UKSC2018/0004

(C1/2017/0470)

IN THE SUPREME COURT

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL, CIVIL DIVISION

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

INTERESTED PARTIES' WRITTEN OBJECTIONS TO THE GRANT OF PERMISSION TO APPEAL TO THE SUPREME COURT AND TO OTHER APPLICATIONS

Introduction

1. These submissions on behalf of the Interested Parties address three matters, namely: (1) permission to appeal, (2) the application for expedition and (3) the application to extend the Protective Costs Orders (PCOs) from the proceedings below[1].

2. Throughout these proceedings the Interested Parties have carried the main burden of making submissions in defence of the proceedings and the Respondent has limited its role to assisting the Court in explaining its composition and functions and the practical difficulties which might arise if the Investigatory Powers Tribunal (IPT) was amenable to judicial review.

[1] It is to be noted that the need to deal with expedition and the PCO application has necessarily meant that these submissions are slightly longer than the 5 pages recommended in Practice Direction 3 at 3.1.10(c).

3. It is the Interested Parties' position that permission to appeal should be refused. The application does not reveal an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time. The unanimous judgment of the Court of Appeal contains no arguable error of law and in circumstances where a new appeal right is due to be introduced later this year on a point of law from decisions of the IPT[2], this is not an appropriate case for determination by the Supreme Court.

4. In any event and without prejudice to that, if permission is granted, expedition should be refused and a new PCO should be made which provides at least some measure of costs protection for the Interested Parties in the event that they successfully defend the appeal.

Permission to Appeal

5. As the Court of Appeal made clear (Sales LJ giving the only judgment, with which Flaux LJ and Floyd LJ agreed), this case turned on a short point of statutory construction in relation to the Regulation of Investigatory Powers Act 2000 (RIPA); the determination of which came down to the clear language used in s.67(8) of RIPA when read in its very particular legislative context[3].

6. Following a detailed and careful review of the statutory scheme governing the IPT and the case law on ouster clauses, the Court of Appeal unanimously concluded that s.67(8) did oust the jurisdiction of the High Court in any application for judicial review of the IPT. In reaching that conclusion the Court of Appeal endorsed the reasoning of the President of the QBD in the Divisional Court [2017] EWHC 114 (Admin); [2017] 3 All E.R. 1127, which this Court is also invited to read when determining this permission application.

7. Prior to dealing with the Appellant's four criticisms of the judgment of Sales LJ, it is to be noted that the Appellant has not fairly summarised his reasoning in §27 of the Grounds of Appeal. The four points made by the Appellant are a gross oversimplification of his judgment, which began with a careful review of the structure and functions of the IPT and with reference to the detailed judgment of the President of the QBD (at §§5-15). That was integral to Sales LJ's interpretation of s.67(8), as he explained at §12 of the judgment

[2] In s.242 of the Investigatory Powers Act 2016, which introduces a new s.67A of RIPA and which is discussed further below at §25.
[3] See judgment of Sales LJ at §§24 & 26.

– "*the procedural regime governing the IPT and its differences from that applicable to the ordinary courts at the time RIPA was enacted are significant features of the legislative context in which section 67(8) of RIPA falls to be considered*". The sophistication of that contextual analysis is not fully acknowledged or addressed in the Appellant's Grounds of Appeal.

8. Sales LJ took into account the "*highly restrictive approach*" to the interpretation of ouster clauses which is adopted by the courts; an approach which reflects the fundamental importance of the rule of law, consistent with the application of the principle of legality (see §§19-21 and 25 of the judgment). He emphasised the need for clear and explicit words to oust the jurisdiction of the High Court given the "*strong presumption that in promulgating statutes Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution*" (§21) and particularly in respect of claims regarding the "*lawfulness of action taken by the intelligence services, the police and others*" (§25).

9. But, despite acknowledging the need for considerable caution, he nevertheless concluded that:
    a. The language of s.67(8) was clear and unambiguous. It was materially different from the language considered by the House of Lords in *Anisminic*[4] – the words in parenthesis being of particular importance, which were not present in section 4(4) of the 1950 Act considered in that case (see §§33-41)[5].
    b. The Appellant's suggested interpretation, particularly of the words in parenthesis, made no sense and would lead to esoteric distinctions which had "*never been part of public law*" (see §§34-37 and, in particular, §39).
    c. It was implicit in the express language used by Parliament that the IPT could be trusted to make sensible decisions on e.g. questions of law and that was "*nothing implausible about this*" given "*the quality of its membership*" (see §38).
    d. The linguistic points were strongly supported by the statutory context in which s.67(8) appears. It was clear that Parliament's intention in establishing the IPT

[4] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147
[5] 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.*'

and laying down the framework of special procedural rules which govern it, was to set up a Tribunal capable of considering complaints under closed conditions and with complete assurance that there would not be disclosure of sensitive confidential information (§§5-12, 42-45).

e. To construe s.67(8) as ineffective to oust judicial review would subvert Parliament's clear intention and would mean that "*despite the elaborate regime put in place to allow the IPT to determine claims against the intelligence services in a closed procedure while guaranteeing that sensitive information about their activities is not disclosed, judicial review proceedings could be brought in which no such guarantee applied.*" (§43-44).

f. It was significant "*how far the subversion of Parliament's purpose would go*" given that there is no neat, absolute distinction between points of law and points of fact in judicial review proceedings. Any judicial review claims would require the reviewing court to examine all the evidence which was before the decision making body and the rules on Public Interest Immunity (PII) did not afford the same protection as Rule 6(1) of the IPT Rules (§44);

g. The Supreme Court decision in *A v Director of the Security Service* [2010] 2 AC 1 ('*A v B*') was powerful persuasive authority for s.67(8) as an "*unambiguous ouster*"; a conclusion which the Supreme Court reached following a considered and careful review of RIPA and the IPT regime (§§46-48).

10. As to the four specific Grounds of Appeal (see §§29-48 of the Appellant's Grounds), the Interested Parties' position can be summarised as follows:

Issue 1: Construction of s.67(8)

11. Sales LJ did not misstate what the rule of law requires in this context (see §§29-30 of the Appellant's Grounds). As is evident from a fair reading of his judgment, in particular at §§19-21, 25 and 38, and from what was said by the President of the QBD at §24 of the Divisional Court judgment (which specifically highlighted the "local law" concern), he fully understood the impact on the rule of law which such clauses might have. His pithy summary of what the rule of law requires at §29 does not reveal a misunderstanding of its implications in this context.

12. Sales LJ also did not err in law when he distinguished s.67(8) from the ouster clause in *Anisminic*, including in his interpretation of the words in parenthesis. The Appellant's suggestion at §32(b) of the Grounds of Appeal that such words are directed to whether jurisdiction can be challenged "on the facts" is wholly untenable and would result in absurd distinctions being drawn between errors about jurisdictional facts and errors of law relevant to jurisdiction. As Sales LJ explained, there is no justification for introducing such esoteric distinctions and Parliament cannot be taken to have intended the same. Had it intended to do so then it can be expected to have used very different language.

13. There is also no merit in the suggestion that Parliament should have used the phrase "purported determination" in s.67(8) if it had wanted to exclude judicial review post-*Anisminic*. As Sales LJ made clear, the words in parenthesis render that unnecessary; the drafter of s.67(8) has expressly averted to the possibility of the IPT making an error of law going to its jurisdiction (see §34) and, in any event, sections 67 and 68 of RIPA, including sections 68(4) and (5) demonstrate that the word "determination" in the Act means a determination in both senses (see §41).

Issue 2: Quality of the IPT's members

14. It is an oversimplification of Sales LJ's reasoning to state that the high quality of the IPT was accepted by him as a basis for the ouster clause. On a proper reading of §38 of his judgment it is clear that Sales LJ was considering the composition of the Tribunal as part of checking his conclusions about the clarity of the language and whether it could have been Parliament's intention to confine decision-making to the IPT. The point he makes is that its membership is entirely consistent with his interpretation of the express language Parliament has used; it is not being advanced as a freestanding reason why judicial review should not lie.

Issue 3: Risk of disclosure of sensitive material

15. Sales LJ was entirely justified in highlighting the highly sensitive nature of IPT proceedings and the very specialist procedures it adopts when considering whether it can have been Parliament's intention to permit judicial review without any bespoke rules which would protect sensitive material. That was a point made by Lord Dyson in *A v B* in the Court of Appeal (in a passage quoted by Lord Brown at §14):

> *"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)

16. As is evident from the decision of the Supreme Court in *A v B*, the statutory context is a central aid to construction and particularly important when interpreting the provisions of RIPA, which formed part of a single legislative scheme which was introduced simultaneously with the Human Rights Act 1998 and the Civil Procedure Rules 2000.

17. At the time that RIPA was introduced there was no ability of the High Court to consider closed material in civil proceedings, including in judicial review proceedings. That only came about with the introduction of the Justice and Security Act 2013 and therefore, cannot have been within the contemplation of Parliament when RIPA was enacted. As emphasised by Sales LJ, any applications for PII do not provide the same protection for sensitive material as section 6(1) of the IPT Procedure Rules which contains no balancing of the public interest in disclosure (see §§7-9 and §§42-44 of Sales LJ's judgment).

18. In those circumstances, there was no error of law in the approach which Sales LJ adopted in §§42-44 of the judgment. The Appellant has no answer to his conclusion that there is no neat division between points of law and points of fact in judicial review proceedings and that it would be wholly unsatisfactory for challenges to such sensitive subject matter to be heard by a Court without powers equivalent to those carefully set out in RIPA and the IPT Rules.

Issue 4: Lord Brown in *A v B*

19. Finally, there can be no criticism of Sales LJ for concluding that the decision of the Supreme Court in *A v B* was "*powerful persuasive authority*" as to the proper interpretation and effect of s.67(8). Although the primary issue in that appeal was whether the IPT had exclusive jurisdiction to hear certain claims under section 7 of the HRA 1998, section 67(8) was one of the provisions of RIPA "*most central to the arguments*" (see Lord Brown at §14) and the Supreme Court unanimously concluded that the provision clearly and unambiguously excluded the application of judicial review to decisions of the IPT. The Supreme Court 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*"[6].

20. Accordingly, to the extent that Sales LJ relied on Lord Brown's views in *A v B* about the effectiveness of the ouster in s.67(8) of RIPA, he was entitled to do so. The decision is important both in demonstrating the proper approach to the interpretation of RIPA and as to the clear meaning of the ouster itself.

Complete ouster unconstitutional

21. There is no merit in the Appellant's alternative case that a complete ouster of judicial review of an inferior tribunal is "unconstitutional" and can never be sanctioned by Parliament (see §§49-54 of the Appellant's Grounds). There is a clear and well-established line of authority which makes plain that 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, in particular:

    a. *R v Medical Appeal Tribunal ex parte Gilmore* [1957] 1 QB 574 per Lord Denning at 583:

        "*I find it very well settled that the remedy by certiorari is never to be taken away by statute except by the most clear and explicit words.*"

    b. *R v Hull University Visitor ex parte Page* [1993] AC 682 per Lord Griffiths at 693H:

        "*The decision in Re A Company [1981] AC 374 shows that Parliament can by the use of appropriate language provide that a decision on a question of law whether taken by a judge or some other form of tribunal shall be considered final and not be subject to challenge either by way of appeal or judicial review.*"

    c. *Cart v Upper Tribunal* [2012] 1 AC 663 per Baroness Hale at §40 (with whom Lords Phillips, Hope, Brown, Clarke and Dyson agreed), citing Lord Wilberforce *Anisminic* at 207B 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*

[6] *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]**.

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."""

22. The decisions referred to at §§50-51 of the Appellant's Grounds of Appeal do not come close to undermining the clear statements set out above, either in terms of the clarity of the proposition expressed or the seniority of the author. In addition, on a proper reading of the judgment of Laws LJ in the Divisional Court in *Cart*[7], he was not saying that Parliament could never oust judicial review (see §54 of the Appellant's Grounds). The point he was addressing in §§28-42 of his judgment was whether judicial review could be ousted by a deeming provision i.e. statutory implication, because of the designation of a court as a Superior Court of Record. As is evident from §31 of his judgment, he expressly accepted that "*the supervisory jurisdiction...can only be ousted by the most clear and express words*" citing the passage from Denning LJ in *Gilmore* set out at paragraph 21(a) above. Accordingly his judgment is not authority for the proposition that it would be unconstitutional for Parliament to oust judicial review by the use of clear and express words.

General public importance

23. In assessing whether this appeal raises a point of law of arguable public importance, the Interested Parties make two further points.

24. **First** it is important to be clear about the proper limits of the IPT's actual decision in the underlying proceedings which are the subject of this challenge. The IPT gave general guidance about the scope of warrants under s.5 ISA, but 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 of the IPT judgment); and that any warrant should be "*as specific as possible*" in relation to the property covered by the warrant (§47). The day to day oversight for such matters rested with the Intelligence Services Commissioner (who has now been replaced by the Investigatory Powers Commissioner) who brought this issue to public attention in his 2014 Report and who made recommendations about the

[7] [2010] 2 WLR 1012

use of such warrants, in particular, indicating that any such warrants should be highlighted in the list which is provided for his selection during his inspections.

25. **Secondly**, a new appeal right from IPT decisions is due to be introduced. Section 242 of the Investigatory Powers Act 2016 (IPA 2016), which introduces a new s.67A into RIPA, provides for an appeal from the IPT on a point of law, 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)[8]. Not only does this new appeal right support the proposition that Parliament intends the statutory regime to be a complete code (with no room for the application of judicial review), it means that an appeal to the Supreme Court would be largely academic, since future decisions of the IPT on points of law would be capable of being appealed.

26. The Interested Parties submit that, in these circumstances, this is not an appeal which merits consideration by the Supreme Court at this time.

Expedition

27. Without prejudice to the above, if permission is granted, this is not a case which is deserving of expedition. It does not concern the liberty of the subject, urgent medical intervention or the well-being of children (see Practice Direction at 4.8.1). The IPT decision which is sought to be challenged is dated 12 February 2016 i.e. almost 2 years ago, and there is no proper justification for accelerating the usual procedures which would apply to this appeal.

28. As to the ongoing relevance of the property interference power in s.5 of the Intelligence Services Act 1994 (ISA), it is the case that any property interference which does not involve obtaining communications, equipment data or other information (which will be governed by an equipment interference warrant under the IPA 2016), will remain capable

[8] The new s.67A is not yet in force. The Secretary of State will, in exercise of the power to make Regulations under s.67A(5), 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. Whilst it was previously anticipated that the appeal route would be commenced before the end of 2017, there has been a short delay pending a consultation on the updated IPT rules (the consultation closed on 10th November 2017) and consideration of responses to that consultation. It has also been recognised that the changes being made to make the appeal route effective should also be reflected through amendments to the Civil Procedure Rules. It is currently expected that the necessary Regulations and updated IPT and Civil Procedure Rules will be completed later this year.

of being authorised under the existing s.5 ISA power. But it is incorrect to assert[9] that this power has been significantly widened by the IPA 2016. Section 251 of the IPA 2016 (amongst other things) amended section 5 of the ISA so that GCHQ and SIS are able to use their powers in the British Islands in support of the "*prevention and detection of serious crime*". It is not the case that GCHQ and SIS were unable previously to undertake property interference in the British Islands on other grounds.

PCO/Remission of Court Fees

29. Whilst the Interested Parties do not object to a PCO being made if permission is granted in this appeal, they do object to the proposition that the PCOs from the proceedings below should simply be extended on the basis that Appellant's total liability should remain at £25,000 (in respect of both the proceedings below and this appeal).

30. The Interested Parties make the following key points (with reference to the key tests set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at §74):

Issues raised of general public importance

31. The range of public interest reasons in this appeal which have been advanced by the Appellant are not accepted.

32. In particular, contrary to the matters set out at §3(ii) of Mr Kernon's third witness statement the decision of the IPT does not embrace the concept of general warrants nor does it threaten the principle of legality. That was not what the IPT decided. 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). But it was no part of the IPT's careful reasoning to conclude that the principle of legality could never have any application in the national security sphere.

33. It is also important to be clear about the proper limits of the IPT's actual decision and the Interested Parties repeat those matters set out at §24 above.

[9] See page 9 of the Appellant's Notice of Appeal.

Fair and just to make the order having regard to the financial resources of the claimant and defendant?/will the appellant probably discontinue and be acting reasonably in so doing?

34. In the Administrative Court Lang J made a PCO which capped the Appellant's liability at £15,000. She also imposed reciprocal caps on the Defendant and the Interested Parties' liability at £15,000 each i.e. making a total of £30,000 (see her order dated 17 June 2016).

35. The Court of Appeal rejected an application by the Appellant to roll over that same PCO to encompass the Court of Appeal proceedings. The Court of Appeal accepted the Interested Parties' submissions that a new PCO should be made and "*In view of Privacy's...cashflow predictions*" decided that it was appropriate to impose an order which capped the Appellant's liability for the appeal at £10,000 and imposed a reciprocal cap on the Respondent's liability (which included the Interested Parties) in the sum of £10,000[10]. An attempt by the Appellant to persuade the Court of Appeal to review the terms of the PCO was also rejected[11].

36. The Appellant's evidence is to the effect that the PCOs from below (which limit the Appellant's liability to £25,000) should simply be rolled over to encompass this appeal and with no extension to the amount of those caps.

37. For the following reasons, that is not a fair and just approach in this appeal.

    a. In Mr Kernon's third witness statement in support of this application he indicates at §19 that the Appellant's unrestricted funds for the financial year 2017/18 are estimated to be £1,059,153. This is said to be a decrease from £1,307,630 in 2016/2017, although in the second witness statement of Mr Kernon. dated 1 March 2017, he indicated that these unrestricted funds were £322,000[12].

    b. Mr Kernon states that the unrestricted funds for 2017/18 amount to 4 months of operating costs (see §19 of his third statement). Although it is accepted that the

[10] See order of Beatson LJ dated 3 April 2017.
[11] See e-mail dated 7 June 2017 from the Civil Appeals Office in which Lord Justice Beatson directed that the PCO should remain at £10,000.
[12] The discrepancies between the figures at §19 of the third statement and §15 of the second witness statement (exhibited at BK1 of the third statement) are not understood.

trustees have a policy of seeking to increase unrestricted reserves until they are built to a level which ensures that approximately 6 months' worth of core activity could continue, it is to be noted that the Appellant's unrestricted reserves have remained at less than 4 months of operating costs since 2014/2015 (see the first witness statement of Mr Kernon at §6 and his second witness statement at §9). It is also to be noted that the Charity Commission Guidance (attached to Mr Kernon's first witness statement – see Exhibit BK1 to the third statement) does not recommend any particular level or range of reserves for charities (see in particular §3.4). Nowhere in that Guidance is the 6-month reserve figure recommended. That Guidance also makes clear that any reserves policy should not be regarded as static and may change over time (see §3.3).

c. Whilst the Appellant has indicated that it has had difficulties fundraising in relation to these proceedings, it is to be noted that its fundraising for the Court of Appeal proceedings was significantly more successful than at first instance i.e. an increase from £1,164 to £9,063 (see §7 and §10 of his third statement). In addition, the Interested Parties note that "strategic litigation" does appear to be a core part of the Appellant's activities – as is apparent from its Audited Financial Statements and Trustees Report for the year ended 31 January 2017 at page 7 (exhibited to Mr Kernon's third statement at BK5). In those circumstances, it is surprising that the Appellant has indicated that its trustees are unwilling to devote any further unrestricted funds to this litigation.

d. The Interested Parties incurred costs of £25,210 i.e. significantly in excess of the £15,000 costs cap which was ordered by Lang J, in the Divisional Court. Their costs in the Court of Appeal were approximately £22,650; again significantly in excess of the £10,000 costs cap which was ordered by Beatson LJ.

e. The Divisional Court rejected an application by the Appellant that there should be no order for costs and awarded the Interested Parties the sum of £15,000 in accordance with the PCO (which was expressed as not to be enforced until the conclusion of any proceedings in the Court of Appeal or further order) (see the Divisional Court order dated 9 February 2017). (It is to be noted that the

Defendant (i.e. the IPT) did not seek any of its costs in the Divisional Court or the Court of Appeal.)

f. The Interested Parties are therefore already more than £22,000 out of pocket following the proceedings below. If the Appellant's total liability remains at £25,000 in this appeal, the Interested Parties are likely to be substantially disadvantaged in terms of their costs recovery if they are successful in resisting the appeal.

g. Finally, it is to be noted that the Appellant's counsel and solicitors are not acting pro bono, but are on conditional fee agreements with their fees capped.

38. In the light of the matters set out above, it is submitted that a fair and just result would be to (1) order a fresh PCO in these appeal proceedings or alternatively (2) to extend the limit of the Court of Appeal PCO to take into account at least some of the likely costs of the appeal.

39. For the avoidance of doubt, it is the Interested Parties' submission that the Appellant would not be acting reasonably if it discontinued this appeal if its costs liability was to be extended in this appeal.

40. As to the remission of Court Fees, whilst this is principally a matter for the Court, the Interested Parties would note that the Appellant's unrestricted funds are such that the Appellant ought not to be exempted from these fees.

January 2018

JAMES EADIE QC

KATE GRANGE QC