IN THE INVESTIGATORY POWERS TRIBUNAL

(THE PRESIDENT AND THE VICE-PRESIDENT)

23 JANUARY 2003

IN THE MATTER OF APPLICATIONS Nos. IPT/01/62 and IPT/01/77

RULINGS OF THE TRIBUNAL ON PRELIMINARY ISSUES OF LAW

REPRESENTATION:

Mr Ben Emmerson QC and Mr Gordon Nardell for the Complainants (instructed by Mr John Wadham, Solicitor and Director, Liberty).

Mr Philip Sales and Mr Ben Hooper for the Respondents (instructed by The Treasury Solicitor)

Mr Michael Tugendhat QC and Ms Sapna Jethani for Guardian Newspapers Limited (instructed by Miss Cosgrove, Solicitor)

APPROVED BY THE TRIBUNAL FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

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INTRODUCTION

Publication of Rulings

1. This is the first occasion on which the Investigatory Powers Tribunal (the Tribunal) have sat in public. (The Tribunal will be referred to in the plural in accordance with the usage in the legislation. Consequential changes have been made in the quotations from documents submitted to the Tribunal using the singular.)

2. The Tribunal have decided to sit in public for the sole purpose of handing down written rulings of law on preliminary issues concerning the procedure of the Tribunal laid down in the Regulation of Investigatory Powers Act 2000 (RIPA), which established the Tribunal in succession to the Intelligence Services Tribunal and the Security Services Tribunal, and in the Investigatory Powers Tribunal Rules 2000 SI No. 2665 (the Rules).

3. The Tribunal are satisfied that the publication of the legal rulings, in the manner and to the extent set out below, does not disclose any information or document contrary to the public interest, or prejudicial to national security, the prevention or detection of serious crime or the continued discharge of the functions of any of the intelligence services. Publication does not breach the Tribunal's general duty to carry out their functions in such a way as to secure that such information is not disclosed: rule 6(1).

4. The Tribunal also consider that the requirements of the relevant Articles of the European Convention on Human Rights (the Convention) and the duties of the Tribunal, as a public authority within section 6 of the Human Rights Act 1998 (the 1998 Act), are satisfied by publication of the reasons for the rulings on the preliminary issues.

General Background

5. The preliminary procedural issues were raised in the grounds submitted to the Tribunal in two sets of proceedings and complaints based on allegations of interception of communications by the intelligence services and also, in one of the cases, by a police force.

6. The Tribunal will refer to those who have brought the proceedings and have made the complaints as "the Complainants." All of them are represented by the same solicitor and counsel.

7. The Tribunal will refer to all those against whom the proceedings have been brought and the complaints made as "the Respondents." All of them are represented by the same solicitors and counsel.

8. Oral hearings of the preliminary issues were conducted in private in accordance with rule 9(6). No objection was taken to the Tribunal allowing all the parties and their legal representatives to be present throughout all of the oral hearings.

9. One of the grounds of challenge to the Rules by the Complaints, (and the only ground of challenge by Guardian Newspapers Limited (GNL), who gave short notice of their intention to attend the oral hearing) rests on the claimed impact of Articles 6, 8 and 10 of the Convention and sections 3(1) and 6(1) of the 1998 Act on rule 9(6). That rule requires the proceedings of the Tribunal, including oral hearings, to be conducted in private.

10. The challenge to rule 9(6) and to most of the other rules governing the basic procedures of the Tribunal have made this the most significant case ever to come before the Tribunal. The Tribunal are left in no doubt that their rulings on the legal issues formulated by the parties have potentially important consequences for dealing with and determining these and future proceedings and complaints. Counsel and those instructing them were encouraged to argue all the issues in detail, in writing as well as at the oral hearings held over a period of three days in July and August 2002. At the end of September 2002 the written submissions were completed when the parties provided, at the request of the Tribunal, final comments-on how the Rules ought, if permissible arid appropriate, to be revised and applied by the Tribunal, in the event of a ruling that one or more of the Rules are incompatible with Convention rights and/or ultra vires.

11. The Tribunal are immensely grateful to all concerned for their helpful contributions to the disposal of the preliminary issues. Their efforts were ample proof, if any were needed, of the clarifying and collaborative value of adversarial oral argument, even though it had to take place in private, as required by the Rules, until such time as there was a ruling that the legal position was otherwise.

12. The Tribunal have concluded that (a) the hearing of the preliminary issues should have been conducted in public, and not in private as stated in rule 9(6); (b) the reasons for the legal rulings should be made public; and (c) 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.

13. The Tribunal propose to direct that the full transcript made of the oral hearing should be released, so that it is available to GNL, who specifically applied at the outset to attend and report the hearing, and to the public generally. All interested in knowing what happened at the oral hearing may now find out.

14. While the preliminary procedural issues were pending it was obviously not possible to determine the substantive proceedings and complaints. Just as the parties needed time to prepare and present their legal arguments, the Tribunal needed time to reflect on the arguments and consider their decision. The responsibility of the Tribunal is a particularly anxious one. It is not within the competence of many courts and tribunals, short of the House of Lords, to make rulings on questions of law apparently unappealable to, and unreviewable by, any other judicial body within the jurisdiction. In those exceptional circumstances the rival arguments on the issues and the Tribunal's reasons for their conclusions are set out in considerably more detail than would normally be necessary in deciding procedural questions. The rulings do not constitute a precedent binding on the Tribunal or on any other court or tribunal. They are subject to re-consideration and revision in the light of increases in the experience of the Tribunal, new developments and fresh arguments. For the time being, however,

The rulings are the procedural foundation for the Tribunal's application of the Rules to these and other claims and complaints under RIP A.

15. The consequent delay in the substantive determinations is regrettable, but it was unavoidable while the procedural issues, which are significant for the parties and for the future conduct of proceedings in the Tribunal, were being resolved.

THE CASES

16. The preliminary issue can be adequately explained and intelligibly resolved without revealing the identities of the Complainants and the Respondents and without disclosing any factual information about the claims and complaints. In one case the Complainant is an individual. In the other case the Complainants are organisations. In each case allegations are made against agencies responsible for gathering intelligence by the use of investigatory powers regulated under RIPA. In one case allegations are also made against a police force.

17. The grounds of the claims and the complaints in each case are that there has been unlawful interception of telephone communications between the Complainants and third parties both before and after 2 October 2000, the date when RIPA, which was enacted on 28 July 2000, the Rules, which were made on 28 September 2000, and the 1998 Act all came into force. The claims under section 7 of the 1998 Act are limited to conduct after 2 October 2000. The interception is alleged to have been by one or more of the Respondents. It is alleged to be continuing in violation of the Convention right guaranteed by Article 8(1) to respect for private life and correspondence.

18. In his written grounds the individual Complainant asks the Tribunal to give directions for the conduct of the claims and complaints that:

> "(a) the Complainant's argument and evidence in support of his case (including that in support of his application for interim relief) be presented at an oral hearing;
>
> (b) all hearings in the proceedings be conducted in public;
>
> (c) there be mutual disclosure and inspection between the parties of any witness statements or documentary evidence on which each party proposes to

rely, and exchange of skeleton arguments in relation to legal submissions any party proposes to make;

(d) evidence on behalf of the Complainant be heard by the Tribunal in the presence of the Respondents (or their legal representatives) and vice versa, and any evidence given orally be subject to cross examination on behalf of the opposite party;

(e) any opinion or other relevant representation received from a Commissioner under RIPA s. 68(2) shall be disclosed to the parties, who shall have an opportunity to make representations in the light of it;

(f) each party be at liberty to apply for a direction derogating from any of the above in relation to a particular piece of information or evidence."

19. The same directions are requested by the Complainant organisations.

20. In addition all the Complainants ask the Tribunal

> "when giving their final determination in the case and when making any contested interim order or ruling, to state their findings and give reasons for their conclusion on each relevant issue."

21. If these claims and complaints were proceeding in the ordinary courts under the Civil Procedure Rules or in most ordinary tribunals, such as an Employment Tribunal, there would be nothing remarkable in the request for directions. However, the directions requested are opposed by the Respondents on the ground that they are contrary to binding special procedures laid down in RIPA and the Rules.

22. Anticipating this response the Complainants contended in their grounds that their proceedings involve "the determination of civil rights" within Article 6(1) of the Convention; that they are entitled to a fair and public hearing guaranteed under Article 6 and in accordance with the procedural requirements associated with the right to

Respect for private life in Article 8 and freedom of expression under Article 10; that the Tribunal, as a "public authority" within section 6 (1) of the 1998 Act, must conduct the proceedings compatibly with Articles 6, 8 and 10; that, by virtue of section 3(1) of the 1998 Act, the Tribunal must interpret RIP A and the Rules compatibly with those Articles; and that the incompatible provisions are ultra vires to the extent that they cannot be read and given effect compatibly with the requirements of fairness and publicity. It is contended that the directions sought are the minimum necessary to give effect to Convention and common law procedural requirements.

23. Although some of the written and oral arguments of the Complainants have been modified in the course of the hearing, the directions requested have not been abandoned or amended.

RIPA.

24. The main purpose of RIPA is to ensure that the relevant investigatory powers (interception of communications, intrusive covert surveillance and the use of covert human intelligence resources) are used lawfully and compatibly with Convention rights. RIPA covers the purposes for which investigatory powers can be used, identifies the authorities who can use the powers and who should authorise their use, and defines the use which can properly be made of the material obtained.

25. There is a system of independent judicial oversight of these activities by an Interception of Communications Commissioner, by an Intelligence Services

Commissioner and by a Chief Surveillance Commissioner (with the help of Assistant Commissioners.)

26. Means of redress for persons aggrieved by use of the investigatory powers are provided by the Tribunal, on which there is conferred jurisdiction to consider and determine proceedings and complaints.

THE TRIBUNAL

The Jurisdiction and Powers of the Tribunal

27. Holders (and a former holder) of high judicial office and senior members of the legal professions have been appointed to membership of the Tribunal in accordance with RIPA (Schedule 3).

28. The Tribunal have jurisdiction over two matters relevant to the present cases.

(1) Proceedings

29. They are the only appropriate tribunal for the purposes of certain proceedings under section 7(1) (a) of the 1998 Act. That provision is concerned with proceedings for actions incompatible with the Convention: section 65(2)(a). The relevant proceedings are those against any of the intelligence services and also those against other public authorities relating to specified conduct taking place in "challengeable circumstances," as defined in section 65(7).

30. The proceedings may be brought in respect of conduct for, or in connection with, the interception of communications and specified types of surveillance. The provisions extend to such conduct by, or on behalf of, a person holding any office, rank or position with specified organisations, including any police force.

(2) Complaints

31. The Tribunal also have jurisdiction to consider and determine any complaints made to them for which they are the appropriate forum. They include complaints by a person aggrieved by any conduct of the kind for which a claim may be brought under section 7(l)(a) of the 1998 Act, which he believes to have taken place in relation to him, to any of his property or any communication sent to or by him or intended for him and to have taken place in "challengeable circumstances," or to have been carried out by, or on behalf of, any of the intelligence services.

32. Subject to the summary disposal of frivolous or vexatious proceedings or complaints and subject to a time limit of 1 year (which may be extended, if it is equitable to do so), the Tribunal have a duty to hear and determine any proceedings brought before them by virtue of section 65(2)(a) and to consider and determine any complaints made to them by virtue of section 65 (2)(b).

33. The principles to be applied to the determination of the proceedings and of the complaints investigated by them are the same as those as would be applied by a court on an application for judicial review: section 67(2) and (3) (c).

34. The Tribunal have power to make interim orders and to make such award of compensation or other order as they think fit, including an order quashing or cancelling any warrant or authorisation, and orders requiring the destruction of any records of information obtained in exercise of any power conferred by any warrant or authorisation, or held by any public authority in relation to any person: section 67(7). The determinations, awards and orders of the Tribunal are not subject to appeal or liable to be questioned in any court: section 67(8).

The Procedure of the Tribunal

35. The Tribunal's procedure is contained partly in RIPA and partly in the Rules.

(l)RIPA

36. Subject to rules made by the Secretary of State under section 69(1), the Tribunal have power under section 68(1) to determine their own procedure. The existence of this discretion featured prominently in the arguments on the preliminary issues.

37. The rule-making power of the Secretary of State is a wide one. He may make rules regulating the exercise by the Tribunal of the jurisdiction conferred on them by section 65. Although particular types of provision potentially covered by the exercise of the power to make rules are set out, the particular topics singled out for special mention are "without prejudice to the generality" of the discretion of the Secretary of State: section 69(2).

38. It will be necessary to refer to some of the detailed subsections later when considering the meaning and scope of particular Rules and their validity. All that need be noted at present is that, in making the Rules, the Secretary of State was directed by section 69(6) to "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."

39. Thinking similar to that behind section 69 (6)(b) no doubt informed the restriction imposed by Parliament in section 68(4) on the content of the Tribunal's determinations when notified to a complainant. They are expressly confined (subject to any rules) 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."

40. These and other provisions in sections 68 and 69 of RIPA are reflected in the Rules

(2) The Rules

41. It will be necessary to quote the actual language of the Rules later when interpreting them and considering their validity. At this stage a brief overview of those

aspects of the Rules challenged by the Complaints will place the preliminary issues in their proper context.

Restrictions on Disclosure of Information: rule 6

42. The Tribunal are placed under a general duty to carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security or other interests specified in section 69(6)(b) and repeated in rule 6(1). More specifically, the Tribunal must not, without specified consents, disclose particular facts, information or documents to the complainant or to any other person, or order any person to disclose such matters, which the Tribunal would themselves be prohibited from disclosing by virtue of the rule.

Oral Hearing Procedure: rule 9

43. The Tribunal are not under a duty to hold oral hearings. They have a discretion to do so in accordance with rule 9. So they may hold oral hearings at which the complainant may make representations, give evidence and call witnesses. The Tribunal are specifically authorised by rule 9 to hold separate oral hearings, which the complainant, the respondent or others may be required to attend and at which representations may be made, evidence given and witnesses called. But rule 9(6) provides that the Tribunal shall conduct their proceedings, including oral hearings, in private.

Evidence: rule 11

44. The Tribunal may receive evidence in any form, even if inadmissible in **a** court of law. No person shall be compelled, however, to give evidence at an oral hearing.

Notification of Determination: rule 13

45. The Tribunal are under a duty to provide information to the complainant in accordance with rule 13, subject to the general duty to secure that information is not disclosed contrary to rule 6(1). Where the Tribunal make a determination in favour of the complainant, the Tribunal shall provide him with a summary of their determination, including any findings of fact. There is no such duty when the determination is not in his favour, in which case the position is as stated in section 68(4)(b) (quoted in paragraph 39 above) and in rule 13(3), which provides that, when the Tribunal make a determination that the proceedings are frivolous or vexatious, or are out of time or that the complainant does not have the right to bring them, the Tribunal shall notify the complainant of that fact.

Tribunal Procedure: the National Security, the NCND Policy and the Public Interest Context

46. As is evident from the nature of the Tribunal's jurisdiction and as is expressly recognised in RIPA and the Rules, secret interception and surveillance operations, information and documents pose special procedural problems for a tribunal established to consider and determine claims and complaints of violations of the

Convention rights of individuals and to provide redress against the unlawful use of investigatory powers by public authorities. The problems arise from the inescapable and incontrovertible fact that interception of communications and covert surveillance must, if they are to be used effectively, be and remain secret.

47. When questions are raised or complaints are made about interception and surveillance public authorities invoke the policy that they "neither confirm nor deny" whether the alleged activities have occurred or are still occurring. In a White Paper (Cm 408) in 1988 it was stated in para 43 that

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

48. The rationale of the policy (commonly referred to as "the NCND policy") is unaffected by the Convention and by the 1998 Act. It is central to the Respondents' submissions that the NCND policy is compatible with the common law and with Convention rights and that the relevant provisions of RIP A and the Rules were framed to ensure the maintenance of the NCND policy in relation to the Tribunal's procedure. So, it is forcefully argued, RIPA and the Rules are not to be interpreted or applied by the Tribunal in a way which would undermine the policy.

49. If allegations of interception or surveillance are made, but not denied, then, in the absence of the NCND policy, it is likely to be inferred by a complainant that such acts are taking place. This is specially likely if other complainants are being told that they have no cause for complaint, because no such acts are, or have been, taking place in relation to them. On becoming aware of, or on inferring the possibility of surveillance

or of interception of communications, those suspected of harmful activities are likely to adapt their conduct accordingly. The probable result is that the all-important secrecy would be lost and with it the chance of obtaining valuable information needed in the public interest or in the interests of national security. These risks have been noted and recognised in judicial decisions.

50. The Strasbourg Court in **Malone v. UK** (1985) 7 EHRR 14 at paras 67 and 68 recognised this risk in respect of the interception of communications, while emphasising that individuals should be given adequate legal protection against arbitrary interference from resort "to this secret and potentially dangerous interference with the right to respect for private life and correspondence."

51. In **R (Al-Hassan) v. Secretary of State for the Home Department** [2002] 1 WLR 545 at para 60 the Court of Appeal accepted that there was a danger that, where there is secret surveillance in relation to organised activities, such as crime or terrorism, it might be possible for the suspect organisation: to adopt more sophisticated patterns of questioning or complaining and, in effect, interrogate the security agencies about the extent of scrutiny of their activities. Answers to questions, if required, might reveal sensitive information or activities, which need to be kept confidential in the interests of protecting national security.

52. As appears from **Baker v. Secretary of State for Home Department** (2001) UKHRR 1275 at para 35(l)-(3), a decision of the Information Tribunal (National Security Appeals), it was common ground that, in general, the work of the security services must be carried out in secret in order to safeguard national security as an

Important policy objective. National security may be comprised and harmed by the disclosure of the fact of surveillance. So non-committal responses to questions and complaints as to the facts of surveillance may be justified for that purpose.

53. The Complainants do not challenge the NCND policy as such. They accept that it is a legitimate policy aim in relation to the use of investigatory powers. Their contention is that the policy does not justify the scale of the departure in RIP A and the Rules from the Convention and common law requirements of a fair trial and a public hearing of their claims and complaints.

54. The Tribunal will approach the preliminary procedural issues on the basis that the NCND policy is, and is judicially recognised as, a legitimate objective in relation to security and intelligence gathering activities and that it is not in itself incompatible with Convention rights. The Tribunal are entitled to take account of the policy when ruling on the interpretation and validity of the relevant provisions in RIPA and the Rules.

55. The Tribunal recognise, of course, the potential conflict between, on the one hand, the interests of the Complainants in securing maximum information and openness in the consideration and determination of their claims and complaints and, on the other hand, the interests of national security and other public interests served by the NCND policy. A proper balance must be struck between them. At the forefront of the Complainants' case is the submission that the balance is to be properly struck by the Tribunal themselves in the exercise of a judicial discretion, not by the executive in the making and operation of the Rules.

56. The Tribunal accept the submission of the Respondents that RIPA and the Rules together represent a considered attempt by Parliament and the Secretary of State to strike a responsible balance between the conflicting claims. They are the product of a discretionary judgment in the difficult area of what constitutes a necessary and proportionate response to the competing claims of Convention rights and the NCND policy and other public interest considerations.

57. As the Respondents appreciate, however, this does not mean that the Tribunal are bound to hold that the procedures laid down in the Rules are beyond challenge in the Tribunal. The Respondents have urged upon the Tribunal the value and virtue of "bright-line" rules (as they were described in argument), contending that such rules provide procedural certainty, save time and money from being wasted on procedural wrangling, satisfy the principle of proportionality and maintain the NCND policy.

58. It is, however, the function of the Tribunal, as a judicial body, to determine whether the procedures laid down in the Rules comply with Convention requirements; if so, to what extent; and, if necessary, whether they are strictly necessary and proportionate in achieving a reasonable relationship between interference with Convention rights and the objectives underlying the NCND policy. If compliance with Convention rights is required, it is for the Tribunal, so far as it is possible to do so by a process of judicial interpretation of RIPA and the Rules, to determine what procedures apply to the proceedings and complaints before them and whether the Rules are legally valid and binding on them.

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

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

THE PRELIMINARY ISSUES

61. With those general observations in mind the Tribunal turn to consider the preliminary issues. On 14 December 2001 a preliminary hearing for directions and for

Interim relief took place. The Complaints asked for the hearing to be held in public. The Tribunal ruled that their proceedings had to be held in private, as required by rule 9(6), until there had been full argument on the interpretation and validity of the rule and a ruling on that issued by the Tribunal.

62. The parties agreed on the formulation of the preliminary issues of law arising from the procedural directions requested by the Complainants and opposed by the Respondents. An order was made, with consequential directions, on 22 February 2002 setting out the issues in a schedule.

63. In summary, the preliminary issues concern (a) the applicability of Article 6 to the procedure of the Tribunal and to the rule-making power of the Secretary of State in the light of section 3 (1) of the 1998 Act; (b) the interpretation of RIP A and the Rules relating to particular topics, principally the restrictions on the disclosure of information and documents, the holding of hearings in private, the departures from the adversarial procedure in having separate hearings without the attendance of the other party, the absence of cross examination and the power to compel witnesses, the restrictions on the content of the determinations notified to the parties; and (c) the ambit and exercise of the discretion of the Tribunal to determine their own procedure.

64. The preliminary issues were formulated as follows

" AGREED STATEMENT OF ISSUES FOR THE PRELIMINARY HEARING

ISSUE 1: Convention Rights and alleged Common Law principles

1. Does Article 6 apply?

2. Does Article 8 create obligations as to the procedure to be adopted by a body such as the Tribunal?

3.Does Article 10 create obligations as to the procedure to be adopted by a body such as the Tribunal?

4. Is there any relevant principle or presumption arising at common law as to the procedure to be adopted by a body such as the Tribunal?

ISSUE 2: Vires and construction.

1. In the light of the answers under Issue 1 above and in the light of s.3(l) of the Human Rights Act 1998 (if applicable), how is s.69 of RIP A properly to be construed?

2. In the light of the answers under Issue 1 above and in the light of s.3(l) of the Human Rights Act 1998 (if applicable), how are the Investigatory Powers Tribunal Rules properly to be construed?

3. Are any of the Rules to any extent ultra vires the enabling power in s.69 of RIPA? The Complainants refer in particular to:

a. Rule 6(2) to (5) so far as preventing (i) mutual disclosure of material on which the parties propose to rely or which it would be unfair for one party to keep from another, and (ii) disclosure to the parties of any information or opinion provided by a Commissioner;

b. Rules 9 and 6(2)(a), so far as preventing the Tribunal from (i) conducting their proceedings in public and (ii) adopting an inter partes adversarial procedure involving the hearing of representations, evidence and witnesses of a party in the presence of the other or otherwise enabling a party to know and deal with the other's case;

c. Rule 11(3) so far as preventing the Tribunal from compelling from an unwilling source evidence relevant to a party's case;

d. Rule 13 (read with s.68(4) of RIP A) so far as preventing the Tribunal from providing an unsuccessful complainant with any statement of their findings and of their reasons for the conclusions reached on the issues determined.

ISSUE 3:Ambit of discretion.

1.In the light of the answers under Issue 1 and Issue 2 above, what is the ambit of the Tribunal's discretion (if any) under s. 68(1) of RIP A to determine their own procedure?

2.In the light of the answers under Issue 1 and Issue 2 above, insofar as the Tribunal's discretion under s. 68(1) of RIP A is prima facie circumscribed by valid Rules in the Investigatory Powers Tribunal Rules 2000, what is the ambit of the Tribunal's discretion (if any) under s. 6(1) of the Human Rights Act 1998 to determine their own procedure?

ISSUE 4: Exercise of discretion.

In the light of the answers under Issues 1,2 and 3 above, how should such discretion (if any) as the Tribunal enjoys with respect to determining their own procedure be exercised?"

THE GNL APPLICATIONS

65. In addition to the preliminary issues the Tribunal have to rule on related issues arising from the surprise late appearance of GNL, who made applications to the Tribunal on the first day of the hearing on 11 July 2002. The applications, which were made to the Tribunal in private, save for the presence of the parties and their legal representatives, were for the following directions-

> (1) A direction that the Tribunal shall not sit in private for the hearing of the preliminary issues, save in so far as that may be necessary to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security or the other matters specified in section 69(6) (a) RIPA and rule 6 (1);.
>
> (2) A declaration that section 69 RIPA and Rule 9(6) are to be read and given effect (pursuant to the principles of common law or to section 3 of the 1998

> Act) as permitting such an order to be made in an appropriate case; alternatively, that rule 9(6) is ultra vires and (pursuant to section 4(4) of the 1998 Act) that the rule is incompatible with Article 10;
>
> (3) Alternatively, a direction that, in the event that the Tribunal declined the order in (1) above, and the proceedings continue to be heard in private, nevertheless such parts of the hearing of the Tribunal considered appropriate may be reported."

66. It was specifically requested that named GNL journalists should be allowed to attend the hearing and that the hearing of the applications for the directions should be in public.

67. The Tribunal declined to make any of the directions sought at that stage, pointing out that the requirement that the proceedings of the Tribunal should be conducted in private was one of the preliminary issues formulated by the parties and that, unless and until that issue was decided in favour of the Complainants, the Tribunal were bound by rule 9(6) to conduct the oral hearing and the rest of the proceedings in private.

68. It was, however, agreed by the parties and the Tribunal that a transcript of the hearing of the legal argument on the preliminary issues would be made so that, if the ruling of the Tribunal on that issue permitted it, media reports could be made of the parties' legal arguments, as well as of the rulings on the preliminary issues.

GNL's Submissions

69. The legal basis of GNL's submission that the proceedings of the Tribunal should not be conducted in private and that they should be allowed to be reported serves as a

useful general introduction to the detailed legal arguments on the preliminary issues. It highlights the wider public interest context of the issues to be determined between the parties in these particular cases.

70. It was submitted that there were three concepts in play on the GNL applications:

(1) Access by the public to the Tribunal hearing.

(2) The freedom of the parties attending the hearing to disclose what happened in private at the hearing.

(3) The power of the Tribunal themselves to disclose what has occurred at the hearing in private. When an ordinary court sits in private, as it is entitled to do in well recognised circumstances, it may, at the conclusion of the hearing, deliver, in the interests of open justice and press freedom, a public judgment revealing aspects of the case which would not otherwise be disclosed or reported.

71. The principal point relevant to all three concepts is that no question of prejudice to national security or to any other public interest would be involved in the oral hearing of the preliminary issues or of GNL's applications. The hearing was devoted entirely to purely legal arguments on matters of procedure.

72. The general legislative position is that, subject to the Rules, the Tribunal have power to determine their own procedure. The provision in rule 9(6) requiring oral hearings to be conducted in private is alleged to be an impermissibly wide fetter on

that power, being incompatible with fundamental principles of the common law and with the Strasbourg jurisprudence on Article 6. The blanket requirement of private oral hearings is not necessary for the attainment of any legitimate aim. Nor is it a proportionate response to the needs of the public interest, national security or the functioning of the intelligence services.

73. Further, section 69 of RIP A does not expressly authorise the making of a blanket rule for the exclusion of the press and the public, so as to prevent the rule from being read and given effect to under section 3 (1) of the 1998 Act in the manner sought in the application.

Common Law Position

74. The common law was also invoked in favour of a public hearing. A person's reliance on a Convention right does not, of course, restrict any other right or freedom conferred on him by or under law having- effect in any part of the United Kingdom: section 11 1998 Act.

75. The Tribunal agree that, in accordance with common law principles, RIPA and the Rules should be interpreted in the context that Parliament intends, in the absence of clear language to the contrary, to preserve the fundamental principles of open justice (see Scott v. Scott [1913] AC 417 at 438) and not to curtail them more than is required by the public interest, in particular by the mischief identified in the express requirements of section 69(6)(b) RIPA and rule 6(1). It is presumed that Parliament intends that the norm of hearings held in public and freely reportable in the media

should apply. The strength of the presumption is founded on all the factors indicated by the Court of Appeal in **Ex p Kaim Todner** [1999] QB 966 at 977 and **Ex p Guardian Newspapers Ltd** [1999] 1 WLR 2130 and by the Strasbourg court in **Pretto v. Italy** (1983) 6 EHRR 182 at para 21, and embraced by the concept of the rule of law: the imperatives of transparency in the administration of justice, the deterrence of inappropriate judicial conduct, the maintenance of public confidence in the impartial administration of justice, the encouragement of informed and accurate reports and comments about what was seen and heard in the light, instead of ignorant and prejudiced speculation about what was kept in the dark; the reduction of the risk of injustice (and of the perception of injustice); and eliciting the production of evidence, which, in the absence of publicity, might never become available.

76. GNL accepted that sometimes there are compelling reasons for restricting access to, and the reporting of, hearings in courts and tribunals. The restrictions imposed must, however, be proportionate. They must be no more than is strictly necessary to promote the legitimate aim of the restriction. An absolute blanket ban on any public access or reporting is incompatible with open justice and freedom of expression. It is not proportionate. It is not justified in its application to all aspects of all cases involving national security.

77. It was submitted that, on that approach, rule 9(6) is outside the rule-making power conferred by section 69 of RIPA. To be within it rule 9(6) had to be confined to the prevention and the limiting of the disclosure of the "particular matters" allowed by section 69(4)(d) of RIP A (and specifically mentioned in section 69(6)(b))-

> "(d) enabling or requiring the Tribunal to exercise their jurisdiction, and to exercise and perform the powers and duties conferred or imposed on them (including, in particular, in relation to the giving of reasons), in such manner provided for in the rules as prevents or limits the disclosure of particular matters."

78. The requirement of private hearings in rule 9(6) should be read and given effect as confined to limiting disclosure of information and documents in the circumstances stated in section 69(6)(b) and covered by the general duty imposed on the Tribunal by rule 6(1).

79. GNL argued that the present case is not caught by such reasons for imposing restrictions on disclosure of information and documents. There is no prejudice to the public interest or to national security in public hearings and media reports of pure legal argument. On the contrary, there is a strong interest in the public knowing the legal arguments deployed at a hearing held to decide what is the law.

Convention Rights

80. Similar points were made on behalf of GNL in reliance on the right to a fair and public hearing under Article 6 and on freedom of expression guaranteed by Article 10. It was submitted that even if, as is contended by the Respondents, Article 10 does not confer a right of access to information, it is common in the context of legal proceedings for a party, who has access to the hearing held in private, to want to communicate to others information about what has happened in the hearing. In the present case the Complainant organisations want to exercise their freedom of expression by passing information about the hearing to GNL for public consumption.

81. It was pointed out that rule 9(6) is only concerned with access to the hearing and that it does not expressly prohibit disclosure of information about the hearing by those who have access to it. If, however, the rule imposes a blanket prohibition on disclosure, that is incompatible with Article 10, unless the restriction is necessary and proportionate in accordance with Article 10(2), the terms of which are reflected in section 69(6)(b) of RIP A and in rule 6(1).

82. GNL's submissions covered the possible application of the law of contempt of court. It was argued that, although the Tribunal exercise judicial power of the State making them a "court" within section 12 of the Administration of Justice Act 1960, it does not follow that all publication of proceedings held by them in private would be a contempt of court. Section 12 had to be read not only in the light of common law principles, but also subject to section 3 of the 1998 Act and Article 10, so that interference with freedom of expression is no greater than can be justified under Article 10(2).

83. For these reasons GNL applied for authorisation to publish the proceedings held in private, contending that the Tribunal, as a public authority, are bound to grant it. The Tribunal are bound by section 6 of the 1998 Act to act compatibly with Article 10. There is no public interest falling within the exception in Article 10(2). In fact, for the reasons already indicated, it would be not be in the public interest to withhold authorisation. It would also be arbitrary if the availability of legal information to the public were to depend on the wishes of an individual lawfully present at the hearing. The party would act by reference to his own interests rather than by reference to the

public interest. Article 10 entitles the media to report proceedings in a court to the general public, who have a right to receive that information. Publication would not prejudice any aspect of the public interest that the privacy of the hearing was intended to protect.

84. As already indicated, the Tribunal agree with the Complainants and with GNL that the hearing of the preliminary issues need not have been held in private. The Tribunal have concluded that rule 9(6) does not prevent public access to, and reporting of, a Tribunal hearing solely concerned with purely legal argument on issues of a procedural nature. As no risk of prejudice to the NCND policy or to any other aspect of national security or the public interest is present, the Tribunal have decided to exercise their discretion under section 68(1) of RIP A to allow that hearing to be made public by means of the transcripts and also to make public the reasons for their rulings on the legal issues argued at the hearing.

ISSUE 1: Convention rights and alleged Common law principles.

Does Article 6 apply?

85.The conclusion of the Tribunal is that Article 6 applies to a person's claims under section 65(2)(a) and to his complaints under section 65(2)(b) of RIP A, as each of them involves "the determination of his civil rights" by the Tribunal within the meaning of Article 6(1).

86. Article 6 guarantees the right to a fair trial in the following terms:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

87. It is common ground that the Article does not apply to every claim or complaint that a person may bring before a civil court of law or tribunal for redress. It only applies to the "determination of his civil rights and obligations."

88. This means that, to attract Article 6, there must be a disputed civil right arguably recognised by the domestic law of the respondent State: **Powell & Rayner v. United Kingdom** (1990) 12 EHRR 355. Article 6 does not guarantee any particular content for the civil right in the substantive law. of the respondent State: **James v. United Kingdom** (1986) 8 EHRR 123 at para 81. But the concept of "civil rights" is not interpreted solely by reference to the domestic law of the respondent State: **Benthem v. Netherlands** (1986) 8 EHRR 1 at para 34. In recognition, however, of the distinction drawn in many Continental legal systems between "civil law", on the one hand, and "public law" or "public order", on the other hand, the Strasbourg Court has held that Article 6 does not apply to proceedings concerned merely with the impact on the private interests of individuals (such as private and family life, employment prospects and financial position) of administrative decisions involving a "substantial

discretionary and public order element": **Maaouia v. France** (2000) 33 EHRR 42 at para 0-111-2 per Sir Nicolas Bratza. The proceedings in that case were for the rescission of an exclusion order made following failure to comply with a deportation order. It was held in para 38 that the proceedings

> "...do not concern the determination of a "civil right" for the purposes of Article 6(1). The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring the proceedings within the scope of civil rights protected by Article 6(1) of the Convention."

89. The same conclusion was reached on the exercise of discretionary administrative powers of deportation by immigration authorities **(Uppal v. United Kingdom (No 1)** [1979] 3 EHRR 391 at 398), a Commission ruling that the complaint was not admissible); the adjudication by a body of election disputes and alleged excess of permitted expenditure **(Pierre-Bloch v. France** (1997) 26 EHRR 202 at paras 50-51); proceedings concerning the obligation to pay state social security contributions, being normal civic duties in a democratic society **(Schouten and Meldrum v. Netherlands** (1995) 19 EHRR 432 at para 50); disputes about the lawfulness of decisions of administrative authorities regarding the payment of state taxes, even though involving pecuniary consequences for individual taxpayers **(Ferrazzini v. Italy** (2002) 34 EHRR 45 at paras 26-31); and proceedings concerning a disputed condition of employment of a public servant employed, as in the case of the armed forces and the police, by a public authority for protecting the general interests of the State and other public authorities **(Pellegrin v. France** (2000) 31 EHRR 26 at para 65-66).

90. The jurisprudence of the Strasbourg Court on this topic was summarised in **Ferrazzini** (supra) at para 27:

> "....procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil " head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to conditions of professional practice or of a licence to serve alcoholic beverages, Moreover the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil."
>
> However, rights and obligations existing for an individual are not necessarily civil in nature." •

(As already indicated, Article 6 has been held not to apply the right to stand for election, disputes between administrative authorities and their employees in posts involving participation in the exercise of powers conferred by public law, the exclusion of aliens and tax disputes.)

91. On which side of the line do determinations of the Tribunal properly belong? The Respondents' position is that Article 6 does not apply to claims or complaints brought before the Tribunal by virtue of section 65, but that, if it does, the Rules are compatible with the requirements of the Article.

92. The Respondents accept, however, that, if, contrary to their contention, Article 6 is engaged and /or Article 10 imposes procedural obligations on the Tribunal, rule 9(6) is in limited respects inappropriate and falls to be interpreted in the light of section 3(1) of the 1998 Act, thereby permitting preliminary hearings on pure questions of law to be heard in public and to be reported.

93. Decisions in disputes about the lawfulness of administrative decisions of public authorities have been treated as involving the determination of "civil rights " within Article 6. For example, in **R (Alconbury Ltd) v. Secretary of State for Environment** [2001] 2 WLR 1389 the House of Lords held that Article 6 applied to the decision of a planning authority to withhold planning permission, as being directly decisive of the applicant's private law right to build. As Lord Hoffmann observed at para 79 the Strasbourg Court has applied Article 6 to

> "...administrative decisions on the ground that they can determine or affect rights in private law"

rather than following the approach that

> "one can have a civil right to a lawful decision by an administrator."

94. Public law decisions of public authorities may have consequences for the private law rights of individuals which are sufficiently decisive for them to attract the procedural protection of Article 6: **Ringeisen v. Austria (No 1)** (1971) 1 EHRR 455 at para 94 (Article 6 held to apply to the exercise of a regulatory power of a public authority to approve the transfer of agricultural land, without which the sale contract was void); **Salesi v. Italy** (1998) 26 EHRR 187 at paras 17-19 (Article 6 held to apply to a claim for a state disability allowance payable, in accordance with specific rules, as a means of subsistence); **Feldbrugge v. Netherlands** (1986) 8 EHRR 425 at para 32 (Claim to State health insurance sickness allowance attracted Article 6 protection); and **Mennitto v. Italy** (2002) 34 EHRR 48 at paras 12 and 20-28 (State disability allowance held to be a civil right of an economic nature.)

95. The Tribunal agree with the Respondents that there is a sense in which the claims and complaints brought by virtue of s 65(2) of RIPA fall within the area of public law. They arise out of the alleged exercise of very wide discretionary, investigatory, state powers by public authorities, such as the intelligence and security agencies and the police. They are concerned with matters of national security, of public order, safety and welfare. The function of the Tribunal is to investigate and review the lawfulness of the exercise of such powers. This is no doubt intended to ensure that the authorities comply with their relevant public law duties, such as by obtaining appropriate warrants and authorisations to carry out interception and surveillance.

96. The public law element is reinforced by the directions to the Tribunal in sections 67(2) and 67(3)(c) of RIPA to apply to the determinations the same principles as would be applied by a court in judicial review proceedings. Such proceedings are concerned with the procedural and substantive legality of decisions and actions of public authorities.

97. The fact that activities, such as interception of communications and surveillance, may also impact on the Convention rights of individuals, such as the right to respect for private life and communications in Article 8, does not of itself necessarily mean that the Tribunal make determinations of civil rights. It was submitted that the determination of a complaint by the Tribunal is not necessarily decisive for private law rights, such as breach of confidence or trespass. The Tribunal's rejection of a person's complaint of interception of his communications would not prevent him from

bringing a private law action for trespass, nuisance, misfeasance in a public office, harassment or breach of confidence in the ordinary courts.

98. Further, the power of the Tribunal to make an award of compensation does not necessarily demonstrate that the Tribunal determine civil rights. In **Pierre-Bloch v. France** (supra) the body adjudicating on election disputes had power to order payments to be made, so that the pecuniary interests of individuals were affected by the body's decisions, but the Strasbourg court held that the proceedings did not involve the determination of civil rights within Article 6 simply because economic issues were raised by the claim.

99. Applying the approach in the Strasbourg cases that account should be taken of the content of the rights in question and of the effect of the relevant decision on them (see **Schaller Volpi v. Switzerland** (1996 Appl. No 25/47194) at para 3), the Tribunal conclude that the public law or public order aspects of the claims and complaints to the Tribunal do not predominate and are not decisive of the juristic character of the determinations of the Tribunal. Those determinations have a sufficiently decisive impact on the private law rights of individuals and organisations to attract the application of Article 6.

100. The jurisdiction of the Tribunal is invoked by the initiation of claims and complaints by persons wishing to protect, and to obtain redress for alleged infringements of, their underlying rights of confidentiality and of privacy for person, property and communications. There is a broad measure of protection for such rights in English private law in the torts of trespass to person and property, in the tort of

nuisance, in the tort of misfeasance in a public office, in the statutory protection from harassment and in the developing equitable doctrine of breach of confidence, as to which see **A-G V. Guardian Newspapers (No 2)**[1990] 1 AC 109 and **Douglas v. Hello'.Ltd** [2001]QB 967.

101. Since 2 October 2000 there has been added statutory protection for invasion of Article 8 rights by public authorities. This follows from the duties imposed on public authorities by section 6 and the rights conferred on victims by section 7 of the 1998 Act. The concept of "civil rights and obligations" is a fair and reasonable description of those common law and statutory rights and obligations, which form the legal foundation of a person's right to bring claims and make complaints by virtue of section 65.

102. The fact that the alleged infringements of those rights is by public authorities in purported discretionary exercise of administrative investigatory powers does not detract from the "civil" nature of the rights and obligations in issue, any more than the fact that the Complainants may also be entitled to bring public law proceedings by way of judicial review, as in **R (Alconbury Developments Ltd) v. Secretary of State for Environment** (supra).

103. Two recent cases in the Strasbourg Court lend support to the characterisation of Tribunal determinations of claims and complaints as involving "civil rights", notwithstanding the public order element in the alleged actions or decisions of public authorities giving rise to the claims and complaints.

104. In **Aerts v. Belgium** (1998) 29 EHRR 50 at para 59 the court recognised that there was involved in a complaint that public law powers had been used to detain the complainant in the psychiatric wing of a prison an infringement of an individual's civil right to his liberty. A question arose as to whether he had been unlawfully deprived of his liberty. The outcome of the challenge to the lawfulness of his detention under public law was decisive for his civil right to compensation for infringement of his civil right to personal liberty. So Article 6 was held to apply to the proceedings.

105. In **Tinnelly** & **McElduff v. United Kingdom** (1999) 27 EHRR 249 at para 61 the public law element of the dispute concerned bidding for public sector contracts, which were subject to security clearance. The applicant asserted a right to be compensated for infringement of the private law right not to be discriminated against on religious or political grounds. The Strasbourg Court held that the determination of the discrimination claim was of a "civil right" within Article 6 and that the public procurement context of the claim did not prevent the rights relied on from being considered as "civil rights" within Article 6.

106. Complainants bringing claims under section 7(l)(a) of the 1998 Act have no choice of forum for their determination. Section 65(2)(a) provides that the Tribunal is the **only** appropriate forum for their adjudication. The Tribunal have at their disposal a range of remedies similar to those available in a private law action in an ordinary court.

107. For all practical purposes the Tribunal is also the only forum for the effective investigation and determination of complaints and for granting redress for them where appropriate. The restrictions imposed by section 17 of RIP A place substantial difficulties in the way of complainants seeking redress by a private law action in the ordinary courts, which lack the special jurisdiction and powers possessed by the Tribunal for investigating complaints about the exercise of investigatory powers by public authorities. Section 17 imposes prohibitions, which are applicable in, or for the purposes of, or in connection with, any legal proceedings, on the adducing of evidence, the asking of questions and the making of assertions or disclosures, which reveal the contents of an intercepted communication or tend to suggest that specified kinds of interception of communications had, or may have, occurred, or were going to occur.

108. In brief, viewing the concept of determination of "civil rights" in the round and in the light of the Strasbourg decisions, the Tribunal conclude that RIPA, which puts all interception, surveillance and similar .intelligence gathering powers on a statutory footing, confers, as part of that special framework, additional "civil rights" on persons affected by the unlawful exercise of those powers. It does so by establishing a single specialised Tribunal for the judicial determination and redress of grievances arising from the unlawful use of investigatory powers.

109. No one in these proceedings has suggested that the Tribunal is not an "independent and impartial tribunal established by law" within Article 6. Membership of the Tribunal is confined by RIPA to members and former members of the senior judiciary and senior members of the legal profession. All those who qualify for

appointment as members of the Tribunal should be well suited by experience and by training to determine contested "civil rights." They are not administrative officials responsible for taking discretionary executive decisions.

110. The Tribunal are under a duty to hear and determine the 1998 Act claims, and to consider and determine complaints, of the unlawful use of investigatory powers. This is directed to be done by the application of a body of legal principles applicable to proceedings in the Administrative Court when determining judicial review applications, which often involve the determination of "civil rights." The relevant procedures, while accommodating the special public interest in safeguarding sensitive information, are intended to secure that the matters brought before the Tribunal are "properly heard and considered." In their determinations there are available to the Tribunal a range of remedies, just as wide as those available to an ordinary court hearing and deciding an ordinary action for the infringement of private law rights.

111 .The cumulative effect of all these factors points to, rather than away from, the conclusion that the determinations of the Tribunal are of "civil rights" within Article 6.

Does Article 8 create obligations as to the procedure to be adopted by a body such as the Tribunal?

112. Even if Article 6 does not apply, the impact of Article 8 on the Tribunal is that their procedure should provide adequate safeguards against the exercise of arbitrary

power by the intelligence and security services and other public bodies equipped with investigatory powers, the exercise of which potentially interfere with the right to respect for private life and communications.

113. The procedural safeguards in respect of interference with Article 8 rights should be no less than those available under Article 6. Considerations of national security and public order serve as the basis of necessary and proportionate exceptions from the procedural rights normally available.

114. Article 8 guarantees the right to respect for private life in the following terms:

> " 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

115. The Respondents submitted that the Rules are compatible with Article 8. They cited authorities establishing the following general points relevant to the potential impact of Article 8, as well as of Article 6, on the procedure of the Tribunal.

(1) Member States are allowed a wide "margin of appreciation" by the Strasbourg Court in the choice of means for achieving legitimate aims, such as the safeguarding of national security, provided that there are in place adequate and effective safeguards against abuse of the protected right. The interest in national security has to be

balanced against the seriousness of the interference with the private life of the complainant: **Leander v. Sweden** (1987) 9 EHRR 433 at paras 59-60, a case on security vetting and access to files, in which it was held that Article 8 was not violated by denial of information to the applicant about the substance of secret files held on him.

(2) The corresponding concept in English domestic law is "the discretionary area of judgment" accorded to the legislature and to the executive in making difficult policy choices between the rights of individual to private life and the needs of national security: **DPP v. Kebiline** [2000] 2 AC 326 at 380E-381D.

(3) It has been recognised by the Strasbourg Court that, for surveillance to be effective, an individual should not be enabled to foresee when the authorities are likely to intercept his communications, so that he can adapt his conduct accordingly. In **Klass v. Germany** (1978) 2 EHRR 214 the court ruled that failure to inform a person that he had been subjected to surveillance in the past was compatible with Article 8, stating the position at para 58 in terms similar to the rationale of the NCND policy:

> "Subsequent notification of surveillance might jeopardise the long term purpose that originally prompted the surveillance and reveal working methods and fields of operation of the intelligence services and possibly identify agents."

(4) It has also been recognised by the Commission, in rejecting a claim as inadmissible, that in a case of the alleged installation of a listening device in the complainant's property, there was no infringement of Article 8 in the Security

Services Tribunal simply informing the complainant, without further explanation that no determination had been made in her favour. The Commission recognised the risk of jeopardising the efficacy of the surveillance system by divulging any information to the person concerned: **Redgrave v. United Kingdom** (1993- App. L No 20271/92). Other complaints about the procedure of the security and intelligence tribunals have also been ruled as inadmissible by the Commission. In **Christie** v. **United Kingdom** (1993) App No N 21482/93) the Commission ruled as inadmissible and ill-founded complaints that the tribunals established to determine complaints against the security and intelligence services gave no reasons for their determinations against a complaint and that no appeal was available. Those procedural features were regarded as necessary in the interests of a democratic society. **Esbester v. United Kingdom** [1993] 18 EHRR CD 72 was a Commission decision relating to a complaint of disclosure of information for vetting under the Security Services Act 1989. One of the complaints was that the tribunal did not provide adequate and effective protection from abuse, for example in not giving reasons for rejecting a complaint. The Commission refused to admit the complaint, on the ground that the UK legislation, by which the tribunal was established, contained adequate safeguards and complied with Article 8 in its compromise between the requirements of defending national security and the rights of the individual. Thus, as far as the Strasbourg authorities are concerned, the earlier United Kingdom legislation governing the tribunals, which were established in relation to complaints about the use of investigatory powers by the security and intelligence agencies, generally satisfied the requirements of Article 8. RIPA and the Rules have since replaced that Convention compliant legislation with procedures, which repeat and, from a Convention perspective, improve upon the previous procedural position.

116. The Tribunal conclude that the Rules do not contain procedural requirements which, in the context of the interception of communications and secret surveillance and the need to maintain the NCND policy, are incompatible with Article 8.

Does Article 10 create obligations as to the procedure to be adopted by a body such as the Tribunal?

117. Article 10 does not impose any relevant procedural requirements on the Tribunal additional to those already considered and found in Articles 6 and 8. Article 10(2) contains an exception to the guaranteed right of freedom of expression where necessary in the interests of national security and other aspects of the public interest in the same terms as Article 8(2). Those exceptions in Article 8(2) and 10 (2) are wider than the exceptions in Article 6, which are confined to the exclusion of the press and the public from the hearing.

118. Article 10 featured in the contentions of GNL and the Complainants that the oral hearings of the Tribunal should be open to scrutiny by being held in public, and so that they can be reported in the media, and that material should only be kept private to the extent that its nature and content specifically require for one or more of the excepted purposes, such as national security

119. Article 10 protects freedom of expression in the following terms:

> "1.Everyone has the right of freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers .....
>
> 2.The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputations or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

120. The noteworthy point made in the cited authorities is that Article 10 does not create a right of access to information, which is not generally available. Information in the hands of the security and intelligence services obviously falls in this class of information: the holders of such information do not wish to make it public or to make it available to the putative recipient. The inaccessibility of the information is not an interference with freedom of expression on the part of the Complainants. They have freedom of expression before the Tribunal.

121. As was pointed out in **Persey v. Secretary of State for Environment** [2002] EWHC 371, there is a difference between freedom of expression (imparting and receiving information) and access to information. Article 10 does not cover access. It is not about freedom of information. So it was compatible with Article 10 for the government to set up a closed inquiry, to which the public would have no access, into the foot and mouth outbreak.

122. In **Leander v. Sweden** (1987) 9 EHRR 433 at para 74 the Strasbourg Court said:

> " The right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in

> circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

123. It was explained in **Guerra v. Italy** (1998) 26 EHRR 357 at para 53 (concerning a complaint that the State had failed to inform residents of the hazards posed by a chemical factory) that the right of the public to receive information is a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest. Article 10 does not impose on a State a positive obligation to collect and disseminate information of its own motion.

124. The Tribunal conclude that the Rules preventing the Complainants or GNL or others from gaining access, either directly or indirectly via proceedings in the Tribunal, to sensitive information, documents or evidence in the hands of the security and intelligence services are compatible with Article 10. The Rules protecting such information from being disclosed in Tribunal proceedings are necessary in the interests of national security and, in particular, for the maintenance of the NCND policy and they are a proportionate interference under Article 10(2).

Is there any relevant principle or presumption at common law as to the procedure to be adopted by a body such as the Tribunal?

125. There are no common law principles or presumptions of wider ambit or greater force than the Convention rights applicable to the procedure of the Tribunal. The Tribunal is entirely a statutory creation. Express provision has been made for the

procedure of the Tribunal by section 69 of RIPA and the Rules made under it. Those provisions must be interpreted and applied by the Tribunal with due regard for the strength of the common law presumption in favour of basic rights, such as **a** fair trial and open justice. This adds nothing to the considerations necessary in respect of Article 6.

ISSUE 2: Vires and construction

In the light of the answers under Issue 1 above and in the light of s. 3(1) of the Human Rights Act 1998 (if applicable), how is s.69 of RIPA properly to be construed?

126. Section 3 of the 1998 Act enacts the following rule of interpretation applicable both to RIPA and to the Rules :

> " (1) So far as it is possible todo so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section-
>
> > (a) applies to primary legislation and subordinate legislation whenever enacted;
> >
> > (b) does not affect the validity, continuing operation or enforcement of any incompatible legislation; and
> >
> > (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

127. It is common ground that the Tribunal should interrupt section 69 in accordance with ordinary purposive and contextual principles of domestic law. Only if that would result in incompatibility with a Convention right does section 3 apply, so as to achieve (if it is possible to do so), a Convention compliant interpretation of s 69. The Tribunal were referred to the following statement of principles in **Poplar HARCA** v. **Donoghue** [2002] QB 48 at para 75-

> "(a) Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so the courts should always first ascertain whether, absent section 3, there would be any breach of the Convention.)
>
> (b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility.
>
> (c) Section 3 does not entitle the Court to legislate (its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3)."

128. This approach was approved by the House of Lords in Re S [2002] 2 WLR 720 at paras 38-40, in which it was emphasised that section 3 is consistent with judicial interpretation, but not with legislative amendment, which is constitutionally reserved to Parliament. The House recognised, however, that increasingly there may be difficulties in identifying the limits of judicial interpretation. The Tribunal's attention was also drawn to the observations of Lord Steyn in **R v. A (No 2)** [2001] 2 WLR 1546 at para 44 that the obligation in section 3 (1) is a strong one applicable even if there is no ambiguity in the language of the statutory provision, in the sense of it being capable of two different meanings. The Court must strive to find a possible interpretation compatible with Convention rights e.g by reading down the width of the express language and by the implication of provisions.

129. On the purely domestic law front, **R v. Secretary of State for Home Department ex p Simms & O'Brien** [2000] 2 AC 115. was cited on the effect of the principle of legality discussed by Lord Hoffmann at p.l31E-G:

> " Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning might have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

(See, by way of example, the common law approach to the impact of statute on basic rights in **Ex p Leech** [1994] QB 198 and **Ex p Witham** [1998] QB 575.)

130. Lord Hoffmann later referred at p 132A to the express enactment of the principle of legality as a rule of construction in section 3 of the 1998 Act.

131. In the light of these statutory and common law principles of interpretation the Complainants pointed to the permissive nature of the provisions in section 69 (1) to (5).

> "(I) The Secretary of State **may** make rules regulating -

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

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

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

[(a) -*0)]*

(3) Rules under this section in relation to the hearing or consideration of any matter by the Tribunal may provide-

[(a)-(c)]

(4) The power to make rules under this section includes power to make rules-

[(a)-(d)]

(5) Rules under this section may also include provision-

[(a)-(b)]."

132. So, the Complainants argued, there is no necessary or inevitable incompatibility between the Rules, which can properly be made under section 69, and the Convention rights. There is nothing in section 69 generally or specifically requiring rules to be made which are incompatible with Convention rights or preventing the removal of any such incompatibility in the Rules.

133. The common law principle of legality was also relied on by the Complainants in relation to the power to make subordinate legislation in the form of the Rules. A rule-

making power cast in very general terms, such as section 69(1), it was argued, should

not be interpreted as enabling rules to be made, which are incompatible with basic rights of fair trial and open justice. It was contended that rules which cannot be interpreted to be compatible with basic common law rights should be held to be ultra vires section 69.

134. The general approach to the interpretation and application of section 69 and of the Rules was developed by the Complainants along the following lines:

(1) The Tribunal, as a "public authority" within section 6 (3) (a) of the 1998 Act, are under a duty to act compatibly with Convention rights: section 6(1).

(2) The Tribunal are only excused from acting compatibly with Convention rights, such as those in Article 6, if section 6(2) (a) or (b) apply. That provides-

> " (2) Subsection (1) shall not apply to an act if-
>
> > (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> >
> > (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

(3) Section 6(2) does not apply so as to excuse the Tribunal from their duty to act compatibly with Convention rights: first, because the provisions of RIP A (the primary legislation) do not prevent the Tribunal from conducting the proceedings compatibly

with Convention rights; and, secondly, because the Rules made under RIPA should all be read and given effect in a way which is compatible with Convention rights.

(4) Each provision in the Rules must be read in accordance with the interpretative obligation in section 3 (1) of the 1998 Act. It is particularly strong in this instance as RIP A and the Rules were designed for the very purpose of accommodating the requirements of the 1998 Act coming into force at the same time.

(5) If, contrary to the Complainants' submissions, it is not possible to read and give effect to a particular rule as compatible with Convention rights, then that provision in the Rules is ultra vires section 69 and does not bind the Tribunal. The reason for that result is that section 69, when interpreted in accordance with section 3(1), cannot be read as enabling the Secretary of State to make rules which are incompatible with Convention rights and there is nothing in RIPA requiring the Rules to contain provisions incompatible with Convention rights. The disregarded rule would not be saved by section 3(2)(c) of the 1998 Act quoted in paragraph 126 above. In the absence of binding rules in the subordinate legislation the Tribunal could and should exercise their general power under section 68 (1) of RIPA to conduct the proceedings compatibly with Convention rights.

(6) Alternatively, the same result would follow by interpreting section 69 in accordance with the common law principle of legality that Parliament does not intend, by employing general words such as are to be found in section 69, to enable subordinate legislation to be made which is incompatible with fundamental rights of fair trial and open justice. If the provisions in the Rules cannot be interpreted as compatible with such rights, they are ultra vires the rule making power in section 69.

135. The Respondents' position maybe summarised as follows-

(1) The power to make rules under section 69 is couched in language which is clear and strong and should be construed in its ordinary and natural meaning.

(2) Section 69 authorised the Secretary of State to make all the Rules that he has in fact made in SI 2000 No 2665.

(3) On ordinary domestic principles of interpretation section 69 and the Rules are compatible with the Convention rights with the possible exception of rule 9(6) (as to which see paras 163-173 below.) There is no warrant for the Tribunal to apply section 3(1) of the 1998 Act to distort their meaning (although, in the alternative, if necessary, that could or should be done.

(4) If section 69 and the Rules made under it cannot be read and given effect so as to be compatible with Convention rights, the position is that Parliament has made clear its intentions in sections 69(4) and (5) that Rules in this form should be capable of being made and it is not permissible for the Tribunal to override those intentions.

136 The Tribunal have reached the conclusion that there are legal limits to the rule-making power in section 69, but that the power is not as restricted as the Complainants submitted or as unfettered as the Respondents submitted.

137. The Tribunal do not accept the Complaints' submissions that section 3(1) or section 6(1) of the 1998 Act and/or the common law principle of legality control the meaning or effect of section 69(1) of RIP A. The Tribunal conclude that this is a straightforward case of the application of ordinary domestic law principles of statutory interpretation. On that approach section 69(1) is compatible with the Convention Articles, as well as with the common law principle of legality. There is no need to have resort to section 3(1) and there is no room for the application of section 6(1).

138. The Tribunal are given power by section 68(1) to determine their own procedure. That power is expressly made "Subject to any rules made under section 69." Compatibility with Convention rights does not require that the Tribunal should be the sole masters of their own procedure. The very wide power conferred on the Secretary of State to make rules regulating the Tribunal's exercise of their jurisdiction is compatible with Convention rights, as it is expressly made subject, in particular, to the mandatory matters stated in section 69(6)(a) and (b), as quoted in para 38 above. There is no justification for recourse to section 3(1) in order to read down the section 69(1) power further than is expressly provided in section 69(6), or to imply a differently worded qualification into it, such as one expressly confining the Secretary of State's power to making rules which are compatible with Convention rights. In the view of the Tribunal, Parliament clearly placed Convention compliant limits on the rule making power in section 69. The limits require a balance to be struck by the Secretary of State between basic common law rights and Convention rights of fair trial and open justice and the needs of national security and the public interest. In making the Rules the Secretary of State must ("shall") have particular regard to the two matters specified in section 69(6) (a) and (b). They obviously reflect the tension in

Articles 6, 8 and 10 of the Convention between, on the one hand, the principles of fair trial and open justice normally applicable to the hearing and consideration of claims and complaints to a judicial body entrusted with the determination of civil rights and, on the other hand, the special needs and legitimate aim of preventing the disclosure of information prejudicial to national security and other aspects of the public interest.

139. The critical question is whether, in making the Rules, the Secretary of State had the proper regard he was required to have to all of those matters. The Secretary of State has a discretionary area of judgment in this matter. If, however, he makes rules which could not have been made by a reasonable Secretary of State, properly directing himself as to the mandatory factors, then the Tribunal would be entitled to conclude that he has overstepped his rule-making powers. The result would be that the rule in question does not bind the Tribunal, which would then be entitled to fall back on their general procedural discretion under section 68(1). As explained below, the Tribunal conclude that, on this approach, the Secretary of State had power to make all of the Rules, with the exception of rule 9(6) in that it extends to oral hearings of legal arguments on preliminary procedural issues, which pose no risk at all to the disclosure of sensitive information, to national security or to the NCND policy.

In the light of the answers under Issue 1 above and in the light of s. 3(1) of the Human Rights Act 1998 (if applicable), how are the Investigatory Powers Tribunal Rules 2000 properly to be construed?

140. Predictably the difference in approach between the Complainants and the Respondents to the interpretation of section 69 of RIPA is reflected in the rival submissions on the proper interpretation of the Rules.

141. The Respondents contend that all the Rules are clear and should be construed according to their natural and ordinary meaning. On that approach they are all said to be compatible with the relevant Convention rights in Articles 6, 8 and 10, taking due account of the exceptions for national security and the public interest made in the Articles. If that is correct, there is no room for the application of section 3(1) of the 1998 Act to the Rules, save possibly to rule 9(6) which they accept, if, as the Tribunal have held, Article 6 is engaged, is in limited respects inappropriate and falls to be interpreted in the light of section 3(1).

142. The Complainants submit that the Article 6 right to a fair hearing, including the right to equality of arms and to a reasoned judgment, is an absolute one. Every departure from the basic principle made in the Rules must be a necessary and proportionate response to a legitimate aim. A balancing exercise has to be conducted by the Tribunal in fixing the appropriate standard of fairness, with a powerful presumption in favour of the normal standards of judicial procedure. That presumption applies to the Tribunal as a judicial body with jurisdiction to adjudicate conclusively on factual and legal issues arising in claims and complaints before them. The Tribunal should decide, as an ordinary court would decide, the extent to which the arguments, in favour of national security and the NCND policy justify each departure required by the Rules from the principles of fair trial and open justice.

143. Cases decided by the Strasbourg Court were cited by the Complainants to illustrate the standards of fairness required by Article 6 with regard to the production of all the evidence in the case at a public hearing. It was held in **Van Mechelen v. Netherlands** (1997) 25 EHRR 647 at para 51 that, in a criminal case, as a general rule, all the evidence must normally be produced at a public hearing in the presence of the accused, with a view to adversarial argument, in which the defendant has an adequate and proper opportunity to challenge and question a witness against him. It was recognised in **Rowe & Davies v. United Kingdom** (2000-Appl. No 28901/95) at paras 60-65 that, although entitlement to the relevant evidence is not an absolute right in cases where there is a competing interest, such as national security and the protection of witnesses, those aspects of the public interest must be weighed against the right of the accused in disclosure, so that he has knowledge of, and can comment on, evidence adduced by the other party. The withholding of evidence must only be permitted where strictly necessary and the difficulties must be counterbalanced by procedures followed by the judicial authorities. See also **Jasper v. United Kingdom** (2000- Appl. No 27052/95) at paras 55-56 and **Cabal v. United Kingdom** (1997) 23 EHRR 413 at para 131, which referred to the need to use judicial techniques to accommodate both legitimate security concerns and the means of procedural justice. Mention must also be made, however, of decisions of the Strasbourg Court in which it was recognised that in civil cases there may be exceptional circumstances, which might justify dispensing with an oral hearing: **Fischer v. Austria** (1995) 20 EHRR 349 at para 44; and **Stallinger v. Austria** (1997) 26 EHRR 81 at para 51 (Refusal to hold an oral hearing not justified on ground that it was unlikely to "clarify the case"); **Jacobsson v. Sweden** (No 2) (1998) 32 EHRR 463 at para 46; **B v. United Kingdom**

(2002) 34 EHRR 19 at paras 37-40;and **GOC v. Turkey** (2002-Appl. No. 36590/97) at para 47 stating that

> "According to the Court's established case-law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of Article 6(1) entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing."

144. The right to a public hearing is also qualified. It is accepted that the media and the general public may be excluded from all or part of the hearing. But the exclusion must be justified by a legitimate aim and be proportionate.

145. The Complainants accordingly contend that the Rules should be interpreted in the following way.

(1) The Tribunal must decide what standards of fairness are required of a procedure to give effect to the principles of fair trial and open justice.

(2) The Rules should be read as enabling Convention compliant procedures to be followed, either by applying the common law rules of interpretation or by applying the rule of interpretation in section 3(1) of the 1998 Act. In deciding whether a provision is compatible with the Convention right, it is necessary to evaluate the weight of the Convention right and then consider whether the curtailment of it in the provision is justified by a countervailing legitimate aim, such as national security or another relevant aspect of the public interest, to the minimum extent necessary.

(3) If it is not possible to read a provision in the Rules as compatible with Convention rights, it is ultra vires and the Tribunal are entitled to exercise their discretion under section 68(1) to conduct the proceedings under a procedure which is compatible with Convention rights.

146. On this approach the Complainants submit that there is nothing to justify the wholesale departure in the Rules from normal judicial procedure in favour of a procedure which is "secretive and one sided." In particular, the use of blanket rules to create secrecy in the proceedings is not justified simply by relying on the context of national security or of covert operations or by invoking the NCND policy.

147. The Tribunal reject the broad proposition of the Complainants that a provision in the Rules is ultra vires if it is not possible to read it as compatible with Convention rights. The Rules were made on 28 September 2000, that is before section 3(1) of the 1998 Act came into effect. Although section 3(1) applies to already existing legislation, it does not have retrospective effect and so the interpretation of the law up to 2 October 2000 is not, and will not be, affected by section 3(1). The validity of the Rules continues to be tested without reference to section 3(1).

148. The proper approach is for the Tribunal to interpret the Rules according to their ordinary and natural meaning in the light of the NCND policy, which they are intended to maintain, and to determine the validity of the Rules so interpreted in the light of the limits on the rule-making power in section 69(6)(a) and (b). As explained later the Tribunal conclude that, with the exception of rule 9(6), the Rules, properly interpreted, are valid and binding on the Tribunal.

Are any of the Rules to any extent ultra vires the enabling power in s. 69 of RIPA? The Complainants refer in particular to rule 6(2) to (5) (disclosure);rules 9 and 6(2)(a) (hearings in private); (adversarial procedure); rule 11(3) (compelling evidence);rule 13 (statement of findings and reasons in case of unsuccessful complainant).

149. The principal ground of the Complainants' challenge to the Rules is that their absolute blanket nature is unjustified by the NCND policy or by any other national security or public interest considerations and should be adjusted to meet the requirements of Article 6 of a fair trial and of open justice. On that basis they ask for the procedural directions referred to in paragraph 18 above.

150. The Respondents submit that the application of Article 6 to the Tribunal does not require the proceedings to be conducted in every respect in accordance with fully open adversarial procedures, without regard to the interests of national security and other public interest factors, such as the NCND policy. The normal requirements that the proceedings are adversarial, public and with equality of arms may be displaced by an overriding interest, such as the need to protect national security, the identity of informants, the preservation of the confidentiality of sensitive information and the maintenance of the NCND policy. In such cases the matter can be dealt with by a judicial body, such as the Tribunal, by procedural safeguards designed to ensure that the rights of the person denied access to sensitive information are protected. It is compatible with Convention rights to protect the secrecy of the information in

question, for example by the use of the procedure of the special advocate, but such a course is not essential in order to comply with the requirements of Article 6.

151. In defence of the Rules the Respondents argued that all of them are intra vires and compatible with Convention rights. They were validly made, as they are all necessary to promote and secure the NCND policy, which, whether Article 6 applies or not, is a legitimate objective under section 69(6)(b) of RIPA and the Rules. The policy is calculated to safeguard national security, the functioning of the intelligence services and the identity of informants. Those objectives are also permitted by the national security and other public interest exceptions to the Convention rights in Article 8 and 10.

152. As for the authorities, it was held by the Strasbourg Court in **Tinnelly & McElduff v. United Kingdom** (1999) 27 EHRR 249 that the protection of national security is a legitimate aim, which may entail limitations on the right of access to a court. Judicial procedures may have to be modified in a proportionate way to safeguard national security concerns about intelligence and yet accord to the individual a substantial degree of procedural justice and preserve public confidence in the independence of the judiciary and in the administration of justice.

153. The Respondents claim that there are adequate judicial checks in place to safeguard the interests of the Complainants to the extent required by the Convention Articles : the Tribunal is an independent and impartial judicial body equipped with powers to investigate claims and complaints; the Respondents are under a duty to co-operate with investigations by the Tribunal (section 68(6)); and the Tribunal have the

power to require the relevant Commissioner to provide the Tribunal with all such assistance as the Tribunal shall think fit (section 57 (3) and 68(2)). In those circumstances the Tribunal agree with the Respondents that valid rules may be made in a general, broad and blanket "bright line" form departing from the normal adversarial procedures in order to achieve certainty and to maintain the legitimate aims of the NCND policy: see the general broad approach in the pursuit of legitimate policy aims in **James v. United Kingdom** (1986) 8 EHRR 123 at para 68; **Mellacher ' v. Austria** (1989) 12 EHRR 391 at paras 52-53;**Stubbings v. United Kingdom**.(1996) 23 EHRR 213 at para 49; and **Pretty v. United Kingdom** (2002) 35 EHRR 1 at paras 72-74.lt is not necessary to confer on the Tribunal a discretion to be exercised in each case having regard to all the relevant factors. It is essential for the maintenance of the NCND policy that the Tribunal should not be required to give reasons in each case for each particular exercise of discretion. The making of distinctions between one set of circumstances and another and the expression of such distinctions would itself be incompatible with maintenance of the NCND policy.

154. The Respondents submit that if, contrary to their primary contention, the Rules do not fully satisfy the requirements of the Convention, they can be met by limited adjustments to them and without going as far as the Complainants propose in their request for procedural directions. The further safeguards could include an option for the Tribunal, where necessary, to call for the appointment of counsel to represent the Complainants' interests, to whom disclosures of information could be made, in any case in which the Tribunal considered that they required further assistance in their investigations and to ensure that the interests of the Complainant were safeguarded. See **R. v. Shayler** [2002] 2 WLR 754 at 776 para 34 and para 113 and **Secretary of**

State for Home Department v. Rehman [2000] 3 WLR 1240 at 1250-1251, paras 31-32.

155. Even if, contrary to the Respondents' primary case, more extensive adjustments to the Rules are required to make the Rules Convention compliant, that could be achieved without adopting all the directions requested by the Complainants. For example, the obvious need to protect sensitive information could be met by the adoption of the procedure for a special advocate, known to and briefed by the Complainants. Such a procedure exists in the Special Immigration Appeals Commission. This result could not, however, be achieved by a process of judicial interpretation of the Rules, applying sections 3(1) and 6 of the 1998 Act. Legislative amendment of the Rules would be required.

156. In the light of these general submissions it is necessary to consider the interpretation and validity of the particular provisions in the Rules challenged by the Complainants.

Right to an oral hearing

157. The language of rule 9(2) is clear.

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

158. Oral hearings are in the discretion of the Tribunal. They do not have to hold them, but they may, if they so wish, do so in accordance with rule 9.

159. In the exercise of their discretion the Tribunal "may hold separate oral hearings." That exercise of discretion, which would be a departure from normal adversarial procedures, is expressly authorised by rule 9(4).

160. The Tribunal should explain that, contrary to the views apparently held by the Complainants' advisers, the discretion in rule 9(4) neither expressly nor impliedly precludes the Tribunal from exercising their general discretion under rule 9(2) to hold inter partes oral hearings. It is accepted by the Respondents that the Tribunal may, in their discretion, direct joint or collective oral hearings to take place. That discretion was in fact exercised in relation to this very hearing. The exercise of discretion must take into account the relevant provisions of other rules, in particular the Tribunal's general duty under rule 6(1) to prevent the potentially harmful disclosure of sensitive information in the carrying out of their functions. As already explained, this hearing has neither required nor involved the disclosure of any such information or documents emanating from the Complainants, the Respondents or anyone else. The hearing has only been concerned with undiluted legal argument about the procedure of the Tribunal.

161. The Tribunal have reached the conclusion that the absence from the Rules of an absolute right to either an inter partes oral hearing, or, failing that, to a separate oral hearing in every case is within the rule-making power in section 69(1). It is also compatible with the Convention rights under Article 6,8 and 10. Oral hearings

involving evidence or a consideration of the substantive merits of a claim or complaint run the risk of breaching the NCND policy or other aspects of national security and the public interest. It is necessary to provide safeguards against that. The conferring of a discretion on the Tribunal to decide when there should be oral hearings and what form they should take is a proportionate response to the need for safeguards, against which the tribunal, as a judicial body, can balance the Complainants' interests in a fair trial and open justice according to the circumstances of the particular case.

162. If the discretionary nature of the oral hearings were for some reason incompatible with Convention rights, the Tribunal conclude that it is impossible to employ section 3(1) to read the discretion in rule 9 as having the meaning and effect contended for by the Complainants i.e as requiring the Tribunal to ask the Complainant in every case whether an oral hearing was sought and as requiring the Tribunal to hold an oral hearing, unless the Complainant waived his right to have one. It simply is not possible, as an exercise in judicial interpretation, to read and give effect to a **discretion** conferred on the Tribunal in regard to oral hearings under rule 9 as imposing a statutory **duty** hold oral hearings, unless waived by the Complainants.

Hearings in private

163. The language of rule 9(6) is clear and unqualified.

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

164. The Tribunal are given no discretion in the matter. Rule 6(2)(a) stiffens the strictness of the rule by providing that the Tribunal may not even disclose to the Complainant or to any other person the fact that the Tribunal have held, or propose to hold, a separate oral hearing under rule 9(4). The fact of an oral hearing is kept private, even from the other party. There are limited exceptions where relevant consents are given by persons specified in rule 6(3) and where the information is given to a successful Complainant in a determination notified under rule 13(2).

165. The Tribunal are unable to accept the submission that, as a matter of interpretation, rule 9(6) can be read, either on the application of common law principles of interpretation or under section 3(1), as confined to the substantive determination of the claim or complaint, and not to include rulings on preliminary issues of procedure, as at this hearing. Rule 9(6) refers to "proceedings" generally, including "any" oral hearing. Arguments and decisions on preliminary procedural issues arising in the proceedings are part of the "proceedings." An oral hearing consisting of only legal argument is as much a "hearing" within rule 9(6) as the Tribunal hearing evidence given by witnesses of fact or submissions on the merits.

166. The Complainants also argued that there should, as a matter of interpretation, be read into rule 9(6) a qualification that the proceedings should only be heard in private where that was necessary for the protection of the interests identified in section 69 (6)(b) and rule 6 (1) and then only to an extent proportionate to that need. The Tribunal are unable to accept that the rule can be so interpreted. The suggested interpretation would amount to an impermissible legislative amendment of the rule.

167. However, the very fact that this rule is of an absolute blanket nature is, in the judgment of the Tribunal in the circumstances, fatal to its validity. As indicated earlier, the Tribunal have concluded that the very width of the rule preventing any hearing of the proceedings in public goes beyond what is authorised by section 69 of RIPA.

168. Nothing in any of the "particular matters" referred to in section 69 itself expressly empowers the Secretary of State to require that all the hearings of the proceedings in the Tribunal shall take place in private. Reliance on the generality of the rule-making power in order to exclude the presumption in favour of open justice presents difficulties in the face of the provision in section 69(6) that, in making rules, the Secretary of State "shall have regard, in particular, to-

> "(a) the need to secure that matters which are the subject of proceedings, complaints and 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."

169. In many of the cases dealt with by the Tribunal to date it has been necessary to make a determination after investigation and/or consideration of factual matters raised by the claim or complaint. In such cases the requirement that any hearing the Tribunal might hold should be in private is justified as strictly necessary to secure the non-disclosure of the specified sensitive information or for the maintenance of the NCND

policy, which, for reasons already explained, is essential to the continued discharge of the functions of the intelligence services.

170. This preliminary hearing is, however, a different matter. It is the first of its kind in the short history of the Tribunal. It is a situation which may well not have been foreseen when the Rules were made. In the view of the. Tribunal, if this situation had been foreseen and due regard had been paid to the two specified fundamental factors in section 69(6), it would have been appreciated by a reasonable rule making body that it is impossible to justify the absolute blanket nature of rule 9(6), so as to extend to oral hearings consisting solely of purely legal arguments on procedural matters.

171. There is no conceivable ground for requiring legal arguments on pure points of procedural law, arising on the interpretation and validity of the Rules, to be held in private. There is no need to secure the non-disclosure of information potentially prejudicial to any aspect of the interests identified in section 69 (6)(b), such as the NCND policy. No "particular matters" (see section 69 (4)(d)) have been identified as needing protection from disclosure in the course of the hearing of the preliminary issues. The legal arguments have been deployed, debated and decided in this case without disclosing any factual information at all, or anything from which any facts may be inferred about the occurrence or non-occurrence of interception or surveillance. There is no question of either confirming or denying any fact or allegation of fact in breach of the NCND policy.

172. Indeed, purely legal arguments, conducted for the sole purpose of ascertaining what is the law and not involving the risk of disclosure of any sensitive information,

should be heard in public. The public, as well as the parties, has a right to know that there is a dispute about the interpretation and validity of the relevant law and what the rival legal contentions are.

173. The result is that rule 9(6) is ultra vires section 69. It does not bind the Tribunal. The Secretary of State may exercise his discretion under section 69(1) to make fresh rules on the point, but, unless and until he does, the Tribunal may exercise their discretion under section 68(1) to hear the legal arguments in public under rule 9(3), subject to their general and specific duties, such as rule 6(1) in the Rules and in RIP A. It is appropriate to exercise that discretion to direct that the hearing of the preliminary issues shall be treated as if it had taken place under rule 9(3) in public, because such a preliminary hearing of purely legal arguments solely on procedural issues does not pose any risk to the duty of the Tribunal under rule 6(1) or to the maintenance of the NCND policy. The transcripts of the hearing should be made available for public consumption.

Departures from adversarial procedure (including restrictions on disclosure)

174. The Rules require other procedures departing from normal adversarial practice and procedure followed by courts and tribunals in the determination of civil rights. Normally all documentary evidence, including witness statements, are mutually disclosed and available; evidence and submissions on behalf of the parties are heard in the presence' of all parties or their legal representatives; evidence is subject to challenge by cross examination by or on behalf of the opposite party; and the giving of evidence may be compelled.

175. As already mentioned, me tribunal have a discretion under rule 9(4) to hold separate oral hearings, which the persons specified may be required to attend and at which such persons may make representations, give evidence and call witnesses. Further, under rule 6 (2) no disclosure to the Complainant or to any other person is permitted of-

> "(a) the fact that the Tribunal have held, or propose to hold, an oral hearing under rule 9(4);
>
> (b) any information or document disclosed or provided to the Tribunal in the course of that hearing, or the identity of any witness at that hearing;
>
> (c) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act (or provided voluntarily by a person specified in section 68) (7));
>
> (d) any information or opinion provided to the Tribunal by a Commissioner pursuant to section 68(2) of the Act;
>
> (e) the fact that any information, document, identity or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (b) to (d).

176. Disclosure may only take place with the appropriate consent of the person specified in rule 6 (3) or as part of the information provided to the Complainant under rule 13(2) notifying him of determination in his favour: rule 6 (4)

177.The Tribunal may not order any person to disclose any information or document which the Tribunal themselves would be prohibited from disclosing by virtue of rule 6, had the information or document been disclosed or provided to them by that person: rule 6(5).

178. Further, by rule 11(3) the tribunal are prohibited from compelling any person to give evidence at an oral hearing.

179. The Complainants submitted that these departures from normal adversarial procedures result in an inequality of arms incompatible with Convention rights. The Tribunal receive information and documents from the Respondents without the Complainants having any right to see the material or to cross examine on it. The same applies to information and opinions received by the Tribunal from a Commissioner. The offending rules were said to be incompatible with Convention rights, as they require departures from adversarial procedures beyond those strictly justified by the protected interests. The Rules prevent the Tribunal, as a judicial body, from making their own assessments of what is necessary and proportionate. The Tribunal should be able to decide for themselves whether fairness requires disclosure of information and documents and the compelling of a witness to give oral evidence.

180. It was argued that lesser measures than the blanket rules would be sufficient to protect sensitive information and would satisfy the Tribunal's general duty to secure information from prejudicial disclosure. For example, it is not uncommon for arrangements to be made in the ordinary courts to protect the identity of witnesses; and for documents to be disclosed with redaction of sensitive information. The Tribunal could provide the complainant with a summary of the gist of information, if it is too sensitive to be disclosed in full; alternatively, a representative could be appointed to receive sensitive information and documents; or a special advocate could be appointed.

181. The Tribunal conclude that these departures from the adversarial model are within the power conferred on the Secretary of State by section 69(1), as limited by section 69(6). A reasonable rule-making body, having regard to the mandatory, factors in section 69(6), could properly conclude that these departures were necessary and proportionate for the purposes stated in section 69(6)(b). In the context of the factors set out in that provision and, in particular, the need to maintain the NCND policy, the procedures laid down in the Rules provide a "fair trial" within Article 6 for the determination of the civil rights and obligations arising in claims and complaints under section 65 of RIPA.

182. They are also compatible with Convention rights in Articles 8 and 10, taking account of the exceptions for the public interest and national security in Articles 8(2) and 10(2), in particular the effective operation of the legitimate policy of NCND in relation to the use of investigatory powers. The disclosure of information is not an absolute right where there are competing interests, such as national security considerations, and it may be necessary to withhold information for that reason, provided that, as in the kind of cases coming before this Tribunal, it is strictly necessary to do so and the restriction is counterbalanced by judicial procedures which protect the interests of the Complainants: see **Fitt v. United Kingdom** (2000) 30 EHRR 480 paras 45 and 46 and **R v. Smith** (2001) 1 WLR 1031 at para 25.

Reasoned and Public Determination

183. Rule 13(2) was also challenged by the Complainants for limiting the right to a reasoned determination of a claim or a complaint by providing that

> " When they make a determination in favour of the complainant, the Tribunal shall provide him with a summary of that determination including any findings of fact."

184. This duty is subject to the general duty imposed by rule 6(1) regarding the disclosure of information: rule 13 (4). It is also subject to the right of the person whose consent to disclosure is required to make representations: rule 13(5).

185. If no determination is made in favour of the Complainant, he is not entitled to receive any more than notification of that fact: s 68(4)(b) of RIPA.

186. These provisions were criticised by the Complainants as incompatible with the Convention right to a fair trial, which includes the right to a reasoned judgment given in public. The inability of the Tribunal to supply reasons for their decision to the unsuccessful Complainant is plainly disproportionate: **Campbell & Fell v. United Kingdom** (1984) 7 EHRR 165 at paras 87-89. The NCND policy could not be a justification for the total absence of a public pronouncement of reasons in a case such as the present. The Tribunal ought to be free to consider what harm might flow from disclosure of particular factual or legal findings in each case.

187.It was argued that rule 13 should be read and given effect either by reading in the right for the unsuccessful Complainant to have reasons or, at least, by reading down the provisions so as to be confined to a determination on the merits of the case and so as not to apply to rulings on points of procedural law. In such a case full reasons

should be given tor the determination, whether the legal points have been determined for or against the Complainant. If not interpreted to have that effect, the rule should be held to be ultra vires section 69(1) for the same reasons as apply in respect of the holding of the oral hearing in private. The NCND policy would not be prejudiced by making a full statement of the legal reasons public, whatever the outcome.

188. The provisions were also challenged as ultra vires section 69(1) to the extent that they unjustifiably distinguish between successful and unsuccessful Complainants. Neither section 68(4) nor section 69(2) require the making of rules denying the unsuccessful Complainants the reasons for the determination

189. The Respondents submitted that it was appropriate for the determination of the Tribunal to be expressed in terms which safeguard the public interest in maintaining the confidentiality of sensitive information, as required by the NCND policy. The right to a public judgment is not an absolute one and can be denied, if publicity would frustrate the protection of a legitimate interest in holding a hearing in private: **B v. United Kingdom** (2002) 34 EHRR 19 at paras 45-49.

190. The Tribunal conclude that, properly interpreted in context on ordinary principles of domestic law, rule 13 and section 68(4) of RIP A do not apply to prevent publication of the reasons for the rulings of the Tribunal on the preliminary issues on matters of procedural law, as they are not a "determination" of the proceedings brought before them or of the complaint made to them within the meaning of those provisions. Those provisions concern decisions of the Tribunal which bring the claim or complaint to an end, either by a determination of the substantive claim or complaint

on its merits, or by a determination of the claim or complaint for one of the specific reasons mentioned in rule 13 (3):

> "Where they make a determination:
>
> (a) that the bringing of the section 7 proceedings or the making of the complaint is frivolous or vexatious;
>
> (b) that the section 7 proceedings have been brought or the complaint made, out of time and that the time limit should not be extended; or
>
> (c) that the complainant does not have the right to bring the section 7 proceedings or make the complaint;

the Tribunal shall notify the complainant of that fact."

191. As explained earlier, the legal argument on the preliminary issues is part of the "proceedings" heard by the Tribunal within rule 9. Separate provision is, however, made in section 68(4) and rule 13 for the "determination" of the proceedings. The provisions of RIP A use "determination" in a narrower sense than, for example, a "decision made by the Tribunal," or an order of the Tribunal: see, for example, section 68 (3)(b), which refers to

> " ....any determination, award, order or other decision made by the Tribunal with respect to the matter."

The Tribunal conclude that the natural and ordinary meaning of "determination" in the relevant context does not include the legal rulings on the preliminary issues, which do not determine the merits of the substantive matters or bring the proceedings to an end for one of the reasons specified in rule 13(3). In the circumstances there can be publication of the reasons for legal rulings on preliminary issues, but, so far as

determinations are concerned, the Tribunal are satisfied that section 68(4) and rule 13 are valid and binding and that the distinction between information given to the successful complainants and that given to unsuccessful complainants (where the NCND policy must be preserved) is necessary and justifiable.

ISSUE 3: **Ambit of discretion**

In the light of the answers under Issue 1 and Issue 2 above, what is the ambit of the Tribunal's discretion (if any) under s. 68(1) of RIPA to determine their own procedure?

192. This question arises in those instances where a rule has been held not to bind the Tribunal either because it is ultra vires the rule-making power in section 69 or because, properly interpreted, the rule does not cover a procedural area, which accordingly remains within the Tribunal's discretion under section 68.

193. The Complainants contended that the Tribunal are entitled and bound to exercise their procedural power under section 68(1) so as to achieve compatibility with the Convention rights, as the relevant rules are ultra vires and there are no provisions in RIPA, which, properly interpreted, require them to do otherwise.

194. The Respondents' case is that the Tribunal are bound by all the Rules, as they are compatible with the Convention rights. Alternatively, they would only be justified under section 3(1) of the 1998 Act in departing from the Rules to the minimum extent

necessary to secure compliance with Convention rights and to adopt more extensive procedural safeguards, while maintaining the NCND policy so far as they are able to do so.

195. In the light of the earlier rulings the position is that the Tribunal have a discretion under section 68(1) in respect of only three relevant areas of procedure: whether to hold an oral hearing with all parties present; whether to hold the hearing in public; and whether to publish detailed reasons for their rulings on pure questions of law concerning procedure and practice. The ambit of those discretions is determined by the Tribunal principally by reference to (a) the express provisions of section 69(6), which reflect, and are compatible with, Articles 6, 8 and 10 of the Convention, as interpreted by the Strasbourg Court and by this Tribunal; (b) the duties of the Tribunal under RIPA and the Rules; and (c) the particular importance of maintaining the NCND policy.

In the light of the answers under Issue 1 and Issue 2 above, insofar as the Tribunal's discretion under s. 68(1) of RIPA is prima facie circumscribed by valid Rules of the Investigatory Powers Tribunal Rules 2000, what is the ambit of the Tribunal's discretion (if any) under s. 6(1) of the Human Rights Act 1998 to determine their own procedure?

196. It is provided by section 6 (1) of the 1990 Act that:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if-

(a) as the result of one of more provisions of primary legislation the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention right, the authority was acting so as to give effect to or enforce those provisions

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature..."

197. The Complainants' position is that the answer is the same whether the issue is approached purely as one of interpretation of section 69 of RIPA and the application of section 3(1) of the 1998 Act to section 69 and the Rules, or from the standpoint of the Tribunal's obligations under section 6 (1) of the 1998 Act to proceed compatibly with the Complainants' Convention rights.

198. It was contended that section 6(2) is not engaged by section 69. If it was, then an incompatible rule would be intra vires and section 6(2) would allow the Tribunal to apply it.

199. The Respondents accepted that the Tribunal is a public authority for the purposes of section 6(3), but contended that section 6 does not authorise them to disregard or ignore the Rules. They were authorised to be made under section 69 in that form and section 69 cannot be read down under section 3(1) to produce a revised procedure. Their primary contention is that the Rules are compatible with the Convention rights.

By applying them the Tribunal will not be acting incompatibly with Convention rights.

200. Even if, however, any of the Rules are incompatible, they give effect to the intention of Parliament, as clearly expressed in section 69, which contemplates that rules may be made in an incompatible form, even though they are not required to be so made. The Tribunal cannot act differently than they are required to act by the Rules made under primary legislation. Under section 6(2)(b) they must give effect to the Rules, doing what they have been authorised to do by them: R v Kansal (No 2) [2001] 3 WLR 1562 at para 88 per Lord Hope. The effect of section 6(2) is to disapply section 6(1) so that the Tribunal would have no discretion to ignore the Rules, even if they were incompatible

201. In the light of the earlier rulings above the Tribunal conclude that they have no separate discretion under section 6(1) of the 1998 Act to determine their own procedure. Their discretion to determine -their own procedure is expressly conferred by section 68(1) of RIP A. It is governed by that section, save in so far as it is subject to the Rules. If, and to the extent that, the Tribunal have decided that a particular rule is invalid (rule 9(6)) or that a particular rule does not apply (rule 13 in the case of legal rulings on preliminary issues), the procedure of the Tribunal will remain within their discretion under section 68(1). If, as the Tribunal have also decided, a rule is, on its proper interpretation, a valid rule (rule 6 and rule 9, save for rule 9(6)), then the discretion of the Tribunal under section 68(1) is subject to those rules. There is no discretion to act differently under section 6(1).

ISSUE 4:Exercise of discretion

In the light of the answers under Issues 1,2 and 3 above, how should such discretion (if any) as the Tribunal enjoys with respect to determining their own procedure be exercised?

202. The contention of the Complainants was that the Tribunal's discretion should be exercised so as to conduct the proceedings before them in accordance with the principles of fair trial and open justice, except so far as any departure from those principles is sufficiently and specifically justified.

203. The Respondents' primary case is, of course, that the Tribunal's duty is to apply the Rules in their clear and natural meaning and that, apart from the particular discretions conferred and covered by the Rules, they have no relevant discretion to exercise.

204. Alternatively, if the Tribunal have any relevant discretion, they should not exercise it to apply the procedure proposed by the Complainants (see para 18 above), as that would undermine the NCND policy. Only limited, if any, adjustments should be made.

205. The conclusion of the Tribunal is that, in respect of the three relevant areas of discretion, the Tribunal exercise it, first, by holding an oral hearing of the preliminary issues in the presence of all the parties; secondly, by directing that the oral hearing of the legal argument on the preliminary issues should be treated as having been held in public; and, thirdly, by directing that the reasons for the rulings on the preliminary

issues should be given in public. That procedure runs no risk of disclosure of any information to any extent, or in any manner, that is contrary to or prejudicial to the matters referred to in section 69(6)(b) of RIP A and rule 6(1) or to the NCND policy. It is also compatible with Convention rights.

CONCLUSION

206. The Tribunal decline to make the procedural directions sought by the Complainants in para 18 above and invite the parties to make any further submissions they may wish to make on how the Tribunal should now determine the proceedings and the complaints. Subject to any further submissions, the Tribunal will proceed to deal with the claims and complaints of the Complainants in accordance with the normal procedure.