Title: Investigatory Powers Tribunal – Domestic Right of Appeal

IA No: HO0201

Lead department or agency:
Home Office

Other departments or agencies:
FCO, Cabinet Office, NIO, MOJ, CPS, GCHQ, MI5, SIS, MOD, HMRC, NCA, MPS, PSNI, Police Scotland, wider law enforcement agencies

Impact Assessment (IA)

Date: 4 November 2015

Stage: Consultation

Source of intervention: Domestic

Type of measure: Primary legislation

Contact for enquiries:
investigatorypowers@homeoffice.gsi.gov.uk

Summary: Intervention and Options

RPC Opinion: Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, Measure qualifies as One-Out?**	
£0m	£0m	£0m	No	NA

What is the problem under consideration? Why is government intervention necessary?

Individuals who believe themselves to have been unlawfully surveilled can bring a case before the Investigatory Powers Tribunal (IPT). Currently those wishing to challenge a judgment from the IPT must bring it before the European Court of Human Rights (ECtHR), a system which has been identified as time consuming, opaque and difficult to understand. Legislation is necessary to provide the public with reassurance that surveillance bodies can be held to account effectively within the domestic courts.

What are the policy objectives and the intended effects?

To achieve a potential means by which a Claimant can have their case heard by an appellate court in the domestic court system following permission to appeal from the IPT. This is intended to increase public confidence that those who use investigatory powers are fully held to account by the law, and that Articles 8 and 10 of the European Convention on Human Rights are respected. It will also serve to bring the IPT in line with the wider British Tribunal system and to lessen the cost of time and inconvenience for those who appeal.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

1. Do nothing- maintain the current system wherein the only route for challenging a judgment by the Tribunal is to bring a claim at the ECtHR.
2. Create a domestic right of appeal that would hear appeals in the British court system, where there is a point of law issue.

Option 2 is the preferred option as it best meets the policy objectives set out above.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** December 2021

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** No	**< 20** No	**Small** No	**Medium** No	**Large** No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)	**Traded:** N/A		**Non-traded:** N/A		

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister ..... Date: 3/11/15

Summary: Analysis & Evidence

Policy Option 1

Description: Do nothing.

FULL ECONOMIC ASSESSMENT

Price Base Year 2015	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0		0	0
High	0		0	0
Best Estimate	0		0	0

Description and scale of key monetised costs by 'main affected groups'

This option is the baseline and there are no additional costs or benefits associated with this option.

Other key non-monetised costs by 'main affected groups'

This option is the baseline and there are no additional costs or benefits associated with this option.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	N/A		N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

This option is the baseline and there are no additional costs or benefits associated with this option.

Other key non-monetised benefits by 'main affected groups'

This option is the baseline and there are no additional costs or benefits associated with this option.

Key assumptions/sensitivities/risk — **Discount rate (%)** 3.5

It is assumed that the appeals process through the ECtHR stays the same under this option, such that the burden on individuals who have their appeals heard in this court does not change.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Create a domestic right of appeal from the Investigatory Powers Tribunal

FULL ECONOMIC ASSESSMENT

Price Base Year 2015	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: N/K	**High:** N/K	**Best Estimate:** N/K

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/K		N/K	N/K
High	N/K		N/K	N/K
Best Estimate	N/K		N/K	N/K

Description and scale of key monetised costs by 'main affected groups'

The Home Office and Ministry of Justice have agreed that the impact to the justice system is likely to be minimal. There will be costs associated with training judicial and court staff which will be considered as part of the ongoing terms of trade discussions between the two departments.

Other key non-monetised costs by 'main affected groups'

There will likely be a necessary time cost to train the IPT and its secretariat in the new rules and procedures.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low				
High				
Best Estimate	N/K		N/K	N/K

Description and scale of key monetised benefits by 'main affected groups'

No benefits have been monetised for this policy.

Other key non-monetised benefits by 'main affected groups'

Less time consuming than the current arrangements, whereby challenges are heard via the ECtHR process. Easier to understand to those involved. Public reassurance that those who use investigatory powers can be fully held to account for their lawfulness.

Key assumptions/sensitivities/risk — **Discount rate (%)** 3.5

The extent of the increase in costs will depend on the quantity of cases eligible for appeal, which may exceed the assumptions made.
Appeals could entail extra costs for departments and agencies, and a greater strain on staff resources.
It is possible that reform may not generate the expected increase in confidence amongst the public.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	**Benefits:** N/A	**Net:** N/A	No	NA

Evidence Base

The Investigatory Powers Tribunal (IPT) was established in October 2000 under the Regulation of Investigatory Powers Act 2000 (RIPA). It is one of a range of oversight provisions which ensure that public authorities act in ways that are compatible with the Human Rights Act 1998. Specifically it provides a right of redress for anyone who believes they have been a victim of unlawful action under RIPA or wider human rights infringements in breach of the Human Rights Act 1998.

The Tribunal investigates and determines two types of application:

a.) Interference complaints against a broad range of public authorities using covert techniques regulated under RIPA. This includes interception, surveillance and interference with property. The public authorities include UK intelligence, military and law enforcement agencies as well as a range of Government Departments, regulators and local authorities.

b.) Human rights claims. These claims can relate to the use of covert techniques by intelligence, military and law enforcement agencies.

There is currently no domestic route of appeal from the IPT; a Complainant wishing to challenge a judgement from the IPT must bring it before the European Court of Human Rights (ECtHR). It is important for public trust and confidence in the use of investigatory powers that there is a robust legal means by which their use can be challenged.

Three independent reviews recently undertaken by the Intelligence and Security Committee of Parliament, David Anderson QC and the Royal United Service Institute all recommended the creation of a domestic route of appeal on a point of law. David Anderson commented that:

> *The IPT is unusual in being subject to no process of appeal, an incongruous state of affairs given that it is the only appropriate tribunal for certain categories of human rights appeals (RIPA s65(2)(3)), and that it can decide issues of great general importance involving vital issues of principle.*
>
> *The Court of Appeal is now accustomed to hearing appeals involving closed materials. It is desirable that human rights cases should be finally determined in the UK if possible; and if not, that the ECtHR should have the benefit of views reached after the benefit of argument in more than one court, and expressed at a very senior judicial level within the UK.*

While the IPT's rules and procedures have been found to be lawful by the European Court of Human Rights (Kennedy v United Kingdom [2011] 52 EHRR 4), there still remains a concern that the decisions of the IPT should be subject to scrutiny, just as other Tribunals are.

A. Rationale

The only option available to a complainant – or a respondent - wishing to challenge a decision of the IPT is to bring a case before the European Court of Human Rights (ECtHR).

The current appeal process through the ECtHR creates inherent inefficiencies in the process of seeking justice domestically, due to the need to take matters outside of the domestic system. The ECtHR can take up to a year to consider an applicant's claim, and may also require a reference to the Committee of Ministers of the Council of Europe in order to execute any judgment made.

It also makes the process of challenging the Tribunal's decisions opaque. The ECtHR does not act as a court of appeal in relation to national courts; it does not rehear cases, and so there can be a perceived lack of accountability to the IPT's judgments.

B. Objectives

The overarching aim of introducing a domestic right of appeal, enabling parties to challenge the IPT's rulings on points of law – including points of law of general public importance, is to increase public confidence in the independence of the Tribunal and the quality of the Tribunal's decisions.

The favoured option seeks to create a system that is easier to understand, and less stressful and time consuming for those involved. The aim is also to reassure the public that those bodies which use investigatory powers can be fully held to account for the lawfulness of their actions.

C. Options

Two options have been considered. The basic assumption for both options is that the Investigatory Powers Tribunal should be maintained as an oversight provision for the exercise of investigatory powers.

Option one – do nothing

In 2014 the Tribunal received 215 complaints and claims in total, of which 60 were complaints, 58 were claims and 97 were a joint claim and complaint.

After the IPT have considered/heard a claim or complaint, they are restricted to providing the complainant with one of two decisions:

- **A determination in the complainant's favour - s68(4)(a)**

  Where the IPT upholds a complaint/claim, finding that conduct was unlawful, the IPT provides a summary of their determination together with any findings of fact that have arisen from its investigation. The IPT has the power to make an award of compensation, or other order, as it considers appropriate (section 67(7) of RIPA).

- **A statement that 'no determination' has been made in the complainant's favour – s68(4)(b)**

  Where the IPT do not uphold a complaint/claim, they will simply state that no determination has been made in the complainant's favour. This limited approach is adopted, as it is not possible to confirm whether conduct has or has not been taken against individuals, reflecting wider NCND policy (neither confirm nor deny). As a result, such a determination can mean:

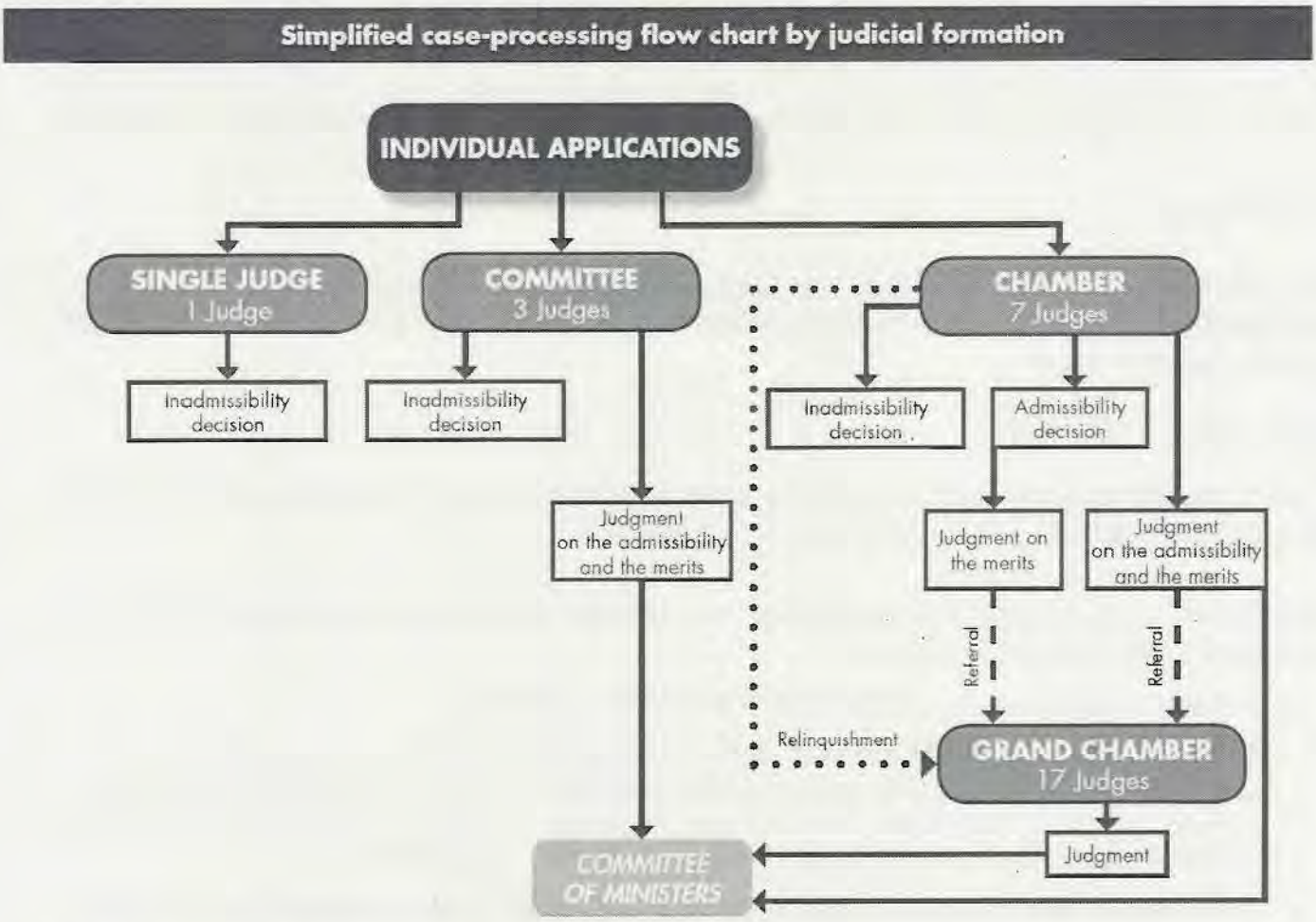
  - That no conduct took place against the individual; or
  - That conduct was taken against the individual, but that such activity was lawful.

As noted above, at present Claimants wishing to challenge an IPT judgement must then do so via the ECtHR.

Proceedings in the ECtHR are generally dealt with on paper, with public hearings being exceptional, with claimants only having to bear their own costs (e.g. lawyers' fees and expenses relating to research and correspondence). The Court advises that applicants may

have to wait up to a year to have their claims heard, though applications can be made for an expedited process if, for example, there is a risk of immediate physical danger.

Applications to the ECtHR that are clearly inadmissible (i.e. due to failure to exhaust domestic remedies) will be dealt with by a single judge. Where a case is admissible but concerns matters previously ruled on a Committee of three judges will consider the claim on merits. Where a claim brings up matters not previously ruled on it will be considered by a Chamber of seven judges. In exceptional circumstances, such as where a claim raises a serious question about the interpretation of the Convention, it may be relinquished to the Grand Chamber of seventeen judges. This is illustrated in the following flowchart:



Option two – create a domestic right of appeal

This option would see the introduction of a domestic right of appeal on a point of law as recommended by David Anderson. On this basis we anticipate that there will be few (fewer than 10 annually, on the basis that last year there were only three matters which warranted oral hearings) claims/complaints which will be eligible for an appeal.

A lot of the claims and complaints considered by the IPT could potentially give rise to national security issues and so inevitably a significant proportion of the work undertaken by the IPT has to be conducted in closed sessions. Therefore, complainants will not always know whether there is a point of law which has been considered, which could be the subject of an appeal. In these circumstances we are proposing that the appeal process will operate as follows (The same process would be employed in the event that a complaint does not raise national security issues that require closed session):

- All applications (complaints and claims) will be capable of being subject to an appeal, where there is a point of law.
- The IPT will determine whether the complaint/claim raised a point of law relevant for the purposes of an appeal. This will be done at the same time as considering/hearing the claim/complaint.
- The IPT will confirm to the complainant whether or not there is a relevant point of law for the purposes of an appeal, at the time of providing their determination/non-determination to the complainant.
- Where the IPT consider there is no point of law raised, the determination will be final and this decision will not be subject to challenge. In these circumstances no appeal will be possible.
- Where the IPT consider that there is a point of law, the complaint will have the right to:
    - Make an initial application to the IPT for permission to appeal. If permission is granted, then the appeal can proceed to the relevant appeal court, which will be identified by the IPT.
    - Where permission is refused by the IPT, the Tribunal will confirm to the complainant which the relevant appeal court is for the purposes of seeking permission. The complainant will then be able to make an application for permission to appeal directly to the higher court.

D. Costs and Benefits

The legislation in relation to creating a domestic right of appeal for the IPT would provide for greater costs incurred only in respect of the public purse. No additional costs would be accrued by businesses or individuals.

GENERAL ASSUMPTIONS & DATA

The Government would continue to provide for a right to redress to Claimants through the Investigatory Powers Tribunal, we have therefore assumed that IPT provisions within the Regulation of Investigatory Powers Act 2000 would continue to stand.

While efforts have been made to understand the costs and benefits to all affected groups, it is necessary to make some assumptions. The Home Office has (as far as is possible) strengthened and confirmed the evidence base through information gathered through consultation with Government departments; the Office of the Chief Justice and operational partners.

GROUPS AFFECTED

- Government Departments **(Home Office, FCO, Cabinet Office)**
- SIAs **(Security Service, Secret Intelligence Service, GCHQ)**
- LEAs **(National Crime Agency, the Police, HM Revenue and Customs)**
- Ministry of Justice
- HM Courts and Tribunal Service
- Crown Prosecution Service
- HM Prison Service
- The public

Option one: Do nothing, maintain the current system wherein the only route for challenging a judgment by the Tribunal is to bring a claim at the ECtHR.

COSTS

This is the baseline option. No additional monetary costs incurred as a result of policy option.

BENEFITS

This is the baseline option. No additional monetary or non-monetary benefits incurred as a result of this option.

There is a risk of reduced public confidence under this option.

Option two: Create a domestic right of appeal that would hear appeals in the British court system, where there is a point of law issue.

COSTS

The Home Office and Ministry of Justice have agreed that the impact to the justice system is likely to be minimal. There will be costs associated with training judicial and court staff which will be considered as part of the ongoing terms of trade discussions between the two departments.

BENEFITS

The overarching aim of introducing a domestic right of appeal, enabling parties to challenge the IPT's rulings on points of law – including points of law of general public importance, is to increase public confidence in the independence of the Tribunal and the quality of the Tribunal's decisions.

Bringing the IPT in line with the broader British justice system will have a positive impact on those who are able to appeal. It will:

- be less time consuming than the current arrangements - whereby challenges are heard via the ECtHR process
- be easier to understand
- be less stressful to those involved
- reassure the public that those who use investigatory powers can be fully held to account for their lawfulness, and that Article 8 and Article 10 of the European Convention on Human Rights are being upheld; and
- increase the transparency of proceedings as the IPT would confirm whether there was a valid point of law for appeal.

The creation of the domestic right of appeal should also provide the following benefits:

- Fewer cases being referred to the ECtHR, having been dealt with in the domestic courts – thus saving those bringing challenges both time and cost, and reducing the stress associated with long, drawn-out legal cases. This will not preclude cases being taken to the ECtHR, but does provide an opportunity for remedy more easily domestically first.
- For those cases that do go to the ECtHR, the benefit of arguments that have been heard in more than one court and expressed at a very senior judicial level will aid the legal process, ensuring stronger judgements overall.

F: Risks

The extent of the increase in costs will depend on the quantity of cases eligible for appeal, which may exceed the assumptions made. The bar for appeals under the proposed domestic route would be higher than for challenges at the ECtHR, so this risk is relatively low.

Appeals could entail extra costs for departments and agencies, and a greater strain on staff resources. Measures to mitigate this are in the early planning stages.

It is possible that reform may not generate the expected increase in confidence amongst the public; however we are confident that the new system's greater transparency and increase in oversight of the bodies which use investigatory powers will – as part of the broader package of reform to oversight – will serve to reinforce public trust in the system.

G. Implementation

The Government will Introduce a Bill following any revisions necessary after pre-legislative scrutiny, in the New Year. The Bill will need to be enacted by 31 December 2016, by which point the Data Retention and Investigatory Powers Act will fall away.

This amendment to the appeals procedure is a complex process and full implementation plans will be considered after the introduction of the primary legislation.

H. Monitoring and Evaluation

The proposed legislation will be scrutinised by a Joint Committee of Parliament, before being introduced in the early New Year. The Intelligence and Security Committee of Parliament will continue to oversee the activities of the security and intelligence agencies, including their exercise of investigatory powers. And the Investigatory Powers Tribunal will provide a right of redress to any individual who believes they have been unlawfully surveilled.

This impact assessment will be revised in light of the pre-legislative scrutiny process and the report of the Joint Committee.

I. Feedback

The Government will consider carefully the recommendations of the Joint Committee before bringing forward revised proposals for Introduction. Public consultation will form part of the pre-legislative scrutiny process.