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Kay Everett Memorial Lecture  
School of Oriental and African Studies  
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**Holding the Balance:**  
**National Security, Civil Liberties and the Role of the Investigatory Powers**  
**Tribunal**

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1. It is a genuine pleasure to give this year's Kay Everett Memorial Lecture. Kay Everett was a truly remarkable person. I doubt if there are many others who would have the courage to do what she did. Midway through her career with a "magic circle" firm of solicitors, she decided to embark on an LLM here at SOAS on the subject of human rights law. She then devoted her life and career to helping others by making use of that knowledge and experience. Her life was sadly cut short when she was only 43 but her memory lives on and inspires others.
2. The theme of my lecture this evening will be the work of the Investigatory Powers Tribunal (or "IPT"). I was appointed President of that Tribunal in September last year. I hope you will find it interesting to hear about the history

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<sup>1</sup> Lord Justice of Appeal and President of the Investigatory Powers Tribunal. I would like to thank Jonathan Glasson QC for his comments on an earlier draft of this lecture.

and work of this Tribunal. It is a tribunal whose work is perhaps not as well known as it should be. It is also a relatively rare kind of tribunal in that its jurisdiction extends to all four constituent nations of the United Kingdom.

3. The activities over which the IPT has jurisdiction include surveillance, interception of communications and the use of covert human intelligence sources (“CHIS” as they are known in the jargon or “informants” as they are known more colloquially). The public authorities which are within its remit include the police, local authorities and central government departments. Perhaps most significantly, its jurisdiction includes complaints made by members of the public against one of the security and intelligence agencies.
4. The IPT has been described by one commentator (Ian Cobain) as the “most secretive court” in this country.<sup>2</sup> On the other hand, the very fact that the IPT exists, to review the legality of the actions of bodies which necessarily have to operate in secret, may itself be a tribute to the rule of law in this country.
5. As one academic commentator, Paul F. Scott, has put it in his recent study, The National Security Constitution.<sup>3</sup>

“... Where the pursuit of national security ends reaches further into the constitutional landscape than was previously the case, that fact is often in large part the consequence of there having been formalised in law (and, by extension, in constitutional law) processes and actions which would previously not have taken place, or would have happened without legal authority. ... What is presented here as the emergence (or acceleration) of a national security constitution is in many ways the consequence of developments which are themselves, from the point of view of the rule of law – or, if that is too diffuse a value, the bare commitment to legality – unambiguously positive.”

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<sup>2</sup> The History Thieves (2016, Portobello Books), p.287.

<sup>3</sup> (2018, Hart), p.4.

6. The IPT was created by the Regulation of Investigatory Powers Act 2000 (“RIPA”). It succeeded several earlier bodies, including the Interception of Communications Act Tribunal, which had been created in 1985.
7. The IPT’s first President was a Court of Appeal judge, Lord Justice Mummery, who served from its inception in 2000 until his retirement in 2013. Its second President was a High Court judge, Mr Justice (later Sir Michael) Burton, who served from 2013 until 2018. RIPA also makes provision for there to be a Vice-President of the IPT, a post which is currently vacant but which we hope will be filled in the near future. In addition, there are other members. Those other members currently include two serving High Court Judges from England and Wales; a retired High Court Judge from Northern Ireland; and senior practitioners from England and Wales and Scotland.

#### Some history

8. The history of spying long predates modern technology such as telephones and computers. The leading historian of intelligence matters, Christopher Andrew, suggests that the history of espionage can be traced back to Moses in the Old Testament. In his recent magisterial history of intelligence, he says that: “The first major figure in world literature to emphasize the importance of good intelligence was God.” After Moses had led his people out of captivity in Egypt

in search of the Promised Land, he was told by God to send spies to the land of Canaan, “which I give unto the children of Israel.”<sup>4</sup>

9. In England, by Elizabethan times, if not before, we can already see the phenomena of interception of communications and code-breakers. Francis Walsingham, who was Queen Elizabeth I’s principal Secretary of State between 1573 and 1590, was particularly keen to keep a careful eye on what was being said in letters written by Mary, Queen of Scots. Indeed, it was a letter which had been intercepted and which appeared to endorse a suggestion that Queen Elizabeth should be assassinated that led to Mary’s death warrant. According to Professor Andrew, it was in 1592, in Shakespeare’s play *Richard III*, that the first use of the word “intelligence” is to be found in its modern sense of “secret information.”<sup>5</sup>
10. During the brief time when England was a republic, in the Commonwealth era after the Civil War, a Deciphering Branch was created. It was to last from 1653 until Victorian times.
11. The General Post Office was created in 1660 after the restoration of Charles II. It seems clear that from its inception postal communications were liable to be intercepted by agents of the state. This practice was recognised for the first time in an Act of 1711 in the reign of Queen Anne.
12. In 1844 it was discovered, after a scandal concerning the interception of the post of the Italian exile Giuseppe Mazzini, that this practice was not uncommon. There was outrage in the House of Commons that something so un-English

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<sup>4</sup> The Secret World: A history of intelligence (2018, Allen Lane), p.13.

<sup>5</sup> *Ibid*, p.187.

could have been happening in this country. This led to the abolition of the Deciphering Branch and the Secret Office of the Post Office. According to Christopher Andrew this had the consequence that, at the outbreak of the First World War, Great Britain did not have a code-breaking facility. It quickly found that it needed one.<sup>6</sup>

13. In the meantime, in 1909 there was established the Secret Service Bureau. Of course its existence was not announced or even acknowledged for many decades. At first it consisted of just two officers, one responsible for domestic matters and the other for foreign intelligence. The original officers, Sir Vernon Kell and Sir Mansfield Cumming became respectively the first heads of the Security Service (MI5) and the Secret Intelligence Service (MI6). It is in honour of Cumming that to this day the Chief of MI6 is known as C – not M, as in the James Bond stories.<sup>7</sup>
14. The third agency which now forms part of the UK intelligence community is the Government Communications Headquarters (GCHQ), whose origins lie in the Government Code and Cypher School, created after the First World War and which famously worked at Bletchley Park during the Second World War, although this was kept secret for many decades after the war.
15. What is important for present purposes is that the security and intelligence agencies are subject to the law of the land, including the requirements of RIPA and the Human Rights Act 1998 (“HRA”). By putting complaints under those Acts against one of the agencies into the IPT Parliament has sought to ensure

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<sup>6</sup> *Ibid.*, pp.380-383. See also David Omand, Securing the State (2010, Hurst & Co), p.277.

<sup>7</sup> Andrew, *op. cit.*, p.483.

both that such complaints can be made to an independent judicial body; and that the interests of national security are protected.

### The impact of the European Convention on Human Rights (“ECHR”)

16. In 1979, in *Malone v Metropolitan Police Commissioner*, an action concerning interception of telephone calls, pursuant to a warrant issued by the Home Secretary, failed in the High Court on the simple ground that, unlike interception of the post, there was no interference with rights of property. Sir Robert Megarry V-C held that there was no right to privacy at common law: [1979] Ch 344. The case of *Malone v United Kingdom* went to the European Court of Human Rights, where it succeeded in 1984: (1985) 7 EHRR 14. It was that decision which led to the first statute regulating the interception of telephone communications: the Interception of Communications Act 1985. It was the 1985 Act which established a tribunal which was one of the three predecessors of the IPT.
  
17. The law in this area was first developed by the European Court of Human Rights in the seminal case of *Klass v Germany* (1979-80) 2 EHRR 214. At para. 42 the Court observed that “powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only insofar as strictly necessary for safeguarding the democratic institutions.” The Court stressed that, although states need to be able to respond to threats of terrorism, this does not mean that they “enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.” (para. 49). In the same passage the Court emphasised that surveillance poses the risk of undermining or even

destroying democracy “on the ground of defending it” and so states “may not in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.”

18. It is important not to lose sight of the underlying values which are protected by the right to privacy. As a recent academic article by Kirsty Hughes, ‘Mass Surveillance and the European Court of Human Rights’ [2018] EHRLR 589 puts it, at p. 598, privacy is not only an individual right. It also:

“has important societal benefits, in particular it acts as a bulwark against totalitarianism, it provides the space in which ideas (particularly controversial ideas) can be formed, developed, explored and expressed, it fosters social relations, and by protecting privacy we protect those that are typically subject to the most intrusive measures including ethnic and religious minorities, and those of low socio-economic status. Thus privacy contributes to a democratic, intellectually vibrant, harmonious and egalitarian society.”

#### The origins and history of the IPT

19. The IPT was established under section 65(1) of RIPA. That Act came into force on 2 October 2000. It is no coincidence that that was the same date on which the Human Rights Act came into full force. This is because RIPA was intended to ensure compliance with this country’s obligations under the ECHR so far as they relate to investigatory powers. That Act therefore fits into the framework of human rights law which was also created at that time.
20. Importantly, section 65(2) provides that the IPT is the only appropriate forum in relation to proceedings against any of the intelligence services for any acts alleged to be incompatible with the Convention rights. In the case of the

intelligence services, therefore, the jurisdiction of the IPT is not confined to investigatory powers as such. It covers all conduct of the intelligence agencies which is alleged to breach section 7 of the Human Rights Act.

21. Under section 67(2) and (3)(c), the IPT must apply the principles applicable by a court on an application for judicial review. However, as has now become clear since 2000, the principles applicable on judicial review include an allegation that a public authority has acted unlawfully under section 6 of the Human Rights Act. Accordingly, the IPT has the same jurisdiction to consider breaches of the Convention rights as an ordinary court would do in a claim for judicial review.
22. However, the IPT does not have the power to make a declaration of incompatibility in respect of primary legislation. This is because it is not a “court” within the meaning of section 4 of the Human Rights Act.
23. In his report of 2015, *A Question of Trust*, David (now Lord) Anderson QC did make a recommendation (at para. 14.106 and Recommendation 115) that consideration should be given to conferring the power to make a declaration of incompatibility on the IPT but this was not accepted when Parliament enacted the Investigatory Powers Act 2016 (“the 2016 Act”). That said, it should be noted that David Anderson felt that a possible alternative reform would be to introduce a right of appeal from the IPT, which would then render it less important that the IPT itself may not grant a declaration of incompatibility. That recommendation was accepted by Parliament, in enacting section 242 of the 2016 Act.
24. Under section 67(8) of RIPA it had been provided that there was to be no appeal from a decision of the IPT “except to such extent as the Secretary of State may



by order otherwise provide”. No such order was made at the time. However, an order has now been made, bringing into force the amendment made by section 242 of the 2016 Act: the new appeal route was introduced from 31 December 2018. Since the courts to which an appeal will lie, including the Court of Appeal of England and Wales, do have the power to make a declaration of incompatibility, it should not be a practical problem that the IPT does not have that power.

25. The question whether the jurisdiction of the IPT in relation to conduct of the security and intelligence agencies is an exclusive one came before the Supreme Court in *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12; [2010] 2 AC 1. In that case the claimant was a former senior member of the Security Service who had written a book about his work with the Service and wished to publish it. He was bound by strict statutory and contractual obligations as well as duties of confidentiality and he was required to obtain the consent of the Director of Establishments of the Security Service before he could publish. The Director refused to give his consent to publish parts of the book. The claimant commenced judicial review proceedings in the High Court alleging that this was contrary to his right to freedom of expression in Article 10 of the ECHR. The Supreme Court held that only the IPT had jurisdiction to hear claims under section 7(1)(a) of the Human Rights Act and section 65(3)(a) of RIPA did not limit that exclusive jurisdiction to proceedings arising out of the exercise of one of the regulated investigatory powers in that Act itself. The judgment of the Court was given by Lord Brown JSC.

26. At para. 14 of his judgment Lord Brown made the particular point that the doctrine of “neither confirm nor deny” (“NCND”) meant that it is important that cases against the security and intelligence services should be brought not in the ordinary courts but in a specialist tribunal that has the appropriate procedures to handle such cases.
27. Furthermore, Lord Brown responded to the criticisms which were made of the IPT’s procedures, in particular the suggestion that they were “flatly contrary to the basic principles of open justice”, as follows at para. 26 of his judgment:

“... Claims against the intelligence services inevitably raise special problems and simply cannot be dealt with in the same way as other claims. This, indeed, has long since been recognised both domestically and in Strasbourg.”

In that context Lord Brown went on to quote what Lord Bingham had said in *R v Shayler* [2002] UKHL11; [2003] 1 AC 247, at para. 26:

“The need to preserve secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion has been recognised by the European Commission and the Court in relation to complaints made under article 10 and other articles under the Convention ... The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question. The acid test is whether, in all the circumstances, the interference with the individual’s Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. ...”

Hearings in private or public?

28. Until very recently the Tribunal's Procedural Rules were those set out in the rules enacted at its inception in 2000. The language of Rule 9(6) of those original rules was clear and unqualified:

“The Tribunal's proceedings, including any oral hearings, shall be conducted in private.”

29. That language was mandatory and on its face admitted of no exceptions.

30. Nevertheless, on 23 January 2003 the Tribunal gave its judgment in the matter of applications number IPT/01/62 and IPT/01/77, which were rulings on preliminary issues of law. As the Tribunal observed at para. 1, this was the first occasion on which the Tribunal sat in public. As later became apparent, the case was about a Mr Kennedy.

31. The relevant provision in the Rules was challenged by Guardian Newspapers Limited under the Human Rights Act, relying upon the right to a fair and public hearing in Article 6, as well as Articles 8 and 10 of the ECHR.

32. The Tribunal comprised the then President (Mummery LJ) and Vice-President (Burton J) and they gave a joint judgment.

33. Rule 9(2) of the 2000 Rules provided that:

“The Tribunal shall be under no duty to hold oral hearings, but they may do so in accordance with this Rule (and not otherwise).”

34. The Tribunal reached the conclusion that the absence from the Rules of an absolute right to either an *inter partes* oral hearing, or failing that, to a separate oral hearing in every case was within the rule-making power in section 69(1) of RIPA. It was also compatible with Articles 6, 8 and 10 of the ECHR: see para. 161 of its judgment.
35. However, when it came to the absolute requirement that hearings must be in private in Rule 9(6), the Tribunal concluded that this was *ultra vires* the enabling power in section 69 of RIPA. Accordingly, it did not bind the Tribunal: see para. 173 of its judgment. The Tribunal concluded that there was no conceivable ground for requiring legal arguments on pure points of procedural law to be held in private: see para. 171.
36. The Tribunal also concluded that, unless and until the Rules were amended by the Secretary of State, the Tribunal would have a discretionary power under section 68(1) to hear legal arguments in public under Rule 9(3). This was, however, subject to the important qualification that the Tribunal continued to be subject to its duties in both RIPA and Rule 6(1). Rule 6 required the Tribunal to carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security or other interests specified in section 69(6)(b) of RIPA. There is a similar provision in the 2018 Rules: Rule 7(1).
37. In its judgment in that early case, the Tribunal also referred to the inherently secret nature of much of its work.

38. As the Tribunal observed at para. 52 of its judgment:

“... In general, the work of the security services must be carried out in secret in order to safeguard national security as an important policy objective. National security may be compromised and harmed by the disclosure of the fact of surveillance.”

39. It was for that reason that the Tribunal concluded that the long standing policy of successive Governments that they “neither confirm nor deny” whether interception or surveillance has taken place was lawful and compatible with the Human Rights Act. That policy was set out, for example, in a White Paper in 1988 (Cm 408), at para. 43:

“... As a general policy, Governments do not comment on assertions about security or intelligence: true statements will generally go unconfirmed, and false statements will normally go undenied.”

40. This flowed from the general and fundamental considerations which were set out in paras. 59-60 of the Tribunal’s judgment. At para. 59 the Tribunal said that:

“... Cases potentially involving national security are at the cutting edge of Convention rights. One of the main responsibilities of a democratically elected Government and its Ministers is to safeguard national security. Intelligence gathering by the use of investigatory powers is an essential part of that function. Otherwise, it may not be possible to forecast and foil attempts to overthrow democratic institutions and laws (including Convention rights) by undemocratic means. Interception of communications and surveillance are obvious methods of gathering intelligence. Legitimate security and intelligence systems are allowed to use those methods, on the basis that they must operate within the law, in order to protect the very rights and freedoms guaranteed by the Convention.”

41. To counter-balance those legitimate considerations, at para. 60 the Tribunal observed that:

“As the exercise of investigatory powers potentially conflicts with individual rights of person, property and privacy there must be a proper means of safeguarding individuals from, and providing redress for, unjustified infringements of their rights. It is the function of the Tribunal to enquire into and determine the lawfulness of any use of investigatory powers and to provide redress where appropriate. They must do so impartially, operating as an independent body discharging judicial functions within the legislative framework of RIPA and the Rules, as properly interpreted by the Tribunal in the light of the Convention requirements of fair trial and open justice ...”

42. In similar vein, in the Court of Appeal case of *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868; [2018] 1 WLR 2572, at para. 38, Sales LJ said:

“It is implicit ... that Parliament considered that the IPT can be trusted to make sensible decisions about matters of this kind and on questions of law which arise and need to be decided for the purpose of making determinations on claims or complaints made to it. There is nothing implausible about this. The quality of the membership of the IPT in terms of judicial expertise and independence is very high, as set out in Schedule 3 to RIPA ... The IPT has been recognised to be ‘a judicial body of like standing and authority to that of the High Court’: see *R (A) v Director of Establishments of the Security Service* [2010] 2 AC 1, para 22, per Laws LJ; and see para 57, per Dyson LJ and para 32, per Rix LJ.”

43. Ever since its decision in *Kennedy* in 2003, the IPT has developed the practice of holding a hearing in public if that is possible and is compatible with the public interest. In particular, it will often hold a hearing in public to consider a question

of law on the basis of assumed facts without (at that stage) deciding whether those facts are true or not.

#### Is the Tribunal part of the Tribunal system?

44. The IPT is not part of the general tribunal system in this country which was established by the Courts, Tribunals and Enforcement Act 2007. That Act implemented the proposals which had been made in 2001 by Sir Andrew Leggatt in his review of Tribunals, *'Tribunals for Users: One System, One Service'*. Sir Andrew addressed the position of the IPT expressly at para. 3.11 of his report, where he said:

“... This Tribunal is different from all others in that its concern is with security. For this reason it must remain separate from the rest and ought not to have any relationship with other Tribunals. It is therefore wholly unsuitable both for inclusion in the Tribunals System and for administration by the Tribunals Service. So although the Chairman is a Lord Justice of Appeal and would be the senior judge in the Tribunals System he would not be in a position to take charge of it. The Tribunal's powers are primarily investigatory, even though it does also have an adjudicative role. Parliament has provided that there should be no appeal from the Tribunal except as provided by the Secretary of State. [See section 67(8) of RIPA]. Subject to Tribunal rules made by the Secretary of State the Tribunal is entitled to determine its own procedure [section 68(1)]. We have accordingly come to the conclusion that this Tribunal should continue to stand alone; ...”

#### The role of Counsel to the Tribunal

45. Over the last 12 years or so the Tribunal has developed the practice of instructing Counsel to the Tribunal, not in every case but in certain cases. It is

important to note that Counsel to the Tribunal does not represent any of the parties in a case but nor is he or she a “special advocate” of the kind that is now familiar in other contexts, for example the Special Immigration Appeals Commission. The closest analogy is probably with counsel to a public inquiry.

46. The original Tribunal Rules of 2000 made no mention of Counsel to the Tribunal. Nevertheless, the Tribunal has, at least since 2006, used its broad power to regulate its own procedure under section 68(1) of RIPA to instruct Counsel to the Tribunal. The first occasion on which I am aware this happened was in *C v The Police and Secretary of State for the Home Department* (IPT/03/32), in which the Tribunal had to consider whether it had jurisdiction to deal with police employment related surveillance cases.
47. The Attorney General was asked to appoint an advocate to the Tribunal. This followed the practice and procedure which is familiar from the Attorney General’s Memorandum of 19 December 2001, ‘Requests for the Appointment of an Advocate to the Court’, a term which has replaced what used to be called the *amicus curiae*.
48. Since that time the practice has developed whereby the Tribunal simply instructs Counsel to assist it without the need for appointment by the Attorney General. In *Liberty/Privacy International v Secretary of State and others* [2014] UK IP Trib 13 77-H; [2015] 1 Cr App R 24, Counsel to the Tribunal (Martin Chamberlain QC) made written submissions, which are recorded in the Tribunal’s judgment, in which he set out the role of Counsel to the Tribunal and distinguished it from the role of a special advocate. He said:



“... A special advocate is appointed (normally, but not necessarily, pursuant to statute) to represent the interests of a party at hearings from which that party is excluded. A special advocate is required to be partisan. He or she makes such submissions (if any) as he considers will advance the interests of the excluded party. If the special advocate reaches the view that it would not advance the interests of the excluded party to make submissions at all (as has happened in a few cases), then the proper course is to decline to make submissions at all, even though this leaves the Tribunal without assistance.

... Counsel to the Tribunal performs a different function, akin to that of *amicus curiae*. His or her function is to assist the Tribunal in whatever way the Tribunal directs. Sometimes (e.g. in relation to issues on which all parties are represented), the Tribunal will not specify from what perspective submissions are to be made. In these circumstances, counsel will make submissions according to his or her own analysis of the relevant legal or factual issues, seeking to give particular emphasis to points not fully developed by the parties. At other times (in particular where one or more interests are not represented), the Tribunal may invite its counsel to make submissions from a particular perspective (normally the perspective of the party or parties whose interests are not otherwise represented).”

49. That description of the role of Counsel to the Tribunal has clearly formed the basis for the definition of such counsel which is now to be found expressly in Rule 12 of the Tribunal Procedure Rules 2018, which have recently come into force (on 31 December 2018). Rule 12(1) provides that:

“The Tribunal may appoint Counsel to assist the Tribunal in their consideration of any complaint or section 7 proceedings where –

- (a) the complainant is not legally represented;
- (b) the respondent objects to the disclosure of documents or information to the complainant;
- (c) the Tribunal intends to hold a hearing (in whole or in part) in the absence of a complainant; or
- (d) in any other circumstance in which the Tribunal considers it appropriate to do so.”

50. Rule 12(2) provides that the Tribunal may request Counsel to the Tribunal to perform various specific functions, which are listed, including cross-examination of a witness called by the respondent in the absence of the complainant; to ensure that all the relevant arguments on the facts and the law are put before the Tribunal and, generally, to perform any other function that would assist the Tribunal.
51. Interestingly, in the context of the new appeal procedure to which I will refer later, Counsel to the Tribunal also now has the role (made mandatory in the Rules by Rule 12(3)) to seek to identify any arguable error of law in relation to any decision or determination made by the Tribunal consequent upon a hearing held (in whole or in part) in the absence of the complainant. Rule 12(4) provides that, where Counsel to the Tribunal does identify an arguable error of law in accordance with that provision, Counsel must notify the Tribunal and, when so notified, the Tribunal must, subject to its general obligation to protect the public interest (in Rule 7 of the 2018 Rules), disclose the arguable error of law to the complainant.
52. In an interesting article published by Martin Chamberlain in the University of Toronto Law Journal (2018) 68 UTLJ 496, ‘Special Advocates and *Amici Curiae* in National Security Proceedings in the United Kingdom’, he again emphasises, at p.505, the difference between the special advocate, who must be partisan and is not there to assist the Court, and an *amicus*, whose function is to assist the Court or Tribunal. It is interesting to observe that, in that article, reflecting the views of some others, for example JUSTICE, he notes criticisms

which have been made about the effectiveness of the special advocate system in closed material proceedings. Nevertheless, there have also been suggestions that, in the IPT, there should be the opportunity to have a special advocate whose function would be to represent the complainant, at least in addition to Counsel to the Tribunal, whose function (as I have mentioned) is primarily to assist the Tribunal and is not to represent the complainant in a partisan way.

53. The recent judgment of the Strasbourg Court in the *Big Brother Watch* case noted, it would appear with approval, the role of Counsel to the Tribunal and how it can help to ensure that the overall procedure is fair.

The decision of the European Court of Human Rights in *Big Brother Watch UK v United Kingdom*

54. The European Court of Human Rights considered the role of the IPT in secret surveillance cases in *Kennedy v United Kingdom*, decided in 2010: (2011) 52 EHRR 4. The Court held that proceedings before the IPT had been compliant with Article 6, since any procedural restrictions were proportionate to the need to keep secret sensitive and confidential information and did not impair the very essence of the applicant's right to a fair trial. However, the Court expressed some concerns about whether proceedings before the IPT should be regarded as an effective remedy so as to require the procedure to be exhausted under Article 35 of the ECHR before an application could be made to Strasbourg.

55. In its recent judgment in *Big Brother Watch* the Court returned to these issues.<sup>8</sup> It observed that the IPT's ruling in *Kennedy* had come very early in its history. In fact it was the first time that the IPT had sat in public. In the 15 years which had passed since that time, the Court considered that the experience of the IPT and the very real impact its judgments have had on domestic law in practice meant that the concerns expressed by the Court in *Kennedy* about its effectiveness as a remedy for complaints about the general compliance of a secret surveillance regime were no longer valid: see para. 253 of the judgment. In that context, at para. 255, the Court was influenced by the consideration that the IPT was the only tribunal with jurisdiction to obtain and review "below the waterline" material. The Court said that an examination of the IPT's extensive caselaw since *Kennedy* demonstrates the important role that it can and does play in analysing and elucidating the general operation of secret surveillance regimes. It noted that in the *Liberty* proceedings the IPT played a crucial role first in identifying those aspects of a surveillance regime which could and should be further elucidated, and then recommending the disclosure of certain "below the waterline" arrangements in order to achieve that goal.
56. Furthermore, at para. 258, the Court noted that it would appear that, where the IPT has found a surveillance regime to be incompatible with the ECHR, the British Government has ensured that any defects are rectified and dealt with.
57. Therefore the Court concluded, at para. 265, that as a general rule the IPT has shown itself to be a remedy, available in theory and practice, which is capable of offering redress to applicants complaining of both specific incidences of

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<sup>8</sup> Applications 58170/13, 62322/14 and 24960/15, judgment of 13 September 2018.

surveillance and the general compliance of surveillance regimes with the ECHR. As a consequence, applicants to Strasbourg will normally be expected to exhaust their domestic remedies by pursuing the opportunity to bring proceedings in the IPT first. Nevertheless, in the special circumstances of the cases before it, and given what the Court had earlier said in *Kennedy*, the Court was prepared to hold that the particular applications before it were not inadmissible under Article 35(1) of the ECHR.

58. The Court went on to consider whether proceedings before the IPT comply with Article 6 of the ECHR. It noted that neither the Commission nor the Court has found to date that Article 6(1) of the ECHR applies to proceedings relating to a decision to place a person under surveillance. It noted further that the IPT has itself gone further than the Court in this regard. In its joint ruling on preliminary issues of law in the British-Irish Rights Watch case the IPT accepted that Article 6 applies to a person's claims under section 65(2)(a) and to his complaints under section 65(2)(b) of RIPA since each of them involves the determination of his civil rights.
59. The European Court itself found it unnecessary to reach any firm conclusion on the applicability of Article 6 since it concluded that the complaint was manifestly ill-founded in any event. The complaint under Article 6 was therefore held to be inadmissible.
60. At para. 510 of its judgment the Court reaffirmed what it had said in *Kennedy*, namely that the procedures of the IPT are compatible with Article 6 since any restrictions on the applicant's rights are both necessary and proportionate and they do not impair the very essence of Article 6. In particular, the Court

observed, the IPT had deployed its extensive powers to ensure the fairness of the proceedings. There was scrutiny of all the relevant material, open and closed. Material was only withheld from the applicants where the IPT was satisfied that there were appropriate public and national security reasons for doing so. Finally, the IPT had appointed Counsel to the Tribunal to make submissions on behalf of the applicants in the closed proceedings.

61. *Big Brother Watch* was a decision of a chamber of the European Court of Human Rights. Earlier this month, on 4 February 2019, the Court decided that the case will be referred to the Grand Chamber. We await the judgment of the Grand Chamber with interest.

#### The 2018 Procedure Rules

62. As I have mentioned, for the first time since its creation in 2000, the IPT's Procedure Rules were recently revised and are now to be found in the Investigatory Powers Tribunal Rules 2018 (SI 2018 No. 1334). The old rule which had required all hearings to be in private has been abolished. Rule 10 now provides that the Tribunal is under no duty to hold a hearing but may do so; and that it may be held wholly or partly in private. Rule 13 provides that the Tribunal may receive evidence in any form, and may receive evidence that would not be admissible in a court of law. Rule 11 provides for representation at hearings. As I have mentioned earlier, Rule 12 expressly refers for the first time in the Rules to Counsel to the Tribunal.
63. Rule 7(1) retains the provision that:

“The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.”

64. Under section 67(7) of RIPA the IPT has a broad power to grant such remedies as it thinks fit. They can include the quashing of a warrant and the award of compensation.
65. An important change has been made by Rule 15 of the 2018 Rules and makes detailed provision for those circumstances in which a notification of a decision by the IPT may contain reasons. This duty remains subject to the general duty in Rule 7(1). Where the IPT make a determination in favour of the complainant, they must provide the complainant and respondent with the determination including any findings of fact: see Rule 15(2). Where the Tribunal make a determination which is not a determination in favour of the complainant, the Tribunal must, if they consider it necessary in the interests of justice to do so, provide the complainant and respondent with “a summary of the determination”: see Rule 15(3).
66. As I have mentioned, the 2016 Act amends RIPA to create for the first time the opportunity to appeal against decisions of the IPT. The 2018 Rules give effect to this in Rules 16-18. The appropriate appellate court will be, in England and Wales, the Court of Appeal. In Scotland it will be the Inner House of the Court of Session. At present it will not be possible for there to be an appeal to the Court of Appeal of Northern Ireland but such appeals may go to another

appropriate appellate court. This is because there is currently no devolved administration in Northern Ireland and its consent would be required to bring this legislation into force in respect of Northern Ireland. The grounds on which an appeal may be made (with the leave either of the IPT or the relevant appellate court) are that there is an error of law which raises an important point of principle or practice, or that there is some other compelling reason for granting leave.

67. The introduction of the possibility of an appeal does not have retrospective effect. It only applies to decisions taken since 31 December 2018. Accordingly, for those decisions which were made before that date, it may still be important to know whether the IPT is amenable to judicial review. That question is currently the subject of an appeal being considered by the Supreme Court, whose judgment is awaited. Both the Divisional Court and the Court of Appeal held that judicial review is not available because there is an effective ouster clause in section 67(8) of RIPA: see *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin); [2017] 3 All ER 1127; [2017] EWCA Civ 1868; [2018] 1 WLR 2572.<sup>9</sup>

68. Whatever the outcome of the case in the Supreme Court it is worth noting two passages in the judgment of Sales LJ in the Court of Appeal because they set out some general features of the nature of litigation before the IPT. At para. 7, Sales LJ said:

“The context in which the IPT functions is one in which there is particular sensitivity in relation to the evidential material in issue

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<sup>9</sup> For differing academic views on this issue see Tom Hickman, ‘The Investigatory Powers Tribunal: a law unto itself?’ [2018] Public Law 584 and Robert Craig, ‘Ouster Clauses, separation of powers and the intention of Parliament: from *Anisminic* to *Privacy International*’ [2018] Public Law 569.



and the public interests which may be jeopardised if it is disclosed. The intelligence services may have valuable sources of information about terrorist organisations, organised crime and hostile activity by foreign powers which would be lost if those targets of investigation and monitoring became aware of them. Human sources, such as informers, might be killed or threatened with serious harm if their identities (or even the possibility of their existence) were revealed. Technological capacities to obtain information might be rendered useless if it were revealed they existed and new strategies to evade them or block them were developed. Opportunities for exploitation of simple lapses of care on the part of targets which allow the intelligence services to obtain valuable information about them would be lost if the targets learned about them and tightened up their procedures. The aspects of the public interest which would be jeopardised if these things occurred, as referred to in rule 6(1),<sup>10</sup> are of the most pressing importance.”

69. At para. 10 Sales LJ said:

“The legislative regime for the IPT deliberately creates a judicial body with powers to examine in private and without disclosure any relevant confidential evidence which cannot safely be revealed to the complainant, which body is at the same time subject to an imperative overriding rule which forbids it from requiring disclosure of such material. In this way, the regime provides a guarantee that the important aspects of the public interest referred to above are safeguarded while at the same time enabling the IPT to examine the merits of claims against the intelligence services and others on the basis of the relevant evidence in a closed proceeding.”

#### Statutory regulation of the intelligence agencies

70. As we have seen, the existence of the various intelligence agencies in this country was not publicly acknowledged until the 1980s. Times have changed greatly since then. In 1989 the Security Service Act placed MI5 on a statutory

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<sup>10</sup> Now rule 7(1) of the 2018 Rules.

footing. Five years later, the Intelligence Services Act 1994 placed both MI6 and GCHQ on a statutory footing. The 1994 Act also established a Parliamentary Committee, the Intelligence and Security Committee, to monitor the work of all three UK intelligence and security agencies. For the first time, members of both Houses of Parliament were to be involved in the scrutiny of the expenditure, administration and policy of the secret agencies.<sup>11</sup> The ISC is currently chaired by the former Attorney General, Dominic Grieve QC MP.

71. Sir David Omand has held various offices, including Permanent Secretary at the Home Office and the Cabinet Office and also Director of GCHQ. Since retirement from public service he has been a visiting professor at King's College, London and has contributed to bringing the field of intelligence studies into the academic world, in particular through his book Securing the State. In that book he quotes one British Ambassador from 1785, who wrote to the Secretary of State in London about his involvement with secret agents:

“I abhor this dirty work, but when one is employed to sweep chimneys, one must black one's fingers.”<sup>12</sup>

72. Sir David Omand welcomes the fact that the intelligence agencies must operate within the law, in particular respecting human rights:

“Human rights are a public good, as is security. The balance to be struck by wise government is not between security and rights, as if to argue that by suspending human rights security could be assured. The balance has to be within the framework of rights, recognising that the fundamental right to life, with the legitimate expectation of being protected by the state from threats to oneself and one's family, is an important right that in some

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<sup>11</sup> David Omand, *op. cit.*, p.264.

<sup>12</sup> *Ibid.*, p.265.

circumstances must be given more weight than other rights, such as the right to privacy of personal and family life. This is a choice that society is able to make when there is a serious terrorist threat ... In those circumstances, checks and balances of good government should come into play to provide confidence that the balance is a genuine one and that red lines are not being crossed. Remaining within the framework of rights is important, however, not least as a constant reminder that there are rights, such as the right not to suffer torture, which cannot be derogated.”<sup>13</sup>

73. The framework of supervision also includes the office of the Investigatory Powers Commissioner, which was created by the Investigatory Powers Act 2016. The first holder of that office is Sir Adrian Fulford, a serving judge of the Court of Appeal. Sir Adrian leads a team of 15 Judicial Commissioners and a larger team of staff; and has a Technical Advisory Panel.<sup>14</sup> The Commissioners have various roles under the 2016 Act, including the grant of judicial warrants where the Act requires them in addition to warrants issued by the Secretary of State for various investigatory practices. The Commissioners’ duties are, however, essentially administrative and their decisions are subject to review by the IPT.
74. It can therefore be seen that each of the three branches of the state, Parliament, the executive and the judicial branch, has a role to play in the legal regulation and supervision of the intelligence agencies.
75. As Sir David Omand puts it:<sup>15</sup>

“I have argued that intelligence gathering is now a recognised, avowed activity of Government. But there is a need to balance

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<sup>13</sup> *Ibid.*, p.267.

<sup>14</sup> For more detail see the first annual report by the IPC, relating to 2017 (HC 1780).

<sup>15</sup> *Ibid.*, p.285.

secret actions for the good of the city with upholding the reputation of being the city of the good. There has to be a level of public acceptance of the activity and how it is conducted – and more importantly, perhaps, public acceptance that there is regulatory mechanism that can prevent excesses and abuses, and processes for a rapid independent way of putting things right when they go wrong.”

76. It will be a matter for others to judge but I would hope that the IPT plays its part in that process of reassuring the public and maintaining the rule of law in this country.

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