UKSC 2018/0004

In The Supreme Court of the United Kingdom

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

APPELLANT'S REPLY

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1. This Reply responds to the new submissions made by the Interested Parties in their Written Case of 1 November 2018. It addresses the following issues:

   1.1. whether there is any difference in the approach which should be taken to the construction of provisions which are claimed to oust the judicial review of so-called "inferior courts of law" as opposed to tribunals; and, if so, whether the IPT is properly to be regarded as a court or a tribunal for this purpose;

   1.2. whether a decision based on an error of law is a nullity; and

1.3. whether authorities concerning statutory limitation provisions which impose a time limit for judicial review are of any relevance or assistance in the construction of s.67(8) of the Regulation of Investigatory Powers Act 2000 ("**RIPA 2000**").

The application of interpretative principles to inferior courts of law

2. The Interested Parties contend that the principle of legality, requiring crystal clear and express language, does not apply where the court is asked to construe a provision purporting to exclude review of an inferior "*court of law*" (IP Case at §59), as opposed to a tribunal. They submit that the interpretation of such a provision is "*determined by reference to careful examination of the nature of the court, its jurisdiction and its powers, not by reference to the principle suggested by the Appellant*" (IP Case at §66). The Interested Parties rely in support of this proposition on the *obiter* comments of Lord Diplock in *Re Racal Communications* [1981] AC 374 at p.383E-G.

3. This proposition is wrong in law, and contrary to authority, including the subsequent decision of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237. The correct distinction is between a court of unlimited jurisdiction, such as the High Court or the Court of Session, and courts or tribunals of limited jurisdiction. See Laws LJ in *U v SIAC* [2010] 2 WLR 1012 at [68]-[72], approved by the Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 at [30]-[31], [37] per Baroness Hale.

Review of inferior courts

4. Before the Judicature Act 1873, there was no right of appeal against the decisions of the courts of common law.[1] Decisions were challenged by the writ of error, by which a superior court could reverse the decision of an inferior court for a material error on the face of the record. Professor Sir J.H. Baker QC in *An Introduction to English Legal History* (4th ed, Butterworths 2002) at p.137 states:

[1] The formal absence of an appeal from a decision of the King's Bench was not the position in substance. As Professor Sir JH Baker explains, "*the decision of… the King's Bench… was a decision of the whole bench, not of the trial judge alone… In case of doubt, proceedings would be adjourned as often as necessary to enable the doubts to be fully explored and for the judges to deliver their 'arguments' (in effect tentative judgments), which could be reviewed on successive occasions until a consensus of judicial opinion was found*" (pp.135-6). Cases would often be repeatedly reconsidered and re-argued before a final judgment was entered.

> "Every court of record was subject to the surveillance of some other tribunal to ensure that in giving judgment it did not err on the face of the record. From local courts of record, such as borough and franchise courts, from the counties palatine, and from the Common Pleas itself, error went to the King's Bench."

5. The prerogative writs (habeas corpus, certiorari, prohibition, quo warranto and mandamus) operated alongside the writs of error in respect of a broader range of decisions. The writs were predominantly issued out of the King's Bench exercising its supervisory jurisdiction, as explained by Baker at p.143:

> "The broad notion was that the king's courts should keep all lesser authorities within the procedural and jurisdictional bounds set by the law and provide the subject with a remedy if tribunals or officials exceeded their legal authority or gave orders which were patently contrary to law."

6. The supremacy of the King's Bench over all other courts is described by Holdsworth with reference to Coke's Fourth Institute (*A History of English Law, Volume 1* (3rd ed, Methuen & Co Ltd 1922) at p.212):

> "It has jurisdiction 'to examine and correct all and all manner of errors in fact and in law of all the judges and justices of the realm in their judgments, process, and proceedings in courts of record, and not only in pleas of the crown, but in all pleas, real, personal and mixt, the court of Exchequer excepted as hereafter shall appear.'"

Blackstone thus described the King's Bench as "*the supreme court of common law in the kingdom*" (Commentaries Book III, Chapter 4, p.41).

7. The principal use of the writ of certiorari by the King's Bench was to supervise inferior courts: see, e.g., Groenwelt v Burwell (1700) 1 Salk 144, 90 ER 1000 per Holt CJ ("*certiorari lies; for no Court can be intended to exempt from the superintendency of the King in this Court of King's Bench. It is a consequence of every inferior jurisdiction of record, that their proceedings be removable to this Court, to inspect the record, and see whether they keep themselves within the limits of their jurisdiction*") and R v Inhabitants in Glamorganshire (1701) 1 Ld Raym 580, 91 ER 1287 per Holt CJ ("*this court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if* [the justices of peace] *under the pretence of such an Act proceed to encroach jurisdiction to themselves greater than the act warrants; this court will send a certiorari to them; to the end that this court may see that they keep themselves within their jurisdiction; and if they exceed it, to refrain them*").

8. The presumption that Parliament should not be taken to intend to oust judicial review in the absence of clear and express words developed against this backdrop and was fully applicable to inferior courts of law:

8.1. In *Smith, Lluellyn, Commissioners of Sewers* (1668) 1 Mod 44, 86 ER 719, a statutory provision[2] purporting to oust the jurisdiction of the King's Bench to review orders of the Commissioner of Sewers was ineffective. Kelynge CJ at p.720 said, "*[Y]ou cannot oust the jurisdiction of this Court without particular words in the Act of Parliament*." Moreton J at p.720 said, "*If the commissioners exceed their jurisdiction, where are such matters to be reformed but in this Court? If any Court in England of an inferior jurisdiction exceeds their bounds, we can grant a prohibition*." The Commissioner of Sewers was an inferior court of specialised jurisdiction.[3] In *R v St Edmundsbury and Ipswich Diocese (Chancellor) ex p White* [1948] 1 KB 195, it was described by Wrottesley LJ at p.212 as "*a new jurisdiction created by Act of Parliament administering the common law; to such courts it is clear that certiorari would lie, unless expressly excluded*."

8.2. In *Berkley v Bragge* (1754) 1 Kenyon 80, 96 ER 923, the statute provided that "*no certiorari shall supersede any order made by the justices* [of the peace] *in pursuance*" of the Excise laws. Wright J at p.102 held that the provision was not sufficiently clear to remove the possibility of *certiorari*.[4] Ryder CJ at p.99 said:

> "There can be no doubt but this Court, by the common law, has in general a right to bring before it all records, in order to rectify wrong ones, if rectifiable, and, if not, to quash them. This jurisdiction is absolutely necessary: without such a one somewhere, the many inferior jurisdictions would run counter to each other, and be soon involved in confusion. This may be done by writ of error, mandamus, habeas corpus, &c. in several cases."

8.3. *R v Cheltenham Commissioners* 113 ER 1211, (1841) 5 Jur 867 concerned the effectiveness of a provision purporting to take away *certiorari* of orders of the Quarter Sessions, a court comprised of magistrates with the power to

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[2] The statute in question in that case had provided that orders of the Commissioners of Sewers were to be binding without Royal assent and "*shall not be reversed but by other commissioners*".

[3] See *Commins v Massam* (1846) March 196, 82 ER 473 per Heath J ("*… there is no Court whatsoever but is to be corrected by this Court*"). See also S.A. Smith, *Judicial Review of Administrative Action* (4th edn, Stevens & Sons Ltd 1980) at p.588.

[4] See also *R v Moreley* (1760) 2 Bur 1041, 97 ER 696 at p.1042 per Lord Mansfield (Written Case at §29).

determine appeals against rates set by commissioners. Lord Denman CJ at p.1214 held that the clause did not preclude the King's Bench from "*exercising superintendence over the proceedings*" and found that "*the Court was improperly instituted; and that rendered the decision invalid*." As explained by Lord Scarman in Attorney General v BBC [1981] AC 303 at p.361D, "*there could be no doubt that the Quarter Sessions … were part of the judicial system of the Kingdom*" and properly characterised as inferior courts.

9. The same principle applies under Scots law (Written Case at §32). For example, in *Ashley v Magistrates of Rothesay* (1873) 11 M 708, the Court of Session (Inner House) held that a statutory provision[5] did not oust judicial review of the Magistrates for breach of natural justice. Lord President Inglis at p.716 made reference to the Court of Session's power to supervise proceedings of inferior courts:

> "… the present is not a process of review, nor is it in any proper sense a stay of execution. It is a proceeding brought in the Court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior Court, and the jurisdiction of this Court to entertain such an action cannot be doubted, notwithstanding the entire prohibition of review of any kind. This is not review, as I said before, but it is the interference of the Supreme Court for the purpose of keeping inferior Courts within the bounds of their jurisdiction. The Magistrates having exceeded their powers under the statute their order, whatever it may be – or decision – is liable to be set aside."

10. Thus, historically, the King's Bench and the Court of Session had jurisdiction to issue a writ of certiorari to supervise inferior courts of law, which was not to be removed except by the clearest possible words. The reasons were well explained by Blackstone (*Commentaries,* Book III, Chapter 7, p.112). Without a Court of unlimited jurisdiction with power to review and control all other inferior courts and tribunals, the same question of law might be determined in different ways. The very idea of a common law across the realm would be frustrated, together with legal certainty in relation to the standards of legal accountability. This is the same concern that was identified by Baroness Hale in *Cart* – the risk of local law:

> "… in handling of matters clearly within their cognisance, they transgress the bounds prescribed to them by the laws of England … in such cases also a

[5] Section 34 of the Public Houses Amendment Act 1862 provided that "*… no warrant, sentence, order, decree, judgment or decision made or given by any Quarter Sessions … shall be subject to reduction, advocation, suspension or appeal, or any other form of review or stay of execution, on any ground or for any reason whatever other than by this Act provided*."

> prohibition will be awarded … else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition."

Re Racal

11. The Interested Parties rely on the following statement of Lord Diplock in *Re Racal Communications* [1981] AC 374 at p.383E-G for the proposition that this presumption does not apply where "*the court is confronted with clauses excluding review of a court of law*" (IP Case at §59):

> "But there is no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption … upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide."

12. It is submitted that these comments are not a correct statement of the law, and should not be followed, for the following reasons:

    12.1. First, the paragraph referred to above is an *obiter dictum*. The issue in the appeal was whether the High Court, when interpreting the Companies Act 1948, was amenable to judicial review. The House of Lords held it was not: the relevant distinction was between a court of unlimited jurisdiction, such as the High Court, and a court of law of limited jurisdiction (see Lord Diplock at p.384G). This is emphasised by Laws LJ in *U v SIAC* at [80], which refers to the paragraph and states that "*Lord Diplock was not in the Racal case considering the force or effect of any ouster clause … the issue in the case was, in effect, whether the Court of Appeal had the power to entertain a form of judicial review over the High Court*."

    12.2. The Interested Parties mischaracterise the case as concerning a High Court Judge "*exercis[ing] the statutory jurisdiction conferred upon him by s.441(1) of the Companies Act 1948 (see p.379G-H). In that sense, the Judge was acting as an inferior*

court, albeit one vested with all the powers of a superior court of record" (IP Case at §61). This is incorrect: judicial review was not available to challenge the judge's decision because the High Court is a court of unlimited jurisdiction. The ratio of the case is set out by Lord Diplock at p.384D-G:

> "There is in my view … an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court acting in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required to construe the words of the statute by which the question submitted to his decision was defined. There is simply no room for error going to his jurisdiction, nor, as is conceded by counsel for the respondent, is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court; and if, as in the instant case, the statute provides that the judge's decision shall not be appealable, they cannot be corrected at all."

12.3. Secondly, Lord Diplock did not refer to any of the English or Scottish cases referred to above which apply a strict approach to the purported ouster of review of inferior courts, and which pre-date *Anisminic*. It appears that none of these authorities was cited to the House of Lords in *Re Racal*. Lord Diplock's *dictum* was thus not only *obiter*, but *per incuriam*.

12.4. Thirdly, no such distinction between "*tribunals*" and "*inferior courts*" was drawn in any of the other speeches given in *Re Racal*.

12.4.1. Although all five members of the Court held that the appeal should be allowed, only Lord Keith of Kinkel expressed agreement with Lord Diplock's reasons (at 391D).

12.4.2. Lord Scarman decided that it would be wrong "*to invoke the Anisminic principle as an aid to the construction of a provision excluding appeal from the High Court to the Court of Appeal*" because "*The Court of Appeal has no original supervisory jurisdiction over the High Court comparable with the High Court's long established supervisory jurisdiction over inferior*

tribunals. Indeed, the Court of Appeal's jurisdiction over the High Court is itself the creature of statute." (392G-393B).

12.4.3. Lord Edmund-Davies similarly stressed "*that the Court of Appeal has no original jurisdiction and that in relation to High Court decisions it has no jurisdiction beyond that prescribed in [statute]*" (388E). He expressly distinguished *Anisminic* on the grounds that it did not concern "*a decision of the High Court*" (389B).

12.4.4. Lord Salmon distinguished *Anisminic* on the same grounds ("*It has no application to any decision or order made at first instance in the High Court of Justice*"). In doing so, he also expressed the view – directly contrary to Lord Diplock's *obiter dictum* – that the principle in *Anisminic* did apply to an inferior court: "*It is confined to decisions made by commissioners, tribunals or inferior courts which can now be reviewed by the High Court of Justice – just as the decisions of inferior courts used to be reviewed by the old court of King's Bench under the prerogative writs*." (386A-B).

12.5. Fourthly, in any event, as set out below, subsequent authorities (and Lord Diplock himself) have made it clear that *Anisminic* and the principle of legality apply without distinction both to inferior courts and to tribunals.

12.6. Fifthly, as a matter of principle, and as set out further below, there is no coherent reason why a distinction should be drawn between inferior courts and tribunals in this context. The rationale for the application of the principle of legality to a purported ouster of judicial review applies equally to both. Neither are there any clear criteria by which inferior courts may be distinguished from tribunals.

Case law following Re Racal

13. The cases decided after *Re Racal* make clear that there is no merit in the Interested Parties' contention that a different approach to construction applies to inferior courts as opposed to tribunals:

13.1. In *O'Reilly v Mackman* [1982] 3 WLR 1096 at p.278D, Lord Diplock himself resiled from the distinction he had drawn in *Re Racal*. He described the effect of *Anisminic* as follows:

> "[*Anisminic*] has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction."

13.2. This passage was considered by the Divisional Court in *R v HM Coroner for Greater Manchester, ex p Tal* [1985] QB 67. The issue was whether a decision of a coroner's inquest was subject to judicial review for jurisdictional error alone. Goff LJ at p.81C declined to follow a prior decision of the Divisional Court in *R v Surrey Coroner, ex p Campbell* [1982] QB 661, where the court relied upon the *dictum* of Lord Diplock in *Re Racal* at p.383E-G and held that the *Anisminic* principle was restricted to statutory tribunals.

13.3. Goff LJ at p.81G-H stated that Lord Diplock's "*authoritative statement*" in *O'Reilly v Mackman* cited above made it "*plain that, in his observation in [Re Racal] Lord Diplock did not intend to say that the Anisminic principle did not extend to inferior courts as well as tribunals*." The Divisional Court held that all errors of law committed during the course of the coroner's inquest were reviewable by the court and "*as a matter of principle, the Anisminic principle applies to inferior courts as well as inferior tribunals, nevertheless we do not wish to be understood as expressing any opinion that the principle will apply with full force in the case of every inferior court*." (p.82C-H).

13.4. The relevance of any such distinction between inferior courts and tribunals was again rejected in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, which considered whether the High Court's power to review the decisions of the County Court had been ousted by a statutory right of appeal under s.54(5) of the Access to Justice Act 1999. Lord Phillips rejected the submission that the general presumption against ouster should not be applied in respect of an inferior court at [43]-[44]:

> "[43] Mr Sales founded on Lord Diplock's comments in *In re A Company* [1981] AC 374[6] in urging us that the general presumption against ouster of judicial review should not be applied on the facts of this case. He submitted that it was clearly implicit in the provision of section 54(4) of the 1999 Act that the decision of an appeal court refusing leave to appeal was not susceptible to challenge by judicial review. …
>
> [44] We have not been persuaded by these submissions. Nearly 50 years ago Denning LJ stated in *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574, 583 that "*the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words*". All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory *implication*. Accordingly, we reject Mr Sales's submission that section 54(4) of the 1999 Act ousts the jurisdiction of the High Court to subject to judicial review the decision of a county court to refuse, or to grant, permission to appeal."

13.5. The Interested Parties rely on Lee v Ashers Baking Company Ltd [2018] UKSC 49 (IP Case at §60). It affords no support for their approach. In that case, although the context was an appeal from the Northern Ireland Court of Appeal Lord Mance nevertheless stated that the ouster of an appeal would "*require much clearer words – and they would clearly be unusual and surprising words – to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law*" (at [88]).

14. The proper distinction, as set out by Laws LJ in U v SIAC at [68], is between courts of unlimited jurisdiction and courts and tribunals of limited jurisdiction:

> "The true contrast is between the High Court on the one hand and courts of limited jurisdiction on the other, and it is clear to my mind that the references (of which there are several) to "inferior courts" means, simply, courts of limited jurisdiction. … The High Court as a court of unlimited jurisdiction cannot be subject to review. On the other hand, courts whose jurisdiction is limited will generally be so subject: they will be amenable to a higher judicial authority – the High Court – to fix the limits of their authority."

15. U v SIAC itself concerned a court that had been designated by Parliament as a superior court of record (unlike the IPT). This did not prevent the full application of the Anisminic approach. Laws LJ at [70] referred to R v Cripps, ex p Muldoon [1984] QB 68 at p.87B-F,

[6] Another name for Re Racal.

which is quoted by the Interested Parties (IP Case at §63), and concluded that "*the approach being commended is to examine all the characteristics of the court in question in order, not to dignify it with a name or status, but to ascertain whether in substance it should be subject to the judicial review jurisdiction of the High Court. … [T]he nearest one gets to a general principle is the 'underlying policy' to which Goff LJ refers, namely that tribunals (and the context shows that courts are included) of limited jurisdiction should generally be subject to judicial review.*" Thus, the presumption applies with equal force both to inferior courts and to tribunals.

16. Similarly, in *R (Woolas) v Parliamentary Election Court* [2012] QB 1, the Divisional Court held that a finality provision[7] did not oust the supervisory jurisdiction to review the decisions of the Parliamentary Election Court, comprising two Judges of the High Court. Even though that Court, like the County Court and SIAC, is undoubtedly a court of law, the approach in *Anisminic* was applied. Thomas LJ held at [47]:

> "… the fact that the decision of an election court as a judgment declaring the status of the election is a judgment in rem and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required."

17. The Divisional Court, applying Lord Diplock's distinction between decisions of judges of the High Court "*acting in that capacity*" and a court of limited jurisdiction in *Re Racal* at p.384D, held that an election court comprised of two High Court judges was a court or tribunal (the judgment uses both terms) of limited jurisdiction "*and therefore the right of judicial review is not excluded*" (at [55]).

18. This is the only coherent distinction that can be drawn. It is notable that the Interested Parties have not put forward any good reason why the distinction between a court of law and a tribunal which they seek to make should have the consequences they assert that it does. They merely state (IP Case at §§58, 59) that an inferior court is a body which is "*exercising judicial functions*" (which is equally true of a tribunal) or has the character of a "*court of law*" (which simply restates the question rather than answering it).

[7] Section 144 of the Representation of the People Act 1983 provides that "*the determination so certified shall be final to all intents as to the matters at issue on the petition*."

19. Neither have the Interested Parties set out any test or criteria by reference to which they say that a court of law can be distinguished from a tribunal. That lack of a clear distinction renders the Interested Parties' analysis unworkable:

    19.1. The logic of their position is that, if Parliament re-enacted today in identical language the statutory formula which was considered in *Anisminic*, the effectiveness of that formula in ousting judicial review would differ depending on whether the body to which it applied is to be regarded as a 'tribunal' or an 'inferior court'.

    19.2. That being so, a court interpreting such a provision would need to reach a view as to whether the body in question is a 'tribunal' or an 'inferior court' in order to know what meaning to give the words used.

    19.3. The result would be that the legal effect of the provision would turn on the court's consideration of whether (i) the body in question is sufficiently 'court-like' that Parliament must have intended to oust judicial review even of its unlawful decisions, or (ii) whether it is sufficiently 'tribunal-like' that Parliament must have intended that the ouster should be more limited.

    19.4. Far from respecting Parliamentary sovereignty as the Interested Parties suggest, that analysis would have the effect of putting a substantial policy decision (as to whether a body has characteristics which in all the circumstances justify it having the power to make unlawful decisions without possibility of review) in the hands of the court rather than Parliament.

The nature of the IPT

20. In any event, even if such a distinction were held to exist, the IPT is properly to be characterised as a tribunal of limited jurisdiction rather than a court of law. The Interested Parties themselves emphasise the unusual nature of the IPT, which is unlike any court of law (see IP Case at §§24, 25). As Lord Brown put it in *Al-Rawi v Security Service* [2012] 1 AC 531 at [86], "*the Investigatory Powers Tribunal … does not pretend to be deciding … claims on a remotely conventional basis*". In particular:

    20.1. The IPT, unlike the ordinary courts, adopts an inquisitorial process. As explained in §2.2 of the Tribunal's 2011-2015 Report **[Appendix, p.455]**:

> "The Tribunal adopts an inquisitorial process to investigate complaints in order to ascertain what has happened in a particular case. This is in contrast to the wholly adversarial approach followed in ordinary court proceedings."

20.2. The IPT can order, receive and consider evidence in a variety of forms, "*even if that evidence would not be admissible in a court of law*": see s.11 of RIPA 2000 and §2.2 of the Tribunal's Report **[Appendix, p.454]**.

20.3. Many of the basic principles applied by the ordinary courts in hearing and determining *inter partes* disputes are not applied by the IPT. In particular, the claimant/complainant will not generally have access to the evidence considered by the decision-maker even if that evidence could be disclosed to him without prejudicing the public interest, and may not even know what findings are ultimately made.

20.3.1. S.69(4) of RIPA 2000 permits the Secretary of State to make rules "*enabling or requiring the Tribunal to hear or consider any proceedings, complaint or reference without the person who brought the proceedings or made the complaint or reference having been given full particulars of the reasons for any conduct which is the subject of the proceedings, complaint or reference*" (s.69(4)(a)), or enabling or requiring it to exercise its jurisdiction in the absence of the complainant (s.69(4)(b)).

20.3.2. S.69(6) requires the Secretary of State to exercise the power described above with regard to the need to secure that information is not disclosed to an extent or in a manner that is prejudicial to, among other things, "*the economic well-being of the United Kingdom*".

20.3.3. The IPT Rules made under s.69 prevent the IPT from disclosing any information obtained from a relevant public authority except in limited circumstances, irrespective of whether the disclosure of that information would prejudice one of the specified interests (Rule 6(2)).

20.3.4. Further, s.68(4) of RIPA confines the IPT's powers in the event of a determination to the provision of "*a statement that they have made a determination in his favour*" or "*a statement that no determination has been made in his favour*". Rule 13 of the IPT Rules makes provision for a

successful complainant to be given "*a summary of [the] determination including any findings of fact*", but (i) even that is expressly subject to a restriction on the disclosure of any information that would be prejudicial to one of the specified interests (Rules 13(4) and 6(1)), and (ii) if a complainant is unsuccessful there is no provision for him to be told anything about the reasons why, or about any findings that the Tribunal has made.

Presumption of validity

21. The Interested Parties contend that modern public law has moved on from *Anisminic*, in that it recognises a presumption of validity. It is said that in modern public law a decision which is unlawful has legal effect unless and until the court intervenes to rule otherwise, and cases such as *Anisminic* which refer to unlawful decisions as 'nullities' must therefore now be disregarded.

22. This argument is wrong in law, for the following reasons:

    22.1. First, there is nothing new about the presumption of validity. Summarised in the maxim "*omnia praesumuntur rite esse acta*" it has been part of the common law for generations prior to *Anisminic: s*ee, for example, the decision of the House of Lords in *R v Inland Revenue Commissioners, ex p TC Coombs & Co* [1991] 2 AC 283, at p.300, and the cases there referred to. Specifically, the idea that a public law error will not necessarily result in the decision in question being treated as ineffective for all purposes is not a modern development which post-dates the concept of nullity. It simply reflects the fact a void decision may be capable of legal consequences for some purposes until declared invalid by a court of competent jurisdiction. It also reflects the fact that those consequences may be mediated for example by the discretionary elements under judicial review proceedings. Cases such as *O'Reilly v Mackman* show the concept of nullity (in the sense used in *Anisminic*) and the discretionary nature of judicial review remedies existing side by side.

    22.2. Secondly, *Anisminic* has been repeatedly applied and approved by the Supreme Court in recent years, including in *Cart* and *Lumba*. The distinction proposed by the Interested Parties was rejected by Lord Dyson in *Lumba v Secretary of*

State for the Home Department [2012] 1 AC 245 at [66] ("*the importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see Boddington v British Transport Police* [1999] 2 AC 143, 158D-E"). A majority of the Court, including Lords Hope, Kerr, and Collins and Baroness Hale, agreed with the reasons given by Lord Dyson ([170, 218, 219, 238]).

22.3. Although Lord Phillips expressed doubts in *Lumba* about the applicability of that principle to executive acts done under a discretionary power, he nevertheless agreed at [304] that it was settled law that an error of law by a tribunal rendered its decision a nullity. Similarly, Lord Walker in expressing concerns about extending "*the principle to a claim for damages for false imprisonment, where a defendant may have his professional reputation at stake and may not enjoy the procedural protections which attend judicial review*" (at [193]) cast no doubt on the applicability of the principle in relation to judicial review itself.

22.4. Thirdly, the decision in *Anisminic* (and the cases preceding it) does not turn on the concept of nullity. As Sir John Laws explained in *Is the High Court the Guardian of Fundamental Constitutional Rights?* [1993] PL 59:

> "*Anisminic* is a case about statutory construction, not the metaphysic of nullity. To oust the court's power of review is necessarily to put some party above the law, or, at least, to make it and not the court the judge of what the law is, which is the same thing. The courts will presume against the conferment of such a power..."

Limitation clauses

23. The Interested Parties seek to rely on cases where the court has upheld the validity of statutory provisions precluding judicial review after a time limit has expired (IP Case at §122), in support of the proposition that "*[n]o one could sensibly suggest that the re-allocation of the High Court's common law supervisory jurisdiction in this way was constitutionally offensive*" (IP Case at §123).

24. This reliance is misconceived. The use of limitation clauses is a familiar and unobjectionable feature of any legal system: see *De Smith's Judicial Review* (8th edn, 2018) at §4-029. A limitation period is intended to balance the right of a Claimant of access to the courts with the right of a Defendant not to be subject to stale claims, and, particularly

in the public law field, with the public interest in finality and legal certainty. This is particularly important in cases involving planning permissions which run with the land notwithstanding changes in ownership or occupation. No analogy can properly be drawn between such a clause, requiring a judicial challenge to a decision to be promptly made, and a provision which purports wholly to oust the supervisory jurisdiction of the High Court and Court of Session. The different Parliamentary intentions in using limitation clauses, as compared with ouster clauses, were explained by Mann LJ in *R v Cornwall County Council, ex p Huntington* [1992] 3 All ER 566 at p.575:[8]

> "The intention of Parliament when it uses an *Anisminic* clause is that questions as to validity are not excluded (see [1969] 1 All ER 208 at 244, [1969] 2 AC 147 at 208 per Lord Wilberforce). When paragraphs such as those considered in *Ex p Ostler* are used, then the legislative intention is that questions as to invalidity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the court is excluded in the interest of certainty."

25. At IP Case §109 the Interested Parties argue more generally that the creation of alternatives to High Court judicial review in areas such as planning, immigration, and homelessness is evidence of Parliament having decided that the High Court's jurisdiction can and should be limited for "*good functional reasons*". They cite §17-003 of *De Smith's Judicial Review* in support. However, as the remainder of Chapter 17 explains, none of those examples involves a total ouster. In the planning context, the body that hears and determines claims is the High Court; it simply adopts a different procedure in doing so. In the context of immigration, the Supreme Court held in *Cart* that even the creation of a wholly new statutory court structure to take such claims out of the High Court list (which they had come to dominate), based on a statutory "superior court of record", did not oust the High Court's supervisory jurisdiction over that structure. In the context of local authorities' decisions concerning homelessness, the statutory arrangements introduced in the Housing Act 1996 provided for an appeal to the County Court, with that decision being itself appealable to the Court of Appeal; the determination of such claims was still firmly within the normal court structure. Even then, the High Court nevertheless held in *R (Lynch) v Lambeth LBC* [2006] EWHC 2737 (Admin) that those arrangements did not prevent judicial review from being available in parallel if necessary.

[8] This was approved by the Court of Appeal ([1994] 1 All ER 694 at p. 699)

26. Accordingly, for the reasons set out above, as well as the reasons in the Appellant's Written Case, the Appellant invites the Court to allow this appeal.

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