

Post-publication updates (up to 1/1/18)

Chapter 11 – Judicial review: Illegality

11.4.2 Error of law within and outside jurisdiction

The clause in *Anisminic*¹ is often described as an ouster clause, as it attempts to oust the jurisdiction of the courts to review decisions made by public authorities. As can be seen, the courts are generally extremely reluctant to give effect to such clauses. However, the Court of Appeal distinguished *Anisminic* in *R (Privacy International) v Investigatory Powers Tribunal*.²

The Investigatory Powers Tribunal ('IPT') is a tribunal established under the Regulation of Investigatory Powers Act 2000 which has the ability to examine the conduct of the intelligence services; MI5, MI6, and GCHQ. At Section 67(8) states:

Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards 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.

A significant feature is that the IPT is made up of five High Court judges and other lawyers from Scotland and Northern Ireland of a similar status. This makes it extremely unusual in terms of public bodies. The issue in this case was whether the IPT is subject to judicial review, or whether this was precluded by section 67(8).

The Court of Appeal decided that decisions of the IPT are exempt from review by the courts. This 'includes those determinations and decisions which the IPT may have made on the basis of what (if there were a judicial review or appeal) might have been found by a court to have been an erroneous view of the law'.³ To reach this decision, the court distinguished *Anisminic*, on the basis that the language used in section 67(8) is 'materially different' from the provision in *Anisminic*.⁴ In *Anisminic*, the word 'determination' was read as excluding 'purported determinations made in excess of jurisdiction, where the excess of jurisdiction arose because of ... an error of law'.⁵ By contrast, section 67(8) of the 2000 Act, which expressly states that 'decisions as to whether the [IPT has] jurisdiction', means that decisions based on an error of law cannot be subject to review by the courts, because that is expressly excluded.

As the Court of Appeal stated,⁶

it is not tenable to apply the simple distinction relied upon in *Anisminic* in the context of section 4(4) of the 1950 Act between a "determination" and a purported determination, in the sense of a determination made without jurisdiction. In section 67(8), the word "decision" is stated to include a decision which (if judicial review or

¹ *Anisminic Ltd V Foreign Compensation Commission* [1969] 2 AC 147.

² [2017] EWCA Civ 1868.

³ *ibid* [26].

⁴ *ibid* [33].

⁵ *ibid* [34].

⁶ *ibid* [34].

an appeal were available) might be found to have been made without jurisdiction because of an error of law on the part of the IPT - that is to say, if one wants to use this phrase, a purported decision.

The Court of Appeal also considered that reading section 67(8) in this way makes sense as regards the overall scheme of the Act. Parliament has ensured that judicial expertise and independence amongst the membership of the IPT is 'very high',⁷ such that the IPT has been recognised in other cases 'as a judicial body of like standing and authority to that of the High Court'.⁸

Although this case may appear to be primarily a matter of statutory interpretation, it clearly raises broader questions about the rule of law. The concern is that if ouster clauses such as this are effective, the rule of law is compromised as 'legal islands'⁹ emerge when correct interpretation of the law is not applied consistently. As Mark Elliot describes, the basic tension in the case is whether the language of the ouster clause and its context is sufficient to displace the presumption that Parliament does not intend to prevent the review of unlawful decisions'.¹⁰

⁷ *ibid* [38]

⁸ *ibid*, citing *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24; [22] (Laws LJ), [57] (Dyson LJ) and [32] (Rix LJ).

⁹ A phrase used by Mark Elliot in 'Privacy International in the Court of Appeal: *Anisminic* distinguished — again', 26th November 2017 [<https://publiclawforeveryone.com/2017/11/26/privacy-international-in-the-court-of-appeal-anisminic-distinguished-again/>]

¹⁰ *ibid*, citing Leggatt J in the Divisional Court: [2017] EWHC 114 (Admin) [55].