Neutral Citation Number: [2025] UKIPTrib 2

Case Nos: **IPT/19/84/CH**
and IPT/22/122/CH

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 17 April 2025

Before :

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
LADY CARMICHAEL
MR JUSTICE JOHNSON
MR JUSTICE CHAMBERLAIN

- -

Between:
(1) BARRY McCAFFREY
(2) TREVOR BIRNEY

Claimants

- v -

(1) CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND
(2) CHIEF CONSTABLE OF DURHAM CONSTABULARY
(3) SECURITY SERVICE
(4) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(5) SECRETARY OF STATE FOR NORTHERN IRELAND
(6) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(7) SECRETARY OF STATE FOR THE FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE
(8) COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondents

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- -

Ben Jaffey KC (instructed by Finucane Toner and KRW Law LLP) appeared on behalf of the **Claimants**
Cathryn McGahey KC and David Reid BL (instructed by the Crown Solicitor's Office Northern Ireland) appeared on behalf of the **First Respondent**
The **Second and Fifth Respondents** were not represented
Andrew Byass (instructed by the Government Legal Department) appeared on behalf of the **Third, Fourth, Sixth and Seventh Respondents**
James Berry and Chloe Hill (instructed by Metropolitan Police Service Directorate of Legal Services) appeared on behalf of the **Eighth Respondent**
Jonathan Glasson KC and Rachel Toney appeared as **Counsel to the Tribunal**

Hearing date: 17 March 2025

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JUDGMENT

Lord Justice Singh (President):

Introduction

1. The Claimants have applied for the costs of two hearings in February and May 2024 which they submit were wasted because of the conduct of the First Respondent, the Police Service of Northern Ireland ("PSNI"). No application for costs is made against any of the other Respondents. Most of the other Respondents (apart from the Second and Fifth Respondents) have, however, made submissions before this Tribunal, recognising that the issue of principle which arises is one of general importance. We have also been assisted by Counsel to the Tribunal.

2. We were able to consider the issues raised by this application entirely in OPEN. This is the unanimous judgment of the Tribunal.

Factual background

3. The applications to the Tribunal were lodged on 19 June 2019. Initially only the application by Mr McCaffrey was referred by the Tribunal to PSNI, which made its first return on 10 February 2020. The case of Mr Birney was referred in 2022 and a response was made by PSNI.

4. The factual background is set out more fully in the substantive OPEN judgment of the Tribunal (then comprising Singh LJ (President), Lady Carmichael and Mr Stephen Shaw KC) dated 17 December 2024: [2024] UKIP Trib 8, at paras 2-20. The terms of that judgment should be considered in full but for present purposes it can be summarised briefly.

5. In the result the Tribunal found that PSNI had acted unlawfully in certain respects. The Tribunal also granted remedies, in particular compensation: see e.g. para 114, where each of the Claimants was awarded £4,000 in respect of a Directed Surveillance Authorisation ("the DSA"). It should be pointed out that, in respect of the 2013 authorisation, although the Tribunal found that PSNI had acted unlawfully in breach of section 6 of the Human Rights Act 1998 ("HRA") (on the limited basis which had been conceded), no award of damages was considered necessary to afford just satisfaction: see para 104.

6. In PSNI's initial return in the case of Mr McCaffrey, it disclosed the existence of two authorisations which were not the subject of the initial claim to the Tribunal: an authorisation dating from 2013 and the DSA, which at this stage was disclosed only to the Tribunal in CLOSED.

7. The substantive hearing in this case was originally listed to start on Wednesday, 28 February 2024. On Friday, 23 February 2024, at 5:58 p.m. (that is only two clear days before the substantive hearing) PSNI disclosed the existence in OPEN of (amongst other things) the DSA. No clear explanation has ever been offered, submits Mr Jaffey, for that exceptionally late disclosure, which fundamentally altered the nature of the OPEN issues in the case.

8. Furthermore, this disclosure was provided in response to the Tribunal's direction that the President wished to convey his firm position to all parties that there would be no

further disclosure of documents accepted by the Tribunal after 6 pm on that date. In fact, much further material was disclosed in the following days. The disclosure was also made in response to the Claimants' complaint that PSNI was already in extensive breach of the Tribunal's orders: see para 32 of the Claimants' skeleton argument.

9. Prior to that disclosure, the Claimants had been misled (they submit) as to the true position. As well as the misleading gist referred to in the Tribunal's judgment, at para 145, Durham informed the Claimants in its skeleton argument served on 16 February 2024 that, in respect of directed surveillance, there had been no application, no authorisation and no return of product for use by Mr Ellis in the investigation. This was inaccurate. It is not suggested by the Claimants that Durham had any intention to mislead. Once Durham appreciated the true position, it corrected its submissions on 26 February 2024 but, in the period from 16-23 February, the Applicants prepared the case on the basis that in respect of directed surveillance their concerns were baseless.

10. On 16 February 2024 PSNI served its OPEN skeleton argument and made additional disclosure. But its skeleton argument still did not disclose the DSA. The additional disclosure included a redacted version of the return to the Tribunal in respect of Mr McCaffrey. The section dealing with the DSA was still entirely redacted save for reference to the Chief Constable. That was insufficient to explain or identify that a DSA had been made.

11. Even on 23 February 2024 the actual DSA was not provided. This was first shown to one of the Claimants' counsel early on the morning of 26 February 2024 (the first day of the hearing) by Counsel to the Tribunal in a form which he was not permitted to copy and he could only take limited notes. It is submitted that this was a clear breach by PSNI of the Tribunal's order of 21 February that all disclosure into OPEN had to be completed in any event no later than 4 pm on 23 February.

12. Mr Ben Jaffey KC submits that the predictable effect of all of this was to derail the substantive hearing, for which the Claimants and their lawyers had had to prepare in full. The hearing could not fairly proceed without their being able to see all relevant material about the DSA that could be opened up. The hearing was not adjourned until well into the first day when it was listed to take place (26 February), by which time the representatives had already spent much additional wasted time seeking to make sense of the large volumes of additional disclosure just before the hearing.

13. At the same time, PSNI disclosed that it had received and used extensive communications data from the Metropolitan Police. It is submitted that this material could and should have been produced earlier. As a result, the Claimants sought and obtained permission to add the Commissioner as a Respondent, who reasonably promptly conceded the unlawfulness of the Metropolitan Police's conduct.

14. To prevent any recurrence, the Tribunal order vacating the February 2024 hearing reserved the issue of costs and set out a procedure for any further disclosure. Any further OPEN disclosure was to be provided by 4 pm on 2 May 2024; and a further disclosure hearing was listed for 8 May to resolve any outstanding issues. However, Mr Jaffey submits, the May hearing was little different from what had occurred in February. It was preceded by large volumes of disclosure raising extensive new issues, in particular the "defensive operation" and the nature and circumstances of the request to Apple (matters which are addressed in more detail in the Tribunal's judgment of 17

December 2024). At the May hearing, the Tribunal again reserved the issue of costs, and directed further extensive searches and written explanations to be provided. Once again, as a result of very late provision of large volumes of material, extensive further re-preparation work had to be done by the Claimants and their representatives.

The application for costs

15. The Claimants do not ask for their costs in full, in particular the costs of the substantive hearing which did eventually take place in October 2024. What they claim is the wasted costs of the two hearings in February and May 2024.

16. On behalf of the Claimants Mr Jaffey submits that:

(1) The Tribunal has jurisdiction to award costs under section 67(7) of the Regulation of Investigatory Powers Act 2000 ("RIPA").

(2) There is no presumption that costs should follow the event. Indeed there are strong public policy reasons for costs not to be awarded against applicants at all; and for orders against public authorities to be confined to those cases where there has been "unreasonable conduct".

17. In the alternative, if the Tribunal has no jurisdiction to award costs, it is invited by Mr Jaffey to make a supplemental award of compensation in the sum that it would have awarded in costs.

18. As to assessment, it is submitted by Mr Jaffey that, if the Tribunal considers that an award of costs should be made, it should adjourn to permit the parties to agree quantum. If an agreement cannot be reached, the Tribunal is invited to assess costs on the basis of brief written submissions to follow in due course.

19. On behalf of PSNI Ms Cathryn McGahey KC's primary submission is that the Tribunal does not have the jurisdiction to award costs. She goes on to submit that, even if the Tribunal has jurisdiction to award costs, it should not do so because costs should only be awarded in "rare cases" and this is not such a case.

20. Ms McGahey does not accept that the Secretary of State could make rules creating a costs regime in the exercise of the regulation making power in section 69(1) of RIPA.

21. Ms McGahey submits that the main issues raised by the Claimants in this application, namely the late provision of the DSA in OPEN and the involvement of the Metropolitan Police, were not the result of any bad faith or negligence on the part of PSNI. PSNI has apologised to the Tribunal for those occasions when there was non-compliance with its orders but refutes the suggestion that any such non-compliance led to hearings having to be abandoned. She also submits that PSNI is alive to the issues which this case has raised and has introduced new methods and processes in order to learn lessons from this experience.

22. Finally, Ms McGahey submits that, if the Tribunal does not have jurisdiction to award costs, it would be wrong to increase the compensation that was otherwise thought sufficient to afford "just satisfaction" to the Claimants in order in effect to award costs by the back door.

23. On behalf of the Commissioner of Police for the Metropolis Mr James Berry is neutral on the question whether the Tribunal has jurisdiction to award costs. He submits that, if the Tribunal does have that jurisdiction, costs are in the discretion of the Tribunal but it is very unlikely to be appropriate to award costs against an applicant in any case, or against a respondent unless there has been unreasonable conduct and there is no other effective means of enforcement.

24. As to the possibility of an increase in the compensation payable otherwise, he submits that the Tribunal may adjust an award of damages where the test for aggravated damages based on a respondent's conduct of litigation is satisfied, but this will not have an "analogous result" to the Tribunal having jurisdiction to award costs.

25. On behalf of the non-core Respondents (which include the three intelligence services), Mr Andrew Byass submits that:

(1) Section 67(7) of RIPA does not provide the Tribunal with power to award costs.

(2) If such power is to be provided, that is to be by way of rules made by the Secretary of State under section 69(1) of RIPA.

(3) It is not appropriate for costs awards to be made by way of orders for compensation. The Tribunal should not circumvent the statutory scheme by making orders for compensation which simply reflect the amount that it would otherwise have awarded by way of costs.

(4) If the Tribunal concludes that it does have the jurisdiction to award costs, then such orders should be made only in "wholly exceptional" cases. The kind of exceptional cases in which an order of costs is likely to be appropriate are those where mere orders and judicial exhortations have not been sufficient to ensure reasonable and timely compliance with the orders of the Tribunal.

26. Quite properly, none of the Respondents apart from PSNI has made submissions on the application of the issues of principle to the facts of this particular case, since the application for costs is made only against PSNI.

Material legislation

27. This Tribunal was established by section 65(1) of RIPA and its jurisdiction is as set out in subsection (2). In essence that jurisdiction consists of dealing with "proceedings" brought under section 7 of the HRA and "complaints" brought by a person who is aggrieved by any conduct falling within section 65(5) of RIPA.

28. Section 67 of RIPA provides as follows:

> "(1) Subject to subsections (4) and (5), it shall be the duty of the Tribunal—
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> (a) to hear and determine any proceedings brought before them by virtue of section 65(2)(a) or (d); and
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> (b) to consider and determine any complaint or reference made to them by virtue of section 65(2)(b) or (c).

(2) Where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review.

(3) Where the Tribunal consider a complaint made to them by virtue of section 65(2)(b), it shall be the duty of the Tribunal—

(a) to investigate whether the persons against whom any allegations are made in the complaint have engaged in relation to—

(i) the complainant,

(ii) any of his property,

(iii) any communications sent by or to him, or intended for him, or

(iv) his use of any postal service, telecommunications service or telecommunication system,

in any conduct falling within section 65(5);

(b) to investigate the authority (if any) for any conduct falling within section 65(5) which they find has been so engaged in; and

(c) in relation to the Tribunal's findings from their investigations, to determine the complaint by applying the same principles as would be applied by a court on an application for judicial review.

(4) The Tribunal shall not be under any duty to hear, consider or determine any proceedings, complaint or reference if it appears to them that the bringing of the proceedings or the making of the complaint or reference is frivolous or vexatious.

…

(6) Subject to any provision made by rules under section 69, where any proceedings have been brought before the Tribunal or any complaint or reference has been made to the Tribunal, they shall have power to make such interim orders, pending their final determination, as they think fit.

(7) Subject to any provision made by rules under section 69, the Tribunal on determining any proceedings, complaint or reference shall have power to make any such award of compensation or other order as they think fit; and, without prejudice to the power to make rules under section 69(2)(h), the other orders that may be made by the Tribunal include—

(a) an order quashing or cancelling any warrant or authorisation;

(aza) an order quashing or cancelling a notice under Part 3 of the Investigatory Powers Act 2016 or a retention notice under Part 4 of that Act;

(azb) an order quashing or revoking a direction under section 225 of that Act;

(azc) an order quashing or revoking a notice under section 252 or 253 of that Act;

(aa) an order quashing an order under section 23A or 32A section 75 of the Investigatory Powers Act 2016 or section 32A of this Act by the relevant judicial authority (within the meaning of that section); and

(b) an order requiring the destruction of any records of information which—

(i) has been obtained in exercise of any power conferred by a warrant or authorisation or by a notice under Part 3 of the Investigatory Powers Act 2016; or

(ii) is held by any public authority in relation to any person.

(8) Except as provided by virtue of section 67A, 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."

29. Section 68(1) of RIPA provides that:

"Subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them."

30. Section 68(4) provides that:

"Where the Tribunal determine any proceedings, complaint or reference brought before or made to them, they shall give notice to the complainant which (subject to any rules made by virtue of section 69(2)(i)) shall be confined, as the case may be, to either—

(a) a statement that they have made a determination in his favour; or

(b) a statement that no determination has been made in his favour."

31. Section 69(1) of RIPA provides that:

"The Secretary of State may make rules regulating—

(a) the exercise by the Tribunal of the jurisdiction conferred on them by or under section 65; and

(b) any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings, complaint or reference brought before or made to the Tribunal."

32. Section 69(2) provides that:

"Without prejudice to the generality of subsection (1), rules under this section may—

…

(h) prescribe orders that may be made by the Tribunal under section 67(6) or (7);

…"

33. The current rules which have been made by the Secretary of State are the Investigatory Powers Tribunal Rules 2018 (SI 2018 No 1334), which came into force on 31 December 2018. The rules do not contain any express provision relating to costs.

34. Rule 14 provides that:

> "(1) Before exercising their power under section 67(7) of the Act, the Tribunal must invite representations in accordance with this rule.
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> (2) Where they propose to make an award of compensation, the Tribunal must give the complainant and the person who would be required to pay the compensation an opportunity to make representations as to the amount of the award.
>
> (3) Where they propose to make any other order (including an interim order) affecting the respondent, the Tribunal must give the complainant and the respondent the opportunity to make representations as to the proposed order."

35. The previous version of the rules was the Investigatory Powers Tribunal Rules 2000 (SI 2000 No 2665). Those rules also contained no express provision about costs. The equivalent to the current rule 14 was rule 12 in the 2000 rules.

Previous decisions of the Tribunal

36. In *W v Public Authority* (case number IPT/09/134/C) (judgment of 1 February 2011), an application was made for costs. It is important to appreciate the narrow way in which the issue in that case was framed by the Tribunal, at para 5:

> "The issue which we are deciding in this case is limited to the following, namely whether costs can (and if so should) be awarded to (i) a respondent against a complainant (ii) upon a withdrawal by the complainant."

37. In addressing that issue, Mummery LJ (President) and Burton J (Vice-President) said, at para 6, that, since this Tribunal is a creature of statute, any power to award costs must be drawn from statute: there is no inherent power.

38. At para 7, they said that the only available provisions from which such a power could be drawn are section 67(7) and section 68 of RIPA, and rule 12 of the 2000 Rules. However, the Tribunal continued:

> "Even assuming that 'any … other order as they think fit' could include an order for costs, the context appears to be referring to, and certainly only exemplifies, orders in favour of a complainant. However, significantly for the determination of the issues before us, even if it could be read as including the possibility of an order for costs in favour of a respondent, such order could only be made 'on determining any proceedings, complaint or reference', and the Tribunal has not made any such determination, because the complaint was withdrawn prior to determination."

39. At para 10, the Tribunal said the following:

> "We conclude for all the above reasons our answer to the question set out in paragraph 5 above should be negative. We do not conclude that there is power to award costs in favour of a respondent against a complainant who has withdrawn his complaint. Notwithstanding the matters which, because they have been so helpfully canvassed, have been set out above, we reach no other decision than that in the instant case and on this occasion."

40. In *Chatwani v National Crime Agency* [2015] UKIPTrib 15_84_88-CH (judgment of 20 July 2015), Burton J (President), giving the judgment of the Tribunal, said, at para 48:

> "Mr Jones sought costs, either as compensation or in the ordinary way. So far as the former is concerned he drew our attention to no authority and we are satisfied that legal costs are not a recognised head of damages. Mr Bird further pointed out that if costs were to be treated as compensation then that would mean that a respondent could never recover costs, and that concepts such as mitigation would arise. As for a claim of costs on the ordinary basis, we see no reason to differ from our previous conclusion in W v Public Authority IPT 09/134 that for reasons given at length in that judgment it was not appropriate to award costs in what is intended to be a 'costs free' jurisdiction. Mr Bird also drew our attention to R (Choudhary) v Bristol Crown Court [2015] EWHC 723 (Admin), where the Divisional Court held at paragraph 35 that, in proceedings relating to a criminal matter in the Crown Court (following an unlawful search warrant), the Crown Court had no general or inherent jurisdiction to award costs, even though it was a superior court of record. This fortifies our previous view. We make no award of costs in the Complainants' favour."

41. Subsequently, in an order dated 9 September 2015 in *Chatwani*, the Tribunal made the following order, at para 3:

> "The Respondent is to pay to the Claimant within 14 days £10,000 in respect of the Claimant's costs incurred as a result of the Respondents' persistent breaches of the said Order. The Tribunal takes the view that the circumstances are wholly exceptional."

No reasons appear to be available to explain the making of that order and, on its face, it appears to be contrary to what the Tribunal had said in *Chatwani* itself in the passage cited above.

42. In *Dias v Chief Constable of Cleveland Police* (case numbers IPT/15/586/CH and others) (judgment of 9 August 2017), there was an application for costs against the respondent. The procedural background was that there had been resistance by the respondent to disclosure of certain documents "presumably hoping that the Tribunal would arrive at a false conclusion as to the facts": see para 12 of the judgment of a five-member Tribunal given by Sir Michael Burton (President). At para 24, the Tribunal said:

> "Further, it is important to recall that the Investigatory Powers Tribunal is essentially a costs free jurisdiction, unlike the European Court of Human Rights.

> There is no statutory power to award costs, and none appears in the Rules of the Tribunal. There is a plausible explanation for this. For obvious reasons claimants frequently do not know how strong their claim is when they issue it, and it is strongly in their private interest but also in the public interest that complainants to the Tribunal should not be deterred by the possibility of an adverse order for costs. The function of the Tribunal cannot be performed if no complaints are made. If no costs are to be awarded against a claimant then the same result should follow in respect of a respondent, or the 'costs-free' jurisdiction would be skewed in favour of the claimant. The position was affirmed in Chatwani and Others v National Crime Agency [2015] UKIPTrib 15-84-88-CH. Ironically, at a later stage of those proceedings an order for costs was made, but that was at a time when the Respondent repeatedly failed to comply with the Tribunal's orders and the Tribunal concluded that it had no other means of enforcement. It is clear that orders for costs will be highly unusual in this jurisdiction. Thus, where the conduct of a respondent in the proceedings can plausibly said to have aggravated the injury to the victim the better way in which an acknowledgment of that fact can be made is by taking it into account in deciding whether to make an award of damages and, if so, at what level."

43. At para 26, the Tribunal said:

> "The consequences of this approach will not be the same as if a costs order were made. The size of awards of damages for non-pecuniary losses in this jurisdiction is modest because they will always reflect the fact that the finding of a violation in this context is itself a very substantial element of just satisfaction, for the reasons explained above. The conduct of the Respondent in the investigation and proceedings may tip the balance in favour of making an award and may lead to a somewhat greater award than otherwise would be the case but the sums awarded by the Tribunal will continue to reflect the approach of the ECtHR rather than the levels of damages awarded in domestic tort claims."

44. In *Wilson v Commissioner of Police of the Metropolis* [2018] UKIPTrib IPT 11 167 H 2, there was an application for costs against the respondent in respect of two applications, described at para 1 in the judgment of the Tribunal given by Singh LJ (President). The Tribunal said the following, at para 5:

> "There is no clear authority which states that this Tribunal has jurisdiction to make an award of costs at all. There is authority to the effect that it does not have that jurisdiction: W v Public Authority (IPT/09/134(C) (1 February 2011). That was a reasoned decision given by the then President (Mummery LJ) and Vice-President (Burton J)."

45. At para 6 the Tribunal said:

> "More recently the Tribunal has made an order for costs but has only done so in one case: Chatwani v National Crime Agency (cited below). That order was made on 9 September 2015. However, neither counsel for the Tribunal have been able to find a transcript of a judgment setting out the reasons why the earlier decision in W would not be followed. In any event, the order was made in

> circumstances which were described as being wholly exceptional. The defendant in that case had been guilty of repeated failures to comply with orders made by the Tribunal."

46. At para 7 the Tribunal quoted the passage from para 24 of *Dias* which we have set out above.

47. At para 8 the Tribunal said the following:

> "In a future case the Tribunal may have to consider further the question of law whether it has jurisdiction to make an award of costs at all. It would be appropriate to do so only after full argument given the earlier decision in W. If such a case arises, it may also provide an opportunity for this Tribunal to set out the principles on which it should act if it is suggested that it should not follow one of its own earlier decisions. However, for present purposes we are prepared to proceed on the assumption that the jurisdiction exists but is only to be exercised in rare cases which are highly unusual."

48. In the circumstances of that case the Tribunal declined to make the orders sought, even on the assumption that it had jurisdiction to make an award of costs.

49. The present case has provided the opportunity for this Tribunal to address and resolve that fundamental issue about its jurisdiction to award costs, and also the practice which this Tribunal should adopt in relation to its own earlier decisions.

Decisions relating to SIAC

50. The question whether the Special Immigration Appeals Commission ("SIAC") has power to award costs has been considered recently in two decisions. The first is the decision of the Court of Appeal of England and Wales in *C7 v Secretary of State for the Home Department* [2023] EWCA Civ 265; [2023] KB 317. The main judgment was given by Elisabeth Laing LJ, with whom Dingemans and Underhill LJJ agreed.

51. The particular issue which arose in that case was whether SIAC could order the Secretary of State to pay the costs of the appellant's successful appeal under section 2B of the SIAC Act 1997 ("the 1997 Act"). As was pointed out at para 5, the issue did not concern SIAC's powers in statutory reviews pursuant to sections 2C-2F of the 1997 Act. The Court reached the following conclusions on the issues of principle which arose in that case:

    (1) SIAC does not have an inherent power to award costs on an appeal under section 2B;

    (2) SIAC does not have an implied power to award costs on such an appeal.

52. Section 1(3) of the 1997 Act provides that SIAC shall be "a superior court of record". In contrast, this Tribunal is not designated by Parliament to be a superior court of record but, in our judgment, nothing turns on that distinction for present purposes.

53. Section 2(B) of the 1997 Act, which was inserted in 2003, provides that a person may appeal to SIAC against a decision to make an order depriving them of citizenship under section 40 of the British Nationality Act 1981.

54. The central provision which fell to be construed in *C7* was section 5 of the 1997 Act, which provides:

> "(1) The Lord Chancellor may make rules –
>
> (a) for regulating the exercise of the rights of appeal conferred by section 2 or 2B …
>
> (b) for prescribing the practice and procedure to be followed on or in connection with appeals under section 2 or 2B … including the mode and burden of proof and admissibility of evidence on such appeals …
>
> (2A) Rules under this section may, in particular, do anything which may be done by Tribunal Procedure Rules."

55. At paras 72-79 Elisabeth Laing LJ held that SIAC does not have an inherent power to award costs. At paras 80-83 she held that it does not have an implied power to award costs either. Her reasoning on that needs to be set out in full:

> "80. Mr Southey also submitted that SIAC has an implied, rather than an inherent, power to award costs. There are two points.
>
> 81. First, I agree with the Judge the test for an implied power in this context is whether a power to award costs is necessary to enable SIAC to do justice. I also agree with him that such a power is not necessary for that purpose. As he said, not all courts or tribunals have a power to award costs. Mr Southey did not show us any material which supported an argument that, in SIAC, a power to award costs is necessary to enable SIAC to do justice. Apart from an isolated and unreasoned statement in Al-Jedda v Secretary of State for the Home Department (Appeal No SC/66/2008) (unreported) 7 February 2014 by Irwin J (as he then was) that SIAC has power to award costs, and a consent order which showed that the Secretary of State had agreed to pay costs in one case, there was no material which showed that SIAC, or the parties, had considered that question.
>
> 82. Second, whether such a power is necessary to enable SIAC to do justice is not the only question. There is a more fundamental question. That is whether such a power can be implied in this statutory scheme. Local authorities, the powers of which are wholly statutory, do not have implied powers to do things in a field which is governed by a detailed statutory code, except to the extent that those are authorised by section III of the Local Government Act 1972, which codifies the common law about implied statutory powers (see Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1, and R (Kalonga) v Croydon London Borough Council [2022] EWCA Civ 670; [2022] PTSR 1568, paragraphs 30-33 and 73). I consider that the position of SIAC is analogous. There is a detailed statutory code governing SIAC's procedural powers. The rule-maker under that code is the Lord Chancellor, not SIAC. If the Lord Chancellor has not made a rule authorising SIAC to make an award of costs, SIAC does not have an implied power to do so.
>
> 83. I should make clear that, in reaching this conclusion, I have not been influenced by the amendments to the 1997 Act which gave SIAC power to set

aside certain decisions on a statutory review (sections 2C-E). I do not consider that these changes, which arguably gave SIAC a power to award costs in those contexts, can cast light on the meaning of section 5, which, for present purposes, was in its current form before the statutory review amendments were made."

56. The point which was left open by the Court of Appeal at para 83 of that judgment then arose before SIAC itself in *FGF v Secretary of State for the Home Department* (Appeal No SN/01/2022), a judgment dated 23 February 2024, in which the Chair of SIAC, Jay J, presided. This case did arise under section 2D of the 1997 Act. Section 2D(4) provides that, if SIAC decides that the decision under review should be set aside, "it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

57. Further, section 5 of the 1997 Act provides that the Lord Chancellor may make rules for regulating the exercise of the rights of appeal conferred by section 2 or 2B.

58. At para 39, Jay J held that the language of section 2D(4) is "extremely wide". It was held that SIAC does have the power to make an award of costs in that context since that is the kind of order which the High Court could make on an application for judicial review. It was held that section 51 of the Senior Courts Act 1981 was in effect "incorporated by reference."

Scottish case law

59. This Tribunal must be very conscious that it is a tribunal not of England and Wales but of the United Kingdom. Accordingly, concepts which apply in the law of England and Wales but not necessarily in other parts of the UK should not necessarily be assumed to be applicable to this Tribunal.

60. We have had regard to the decision of the Inner House of the Court of Session in *Global Santa Fe Drilling (North Sea) Ltd v Lord Advocate* [2009] CSIH 43; [2009] SC 575, in which the judgment was given by the Lord President (Lord Hamilton). The issue in that case arose out of a fatal accident inquiry conducted by a Sheriff under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976. The Sheriff awarded "expenses" for certain parts of the inquiry because the Crown's position could properly be regarded as vexatious. The Lord Advocate presented a petition for judicial review challenging the competency of that award. The Lord Ordinary held that the award of expenses was *ultra vires*. The Inner House reversed that decision. It was held that the Sheriff does have a power to award expenses in administrative or ministerial processes: see para 26. A fatal accident inquiry falls within the class of proceedings to which that principle can be applied: see para 33. A Sheriff may award expenses against a party to a fatal accident inquiry whose conduct has been vexatious: see para 35.

61. In our judgment, the decision in that case is distinguishable on the ground that, in Scots law, expenses were regarded as "merely an accident of the process" and, apart from statutory provisions, there exists a common law right inherent in every civil court to award expenses: see para 20 in the judgment of the Lord President, citing Maclaren, Expenses, page 3. As the Lord President said at para 26, a distinction is drawn in Scots law between ordinary actions before the Sheriff and administrative or ministerial processes. In the latter category of case the general rule that "expenses follow success" does not apply but in certain circumstances, where the conduct of a party can be

described as vexatious or an abuse of process, it will be open to the Sheriff to make an award of expenses. In the particular context with which the Court was concerned in that case, that is a fatal accident inquiry, the Court concluded that the ordinary rule about the circumstances in which a Sheriff may award expenses applies.

62. Before this Tribunal, however, Mr Jaffey disavowed any reliance on any suggestion that this Tribunal has an inherent power to award costs. Accordingly, we must return to the fundamental issue in this case, which is whether the legislation which confers powers on this Tribunal gives it the power to award costs.

Analysis

63. Mr Jaffey's primary submission is that this Tribunal has the power to award costs by virtue of section 67(7) of RIPA. He submits that an order for costs is a normal ancillary order that forms part of relief in litigation and is readily encompassed by the broad language of section 67(7). Where broad words are used, he submits, there is no need to provide a long list of specific orders as well. The text should be given its ordinary, deliberately wide, meaning. Indeed, he submits, the language of section 67(7) is broader than the equivalent language in section 2D(4) of the 1997 Act, which was held to be sufficiently broad in *FGF* to include the power to award costs.

64. In his oral submissions at the hearing before this Tribunal, Mr Jaffey made it clear that the power to award costs in section 67(7) only arises once there has been a "determination" by the Tribunal.

65. Mr Jaffey appeared to accept that the Secretary of State could use the power to make rules in section 69(1) of RIPA in such a way as to restrict or even abolish the power to award costs in section 67(7). He submits, however, that the Secretary of State has elected not to limit or define what orders may be made under that provision relating to costs. Instead, rule 14 provides for a fair procedure to be adopted, without constraining the breadth of the provision.

66. In the alternative, Mr Jaffey submits that, if there is no jurisdiction to award costs, an increased award of damages may in principle be made. Such an award would not necessarily include all of the costs wasted or incurred. He rejects the suggestion made on behalf of PSNI that no increased award should be made because it is now too late to increase damages. This is because, he submits, the issue of costs (which must include a possible increase in the award of damages if costs are not available) was expressly reserved in the order made after the abortive hearings in February and May 2024. He submits that the issue is therefore a live one before the Tribunal now. He further submits that this does not involve circumvention of RIPA but would ensure that an adequate award of "just satisfaction" is made under the HRA. At the oral hearing before us Mr Jaffey clarified that this could arise even in the case of a "complaint", in other words something which is not "proceedings" brought under section 7 of the HRA.

67. As is common ground, this Tribunal has no inherent jurisdiction. Accordingly, the powers of this Tribunal are those set out (expressly or impliedly) in RIPA and the rules made under it and no more and no less.

68. We have reached the conclusion that this Tribunal does not have the power to make an order for costs for the following reasons.

69. First, there is no express reference to costs orders at all in either RIPA or in the 2018 Rules. There could easily have been such express provision. Where Parliament intended to confer such a power on a Tribunal, or at least to confer the power to make rules enabling such orders to be made, it has done so expressly: see e.g. section 13 of the Employment Tribunals Act 1996.

70. Although Mr Jaffey is right to observe that the wording of section 67(7) of RIPA is broad, and the specific orders which are then listed are set out in a non-exhaustive list, nevertheless they do provide the context in which the broad language should be interpreted. They are all examples of substantive remedies which the Tribunal has power to grant on finding that there has been a breach of the law.

71. Next, Mr Jaffey accepts that his submission would have the effect that there would be a power to award costs only against one side in litigation before this Tribunal (that is against respondents). Although it is possible that that is what Parliament intended, it would be surprising that that has not been spelt out clearly in the terms of the governing legislation. Mr Jaffey is right to observe that there are other powers available to this Tribunal to dismiss a claim for example because it is frivolous or vexatious and otherwise to control abuse of its own procedures. Nevertheless, as he fairly acknowledges, his construction of the legislation would have the effect of an asymmetry in the power of the Tribunal to award costs. We would have expected that to be set out clearly on the face of the legislation.

72. Mr Jaffey's construction also faces the difficulty that the power to award costs would only arise, on his submission, once the Tribunal has made a "determination". It is possible that that word could be construed as being sufficiently broad to include a "no determination in favour" of a complainant but the more fundamental difficulty this gives rise to is that there would be no power to award costs at an earlier stage in a case. In an extreme example, if the claim were to be withdrawn, there would be no power to award costs even against a respondent which had behaved unreasonably. That might have been the scenario in the present case if, after the abortive hearings in February or May 2024, the Claimants had simply decided they had had enough and withdrawn their applications to the Tribunal.

73. Mr Jaffey sought to avoid this difficulty at the hearing before us by suggesting that the power to make an interim order, which the Tribunal undoubtedly enjoys under section 67(6) of RIPA, could be used to make an interim order for costs. The difficulty with that submission is that an interim order is an order pending a final decision, whereas what Mr Jaffey would need to cater for is the making of a final order as to costs albeit made at an interim stage in the case. Those are not the same thing.

74. We also consider that this interpretation of the legislation is consistent with the need for legal certainty. Although Mr Jaffey and Ms McGahey are agreed, and this Tribunal has previously said, that the Tribunal should be a cost-free regime at least so far as applicants are concerned, there is nothing on the face of legislation to say that. If the Tribunal does have power to award costs, it is difficult to see any principled basis on which that could be limited to orders only against respondents. In effect the Tribunal would be engaging in legislation, rather than judicial decision-making. This would also not be conducive to the interests of legal certainty. Applicants and indeed respondents are entitled to know what the criteria will be for the award of costs but those criteria do not appear in any legislation.

75. In our view, if there is to be a jurisdiction to award costs conferred on the Tribunal, it would be better for this to be achieved either by rules made by the Secretary of State or in primary legislation enacted by Parliament. This would have the merit of creating legal certainty, so that everyone concerned would know what the criteria are for the award of costs. It would make it clear whether the power to award costs could only be exercised against respondents or whether it would also be available against applicants. It would also make it clear whether the Tribunal should have a general discretion to award costs or whether it should be confined to situations where a party had acted unreasonably.

76. This would also have the merit that any legislative change would only be made after there had been the opportunity for public consultation. The Tribunal is not institutionally well-equipped to engage in setting up a costs regime.

77. Finally, we have reached the conclusion that there is no decision of this Tribunal that leads to the conclusion that there is the power to award costs. In any event, this Tribunal has sat on this occasion as a five-member panel, including the President and Vice-President and other senior members, so that the legal position can be reviewed definitively. Insofar as there is any decision of this Tribunal which has previously held that the Tribunal does have the power to award costs, we make it clear that it was wrong.

78. In our judgment, it is possible that the Secretary of State could make rules to create a costs regime exercising the power in section 69(1)(b), since the issue of costs can properly be said to be a matter which is "incidental to, or arising out of, the hearing or consideration of any proceedings, complaint or reference brought before or made to the Tribunal."

79. But the fundamental difficulty is that no such rules have been made. We have reached the conclusion that the Tribunal does not have the jurisdiction to award costs.

80. In the circumstances of this case, we have also reached the conclusion that it would not be appropriate in effect to circumvent the absence of that power by disguising an award of costs as an adjusted award of compensation. The Tribunal has already decided what the relatively modest sum by way of compensation ought to be in the light of the violations found, in its substantive judgment of 17 December 2024. Although Mr Jaffey is right to say that it would not be procedurally precluded for the Tribunal to revisit that question, on the substantive issue which arises we do not consider that it would be just and appropriate to increase the amount of compensation that the Tribunal has thought fit to award.

<u>The doctrine of precedent in this Tribunal</u>

81. In its first publicly available judgment, in a case subsequently known as *Kennedy* (Application numbers IPT/01/62 and IPT/01/77) (judgment of 23 January 2003) the Tribunal, comprising Mummery LJ (President) and Burton J (Vice-President) said the following, at para 14:

> "… The responsibility of the Tribunal is a particularly anxious one. It is not within the competence of many courts and tribunals, short of the House of Lords, to make rulings on questions of law apparently unappealable to, and unreviewable by, any other judicial body within the jurisdiction. In those

> exceptional circumstances the rival arguments on the issues and the Tribunal's reasons for their conclusions are set out in considerably more detail than would normally be necessary in deciding procedural questions. The rulings do not constitute a precedent binding on the Tribunal or on any other court or tribunal. They are subject to re-consideration and revision in the light of increases in the experience of the Tribunal, new developments and fresh arguments. For the time being, however, the rulings are the procedural foundation for the Tribunal's application of the Rules to those and other claims and complaints under RIPA."

82. As Mr Jaffey pointed out at the hearing before us, two significant developments have taken place since 2003 which have a bearing on what was said in that passage. First, the Supreme Court held in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491 that this Tribunal is in principle amenable to judicial review. Secondly, Parliament decided, in the Investigatory Powers Act 2016, to amend RIPA (by inserting a new section 67A) so as to create a route by which appeals can be taken from this Tribunal to the relevant appellate court, for example the Court of Appeal of England and Wales. Section 67A of RIPA was brought into force on 31 December 2018. Accordingly, submits Mr Jaffey, the time has come for this Tribunal to set out authoritatively that it will adopt the same practice in relation to precedent as would apply in the High Court of England and Wales.

83. That position was explained by the Divisional Court in *R v Greater Manchester Coroner, ex parte Tal* [1985] QB 67, in which the judgment of the Court was given by Robert Goff LJ. At page 81, he said that the relevant principle is that a judge sitting in the High Court will follow the decision of another judge in the same jurisdiction "unless he is convinced that that judgment is wrong" but he is not bound to follow the decision of a judge of equal jurisdiction. He continued that the same principle is applicable when the supervisory jurisdiction of the High Court is exercised not by a single judge but by a Divisional Court, where two or three judges are exercising precisely the same jurisdiction as the single judge. Robert Goff LJ said:

> "We have no doubt that it will be only in rare cases that a Divisional Court will think it fit to depart from the decision of another Divisional Court exercising this jurisdiction. Furthermore, we find it difficult to imagine that a single judge exercising this jurisdiction would ever depart from a decision of a Divisional Court."

84. The position in this Tribunal is not exactly the same as in the High Court. The 2018 Rules provide, in rule 5(1), that, subject to rule 6, "the jurisdiction of the Tribunal may be exercised at any place in the United Kingdom by any two or more members of the Tribunal designated for the purpose by the President."

85. Rule 6 then sets out specific powers and duties which may be exercised or performed by a single member of the Tribunal, for example the power to invite or direct the complainant to supply information or make representations, the power to extend time for a claim brought under section 7 of the HRA under section 7(5)(b) of that Act and so on. Where one of those specific provisions does not apply, it is clear that the jurisdiction of the Tribunal may only be exercised by at least two members. The practice has developed that, at least in substantive hearings, the Tribunal sits as a panel of three members. Before the right of appeal was introduced in 2018, it was common practice for this Tribunal to sit as a panel of five members. The present case illustrates

how that may still occur, although it is likely to be confined to cases such as the present, where the Tribunal is reviewing a long-standing and important issue of law on which there have been previous decisions of the Tribunal and it seeks to set out the legal position authoritatively.

86. We agree with the submission made by Mr Jaffey that in general this Tribunal should from now on follow its own previous decisions unless it is convinced that they are wrong. In principle there is no distinction between different panels of the Tribunal but, in practice, we anticipate that the Tribunal is likely to give special weight to a decision reached by a five member panel and/or a panel in which the President and/or Vice-President have sat.

Postscript

87. We do not regard the outcome as entirely satisfactory. We have not needed to reach a final view on the merits of the particular application for costs made in this case but the facts of the present case illustrate why it would be helpful at least in principle for this Tribunal to have the power to award costs. No one has suggested that the power to award costs would be used so that costs orders were routinely made nor that the principle should be that "costs follow the event". We see force in Mr Jaffey's submission that there is a need for the Tribunal to have the power to award costs, in particular against respondents, where there has been expenditure wasted as a result of their conduct and where, in particular, orders of the Tribunal are persistently breached. But, as we have explained above, that will be a matter for the Secretary of State or for Parliament.

Conclusion

88. For the reasons we have given this application is refused.