In the Supreme Court of the United Kingdom

Notice of appeal

(or application for permission to appeal)

On appeal from

COURT OF APPEAL (CIVIL DIVISION)

PRIVACY INTERNATIONAL

— V —

INVESTIGATORY POWERS TRIBUNAL

Appeal number

Date of filing

1 9 / 0 1 1 / 2 0 1 7

D D M M M Y Y Y Y

Appellant's solicitors

BHATT MURPHY LTD

Respondent's solicitors

THE TREASURY SOLICITOR, GOVERNMENT LEGAL DEPARTMENT

1. Appellant

Appellant's full name: PRIVACY INTERNATIONAL

Original status:
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- [ ] Defendant
- [ ] Petitioner
- [ ] Respondent
- [ ] Pursuer
- [ ] Defender

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Original status

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3. Decision being appealed

Name of Court: COURT OF APPEAL, CIVIL DIVISION

Names of Judges: LORD JUSTICE FLOYD, LORD JUSTICE SALES, LORD JUSTICE FLAUX

Date of order/ interlocutor/decision: 23/011/2017 (D D M M M Y Y Y Y)

ADDITONAL SHEET

Counsel

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2. ~~Respondent~~s INTERESTED PARTIES

Respondent's full name: SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS AND GOVERNMENT COMMUNICATIONS HEADQUARTERS

Original status

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- ☐ Defendant
- ☐ Petitioner
- ☐ Respondent
- ☐ Pursuer
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- ☐ Yes
- ☑ No

If Yes, please give the certificate number

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3. Decision being appealed

Name of Court:

Names of Judges:

Date of order/ interlocutor/decision: DD / MMM / YYYY

4. Permission to appeal

If you have permission to appeal complete **Part A** or complete **Part B** if you require permission to appeal.

PART A

Name of Court granting permission

Date permission granted

D D / M M M / Y Y Y Y

Conditions on which permission granted

PART B

☑ The appellant applies to the Supreme Court for permission to appeal.

5. Information about the decision being appealed

Please set out

- Narrative of the facts
- Statutory framework
- Chronology of proceedings
- Orders made in the Courts below
- Issues before the Court appealed from
- Treatment of issues by the Court appealed from
- Issues in the appeal

Attached in a separate document.

6. Grounds of appeal

Grounds of Appeal are attached in a separate document.

Counsel's name or signature:

DINAH ROSE QC, BEN JAFFEY QC and TOM CLEAVER

7. Other information about the appeal

Are you applying for an extension of time?

☐ Yes ☑ No

If Yes, please explain why

What order are you asking the Supreme Court to make?

Order being appealed ☑ set aside ☐ vary

Original order ☑ set aside ☐ restore ☐ vary

Does the appeal raise issues under the:

Human Rights Act 1998? ☐ Yes ☑ No

Are you seeking a declaration of incompatibility?

☐ Yes ☑ No

Are you challenging an act of a public authority?

☑ Yes ☐ No

If you have answered Yes to any of the questions above please give details below:

The case concerns whether the ouster clause in the Regulation of Investigatory Powers Act 2000 s.67(8) has the effect of preventing a claim for judicial review being brought against the Investigatory Powers Tribunal if it makes an error of law.

Court's devolution jurisdiction?

☐ Yes ☑ No

If Yes, please give details below:

Are you asking the Supreme Court to:

depart from one of its own decisions or from one made by the House of Lords?

☐ Yes ☑ No

If Yes, please give details below:

make a reference to the European Court of Justice of the European Communities?

☐ Yes ☑ No

If Yes, please give details below:

Will you or the respondent request an expedited hearing?

☑ Yes ☐ No

If Yes, please give details below:

The Supreme Court is invited to expedite the application for permission to appeal and, if permission is granted, the appeal.

The underlying issue of law raised in the claim for judicial review (which Lang J held was arguable) is of real and continuing importance. The lawfulness of using section 5 of the Intelligence Services Act 1994 to issue a general (or "thematic") warrant was litigated in the IPT because Sir Mark Waller (then the Intelligence Services Commissioner) raised concerns about the lawfulness of this use of the power in his annual report.

The property interference power in section 5 of ISA 1994 will remain in force after the Investigatory Powers Act 2016 has been implemented. Indeed the 2016 Act widens the power to permit GCHQ and MI6 to engage in property interference in the British Islands – section 251 IPA 2016. The only significant change is that section 5 will no longer be used for computer hacking – section 13 and Part 5 IPA 2016. Warrants that Lang J accepted were arguably unlawful no doubt remain in effect today. The lawfulness of such warrants (which are necesssarily granted and given effect in secret) is a significant issue of ongoing importance that ought to be resolved as soon as possible.

8. Certificate of Service

Either complete this section or attach a separate certificate

The date on which this form was served on the

1st Respondent 19/012/2017 (D D M M M Y Y Y Y)

INTERESTED PARTIES

2nd Respondent ~~2nd Respondent~~ 19/012/2017 (D D M M M Y Y Y Y)

I certify that this document was served on

GOVERNMENT LEGAL DEPARTMENT (ASHLEY NEWBURN; JO WALLWORK)

by

SIMON CREIGHTON, BHATT MURPHY LTD

by the following method

EMAIL

Signature

S. GA

9. Other relevant information

Neutral citation of the judgment appealed against e.g. [2009] EWCA Civ 95

2017/EWCACiv///1868

References to Law Report in which any relevant judgment is reported.

Subject matter catchwords for indexing.

INVESTIGATORY POWERS TRIBUNAL - JUDICIAL REVIEW - OUSTER CLAUSES - REGULATION OF INVESTIGATORY POWERS ACT 2000, S 67(8)

Please return your completed form to:

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IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

C1/2017/0470

B E T W E E N:

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

FORM 1: SECTIONS 5 & 6

SECTION 5: INFORMATION ABOUT THE DECISION BEING APPEALED

1. On 23 November 2017 the Court of Appeal (Floyd, Sales and Flaux LJJ), held that s.67(8) of the Regulation of Investigatory Powers Act 2000 ("**RIPA 2000**") ousts the High Court's judicial review jurisdiction over the Investigatory Powers Tribunal ("**IPT**").

2. The underlying judicial review proceedings concern the IPT's construction of s.5 of the Intelligence Services Act 1994 ("**ISA 1994**").

3. On 12 February 2016, the IPT gave judgment on issues of law, following an open hearing: *Privacy International v SSFCA* [2016] UKIP Trib 14_85-CH. Amongst other things, the IPT held that s.5 ISA 1994, which empowers the Secretary of State to grant warrants authorising only "*specified*" acts in respect of "*specified*" property, permits the grant of general warrants authorising a broad class of possible activity in respect of a broad class of possible property. In doing so, it held (at §37) that the common law's

abhorrence of general warrants was not a *"useful or permissible aid to construction"* of a power granted to an authority tasked with furthering national security. The IPT also held that its interpretation of the relevant legislation was compatible with Articles 8 and 10 of the European Convention on Human Rights.

4. The Appellant considers these propositions, and the IPT's interpretation of s. 5 ISA 1994, to be wrong in law, and has accordingly sought to invoke the supervisory jurisdiction of the High Court to quash the decision of the IPT.

5. On 9 May 2016, the Appellant commenced judicial review proceedings seeking to challenge the IPT's decision. On 17 June 2016 Lang J granted permission for judicial review, made a Protective Costs Order, and directed the hearing of a preliminary issue as to whether the Court's jurisdiction to entertain the claim was precluded by s.67(8) RIPA 2000.

6. S.67(8) RIPA 2000 provides: *"Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."* The Secretary of State has not made any order under this section.

7. The Appellant argued that s.67(8) RIPA 2000 did not have the effect of ousting judicial review for error of law.

8. The Divisional Court (Sir Brian Leveson P and Leggatt J) gave judgment on the preliminary issue on 2 February 2017, and dismissed the claim on the ground that s.67(8) RIPA 2000 ousted judicial review. The Court was divided as to the correct result, but Leggatt J (who was minded to conclude that s.67(8) did not preclude judicial review) concurred in the result so as to avoid the need for a re-hearing before a differently-constituted Divisional Court. Permission to appeal was granted.

9. The Court of Appeal heard the appeal on 5 October 2017 and gave judgment on 23 November 2017, dismissing the appeal. The Appellant sought, and was refused, permission to appeal that decision from the Court of Appeal, and now seeks permission to appeal from this Court.

SECTION 6: GROUNDS OF APPEAL

A. Summary

10. This proposed appeal raises a question of constitutional law of general public importance, as to the circumstances in which an Act of Parliament is to be interpreted as entirely ousting the High Court's jurisdiction to supervise a tribunal of limited statutory jurisdiction by way of judicial review.

11. The Court of Appeal (Sales LJ, with whom Floyd LJ and Flaux LJ agreed) concluded that s.67(8) RIPA 2000 had the effect of excluding judicial review of any decision of the IPT on any ground.

12. The Appellant submits that in so finding, the Court of Appeal has erred in law. The Court of Appeal's judgment is inconsistent with a long line of authority, culminating in the classic decisions of the House of Lords in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 47 and *O'Reilly v Mackman* [1983] 2 AC 237, and recently reaffirmed by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at paragraph 66, and *R (Evans) v Attorney General* [2015] AC 1787, at paragraphs 54 - 57.

13. If the Court of Appeal's judgment is allowed to stand uncorrected, the IPT is free to act in excess of its jurisdiction, to decline to follow a decision of the Supreme Court as to the interpretation of a statute, to flout the principles of natural justice, or to take decisions tainted by actual bias, and there is no remedy for those whose rights are adversely affected by its unlawful decisions.

14. This is the first time that any statutory provision has been held to have the effect of entirely immunising the decisions of an inferior tribunal of limited jurisdiction from any judicial oversight by the High Court, at least since the development of modern public law. Indeed, the Appellant has not been able to discover any case since the seventeenth century in which a statutory provision, no matter how explicitly drafted, has been found to have such an effect.

15. The reason why the High Court has historically refused to countenance the complete ouster of the prerogative writs or judicial review is that such ouster has very serious implications for the rule of law. It gives a tribunal of limited jurisdiction the power to act as it pleases, without limit or restraint: an outcome inconsistent with the limits on the jurisdiction of such a tribunal which are themselves laid down by Parliament. Moreover, it permits the development of lines of legal authority in such tribunals that may be inconsistent with the law laid down by higher courts. Courts have accordingly strained to interpret any statutory language so as to avoid such an outcome. The importance and breadth of this principle has been stated many times and on the highest authority. It must be taken to have been well-known to Parliament when it enacted RIPA 2000.

16. Notwithstanding this history, and the importance of the principle which underlies it, the Court of Appeal concluded that the wording of s.67(8) is sufficient to make the IPT entirely immune from judicial review: Judgment, §§34-37. In support of that conclusion the Court found that the wording of s. 67(8) was materially different from that considered in Anisminic. The Court also relied on the "*very high*" quality of the membership of the IPT (which gave rise to a "*fair inference*" that Parliament had intended it to be immune from review), and on the national security context and the need to ensure that sensitive material is protected from any risk of disclosure in court proceedings.

17. The Appellant submits that in so finding, the Court of Appeal erred in law, as summarised below. In particular:

    a) the Court failed to address or give effect to the authorities in which English courts have repeatedly found that even explicitly worded "no certiorari" clauses in statutes do not have the effect of ousting the jurisdiction of the High Court, at least where an inferior court or tribunal has exceeded its jurisdiction;

    b) the Court failed properly to apply the decision of the House of Lords in Anisminic, in which the House of Lords held that, since any decision of an inferior tribunal tainted by a material error of law (whether or not the error goes to jurisdiction) is a nullity, a statutory provision immunising "decisions" or

"determinations" of such a tribunal from legal challenge is not apt to oust judicial review of *purported* decisions for error of law. That reasoning applies with equal force to the wording of s.67(8) and ought to have led the Court to the same conclusion. The Court was thus wrong to find that there was any material distinction between the statutory language considered in *Anisminic* and that applicable in the present case;

c) the Court was wrong to place any reliance on the 'quality' of the members of the IPT, which is immaterial for the determination of the question in issue; and

d) the Court was wrong to rely on the fact that the IPT deals with sensitive material as a reason for ousting the High Court's jurisdiction. The High Court has ample powers and procedures available to enable it to accommodate such difficulties, and has done so on many occasions. In any event, such a reason could not justify the complete exclusion of the High Court's jurisdiction to supervise the IPT when it acts unlawfully. In the present case, no issue of sensitive material arises, since the challenge which the Appellant seeks to pursue concerns a pure question of law, which was dealt with entirely in open proceedings by the IPT.

18. Further and in the alternative, the Appellant submits that the High Court's power to entertain a claim for judicial review of a decision of an inferior tribunal of limited jurisdiction is a fundamental constitutional principle which cannot be excluded by statute, regardless of the way it is drafted.

B. The correct approach to ouster clauses

19. It is a constitutional principle applied by the common law for centuries that Parliament is not to be taken to intend to exclude the High Court's supervisory jurisdiction over inferior courts and tribunals (by which is meant courts and tribunals whose jurisdiction is limited by statute), at least in the absence of the clearest possible words to that effect. For example:

a) In *R v Moreley* (1760) 2 Bur 1041, 97 ER 696, at 697, Lord Mansfield considered a statutory provision which prohibited any court from "*intermeddling*" with any

proceedings under the Conventicle Act, and prevented any "*record, warrant or mittimus*" from being "*reversed, avoided or any way impeached*". Lord Mansfield held that such words did not oust the jurisdiction of the High Court, stating: "*The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled.*"

b) In *R v Cheltenham Commissioners* (1841) 1 QB 467, 113 ER 1211, at 1214, Lord Denman CJ considered a statutory provision which expressly prohibited certiorari. Holding that such wording was not sufficient to oust the jurisdiction of the High Court, at least where there had been an excess of jurisdiction, he stated: "*the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute.*"

c) In *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] QB 574, Denning LJ surveyed the authorities, and concluded that "*the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal.' It does not mean 'without recourse to certiorari'. It makes the decision final on the facts, but not final on the law.*"

20. This principle was reiterated in *Anisminic*. Moreover, in that case the House of Lords rejected the argument that there was any distinction to be drawn between errors of law going to jurisdiction, and any other material error of law. No inferior court or tribunal of limited jurisdiction has jurisdiction to err in law. Any decision or determination of such a tribunal tainted by error of law is thus a nullity. The House of Lords accordingly held that s.4(4) of the Foreign Compensation Act 1950, which stated that a determination of the Commission shall not be called in question in any court of law, did not exclude judicial review of a *purported* determination on grounds of error of law.

21. In short, as Lord Reid said at 170E-F: "*Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination*

but which is in fact no determination at all." At 171B-G he provided a non-exhaustive list of errors which would render a determination a nullity, including error of law.

22. As Lord Diplock stated in *O'Reilly v Mackman* at p. 278: *"The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity."*

23. *Anisminic* thus makes clear that a statutory provision which states that decisions or determinations shall not be called into question in any court does not have the effect of excluding judicial review on grounds of error of law. This authority must be taken to be known to Parliament when it enacts any statute using similar language.

24. In recent years these principles have been applied to clauses asserted to oust judicial review in the context of a variety of different courts and tribunals of limited jurisdiction. In every case, the clause has been found not to oust judicial review. Examples include the following:

a) a parliamentary election court, comprising two judges of the High Court (*R (Woolas) v Parliamentary Election Court* [2012] QB 1);

b) the Upper Tribunal, which is described by statute as a superior court of record (*R (Cart) v Upper Tribunal* [2012] 1 AC 663);

c) the Special Immigration Appeals Commission, also described by statute as a superior court of record (*U v SIAC* [2011] QB 120);

d) Coroners' courts (*R v Greater Manchester Coroner, ex p Tal* [1985] QB 67); and

e) a local election court (*R v Cripps, ex p Muldoon* [1984] QB 68).

25. If Parliament may exclude judicial review of a tribunal of limited jurisdiction at all (as to which, see below), the very least that would be required in order to establish a clear Parliamentary intention to prevent the High Court correcting an error of law would be:

a) express provision to the effect that the ouster extends not only to decisions but also to purported decisions of the tribunal of limited jurisdiction. That is necessary to address the central reasoning in *Anisminic*. Without it, there is no reason to think that a different outcome from that in *Anisminic* was intended. Indeed, this is the course that was taken in the Foreign Compensation Act 1969, which followed the decision of the House of Lords in *Anisminic*.

b) express reference to excluding judicial review, rather than court proceedings in general. *Cheltenham Commissioners* and *Ex parte Bradlaugh* show that an express reference to removing certiorari is not sufficient, but it is certainly necessary.

c) express confirmation that even errors of law by the IPT may not be corrected by the High Court. That is a highly significant consequence; it means the IPT is a body which purports to determine a party's legal rights but which may do so otherwise than in accordance with the law. Because of the significance of that outcome, it must be spelt out if the statute is to be construed as authorising it.

26. Without at the very least express statutory wording in relation to those three matters, it would not be clear that Parliament was confronting the interference with the rule of law inherent in such an exclusion of judicial review, and accepting the political cost of doing so, as the principle of legality requires: *R (Simms) v SSHD* [2000] 2 AC 115 per Lord Hoffmann at 131.

C. The Court of Appeal's reasons

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

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

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

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

d) that in R (A) v Security Service [2009] UKSC 34, [2010] 2 AC 1, Lord Brown had referred to s.67(8) as "*an ouster (and, indeed, unlike that in Ansiminic, an unambiguous ouster) of any jurisdiction of the courts over the IPT*", and that was "*of powerful persuasive authority*" (§§46-48).

28. It is submitted that each of these reasons is flawed, for the reasons summarised below.

Issue 1: Construction of s.67(8)

29. Sales LJ set out at §19 what he understood to be the jurisprudential basis for the courts' approach to ouster clauses, namely the importance to the rule of law of an individual being able to "*get before a court or tribunal to determine a complaint*". That misstates what the rule of law requires in this context.

30. In nearly all of the cases concerning ouster clauses, there was no dispute that the applicant was able to have his complaint determined by a court or tribunal. The issue was whether the High Court, as a court of general and unlimited jurisdiction may correct courts or tribunals of limited jurisdiction as and when they fall into error. As Baroness Hale said in R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663 at [42-43], the rule of law requires that serious questions of law can be "*channelled into the legal system*" so that a specialist tribunal does not become "*in reality the final arbiter of the law*";

it must be possible to correct any errors or distortions so that pockets of "*local law*" inconsistent with the general law do not emerge. Moreover, as Laws LJ noted in Cart in the Divisional Court, the role of the High Court as the authoritative interpreter of statutes is an aspect of parliamentary sovereignty [2011] QB 120 at [37-40]. In the absence of the High Court's power authoritatively to interpret the law and correct legal errors by tribunals of limited jurisdiction, such tribunals may exceed the jurisdiction granted to them by Parliament with impunity. This in itself would be contrary to Parliament's intention in bestowing a limited jurisdiction upon them.

31. In concluding that s.67(8) showed a clear intention by Parliament to immunise the IPT from review even in respect of errors of law, Sales LJ relied on the words in parenthesis: "*including decisions as to whether they have jurisdiction*" (§34).

32. These words were not intended to address the reasoning in Anisminic, and are in any event inadequate to do so:

a) S.65 RIPA 2000 contains complex provisions defining the scope of the IPT's jurisdiction. Numerous factual disputes could arise as to whether a case falls inside or outside those provisions. For example, there could be a dispute about whether a person accused of carrying out surveillance was or was not in fact "*a foreign police or customs officer*" (s.65(5)(ca)), or whether an act complained of did or did not in fact relate to "*the interception of communications in the course of their transmission*" (s.65(5)(b)).

b) The words in parenthesis are concerned with ensuring that decisions by the IPT as to whether it has jurisdiction cannot be challenged on the facts - i.e. that a decision cannot be overturned on the grounds that the jurisdictional facts which gave the IPT power to hear a particular case were not in fact correct.

c) That submission was made by the Appellant in the Court of Appeal (skeleton argument, paragraph 48(f)), but the Court of Appeal did not address it.

d) Further, as is clear from Lord Reid's judgment in Anisminic at 170-171 (quoted above), the core of the reasoning in that case was that a determination which is

vitiated by an error of law is not a determination or a decision at all. S.67(8) RIPA 2000 does not exclude any review of purported determinations or decisions of the IPT, including purported (but erroneous) decisions as to whether they have jurisdiction. It thus contains the same limit on its scope as the provision considered in *Anisminic*, and is insufficient to oust judicial review for the same reason.

e) The outcome of *Anisminic* did not depend on any conclusion that the relevant determination was a determination as to whether or not the Foreign Compensation Commission had jurisdiction. On the contrary, Lord Reid expressly disclaimed any reliance on the concept of jurisdictional error, at p. 171.

Issue 2: Quality of the IPT's members

33. Sales LJ held at §38 that his interpretation of s.67(8) was supported by the fact that "*The quality of the membership of the IPT in terms of judicial expertise and independence is very high, as set out in Schedule 3 to RIPA*", making it a "*fair inference*" that "*Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise*". This was a further error of law.

34. The quality of the decision-makers in the tribunal is immaterial to the question before the Court. The relevant fact is that the decision is made by a tribunal of limited statutory jurisdiction. This means that recourse to the High Court is necessary both in order to ensure that there is a single body of law with a single authoritative interpretation, and to ensure that the tribunal whose powers have been limited by Parliament has not acted in excess of those powers, which would itself subvert the intention of Parliament. The 'quality' of the members of the tribunal is nothing to the point. Indeed, it is invidious to suggest that it is only necessary for the High Court to have a supervisory jurisdiction over courts of some undefined 'poorer quality'.

35. The high quality of a tribunal has never been accepted as a basis for an ouster. For example:

a) *Anisminic* concerned a decision of a commission which was presided over by "*an eminent Queen's Counsel*" (Cyril Montgomery White QC), and consisted entirely of lawyers (see [1969] 2 AC 223).

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

c) SIAC is invariably chaired by a High Court Judge. Judges up to and including Court of Appeal level sit in the Upper Tribunal. Both SIAC and the Upper Tribunal are described by statute as "superior courts of record". Both are nevertheless subject to judicial review (*Cart*).

36. In any event, schedule 3 to RIPA provides that the eligibility criterion for appointment to the IPT is 7 years' professional standing as a lawyer. Although the President must be a current or former holder of high judicial office, there is no requirement that any decision or type of decision be made by the President. It is therefore not a feature of the statutory scheme (unlike some of those considered above) that decisions of the IPT will be made by individuals who hold or have held a senior judicial appointment.

37. Moreover, this reasoning, based on what Sales LJ referred to as a "*fair inference*" as to Parliament's intention to oust judicial review, is itself legally flawed. The case law shows that the High Court will not permit its jurisdiction to be ousted by "*fair inference*". Nothing less than express language of the utmost clarity and specificity will suffice (if, indeed, the total ouster of judicial review is possible at all).

Issue 3: Risk of disclosure of sensitive material

38. Sales LJ held at §§42-44 that his interpretation was also supported by the statutory context, namely Parliament's intention "*to set up a tribunal capable of considering claims and complaints against the intelligence services under closed conditions which provided complete assurance that there would not be disclosure of sensitive confidential information about their activities.*"

39. This reasoning constitutes a further error of law. The fact that the IPT considers sensitive confidential material cannot support a conclusion that Parliament intended to oust judicial review in the absence of explicit language of the type identified above. Had Parliament concluded that the sensitivity of the matters dealt with by the IPT required so extraordinary a constitutional measure, it was incumbent on it to say so in crystal clear terms, in accordance with the principle of legality. As in relation to the 'quality' of the decision-maker, Sales LJ has here sought to use the substantial national security caseload of the IPT as the basis for an inference as to the intention of Parliament. Such inferences are impermissible in this context.

40. In any event, the fact that the IPT deals with sensitive material is not a good reason for concluding that Parliament intended to oust judicial review. The High Court is capable of determining the sorts of issues that arise in judicial review proceedings whilst dealing appropriately with sensitive material, and has a variety of powers available to enable it to do so.

41. If a particular issue raised in judicial review proceedings were such that it required consideration of such material, there are mechanisms for ensuring its protection, such as public interest immunity, or (now) a closed material procedure under the Justice and Security Act 2013. In extremis, the Court has the option of considering whether to strike out a claim as untriable. See *Carnduff v Rock* [2001] 1 WLR 1786.

42. Sales LJ pointed out at §8 that the IPT Rules require the IPT to preserve the confidentiality of material even if the public interest favours its disclosure, whereas in the ordinary courts "*there is at least a possibility that the court might order disclosure*". However, the High Court does not readily disclose material which has any genuine national security sensitivity. In any event, the same point applies to SIAC, but did not prevent the Divisional Court in *U v SIAC* from construing the ouster clause in that case as insufficient to preclude judicial review.

43. This argument is particularly weak in the context of this claim, in which the Claimant seeks to challenge a decision of the IPT on a pure question of law, made following an open hearing, and where no sensitive material is involved. At the most, considerations

relating to sensitive material might go to the exercise by the High Court of its discretion as to what cases to entertain, and what relief to give. They cannot justify the complete ouster of the Court's jurisdiction.

Issue 4: Lord Brown's comment in R(A)

44. Finally, Sales LJ relied on the *obiter dictum* of Lord Brown in R (A) v Director of Establishments of the Security Service [2009] UKSC 12, [2010] 2 AC 1: "*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 [...]*" [23].

45. However, not only was this provision not in question in R (A), as Lord Brown notes in the passage above, but it was in fact conceded in that case that s.67(8) was effective to oust judicial review. The concession is clear from the report of argument at p. 23D: "*The claimant has no way of seeing the case he has to meet and there is no possibility of judicial review.*" The point was therefore not argued.

46. Moreover, Lord Brown was a member of the Supreme Court which, 18 months later, decided R (Cart) [2012] 1 AC 663. In that case, Lord Phillips said at [71] that Parliament had not since Anisminic "*purported, as it might have done, expressly to preclude the exercise by the High Court of the power of judicial review*". Lord Brown expressed agreement with the reasoning of Lord Phillips, without qualification.

47. In all these circumstances, the passing comment made by Lord Brown in R (A) carries no significant weight, and Sales LJ erred in law in relying on it.

48. Further, the reliance of the Court of Appeal on the *dictum* of Lord Brown from a case in which the issue was not argued is itself a good reason why permission to appeal to the Supreme Court would be appropriate in this case. This important question requires proper consideration by this Court on the basis of full argument.

Complete ouster of judicial review is unconstitutional

49. If necessary, the Appellant will submit that s.67(8) is ineffective to oust judicial review, regardless of its wording, because it would contravene a fundamental constitutional principle for Parliament to legislate so as to wholly exclude the power of the High Court to review decisions of tribunals of limited jurisdiction.

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

51. Similarly, in *R v Cheltenham Commissioners*, Lord Denman CJ held that certiorari was available notwithstanding its express exclusion by statute, holding: "*the clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed: and, here, I am clearly of opinion that justice has not been executed.*"

52. The issue of "no certiorari" clauses was addressed by Parliament in the Tribunals and Inquiries Act 1958, in which Parliament abolished all such clauses. It purported to retain only two "ouster" clauses, both of which have subsequently been held to be ineffective: one was the provision considered in *Anisminic*; the other (as incorporated into a later Act) was considered in *R (Fayed) v SSHD* [1998] 1 WLR 763.

53. Since the 1958 Act and *Anisminic*, Parliament has made no attempt to enact any clear provision excluding judicial review or otherwise conferring on any tribunal or authority the power to act unlawfully. The only such provision that has been proposed, in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2003, provoked enormous Parliamentary and public concern as to its constitutional implications and was not enacted.

54. In the modern era, Laws LJ expressed the view in U v SIAC that Parliament did not have the power to oust judicial review. He explained this as an incident of Parliamentary sovereignty, and not a limit upon it:

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

It is submitted that the analysis of Laws LJ in this passage is correct.

Conclusion

55. For all these reasons, the Appellant invites the Court to grant permission to the Appellant to appeal the decision of the Court of Appeal that s.67(8) of RIPA ousts the jurisdiction of the High Court to hear the Appellant's claim for judicial review of the IPT.

DINAH ROSE QC

BEN JAFFEY QC

TOM CLEAVER

Bhatt Murphy

18 December 2017

COURT 17
Appeal No.

C1/2017/0470

THURSDAY 23RD NOVEMBER 2017

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO23682016

BEFORE LORD JUSTICE FLOYD
AND LORD JUSTICE SALES
AND LORD JUSTICE FLAUX

B E T W E E N

THE QUEEN ON THE APPLICATION OF PRIVACY INTERNATIONAL

APPELLANT

- and -

INVESTIGATORY POWERS TRIBUNAL

RESPONDENT

- and -

1. THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALT
2. GOVERNMENT COMMUNICATION HEADQUARTERS

INTERESTED PARTIES

UPON the Court of Appeal handing down judgment on the appeal from the preliminary issued on 3 November 2017.

AND UPON the Court of Appeal having concluded that the High Court has no jurisdiction to consider a claim for judicial review of a decision of the Respondent pursuant to s.67(8) of the Regulation of Investigatory Powers Act 2000.

AND UPON THE RESPONDENT indicating that it made no application in relation to its costs.

IT IS ORDERED THAT:

1. The appeal is dismissed.

2. The Appellant pays the Interested Parties' costs of the appeal in the sum of £10,000.

3. The Appellant's application for permission to appeal to the Supreme Court is refused.

(The Court sat on 5th October 2017 from 10.35 to 16.25)

By the Court

THURSDAY 23RD NOVEMBER 2017

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT

ORDER

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* This order was drawn by A Marie Smith (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to A Marie Smith, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is