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

1st Respondent

-and-

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2) GOVERNMENT COMMUNICATIONS HEADQUARTERS

2nd Respondents

2ND RESPONDENTS' REASONS IN SUPPORT OF DISMISSAL OF THE APPEAL

Introduction

1. This document restates the substantive points which were made in the Written Objections document which was attached to the Notice of Objection filed by the 2nd Respondents (who were at that point named as Interested Parties).

2. 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[1].

3. 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

[1] See judgment of Sales LJ at §§24 & 26.

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.

4. 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 – "*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.

5. 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).

6. 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*[2] – the words in

[2] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

parenthesis being of particular importance, which were not present in section 4(4) of the 1950 Act considered in that case (see §§33-41)[3].

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 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).

[3] 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.*'

7. As to the four specific Grounds of Appeal (see §§29-48 of the Appellant's Grounds), the 2nd Respondents' position can be summarised as follows:

Issue 1: Construction of s.67(8)

8. 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.

9. 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.

10. 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

11. 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

12. 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)

13. 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.

14. 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).

15. 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*

16. 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*"[4].

17. 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

18. 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:

[4] *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]**.

"*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 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.""*

19. 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*[5], 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.

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[5] [2010] 2 WLR 1012