Michaelmas Term
[2009] UKSC 12
On appeal from: [2009] EWCA Civ 24

JUDGMENT

R (on the application of A) (Appellant) *v* B (Respondent)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Brown
Lord Mance
Lord Clarke

JUDGMENT GIVEN ON

9 December 2009

Heard on 19 and 20 October 2009

Appellant
Gavin Millar QC
Guy Vassall-Adams
(Instructed by Bindmans LLP)

Respondent
Jonathan Crow QC
Jason Coppel
(Instructed by Treasury Solicitors)

Intervener (Justice)
Lord Pannick QC
Tom Hickman
(Instructed by Freshfields Bruckhaus Deringer LLP

LORD BROWN, (with whom all members of the Court agree)

1. A is a former senior member of the Security Service, B its Director of Establishments. A wants to publish a book about his work in the Security Service. For this he needs B's consent: unsurprisingly, A is bound by strict contractual obligations as well as duties of confidentiality and statutory obligations under the Official Secrets Act 1989. On 14 August 2007, after lengthy top secret correspondence (and following final consideration by the Director General), B refused to authorise publication of parts of the manuscript. The correspondence (and annexures) described in detail the Security Services's national security objections to disclosure. On 13 November 2007 A commenced judicial review proceedings to challenge B's decision. He claims that it was unreasonable, vitiated by bias and contrary to article 10 of the European Convention on Human Rights, the right to freedom of expression. Is such a challenge, however, one that A can bring in the courts or can it be brought only in the Investigatory Powers Tribunal (the IPT)? That is the issue now before the Court and it is one which depends principally upon the true construction of section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 (RIPA):

> "(2) The jurisdiction of the Tribunal shall be –
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section;"

Subsection (3) provides that proceedings fall within this section if –

> "(a) they are proceedings against any of the intelligence services;"

2. Collins J decided that the Administrative Court had jurisdiction to hear A's challenge: [2008] 4 All ER 511 (4 July 2008). The Court of Appeal (Laws and Dyson LJJ, Rix LJ dissenting) reversed that decision, holding that exclusive jurisdiction lies with the IPT: [2009] 3 WLR 717 (18 February 2009).

3. Before turning to the rival contentions it is convenient to set out the legislative provisions most central to the arguments advanced. The Human Rights Act 1998 (HRA) by section 7 provides:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1) (a) 'appropriate court or tribunal' means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
>
> . . .
>
> (9) In this section 'rules' means –
>
> (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by . . . the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court."

Pursuant to section 7(9), CPR 7.11 (introduced, like HRA, with effect from 2 October 2000) provides:

> "(1) A claim under section 7(1)(a) of the Human Rights Act 1998 in respect of a judicial act may be brought only in the High Court.
>
> (2) Any other claim under section 7(1)(a) of that Act may be brought in any court."

4. The only tribunals upon whom section 7(1)(a) HRA jurisdiction has been conferred by rules made under section 7(9) are the Special Immigration Appeals Commission (SIAC) and the Proscribed Organisations Appeal Commission (POAC) – not, contrary to the Court of Appeal's understanding (see paras 20, 33 and 56 of the judgments below), the Employment Tribunal.

5. I have already set out section 65(2)(a) of RIPA. Section 65(1) made provision for the establishment of the IPT and schedule 3 to the Act provides for its membership. Currently its President is Mummery LJ and its Vice-President, Burton J. Section 67(2) provides:

> "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."

Section 67(7) empowers the Tribunal "to make any such award of compensation or other order as they think fit". Section 67(8) provides:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

Section 68(1) provides:

> "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."

Section 68(4) provides:

> "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."

6. Section 69 confers on the Secretary of State the rule-making power pursuant to which were made the Investigatory Powers Tribunal Rules 2000 (SI No 2000/2665) (the Rules). Section 69(6) provides:

> "In making rules under this section the Secretary of State shall have regard, in particular, to -
>
> (a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and
>
> (b) the need 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."

7. Rule 13(2) provides that where the Tribunal make a determination in favour of the complainant they shall provide him with a summary of that determination including any findings of fact (to this extent qualifying section 68(4)(a) of the Act). Rule 6(1) gives effect to section 69(6)(b) by providing that the Tribunal shall carry out their functions in such a way as to meet the stipulated need with regard to the non-disclosure of information. The effect of rules 6(2) and (3) is that, save with the consent of those concerned, the Tribunal may not disclose to the complainant or any other person any information or document disclosed or provided to them in the course of any hearing or the identity of any witness at that hearing. Rule 9 provides that the Tribunal are under no duty to hold oral hearings and may hold separate oral hearings for the complainant and the public authority against which the proceedings are brought. Rule 9(6) provides that:

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

8. In *Applications Nos. IPT/01/62* and *IPT/01/77* (23 January 2003) the IPT ruled on various preliminary issues of law regarding the legality of a number of the rules. They held that rule 9(6) was *ultra vires* section 69 of RIPA as being incompatible with article 6 of the Convention but that "in all other respects the Rules are valid and binding on the Tribunal and are compatible with articles 6, 8 and 10 of the Convention" (para 12 of the IPT's 83 page ruling which is itself the subject of a pending application before the European Court of Human Rights

(ECtHR)). Consequent on their ruling on rule 9(b) the IPT published the transcript of the hearing in that case and now hear argument on points of law in open court.

9. A accepts that the legal challenge he is making to B's decision is properly to be characterised as proceedings under section 7(1)(a) of HRA within the meaning of section 65(2)(a) of RIPA (and not, as he had argued before the judge at first instance, that he should be regarded merely as relying on his article 10 rights pursuant to section 7(1)(b) HRA), and that these are proceedings against one of the Intelligence Services within the meaning of section 65(3)(a) (and not, as he had argued before the Court of Appeal, against the Crown). He nevertheless submits that he is not required by section 65(2)(a) to proceed before the IPT. His first and main argument – the argument which prevailed before Collins J and was accepted also by Rix LJ – is that he is entitled to proceed *either* by way of judicial review *or* before the IPT, entirely at his own choice. Section 65(2)(a), he submits, excludes the section 7(1)(a) jurisdiction of any other tribunal but not that of the courts. His second and alternative argument (not advanced in either court below) is that, even if section 65(2)(a) is to be construed as conferring exclusive section 7(1)(a) jurisdiction on the IPT, it does so only in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by RIPA. This, of course, would involve narrowing the apparent width of the expression "proceedings against any of the intelligence services" in section 65(3)(a) and, if correct, means that A here could not proceed before the IPT even if he wished to do so.

10. Justice have intervened in the appeal in support of A's submissions. Like A, they urge us to adopt as narrow a construction of section 65 as possible, first, so as not to exclude the jurisdiction of the ordinary courts and, secondly, to avoid a construction which they submit will inevitably give rise to breaches of other Convention rights, most notably the article 6 right to a fair hearing.

Argument 1 – Section 65(2)(a) excludes only the jurisdiction of other tribunals

11. This argument focuses principally upon the use of the word "tribunal" in the expression "only appropriate tribunal" in section 65(2)(a). A says it that it means tribunals only and not courts; B says that it encompasses both. A says that if it was intended to exclude courts as well as tribunals it would have used the same expression, "the appropriate forum", as was used in section 65(2)(b), 65(4) and 65(4A) of RIPA. B points out that those three provisions all deal with "complaints", for which provision had originally been made in the Security Service Act 1989 and the Intelligence Services Act 1994 and which are not the same as legal claims, "forum" being, therefore, a more appropriate term to describe the venue for their resolution.

12. Plainly the word "tribunal", depending on the context, can apply either to tribunals in contradistinction to courts or to both tribunals and courts. As B points out, section 195(1) of the Extradition Act 2003 describes "the appropriate judge" (a designated District Judge) as "the only appropriate tribunal" in relation to section 7(1)(a) HRA proceedings. So too section 11 of the Prevention of Terrorism Act 2005 describes "the court" (as thereafter defined) as "the appropriate tribunal for the purposes of section 7 of the Human Rights Act".

13. Section 7(2) of HRA itself appears to require that a court *or* tribunal is designated as *the* "appropriate court or tribunal", not that *both* are designated. Couple with that the use of the word "only" before the phrase "appropriate tribunal" in section 65 and it seems to me distinctly unlikely that Parliament was intending to leave it to the complainant to choose for himself whether to bring his proceedings in court or before the IPT.

14. There are, moreover, powerful other pointers in the same direction. Principal amongst these is the self-evident need to safeguard the secrecy and security of sensitive intelligence material, not least with regard to the working of the intelligence services. It is to this end, and to protect the "neither confirm nor deny" policy (equally obviously essential to the effective working of the services), that the Rules are as restrictive as they are regarding the closed nature of the IPT's hearings and the limited disclosure of information to the complainant (both before and after the IPT's determination). There are, however, a number of counterbalancing provisions both in RIPA and the Rules to ensure that proceedings before the IPT are (in the words of section 69(6)(a)) "properly heard and considered". Section 68(6) imposes on all who hold office under the Crown and many others too the widest possible duties to provide information and documents to the IPT as they may require. Public interest immunity could never be invoked against such a requirement. So too sections 57(3) and 59(3) impose respectively upon the Interception of Communications Commissioner and the Intelligence Services Commissioner duties to give the IPT "all such assistance" as it may require. Section 18(1)(c) disapplies the otherwise highly restrictive effect of section 17 (regarding the existence and use of intercept material) in the case of IPT proceedings. And rule 11(1) allows the IPT to "receive evidence in any form, and [to] receive evidence that would not be admissible in a court of law." All these provisions in their various ways are designed to ensure that, even in the most sensitive of intelligence cases, disputes can be properly determined. None of them are available in the courts. This was the point that so strongly attracted Dyson LJ in favour of *B's* case in the court below. As he pithily put it at [2009] 3 WLR 717, para 48:

> "It seems to me to be inherently unlikely that Parliament intended to create an elaborate set of rules to govern proceedings against an

> intelligence service under section 7 of the 1998 Act in the IPT and yet contemplated that such proceedings might be brought before the courts without any rules."

15. A further telling consideration against the contention that section 65(2)(a) is intended only to exclude other tribunals with jurisdiction to consider section 7(1)(a) HRA claims is that there are in fact none such with section 7(1)(a) jurisdiction over the categories of claim listed in section 65(3). As stated (at para 4 above), only SIAC and POAC have section 7(1)(a) jurisdiction and in each instance that is with regard to matters outside the scope of section 65. The Court of Appeal were under the misapprehension that the Employment Tribunal too had section 7(1)(a) jurisdiction and were accordingly mistaken in supposing, as Rix LJ put it at para 33, that "[t]herefore, section 65(2)(a) of the 2000 Act has content as referring to the IPT as 'the only appropriate tribunal'".

16. In the light of these various considerations it is hardly surprising that A himself recognises that this construction produces "a slightly unsatisfactory legislative outcome", although he submits that "this is a small price to pay for protecting the article 6 rights of claimants and respecting the principle that access to the courts should not be denied save by clear words", a submission to which I shall come after considering A's alternative contended-for construction.

Argument 2 – Section 65(2)(a) confers exclusive jurisdiction on the IPT but only in respect of proceedings arising out of the exercise of one of the RIPA regulated investigatory powers

17. Although this was not an argument advanced at any stage below, I confess to having been attracted to it for a while. After all, in enacting RIPA, Parliament must have had principally in mind the use and abuse of the particular investigatory powers regulated by the Act and there would not appear to be the same need for secrecy, the withholding of information and the "neither confirm nor deny" policy in the case of an ex-officer as in the case of someone outside the intelligence community.

18. The difficulties of such a construction, however, are obvious and in the end, to my mind, insurmountable. As already observed, it would involve reading into section 65(3)(a) limiting words which are simply not there. This would be difficult enough at the best of times. Given, however, that other paragraphs of section 65(3) are in fact more obviously directed to complaints of abuse of the intelligence services' regulatory powers (see particularly section 65(3)(d) read with sections

65(5)(a) and 65(7), none of which I have thought it necessary to set out), it seems to me quite impossible to construe the section as this argument invites us to do.

19. Nor, indeed, on reflection, does it seem right to regard proceedings of the kind intended here as immune from much the same requirement for non-disclosure of information as other proceedings against the intelligence services. As B points out, it is perfectly possible that the security service will ask the tribunal hearing this dispute to consider additional material of which A may be unaware (and of which the security service is properly concerned that he should remain unaware) which leads it to believe that the publication of A's manuscript would be harmful to national security. On any view, moreover, the proceedings by which any tribunal comes to determine whether the disputed parts of the manuscript can safely be published would have to be heard in secret. Again, therefore, the existence of the IPT Rules designed to provide for just such proceedings and the lack of any equivalent rules available to the courts points strongly against this alternative construction also.

20. Are there, however, sufficiently strong arguments available to A (and Justice) to compel the court, with or without resort to section 3 of HRA, to adopt a contrary construction of section 65? It is convenient to consider these arguments under three broad heads.

i. Ouster

21. A and Justice argue that to construe section 65 as conferring exclusive jurisdiction on the IPT constitutes an ouster of the ordinary jurisdiction of the courts and is constitutionally objectionable on that ground. They pray in aid two decisions of high authority: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. To my mind, however, the argument is unsustainable. In the first place, it is evident, as the majority of the Court of Appeal pointed out, that the relevant provisions of RIPA, HRA and the CPR all came into force at the same time as part of a single legislative scheme. With effect from 2 October 2000 section 7(1)(a) HRA jurisdiction came into existence (i) in respect of section 65(3) proceedings in the IPT pursuant to section 65(2)(a), and (ii) in respect of any other section 7(1)(a) HRA proceedings in the courts pursuant to section 7(9) and CPR 7.11. True it is, as Rix LJ observed, that CPR 7.11(2) does not explicitly recognise the exception to its apparent width represented by section 65(2)(a). But that is not to say that section 65(2)(a) ousts some pre-existing right.

22. This case, in short, falls within the principle recognised by the House of Lords in *Barraclough v Brown* [1897] AC 615 – where, as Lord Watson said at p 622: "The right and the remedy are given *uno flatu*, and the one cannot be dissociated from the other." - rather than the principle for which *Pyx Granite* stands (p 286):

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

Distinguishing *Barraclough v Brown*, Viscount Simonds pointed out that the statute there in question could be construed as merely providing an alternative means of determining whether or not the company had a pre-existing common law right to develop their land; it did not take away "the inalienable remedy . . . to seek redress in [the courts]". Before 2 October 2000 there was, of course, no pre-existing common law or statutory right to bring a claim based on an asserted breach of the Convention. Section 65(2)(a) takes away no "inalienable remedy".

23. Nor does *Anisminic* assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing. Parliament has not ousted judicial scrutiny of the acts of the intelligence services; it has simply allocated that scrutiny (as to section 7(1)(a) HRA proceedings) to the IPT. Furthermore, as Laws LJ observed at para 22:

> "[S]tatutory measures which confide the jurisdiction to a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand, may well be constitutionally inoffensive. The IPT . . . offers . . . no cause for concern on this score."

True it is that section 67(8) of RIPA constitutes an ouster (and, indeed, unlike that in *Anisminic*, an unambiguous ouster) of any jurisdiction of the courts over the IPT. But that is not the provision in question here and in any event, as A recognises, there is no constitutional (or article 6) requirement for any right of appeal from an appropriate tribunal.

24. The position here is analogous to that in *Farley v Secretary of State for Work and Pensions (No. 2)* [2006] 1 WLR 1817 where the statutory provision in

question provided that, on an application by the Secretary of State for a liability order in respect of a person liable to pay child support, "the court . . . shall not question the maintenance assesment under which the payments of child support maintenance fall to be made." Lord Nicholls, with whom the other members of the Committee agreed, observed, at para 18:

> "The need for a strict approach to the interpretation of an ouster provision . . . was famously confirmed in the leading case of *Anisminic* . . . This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court."

ii. Convention rights

25. A and Justice submit that to force this article 10 challenge into the IPT would inevitably result in breaches of article 6. In support of this submission they rely principally upon the following features of the IPT's procedures: first, that the entire hearing (save for purely legal argument) will be not only private but secret, indeed claimants may not even be told whether a hearing has been or will be held; secondly, that the submissions and evidence relied on respectively by the claimant and the respondent may be considered at separate hearings; thirdly, that only with the respondent's consent will the claimant be informed of the opposing case or given access to any of the respondent's evidence; fourthly, that no reasons will be given for any adverse determination. All of this, runs the argument, is flatly contrary to the basic principles of open justice: that there should be a public hearing at which the parties have a proper opportunity to challenge the opposing case and after which they will learn the reasons for an adverse determination.

26. As, however, already explained (at para 14), 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. It is sufficient for present purposes to cite a single paragraph from the speech of Lord Bingham of Cornhill in *R v Shayler* [2003] 1 AC 247, para 26 (another case raising article 10 considerations):

> "The need to preserve the 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: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 100-103; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 48; *Leander v Sweden* (1987) 9 EHRR 433, para 59; *Hadjianastassiou v Greece* (1992) 16 EHRR 219, paras 45-47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, 83-84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40. 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. The OSA 1989, as it applies to the appellant, must be considered in that context."

27. In one of the Strasbourg cases there referred to, *Esbester v United Kingdom*, and indeed in a series of other cases brought against the UK at about the same time, the Strasbourg Commission rejected complaints as to the form of proceedings adopted by the Security Service Tribunal and the Interception of Communications Tribunal, not least as to the absence of a reasoned determination.

28. I acknowledge that later in his opinion in *Shayler* (at para 31) Lord Bingham, contemplating the possibility that authority to publish might have been refused without adequate justification (or at any rate where the former member firmly believed that no adequate justification existed), said:

> "In this situation the former member is entitled to seek judicial review of the decision to refuse, a course which the OSA 1989 does not seek to inhibit."

In that case, however, the disclosures had been made before the enactment of RIPA and the creation of the IPT and it is plain that the House had not been referred to section 65(2)(a), still less had had occasion to consider its scope. It cannot sensibly be supposed that the case would have been decided any differently

had it been recognised that after 2 October 2000 such a challenge would have had to be brought before the IPT.

29. Admittedly the *Esbester* line of cases were decided in the context of article 8 (rather than article 10) and, understandably, Strasbourg attaches particular weight to the right to freedom of expression. Neither A nor Justice, however, were able to show us any successful article 10 cases involving national security considerations save only for *Sunday Times v UK (No. 2)* (1991) 14 EHRR 229 (*Spycatcher)* where, of course, the disputed material was already in the public domain.

30. For my part I am wholly unpersuaded that the hearing of A's complaint in the IPT will necessarily involve a breach of article 6. There is some measure of flexibility in the IPT's rules such as allows it to adapt its procedures to provide as much information to the complainant as possible consistently with national security interests. In any event, of course, through his lengthy exchanges with B, A has learned in some detail why objections to publication remain. Article 6 complaints fall to be judged in the light of all the circumstances of the case. We would, it seems to me, be going further than the Strasbourg jurisprudence has yet gone were we to hold in the abstract that the IPT procedures are necessarily incompatible with article 6(1). Consistently with the well known rulings of the House of Lords in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 para 20 and *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 paras 105, 106, I would decline to do so, particularly since, as already mentioned, the IPT's own decision on its rules is shortly to be considered by the ECtHR.

31. Over and above all this is the further and fundamental consideration, that even if the IPT's Rules and procedures *are* in any way incompatible with article 6, the remedy for that lies rather in *their* modification than in some artificially limited construction of the IPT's jurisdiction. It is, indeed, difficult to understand which of the appellant's contended-for constructions is said to be advanced by this submission. On any view the IPT has *some* jurisdiction. Yet the argument involves a root and branch challenge to its procedures in *all* cases.

iii. Anomalies

32. The Court of Appeal's construction of section 65(2)(a) is said to give rise to a number of anomalies. Under this head I shall touch too upon certain other points advanced variously by A and Justice.

33. The first anomaly is said to be that while section 7(1)(a) HRA proceedings have to be brought before the IPT, other causes of action or public law grounds for judicial review need not. This point troubled Rix LJ who asked ([2009] 3WLR 717, para 39): "what is so special about section 7 proceedings under the 1998 Act against the intelligence services . . .?" The answer surely is that such claims are the most likely to require a penetrating examination of the justification for the intelligence services' actions and, therefore, close scrutiny of sensitive material and operational judgment. But it may well be (as, indeed, Rix LJ foresaw) that section 65(2)(d) of RIPA will be brought into force so that the Secretary of State can allocate other proceedings too exclusively to the IPT. Meantime, subject always to the court's abuse of process jurisdiction and the exercise of its discretion in public law cases, proceedings outside section 7(1)(a) can still be brought in the courts so that full effect is given to the preservation of such rights by section 11 of HRA.

34. It is similarly said to be anomalous that whereas A, responsibly seeking prior clearance for the publication of his manuscript, is driven into the IPT, someone in a similar position, although perhaps facing injunctive proceedings for having sought to publish without permission, would be entitled pursuant to section 7(1)(b) HRA to rely in those ordinary court proceedings on their article 10 rights. Whilst I readily see the force of this, the answer to it may be that defences were not sufficiently thought through at the time of this legislation and that more, rather than fewer, proceedings involving the intelligence services should be allocated exclusively to the IPT.

35. A further anomaly is said to be that Special Branch police officers and Ministry of Defence special forces may well carry out work of comparable sensitivity to that undertaken by the intelligence services and yet section 7(1)(a) HRA claims brought against them would proceed in the ordinary courts and not in the IPT. Part of the answer to this is to be found in "the special position of those employed in the security and intelligence services, and the special nature of the work they carry out" (Lord Bingham's opinion in *Shayler* at para 36); the rest in the same response as to the earlier points: perhaps the IPT's exclusive jurisdiction should be widened.

36. Sitting a little uneasily alongside the last suggested anomaly is the contention that section 65(2)(a) vests in the IPT exclusive jurisdiction over various kinds of proceedings against people quite other than the intelligence services which may involve little if anything in the way of sensitive material – for example, pursuant to section 65(3)(c), proceedings under section 55(4) of RIPA with regard to accessing encrypted data. Whatever view one takes about this, however, it is impossible to see how it supports either of the alternative constructions of section 65 for which A contends.

37. In short, none of the suggested anomalies resulting from the Court of Appeal's construction seems to me to cast the least doubt on its correctness let alone to compel some strained alternative construction of the section.

38. I see no reason to doubt that the IPT is well able to give full consideration to this dispute about the publication of A's manuscript and, adjusting the procedures as necessary, to resolve it justly. Quite why A appears more concerned than B about the lack of any subsequent right of appeal is difficult to understand. Either way, Parliament has dictated that the IPT has exclusive and final jurisdiction in the matter. I would dismiss the appeal.

LORD HOPE

39. I agree with Lord Brown's opinion. I wish only to add a few brief footnotes.

The Rules

40. As Lord Brown has explained (see para 14, above), among the factors that reinforce the conclusion that is to be drawn from the terms of the statute that Parliament did not intend to leave it to the complainant to choose for himself whether to bring his proceedings in a court or before the IPT are the provisions that RIPA contains about the rules that may be made under it. In *Hanlon v The Law Society* [1981] AC 124, 193-194 Lord Lowry set out the circumstances in which a regulation made under a statutory power was admissible for the purpose of construing the statute under which it was made. The use of the rules themselves as an aid to construction, in addition to what RIPA itself says about them, needs however to be treated with some care.

41. In *Deposit Protection Board v Dalia* [1994] 2 AC 367 the issue was as to the meaning of the word "depositor", and the regulations that were prayed in aid were made four years after the date of the enactment. At p 397 Lord Browne-Wilkinson said that regulations could only be used an aid to construction where the regulations are roughly contemporaneous with the Act being construed. In *Dimond v Lovell* [2000] QB 216, para 48 Sir Richard Scott VC said that he did not think that the content of regulations which postdated the Consumer Credit Act 1974 by some nine years could be taken to be a guide to what Parliament intended by the language used in the Act. One must also bear in mind, as Lord Lowry said in *Hanlon* at p 193-194, that regulations cannot be said to control the meaning of the Act, as that would be to disregard the role of the court as interpreter.

42. In this case the statute received the Royal Assent on 28 July 2000. The Investigatory Powers Tribunal Rules 2000 (SI 2000/2665) were made on 28 September 2000 and laid before Parliament the next day. The interval was so short that, taken together, they can be regarded as all part of same legislative exercise. But, as Mr Crow QC for B submitted, it is not the content of the rules as such that matters here. Rather it is the fact that the Act itself put a specialist regime in place to ensure that the IPT was properly equipped to deal with sensitive intelligence material. Section 68(4) of RIPA limits the information that the Tribunal may give to a complainant where they determine any complaint brought before them to a statement that a determination either has been or has not been made in the complainant's favour. Section 69(4) states that the Secretary of State's power to make rules under that section includes power to make rules that limit the information that is given to the complainant and the extent of his participation in the proceedings. Section 69(6)(b) states that in making rules under that section the Secretary of State shall have regard in particular to the need to secure that information is not disclosed to an extent that is contrary to the public interest or prejudicial to national security.

43. The fact that this regime was so carefully designed to protect the public interest by the scheme that is set out in the statute is in itself a strong pointer to the conclusion that Parliament did not intend by section 65(2)(a) that the jurisdiction of the IPT in relation to claims of the kind that A seeks to bring in this case was to be optional. I do not think that it is necessary to go further and look at the Rules themselves, as the indication that the statute itself gives is so clear on this point.

Anomalies

44. Although he adopted a different stance before Collins J, as the judge recorded in para 20 of his opinion [2008] EWHC 1512 (Admin), A now accepts that the legal challenge that he is making to B's decision is properly to be characterised as proceedings under section 7(1)(a) of the Human Rights Act 1998 and not under section 7(1)(b) of that Act. Section 7(1)(a) of the 1998 Act provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may "bring proceedings against the authority under this Act in the appropriate court of tribunal". Section 7(1)(b) provides, in the alternative, that he may "rely on the Convention right or rights concerned in any legal proceedings".

45. As Clayton & Tomlinson, *The Law of Human Rights*, 2nd ed (2009), para 22.03, puts it:

> "This section contemplates two ways in which a person may advance a contention that a public authority has acted in a way which is incompatible with his Convention rights: either by making a *free standing* claim based on a Convention right in accordance with section 7(1)(a) or by *relying* on a Convention right in proceedings in accordance with section 7(1)(b)."

In *R v Kansal (No 2)* [2002] 2 AC 69, 105-106 I said that section 7(1)(a) and section 7(1)(b) are designed to provide two quite different remedies. Section 7(1)(a) enables the victim of the unlawful act to bring proceedings under the Act against the authority. It is intended to cater for free-standing claims made under the Act where there are no other proceedings in which the claim can be made. It does not apply where the victim wishes to rely on his Convention rights in existing proceedings which have been brought against him by a public authority. His remedy in those proceedings is that provided by section 7(1)(b), which is not subject to the time limit on proceedings under section 7(1)(a) prescribed by section 7(5); see also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para 90. The purpose of section 7(1)(b) is to enable persons against whom proceedings have been brought by a public authority to rely on the Convention rights for their protection.

46. The fact that section 65(2)(a) requires proceedings under section 7(1)(a) to be brought before the IPT, while relying on section 7(1)(b) was not subject to this requirement, was said by Mr Millar QC to be anomalous. Why, he said, should a claim be so restricted when a defence relying on Convention rights to injunctive proceedings by a public authority, or a counterclaim, was not? I am reluctant to conclude that the omission of a reference to section 7(1)(b) was due to an oversight, and I do not think that when regard is had to the purpose of these provisions there is any anomaly.

47. I would reject the suggestion that a counterclaim against a public authority on the ground that it has acted (or proposes to act) in a way that is made unlawful under section 6(1) of the 1998 Act should be regarded as having been made under section 7(1)(b). This issue is not to be resolved by reference to the procedural route by which the claim is made but by reference to the substance of the claim. A counterclaim against a public authority for a breach of Convention rights is to be treated as a claim for the purposes of section 7(1)(a): see section 7(2) which states that proceedings against an authority include a counterclaim or similar proceedings. It will be subject to the time limit on proceedings under that provision in section 7(5).

48. As for defences, the scheme of the 1998 Act is that a person who is (or would be) a victim of an act that it is made unlawful by section 6(1) because the public authority has acted (or proposes to act) in that way is entitled to raise that issue as a defence in any legal proceedings that may be brought against him. Section 7(1)(b) contemplates proceedings in which it would be open to the court or tribunal to grant relief against the public authority on grounds relating to a breach of the person's Convention rights, such as those guaranteed by article 6. The scope for inquiry is relatively limited in comparison with that which may be opened up by a claim made under section 7(1)(a).

49. It is possible, however, to envisage a situation in which a defence to an application for injunctive relief by the intelligence services would open up for inquiry issues of the kind that section 65(2)(a) of RIPA reserves for determination by the IPT if they were to be subject of a claim under section 7(1)(a), the disclosure of which would be contrary to the public interest or prejudicial to national security. It is true that the legislation does not address this problem, perhaps because it was thought inappropriate to reserve to the IPT proceedings that were initiated by and in the control of the intelligence services or any other person in respect of conduct on their behalf. But the situation that this reveals is, I think, properly to be regarded as a product of the way the legislative scheme itself was framed. It does not provide a sound reason for thinking that Parliament intended to leave it to the complainant to choose whether to bring *his* proceedings in a court rather than before the IPT.

50. Like Lord Brown, I can find nothing in this alleged anomaly, or in any of the others that have been suggested, that supports the construction of section 65(2)(a) for which A contends.