

## Public Law

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### The Investigatory Powers Tribunal: a law unto itself?<sup>1</sup>

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**Subject:** Administrative law . **Other related subjects:** Administration of justice. Legal methodology.

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#### Legislation:

[Regulation of Investigatory Powers Act 2000 \(c.23\) s.67](#)

#### Cases:

[R. \(on the application of Privacy International\) v Investigatory Powers Tribunal \[2017\] EWCA Civ 1868; \[2018\] 1 W.L.R. 2572 \(CA \(Civ Div\)\)](#)

[Anisminic Ltd v Foreign Compensation Commission \[1969\] 2 A.C. 147; Times, December 18, 1968 \(HL\)](#)

**\*P.L. 584** In the [Privacy International](#) case the Divisional Court and Court of Appeal have held that [s.67\(8\) of the Regulation of Investigatory Powers Act 2000](#) (RIPA) has the effect of freeing the Investigatory Powers Tribunal ("the tribunal"), a tribunal with a jurisdiction conferred and limited by statute, from the supervisory jurisdiction of the High Court.<sup>2</sup> The effect of their judgments is to make the tribunal sovereign and master over its own jurisdiction and to make the tribunal's pronouncements as to what it regards the law to be incapable of correction by any court of law. The Supreme Court has granted permission to appeal.

In his famous speech in [Anisminic v Foreign Compensation Commission](#) Lord Reid said that it is "a well established principle" that if a provision seemingly ousting the ordinary jurisdiction of the courts "is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court".<sup>3</sup> This note argues that the ouster clause in the [RIPA](#) is reasonably capable of being interpreted in a way that preserves the ability of the High Court to correct errors of law. The construction of the section suggested in this note is not one that appears to have been considered, and is certainly not addressed, by either the Divisional Court or the Court of Appeal. It is also a construction that was not considered by the Supreme Court in [R. \(on the application of A\) v B](#), in which Lord Brown stated obiter that [s.67\(8\)](#) is an "unambiguous" ouster, in contrast to that in [Anisminic](#). The proper meaning of [s.67\(8\)](#) was not in issue in that case and Lord Brown expressly qualified his observation by making clear, "*that is not the provision in question here*".<sup>4</sup>

#### The issue

Privacy International brought a complaint to the tribunal contending that computer hacking allegedly undertaken by GCHQ under the [Intelligence Services Act 1994](#) has been unlawful. The tribunal rejected the complaint and Privacy International brought a judicial review on the grounds that the tribunal had not properly applied **\*P.L. 585** the law. This raised the question as to the effect of [s.67\(8\) of the RIPA](#), which 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."

The, broadly similar, ouster clause in [Anisminic](#) provided:

"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."

In [Anisminic](#) it was held that this clause only applied to a legally valid determination. A legally invalid

determination, being one outside the conferred jurisdiction, was as such a nullity. This reasoning avoided the illogicality, or at least the implausibility, of Parliament establishing a tribunal of limited jurisdiction whilst conferring upon it uncontrollable power to determine the scope of its own jurisdiction.<sup>5</sup> It avoided, as Lord Denning put it, the Commission being a "law unto itself".<sup>6</sup> Later cases made clear that any error of law made by a tribunal of limited jurisdiction would render its decision a nullity. In 1982, Lord Diplock stated<sup>7</sup>:

"The breakthrough that the [Anisminic](#) case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination,' not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity."

This legal principle was thus well established before the enactment the [RIPA](#).<sup>8</sup>

Privacy International accordingly argued that the reference to "determinations, awards, orders and other decisions of the Tribunal" in [s.67\(8\) of the RIPA](#) must mean *lawful* determinations, awards, orders and other decisions of the tribunal. In effect, the argument amounts to saying that no court is competent to say that decisions of the tribunal are wrong on the facts, but that does not affect the jurisdiction of the High Court to correct a misdirection of law. However, the argument has faltered on the different wording of the terms of [s.67\(8\)](#) and, as I will explain, in particular the words in parenthesis ("including decisions as to whether they have jurisdiction"). My contention is that there is a reasonable construction of these words that means that the reasoning and logic of [Anisminic](#) remains applicable to the section as a whole. **\*P.L. 586**

## The importance of the issue

There are two reasons why some might doubt whether the issue raised by the [Privacy International](#) case is important. In the first place, the president of the tribunal must, by statute, hold or have held high judicial office—i.e. the rank of High Court judge or above—and its other members must be lawyers with specified qualified experience.<sup>9</sup> In practice, the tribunal members are distinguished members of the legal profession. Therefore if the courts are ousted it is only to substitute a different form of independent tribunal which must include at least one professional judge. Secondly, one of the reforms introduced by the [Investigatory Powers Act 2016](#) was to create a right of appeal from decisions of the tribunal.<sup>10</sup> Therefore the issue raised by the [Privacy International](#) case is almost entirely of historic relevance.

This would, however, be to miss the point. [Privacy International](#) raises an important point of constitutional principle. In the Divisional Court Leggatt J set out a powerful dissenting position which drew attention to the important principle raised by the case. He explained that the

"integrity of the legal system would be undermined if a statutory tribunal operated as a legal island without any means by which its decisions on significant questions of law can reach the higher courts".

Leggatt J also pointed out that whilst it has been often stated that Parliament could, in principle, exclude the possibility of judicial review by using language of sufficient clarity,

"it is striking that no language so far used (unless it be that in the present case) has been held to be sufficiently clear to have that effect".<sup>11</sup>

In 2010, Thomas LJ, later the Lord Chief Justice, rejected the contention that an election court, even one staffed by a member of the senior judiciary, should finally determine points of law, explaining that "the separation of powers and the rule of law" means that it is "for the courts to determine the meaning of the law enacted by Parliament".<sup>12</sup> The issue raised by the [Privacy International](#) case is thus nothing less than compliance with the rule of law as it is understood in this country.

To be clear, whatever resemblance the tribunal may have to a court, in common with an election court, it is not a court of law. It is not even an inferior court of law.<sup>13</sup> It diverges from a court of law in numerous respects. The tribunal is not a court of record. It has an investigatory, not adversarial, function in respect of **\*P.L. 587** certain complaints made to it and it is subject to very significant restrictions on the information it can disclose and the form of determinations it can give to complainants in order to protect the secrecy of investigations and operations that it inquires into.

Moreover, it is required to exercise its jurisdiction in conformity with rules which are made not by the tribunal itself or by the Civil Procedure Rule Committee, but by the Secretary of State, who is effectively a party to many of the matters that the tribunal considers.<sup>14</sup> The tribunal proceedings are also outside the scope of legal aid. As to its composition, only the president is required to hold or have held judicial office and there is no statutory requirement that complaints are adjudicated by the president.<sup>15</sup>

Despite these characteristics that set the tribunal apart from courts of law—and there are others—the tribunal has very considerable powers. It can quash or cancel warrants or authorisations under the [RIPA](#) (and now, the [Investigatory Powers Act 2016](#)). It can make an award of compensation against a person, can require destruction of records or make "any such ... other order as they think fit" ([s.67\(7\)](#)).

As a general rule, a person or body that is subject to an adverse order made by a statutory tribunal is only bound to comply with such an order if it is valid and effective in law. The effect of the judgment of the Court of Appeal and Divisional Court is that a person or public authority that is subject to an order of the tribunal cannot challenge the legality of such orders.

The implications are profound. Consider, for example, if the tribunal made a finding against a department of government or public body over which the tribunal has no jurisdiction, or if the tribunal decided not to apply a binding decision of the Supreme Court on a point of law with which it did not agree, or if the tribunal decided that it had power to disclose material that would damage national security where there was an overriding public interest in doing so (a power that the tribunal does not have). The courts would not be able to ensure the tribunal complied with the law.

As unlikely as such scenarios might seem, they serve to expose the important point of principle raised by the case. Nor is it fanciful that the tribunal might exceed its jurisdiction. It has decided at least one complaint adverse to a police authority in excess of its jurisdiction, having found in a later complaint that the surveillance in question—being surveillance in support of a disciplinary investigation—was not, contrary to its previous assumption, within the scope of its jurisdiction under the [RIPA](#). Its finding that the police had breached art.8 ECHR was therefore in law a nullity, but, if the Court of Appeal is correct, no court could say so.<sup>16</sup> The police authority, had it appreciated the error at the time, would have had no ability to challenge the tribunal's excess of power in the courts and would have been bound by its order. **\*P.L. 588**

## The meaning of the ouster clause

Despite the departure from the rule of law entailed, the courts have so far held that [s.67\(8\)](#) is effective to exclude judicial review. They have approached the question largely as a conventional search for Parliament's intention. As an exercise of ordinary statutory construction the reasoning, delivered by Leveson P in the Divisional Court and Sales LJ in the Court of Appeal, is powerful. However, the House of Lords in [Anisminic](#) did not adopt a conventional approach to statutory interpretation. As Lord Reid explained, if a section is reasonably capable of having a meaning which preserves the jurisdiction of the courts, that interpretation must be preferred. Applying such a rule of construction is consistent with parliamentary sovereignty as, first, Parliament is taken to legislate in the context of known principles of statutory interpretation and decided cases, it therefore is taken to have consented to the courts seeking to avoid a scenario which they regard as contrary to the rule of law. Secondly, Parliament can always make it clear beyond any doubt that it intends to exclude judicial review and, until it does, there is a risk that Parliament has not appreciated the full consequences of its words.

Indeed, when one posits the scenario of the tribunal deciding that it has power to release material damaging to national security, or making an order against an authority over which it has no jurisdiction, it is far less obvious that Parliament would have intended to exclude judicial control altogether.<sup>17</sup> The tribunal is no ordinary tribunal, it is given great powers including in respect of some of the most sensitive parts of the state, and it would be surprising if it exercised those powers entirely free from the supervision of the courts (the issue of secrecy is addressed below).

Against this background, let us return to the section in question. Leaving aside the bracketed words, [s.67\(8\)](#) is well capable of being interpreted to exclude from courts only determinations, decisions and orders of the tribunal which are based on a correct application of the law and which are therefore valid in law. This follows from the reasoning in [Anisminic](#) itself. Lord Reid reasoned that the reference to determination "means a real determination and does not include an apparent or purported

determination".<sup>18</sup> In this respect the case is stronger than *Anisminic* because [s.67\(8\)](#) was enacted after that case and in the knowledge of the principle and reasoning articulated by the House of Lords.

Furthermore, following the decision in *Anisminic*, the [Foreign Compensation Act 1969](#) sought to avoid the reasoning in *Anisminic* by stating that a "determination" includes "anything which purports to be a determination" ([s.3\(3\)](#)) (notwithstanding that resistance in Parliament also led to the inclusion of a right of appeal from the Commission). As counsel for the claimants pointed out in *Privacy International*, [s.67\(8\)](#) does not use the language of "purported" determinations or decisions. This would have been the form of words that one *\*P.L. 589* would have expected to see if Parliament had intended to avoid the logic of *Anisminic*.

This point is actually more powerful still. [Section 65 of the RIPA](#) sets out the jurisdiction of the tribunal. One basis for jurisdiction is that the tribunal is the appropriate forum for complaints about certain conduct which has taken place in "challengeable circumstances". Conduct takes place in "challengeable circumstances" if it takes place inter alia "with the authority, or *purported authority*, of" a warrant, authorisation or notice under the [RIPA](#) regime ([s.65\(7\)\(a\)](#)). Thus we find in the statutory provisions that establish the jurisdiction of the tribunal an express use of the formula "purported" to address the reasoning in *Anisminic*. The use of this terminology makes clear that the tribunal does not cease to have jurisdiction if a warrant, authorisation or notice is invalid in law or is alleged so to be. This means that the courts do not need to rely on a general presumption that Parliament intended the legislation to be interpreted in accordance with *Anisminic*: the express terms of the [RIPA](#) show that Parliament expected the courts to control the Act's meaning by applying the same logic and reasoning as the House of Lords applied in *Anisminic*. The omission of the words "or purported" from [s.67\(8\)](#) is therefore highly significant. Neither the Divisional Court nor the Court of Appeal addressed this point.

The question, then, is whether the words "including decisions as to whether the tribunal has jurisdiction" preclude this analysis. On first blush one might think that they must do so, because a decision as to jurisdiction can be taken as a reference to the tribunal making a decision of law. This was, as I read the judgment, the decisive factor in the reasoning of Sales LJ in the Court of Appeal. His Lordship wrote:

"[T]he drafter of [section 67\(8\)](#) has expressly adverted to the possibility of the IPT making an error of law going to its jurisdiction or power to act, by the words in parenthesis in that provision: 'including decisions as to whether they have jurisdiction'" (at [34]).

Sales LJ therefore reasoned that at least insofar as a "decision" is concerned, it is not possible to construe the clause as referring only to decisions that are based on a correct understanding of the law, because the words in parenthesis *must* be referring to decisions of law. He then went on to explain why if this is the case for decisions it must also affect the interpretation of the term "determination". The reference to a decision as to jurisdiction, being, so Sales LJ assumed, of necessity a reference to a decision of law, this controls the interpretation of the whole clause and precludes the application of the reasoning in *Anisminic*.

Sales LJ's reasoning depends upon the correctness of his assumption that the reference to jurisdiction necessarily entails a reference to a determination of law. But his assumption is not correct. An important seam of jurisprudence in English administrative law, not addressed in any of the judgments, holds that decisions as to jurisdiction made by inferior tribunals are of two distinct types: they can be either decisions of law or they can be decisions of fact. Where a tribunal's jurisdiction is premised on the existence of a state of facts, a "decision as to jurisdiction" is a decision as to the existence of the state of facts and not a question *\*P.L. 590* of law.<sup>19</sup> In an appropriate case the court can, in the exercise of its supervisory jurisdiction, examine whether the facts exist to ensure that the tribunal has jurisdiction. In so doing it is not correcting any error of law. "[I]t is a general rule", Coleridge J said in one case, "that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends".<sup>20</sup> In *R. v Commissioners for Special Purposes of Income Tax*,<sup>21</sup> Lord Esher MR stated:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they

have acted without jurisdiction."

Therefore there is a false assumption at the very heart of the reasoning of the judgment of Sales LJ that a statement in an Act of Parliament referring to a "decision as to jurisdiction" must be referring to a decision of law.

Lord Esher MR went on to explain that a second state of affairs might exist whereby Parliament confers authority on a tribunal of limited jurisdiction to determine whether a state of facts necessary for the exercise of its jurisdiction does or does not exist, in effect excluding the possibility of the High Court asserting supervisory jurisdiction as to the existence or non-existence of those facts. In such a case, as he explained:

"It is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."<sup>22</sup>

In other words, Lord Esher MR explained that Parliament might well confer power on a tribunal of limited jurisdiction to decide whether the facts necessary for the exercise of its jurisdiction exist and this cannot be questioned in a court on the ground that the tribunal acts in excess of jurisdiction by making a wrong decision as to the existence of the facts. The reference to "decisions as to whether it has jurisdiction" in [s.67\(8\)](#) can therefore be understood, in the context of this case law, to be an example of a situation described by Lord Esher MR in the *\*P.L. 591 Income Tax* case, i.e. where "the legislation gave them jurisdiction to determine all the facts, including the existence of preliminary facts on which the further exercise of their jurisdiction depends".

If the words "determinations, awards, orders and other decisions", taken by themselves and applying the established canon of construction set out in *Anisminic*, would be taken to mean determinations, awards, orders and other *decisions of fact which are not erroneous in law*, then understanding the subsequent words, "including decisions as to whether they have jurisdiction" to mean decisions as to whether the tribunal has *jurisdiction in fact*, is a reasonable interpretation of those words. Indeed, against the background of the *Anisminic* case, it is arguably the most natural and logical reading of those words and of the section as a whole.

The words of Lord Esher MR were cited in several speeches in the House of Lords in *Anisminic* as an example of an excess of jurisdiction.<sup>23</sup> It is therefore not difficult to construe the reference to "decisions as to whether it has jurisdiction" as intended by Parliament, in the light of *Anisminic*, to ensure that all decisions of fact cannot be questioned in a court of law even if they might be regarded as jurisdictional.<sup>24</sup>

Indeed, it does not make any real sense for Parliament to have used those words, rather than the phraseology of "purported" decisions, to avoid the logic that any error of law will render a decision a nullity. This is not least because of the limiting words "as to whether it has". These words make clear that the words in parenthesis only address a situation in which the tribunal has consciously addressed the question of its jurisdiction. They do not apply to any error taking the tribunal outside its jurisdiction. This would be a very strange way of seeking to make clear that the tribunal has jurisdiction to make *any* error of law.

Taking a step back and looking at [s.67\(8\)](#) in the round, it is striking that it makes no mention of "law", "invalidity", "nullity" or "errors of law" at all, and yet the courts have held that its effect is to prevent the High Court from correcting errors of law and identifying decisions that are nullities.

But we cannot rest the analysis here. This construction would be difficult to sustain if there are no facts which must exist as a precondition to the exercise of the tribunal's jurisdiction or, at least, arguably so. There are however important aspects of the tribunal's jurisdiction which depend on the existence of certain facts as preconditions to the tribunal having jurisdiction. The tribunal has expounded its jurisdiction in this way in its decisions (and this is in itself significant because if the Divisional Court and Court of Appeal are right, the tribunal's view of its own jurisdiction cannot be questioned).

Thus, the jurisdiction of the tribunal includes a jurisdiction to hear any complaints made to it for which it is the "appropriate forum" ([s.65\(2\)\(b\)](#)). The tribunal is the "appropriate forum" for a complaint about any of the following types of conduct ([s.65\(4\)](#), [\(5\)](#)):



- conduct by or on behalf of the intelligence services;
- conduct for or in connection with the interception of communications; **\*P.L. 592**
- the acquisition of communications data by a public authority from a telecommunications operator (under the [RIPA Ch.II Pt.I](#));
- any conduct to which [Pt II of the RIPA](#) applies, being "directed surveillance", "intrusive surveillance", use of "covert human intelligence sources" or surveillance by a foreign police or customs officer;
- entry on or interference with property or any interference with wireless telegraphy.<sup>25</sup>

These are all facts that must exist for the tribunal to have jurisdiction.

Thus, the tribunal has made clear in a series of decisions concerned with directed surveillance that the existence of directed surveillance having taken place is a precondition to the exercise of its jurisdiction. In one case it described the position in terms that, "the Tribunal only have jurisdiction in this case if the surveillance alleged by the Applicant is 'directed surveillance'".<sup>26</sup> The tribunal went on to explain that its jurisdiction depends upon various sub-facts being present: the complainant has been subject to "surveillance", that the surveillance was "covert", that it was likely to result in obtaining "private information" and that it was carried out for a "specific investigation" or "specific operation".<sup>27</sup> The tribunal's first task in many cases is thus to investigate and determine whether factual preconditions for the exercise of its jurisdiction are present.<sup>28</sup> In many cases a complainant's suspicions that they have been subject to surveillance will be unfounded and the tribunal will have no jurisdiction. The complainant will simply be notified that no determination has been made in the complainant's favour ([s.68\(4\)\(b\)](#)). The statutory scheme is designed so that an individual does not know whether they have been subject to surveillance (unless the tribunal finds that they have been subjected to unlawful surveillance); it is therefore not surprising that the RIPA excludes judicial review on grounds of jurisdictional fact, i.e. as to whether alleged surveillance has in fact occurred.

Against this background, [s.67\(8\)](#) can be understood to make clear that the "decisions" which are not to be questioned in any court of law include any "decisions" of fact on which the tribunal's jurisdiction might be thought to depend, such as whether a person has been subject to surveillance regulated by the [RIPA](#). And this makes sense in the context of that jurisdiction and how it is understood by the tribunal itself. **\*P.L. 593**

It is true that in some cases a question might arise as to whether the conduct found to have taken place (or in some cases admitted to have taken place) falls within the statutory definitions of conduct falling under the [RIPA](#). Therefore in some cases issues of law will arise. The fact that the High Court cannot question findings of fact made by the tribunal does not prevent the High Court from correcting errors of law that are clearly disclosed from its determinations, even where these arise from findings of fact that are preconditions to its jurisdiction.<sup>29</sup>

## Secrecy and consistency

Before concluding, it is necessary to touch on two final points which are relevant to this discussion. The first is that both the Divisional Court and the Court of Appeal laid emphasis on the secret and sensitive nature of proceedings before the tribunal. However, the tribunal has still generated a considerable body of published decisions which include a wide range of pronouncements on important issues of law. In contexts outside the interception of communications, the tribunal has published many detailed analyses of facts, including some which are a far cry from national security.<sup>30</sup> It is difficult to see why, in principle, errors of law detectable in such pronouncements—errors on the face of the record—should not be capable of correction in the courts of law. Whilst there may well be issues of law that remain shielded by the tribunal's veil of secrecy, this does not speak to the existence of the jurisdiction of the courts as a matter of principle. Secrecy may mean that judicial review lacks teeth in many scenarios, but it remains, rightly, in principle available.<sup>31</sup>

Finally, it is a further consequence of the judgments of the Divisional Court and Court of Appeal that inconsistencies could arise between the tribunal and courts of law. This can be illustrated by an inconsistency that arose between a guidance document that had been published by the former Surveillance Commissioner, who until recently has overseen the exercise of powers under [Pt II of the RIPA](#), and the Home Office Code on Surveillance. These documents set out different views on whether as a matter of law the recording of voluntary interviews constituted surveillance. The code could have been the subject of a judicial review challenge by a public authority wanting to know which guidance was right as a matter of law or by some other interested party. If such a challenge had been brought the court would have set out what the law requires. The matter in fact arose in the context of a complaint to the tribunal, which decided that such recordings were not covered by [Pt II of the RIPA](#), an opinion which, if the Court of Appeal is right, *\*P.L. 594* is neither binding on the courts nor correctable by them.<sup>32</sup> It is also possible that inconsistent positions might be reached where complainants choose to issue proceedings in the ordinary courts but where a defendant claims that the tribunal has exclusive jurisdiction. The courts would then have to decide the scope of the tribunal's jurisdiction, which might differ from the position taken by the tribunal. Thus there is a real potential for inconsistency and incoherence if judicial review of the tribunal is not available.

## Conclusion

As Lord Reid stated in *Anisminic*, the pertinent question is whether [s.67\(8\)](#) is reasonably capable of being understood in a way which preserves the supervisory jurisdiction of the High Court. It has been suggested that [s.67\(8\)](#) is reasonably capable of being given a meaning that preserves the jurisdiction of the courts to correct errors of law. Applying precisely the same logic as the House of Lords applied in *Anisminic*, [s.67\(8\)](#) is capable of being understood to refer only to decisions, determinations and orders of the tribunal that are not vitiated by an error of law. The words in parenthesis in [s.67\(8\)](#) simply make clear that the prohibition on the courts questioning factual decisions of the tribunal that are not vitiated by an error of law extends to findings as to the existence of facts that are, or might be thought to be, preconditions for the tribunal having jurisdiction. This analysis makes sense in the context of the tribunal's actual jurisdiction and the manner that it has understood its jurisdiction in its own published decisions. Thus, once the jurisprudence on jurisdictional fact is taken into account, [s.67\(8\)](#) can be interpreted in a manner consistent with the rule of law.

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1. This essay has benefitted from the valuable comments of Professor Gavin Phillipson, Jeremy Letwin and an anonymous reviewer. I am grateful to them all. The views and errors are mine alone.
  2. [R. \(on the application of Privacy International\) v Investigatory Powers Tribunal \[2017\] EWCA Civ 1868; \[2018\] 1 W.L.R. 2572 CA; \[2017\] EWHC 114 \(Admin\); \[2017\] 3 All E.R. 1127 DC.](#)
  3. [Anisminic v Foreign Compensation Commission \[1969\] 2 A.C. 147](#) at 170.

4. [R. \(on the application of A\) v B \[2009\] UKSC 12; \[2010\] 2 A.C. 1](#). This case concerned [s.65\(2\)\(a\) of the RIPA](#) and whether the designation of the tribunal to determine certain claims under the [Human Rights Act 1998](#) was exclusive.
5. Farwell LJ in [R. v Shoreditch Assessment Committee Ex p. Morgan \[1910\] 2 K.B. 859](#) at 880 (cited by Lord Wilberforce in [Anisimic \[1969\] 2 A.C. 147](#) at 208–209 and Lord Pearce at 197) put the point eloquently: "Subjection ... to the High Court is a necessary and inseparable incident for all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure".
6. [Hansard, HC, col.53 \(4 February 1969\)](#).
7. [O'Reilly v Mackman \[1983\] 2 A.C. 237](#) at 278. For a recent brief summary of the post-[Anisimic](#) cases, see [Stephen Sedley, Law and the Whirligig of Time \(Oxford: Hart, 2018\), pp.5–9](#).
8. And indeed before the first piece of legislation in this field, on which the [RIPA](#) drew, the [Communications Act 1985](#).
9. [RIPA Sch.3 paras 1\(1\) and 2](#)
10. [Investigatory Powers Act 2016 s.242](#)
11. [Privacy International \[2017\] 3 All E.R. 1127](#) at [49] and [52].
12. [R. \(on the application of Woolas\) v Parliamentary Election Court \[2010\] EWHC 3169 \(Admin\); \[2012\] Q.B. 1](#) at [52]. In the parliamentary debates which led to the inclusion of a right of appeal from the Foreign Compensation Commission, Lord Denning explained that, even in the case of judicial tribunals, there is too great a temptation if there is no appeal or possibility of review, for a judge, "to do just what you like". He continued: "[I]t is, as I understand it, one of the cardinal features of the rule of law in this country that tribunals and other bodies, of whatever description, should, in the last resort, be controlled by the Judges of the High Court or of the Court of Appeal, who in saying what the law is should have the last word or the interpretation of Orders in Council" ([Hansard, HC, col.55 \(4 February 1969\)](#)).
13. The importance of the distinction between inferior courts and tribunals of limited jurisdiction, even ones presided over by judges, was the subject of comment by Lord Cooke, [The Hamlyn Lectures, Turning Points of the Common Law \(London: Sweet & Maxwell, 1970\), pp.75–76 and 78](#), and was considered in detail in [Woolas \[2012\] Q.B. 1](#).
14. Unless the tribunal finds the rules to be ultra vires it must follow them: see [In the Matter of Application Nos IPT/01/62 and IPT/01/77 unreported 23 February 2003 Investigatory Powers Tribunal](#) (ruling on the tribunal rules and art.6 ECHR). The tribunal affords considerable deference to the Secretary of State when deciding the legality of its rules.
15. See [RIPA Sch.3 para.2\(2\)](#). The [Privacy International](#) case might have had a rather different complexion if the members of the tribunal were, with the necessary exception of the president, lawyers drawn from the ranks of public bodies and government departments.
16. [Mr & Mrs H v The Police Federation of Great Britain \(IPT/03/23/CH\) unreported 28 February 2005 Investigatory Powers Tribunal](#).
17. I do not consider that it answers this point to draw attention to the power of the Secretary of State to create a right of appeal by statutory instrument. Apart from the fact that this does not speak to the point of principle, and may well be of dubious legality if its sole purpose is to allow a challenge to a decision the Secretary of State does not like, this power is not the government's alone and is subject to positive resolution procedure in Parliament.
18. [Anisimic \[1969\] 2 A.C. 147](#) at 170. The fact that the [Foreign Compensation Act](#) referred to "determinations" and [s.67\(8\)](#) refers also to "decisions" is of no consequence. Much of the reasoning in [Anisimic](#) used the language of "decision": e.g. Lord Morris at 185, Lord Wilberforce at 208.
19. The principle of jurisdictional fact was applied by the Supreme Court in [R. \(on the application of A\) Croydon LBC \[2009\] UKSC 8; \[2009\] 1 W.L.R. 2557](#); for discussion of the principle see [H.W.R. Wade and C.F. Forsyth, Administrative Law, 11th edn \(Oxford: Oxford University Press, 2014\), pp.208–209](#). It does not appear that the cases and tribunal decisions relied upon here were cited to the Divisional Court or Court of Appeal (save in so far as they are referred to in the speeches in [Anisimic](#)).
20. [Bunbury v Fuller \(1853\) 9 Ex. 111](#) at [140]
21. [R. v Commissioners for Special Purposes of Income Tax \(1888\) 21 Q.B.D. 313](#) at 319.
22. [R. v Commissioners for Special Purposes of Income Tax \(1888\) 21 Q.B.D. 313](#) at 319–320.
23. [Anisimic \[1969\] 2 A.C. 147](#) at 190–191 (Lord Morris), 196–197 (Lord Pearce), and 208 (Lord Wilberforce).
24. The issue did not arise in [Anisimic \[1969\] 2 A.C. 147](#) itself. As Lord Morris at 190 explained, the Commission's jurisdiction was not conditional upon the existence of any facts.
25. See the analysis in [C v The Police \(IPT/03/32/H\) unreported 14 November 2006 Investigatory Powers Tribunal](#) at [28]–[34] A further requirement is that the complainant believes that the conduct took place in relation to him, his property or communications sent by or to him, or intended for him, or his use of any postal or telecommunication



service or system, and to have been carried out in challengeable circumstances or by any of the intelligence services ( [s.65\(4\)\(a\)](#) and [\(b\)](#)).

- [26.](#) [C v The Police \(IPT/03/32/H\) unreported 14 November 2006 Investigatory Powers Tribunal](#) at [36] (noting this was not disputed by the parties).
- [27.](#) [C v The Police \(IPT/03/32/H\) unreported 14 November 2006 Investigatory Powers Tribunal](#) at [44]–[60]; [RIPA ss.26\(2\), 48\(1\)](#) and [\(2\)](#).
- [28.](#) Thus, the tribunal was satisfied in one case that it had jurisdiction as a family had been subject to directed surveillance by a local authority concerned about gaming the school admissions system (*Paton v Poole BC (IPT/09/01/C) unreported 29 July 2010 Investigatory Powers Tribunal* at [47] and [51]) and in another it found that a police CCTV sting operation on a dog fouling hotspot was directed surveillance as the camera was trained on the complainant's front door; it therefore had jurisdiction over the matter (*X v Local Authority (IPT/03/50/CH) unreported 25 August 2008 Investigatory Powers Tribunal*). In *BA, RA, CT v Chief Constable of Cleveland Police (IPT/11/129/CH, IPT/11/133/CH & IPT/12/72/CH) unreported 13 July 2012 Investigatory Powers Tribunal*, the tribunal considered covert video recording of a seriously disabled person, holding that it had jurisdiction over the matter (at [24]).
- [29.](#) Thus, in [C v The Police \(IPT/03/32/H\) unreported 14 November 2006 Investigatory Powers Tribunal](#), the tribunal held that covert surveillance by a police authority pursuant to disciplinary or employment-related investigations, not engaging the core functions of the authority, did not constitute "directed surveillance" because it is not a "specific investigation" or "specific operation". This issue might well have been characterised as one of law and not fact and so not excluded by the ouster clause. The boundary between law and fact is not straightforward but it is indisputably central to administrative law: see the judgment of Lord Carnwath in [R. \(on the application of Jones\) v First Tier Tribunal \[2013\] UKSC 19; \[2013\] 2 A.C. 48](#).
- [30.](#) See the examples in fn.28, above. In the context of interception of communications and conduct of the intelligence services, the tribunal has tested issues of law on the basis of "assumed facts".
- [31.](#) See [R. \(on the application of AHK\) v Secretary of State for the Home Department \[2012\] EWHC 1117 \(Admin\)](#) and the discussion in [R. \(on the application of Haralambous\) v St Albans Crown Court \[2018\] UKSC 1; \[2018\] A.C. 236](#) at [47]–[55]. For an example see [R. v Secretary of State for the Home Department, Ex p. Chahal \[1995\] 1 W.L.R. 526](#)
- [32.](#) [Re A Complaint of Surveillance \(IPT/A1/2013\) \[2014\] 2 All E.R. 576](#)