

Investigatory Powers Tribunal Claims and Complaints

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- 1 This paper gives an overview of the Investigatory Powers Tribunal ('IPT') and offers some tips to those representing police forces in IPT proceedings.

The IPT's jurisdiction

- 2 The IPT is part of arrangements in Part 8 of the Regulation of Investigatory Powers Act 2000 ('RIPA') for the oversight of covert investigatory powers, the others being the Investigatory Powers Commissioner and the Judicial Commissioners.
- 3 The IPT was established by s.65(1) of RIPA, which sets out its jurisdiction. It has twelve members, all judges or senior lawyers, under the presidency of Singh LJ. It is the forum for complaints and human rights claims against public authorities concerning the use of covert investigatory powers.
- 4 The covert investigatory powers which may be litigated in the IPT include:
 - a. Interception of communications under Part 2 of the Investigatory Powers Act 2016 ('the IPA').
 - b. Acquisition of communications data (i.e. the 'who', 'when', 'where' and 'how' of correspondence, telephone and electronic communication, but not the content) under Part 3 of the IPA.
 - c. Intrusive surveillance, directed surveillance and the use of covert human intelligence sources ('CHIS')¹ under Part 2 of RIPA.
 - d. Entry onto property and any interference with property or telegraphy under Part 3 of the Police Act 1997.
- 5 As well as 'complaints' that a public authority has acted contrary to specified covert powers, the IPT has exclusive jurisdiction over claims brought under s.7 of the Human Rights Act 1998 ('the HRA') where the alleged breach of the duty in s.6 of the HRA on public authorities not to act incompatibly with an ECHR right relates to the use of covert investigatory powers.
- 6 No doubt in recognition of the fact that someone who has been or thinks they have been the subject of a covert investigatory power will often be unable to evidence the same, complainants do not need to establish at the outset that they have in fact been the subject of covert investigation.² For claims under the HRA, a complainant may be a "*victim*" within the meaning of section 7(1) of the HRA if they can satisfy the IPT that there is a "*reasonable likelihood*" that they have been targeted. For complaints, the complainant must believe there has been conduct by one of the specified public authorities interfering with him, his property or communications in "*challengeable circumstances*".
- 7 "*Challengeable circumstances*" are defined in section 65(7) – (8) of RIPA as, effectively, conduct that takes place pursuant to (purported) authorisation for the use of the covert powers, or conduct which takes place where "*proper consideration*" should have been given as to whether authorisation should have been sought. Conduct therefore falls within the jurisdiction of the IPT whether or not the public authority appreciated it should have considered applying for an authorisation.³

Process

- 8 Proceedings in the IPT are commenced by the lodging of a form T1 (human rights claim) and/or a form T2 (complaint). What those forms must include is set out in rr. 8 – 9 of the Investigatory Powers Tribunal Rules 2018 ('the IPT Rules').
- 9 The nature of the IPT's jurisdiction and process is quasi-inquisitorial: much of its work is undertaken behind closed doors and well before any hearing. Only a small proportion of claims / complaints (complaints for short) reach a final hearing.
- 10 While complaints are investigated and then determined by the IPT "*by applying the same principles as would be applied by a court on an application for judicial review*" (s.67(3) of RIPA) the pre-hearing process operated by the IPT is markedly different to the procedure for judicial review claims in CPR Part 54.
- 11 There is no requirement that the complainant serve their complaint on the respondent public authority or that the IPT send it on. This means that the first a respondent police force will often hear about an IPT complaint is when they receive a direction from the IPT to search for and disclose information and/or documents held by the force on a named individual and their contact details (pursuant to the IPT's power to order production of materials in s.68(6) of RIPA).
- 12 Responding to a search direction will usually be undertaken by the department in the force dealing with covert matters which maintains or has access to records of authorised covert investigations. The IPT may follow up with further requests for information / disclosure. The disclosure exercise can be complex, particularly in cases where the complainant was the subject of an investigation and there is a question as to whether the investigative techniques should have been authorised under one of the statutes referred to above. Police forces should apply the duty of candour in their disclosure exercises to the IPT. Much like in the **Worcestershire** process in coronial investigations, disclosure to the IPT is a separate process to disclosure to the complainant (as to which, see below).
- 13 The IPT decides the extent to which it will investigate the complaint. Its process is not always predictable, and it may ask for submissions on various matters piecemeal, including in response to correspondence from the complainant.
- 14 Many IPT complainants are unrepresented and even those who are represented may not be permitted to see some or all of the material disclosed by the respondent or to attend some or all of the hearings in the case. For these and other reasons the IPT has sometimes appointed Counsel to the Tribunal ('CTT'). The appointment of CTT was formalised in r.12 of the IPT rules, which sets out the types of function that the IPT may request CTT to perform. In cases where CTT are instructed, which appear to be becoming more frequent, they are usually the interface between the IPT and the parties.

Jurisdiction and other preliminary points

- 15 If the police force considers that it has a respectable jurisdictional or allied point, it may be advisable to write to the IPT making that point and asking that it be determined as a preliminary issue (i.e. without the police force having to go to the time and expense of filing a full response and evidence). Examples of points that might be taken as preliminary issues include the following.
- 16 **Limitation.** The time limit for HRA claims is one year or “*such longer period as the court or tribunal considers equitable having regard to all the circumstances*”: s.7(5) of the HRA. Likewise with respect to complaints, s.67(5) of RIPA provides that the IPT “*shall not consider or determine any complaint made by virtue of section 65(2)(b) if it is made more than one year after the taking place of the conduct to which it relates*” save, again, where the IPT is satisfied it is equitable to extend time: see also rr.15(5)(b)–(c) of the IPT Rules.
- 17 **Standing,** if the complainant does not have the right to make the complaint or to bring the claim. In the case of a claim, that will be because they are not a ‘victim’ within the meaning of s.7(1) of the HRA. Complaints are not the subject of a specific test of ‘sufficient interest’ provided they fall within the IPT’s jurisdiction: rr. 8–9 of the IPT Rules.
- 18 **Jurisdiction.** If the complaint / claim falls outwith the IPT’s statutory jurisdiction under s.65 of RIPA the IPT cannot consider it: see r.15(5)(d) of the IPT Rules. That argument has been successfully advanced in complaints about covert techniques used in police misconduct investigations (as to which see below).
- 19 **Strike out / stay applications** on the basis, for instance (i) that there has been a wilful or persistent failure to comply with an order or direction of the IPT (mentioned in r.6(k) of the IPT Rules); (ii) that the claim or complaint were filed otherwise that in accordance with rr.8–9 (mentioned in r.6(l)); (iii) that the proceedings or the making of the complaint is frivolous or vexatious (mentioned in s.67(4) of RIPA and r.15(5)(a)) or otherwise an abuse of the IPT’s process.
- 20 **Other litigation / investigations.** A complaint to the IPT may be but one of a number of forums in which the subject matter of the complaint has been / is to be considered. The deployment of certain undercover officers by the Special Demonstration Squad / National Public Order Intelligence Unit provides a good example of this. The same deployments have been (or will be) examined in (i) internal misconduct investigations; (ii) the Undercover Policing Inquiry; (iii) civil claims; and (iv) complaints to the IPT. On some occasions the IPT has been persuaded that the full facts of the matter have been brought to light and/or the complaint has already received an admission and/or apology and/or compensation so there is essentially no ‘litigation gain’ to IPT proceedings continuing.
- 21 Of its determinations made in 2021 the IPT terminated the vast majority of cases for one of the reasons set out above: the IPT dismissed 43% of complaints as being frivolous; 27% of complaints for being vexatious; 6% of complaints for being out of time; 4% of complaints for want of jurisdiction; and a further 1% of claims were struck out for other reasons. In the remainder of cases the IPT made no determination (13%) or the complaint was withdrawn (6%). It made no determinations in favour of a complainant.⁴

The response and evidence

- 22 The first direction made by the IPT that usually prompts instructions to counsel is a direction that the police force file a response to the complaint. There may or may not be a direction for the police to file evidence at the same time as the response (as would be the case in judicial review proceedings). If the police force has not yet been sent the T1 / T2, this is the time to ask for them.
- 23 The police force's response to the claim will take a similar form to the detailed grounds for contesting the claim in judicial review proceedings.
- 24 Whether the direction is to submit evidence simultaneously or subsequently, three considerations are likely to arise:
 - a. First, whether to file witness evidence. This will often be advisable because a witness will be able to 'narrate' the information contained in disparate documents and/or explain their decision making so as to provide an evidential basis for legal submissions. The duty of candour applies.
 - b. Second, whether any further disclosure is required (i.e. beyond what was disclosure in response to the search direction). Disclosure should be kept under review and the duty of candour applies.
 - c. Third, whether any redactions are required to the police force's response and evidence before they can be provided to the complainant (as to which, see below), in other words what should be in OPEN or in CLOSED.

Non-disclosure of information to the complainant

- 25 An inevitable feature of the IPT's jurisdiction is that it will be considering sensitive matters that ordinarily would not be revealed to the complainant. For instance, a complaint might be made during the course of an ongoing covert operation, or about the activities of someone the complainant suspects of being a CHIS. This may mean that *nothing* can be safely disclosed by the IPT to the complainant as to do so would reveal at least the fact of a police investigation.
- 26 A crucial imperative for the IPT is found in r.7(1) of the IPT Rules viz:

"The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."
- 27 Pursuant to that imperative, the starting point in r.7(2) is that the IPT may not disclose to a complainant (or anyone other than CTT) *inter alia* (i) any information or documents disclosed or provided to the IPT in the course of a hearing from which the complainant was excluded; (ii) any information otherwise disclosed / provided to the IPT; (iii) the fact that such information or document has been provided to the IPT; (iv) the identity of any witness called at a hearing from which the complainant was excluded or the fact that any witnesses were called.
- 28 With that starting point in mind, disclosure is given in two situations:
 - a. First, where consent to disclosure is given by the provider of the information (or in the case of the identity of the witness, by the witness): r.7(3);
 - b. Second, where consent to disclosure (or at least a gist or a summary of the material) is refused but the IPT directs that it should be given nonetheless: r.7(6).

- 29 Before directing an unwilling respondent to disclose information, the IPT may (and it is almost inconceivable that the IPT would not) direct the respondent to make representations giving their reason for withholding information / a document (or part thereof) from the complainant: r.7(5) of the IPT rules.
- 30 Where the IPT makes a disclosure direction the respondent is “not required” to comply with the direction: r.7(7)(a) of the IPT Rules. A decision not to comply with such a direction should only be taken upon the most careful consideration given the serious consequences it might have for the respondent's defence of the complaint. Rule 7(7)(b) provides that if the respondent does not disclose the information or documents as directed, the IPT may:
- a. direct that the respondent is not to rely on such points in the respondent's case, or that the respondent must make such concessions or take such other steps as the IPT may specify, if the IPT considers that anything required to be disclosed or provided might adversely affect the respondent's case or support a complainant's case; and
 - b. in any other case, direct that the respondent must not rely in the proceedings on anything required to be disclosed or provided.

The hearing

- 31 The IPT may, but is not required to, hold a hearing at any stage of their consideration of a complaint: r.10(1) of the IPT Rules. Where the IPT does hold a hearing, it may hold a hearing:
- a. at which the complainant and the respondent may make representations, give evidence and call witnesses;
 - b. in the absence of the respondent at which the complainant may make representations, give evidence and call witnesses,
 - c. in the absence of the complainant at which the respondent may make representations, give evidence and call witnesses.
- 32 An IPT hearing may be held wholly or partly in private: r.10(2) of the IPT Rules.
- 33 In exercising its discretion to exclude the complainant and/or the public the IPT is required by r.10(4) of the IPT Rules to endeavour, so far is consistent with the duty in r.7(1) (see above) to conduct its proceedings, including any hearing (i) in public; and (ii) in the presence of the complainant. Before making its decision, the IPT may (and in practice usually will) direct the complainant and/or respondent to make representations on the reasons for requesting the IPT to hold a hearing other than on a full *inter partes* basis (r.10(3)) or other than wholly in public.
- 34 Final hearings in the IPT hearings run in a similar way to final hearings in judicial review proceedings.

Orders and remedies in the IPT

35 The IPT has the power, at the conclusion of a claim, to make, pursuant to s.67(7) of RIPA and r.14 of the IPT Rules:⁵

- a. any award of compensation it thinks fit;
- b. any other order as it thinks fit, including (i) an order quashing or cancelling warrants, authorisations, notices and directions given under the relevant legislation; and (ii) an order requiring the destruction of any records of information which have been obtained in exercise of any power conferred by a warrant, authorisation or notice under the relevant legislation.

36 Compensation will only be ordered where, taking account of all the circumstances, such an award is necessary to afford “*just satisfaction*”: s.8 of the HRA. Complainants may not find the IPT a lucrative forum. In the ***Dias v Chief Constable of Cleveland Police*** IPT/15/586/CH remedies judgment the IPT explained at [18(b)] that:

*“There are many cases before the Tribunal where just satisfaction is achieved by the investigation which the Tribunal carries out whereby the facts are established and a determination made as to the legality of the conduct under review. This is especially so where the outcome is a reasoned and published judgment in favour of the victim of the unlawful conduct ... such a decision is likely to result in other investigatory and regulatory bodies considering whether they need to take action. Where appropriate, disciplinary, regulatory or criminal action against wrongdoers is a real form of just satisfaction, as is the knowledge that a public body has taken steps to prevent recurrence and to acknowledge the unlawfulness. **Liberty v. United Kingdom** (2009) 48 EHRR 1 at [77] establishes that it is lawful to regard the finding of violation as sufficient just satisfaction in many cases involving covert surveillance.”*

37 Where compensation is awarded by the IPT, it tends to be low. Few awards made by the IPT exceed £10,000. There are, however, two recent examples of much higher awards being made.

38 In ***Gary Davies v British Transport Police*** IPT 17/93/H (10 July 2018) BTP had carried out unauthorised surveillance on the complainant who was (unknown to them at the time) a retired police chief superintendent while he was travelling on a train. The officer who carried out the surveillance had decided to do so the previous day were the complainant to appear at the railway station, and had arranged for a colleague to travel on the same train to assist if necessary. The complainant was observed throughout the journey and photographs were taken. He was publicly arrested at the close of the journey, removed from the train and interviewed. He was then charged with sexual offences. His arrest and charge were publicised by BTP. He stood trial and was acquitted. The fact that the surveillance was not authorised under RIPA became clear at trial.

39 Having ruled that the surveillance was unlawful (the officer's actions were pre-planned and not an immediate response to events, so a RIPA authorisation should have been sought), the IPT awarded the complainant the significant sum of £46,694. That sum comprised:

- a. £25,000 in general damages to reflect the gravity of the breach, real injury to feelings, damage to reputation and probable loss of promotion prospects brought about by the arrest, the accompanying publicity and the trial; and
- b. £21,694 of unrecouped costs of the criminal trial on the basis that, but for the unlawful surveillance, it would not have taken place.

- 40 In *Kate Wilson v Commissioner of Police of the Metropolis & NPCC* IPT/11/167/H the complainant was a climate change activist who discovered, years after the event, that a man who she had been in a long term sexual relationship with was, unbeknownst to her at the time, an undercover police officer. The officer, Mark Kennedy, had been authorised under RIPA Part 2 as a CHIS to obtain intelligence about public disorder from a protest group with which Ms Wilson was associated. He used their relationship to help him successfully infiltrate and obtain intelligence on the activities of the protest group.
- 41 Ms Wilson claimed that the actions of Kennedy and his supervisors breached a smorgasbord of her ECHR rights. The respondent admitted to breaches of Ms Wilson's Articles 3, 8 and 10 ECHR rights. The IPT also found breaches of (i) Ms Wilson's Article 11 rights because of the interference with her right to hold political opinions; and (ii) her Article 14 rights because of the disproportionate impact of the matters complained of on women.
- 42 The IPT awarded Ms Wilson £229,471.96, which was slightly more than the sum of £225,971.96 agreed by the parties, and which comprised:
- a. £35,000 in general damages, which excluded any compensation for the actions of Kennedy, for which she was compensated in an earlier civil claim;
 - b. £182,944.86 of pecuniary loss (including £87,809.45 in legal costs which the respondent conceded could be reflected in an award for just satisfaction).

Costs

- 43 The IPT is not a costs jurisdiction but it may, exceptionally, award costs. There has never been an award of costs in favour of a respondent. Costs were awarded in favour of a complainant for the first time in the *Chatwani v NCA* [2015] Lloyds Rep FC 659 (20 July 2015) due to the respondent's failure to comply with the IPT's orders after it had delivered its decision.

Appeals and other challenges

- 44 There is a right of appeal from final decisions of the IPT (save for procedural decisions) on a point of law to the Court of Appeal. This power was introduced by s.242 of the IPA.
- 45 Following the controversial decision in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491 a decision of the IPT is amenable to judicial review.

Surveillance in misconduct cases

- 46 An issue on which police lawyers are often asked to advise is the extent to which it is lawful for PSDs to use covert techniques in (non-criminal) misconduct investigations. The answer to this question is informed by one of the early cases considered by the IPT and one of the most recent.
- 47 In *C v The Police* IPT/03/32 (14 November 2006) the complainant was a retired police officer in receipt of an enhanced pension following injury on duty. His former force suspected that he was not as injured as he claimed and instructed a firm of private 'enquiry agents' to conduct surveillance of the kind sometimes used in personal injury claims. The enquiry agents filmed the complainant outside his house. He made an Article 8 claim in the IPT and argued that the

police force should have, but did not, follow the procedure in RIPA Part 2 for the authorisation of directed surveillance. The IPT found that it lacked jurisdiction to entertain the claim because the surveillance in question could not have been authorised under RIPA. RIPA only applied to surveillance in pursuit of the relevant public authority's "core functions" (in the case of the police, preventing and detecting crime) and not its incidental or "ordinary functions" (such as non-criminal misconduct investigations that every employer undertakes).

- 48 The decision in C was recently reaffirmed in **Bartram and Howe v British Transport Police** IPT/19/181/CH (11 May 2022) in which the IPT appointed CTT to advance arguments as to why C might be considered not to apply on the facts of the case and/or no longer to be good law, only firmly to reject those arguments. A police officer was suspected of leaving work early in order to conduct an extra-marital affair. BTP decided that this was a misconduct rather than a criminal matter and thus RIPA powers were not available. Instead, surveillance was authorised (including by means of a covert camera situated outside the property the officer was thought to be visiting for the purposes of the affair) pursuant to an internal process that reflected the relevant provisions of RIPA.
- 49 Claims and complaints were brought by both the officer and the woman he was suspected of having an affair with alleging that BTP had breached their Article 8 rights including by subjecting them to directed surveillance and (in the officer's case) the use of CHIS without authorisation under RIPA. The IPT followed C and found it lacked jurisdiction. In consequence, at least one of the complainants is now pursuing an identical claim under s.7 of the HRA in the county court.
- 50 The difficulty created by C and **Bartram** is that police forces are unable to avail themselves of the 'shield' against claims for breach of Article 8 provided by compliance with RIPA where they consider it necessary to undertake surveillance in pursuit of (a non-criminal) misconduct investigation. Because such surveillance will almost inevitably interfere with the subject's Article 8(1) rights, police forces will have to justify that interference as being 'in accordance with the law', necessary and proportionate under Article 8(2).
- 51 The kind of internal policies relied upon by police forces to conduct surveillance in misconduct cases outside RIPA (sometimes unfortunately labelled 'unregulated surveillance') are unlikely to amount to "law" for the purposes of Article 8(2)⁶ and there is no other obvious source of law regulating such surveillance. It has been submitted to the government that it should remove the real risk of a successful Article 8 claim in these circumstances by bringing forward legislation replicating the relevant provisions of RIPA etc for the purposes of police misconduct investigations. Otherwise the police (and other public authorities) are in a materially worse position when seeking to investigate serious misconduct by their officers / staff than private sector employers who are not subject to the duty in s.6 of the HRA not to act incompatibly with ECHR rights.

Footnotes

- 1 Including undercover officers who meet the definition of a CHIS in s.26(7)-(8) of RIPA.
- 2 The IPT considered the scope of its jurisdiction and the extent of the knowledge or evidence of the use of investigatory powers required to make a claim in ***Human Rights Watch v Secretary of State for Foreign and Commonwealth Affairs*** [2016] UKIPTrib_15_165-CH.
- 3 Note, however, that the IPT's jurisdiction does not extend to review of conduct which is authorised by, or takes place with the permission of, a judicial authority: section 65(7) RIPA.
- 4 <https://investigatorypowerstribunal.org.uk/wp-content/uploads/2023/03/Report-of-the-Investigatory-Powers-Tribunal-2016-2021.pdf>
- 5 For a recent summary of the principles applied by the IPT, see the remedies judgment in ***Dias v Chief Constable of Cleveland Police*** IPT/15/586/CH at [17] et seq.
- 6 In a series of cases in the 1980s and 1990s the European Court of Human Rights found that police / MI5 interception of communications, property interference and surveillance was not "in accordance with the law" for the purposes of Article 8(2) because there was no basis for those powers in legislation: ***Malone v United Kingdom*** (1985) 7 EHRR 14; ***Hewitt and Harman v United Kingdom***, Application No 12175/86 (1992) 14 EHRR 657; ***Govell v United Kingdom*** (1997) 23 EHRR CD101