

IN THE SUPREME COURT OF THE UNITED KINGDOM

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

BETWEEN:

THE QUEEN on the application of
PRIVACY INTERNATIONAL

Appellant

-and-

THE INVESTIGATORY POWERS TRIBUNAL

First Respondent

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

Second Respondents

FIRST RESPONDENT'S NOTE

1. This Note has been prepared on behalf of the First Respondent, the Investigatory Powers Tribunal ("the IPT").

The IPT's role in these proceedings

2. In the hearings before the Divisional Court and the Court of Appeal the IPT made plain that it would not make any submissions in relation to the impugned judgment concerning s.5 of the Intelligence Services Act 1994. The IPT sought to adopt a non-adversarial role

to assist the court and to that end, it submitted detailed Notes in relation to its statutory functions and the way in which it operates. The IPT will maintain that approach before the Supreme Court.

The legislative scheme

3. Section 67(8) of the Regulation of Investigatory Powers Act 2000 (“RIPA”) recognises that there may be provision for the Secretary of State to order (or *a fortiori* Parliament to conclude) that there could be an appeal from the IPT. The Investigative Powers Act 2016 provides for such an appeal using the “second tier” appeal test approved by the Supreme Court in *R (Cart) v Upper Tribunal* [2011] UKSC 28 [2012] 1 AC 663 in relation to the Upper Tribunal.
4. This new provision means that a complainant as well as a respondent to a complaint can appeal against determinations of the IPT falling within Section 68(4)¹ and 68 (4C)² of RIPA – i.e. final determinations as well a final decision on a preliminary issue. No appeal can be brought in relation to a decision concerning a procedural matter.
5. In September 2017 the Secretary of State issued for consultation a new set of procedural rules for the IPT which will give effect to the appeal rights introduced by s.242 of the Investigatory Powers Act 2016 and which also reflects the IPT’s developed procedural practice. It is envisaged that the appeal rights and the new rules will come into force later this year.

¹ Section 68(4) provides: “(4) Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—

- (a) a statement that they have made a determination in his favour; or
- (b) a statement that no determination has been made in his favour.”

² This provides:

“(4C) Where the Tribunal make any decision which—

(a) is a final decision of a preliminary issue in relation to any proceedings, complaint or reference brought before or made to them, **and**

(b) is neither a determination of a kind mentioned in subsection (4) nor a decision relating to a procedural matter,

they must give notice of that decision to every person who would be entitled to receive notice of the determination under subsection (4) or (4A).” (Emphasis added)

6. The new appeal right means that future decisions of the IPT on points of law (including any challenge to the power under s.5 of the Intelligence Services Act 1994, as amended by s.251 of the Investigatory Powers Act 2016) would be capable of being appealed.

Conclusion

7. In the premises it is submitted that the ouster clause in RIPA falls to be construed within the context that in this sensitive area the legislature provided for there to be an appeal and has now done so.

JONATHAN GLASSON QC

Matrix Chambers

12 April 2018