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Ouster Clauses and National Security: Judicial Review of the Investigatory Powers Tribunal

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1. Introduction

One of the principles most dear to the United Kingdom's constitution is the rule of law, at the core of which stand the requirement that the state abide by law and – a necessary corollary of that – the right of individuals to challenge the lawfulness of the acts of public decision-makers by invoking the supervisory jurisdiction. This commitment to the rule of law manifests itself in particular in a deep suspicion of 'ouster clauses' by which statutes purport to limit or exclude the exercise of the supervisory jurisdiction. In *R (Privacy International) v Investigatory Powers Tribunal*,¹ the High Court has held that the ouster clause in the Regulation of Investigatory Powers Act 2000 – the statute which creates the Investigatory Powers Tribunal – suffices to prevent the High Court from carrying out judicial review of that tribunal's decisions. This decision is unusual in recognising that an ouster clause has that effect. It is also, I argue here, incorrect. Though the creation, by the Investigatory Powers Act 2016,² of a limited right to appeal against decisions of the IPT will limit the implications of this failure to insist upon the rule of law ideal, the constitutional significance of the matter is such that this wrong should be put right at the first available opportunity.

2. Background

The Regulation of Investigatory Powers Act 2000 ('RIPA') established the Investigatory Powers Tribunal ('IPT'), giving it exclusive jurisdiction over – amongst other things – proceedings arising out of the interception of communications and human rights claims against the intelligence services.³ The Investigatory Powers Tribunal possesses a number of unusual features: it usually sits in private (though can hear preliminary legal argument in public),⁴ can hear evidence which would

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¹ [2017] EWHC 114 (Admin).

² See Investigatory Powers Act 2016, inserting a new s.67A into RIPA, which continues to provide the statutory framework for the IPT.

³ RIPA 2000, s.65.

⁴ As a result of its decision, in the *Kennedy* case, that the rule which required the IPT to sit in private was *ultra vires* section 69 of RIPA: IPT/01/62 and IPT/01/77.

not be admissible in ordinary legal proceedings,⁵ and will in normal cases simply inform applicants that no determination has been made in their favour⁶ (though it can and does issue open judgments on questions of law).⁷ It has nevertheless been held that the IPT's procedures are in accordance with Article 6 of the ECHR and that the Tribunal is capable of satisfying the requirement therein that a person whose rights have been violated should have an effective remedy.⁸ Like those of the tribunals it replaced (the Interception of Communications Tribunal, the Intelligence Services Tribunal, and the Security Service Tribunal)⁹ the IPT's decisions are subject to an ouster clause, by which RIPA provided that "[e]xcept 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".¹⁰ No such provision was made, and there was, until the enactment of the Investigatory Powers Act 2016, no right of appeal against the Tribunal's decisions.

In a challenge brought by Privacy International and a number of Internet Service Providers,¹¹ the IPT ruled that the language of the relevant provision of the Intelligence Services Act 1994 (which permits the Secretary of State to issue, under certain conditions, warrants which authorise the taking of "such action as is specified in the warrant in respect of any property so specified or in respect of wireless telegraphy so specified")¹² permits warrants which are 'thematic'; which identify, that is, not particular persons or property but rather categories of person or property. It is therefore unnecessary for a warrant to identify the specific person or property to which it relates. Instead, a warrant must be "as specific as possible in relation to the property to be covered by the warrant, both to enable the Secretary of State to be satisfied as to legality, necessity and proportionality and to assist those executing the warrant, so that the property to be covered is objectively ascertainable."¹³ Such conclusion seems to be at odds with, first, the common law principle of legality,¹⁴ and, second, the common law's well-known suspicion of general warrants.¹⁵ The

⁵ Investigatory Powers Rules (SI 2000/2665), rule 11(1).

⁶ In accordance with RIPA 2000, 68(4).

⁷ Also as a result of the decision in *Kennedy*: IPT/01/62 and IPT/01/77.

⁸ *Kennedy v United Kingdom* (2011) 52 EHRR 4.

⁹ Interception of Communications Act 1985, s.7(8); Security Service Act 1989, s.5(4); Intelligence Services Act 1994, s.9(4).

¹⁰ RIPA 2000, s.67(8).

¹¹ *Privacy International v The Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 14_85-CH.

¹² Intelligence Services Act 1994, s.5

¹³ [2016] UKIP Trib 14_85-CH, [47].

¹⁴ Articulated canonically in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115.

¹⁵ See, most famously, *Entick v Carrington* (1765) 19 St Tr 1029.

combined effect of these is that broad, even ‘bulk’, powers may be given to the executive where – as with related powers under section 7 of the 1994 Act,¹⁶ or the various powers contained in the Investigatory Powers Act 2016 – the statutory language is suitably explicit. The language of section 5 does not, however, seem sufficiently unambiguous to justify the IPT’s conclusion. Privacy International sought judicial review of this element of the IPT’s decision. In response, it was argued that the RIPA ouster clause prevented such review.

3. Ouster clauses and statutory appeal regimes

The courts’ suspicion of provisions which purport to oust their jurisdiction over the decisions over decision-makers and inferior tribunals is well-known,¹⁷ and best illustrated by the decision in *Anisminic v Foreign Compensation Commission*.¹⁸ It was held there that a provision in the Foreign Compensation Act 1950 whereby “[t]he determination by the commission of any application made to them under this Act shall not be called into question in any court of law”¹⁹ was not sufficient to prevent the courts from determining that, by virtue of an error of law made by the Commission, its decision was a nullity, and so the prerogative writ of certiorari was available in respect of the ‘purported’ determination. *Anisminic* also heralded (if it did not in fact itself bring about) the end of the distinction between errors of law within jurisdiction and those going to jurisdiction. Where prior to it, ouster clauses were often ineffective because the tribunal was held to have made a decision without, or outside of its, jurisdiction,²⁰ the post-*Anisminic* case law shows that any error of law will suffice to place the decision of a tribunal beyond the scope of an ouster clause.²¹ The effect is to create something of a paradox, which subsequent case law has not satisfactorily resolved: to know whether a given decision is correct in law and therefore caught by any ouster clause, it is necessary first to examine it, which a court is not entitled to do where the decision is so caught. It has therefore proven easier in almost all cases to avoid the paradox by interpreting away, in the *Anisminic* fashion, the effect of any clause purporting to oust judicial review.

¹⁶ Which permits the making of authorisations to do certain acts outside the British Islands, explicitly allowing authorisations which “relate to a particular act or acts, to acts of a description specified in the authorisation or to acts undertaken in the course of an operation so specified”.

¹⁷ See, eg, *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 and the cases cited therein by Denning LJ.

¹⁸ [1969] 2 AC 147

¹⁹ Foreign Compensation Act 1950, s.4(4).

²⁰ See, eg, *R v Hurst, ex parte Smith* [1960] 2 QB 133, 142 and *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574.

²¹ See, eg, *Re Racal Communications Ltd* [1981] AC 374, and *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682.

Despite this constitutional aversion to ouster clauses, Parliamentary sovereignty implies – like the terms of *Anisminic* itself²² – that a suitably explicit statutory provision might suffice to oust the courts’ jurisdiction. Such provision might resemble the terms that contained in the Asylum and Immigration (Treatment of Claimants etc.) Bill, which contained not only an ouster clause, but also a clarification that the provisions in question prevented a court from “from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter...”²³ It was this provision – which could hardly have been more explicit in its intention and was never in fact enacted²⁴ – which prompted certain members of the House of Lords, in *Jackson v Attorney General*,²⁵ to suggest that Parliamentary sovereignty might in fact be limited by the requirements of the rule of law, meaning in particular (it would seem) the continuing availability of judicial review.²⁶ The *Jackson* dicta are not relied upon in *Privacy International* and it is accepted by Sir Brian Leveson that the supervisory jurisdiction of the courts might be ousted by suitably explicit words.²⁷ Leggatt J casts doubt on that proposition, noting that not only had no ouster clause ever been held to have the effect of excluding decisions from the scope of judicial review, but also that “it is difficult to conceive how Parliament could have been more explicit than it was in... the Foreign Compensation Act 1950, other than by referring to ‘purported determinations’ rather than simply ‘determinations’ of the tribunal.”²⁸ Three points might be made in response: the first is that the drafting of the abortive ouster clause in the 2003 Bill demonstrates clearly how an ouster clause might be rendered more explicit than that at issue in *Anisminic* (and indeed, that found in RIPA). That the clause in question met with tremendous political opposition (including in extra-curial judicial interventions)²⁹ suggests the existence of great doubt as to the possibility of interpreting away its effect.³⁰ Secondly, the vast difference between

²² [1969] 2 AC 147, 207B (Lord Wilberforce). See also *R v Hull University Visitor, ex parte Page* [1993] AC 682, 693H (Lord Griffiths).

²³ Asylum and Immigration (Treatment of Claimants, etc.) HC Bill (2003-04) [5] cl 10(7), which would have inserted a new s.108A in those terms into the Nationality, Immigration and Asylum Act 2002.

²⁴ The circumstances of the ouster clause and its abandonment are well described in Richard Rawlings ‘Review, Revenge and Retreat’ (2005) 68 *Modern Law Review* 37 and in Andrew Le Sueur, ‘Three Strikes and it’s out? The UK Government’s Strategy to Oust Judicial Review from Immigration and Asylum Decision-Making’ [2004] *Public Law* 225.

²⁵ [2005] UKHL 56.

²⁶ [2005] UKHL 56 See, most importantly, [102] (Lord Steyn) and [107] (Lord Hope).

²⁷ [2017] EWHC 114 (Admin) [19].

²⁸ [2017] EWHC 114 (Admin) [52].

²⁹ See, eg, Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (Squire Centenary Lecture, March 2004), later published in (2004) 63 *Cambridge Law Journal* 317.

³⁰ And, indeed, Rawlings suggests – on the authority of Lord Woolf – that if the clause was free of loopholes it was because senior members of the judiciary, on being shown a draft of the clause, had advised on how such loopholes might be closed: ‘Review, Revenge and Retreat’, 400.

the 2003 clause and that found in RIPA (enacted only 3 years earlier) provides a strong basis for asserting that while the former might suffice to exclude judicial review, the latter does not. The third is that Leggatt J's observations imply doubt as to the fact of Parliament's absolute legislative competence. That they are made so casually, without acknowledgement of their import nor with reference to *Jackson*, the one case containing dicta which might support them, is rather remarkable.

Alongside this suspicion of ouster clauses there exists a recognition of the appropriateness of channelling certain legal challenges into specialist tribunals: there is nothing unconstitutional, therefore, about the system by which many decisions are required by statute to be challenged in the Special Immigration Appeals Commission,³¹ or the First Tier and Upper Tribunals.³² Where a statutory route is provided, the courts will usually require that it be exhausted by anyone seeking to challenge the underlying decision.³³ Even here, however, review is not *per se* excluded, not least because to do so would allow errors of law made by specialist tribunals to go uncorrected. The availability of such review may be more limited than the standard judicial review jurisdiction. Unappealable decisions of the Upper Tribunal were held by the Supreme Court in *R (Cart) v Upper Tribunal* to be reviewable on the limited grounds comprising the second tier appeal criteria,³⁴ where “(a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal”.³⁵ Prior to *Cart*, but applying the same basic logic, the Supreme Court in *A v B* held that the IPT was the appropriate venue for a challenge brought by a former member of MI5 of the Service's refusal to consent to the publication of a book about his work for it.³⁶ Lord Brown distinguished that case from *Anisminic* on the basis that it did not relate to a provision which purported to prevent the scrutiny of a decision but rather one which “allocated that scrutiny... to the IPT.”³⁷ In what was necessarily an obiter remark, however, he noted the existence of s.68(7) (the provision at issue before the High Court here), stating that it “constitutes an ouster (and, indeed, unlike that in *Anisminic*, an unambiguous ouster) of any jurisdiction of the courts over the IPT.”³⁸ The question in *Privacy International* was, in effect, whether that description was correct.

³¹ By the Special Immigration Appeals Commission Act 1997 and by an ever-increasing number of subsequent enactments.

³² By the Tribunals, Courts and Enforcement Act 2007.

³³ See, for example, *R (G) v Immigration Appeal Tribunal* [2004] EWHC 588 (Admin) and *Farley v Child Support Agency* [2006] UKHL 31

³⁴ *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

³⁵ The language is taken from the Appeals from the Upper Tribunal to the Court of Appeal Order 2008, (SI 2008/2834), art 2.

³⁶ *A v B* [2009] UKSC 12.

³⁷ *A v B* [2009] UKSC 12, [23].

³⁸ *A v B* [2009] UKSC 12, [23].

4. The decision of the Divisional Court

The two judgments of the Divisional Court – given by Sir Brian Leveson PQBD and Leggatt J – differ significantly in tone and content, even if the former ultimately attracted the latter’s (reluctant) concurrence. It had been argued by Privacy International that the only material difference between the *Anisminic* ouster clause and that at issue here (the addition, in parenthesis, of “including decisions as to whether they have jurisdiction”) was not relevant to clause’s ability to oust the supervisory jurisdiction, and simply confirms that the any lawful decision by the IPT as to whether or not it enjoys jurisdiction cannot be impugned by any court. This was rejected by Sir Brian Leveson because it implied, in the first place, a revival of the concept of jurisdictional errors of law. Having been laid to rest in the post-*Anisminic* case law, an earlier attempt had been made to revive it by Laws LJ in his first instance decision in *Cart*, to identify which of the unappealable decisions of the Upper Tribunal were and were not reviewable.³⁹ In preferring the second-tier appeals criteria, however, the Supreme Court had been dismissive of the distinction between jurisdictional and non-jurisdictional errors of law,⁴⁰ and there was no appetite for reviving it here, even in the negative sense in which Privacy International relied upon it.⁴¹ Sir Brian Leveson relied primarily, however, upon the need to interpret ouster clauses (like all statutory provisions) in context, emphasising here that the IPT was already performing the sort of supervisory function normally left to the High Court, though in cases which, because they involve “highly sensitive material and activities which need to be kept secret in the public interest”, cannot be handled within the ordinary court system.⁴² He identified a material distinction between tribunals which adjudicate “claims brought to enforce individual rights”, which there are compelling reasons for subjecting to judicial review, and the IPT, which “is exercising a supervisory jurisdiction over the actions of public authorities”.⁴³ Because the IPT effectively exercises a supervisory jurisdiction, the case for subjecting it to the High Court’s supervisory jurisdiction is – the PQBD held – weak. Though a contextual approach to this issue has some merit, it should be noted that the case for restricting judicial review has often been made in the first place with reference to the large number of applications in certain policy areas. The quantity of judicial review applications in the field of asylum, for example, was (alongside the perception about their often low quality) central to the

³⁹ R (*Cart*) v *Upper Tribunal* [2009] EWHC 3052 (Admin).

⁴⁰ [2011] UKSC 28.

⁴¹ [2017] EWHC 114 (Admin), [37]-[39].

⁴² [2017] EWHC 114 (Admin), [41].

⁴³ [2017] EWHC 114 (Admin), [42].

case for the 2003 ouster clause.⁴⁴ That consideration – even assuming its legitimacy – does not apply in the context of the IPT: it makes relatively few decisions, and holding these decisions to be reviewable would not add greatly to the volume of judicial review.

More generally, the PQBD’s reasoning seems problematic, first in its reliance upon the claim that the IPT is “exercising a supervisory jurisdiction” – it is not clear that the IPT does so when, for example, it determines Human Rights Act claims against the intelligence services, nor when it determines complaints about specific types of act done by a series of specified bodies. In *A v B*, in particular, the applicant accepted before the Supreme Court that his claim fell within one of the statutory categories of claim over which RIPA gives the IPT jurisdiction.⁴⁵ And even if the categorisation of the IPT within the schema offered by the PQBD is reasonable, that schema does not seem to have any particular pedigree, as do, for example, the distinctions between tribunals which are and are not ‘superior courts of record’ or which are of limited or unlimited jurisdiction.⁴⁶ Too much reliance is therefore placed upon a categorisation which is not logically compelling, while the basis of the argument that a tribunal exercising a supervisory jurisdiction should not itself be subject to such a jurisdiction is a single, *obiter*, remark by Laws LJ in the first instance decision in *Cart*,⁴⁷ and the claim – made only through implication – that it is somehow less important that errors of law made by such a body are corrected, and unfairness in its procedure addressed.⁴⁸ This is, with respect, an insufficient basis for departing from a principle – the rule of law, which mandates a deep suspicion of ouster clauses – so fundamental to the constitution. Finally, the PQBD holds that the presumption that Parliament “could not have intended to make a statutory tribunal wholly immune from judicial oversight” is not engaged here, given that RIPA makes provision for the introduction of rights of appeal.⁴⁹ Except, of course, that it is equally plausible to say that, because Parliament has granted to the executive a discretion as to whether there should be any right of appeal at all, the presumption in question should apply at least while (or to the extent that) no such right exists. The holding that the presumption is not engaged here had the convenient consequence that no consideration needed be given to the difference between the RIPA ouster clause and that in the 2003 Bill. Any such consideration can be expected to have resulted in the conclusion that the RIPA clause did not in fact exclude judicial review.

⁴⁴ See Rawlings, ‘Review, Revenge and Retreat’, 484-6.

⁴⁵ *A v B* [2009] UKSC 12, [9].

⁴⁶ On which, see the judgment of Laws LJ in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

⁴⁷ [2009] EWHC 3052 (Admin), [94].

⁴⁸ [2017] EWHC 114 (Admin), [42].

⁴⁹ [2017] EWHC 114 (Admin), [43].

Though Leggatt J eventually concurred with the judgment of Sir Brian Leveson, he did so with a notable lack of enthusiasm, with reference to the futility of requiring the matter to be considered by a differently constituted Divisional Court.⁵⁰ The substance of his judgment in fact points to the opposite conclusion. Unlike the PQDB, he speaks the language of the rule of law, noting that judicial review serves that end in two ways. First, it provides “a means of correcting legal error.”⁵¹ Second, it ensures that the law is interpreted and applied in a consistent fashion, with questions of law able to move from a statutory tribunal to a position within the hierarchy of courts which is “commensurate with their public importance and difficulty” and not left stranded in separate, statutory, legal islands.⁵² The claim that the language here was suitably unambiguous was weakened by its resemblance to the language which had been held insufficient, in *Anisminic*, to oust the courts’ jurisdiction.⁵³ Moreover, the *ratio* of *Anisminic* – that any determination reflecting an error of law is in fact a nullity, not that every error of law is an error about jurisdiction – applied with equal force here.⁵⁴ If the bracketed words of the RIPA ouster clause were intended to overcome the effect of *Anisminic*, they reflected a misunderstanding of that decision.

Leggatt J suggests that the (contingent) possibility of appeal against the IPT’s decisions does not suffice to distinguish it from other tribunals. A statutory appeal was also available under the Special Immigration Commission Act 1997, the ouster clause in which was the subject of one of the applications before the High Court in *Cart*. There, however, it was held that the ouster clause failed to exclude judicial review of decisions other than those in respect of which appeal was available, and that holding was not appealed along with those relating to the Upper Tribunal.⁵⁵ He says nothing regarding the distinction drawn between different types of tribunal by Sir Brian Leveson; of the claim, however, that a body exercising a supervisory jurisdiction cannot sensibly be subject to some other supervisory jurisdiction, he is sceptical: though it may not makes sense to review a body exercising the supervisory jurisdiction on rationality grounds (on the basis that already applies its own rationality test to the decision it reviews), the objection does not hold (at least as strongly) “where a challenge is made, for example, on grounds of procedural impropriety or, as in this case, that the IPT has made an error of statutory interpretation.”⁵⁶ This must be correct. There is no

⁵⁰ [2017] EWHC 114 (Admin), [62].

⁵¹ [2017] EWHC 114 (Admin), [48].

⁵² [2017] EWHC 114 (Admin), [49].

⁵³ [2017] EWHC 114 (Admin), [54].

⁵⁴ [2017] EWHC 114 (Admin), [55].

⁵⁵ [2017] EWHC 114 (Admin), [55]-[56].

⁵⁶ [2017] EWHC 114 (Admin), [61].

logical difficulty in examining whether the IPT has made an error of law, even if (as must be doubted) the IPT is best understood as a tribunal which exercises a supervisory jurisdiction.

5. Conclusion

The High Court's decision in *Privacy International* does too little to insist upon the rule of law implications of the availability of judicial review, and is predicated upon a problematic characterisation of the Investigatory Powers Tribunal, whose legal relevance must be doubted. In holding that the RIPA ouster clause – whose language falls far short of that in the original Asylum and Immigration (Treatment of Claimants etc) Bill in 2003 – prevents judicial review of the decisions of the IPT, the High Court has failed to uphold the common law tradition of treating ouster clauses with the maximum of suspicion. The effect is to permit Parliament to interfere with fundamental values and rights (the rule of law, and the right of access to the court) without using the most explicit possible language. In the decision challenged here, the IPT had justified its approach to the interpretation of the 1994 Act by noting that GCHQ was an agency “one of whose principal functions is to further the interests of UK national security...”⁵⁷ Though it is not said so explicitly, equivalent reasoning may be at work here. The requirements of national security alone, however, should not automatically take priority over the fundamentals of the constitution. Much of the effect of the High Court's judgment is undone by the enactment of the Investigatory Powers Act 2016. That reconnects the ‘legal island’ which the IPT has become back to the ordinary courts, introducing a right of appeal on the same second-tier appeal criteria on which the Supreme Court held the unappealable decisions of the Upper Tribunal to be subject to judicial review, and which would have likely been applied also to review of the IPT had the High Court here taken a different view of the ouster clause's effect. It may therefore be that the question of the reviewability of the IPT has no practical significance: the interpretation of the RIPA ouster clause (which remains otherwise in effect) is no longer determinative of whether the IPT's decision can be reviewed. Nevertheless, the immediate effect of the High Court's decision here is that the IPT's decision as to the scope of section 5 of the Intelligence Services Act will go, for now, unreviewed (and uncorrected) by the courts. As the provision in question is left in place by the 2016 Act (now subject to the rule that it may no longer be used for the purpose of obtaining communications where there is a “British Islands connection”),⁵⁸ the point has an ongoing significance and would

⁵⁷ [2016] UKIP Trib 14_85-CH, [37].

⁵⁸ Investigatory Powers Act 2016, s.13.

have fulfilled the second-tier appeal criteria, had the High Court done as it should have and applied them here.