***Privacy International*,“constitutional” statutory interpretation and Judicial sovereignty**

**S H Bailey, Professor of Public Law, University of Nottingham**

**Prologue**

*Enter a Minister and a Drafter*

Minister: We are setting up a tribunal, with some of our top judges, to deal with sensitive security matters. We want you to draft an ouster clause.

Drafter: Yes Minister. I take it you’ll be wanting a complete ouster? (What in the office we laughingly refer to as the Full English.)

Minister: No no no. That might be thought to be contrary to the Rule of Law. I say might be because while, like the Lord Chancellor, I’m fully committed to upholding it, I’m not quite sure what it is. No, what we are particularly worried about are questions of jurisdictional fact.

Drafter: I see. Can I ask, Minister, what do you mean by a question of fact here? Minister: Ah….good point. As I understand it that’s not at all clear and the courts basically decide that a matter is one of law rather than one of fact if they want to interfere.

Drafter: Yes indeed. Isn’t that a problem?

Minister: No no. We don’t mind at all. We will be confident that all matters of primary fact, including jurisdictional fact, will be for the tribunal alone. That’s all our voters will be interested in. Beyond that, we’re entirely happy to leave it to the judges.

Drafter: Yes, but won’t that leave the law in a state of uncertainty?

Minister: I suppose it will. But we often do that, so who cares? Is that enough for you to go on?

Drafter: Yes, Minister.

**Introduction**

1. *Privacy International*[[1]](#footnote-1) is a very curious case. In one sense the outcome did not matter much for the future. The decision of the majority of the Supreme Court that the Investigatory Powers Tribunal was amenable to judicial review had already been overtaken by the creation by Parliament of an appeal to the Court of Appeal on a point of law in respect of specified decisions. Furthermore, the Court chose to address a question of fundamental importance that did not require an answer (at least from the Justices in the majority) for the purpose of disposing of the appeal. The comments here were brief and tentative but, in so far as they indicated that there may be limits to Parliamentary sovereignty, will no doubt be regularly cited. The judgments ultimately split four ways. They are of considerable interest and have certainly provided lines of analysis (some supporting opposing positions) that will be relied upon by future advocates and judges. Some points have helpfully been clarified. However, it is difficult to see that the law on some of these fundamental matters has been taken much further.
2. The result was entirely in accord with the wishes of our fictional Minister. However, it is highly probable that it did not accord with the intention of Parliament, the fictional conversation being self-evidently highly implausible. Indeed, there were no serious suggestions that the interpretation adopted by the majority was intended. All the judges were agreed clear words were needed to oust the judicial review jurisdiction of the High Court. They were not agreed as to whether the words were clear or, indeed, on what kind of wording was needed for there to be “clarity”.

**The issues**

1. The key issues in the case centred on the proper interpretation of section 67(8) of the Regulation of Investigatory Powers Act 2000 (RIPA), which provided:

“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.”

This was the successor to an ouster clause in slightly different terms in section 7(8) of the Interception of Communications Act 1985 in respect of decisions of the tribunal established by that Act:

“The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.”

1. The power of the Secretary of State under RIPA to provide for an appeal has not been exercised. Section 242 of the Investigatory Powers Act 2016 inserted section 67A in RIPA providing for an appeal on a point of law to the Court of Appeal or the Court of Session against specified decisions of the IPT.
2. The Divisional Court[[2]](#footnote-2) and the Court of Appeal[[3]](#footnote-3) held that judicial review of IPT discussions was barred by the ouster clause. The Supreme Court,[[4]](#footnote-4) by a majority, in a court of seven Justices, allowed an appeal. The main majority judgment was given by Lord Carnwath, with whom Lady Hale and Lord Kerr agreed. Lord Lloyd-Jones agreed with Lord Carnwath on the first issue argued.[[5]](#footnote-5) Lord Sumption (with whom Lord Reed agreed) and Lord Wilson dissented, but adopted different positions.
3. The agreed statement before the court identified two issues:[[6]](#footnote-6)

“(i) whether section 67(8) of RIPA 2000 ‘ousts’ the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal for error of law?  
(ii) whether, and, if so, in accordance with what principles, Parliament may by statute ‘oust’ the supervisor jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction?”  
  
*The first issue*

1. In determining the first issue, the Court had to consider (1) the true content of the *Anisminic* principle; (2) the effect of the ouster clause absent the words in brackets referring to decisions as to whether the IPT had jurisdiction; and (3) the effect of the words in brackets.  
     
   *The Anisminic principle*
2. The decision in *Anisminic Ltd v Foreign Compensation Commission[[7]](#footnote-7)* is recognised as a landmark decision in the development of public law. It has generated significant literature, including Professor David Feldman’s outstanding analysis,[[8]](#footnote-8) which was cited with approval by the Supreme Court in the present case. The accepted analysis is that the House of Lords in *Anisminic* held, by a majority, that an error of law in the course of decision-making that caused he decision-maker to ask the wrong question or to take into account a legally irrelevant consideration would cause the decision maker to come to a determination outside jurisdiction. It was accordingly a “nullity” and so not a “determination” and, accordingly, judicial review (here, action for a declaration) was not barred by section 4(4) of the Foreign Compensation Act 1950. This which provided that  
     
   “The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.”  
     
   The speeches in the case cannot be read as authority for the proposition that any error of law goes to jurisdiction. However, it was recognised[[9]](#footnote-9) that it would be relatively straightforward for an error of law to be presented in those terms and it was subsequently accepted by the House of Lords, led by Lord Diplock,[[10]](#footnote-10) that all errors of law do indeed go to jurisdiction.
3. Lord Carnwath[[11]](#footnote-11) provided an account of the historical origins of the common law powers of the Court of King’s and Queen’s Bench to keep “all inferior jurisdictions within the bounds of their authority”, transferred to the High Court by the Judicature Act 1873 s.16. He cited the case law on the “strong interpretative presumption against the exclusion of judicial review, other than by ‘the most clear and explicit words.’”[[12]](#footnote-12) Lord Carnwath also endorsed the general view of the *Amisminic* story outlined above, accepting Professor Feldman’s account, albeit with some nuances of language. He said[[13]](#footnote-13) that, looked at from the perspective of how *Anisminic* had been interpreted in later cases, it  
     
   “can be taken as confirming or establishing three distinct but related propositions:  
     
   (1) That there is (at the least) a strong presumption against statutory exclusion of review by the High Court of any decision of an inferior court or tribunal treated as made without jurisdiction and so a ‘nullity’.  
   (2) That for this purpose there is no material distinction between an excess of jurisdiction at the outset, and one occurring in the course of proceedings.  
   (3) That a decision which is validated by error of law (whether or not ‘on the face of the record’) is, or is to be treated as, made without jurisdiction and so a nullity.”  
     
   The nuances of particular interest here are the words “(at the very least)” in the first proposition and the “or is to be treated as” in the third: What can be stronger than a “strong” presumption? There are two candidates: a “very strong” presumption or an irrefutable presumption. We will return to this below. The words “or is to be treated as” muddy the waters. They might mean that there are two categories of jurisdictional error: genuine jurisdictional errors and errors that are deemed to be, jurisdictional errors. It is difficult to see that this would be a helpful distinction to introduce.
4. Were there any obstacles to the third of Lord Carnwath’s propositions derived from *Anisminic*? His Lordship disposed of two. The first was Lord Diplock’s statement in *In re Racal* Communications *Ltd[[14]](#footnote-14)* that it was to be presumed that *Anisminic* had effectively abolished the distinction between errors of law that went to jurisdiction and those that did not in the case of “administrative tribunals and authorities”, but that this presumption did not apply in the case of “courts of law”. This was to be regarded as a dictum that did not have majority support in *Racal*. Indeed there was force in the submission that it was per incuriam as being out of line with authorities not referred to in *Racal*.[[15]](#footnote-15) The second was the endorsement by a majority of judges in *Racal*[[16]](#footnote-16) of the dissenting judgment of Geoffrey Lane LJ in *Pearlman v Keepers and Governors of Harrow School*,[[17]](#footnote-17) in which he held that a county court judge had been acting within his jurisdiction when determining the meaning of the words “structural alteration…or addition” in the Housing Act 1974. Lord Denning’s view[[18]](#footnote-18) was that “no court or tribunal has jurisdiction to make an error of law on which the decision of the case depends”. Lord Carnwath regarded *Pearlman, South East Asia* and *Racal* as “products of their time at a relatively early stage of the evaluation by the courts of the *Anisminic* principle” and Lord Denning’s approach “seems closer to subsequent authority than that of the dissenting judgment”.[[19]](#footnote-19)

*Ultra vires or Nullity as the basis for judicial review*

1. Lord Carnwath then said that, “at least as applied to review for errors of law” he saw “considerable force” in observations[[20]](#footnote-20) that doubted that the ultra vires principle was the true justification for intervention by the courts. As noted by Craig,[[21]](#footnote-21) the critical question is “whose relative opinion on the relevant question should be held to be authoritative” and the answer “must ultimately be based on a value judgement, the precise content of which will not necessarily be always the same”. Lord Carnwath[[22]](#footnote-22) expressly agreed with an observation by Lord Dyson[[23]](#footnote-23) that the distinction between jurisdictional error and other error was “artificial and technical”.  
     
   This demonstrates clearly an unwillingness to return to the pre-*Anisminic* distinction between jurisdictional and non-jurisdictional errors of law. Lord Carnwath mentioned[[24]](#footnote-24) the existence of but avoided serious engagement with the academic debate on the general basis for judicial review. Indeed, the possibility that arises from the words “at least as applied to review for errors of law” that the ultra vires doctrine remains the basis of intervention except for review for error of law would be hard to defend.

*Cart*

1. His Lordship then proceeded to examine the decision in *Cart,* which decided that decisions of the Upper Tribunal to refuse leave to appeal *were* subject to judicial review, but only (via the grant or refusal of permission to apply for judicial review) on grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted. The Court had regarded the real question as being what level of scrutiny of the Upper Tribunal was required by the rule of law.[[25]](#footnote-25) Notwithstanding academic criticism of *Cart*, Lord Carnwath seemed entirely content with the outcome noting, relevant to the present case, that the decision ”reaffirmed in no uncertain terms the continuing strength of the fundamental presumption against ousting the supervisory role of the High Court over other adjudicative bodies”, even those of a status apparently equivalent to the High Court.  
     
   *Lord Carnwath’s conclusion on the first issue*
2. A key point in coming to a conclusion on the first issue was Lord Carnwath’s rejection of the argument of counsel for the IPT as intervener[[26]](#footnote-26) that the task of interpretation of s.67(8) was to be approached, by reference,  
     
   “not simply to a general presumption against ouster clauses of any kind, but rather to careful examination of the language of the provision, having regard to all aspects of the statutory scheme, and the status of the body in question, in order to discern the policy Parliament intended in the legislation.”[[27]](#footnote-27)  
     
   This was to treat the exercise “as one of ordinary statutory interpretation, designed simply to discern the policy intention of Parliament, so downgrading the critical importance of the common law presumption against ouster”.   
     
   Applying *Anisminic*, “determinations” etc made by the IPT that were erroneous in law were a nullity and so not a “determination” etc protected by the ouster clause.
3. The words in brackets made no difference. The decision challenged was on the meaning of a particular word in a provision authorising the grant of an interception warrant. “On no ordinary view” could this be regarded as a decision “as to whether [the IPT] had jurisdiction” nor even a decision “as to jurisdiction” under the “apparently broader” language of the 1985 Act.[[28]](#footnote-28) Alternatively, applying *Anisminic*, the exclusion applied “only to a legally valid decision relating to jurisdiction”.[[29]](#footnote-29) This did not mean that the exclusion was otiose as it would apply where the alleged error in a decision as to jurisdiction was one of fact rather than law.[[30]](#footnote-30) It was “beside the point” whether this was a likely interpretation of Parliament’s intentions or even whether the words in brackets were entirely redundant:  
     
   “If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words beyond their natural meaning.”  
     
   If the promotors of the legislation had wanted to provide comprehensive protection from jurisdictional review of any kind, “one is entitled to ask why they did not use more explicit wording”.[[31]](#footnote-31) This might have excluded challenges to “purported” determinations etc.  
     
   *Lord Sumption’s dissent on the first issue*
4. The first dissent was that of Lord Sumption, with whom Lord Reed agreed:  
     
   “[M]y reason can be shortly summarised. The effect of section 67(8) is simply to exclude the jurisdiction of the High Court to entertain a challenge to the Tribunal’s decision on the merits. In other words, it excludes judicial review on grounds which would be tantamount to an appeal.”[[32]](#footnote-32)  
     
   The rule of law was “sufficiently vindicated by the judicial character of the Tribunal” and did not require a right of appeal. Lord Sumption’s analysis of *Anisminic* was essentially the same as Lord Carnwath’s. it was  
     
   “now to late to revert to the subtler distinctions in the speeches in *Anisminic,* even if it were thought desirable to do so.”  
     
   However, the implications of what was in substance “a right of appeal on points of law going to the merits” were very different, according as the decision in question was made by an administrative/executive body or a judicial body. A right of access to a judicial body to review the lawfulness or executive acts was “an essential part of the rule of law”, but the rule of law did *not* require a right of appeal *from* such a body. By contrast, a judicial body was more likely to have a wider “permitted field”.[[33]](#footnote-33)  
     
   “extending to the conclusive resolution of issues of law (or indeed fact) and including an unrestricted interpretative power.”[[34]](#footnote-34)  
     
   All turned on the proper interpretation of the “permitted field”. Here, Lord Sumption, by contrast with Lord Carnwath, endorsed Lord Diplock’s view in *Racal* that the presumption against a statutory ouster of judicial review did not apply to the decisions of a judicial body, although he disagreed with any suggestion that a tribunal could not be a judicial body for those purposes.[[35]](#footnote-35) *Cart* was of limited relevance to the present case because there had been no ouster clause; its real significance lay   
     
   “in the recognition that the rule of law does not necessarily require that the decisions of an inferior tribunal be subject to a power of review, even where they are unappealable.”[[36]](#footnote-36)
5. Turning to the IPT,[[37]](#footnote-37) it was, plain from the legislation that Parliament considered that ordinary proceedings in the High Court  
     
   “presented an unacceptable risk that secret material would be disclosed, contrary to the public interest,”

and that a major factor in the decision to allocate proceedings to the Tribunal was that it had special procedures which would reduce that risk. The fact that subsequent developments had established that closed material procedures could be used in ordinary High Court proceedings made no difference: “What matters is whether Parliament had those concerns, not whether they were justified.”  
  
The IPT was clearly a judicial body, and in “an altogether more significant sense” than the FCC, in that it had a statutory power to exercise a power of judicial review,[[38]](#footnote-38) and so in that respect exercised an adjudicative jurisdiction which was coordinate with the High Court. All this was relevant in interpreting the effect of s.67(8) of RIPA.

1. In approaching the interpretation of s.67(8),[[39]](#footnote-39) Lord Sumption noted that it was agreed that clear words were required to oust the review jurisdiction of the High Court. The reason underlying this, recognised by Lord Carnwath, was that Parliament was presumed not to legislate contrary to the rule of law.  
     
   However,   
     
   “the degree of elaboration called for in a statutory provision designed to achieve a given effect must depend on how anomalous that effect would be.”[[40]](#footnote-40)  
     
   There was nothing inconsistent with the rule of law about allocating a conclusive review jurisdiction to a judicial body other than the High Court. For Lord Sumption, it was clear that the draftsman of the 2000 Act “did not intend the same result as in *Anisminic*”, in view of the bracketed words, which had no counterpartin the *Anisminic* ouster clause. The intention was to bar claims for judicial review for errors of law on the merits (to use Lord Sumption’s terminology) in parallel to the express barring of an appeal. But the bar was not intended to protect other decisions in excess of jurisdiction, as where a dispute was not within the IPT is subject-matter competence, or the IPT was improperly constituted or affected by bias. The security considerations provided an “entirely rational reason” why Parliament should have wished to confine these matters to a secure Tribunal and bar access to the High Court, whether by appeal or by review. Finally, if s.67(8) did not have this effect, then what else could it mean? Lord Sumption rejected the submission that s.67(8) was designed to bar claims based on errors as to jurisdictional *fact* as opposed to *law*. Judicial review commonly involved interrelated questions of fact and law and such distinctions  
     
   “tend to lead to arbitrary and technical subtleties of a kind which Parliament is unlikely to have intended. Certainly there is no trace of such a distinction in section 67(8) or anywhere else in the Act.”[[41]](#footnote-41)  
     
   The interpretation adopted was “the narrowest meaning consistent with the language and manifest purpose of the subsection.”  
     
   *Lord Wilson’s dissent on the first issue*
2. Lord Wilson’s dissent started with disapproval of the decision in *Anisminic,* and agreement with the dissenting opinion of Lord Morris of Borth-y-Gest that the FCC’s error of law was not in excess of jurisdiction. The majority’s decision had been reached by adopting a strained constriction of the concept of “nullity” or acting “in excess of jurisdiction”.[[42]](#footnote-42) However, Lord Diplock had clearly stated in *O’Reilly v Mackman* that, as a result of *Anisminic*, if a statutory tribunal made an error of law, it must have asked itself the wrong question, and so one which it had no jurisdiction to determine. In Lord Wilson’s view, the drafter of the 1985 Act ouster clause intended to bar judicial review of all the decisions of IPT in relation to its “jurisdiction”.[[43]](#footnote-43) This was the “only reasonable meaning of the words”. As regards Lord Carnwath’s interpretation, he responded:[[44]](#footnote-44)  
     
   “where would be the logic in excluding from judicial oversight errors of jurisdiction in the proper sense, but not ordinary errors of law?”  
     
   As to the argument that the ouster clause would bar review for jurisdictional fact, there was no basis for confining the exclusion to that narrow area of the IPT’s decision-making. Equally, Lord Wilson was unable to accept Lord Sumption’s reading of the ouster clause as being “characteristically ingenious but too strained:”  
     
   “Had Parliament’s intention been to allow judicial review of the IPT’s errors of jurisdiction in the proper sense, it would not have borrowed from the 1985 Act words in parenthesis which, on any conventional construction of them, so obviously appear to exclude it.”  
     
   **Discussion**
3. It was submitted that, as a matter of ordinary statutory interpretation the ordinary meaning of section 67(8) was to bar judicial review on any ground: Lord Wilson’s position. Lord Carnwath’s position involves giving a meaning to the provision that cannot reflect the intention of Parliament. It is simply implausible that these could have been a policy instruction to the drafter that there be a bar to judicial review on the ground of jurisdictional *fact*, as distinct from jurisdictional *law*. The line between law and fact is notoriously difficult to draw: one helpful result of *Anisminic* is that where a question *is* jurisdictional it is not necessary to consider whether the question ultimately is one of law or fact. While it is clear that findings of primary fact obviously fall on one side of the line and debates as to the meaning of the words obviously fall on the other, whether facts found fall within a statutory description can often be characterised either way. Both cases cited by Lord Carnwath as illustrating the “jurisdictional fact” category[[45]](#footnote-45) were actually questions of application of a statutory description (whether the applicant was an “illegal entrant” and whether there had been “directed surveillance”) and so were at least arguably questions of law.
4. Is it then a good answer, as Lord Carnwath says, that this is not a matter of “ordinary statutory interpretation”, in that room has to be found for the “common law presumption against ouster”, and that this presumption was not rebutted. There are two possible answers. One is to say, with Lord Sumption, that this presumption does not apply in the case of judicial bodies: one simply looks for the intention of Parliament untrammelled by any such presumption. The difficulty with this approach is how to define “judicial bodies” for this purpose. It is clear that a “tribunal” like the IPT qualifies. Is it so clear that any body labelled a “court would, including a magistrates’ court comprising lay justices? It is submitted that it would be better to focus directly on the question when words will be sufficiently clear to secure the effect sought, adopting Lord Sumption’s helpful approach on this matter, previously mentioned.[[46]](#footnote-46) Furthermore, it seems inappropriate to characterise this as simply “ordinary statutory interpretation”.[[47]](#footnote-47) There would still be a presumption against ouster, but a less strained approach to the determination of whether the presumption has been rebutted.
5. Is it a good answer to say that *Anisminic* applies to the words in brackets so that the ouster clause only protects a legally valid decision as to jurisdiction? On this approach the words in brackets would indeed be otiose, merely demonstrating the drafter’s understanding of the broad reach of *Anisminic.*
6. It is submitted that Lord Carnwath’s approach on its face demonstrates a lack of any serious interest in what Parliament was likely to have intended, and that that is a dangerous path to take. Granted, clearer words could have been used by the drafter (for example protecting “purported” determinations). But that does not establish that the words actually used were not *sufficiently* clear to rebut any presumption against ouster. Lord Carnwath’s approach seems to equate the requirement for *clear words* with a requirement for *words that are clear when read literally,* which does not fit easily within contemporary approaches to statutory interpretation. Is the concept of a decision “as to jurisdiction” *clearly* different from a decision “going to jurisdiction”? Is there any difference of substance between the formulations in the 1985 and 2000 Acts? The parties were agreed that there were not, although Lord Carnwath had doubts.[[48]](#footnote-48) The concept of an error “going to jurisdiction” is a widely understood piece of jargon. Why could “as to jurisdiction” not be treated the same way? Conversely, if there had been an intention to exclude review of determinations of jurisdictional fact alone it would have been very easy to say so in terms.
7. Overall, the general approach of the dissenters is to be preferred, although Lord Sumption’s gloss does seem a complication too far that in effect requires extensive rewriting of the provision. It is to be hoped that this approach, under which a balanced rather than mechanical approach is taken when deciding whether there are the clear words to rebut a presumption may commend itself to future courts.  
     
   **The second issue**
8. The essence of the proposition of counsel for the claimants[[49]](#footnote-49) to be considered here was summarised by Lord Carnwath[[50]](#footnote-50) as being that  
     
   “a clause purporting to ‘oust’ the supervisory role of the High Court to correct errors of law cannot properly be upheld because it would conflict with the ‘rule of law’, a principle which is as fundamental to our constitution as the principle of Parliamentary sovereignty”.  
     
   This did not involve questioning the principle of Parliamentary sovereignty itself but sought to   
     
   “explain its boundaries, and why the laws of a sovereign Parliament require an independent interpreter of unlimited jurisdiction to ensure those laws are faithfully implemented”.  
     
   The opposing argument[[51]](#footnote-51) did not question the need for an independent, authoritative interpreter of legislation as a fundamental requirement of the rule of law, but said that the IPT met that need. There was, furthermore, no absolute constitutional requirement for a right of appeal to the higher courts:  
     
   “the balance between the correction of judicial error and the policy considerations in favour of finality is a judgment properly for the legislature.”
9. On this issue, Lord Carnwath, with whom Lady Hale and Lord Kerr agreed, thought, obiter, that there was a limit to Parliamentary sovereignty. Lord Lloyd-Jones, who agreed with Lord Carnwath on the first issue, expressly left the second issue open. However, Lord Wilson, who otherwise dissented, did agree to an extent with Lord Carnwath on the second issue.[[52]](#footnote-52) Lord Carnwath’s conclusion, in full, clearly presented as obiter, was this:  
     
   “I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory content, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.”[[53]](#footnote-53)
10. The building blocks to support the conclusion were: (1) acceptance by both parties that the relationship between Parliament and the courts is governed by accepted principles of the “rule of law”; (2) that the “constitutional principle” of the rule of law had received express statutory recognition in section 1 of the Constitutional Reform Act 2005; (3) that as Parliament had failed to define the concept it was for the courts to determine its content and limits; (4) that it was accepted that there were certain fundamental requirements of the rule of law which “no form of ouster clause (however clear and explicit) could exclude from the jurisdiction of the courts”:[[54]](#footnote-54) this would apply to cases of excess or abuse of jurisdiction, and probably, at least some cases of breach of natural justice; (5) that nullity should no longer be regarded as the basis for intervention in judicial review. The core of the approach was the claim that  
      
    “the courts have felt free to adapt or limit the scope and form of judicial review, so as to ensure respect on the one hand for the particular statutory content and the inferred intention of the legislature, and on the other for the fundamental principle of the rule of law, and to find an appropriate balance between the two….”[[55]](#footnote-55)  
      
    It was claimed that:  
      
    “the critical step taken by this court in *Cart* was to confirm…that it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review.”[[56]](#footnote-56)  
      
    This should be seen as based as a “natural application of the constitutional principle of the rule of law…and as an essential counterpart to the power of Parliament to make law.”
11. Time limit ouster clauses, the outcome in *Racal* and the dissent in *Pearlman* could be supported as providing a sufficient and proportionate level of protection. In the present context, review only by the IPT would not.  
      
    *Lord Sumption’s view on the second issue*
12. Lord Sumption[[57]](#footnote-57) did not understand Ms Rose to be arguing that “Parliament is not competent to legislate contrary to the rule of law”. (This is curious as that this seems to be precisely the position that Lord Carnwath favoured as regards that aspect of the rule of law that requires access to the judicial review jurisdiction of the High Court) The argument was the “less radical” one that “judicial review is necessary to sustain Parliamentary sovereignty….Parliament’s lack of competence to oust judicial review is on this view conceptual rather than normative”. On the more radical argument Lord Sumption was clear that the status of Parliamentary legislation as the ultimate source of law was the foundation of democracy in the UK and had been so recognised in *Miller*.[[58]](#footnote-58)
13. The less radical argument was accepted “up to a point”, but as in truth a variant of the claimant’s primary case about Parliamentary intention. It was not suggested that the IPT had been established as a tribunal with unlimited jurisdiction or one with unlimited discretionary power to determine its own jurisdiction. The question was how to reconcile the *limited* character of its jurisdiction with the language of s.67(8), and such a reconciliation had been set out in addressing the first issue. The conceptual problem did not arise. Lord Sumption cited Lady Hale’s judgment in *Cart*[[59]](#footnote-59) for the proposition that Parliament *could* if it wished provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it had to administer.

*Lord Wilson’s view on the second issue*

1. Lord Wilson thought that there was “much to be said” for Lord Carnwath’s analysis in cases that involved lack of jurisdiction. The question here   
     
   “would have become whether, when it chooses to make a law which sets the limits of a jurisdiction, Parliament can elsewhere deprive it of an essential element of a law, namely that observance of its limits will be enforced by the courts”.[[60]](#footnote-60)  
     
   However, it was much more difficult to apply this in the case of error of law and, on this aspect, Lord Wilson disagreed with Lord Carnwath.  
     
   *Racal* and *Cart* demonstrated that there were courts and tribunals where the judges, in the course of making unappealable decisions, can make ordinary errors of law of which Parliament has power to exclude judicial review. The status and function of the IPT were such as to enable Parliament to do the same.  
     
   **Discussion of the second issue**
2. The first point to note is that the second issue is not addressed in any detail. The extensive theoretical academic debates on possible limits to Parliamentary sovereignty based on the common law are not relied upon or even addressed. The conclusions have to stand or fall by reference to the rather limited reasoning actually deployed. It is difficult to read Lord Carnwath’s approach (fully supported by three Justices and in part by Lord Wilson) as other than setting out an exception to Parliamentary sovereignty. This is questionable for the reasons given by Lord Sumption. In the absence of a written constitution operating as a form of higher law, a secure basis for an exception to Parliamentary sovereignty is provided, for the moment, by the European Communities Act 1972. A secure basis for a quasi-exception (via the interpretative power in s.3) is provided by the Human Rights Act 1998. Invocation of the rule of law, a contested principle that has been recognised but not defined by Parliament, is clearly insecure by comparison. Here the challenge to the validity of Parliamentary legislation does not come from an external source equivalent to the overriding requirements of membership of the EU or compliance with the UK’s obligations under the ECHR, mediated by Act of Parliament. The challenge is based simply on the assertion of the judges themselves, albeit invoking their understanding of the common law, that a particular law conflicts with the rule of law and that they can therefore lawfully ignore it. This is not to deny that there are aspects of the rule of law that have been articulated by the judges with great clarity and entirely properly relied on as a reason for holding the acts of administrative and judicial bodies to be unlawful. But it does not follow that a presumption that Parliament does not intend to legislate contrary to the rule of law can simply become, through judicial assertion, a presumption that Parliament cannot legislate contrary to the rule of law. If this approach were to be accepted it would be to recognise a pocket of Judicial sovereignty alongside Parliamentary sovereignty: a power based simply on the assertion of the judges that they have it. And if this approach be accepted what other essential features of the rule of law would then be identified in future cases as so fundamental as to fall within the ambit of Judicial sovereignty? How about high court fees enshrined in primary legislation?[[61]](#footnote-61)
3. Is there a conceptual difficulty in the way of Parliament establishing a body with limited jurisdiction and then providing that those limits were not enforceable in the courts? The possibility that Parliament might entrust a tribunal with power finally to determine jurisdictional facts was recognised by Lord Esher in *R v The Commissioners for Special Purposes of the Income Tax*.[[62]](#footnote-62) If jurisdictional fact, why not jurisdictional law? A clear example of conceptual impossibility would be for Parliament to legislate that elephants “are” (as distinct from “are deemed to be”) fish. But the scenario here is not of that kind. Any suggestion that it is assumes that, whenever Parliament sets up a tribunal with a limited jurisdiction, its view is that it is essential for the limits on jurisdiction to be legally enforceable and that the courts can provide the *only* mechanism for enforcement of such limits.[[63]](#footnote-63) But Parliament might have taken the view that the qualities of the members of the tribunal are such that the risk of them overstepping the mark is less significant than that of jurisdictional matters being referred to the ordinary courts. Furthermore, there will always be room for a political and/or legislative response to improper exercises of power. There is no conceptual impossibility here.
4. This case is one a small number that shows that there are some judges who in special circumstances would be willing to hold that a provision of an Act of Parliament is unlawful. In principle, if this is to be done, it is better for it to be done openly, through the express articulation of a principle on the lines of Lord Carnwath’s view on the second issue. It should be coupled with the frank avowal that this is an assertion of Judicial sovereignty. Only then will the public be in a position to know what is going on. It is arguably less appropriate for the judges to reach the same result by what is claimed to be a process of “interpretation” when everyone knows that the outcome cannot have been intended by Parliament.[[64]](#footnote-64)

**Conclusions**

1. *Privacy International* does provide helpful guidance on a number of points:
2. The *Anisminic* approach to error of law is firmly approved. This is to be welcomed. I was taught Administrative Law in 1970-71 and began teaching it in 1972-73 a time when the old law still had to be covered. Only a masochist would seek to return to that position.
3. It is possible that, as a matter of drafting, avoidance of the *Anisminic* approach to ouster clauses may be secured by protecting *purported* determinations.
4. In general, the optimum approach to the *interpretation* of an ouster clause is indeed for that to be informed by the extent to which giving effect to it can be said to be contrary to the rule of law.[[65]](#footnote-65)

However, at the end of the day, this approach should only be regarded as permitting the adoption of interpretations that the words can reasonably bear and not challenges, whether overt or concealed, to Parliamentary sovereignty. At a time when the most difficult political issue for generations in the UK centres on the proposed removal of the limit to Parliamentary sovereignty derived from membership of the EU, perhaps now is not the most propitious moment to raise the possibility of a challenge to Parliamentary sovereignty from a different direction. Here, it is submitted, with respect, that there is a lot to be said for Lord Lloyd-Jones’ position on the second issue, safely behind the parapet.

17 7 19

**ALBA Conference 2019 (20 7 19)**

1. *R (on the application of Privacy International) v Investigatory Powers Tribunal*

   [2019] UKSC 22, [2019] 2 WLR 1219. See P Daly, “Of clarity and context” <https://www.administrativelawmatters.com/blog/2019/05/15/of-clarity-and-context-r-privacy-international-v-investigatory-powers-tribunal-2019-uksc-22/>; A Deb, “Privacy International: A Matter of Constitutional Logic and Judicial trust?” <https://ukconstitutionallaw.org/2019/01/08/anurag-deb-privacy-international-a-matter-of-constitutional-logic-and-judicial-trust/> [↑](#footnote-ref-1)
2. [2017] EWHC 114 (Admin) per Sir Brian Leveson P; Leggatt J inclined to a different view but did not formally dissent, thereby avoiding the need for the case to be reargued. [↑](#footnote-ref-2)
3. [2017] EWCA Civ 1868, [2018] 1 WLR 2572, per Sales LJ (with whom Floyd and Flaux LJJ agreed. For comments on these judgments see M Elliott, “Through the Looking-Glass?” University of Cambridge Faculty of Law Legal Studies Research Paper No 4/2018; R Craig, “Ouster clauses, separation of powers and the intention of Parliament: From *Anisminic* to *Privacy International*”[2018] PL 570; T Hickman, “The Investigatory Powers Tribunal: a law unto itself?” [2018] PL 584 (advancing the interpretation based on jurisdictional facts that ultimately prevailed in the Supreme Court); A. Tucker, ‘Parliamentary Intention, Anisminic, and the Privacy International Case (Part One and Part Two)’, U.K. Const. L. Blog (18th and 19th Dec. 2018) (available at <https://ukconstitutionallaw.org/>)). See also the Admin Law Blog (<https://adminlawblog.org/2017/03/01/welcome-to-the-admin-law-blog/>): contributions by Joanna Bell, Robert Craig, Christopher Forsyth, Nora Ni Lóideán, and Joe Tomlinson (an online collection that grew out of a symposium held by the Centre for Public Law at the University of Cambridge on October 20, 2018, organised by Dr Paul Daly (University of Cambridge)). [↑](#footnote-ref-3)
4. [2019] UKSC 22. [↑](#footnote-ref-4)
5. See para 6, below. [↑](#footnote-ref-5)
6. See Lord Carnwath at para [21]. [↑](#footnote-ref-6)
7. [1969] 2 AC 147. [↑](#footnote-ref-7)
8. S Juss and M Sunkin (eds), *Landmark Cases in Public Law* (Oxford and Portland, Oregon: Hart Publishing, 2017) Ch 4. [↑](#footnote-ref-8)
9. See SA de Smith, *Judicial Review of Administrative Action* (London: Stevens & Sons Ltd, 3rd edn, 1973) p 99 (“it was not easy to identify errors of law which, in the light of their analyses, would not be held to go to jurisdiction”). [↑](#footnote-ref-9)
10. See Lord Diplock in *O’Reilly v Mackman* [1983] 2 AC 237, 239, [↑](#footnote-ref-10)
11. Paras [30] – [37]. [↑](#footnote-ref-11)
12. Lord Carnwath at para [37] citing Laws LJ in *Cart* [2011] QB 120, at para [31]. [↑](#footnote-ref-12)
13. At para [43]. [↑](#footnote-ref-13)
14. [1981] AC 374, at p 383. [↑](#footnote-ref-14)
15. See Lord Carnwath at paras [64] – [68]. [↑](#footnote-ref-15)
16. Lords Diplock, Keith and Edmund-Davies. Approval had also been expressed by the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363. [↑](#footnote-ref-16)
17. [1979] QB 56, 76. [↑](#footnote-ref-17)
18. *Ibid*, at p.70. [↑](#footnote-ref-18)
19. Lord Carnwath at paras [69] – [74]. [↑](#footnote-ref-19)
20. In particular by Professor Paul Craig *(Administrative Law* (London: Sweet & Maxwell, 8th edn, 2016), para 16-015, citing Sir John Laws (“Illegality: The Problem of Jurisdiction” in M Supperstone and J Goudie, *Judicial Review* (1st edn, 1992), p. 67. [↑](#footnote-ref-20)
21. Op.cit. para 16-016. [↑](#footnote-ref-21)
22. At para [84]. [↑](#footnote-ref-22)
23. *Cart*, para [111]. [↑](#footnote-ref-23)
24. At para [81]. [↑](#footnote-ref-24)
25. On this, Lord Carnwath cited judgments in *Cart* by Lady Hale at para [51], Lord Brown at para [100], Lord Clarke at para [102] and Lord Dyson at paras [119] – [122]. [↑](#footnote-ref-25)
26. Sir James Eadie QC. [↑](#footnote-ref-26)
27. Lord Carnwath at para [106]. The quotation at the end is from *R (on the application of Woolas) v Parliamentary Election Court* [2012] QB 1, para [54] per Thomas LJ. [↑](#footnote-ref-27)
28. Lord Carnwath at para [108]. The parties accepted that there was no material difference between the 1985 Act and 2000 Act provisions. [↑](#footnote-ref-28)
29. Lord Carnwath at para [109]. [↑](#footnote-ref-29)
30. Lord Carnwath at para [110]. [↑](#footnote-ref-30)
31. Lord Carnwath at para [111]. [↑](#footnote-ref-31)
32. Para [172]. [↑](#footnote-ref-32)
33. To use Lord Wilberforce’s phrase in *Anisminic.* [↑](#footnote-ref-33)
34. Lord Sumption at para [182]. [↑](#footnote-ref-34)
35. Paras [184] – [187]. The *South East Asia* decision was accordingly correct and *Pearlman* had been overruled by *Racal.* [↑](#footnote-ref-35)
36. Lord Sumption at paras [189] – [192], referring to Lord Phillips and Lord Dyson in *Cart* at paras [89] – [90] and [122] – [124] respectively, Lord Dyson noting that the status and functions of the Upper Tribunal were important in determining the proper scope of judicial review. [↑](#footnote-ref-36)
37. Lord Sumption at paras [193] – [198]. [↑](#footnote-ref-37)
38. 2000 Act s.67. [↑](#footnote-ref-38)
39. Lord Sumption at paras [199] – [206]. [↑](#footnote-ref-39)
40. Para [199]. [↑](#footnote-ref-40)
41. Para [204]. [↑](#footnote-ref-41)
42. Paras [214] – [219]. [↑](#footnote-ref-42)
43. Paras [220] – [226]. [↑](#footnote-ref-43)
44. Para [227] [↑](#footnote-ref-44)
45. *R v Secretary of State for the Home Department Ex p Khawaja* [1984] AC 74; *C v Comr of Police of the Metropolis* [2006] Po LR 151. [↑](#footnote-ref-45)
46. N 40 above. [↑](#footnote-ref-46)
47. See para 13 above. [↑](#footnote-ref-47)
48. See Lord Carnwath at para [108]. [↑](#footnote-ref-48)
49. Dinah Rose QC. [↑](#footnote-ref-49)
50. Paras [113] – [115]. [↑](#footnote-ref-50)
51. By Sir James Eadie QC, for the interveners. [↑](#footnote-ref-51)
52. Para [236]. [↑](#footnote-ref-52)
53. Para [144]. [↑](#footnote-ref-53)
54. Para [122]. This suggests that all counsel were agreed that there were some limits to Parliamentary sovereignty and not merely that there was agreement as to the relevant content of the rule of law. This seems a little surprising. [↑](#footnote-ref-54)
55. Para [130]. [↑](#footnote-ref-55)
56. Para [131]. [↑](#footnote-ref-56)
57. At para [208]. [↑](#footnote-ref-57)
58. *R (on the application of Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2018] AC 61. [↑](#footnote-ref-58)
59. [2012] 1 AC 663 at para [40]. [↑](#footnote-ref-59)
60. Para [236]. [↑](#footnote-ref-60)
61. Cf *R (on the application of UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51, [2017] ICR 1037. [↑](#footnote-ref-61)
62. (1888) 21 Q.B.D. 313, 319. Se to similar effect Lord Wilberforce in *Anisminic* ([1969] 2 AC 147 at p 207) and Lady Hale in *Cart* (see above n 59). [↑](#footnote-ref-62)
63. This assumption is reflected in Lord Wilberforce’s judgment in *Anisminic*: [1969] 2 AC 147, at p 208. [↑](#footnote-ref-63)
64. Mark Elliott (op cit n 3), notes (at p 19) that Lord Phillips in evidence to the House of Commons Political and Constitutional Reform Committee acknowledged the existence of a judicial willingness to adopt an approach that is “ostensibly – even if it is not actually – interpretative in nature”, giving *Anisminic* as an example, in preference to “naked curial rebellion”. Lord Phillips’ comment in full was: “One would be considering a constitutional crisis before you could envisage the courts purporting to strike down primary legislation. Before you got that, the courts would say, ‘Parliament couldn’t possibly have meant that because—' and therefore would have given an interpretation to the legislation that it, faced with it, couldn’t bear it, but would have chucked the gauntlet back to Parliament, saying, ‘We have pulled you back from the brink. Are you really going to persist with this?’ That is what the House of Lords did as the Privy Council in *Anisminic*. They threw down the gauntlet and it was not taken up. Judges do have ways of finessing the intention of Parliament from time to time (Political and Constitutional Reform Committee

    Oral evidence: *The constitutional role of the judiciary if there were a codified constitution*, HC 802 Thursday 30 January 2014, Qn 208). It is submitted that *Privacy International* provides a significantly stronger example than *Anisminic*, one that is correspondingly more difficult to justify. [↑](#footnote-ref-64)
65. This is in essence the approach that Lord Carnwath would use for the more radical purpose of denying an ouster clause binding effect: see *Privacy International* at para [144], above n 55. [↑](#footnote-ref-65)