**Hebrew University & University of Essex Surveillance Workshop Series**

**in collaboration with the Investigatory Powers Commissioner’s Office**

**Investigatory Powers Commissioner(s) and Judicial Review**

Workshop

Landmark Chambers London

14 March 2018

10.30 -16.30

**The meeting will be held under the Chatham House rule**

The Investigatory Powers Act 2016 provides that when deciding whether warrants should be approved a Judicial Commissioner is required to review the Secretary of State’s conclusions as to whether the warrant is necessary and whether the conduct to be authorised under the warrant is proportionate. In doing so the Judicial Commissioner must apply the same principles as would be applied by a court on an application for judicial review. These requirements form what is widely referred to as the ‘double lock’. This workshop will consider what these tests are likely to require in practice and how the Investigatory Powers Commissioner’s Office is preparing for this important role.

Agenda

The following is a broad agenda for the day. It refers to some of the emerging issues and questions but is not exhaustive and is intended as a guide. The discussion will be informed by some hypothetical factual scenarios that will be fed into the discussion.

10.30: Welcome and Introductions

10.40 – 11.00: The nature of the scheme:

A update from the IPCO

The role of the JC/JCs

Their institutional and functional independence

Can a non-adversarial process be sufficiently robust? What eg are the points of friction that enable JCs to see/test alternatives/consider the impacts on those who are participants?

The meaning of the ‘double lock’. In what sense is a ‘review’ a ‘lock’?

11.00- 13.00: What do the principles of judicial review require?

What *level* of scrutiny is required?

Will this *level* of scrutiny vary? If so, what factors are relevant?

Rights: How will JCs determine whether rights are engaged? How will they approach rights beyond privacy, including eg freedom of expression and other rights which are central to the proper functioning of democracy?

How broad a margin of judgement will be permitted the SS?

Sensitive professions

14.00-16.00: Necessity and proportionality

What does necessity and proportionality require in practice? Can (should) these tests be given greater clarity? Eg Advice Note (AN) (Para 16) Refers to consideration of alternative ‘less intrusive means’. How will these alternatives be identified?

AN para 17. The necessity test as per the ECtHR (and CJEU) is a key requirement. Note that, in the context of secret surveillance, the relevant test is widely regarded as one of *strict* necessity as discussed in *Szabo & Vissy* (ECtHR, para 72-72) and *Tele2* (CJEU, paras107-110;116-119). If this test is applied, it may require the JC to refuse a warrant, even though the IPA 2016 allows for powers in those circumstances. This is because certain of the powers in the IPA are arguably broader than those permitted by reference to European case law.

16.00-16.15: Closing remarks and ‘any other business’

After the workshop people are welcome to join us for a post-workshop tea/drink and if anyone is interested in dinner, let us know and we will arrange.