IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2018/0004**

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

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

RESPONSE TO NOTICES OF OBJECTION

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1. The Appellant seeks permission to provide this brief response to the Notices of Objection.

2. The Interested Parties make two points on the issue of general public importance:

   a) First, it is said the appeal is not of general public importance because of the forthcoming introduction of a route of appeal against some decisions of the IPT [25].[1]

   b) Secondly, the Interested Parties submit that the scope of warrants is under the "*day to day oversight*" of the Commissioners, so that there is no reason for concern [24].

3. Neither point has merit, for the following reasons:

[1] The Investigatory Powers Tribunal takes the same point in its Notice of Objection.

a) No right of appeal is yet in force, and there is no guarantee as to whether or when any such right will be brought into force. The current proposal is for implementation at some point in 2018. Before that can happen, amendments are needed to the CPR.

b) Even if the right of appeal is brought into force as enacted, it will not cover all decisions of the IPT. The right of appeal excludes all decisions relating to a "*procedural matter*" (s. 68(4C)(b) RIPA 2000, as amended). Thus, any complaint about an unfair procedure adopted by the IPT, or the lack of independence or bias, will continue to be subject to the ouster clause and outside the scope of any appeal.

c) The right of appeal is not retrospective. If and when it is brought into force, the Appellant will not be able to use it to obtain a remedy for the substantive unlawfulness that it has suffered, which is the subject matter of this appeal. In the meantime, the IPT's decision permitting the issue of a general warrant for computer hacking (known within the security and intelligence services as 'CNE', computers and network exploitation) continues to be applied by the security and intelligence services. Other persons affected are unlikely to be able to seek a remedy, given that a warrant is, for obvious reasons, granted and executed in secret.

d) If the Interested Parties are correct, the only means of correcting the IPT's error of law is for the Appellant to wait for the right of appeal to be introduced, then seek to relitigate the same issue of law before the IPT and invite it to grant permission to appeal. Not only would that course leave the Appellant without a remedy for past unlawful conduct, but it would permit the continuation for a lengthy and indefinite period of an unlawful and secret practice that is adversely affecting the fundamental rights of an unknown number of people.

e) The Commissioners are bound by the decisions of the IPT. They cannot provide any remedy against a decision of the IPT that is wrong in law. The Commissioners have no power to quash a warrant, notify victims of an over-broad warrant or grant any other remedy. Only the Court can grant an effective remedy.

4. In any event, the public and constitutional importance of the determination of the question whether and by what means Parliament can oust the supervisory jurisdiction of the High Court is plain. The legal principles applied by the Court of Appeal when answering that question were wrong. The Court of Appeal's judgment has serious implications for the rule of law generally, not just claims before the Investigatory Powers Tribunal. It is submitted that it is both appropriate and important for this question to be decided by the Supreme Court.

DINAH ROSE QC

BEN JAFFEY QC

TOM CLEAVER

Bhatt Murphy

5 February 2018