activity under RIPA. In most instances however the IPT is not permitted to disclose what evidence it has taken into account in considering the complaint.[23]

Representation of complainants

52. The vast majority of complainants to the IPT are not legally represented. No public funding is available to complainants but potential complainants are advised by the IPT that they may be assisted by citizens advice bureaux or by law centres.

Appeals from the IPT

53. Section 67(8) of RIPA 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 from the IPT (other than to the ECtHR).

54. The Investigative Powers Act 2016 provides for such an appeal using the "second tier" appeal test approved by the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663, [2011] UKSC 28 *Cart* in relation to the Upper Tribunal. Section 242 of the 2016 Act inserts a new section 67A into RIPA dealing with appeals from the IPT in these terms:

[22] See for example the judgments in *Vaughan v South Oxfordshire Council*, IPT/12/28/C (whether Council Tax home inspections constituted surveillance under RIPA) and *BA and others v Cleveland Police* IPT/11/129/CH (police surveillance by way of covert monitoring in the sitting room of a flat owned by a seriously disabled patient designed to detect the perpetrators of thefts from the patient). In both cases the reasons for a "no determination" notice were given in full judgments by the IPT.

[23] The IPT has considered the application of the "neither confirm nor deny" policy in conjunction with Rule 6 of the Rules in its procedural rulings in *IPT/01/77* and *IPT/06/81*. As the IPT explained in its 2011-2015 report at para 2.21: "*The justification for this policy is that if allegations of interception or surveillance are made, but not denied, then, in the absence of the NCND policy, it is likely to be inferred by a complainant that such acts are taking place. This is especially so if other complainants are being told that they have no cause for complaint, because no such acts are, or have been, taking place in relation to them. If criminals and terrorists became aware, or could infer the possibility, of covert activities, they are likely to adapt their behaviour accordingly. The likely outcome of this is that the all-important secrecy would be lost and with it the chance of obtaining valuable information needed in the public interest or in the interests of national security*."

"(1) A relevant person may appeal on a point of law against any determination of the Tribunal of a kind mentioned in section 68(4) or any decision of the Tribunal of a kind mentioned in section 68(4C).

(2) Before making a determination or decision which might be the subject of an appeal under this section, the Tribunal must specify the court which is to have jurisdiction to hear the appeal (the relevant "appellate court").

(3) This court is whichever of the following courts appears to the Tribunal to be the most appropriate-

(a) the Court of Appeal in England and Wales,

(b) the Court of Session

(4) The Secretary of State may by regulations, with the consent of the Northern Ireland Assembly, amend subsection (3) so as to add the Court of Appeal in Northern Ireland to the list of courts mentioned there.

(5) The Secretary of State may by regulations specify criteria to be applied by the tribunal in making decisions under subsection (2) as to the identity of the relevant appellate court.

(6) An appeal under this section –

(a) is to be heard by the relevant appellate court, but

(b) may not be made without leave of the Tribunal or, if that is refused, of the relevant appellate court.

(7) The Tribunal or relevant appellate court must not grant leave to appeal unless it considers that –

(a) the appeal would raise an important point of principle or practice, or

(b) there is another compelling reason for granting leave.

(8) In this section – "*relevant appellate court*" has the meaning given by subsection (2), "*relevant person*", in relation to any proceedings, complaint or reference, means the complainant or –

(a) in the case of proceedings, the respondent,

(b) in the case of a complaint, the person complained against, and

(c) in the case of a reference, any public authority to whom the reference relates."

55. This new provision means that a complainant as well as a respondent to a complaint can appeal against determinations of the IPT falling within Section 68(4)[24] and 68

[24] Section 68(4) provides

(4C)[25] of RIPA – i.e. final determinations as well a final decision on a preliminary issue. No appeal can be brought in relation to a decision concerning a procedural matter.

56. The Secretary of State will be issuing for consultation a new set of procedural rules which will give effect to the appeal rights introduced by s.242 of the Investigatory Powers Act 2016 and which will also reflect the Tribunal's developed procedural practice. It is envisaged that the appeal rights and the new rules will come into force by the end of 2017.

Conclusions

57. The summary of the IPT's history, statutory functions as well as the manner in which it performs its statutory functions contained above indicates that there would be particular practical difficulties if the appeal were to be allowed and this Court concluded that the IPT was amenable to judicial review.

58. In the Divisional Court the Appellant argued that those practical difficulties would be met by s.6 of the Justice and Security Act 2013[26], but those provisions are an incomplete answer to such difficulties. The Justice and Security Act 2013 only applies to closed material which is "*damaging to the interests of national security*" (see section 6 of that Act) whereas the provisions of Rule 6 of the Rules (set out above) are far wider. Therefore in defending a claim for judicial review of an IPT "no determination", where information has been withheld for reasons (for example) because disclosure would be

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"(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—
(a) a statement that they have made a determination in his favour; or
(b) a statement that no determination has been made in his favour."

[25] "(4C) Where the Tribunal make any decision which—
(a) is a final decision of a preliminary issue in relation to any proceedings, complaint or reference brought before or made to them, **and**

(b) is neither a determination of a kind mentioned in subsection (4) nor a decision relating to a procedural matter,
they must give notice of that decision to every person who would be entitled to receive notice of the determination under subsection (4) or (4A)." (Emphasis added)

[26] See para 54 of the Claimant's Skeleton Argument in the Divisional Court.

prejudicial to the "*the prevention or detection of serious crime*", the interested party would have to make an application for a Public Interest Immunity Certificate. That would mean that the material that led to the IPT's conclusion would not actually be available to the reviewing court, rendering the claim being struck out (see *Carnduff v Rock & Anor* [2001] 1 WLR 2205).

59. Unrepresented complainants seeking to challenge the dismissal of their complaints as being frivolous or vexatious will also be likely to place a considerable burden on the Court's resources as well as those of the IPT. The two recent attempted challenges referred to above at paragraphs 48-50 give an indication of those difficulties. For example, the *Mandy Richards* claims have resulted in three separate hearings, one before Dove J, one before Globe J and the most recent one before Nicol J.

60. Finally, the importance of the fact that Parliament specifically legislated in RIPA for the possibility of an appeal right is a significant factor in determining whether or not the effect of s. 67 (8) of RIPA is such that the IPT is not amenable to judicial review – see the judgment of Sir Brian Leveson PQBD at [43]-[44] and in particular his conclusion at [44]:

> "In my judgment, the provision achieves the aim that Parliament clearly intended of restricting the means by which decisions of the IPT may be challenged in the courts to the system of appeals for which the Act itself provides. Were it otherwise, as I have explained, there would have been no point in including authority within s.67(8) for the Secretary of State by order to provide for a right of appeal, a duty under s.67(9) to do so in relation to a person who claims under s.65(2)(c) and (d) of RIPA and the power to create mechanisms in order to do so: see s.67(10)."

61. Parliament has now provided for such an appeal route that is subject to carefully circumscribed criteria to be applied in circumstances which recognise the unique role played by the IPT as a specialist tribunal.

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