Appeal Ref: 2017/0470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT (Sir Brian Leveson PQBD and Leggatt J)

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

SKELETON ARGUMENT OF THE INTERESTED PARTIES

[References to the Appeal Bundle appear as [AB/Tab X/page X] and references to the three volume Bundle of Authorities appear as e.g. [A1/Tab X].

Time estimate: 1 day
Essential reading: Divisional Court judgment dated 2 February 2017 **[AB/Tab A/pp11-32]**; IPT judgment in 'Privacy' and 'Greennet' complaints (IPT/14/85/CH and IPT/14/120-126/CH) dated 12 February 2016 at §§1-11 & 31-47 **[AB/Tab B/pp126-140, 148-155]**
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Introduction

1. This is an appeal from the decision of the Divisional Court dated 2 February 2017 in which it determined a preliminary issue in these judicial review proceedings, namely whether the Investigatory Powers Tribunal ('IPT') is amenable to judicial review. Following a detailed and careful review of the statutory scheme governing the IPT and the case law on ouster clauses, the Divisional Court concluded that s.67(8) of the

Regulation of Investigatory Powers Act 2000 ('RIPA')[1] **[A1/Tab 5]** did oust the jurisdiction of the High Court in any application for judicial review of the IPT. The Divisional Court's reasons are set out in the judgment of the President of the Queen's Bench Division (see §§1-45) **[AB/Tab A/pp12-28]**. Leggatt J concurred in the result, having recognised the "cogency" of the President's reasoning, but chose to record a number of "reservations" in his separate judgment (see §§46-62) **[AB/Tab A/pp28-32]**.

2. The unanimous conclusion of the Supreme Court in *A v Director of the Security Service* [2010] 2 AC 1 ('*A v B*') **[A2/Tab 22]** was also that s.67(8) clearly and unambiguously excludes the application of judicial review to decisions of the IPT. The Supreme Court recognised the specialist context in which the IPT operates. It also concluded that conferring final jurisdiction on the IPT - a body of like standing and authority to the High Court and subject to special procedures apt for its unique task - was "*constitutionally inoffensive*"[2]. The IPT sits as one part of a carefully balanced system of oversight of the acts of the Security and Intelligence Agencies ('SIAs'). Its procedures have been upheld as compatible with Art 6 ECHR[3].

3. The President's judgment recognised the need for clear and explicit words excluding the judicial review jurisdiction of the High Court and he conscientiously analysed the wording of RIPA and the "*carefully crafted regime*" which Parliament had created **[AB/Tab A/p27/§41]**. He rightly rejected suggested parallels with the ouster clause in *Anisminic*[4] and agreed with the Supreme Court in *A v B* **[A2/Tab 22]** that Parliament had restricted the means by which decisions of the IPT may be challenged in the courts to the system of appeals for which RIPA itself provides. Whilst Leggatt J expressed "reservations" about that conclusion, his approach in recording those reservations was demonstrably too narrow (e.g. on the basis of words read in isolation) and without proper regard to the specialist features of the RIPA regime.

[1] Which provides as follows: "*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.*"
[2] *A v B* at §23 per Lord Brown (with whom all the other members of the Supreme Court agreed), citing Laws LJ in the Court of Appeal **[A2/Tab 22]**.
[3] *Kennedy v United Kingdom* (2011) 52 EHRR 4 **[A2/Tab 30]**.
[4] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 **[A1/Tab 10]** – discussed further below.

4. The JR challenge the Appellant seeks to mount is to the IPT judgment in the linked 'Privacy' and 'Greennet' complaints[5] **[AB/Tab B/p126]**. They related to GCHQ's "Computer Network Exploitation" ('CNE') activities. The constitution of the IPT consisted of two High Court Judges (Burton J and Mitting J as President and Vice President respectively) and three senior QCs[6]. In its judgment the IPT decided a number of preliminary issues concerning the lawfulness of CNE, including the compatibility of the regime with Arts. 8 and 10 ECHR. Following the preliminary issues judgment in February 2016, the IPT made "*no determination in favour*" in respect of each of the complainants[7].

5. The Appellant has sought (both in this appeal and in the Court below) to frame its case on jurisdiction by reference to the allegedly egregious nature of the IPT's "*rejection*" of the principle of legality[8]. As to that:

    a. The Appellant has seriously mischaracterised the IPT's decision in this case. Nowhere in the operative paragraphs setting out its reasoning does the IPT state that the principle of legality does not apply to matters of national security (see the Appellant's skeleton at §50(d)). The IPT did conclude (correctly) that the eighteenth century common law cases about general warrants were "*not a useful or permissible aid to construction*" of the express statutory powers given to the intelligence agencies in the Intelligence Services Act 1994 ('ISA') (see §37 of the judgment) **[AB/Tab B/p153]**. It was no part of the IPT's reasoning to conclude that the principle of legality could never have application in the national security sphere.
    b. It is also important to be clear about the proper limits of the IPT's actual decision. It gives general guidance about the scope of warrants under s.5 ISA. It was careful to make plain that the lawfulness of the warrant in any particular case would be dependent on the particular facts of that case (see §38) **[AB/Tab B/p153]**; and that any warrant should be "*as specific as possible*" in relation to the property covered by the warrant (§47) **[AB/Tab B/p155]**. The day to day oversight for such

[5] IPT/14/85/CH and IPT/14/120-126/CH.
[6] Mr Robert Seabrook QC, Mr Charles Flint QC and The Hon Christopher Gardner QC.
[7] In accordance with the statutory provisions in s.68(4) of RIPA, and notified them by letter dated 9 March 2016.
[8] As asserted at §9, §37 and §57 of the Claimant's Grounds and see e.g. §15 and §50(d) of the Appellant's skeleton argument in this appeal.

matters rests with the Intelligence Services Commissioner (as explained at §27 of the Interested Parties' Summary Grounds)[9] **[AB/Tab B/p114]**.

c. The merits of any challenge have been stayed pending resolution of this preliminary issue; and the preliminary issue itself has ramifications beyond this case.

The relevant statutory framework establishing and governing the IPT[10]

6. On 2 October 2000 a "*single legislative scheme*"[11] came into existence consisting of the Human Rights Act 1998 ('the HRA'), RIPA and the Civil Procedure Rules 2000[12]. As set out in the Explanatory Notes to RIPA, the main purpose of the Act was to ensure that investigatory powers (including e.g. the interception of communications and the carrying out of surveillance) were "*used in accordance with human rights*"; and that included making provision for the IPT with functions and jurisdiction in relation to those matters.

7. The IPT was established by s.65(1) of RIPA **[A1/Tab 5]**. Members of the IPT must either hold or have held high judicial office, or be a qualified lawyer of at least 7 years' standing (§1(1) of Sch. 3 to RIPA). The President of the IPT must hold or have held high judicial office (§2(2) of Sch. 3 to RIPA).

8. The IPT has exclusive jurisdiction to consider claims under s.7(1)(a) HRA brought against any of the SIAs or any other person in respect of any conduct, or proposed conduct, by or on behalf of any of the intelligence services (ss.65(2)(a), 65(3)(a) and 65(3)(b) RIPA). The IPT may consider and determine any complaints by a person who is aggrieved by any conduct by or on behalf of any of the SIAs which he believes to have taken place in relation to him, to any of his property, to any communications sent by or to

[9] The final sentence of §15 of the Appellant's skeleton should also be approached with caution. Whilst it is right that the Interested Parties submitted that warrants did not have to identify specific persons, they submitted that the warrant needed to be as specific as possible to enable the Secretary of State to take a view on its legality and its necessity and proportionality. The Appellant's summary of the Interested Parties' submission is not a fair reflection of the submissions made to the IPT as recorded at §36(iii) of its judgment.

[10] The President summarised the structure and functions of the IPT at §§5-14 of his judgment.

[11] See *A v B* at §21 per Lord Brown and see also the Court of Appeal judgment in that case per Laws LJ at §14 and Dyson LJ at §48 **[A2/Tab 22]**.

[12] Those rules, *inter alia*, contained provisions governing claims under s.7 of the HRA at CPR 7.11 (see *A v B* at §3).

him, or intended for him, or to his use of any telecommunications service or system (ss.65(2)(b), 65(4) and 65(5)(a) RIPA). Any person, regardless of nationality, may bring a claim or raise a complaint in the IPT. Where the Tribunal hears proceedings under s.7(1)(a) of the HRA (s.65(2)(a)) it is to apply the same principles for making their determination "*as would be applied by a court in an application for judicial review*" (s. 67(2)). Similarly complaints of the latter sort (i.e. under s.65(2)(b)) must be investigated and then determined "*by applying the same principles as would be applied by a court on an application for judicial review*" (s.67(3)).

9. One of the special features of the IPT's regime is its interaction with the relevant Commissioners, including the Intelligence Services Commissioner and the Interception of Communications Commissioner. The role of these Commissioners is set out in ss.57-60 of RIPA. In broad terms, it is to provide independent oversight of the exercise by the SIAs of their statutory powers. Every member of the intelligence services has a duty to cooperate with the Commissioner by providing *'all such documents and information as he may require for the purpose of enabling him to carry out his functions.'*[13] The relevant Commissioner then reports to the Prime Minister, at least on an annual basis.[14] In turn, the Prime Minister is required to lay the reports before each House of Parliament (with the discretion to exclude matters that may be *'contrary to the public interest'*).[15] Pursuant to s.68(2) RIPA, the IPT has a broad power to require a relevant Commissioner (as defined in s.68(8)) to provide it with "*all such assistance...as the Tribunal think fit*". Thus, in a case involving the exercise of powers under the ISA 1994, the IPT may require the Intelligence Services Commissioner (see ss.59-60 of RIPA) to provide it with assistance in connection with any investigation of any matter by the Tribunal, or otherwise for the purposes of the Tribunal's consideration or determination of any matter (see also s.59(3)). The Tribunal is also obliged to ensure that every relevant Commissioner is aware of proceedings in the IPT which are relevant to their functions and to keep the Commissioner informed of any determination, award or other decision made by the Tribunal in respect of that matter (s.68(3)). Prior to the coming into force of the Investigatory Powers Act 2016 (which post-dates these judicial review proceedings) the

[13] RIPA, s.60(1).
[14] *ibid*, s.60(2) and (3).
[15] *ibid*, s.60(4) and (5).

Intelligence Services Commissioner was Sir John Goldring and the Interception Commissioner was Sir Stanley Burnton.

10. The IPT's procedure is governed by ss.67-69 of RIPA **[A1/Tab 5]** and the Rules made under s.69 **[A1/Tab 6]**. When making Rules pursuant to s.69, the Secretary of State is to have regard, in particular, to the need to ensure that complaints are "*properly heard and considered*" (s.69(6)(a)). Subject to those Rules, the IPT is entitled to determine its own procedure in relation to any proceedings, complaint or reference brought before it (s.68(1)). It is also allowed to "*receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law*" (r.11(1)). Pursuant to s.18(1)(c) the prohibition in s.17 of RIPA (regarding the existence and use of intercept material) is disapplied. As explained in the Tribunal's 2011-2015 Report **[AB/Tab B/p53]**:

> *"The Tribunal adopts an inquisitorial process to investigate complaints in order to ascertain what has happened in a particular case. This is in contrast to the wholly adversarial approach followed in ordinary court proceedings."* (§2.2) **[AB/Tab B/p61]**

11. Central to the IPT's judicial oversight is the duty of disclosure in IPT proceedings which is imposed on the Government (it is imposed on every person holding office under the Crown). Such persons are required to disclose "*all such documents and information as the Tribunal may require for the purposes of enabling them*", to exercise their functions: see s.68(6) of RIPA. In practice, that means that there is wide-ranging disclosure provided to the Tribunal of all information (including sensitive information) which is relevant to the particular complaints. As stated by the IPT in its 2011-2015 Report:

> *"It is the experience of the Tribunal that it has received full and frank disclosure of relevant, often sensitive, material from those bodies of whom requests have been made. This is in no small part due to the strength of the procedures developed by the Tribunal to protect this material, and the confidence this inspires."* **[AB/Tab B/p66 at §2.27]**

12. In §173 of the IPT's procedural ruling of 22 January 2003 in IPT/01/62 and IPT/01/77 ('the Procedural Ruling') **[A3/Tab 34]**, the IPT held that "*purely legal arguments, conducted for the sole purpose of ascertaining what is the law and not involving the risk of disclosure of sensitive information*" should be heard by the IPT in public (Procedural Ruling, §172); and the IPT's reasons for its ruling on any "*pure questions of law*" (§195)

that are raised at such a hearing may be published without infringing either r.13 of the Rules or s.68(4) of RIPA (Procedural Ruling, §§190-191). Thus, where necessary, the IPT holds an open legal issues hearing to consider any relevant (and disputed) issues of law, and subsequently publishes its rulings (with its reasoning) on such issues. In order to enable the legal issues to be determined the IPT can, if necessary, consider some (or all) of those issues on the basis of 'assumed facts', as occurred in the substantive IPT proceedings in this case (see §§5-9 of the February 2016 judgment) **[AB/Tab B/pp136-139]**.

13. Importantly, and consistently with its specialist functions, the IPT is able to consider matters which, e.g. for reasons of national security, cannot be disclosed into open. It does so by holding closed hearings, often with the assistance of Counsel to the Tribunal ('CTT') where the complaint raises issues of complexity. The IPT will investigate and consider in closed session such sensitive material as is relevant to the complaints. It then produces its decisions having regard to that closed material. That closed material may relate e.g. to the internal arrangements and safeguards which are operated by the SIAs and which, for reasons of national security, cannot be disclosed. It may also relate to the factual position vis à vis individual complainants and/or to the intelligence picture insofar as that is relevant to the proportionality of particular intelligence regimes/techniques. That access to closed material, coupled with the extensive disclosure duties which arise in IPT proceedings, puts the IPT in a special position. It means that the IPT's open determinations can be determined against the background and with the benefit of knowledge of the full position in closed. In a case involving alleged interference with Art 8/Art 10 ECHR rights that enables the IPT, for example:

    a. to assess whether the SIAs' internal arrangements/safeguards are, in fact, in place, in accordance with the publicly available regime;
    b. to evaluate the adequacy and effectiveness of those internal arrangements/safeguards;
    c. to make an assessment as to whether more needs to be said about those arrangements/safeguards in open;
    d. to make an assessment of the proportionality of the measures/techniques which are used;

e. to investigate the particular factual circumstances of each claimant including whether they may have been the subject of any relevant activity and, if so, the lawfulness of that activity.

14. As the IPT explained at §7 and §46(iii)-(iv) of its 5 December 2014 judgment in the *Liberty/Privacy* proceedings **[A3/Tab 35]**, which considered the lawfulness of the intelligence sharing regime and the regime for the interception of external communications under s.8(4) of RIPA:

> *"...we considered in particular the arrangements… described during the public hearing as "below the waterline", regulating the conduct and practice of the Intelligence Services, in order to consider (i) their adequacy and (ii) whether any of them could and should be publicly disclosed in order to comply with the requirements of Articles 8 and 10 of the Convention as interpreted by the ECtHR…*
> *...[The IPT] has access to all secret information, and can adjourn into closed hearing in order to assess whether the arrangements (a) do indeed exist..., (b) are adequate to do the job of giving the individual "adequate protection against arbitrary interference".*
> *[The IPT] has, and takes, the opportunity, with the benefit of full argument, to probe fully whether matters disclosed to it in closed hearing, pursuant to the Respondents' obligation to do so pursuant to s.68(6) of RIPA, can and should be disclosed in open and thereby publicised."*

15. By considering the closed material, the IPT is able to ensure that the public hearings are appropriately targeted at the right issues, avoiding the possibility of a disconnect between the open arguments and the true factual position in closed. As stated at §50(ii) of the 5 December 2014 Judgment in *Liberty/Privacy*:

> *"This enables a combination of open and closed hearings which both gives the fullest and most transparent opportunity for hearing full arguments inter partes on hypothetical or actual facts, with as much as possible heard in public, and preserves the public interest and national security."* **[A3/Tab 35]**

16. In a number of recent IPT cases, Counsel to the Tribunal (CTT) has performed a somewhat similar function to that of a Special Advocate. That has included reviewing the closed disclosure provided to the Tribunal to identify documents, parts of documents or gists that ought properly to be disclosed, together with making submissions to the IPT favour of disclosure, in the interests of the claimants and open justice (see e.g. §10 of the

December 2014 judgment in *Liberty/Privacy*)[16] **[A3/Tab 35]**. That process also occurred in the *Privacy* proceedings which are the subject of these proceedings, as is evident from e.g. §11(ii) of the IPT's judgment **[AB/Tab B/p140]**.

17. The IPT's remedial discretion is also very broad and includes the following special features:
    a. On determining any proceedings the IPT can make any award of compensation or other order which it "*thinks fit*", and also has the power to quash or cancel any warrant or authorisation: see s.67(7) RIPA **[A1/Tab 5]**.
    b. Where the IPT determines any proceedings, complaint or reference brought before it, it can either make a statement to the complainant that it has made a determination in his favour or a statement that no determination in favour has been made (see s.68(4)).
    c. The finding of "*no determination in favour*" plays an important role in preserving the neither confirm nor deny principle[17]. It means that after considering the case and requiring any necessary investigation, either the Tribunal 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 official activity which is not in contravention of relevant statutory powers, and cannot be criticised as disproportionate. In these circumstances the provisions of RIPA therefore do not allow the Tribunal to disclose whether or not complainants are, or have been, of interest to the SIAs or law enforcement agencies. Nor is the Tribunal permitted to disclose what evidence it has taken into account in considering the complaint.
    d. Subject to the general duty imposed on the Tribunal pursuant to r.6(1)[18] **[A1/Tab 6]**, if the IPT makes a determination in favour it shall provide the complainant with a summary of that determination, including any findings of fact.

[16] It is that disclosure function of CTT which has been similar to that which would be performed by a Special Advocate. For the avoidance of doubt, these are not cases involving executive action where there are positive factual allegations against an individual and therefore they do not need special advocates representing the interests of the complainants in quite the same way.
[17] For a discussion of the application of that policy, see the Undercover Policing Inquiry Ruling 3 May 2016, Restriction Orders: Legal Principles and Approach (Pitchford LJ) at §§113ff **[A3/Tab 49]**.
[18] Which provides that "*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.*"

e. Where a determination in favour has been made, the IPT may be required to make a report of its findings to the Prime Minister - see s.68(5)[19] .

f. The IPT is also obliged to make sure that every relevant Commissioner is kept informed of any determination, award, order or other decision made by the Tribunal in respect of any matter – see s.68(3)(b) RIPA.

g. The IPT also has the power to make such interim orders, pending final determination, as it thinks fit – see s.67(6) RIPA.

18. The IPT sits as one of a number of oversight bodies, all of which work together to ensure that the activities of the SIAs are properly and appropriately scrutinised. The interface between the Tribunal and the Commissioners has already been referred to above. Those bodies also include the Intelligence and Security Committee (see the ISA 1994 and Justice and Security Act 2013), described as "*robustly independent, and now additionally fortified by the provisions of the JSA*" in *Liberty/Privacy* at §121 **[A3/Tab 35]**. This comprises distinguished Parliamentarians who have further responsibility for the oversight of the SIAs (MI5, MI6, and GCHQ) and other parts of the UK intelligence community including overseeing their activities, policies, expenditure, administration and operations. This Committee is currently chaired by the Rt. Hon. Dominic Grieve QC MP.

19. **Annex 1** to this skeleton argument provides some recent examples of the IPT's work. As is evident from these recent cases, the IPT is a bespoke tribunal set up for a very specialist purpose of investigating, considering and ruling on sensitive and difficult issues connected with the exercise by the SIAs of their statutory powers. In fulfilling its functions it has at its disposal a panoply of specialist powers which ordinary courts (including the High Court) do not possess. It also sits within a carefully crafted scheme of checks and balances which work together to provide important oversight of the exercise of sensitive intelligence gathering powers.

The judgment of the President

[19] The IPT is required to make such a report where they make a determination in favour of any person and where the determination relates to any act or omission by or on behalf of the Secretary of State or to conduct for which any warrant, authorisation or permission was issued, granted or given by the Secretary of State.

20. The Appellant has not fairly or accurately summarised the President's reasoning in §6 and §46 of its skeleton. He began his analysis with a careful review of the structure and functions of the IPT (see §§5-15) **[AB/Tab A/pp12-19]**. At §9 he explained that he had set out the remit of the IPT extensively "*in order to identify the range of its activities and the responsibility of the Secretary of State to allocate work to it*". He noted that, alongside its work, there was further and additional oversight by the relevant Commissioners, whose activities "*fit into the work of the IPT*" (§9). He concluded that the way in which the IPT exercises "*its jurisdiction, its procedure and its powers*" (under ss. 67-69 of RIPA) **[A1/Tab 5]** were "*tailored to the sensitive subject matter with which it deals*" (§10). In that regard, he noted the breadth of the IPT's procedural powers (§10), its ability to consider closed material in closed hearings (§11) and the development of mechanisms for resolving disputes in the IPT, including on the basis of assuming the facts as alleged (§12).

21. At §§16-35 of his judgment the President considered how s.67(8) of RIPA sat against the background of other attempts to oust the jurisdiction of the High Court, before going on to set out his key conclusions at §§36-44. Starting with the House of Lords decision in *Anisminic* **[A1/Tab 10]** he considered the key case law applicable to ouster clauses. In doing that, he noted three overarching principles:

22. **First**, it is not impossible for Parliament to legislate in such a way as to exclude judicial review. Parliament can, by the use of appropriate language, provide that a tribunal is to be the final arbiter of the law it has to determine and that a decision on a question of law shall be considered final and not subject to challenge either by way of appeal or judicial review – see §§19, 20, 24, 29 of the President's judgment - citing *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at 583 **[A1/Tab 9]**, *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths at 693H **[A1/Tab 13]**, *Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §40 **[A2/Tab 23]**, citing Lord Wilberforce *Anisminic* at 207B[20]. **Secondly**, the courts will presume against the conferment of such a power save in the clearest of cases - clear and explicit words will be required - see §§19 & 36 citing *R (Gilmore) v Medical Appeal Tribunal* (per

[20] Where she stated: "*it does of course lie within the power of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer: "the position may be reached, as the result of statutory provisions, that even if they make what the courts might regard as decisions wrong in law, these are to stand.*"" (§40)

Denning LJ at 583) **[A1/Tab 9]** and *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 (per Lord Hoffmann at 131 E-G) **[A1/Tab 17]**. **Thirdly**, it is important to analyse the parliamentary language concerned and to understand the statutory ***context*** of each i.e. it is not simply an exercise in considering the language of the ouster clause in isolation – see §20, 25-29, 31-32 of the President's judgment[21]. As he later recorded at §40:

> "*… the proper approach to interpretation of this (or any) statutory provision is not simply a matter of looking at the words and comparing them with other words used in another statute where the context might be entirely different. "Context is everything" (R. (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, per Lord Steyn at 548); it "provides the colour and background to the words used": see Bennion on Statutory Interpretation, 6th edn, at 540 and, in particular, AG v HRH Prince Ernest Augustus of Hanover [1957] AC 436 per Viscount Simonds (at 461), Lord Normand (at 465) and Lord Somervell of Harrow (at 476)."* **[AB/Tab A/p27]**

23. Applying these overarching principles, the President analysed s.67(8), in particular at §§36-44 of his judgment. He reached the following core conclusions:

    a. In exercising its functions the IPT performs a similar oversight function in relation to the activities of the intelligence services to that ordinarily performed in relation to the actions of public bodies by the High Court when it deals with claims for judicial review. This is reflected in ss. 67(2) and 67(3)(c) of RIPA which require the IPT to apply the same principles "*as would be applied by a court on an application for judicial review*" (§41) **[A1/Tab 5]**.
    b. The reason for allocating this judicial review jurisdiction to a specially constituted tribunal is the nature of its subject matter, involving as it does highly sensitive material and activities which need to be kept secret in the public interest. Such cases are not suitable for determination through the normal court process and a carefully crafted regime has been created by Parliament to deal with them. In the words of Laws LJ in *A v B* quoted above, the solution adopted has been to "*confide the jurisdiction to a judicial body of like standing and authority to that of*

[21] This underlines the fundamental difference in approach between the President and Leggatt J when interpreting s.67(8). The President's judgment is infused with references to the statutory context within which the relevant words have to be determined. By contrast, Leggatt J's judgment takes a narrower approach to the wording of s.67(8) and makes only passing reference to the special features of the statutory regime in which the IPT operates (see §60).

the High Court, but which operates subject to special procedures apt for the subject matter in hand" (§41).

c. 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 (§42).

d. A further feature of the regime under RIPA which differs from that considered in *Anisminic* is that Parliament has made provision in s. 67 of RIPA for challenging decisions of the IPT by way of an appeal in specified cases (§34 & §43). Those provisions would not have been necessary had there been a wider route of challenge open, not only in those cases, but in every case (§34).

e. Even though the Supreme Court in *A v B* **[A2/Tab 22]** did not deal with s.67(8) as part of the *ratio* of its decision, its analysis was correct – 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 (§44) (as discussed further below).

a. Were it otherwise, 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 ss.65(2)(c) and (d) of RIPA and the power to create mechanisms in order to do so: see s.67(10) (§44).

The Supreme Court's conclusions in A v B

24. That the statutory context is all important in construing the import of the relevant provisions was emphasised by the Supreme Court in *A v B* **[A2/Tab 22]** in this very context – see the judgment of the President at §§25-30. There the Supreme Court considered whether RIPA (and in particular s.65(2)(a)) had conferred exclusive jurisdiction on the IPT to hear claims under s.7(1) HRA against any of the intelligence services.

25. Lord Brown gave the judgment of the Court, with whom all other members of the Supreme Court agreed. As noted by the President at §27 of his judgment, the Court set

out the "***legislative provisions most central to the arguments***". These included s.67(8) of RIPA 2000 (see §3 and §5). The Court then emphasised the specialist nature of the IPT regime. At §14 (quoted by the President at §27) they stated:

> "*There are, moreover, powerful other pointers in the same direction. Principal amongst these is the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination). There are, however, a number of counterbalancing provisions both in RIPA and the Rules to ensure that proceedings before the IPT are (in the words of section 69(6)(a)) "properly heard and considered". Section 68(6) imposes on all who hold office under the Crown and many others too the widest possible duties to provide information and documents to the IPT as they may require. Public interest immunity could never be invoked against such a requirement. So too sections 57(3) and 59(3) impose respectively upon the Interception of Communications Commissioner and the Intelligence Services Commissioner duties to give the IPT "all such assistance" as it may require. Section 18(1)(c) disapplies the otherwise highly restrictive effect of section 17 (regarding the existence and use of intercept material) in the case of IPT proceedings. And rule 11(1) allows the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law". **All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined. None of them are available in the courts. This was the point that so strongly attracted Dyson LJ in favour of B's case in the court below. As he pithily put it**, ante, p 19, para 48:*
>
> > *"**It seems to me to be inherently unlikely that Parliament intended to create an elaborate set of rules to govern proceedings against an intelligence service under section 7 of the 1998 Act in the IPT and yet contemplated that such proceedings might be brought before the courts without any rules**."* (emphasis added)

26. At §§21-24 the Supreme Court then considered whether s.65(2)(a), in providing for the exclusive jurisdiction of the IPT in respect of certain types of claims against the intelligence agencies, constituted an impermissible ouster of the ordinary jurisdiction of the Courts. They concluded that it did not. That was because:

    a. RIPA, the HRA and the Civil Procedure Rules had come into force at the same time as part of a "*single legislative scheme*".
    b. The exclusive jurisdiction given to the IPT did not take away a pre-existing common law right to access the courts and, for that reason, did not amount to an ouster of the ordinary jurisdiction of the courts anyway.

c. Parliament had not ousted judicial scrutiny of the acts of the intelligence services, it had simply *allocated* that scrutiny to the IPT. The IPT was not a court of inferior jurisdiction. It was rather a specialist tribunal with special procedures apt for the subject matter in hand.

27. At §§23-24, the Court specifically distinguished the relevant regime from that which had operated in *Anisminic*; and also considered the import of s.67(8) of RIPA. They stated:

> *"23. Nor does Anisminic assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing.* ***Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny*** *(as to section 7(1)(a) HRA proceedings)* ***to the IPT****. Furthermore, as Laws LJ observed, ante, p 13, para 22:*
>
> > *"****statutory measures which confide 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 … offers … no cause for concern on this score****."*
>
> ***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.***
>
> *24 The position here is analogous to that in Farley v Secretary of State for Work and Pensions (No 2) [2006] 1 WLR 1817 where the statutory provision in question provided that, on an application by the Secretary of State for a liability order in respect of a person liable to pay child support, "the court … shall not question the maintenance assessment under which the payments of child support maintenance fall to be made". Lord Nicholls of Birkenhead, with whom the other members of the committee agreed, observed, at para 18:*
>
> > *"The need for a strict approach to the interpretation of an ouster provision … was famously confirmed in the leading case of Anisminic … This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court.""* (emphasis added)

28. Even if the Supreme Court's conclusions on s.67(8) were *obiter* (see the President at §30), they are highly persuasive given that s.67(8) was one of the legislative provisions most central to the arguments in that case (see §3 and §5). As made clear by the President at §44 of his judgment, the conclusions of the Supreme Court were entirely consistent with his own view as to the effect of s.67(8).

Alleged flaws in the President's analysis

29. The Appellant asserts three flaws in the analysis of the President.

(1) Alleged similarities with the ouster clause in *Anisminic*

30. At §48(a)-(g) of its skeleton the Appellant asserts that the President was "*wrong to conclude that the similarity between s.67(8) of RIPA and the ouster clause in Anisminic was irrelevant, or that the clauses were insufficiently similar for the decision in Anisminic to be of assistance*". That criticism is unfounded and also mischaracterises the conclusions of the President.

31. **First,** the central point made by the President was that the statutory context in *Anisminic*, as compared with RIPA and the IPT, was materially different – see §42 of his judgment. That was at the heart of his reasoning on *Anisminic*, rather than a technical analysis of the respective ouster clauses when read in isolation. As set out above, that approach accords with well-established rules of statutory interpretation and with the analysis of the Supreme Court in *A v B* **[A2/Tab 22]** when interpreting the very same provisions of RIPA. Section 67(8) sits in its own and very particular context. Many of the features of the RIPA regime which were relied upon by the Supreme Court when interpreting s.65 in *A v B* play equally powerfully into the interpretation of s.67(8).

32. As the President made clear, there was no suggestion in *Anisminic* that the Foreign Compensation Commission was of like standing and authority to High Court and there was nothing equivalent to the security context and the very specialist powers and processes (unmirrored in the High Court) which are operated by the IPT. Nor was there any suggestion that the Commission in *Anisminic* was part of a carefully crafted scheme (of which the IPT is one part) exercising a supervisory jurisdiction over the actions of

public authorities. It was those features of the RIPA regime which made s.67(8) "*constitutionally inoffensive*"[22].

33. **Secondly,** the Appellant is wrong to assert that that the ouster clause in *Anisminic* is materially identical to s.67(8) of RIPA[23]. Leaving aside the important differences in the statutory context, there are the following key differences:

    a. In RIPA Parliament has made plain that <u>all</u> aspects of the IPT's decision-making shall not be challenged whether by way of appeal or by way of questioning in any Court. The words used in s.67(8) to describe that which falls within the preclusion are evidently and deliberately broad (in contrast to the language used in *Anisminic*) – i.e. they are designed to cover everything, including that which is in issue here i.e. a "*determination*" of the IPT.
    b. The wording of s.67(8) was evidently intended to, and on its face and natural meaning does, exclude the application of judicial review to decisions of the IPT. That judicial review jurisdiction falls within the final words of the section. They sit in contradistinction to, and operate in addition to, "*appeal*" which is also precluded. The ouster clause in *Anisminic* merely contained the phrase "*shall not be questioned in any court of law*" and did not split out the concept of an appeal and of judicial review[24].
    c. In s.67(8) Parliament has included important words in parenthesis (which did not feature in *Anisminic*) i.e. "*(<u>including</u> decisions as to whether they have jurisdiction)*". Those words make plain that it matters not what the alleged category of error is, since it would include even a basic error as to whether or not the Tribunal had jurisdiction to embark on the determination of the matter i.e. they are given exclusive "*kompetenz kompetenz*". That is significant both (a) to the range of decision making covered but also (b) as a strong pointer to the fact that

[22] Per Laws LJ in *A v B*, as unanimously approved by the Supreme Court in that case at §23 **[A2/Tab 22]**.
[23] Section 67(8) reads as follows: "*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*." By contrast, the ouster clause in *Anisminic* read as follows: "*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*.' **[A1/Tab 5]**
[24] It is no answer to that point to highlight the fact that there was no right of appeal from the Foreign Compensation Commission in *Anisminic* – see §48 of the Appellant's skeleton and §54 of Leggatt J's judgment. That does not undermine the importance of the contradistinction between appeals and judicial review in s.67(8) itself, which is a strong pointer to Parliament's intention in the RIPA context. That this was not required in *Anisminic* does not mean that its inclusion in s.67(8) is insignificant.

judicial review is included in the preclusion, since, at one time (and even for some time post-*Anisminic*), there was still some importance in the difference between challenges on grounds of excess of jurisdiction and other species of challenge not affecting jurisdiction[25].

34. It is also highly significant that the Supreme Court expressly considered this point in *A v B* **[A2/Tab 22]** and concluded that the two clauses were not the same – s. 67(8) was "*unambiguous*" in contrast to the clause in *Anisminic* (see Lord Brown at §23).

35. **Thirdly** the Appellant's case is that, in order to be effective, the ouster clause needs to expressly confront the fact that a decision made in error of law is "*void*" and a "*nullity*" (see e.g. §48(b), (c), (f)(i) and (ii) of its skeleton argument). On that basis, it is said that the ouster clause is ineffective because it does not refer to a "*purported determination*" as well as a "*determination*" (see §48(c) of the Appellant's skeleton).

36. But that ignores important developments in public law which post-date *Anisminic*. The position used to be that the Courts would attempt to draw a distinction between void and voidable errors. In the case of jurisdictional errors, these were considered *ultra vires*, i.e. acts in excess of jurisdiction where the decisions were considered *void ab initio* and incapable of ever having produced a legal effect. In the case of non-jurisdictional errors, if an error was made which was still within jurisdiction (usually the answering of a question of law which the courts considered incorrect), this was said to be voidable i.e. valid until set aside. But the distinction between jurisdictional (void) and non-jurisdictional (voidable) acts gave rise to problems of "*excruciating complexity*" and the Courts became "*increasingly impatient with the distinction*"[26]. In addition the notion that void acts were never of any legal effect was always subject to major qualifications, including where appeals were permitted against ostensibly void acts.

37. As a result, the modern approach in public law attaches no real importance to the distinction between decisions that are void and voidable. In public law there is now a recognised presumption of validity; including a clear recognition that the grant of a remedy in judicial review, creating the Court's desired legal effects, is a separate and

[25] See e.g. the cases discussed in De Smith's Judicial Review, 7th Edition, at 4-032-4-040 **[A3/Tab 48]**.
[26] See De Smith's Judicial Review 7th Edition at 4-054 and 4-058 **[A3/Tab 48]** including the cases cited at footnotes 189-190 including *Hoffmann-La Roche* [1975] AC 295 at 366 per Lord Diplock, *Smith v East Elloe RDC* [1956] AC 736 per Lord Radcliffe at 769 and see also *Anisminic* at 171 per Lord Reed **[A1/Tab 10]**.

necessary part of creating those legal effects. The position is summarised at §4-059 of De Smith **[A3/Tab 48]**:

> "*Decisions are thus presumed lawful unless and until a court of competent jurisdiction declares them unlawful. There is good reason for this: the public must be entitled to rely upon the validity of official decisions and individuals should not take the law into their own hands. These reasons are built into the procedures for judicial review which requires for example an application to quash a decision to be brought within a limited time. A decision not challenged within that time, whether or not it would have been declared unlawful if challenged, and whether or not unlawful for jurisdictional error, retains legal effect. So does a decision found to be unlawful but where a remedy is, in the court's discretion, withheld. The language of void and voidable cannot, however accommodate such an effect, as it would insist that a void decision, being void ab initio, is devoid of legal consequences and that a voidable decision is capable of being set aside.* "[27]

38. And see also:

a. Professor Wade, in a passage expressly approved by Lord Carnwarth in *R (New London College) v Home Secretary* [2013] 1 WLR 2358 at §45 **[A2/Tab 25]**:

> *"... the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative depending upon the court's willingness to grant relief in any particular situation.*"[28].

b. Lord Bingham in *Mclaughlin v His Excellency the Governor of the Caymen Islands* [2007] UKPC 50, [2007] 1 WLR 2839 at §14 and §16 **[A1/Tab 20]**:

> "*It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect,* ***at any rate once a court of competent jurisdiction so declares or orders.*** *...*
> *...****Since public law remedies are, for the most part, discretionary, it necessarily follows that a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case****."* (emphasis added)

c. Professor Paul Craig:

[27] See also Lewis "Judicial Remedies in Public Law" at 5-009.
[28] Wade and Forsyth, Administrative Law (11th Edn) at p251 **[A3/Tab 47]**.

"*In administrative law there are rules of locus standi, time limits, and other reasons for refusing a remedy such as acquiescence. It is only if an applicant surmounts these hurdles that a remedy will be given....It is, as Lord Diplock said [in Hoffmann-La Roche] confusing to speak of the terms void or voidable before the validity of an order has been pronounced on by a court of competent jurisdiction.*"[29] [30] **[A3/Tab 46]**

39. In asserting that a decision made in error of law by the IPT is a "*nullity*" and merely a "*purported decision*" to which s.67(8) could not attach, the Appellant is seeking to revive the "*void/voidable*" distinction. That amounts, in effect, to a contention that unlawfulness without more operates to deprive a decision of legal effect. But such a principle is seriously at odds with conventional public law principles:

    a. It would substantially undermine the acknowledged existence of the remedial discretion. There would be no point in a Court considering whether it is appropriate to grant a remedy.

    b. The mere finding of unlawfulness would achieve the same effect as quashing – thereby removing not merely the question whether a remedy is appropriate but also any question as to the form of remedy (eg a prospective or limited declaration).

    c. The presumption of validity would be replaced by a rule that unlawful public law decisions were void.

40. Accordingly, in interpreting s.67(8), the President did not err by failing to adopt this absolutist (and highly controversial) approach. Unlawful public law decisions are not "*void*" and a "*nullity*" and to be treated, without more, as retrospectively without legal effect and it is wholly unrealistic to have expected Parliament to have shaped its language in that way. There need be no reference to "*purported decisions*" in s.67(8) in order for that provision to be effective.

41. **Fourthly**, on the Appellant's case, the words in parenthesis would mean that unhelpful distinctions would be drawn between those categories of case which were and were not excluded from judicial review. At §48(f)(i)-(ii) of its skeleton it is said that the effect of

[29] Paul Craig 'Administrative Law' 7th Edition 2012 at 24-011 p749

[30] See also the article by John Laws '*Is the High Court the guardian of fundamental constitutional rights?*' Public Law 1993, at page 15 in which he emphasised that the "*doctrine of nullity*" was one which "*I hope will soon be finally discarded by the courts*". He was also of the view that *Anisminic* "*was a case about statutory construction, not the metaphysic of nullity.*" **[A3/Tab 40]**

these words is to "*make clear that a lawful decision by the IPT that it had or did not have jurisdiction – is not to be impugnable*", but that those words "*have no effect on the ability of the Courts to review unlawful decisions"*. The Appellant's position appears to be that "*jurisdiction*" in this context could, at most, only relate to what Lord Reid in *Anisminic* referred to as "*the narrow and original sense of the tribunal being entitled to enter on to the inquiry in question*", with the result that no other challenges (e.g. on the grounds of error of law) are excluded. But, if that interpretation were right (and as made clear by the President at §39 of his judgment), it would mark a return to a distinction between jurisdictional and non-jurisdictional errors which was rejected, most recently, by the Supreme Court in *Cart* **[A2/Tab 23]**. Baroness Hale was of the view that returning to such "*technicalities of the past*" would be a retrograde step (§40). Similarly, Lord Dyson referred to the distinction as "*artificial and technical*" (§111), citing with approval the editors of De Smith's judicial review 6th Edition (2007) at 4-046:

> "*It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based on foundations of sand. Much of the super-structure had already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply, lawful, whether or not jurisdictionally lawful."*

42. In those circumstances, the straightforward approach is to read s.67(8) as making clear that it matters not whether a challenge is on the grounds of excess of jurisdiction (in the narrow sense) or in a broader sense (i.e. the Court gets the law wrong). Both will be excluded by the provision. That is apparent from the use of the word "*including*" in the words in parentheses i.e. the question is not a binary one. What Parliament has done is to give an (obvious) example of the type of decision which is excluded, but that is only an example. The words Parliament has chosen to use are inconsistent with it having intended to draw difficult distinctions between jurisdictional and non-jurisdictional errors.

43. Moreover, as a matter of Parliamentary logic in this particular context there is no sound basis for putting narrow jurisdictional errors outside the reach of the provision but making determinations (i.e. judgments) within it. On the Appellant's case any arguable "error of law" would be outwith the preclusion. But that ignores the fact that the boundary between fact and law can be difficult and especially so in this particular context where the facts will remain largely (if not exclusively) in closed, as Parliament can be taken to have

anticipated when RIPA was enacted. A recent example of that is to be found in the IPT's judgment in the *Liberty/Privacy* complaints which considered the Art. 8 ECHR compatibility of the intelligence sharing and interception regimes (see Annex 1 to this skeleton at §§2-3). As part of that consideration, the IPT considered "*below the waterline*" safeguards when determining whether the regime contained sufficient safeguards against abuse (as part of the Art 8(2) analysis)[31]. As the IPT itself concluded at §47 of its Note for the Divisional Court dated 26 October 2016, which now appears at §57 of its Note for this Court at **[AB/Tab A/p81]**:

> "*The summary of the IPT's history, statutory functions as well as the manner in which it performs its statutory functions…indicates that there would be particular practical difficulties in a finding by the Court that the IPT was amenable to judicial review.*"[32]

44. This part of the Appellant's case is also fundamentally at odds with its absolutist approach on jurisdictional errors and nullity. In asserting that a reference to a "*purported determination*" is required, the Appellant adopts a broad interpretation of the concept of jurisdictional error. But, when it comes to the words in parenthesis, the Appellant is forced to contend that "*jurisdiction*" must be construed narrowly, otherwise its argument proves too much. The answer lies in the straightforward interpretation of s.67(8) preferred by the President.

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[31] As made clear by the IPT at §32 of its Note for the Divisional Court (dated 26 October 2016), now §36 of its Note for this Court **[AB/Tab A/p74]**, 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.

[32] Further, it is no answer to that to point to the availability of closed material procedures under the Justice and Security Act 2013 ('JSA 2013') **[A1/Tab 7]**. Those statutory provisions were not in existence when RIPA was enacted and cannot have been within the contemplation of Parliament when s.67(8) was enacted. In addition there is a mismatch between the IPT's powers and those which the Administrative Court could exercise under the JSA 2013. For example the IPT is under a duty to "*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*" (see r.6(1) of the Tribunal Rules). In contrast, the JSA 2013 only applies to closed material which is "*damaging to the interests of national security*" (s.6(11) JSA 2013); any other relevant material which is damaging to the public interest has to be the subject of a PII application with the consequence that, if upheld, the material is excluded from the court's consideration (see, for example, *CF & Mohammed v Security Service & Others* [2014] 1 WLR 1699 at §§52-62 and *Ignaoua v Secretary of State for the Home Department* [2014] EWHC 1382 (Admin)at §32). That introduces the prospect that the High Court cannot properly review the decisions reached by the IPT because the closed material relied upon by the IPT would not be available to it. It has particular consequences e.g. in cases involving the IPT's oversight of the police since closed information relevant to the "*prevention or detection of serious crime*" could not be put before the Administrative Court in closed proceedings under the JSA 2013. This disconnect between the two statutory schemes serves to underline the undesirability of re-litigating issues which are considered by the IPT in another forum which does not have its specialist powers and procedures.

45. **Fifthly,** the Commonwealth authorities (from Australia and New Zealand) are of little assistance in this context (see §§48(f)(iii) and 36-41 of the Appellant's skeleton) and the Divisional Court was right not to refer to them:

    a. In Australia the constitutional position is fundamentally different because the written constitution provides for the Supreme Courts to be superintendent over other inferior courts and tribunals in the relevant State - see *Kirk v IRC* [2010] HCA 1 at §4 and §§93-100 **[A2/Tab 33]**. That constitutional point is made in the quotation which appears at §38 of the Appellant's skeleton i.e. from §105 of the judgment.
    b. More generally it was expressly stated in *Kirk* (with reference to English principles of the availability of certiorari and prohibition) that the "*constitutional context is too different'* to permit of a transposition to Australia of the principles applied in England[33].
    c. It is also to be noted that the context in *Kirk* was an industrial court of "*limited power*"[34]. There was no indication that it acted in like manner to the Supreme Court (i.e. the equivalent of the High Court here).
    d. Similarly, the New Zealand case of *AG v Zaoui* [2005] 1 NZLR 960 (see §§40-41 of the Appellant's skeleton argument) **[A2/Tab 32]** related to a decision of an "*Inspector-General*" i.e. a quasi-executive decision maker and it was not a case about a body with similar standing to the IPT[35].

46. **Finally** the President was right to conclude that it was not helpful to seek to analyse RIPA by reference to e.g. legislative proposals which were never enacted by Parliament (see §32 of his judgment and see §§32-35 and 48(g) of the Appellant's skeleton). "*The context within which those provisions fell to be determined was very different*" (President at §32). For example, as is clear from Clause 108A and Schedule 4 to the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003, the proposal was for the Immigration and Asylum Tribunal - comprised of e.g. advocates of at least 7 years standing (i.e. nothing equivalent to Judges in the High Court) - to be immune from

[33] see §66, and also §93, §103 & §107, as discussed in De Smith, Judicial Review, 7th ed at 4-071 **[A3/Tab 48]**.
[34] See §107 of the judgment.
[35] And see also the discussion in *Bulk Gas Users Group v Attorney General* [1983] NZLR 129 **[A2/Tab 31]**, referred to at §179 of *AG v Zaoui*, at 133-136 **[A2/Tab 32]**.

judicial review. There is no proper analogue between those bodies/decision-makers and the IPT and it is notable that there was no reliance on these provisions in Leggatt J's reservations.

(2) Importance of the appeal provisions in s.67

47. At §49 of its skeleton argument the Appellant asserts that the President was wrong to conclude that the existence of the possibility of a right of appeal in s.67 of RIPA meant that any presumption that Parliament could not have intended to make a statutory tribunal wholly immune from judicial oversight was not engaged in this case (see §43).

48. Section 67(9) of RIPA provides that the Secretary of State must, by order, make provision for appeals from the IPT in certain categories of case (not engaged in the present context) (see §15 of the judgment)[36]. As highlighted by the President at §34 of his judgment, such provision "*would not have been necessary had there been a wider route of challenge open, not only in those cases but also in every other case*" **[AB/Tab A/p25]**. Put another way, it is improbable that, in providing this appeal route, Parliament intended merely to open the door to appeals on the facts in those categories of case, in circumstances where (on the Appellant's case) errors of law could already be corrected by means of judicial review. That position is some considerable way away from the wording which Parliament has chosen to use.

49. It is also no answer to point to the decision in *Cart* on the basis that there were relevant appeal provisions relating to SIAC, which did not preclude judicial review (see the Appellant's skeleton at §49(b), citing Leggatt J at §56). The question in *Cart* **[A1/Tab 21]** was whether decisions which were not "*final determinations*" of SIAC (such final determinations being appealable to the Court of Appeal[37]), could be amenable to judicial review e.g. bail decisions by SIAC. Importantly s.1(4) of the SIAC Act was not at the heart of the Defendants' case, since the language used in s.1(4) lacked the clarity of e.g.

[36] Those provisions have not, to date, been brought into force. However that is not relevant to the construction of RIPA at the time it was enacted. As stated in Bennion on Statutory Interpretation at section 231 "*Nothing that happens after an Act is passed can affect the legislative intention at the time it was enacted*" – p654.
[37] See s.7(1) of the Special Immigration Appeals Commission Act 1997 cited at §8 of the Divisional Court judgment in *Cart* – [2010] 2 WLR 1012 **[A1/Tab 21]**.

s.67(8) of RIPA[38]. It was for that reason that the Defendants' primary case in *Cart* rested, not on the language used in s.1(4) of the SIAC Act, but on the basis of SIAC's status as a "*superior court of record*" in s.1(3) of that Act (as recorded at §28 of Laws LJ's judgment in the Divisional Court) **[A1/Tab 21]**. The Divisional Court rejected that contention. The jurisdiction could not be removed by statutory implication, or one which amounted, in effect, to a deeming provision (see Laws LJ at §§31-32). That is very different from the present situation where the language of s.67(8) clearly and expressly excludes judicial review challenges of the IPT.

50. In considering this ground of appeal it is also important to be clear about the full extent of the President's reasoning. As is evident from §44 of his judgment he was not simply making the point that the fact that there were routes of appeal against certain IPT decisions made it unlikely that Parliament would have envisaged that its decision-making would be subject to judicial review on a much wider basis. What is also important about s.67(9), when read with 67(10) of RIPA, is that those provisions show that Parliament envisaged that there would be *specific mechanisms* for any appeals from the IPT; mechanisms which are inconsistent with there being a parallel regime for judicial review. In particular s.67(10) makes clear that any order allowing for an appeal may make provision for "*the establishment and membership of a tribunal or body to hear appeals*" (s. 67(10)(a)) and may include provisions corresponding to the Tribunal's specialist procedure rules (as provided for by s.69 of RIPA) in any such appeals (s.67(10)(d) – as cited at §15 of the President's judgment). The clear intention of these provisions is that any oversight of the IPT's decision-making should be by a specialist body, with powers mirroring those available as part of the IPT's specialist regime and that is a powerful indicator against a more general application of judicial review.

51. Finally, as highlighted by the President at §34 of his judgment, if the Appellant is right in its interpretation, the effect would be that, in creating a new right of appeal from the IPT in the Investigatory Powers Act 2016 (see s.242 which inserts a new section 67A into RIPA dealing with appeals from the IPT[39]) **[A1/Tab 8]**, Parliament has narrowed the

[38] Section 1(4) states: *"A decision of the commission shall be questioned in legal proceedings only in accordance with – (a) section 7, or section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)"*.

[39] As set out in full at §34 of the Divisional Court judgment **[AB/Tab A/pp25-26]**. It is to be noted that s.242 of the 2016 Act, which introduces the new s.67A is not yet in force. The Secretary of State will be making

routes of challenge from IPT decisions, rather than broadened them. The new appeal provisions provide for an appeal from the IPT on a point of law, but only in circumstances where the "*second tier appeals criteria*" is satisfied (see *Cart* in the Supreme Court at §52 per Lady Hale and §129 per Lord Dyson **[A2/Tab 23]**) i.e. it is not any error of law which will justify an appeal, but only one falling within the restricted tests set out in s.67A(7) of RIPA[40]. That supports the proposition that Parliament intends the statutory regime to be a complete code (with no room for the application of judicial review) i.e. Parliament sets the limits on the jurisdiction of the IPT and any challenges from it.

(3) Error of approach regarding status of the IPT

52. At §50 of the Appellant's skeleton it is asserted that the President was wrong to conclude that the IPT's status as a body reviewing the acts of other bodies, and applying judicial review principles in doing so, meant that the normal principles governing the interpretation of ouster clauses did not apply. But that is not what the President decided. Nowhere in his judgment did he decide that the normal rules on the interpretation of ouster clauses should not apply. On the contrary, as already noted, the President analysed RIPA in accordance with well-established rules of statutory interpretation, including against the background of "*other attempts to oust the jurisdiction of the court*" (see §16) and starting with the decision in *Anisminic*.

53. In §§41-42 the President was highlighting a number of different features of the IPT regime which, as a matter of interpretation, strongly suggested that it was not amenable to judicial review. As he concluded, it is clear from the constitution, jurisdiction and powers of the Tribunal that it is not properly to be regarded as inferior to the High Court. And one of the features which fed into that analysis was the fact that the IPT is tasked with applying the same principles for making its determination as would be applied by a court on an application for judicial review (see s.67(2) and, to same effect, s.67(3) of RIPA). That was a significant factor pointing to the conclusion that Parliament intended the IPT

Regulations under s.67A(5) which will specify the criteria to be applied by the Tribunal when considering the relevant appellate court. The IPT Rules also need to be updated to make the appeal route operational. In the light of these necessary steps, it is currently anticipated that this appeal route will be commenced before the end of 2017.

[40] i.e. (1) an appeal would raise an important point of principle or practice or (2) there is another compelling reason for granting leave" – see §34 of the President's judgment.

to perform a similar oversight function in relation to activities of the SIAs to that ordinarily performed in relation to the actions of public bodies by the High Court (see §41 of his judgment).

54. The Appellant asserts that there is no principled basis which precludes judicial review of a body which has already applied judicial review principles (see §§50(a)-(b) of the Appellant's skeleton) e.g. where serious procedural irregularities occurred below. But that theoretical possibility does not detract from the fact that this is another useful pointer to the question whether Parliament intended the IPT to be subject to the supervisory jurisdiction of the High Court. As the President noted, the need and the justification for judicial review is "*far less clear*" where the Tribunal is itself exercising powers of judicial review (see §42) and that conclusion was amply supported by the Supreme Court decision in *A v B* **[A2/Tab 22]**, as made clear by the President at §41 of his judgment.

55. As is apparent from the judgment of the President, there are a number of features of the IPT's regime which support that conclusion, including the following factors:

    a. Members of the Tribunal must either hold or have held high judicial office, or be a qualified lawyer of at least 7 years' standing[41] and the President of the Tribunal must hold or have held high judicial office[42]. The fact that High Court Judges sit in the IPT is a "*powerful factor*" against the application of judicial review, albeit not conclusive – see Thomas LJ in *R (Woolas) v Parliamentary Election Court* [2012] QB 1 at §33 **[A2/Tab 24]**, citing *R v Cripps ex p Muldoon* [1984] QB 68 at 84C-D **[A1/Tab 11]**.
    b. Parliament has been specific about the types of determinations which can be made by the Tribunal at the conclusion of its proceedings, recognising the importance of maintaining secrecy in the work of the SIAs. As set out at §17 above, the statutory scheme limits the nature of its determinations, including confining them to a statement that there is "*no determination in favour*" in appropriate circumstances (s. 68(4)) **[A1/Tab 5]**. That again points to Parliament's clear intention that the scheme should be a final and conclusive one, since other courts (including the High Court) will not be subject to the same statutory constraints.

[41] §1(1) of Sch. 3 to RIPA
[42] §2(2) of Sch. 3 to RIPA

c. The IPT's remedial discretion is very broad and arguably goes even further than the High Court's (broad) remedial jurisdiction in judicial review proceedings[43]. In particular the Tribunal can make any order it "*thinks fit*" and has broad powers to quash relevant warrants or authorisations and to award compensation where appropriate.

d. The IPT is not part of Her Majesty's Courts and Tribunal Service. As explained by Sir Andrew Leggatt in his 2001 Report of the Review of Tribunals (§3.11) **[A3/Tab 43]**:

> *"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."*

e. The IPT sits as part of a carefully crafted scheme in order to provide important oversight of the SIAs. Its relationship with the Commissioners, with the Intelligence and Security Committee and with the Prime Minister in certain circumstances (see e.g. s.68(5) RIPA) sets it apart from other Courts or tribunals[44].

56. Finally, the Appellant seeks to rely on the dangers of "local law", with reference to the speech of Lady Hale in *Cart* **[A2/Tab 23]** (and as highlighted in Leggatt J's reservations at §§48-49). As to that:

[43] In judicial review proceedings remedies are not as of right, see *Rahmatullah v Secretary of State for Defence* [2013] 1 AC 614 at §77, in contrast with e.g. applications for *habeas corpus*.
[44] It is to be noted that a tribunal's constitutional relationship with Parliament can also be an important factor – see *Woolas* at §§48-53 **[A2/Tab 24]**.

a. It is important to recognise that Lady Hale's starting point in *Cart* was that Parliament can legislate to exclude judicial review, provided it uses clear words to do so – see her judgment at §37.

b. As explained by the authors of De Smith[45] **[A3/Tab 48]**, the rule of law has a number of permutations in the present context. Whilst excess of powers by public bodies should generally be subject to restraint, the sovereignty of Parliament is also of importance and Parliament may permit a public body to be the ultimate interpreter of the law it has to administer.

c. No-one could sensibly suggest that excluding a right of appeal from a species of High Court decision could be open to "local law" objection.

d. The IPT regime was endorsed by the ECtHR in *Kennedy v United Kingdom* (2011) 52 EHRR 4 **[A2/Tab 30]**, in which the extensive jurisdiction of the IPT and the considerable restrictions applied by it in order to safeguard secret information, were found to be compatible with Article 6 ECHR. Nothing was said in that case to indicate any Article 6 concern about the exclusivity of its jurisdiction. On the contrary, the ECtHR specifically noted at §77 of its judgment that there was "no appeal from a decision of the IPT". The ECtHR was clear that the IPT provides an important level of scrutiny to surveillance activities in the UK and that that the procedures that it operates and that surround it are compatible with Article 6 ECHR – see §167.

e. The danger of "local law" is one which, if it realistically exists, is a policy judgement for Parliament. But the policy intention behind the exclusivity of the IPT is clear – there needs to be a specialist tribunal which has the powers to oversee the work of the SIAs and it is inappropriate for that body to be overseen by bodies without equivalent powers. As Dyson LJ noted in *A v B*[46] **[A2/Tab 22]**, it is inherently unlikely that Parliament would have established such elaborate procedures whilst also contemplating that the High Court could review such decisions, without any comparative powers.

f. In this particular specialist context, that danger is significantly mitigated by the IPT being of like standing and authority to the High Court (i.e. sitting with one, and sometimes two, High Court Judges).

[45] See 4-044 7th Edition.
[46] In the Court of Appeal at §48.

g. It is also mitigated by the other systems of oversight which are built into the regime, including by the Commissioners, the ISC and under the RIPA regime itself, in terms of e.g. the warrantry safeguards which must be satisfied for SIA activity to be carried out.

Leggatt J's "reservations"

57. It is submitted that the President's reasoning is compelling and should be followed. The following specific, summary submissions are made on the "reservations" expressed by Leggatt J:

a. Leggatt J makes only glancing reference to the particular statutory context in which the IPT operates (see §60 of his judgment). But those features of the statutory scheme lie properly at the heart of the correct analysis.
b. In §§48-52 Leggatt J comes close to suggesting that Parliament could never legislate to exclude the application of judicial review to statutory tribunals, contrary to the established principle that that can be done.
c. At §49 he states that there is a "*principle*" that a statutory tribunal should not be completely cut off from the court system. He refers to §§42-43 of Lady Hale's judgment in *Cart* **[A2/Tab 23]**. But he does not acknowledge her acceptance that Parliament can legislate to oust judicial review, as made clear at §37 and §40 of her judgment. To elevate her concerns about the development of "local law" to a "*principle*" that this cannot occur is incorrectly to analyse her judgment. As set out at §55 above, any concerns about the development of "local law" are met, not least by the specialist constitution and powers of the IPT and its place in a carefully balanced scheme of oversight.
d. At §§54-55 he does not deal with the important differences in the language used in *Anisminic* **[A1/Tab 10]** and in s.67(8) (see §§33-34 above).
e. At §52 and §55 he does not recognise important developments in public law post-dating *Anisminic*, including the principle of legality and the erosion of the void/voidable distinction (see §§36-40 above). On his interpretation of the law a "*determination*" is not valid if made in error of law and cannot be subject to an effective ouster clause (unless perhaps it refers to "*purported determination*" see

§52). Further, on his interpretation of s.67(8), the words in parenthesis are meaningless – see his conclusion at §55.

f. As noted at §49 above Leggatt J was wrong to suggest at §56 that s.67(8) was similar to s.1(4) of the SIAC Act addressed in *Cart* **[A1/Tab 21]**. Neither the statutory context, nor the language used in *Cart* was similar to that which arises in the present case.

g. He was also wrong to conclude that the fact that the IPT applies principles of judicial review was irrelevant to the analysis of whether its decisions were amenable to judicial review (see §§52-55 above).

h. Finally, the enactment of s.67A of RIPA as part of the Investigatory Powers Act 2016 **[A1/Tab 8]** does not demonstrate that there is no reason of policy why decisions of the IPT cannot be subject to judicial review. On the contrary, the enactment of such limited rights of appeal from IPT decisions supports the contention that Parliament has not already opened up the IPT's decision-making to broad and unlimited challenge in judicial review proceedings.

3 April 2017

27 September 2017

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Annex 1 - Recent examples of the IPT's operation

1. As explained in the IPT's Report for 2011-2015 **[A3/Tab 45]**, there have been considerable changes in the workload and the day to day working of the Tribunal, in part, due to the alleged disclosures made by the former NSA Contractor Edward Snowden[47]. That has prompted a number of high-profile challenges in the IPT brought by NGOs or individuals/companies allegedly affected by the SIAs' activity[48].

2. In the ***Liberty/Privacy***[49] proceedings, the Tribunal sat as a tribunal of five distinguished lawyers, including two High Court Judges. It considered the legality of two regimes referred to as "*the Intelligence Sharing regime*" and "*the section 8(4) RIPA regime*". It held open hearings, initially over 5 full days in July 2014. It considered a very large quantity of evidence and submissions produced by the parties. The Applicants were represented throughout by experienced teams of Leading and Junior Counsel. It considered and applied the relevant Articles of the Convention (Articles 8, 10 and 14) and the Convention jurisprudence relating to them. It also conducted closed hearings. It did so because, unsurprisingly given the context, there were some relevant aspects (relating to the facts concerning the Applicants, the nature of the safeguarding regimes, and the SIA' capabilities) which could not be considered in open without damaging national security. At those hearings, and more generally, the IPT was assisted by Leading Counsel acting as Counsel to the Tribunal. That assisted a thorough and rigorous examination of the relevant matters in closed – including specifically of the safeguards provided by internal arrangements in place to provide additional layers of protection surrounding any interferences with eg Article 8 rights. In its 5 December 2014 judgment [2015] 3 All ER 142 **[A3/Tab 35]**, the IPT concluded that the two regimes were lawful and consistent with Articles 8, 10 and 14 ECHR. Thereafter, in a judgment of 6 February 2015, [2015] 3 All ER 212 **[A3/Tab 36]** the IPT considered an outstanding issue, namely whether prior to certain public disclosure the Intelligence Sharing regime was in accordance with the law. It held that it was not, because without such disclosure the internal arrangements were

[47] See the foreword to the report at page 1.
[48] In addition the Tribunal continues to determine more routine complaints. It is to be noted that 47% of the complaints in 2015 were ruled to be "frivolous or vexatious" and dismissed on that basis. See s.67(4) of RIPA which makes clear that the Tribunal shall not be under any duty to consider or determine proceedings if it appears to them that the bringing of the proceedings or the making of the complaint is frivolous or vexatious.
[49] IPT/13/77H, IPT/13/92/CH, IPT/13/168-173/H, IPT/13/194/CH, IPT/13/204/CH.

inadequately signposted. However, it declared that in light of the disclosure the regime was now in accordance with the law.

3. In a further judgment dated 22 June 2015 **[A3/Tab 37]**, the IPT considered whether there had, in fact, been unlawful conduct in relation to any of the claimants' communications under either of the Intelligence Sharing or the s.8(4) regimes. In determining that issue, the IPT considered proportionality both as it arose specifically in relation to the claimants' communications, and as it arose in relation to the s.8(4) regime as a whole (i.e. what the IPT described as "*systemic proportionality*"). The IPT concluded that there had been unlawful conduct in relation to two of the claimants, whose communications had been intercepted and selected for examination under the s.8(4) regime: namely, the Legal Resources Centre and Amnesty International. In each case, the unlawful conduct in question was "*technical*", in that it had caused the claimants no prejudice (so that a declaration constituted just satisfaction). The IPT stated at §18:

> *"The Tribunal is concerned that steps should be taken to ensure that neither of the breaches of procedure referred to in this Determination occurs again. For the avoidance of doubt, the Tribunal makes it clear that it will be making a closed report to the Prime Minister pursuant to s.68(5) of RIPA.*"

4. In 2014/2015 the IPT also determined a series of complaints by individuals who alleged that the regime for the interception of legally privileged communications was not compatible with the ECHR – ***Belhaj & others v Security Service & others*** (IPT/13/132-9/H). Those proceedings were commenced in late 2013 and were listed for a determination of preliminary issues in March 2015. During the proceedings, the IPT appointed CTT to assist it in the same manner as occurred in the Liberty proceedings. During the proceedings CTT made submissions to the IPT on disclosure, having seen the closed material produced by the SIAs which was relevant to the preliminary issues. That process led to the SIAs agreeing to disclose aspects of their internal policies dealing with the handling of legally privileged information. In addition, the Tribunal determined an application for interim relief, which resulted in undertakings being provided to the claimants in the proceedings. Those undertakings were designed to protect the legal privilege of the claimants in their communications, if any such communications had been intercepted (see the IPT judgment dated 7 February 2014).

5. In the event, in February 2015, the Respondents conceded that from January 2010, the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material had not been in accordance with the law for the purposes of Article 8(2) of the ECHR and was accordingly unlawful. A declaration in those terms was made by the Tribunal. Following that, the IPT proceeded to consider the specific factual complaints which had been made by the *Belhaj* claimants. That involved an open hearing on the basis of hypothetical assumptions, together with consideration of the factual position in closed session. That resulted in the IPT's further determination of 29 April 2015 in which it, indicated, *inter alia*, that two documents containing legally privileged material relating to the Third Claimant had been held by the Agencies. However the IPT was satisfied that there was no improper use or disclosure of that privileged material in a manner which would contravene Article 6 ECHR. Therefore, in the *Belhaj* proceedings, the IPT gave a determination in favour of one of the claimants and made an order for the destruction of certain records. That outcome could not have been achieved without the IPT being able to consider sensitive material relevant to the factual complaints in closed.

6. In 2015 and 2016 the IPT considered a complaint against the Metropolitan Police by News Group Newspapers and three journalists – ***News Group Newspapers & Others v The Commissioner of Police of the Metropolis*** [2015] UKIPTrib_14_176-H **[A3/Tab 38]**. In those proceedings the IPT considered the lawfulness of four authorisations issued under s.22 of RIPA which gave power to the police to obtain communications data from communications operators. The IPT concluded that one of those authorisations (referred to as the Third Authorisation) did not comply with the requirements of s.22 of RIPA; it was neither necessary nor proportionate to the legitimate aim sought to be achieved and was thereby unlawful (see §83 and §126 of the judgment). That led to a finding in favour of the Fourth Complainant in respect of the Third Authorisation. By a further judgment, dated 4 February 2016, the Tribunal concluded, by reference to its own authorities and those of the European Court of Human Rights, that the remedy of a declaration and a quashing order amounted to due satisfaction, and that it was not necessary to award any compensation.

7. Most recently in October 2016 the IPT handed down its first judgment in the case of ***Privacy International v Secretary of State for Foreign and Commonwealth Affairs and***

Others IPT/15/110/CH in relation to the acquisition, use, retention, disclosure, storage and deletion of Bulk Personal Datasets ("BPDs") and the use of s.94 of the Telecommunications Act 1984 by the Home and Foreign Secretaries to give directions to Public Electronic Communications Networks ("PECNs") to transfer bulk communications data to GCHQ and MI5 ("BCD"). Again the full *inter partes* argument was heard on the basis of agreed or assumed facts[50]. The IPT concluded that collection of bulk communications data by s.94 Telecommunications Act 1984 is lawful domestically; that both the bulk communications data (BCD) and bulk personal data (BPD) regimes are currently lawful under Art 8 ECHR (subject to one point - which will require further submissions (§95). However it held that neither regime was lawful prior to a public avowal in 2015 because there was no public Code or handling arrangements relating to either regime and, in addition, Commissioner oversight for BCD was inadequate (unlike for BPD, which was adequate from 2010 onwards). The proportionality of the BCD and BPD regimes is to be considered at a further hearing in June 2017 (which will also consider EU law issues).

[50] See §18 of the IPT judgment.