Investigatory Powers Tribunal – amenability to judicial review – ouster clause – Regulation of Investigatory Powers Act 2000, section 67(8)

Judgment of the Court of Appeal: [2018] 1 WLR 2572; [2017] EWCA Civ 1868

Time occupied in the Court of Appeal: 1 day

Court of Appeal reference: C1/2017/0470

UKSC 2018/0004

In The Supreme Court of the United Kingdom

ON APPEAL

FROM THE COURT OF APPEAL (CIVIL DIVISION)

FLOYD, SALES AND FLAUX LJJ

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

STATEMENT OF FACTS AND ISSUES

FACTS AND PROCEDURAL CHRONOLOGY

1. The Appellant made a complaint to the Investigatory Powers Tribunal ("IPT") alleging that the Government Communications Headquarters ("GCHQ") had carried out unlawful computer and network exploitation (also known as "computer hacking").

2. The IPT directed the hearing of preliminary issues on assumed facts. This enabled it to consider issues of law in an open *inter partes* hearing.

3. One of the preliminary issues was the proper interpretation of the power to issue a property interference warrant in section 5 of the Intelligence Services Act 1994 ("ISA 1994").

4. On 12 February 2016, the IPT gave judgment as to the construction of section 5 of the ISA 1994, following an open hearing on 1 to 3 December 2015: *Privacy International v SSFCA* [2016] UKIP Trib 14_85-CH.

5. Amongst other things, the IPT held that section 5(2) of the ISA 1994, which empowers the Secretary of State to issue a warrant authorising *"specified"* acts in respect of *"specified"* property, permits the grant of warrants authorising a class of possible activity in respect of a class of property. 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.

6. There is currently no right of appeal from a decision of the IPT. The Investigatory Powers Act 2016 has created a right of appeal from the IPT to the Court of Appeal on a point of law, inserting a new section 67A into the Regulation of Investigatory Powers Act 2000 ('RIPA 2000'), which is not yet in force.

7. On 9 May 2016, the Appellant commenced proceedings for judicial review, seeking an order quashing the decision of the IPT, on the ground that its interpretation of section 5(2) of the ISA 1994 was wrong in law.

8. On 17 June 2016, Lang J (a) granted permission for judicial review, (b) made a Protective Costs Order, and (c) directed the hearing of a preliminary issue on the question of whether the High Court's jurisdiction to entertain a claim for judicial review to quash the IPT's decision was ousted by section 67(8) of RIPA 2000.

9. The preliminary issue was heard by the Divisional Court on 2 November 2016 (Sir Brian Leveson PQBD and Leggatt J).

10. On 2 February 2017, the Divisional Court gave judgment on the preliminary issue and dismissed the claim on the ground that section 67(8) of RIPA ousted judicial review: [2017] EWHC 114 (Admin); [2017] All ER 1127.

11. Leggatt J concurred with Sir Brian Leveson PQBD in the result, noting the cogency of his opinion and so as to avoid the need for a re-hearing before a differently constituted Divisional Court, but gave a judgment containing reasons why the decision that jurisdiction of the High Court had been ousted was wrong in law. Permission to appeal was granted. On 3 April 2017, Beatson LJ made a Protective Costs Order for the proceedings before the Court of Appeal.

12. The Court of Appeal heard the Appellant's appeal on 5 October 2017.

13. On 23 November 2017, the Court of Appeal (Sales LJ, with whom Floyd LJ and Flaux LJ agreed) gave judgment dismissing the appeal: [2017] EWCA Civ 1868; [2018] 1 WLR 2572.

14. The Court of Appeal refused permission to appeal.

15. The Appellants sought permission to appeal from this Court, which was granted on 22 March 2018.

STATUTORY FRAMEWORK

16. Section 67(8) of 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."*

ISSUES IN THE APPEAL

(1) whether section 67(8) of RIPA 2000 "ousts" the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal for error of law?

(2) whether, and, if so, in accordance with what principles, Parliament may by statute "oust" the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction?

DINAH ROSE QC

BEN JAFFEY QC

TOM CLEAVER

Counsel for the Appellants

JONATHAN GLASSON QC

Counsel for the Respondent

JAMES EADIE QC

KATE GRANGE QC

CATHERINE DOBSON

Counsel for the Interested Parties