AC- 2023-LON-2413; CO/2593/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE KING
on the application of

(1) IA (2) TT (3) AM (a child, by his litigation friend TT) (4) MB (5) KK (6) IAL (7) NA (8) AS

Claimants

- and –

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Defendants

- and –

JUSTICE

Intervener

SKELETON ARGUMENT ON BEHALF OF JUSTICE
For Hearing: 8 November 2023

INTRODUCTION

1. This is the skeleton argument on behalf of JUSTICE, the all-party law reform and human rights organisation, in support of its intervention in this case for the purpose of making representations at a hearing listed on 8 November 2023 before Mr Justice Swift to address the issue defined at paragraph 6 of the Court's Order dated 25 October 2023 concerning redactions of the names of civil servants.

2. It is clear from their skeleton argument that the Defendants seek nothing less than the introduction of a general rule in favour of redacting the names of junior civil servants from documents disclosed in judicial review proceedings. JUSTICE's intervention is directed towards that issue alone. The Court should note that, at the time of writing,

JUSTICE has not seen the underlying evidence in support of the application and the specific redactions which the Defendants seek in this case.

LEGAL PRINCIPLES

THE DUTY OF CANDOUR

3. The principles governing the duty of candour are well-known to the Court and summarised in the skeleton arguments of the parties. A few features of the principle bear emphasis in the present context:
   (1) The duty of candour is an onerous duty where the public authority is required to ensure that not only all relevant documents, but also all relevant information, is before the Court.
   (2) The underlying purpose of the duty of candour is the same as that of disclosure in civil proceedings, which is to ensure that the applicant has a fair hearing and that all relevant information bearing on the lawfulness of the decision is made available. The only reason that standard disclosure does not apply in judicial review proceedings is because the duty of candour plays the same role.
   (3) It is a feature of judicial review proceedings that "the vast majority of the cards will start in the public authority's hands" (***R v Lancashire County Council, ex p. Huddleston*** [1986] 2 All ER 941). This imbalance of access to the documentation necessary to evaluate the lawfulness of the decision under challenge creates an inequality of arms which makes it particularly important that public authorities discharge these responsibilities fairly and fully.
   (4) The duty of candour is not confined to the boundaries of the claimants' pleaded case (as with standard disclosure in civil litigation), but even extends to documents that would give rise to (hitherto unknown) grounds of challenge.
   (5) The role of a public authority in a judicial review is not the same as that of a defendant in ordinary litigation, seeking by every possible means to defend its own private interests; rather it is engaged in a common enterprise with the Court trying to fulfil the public interest in upholding the rule of law: ***R(Horeau) v Secretary of State for the Foreign Office*** [2018] EWHC 1508 (Admin), Singh LJ at [20].
   (6) The relationship between the courts and public authorities "*is one of partnership, based on a common aim, namely the maintenance of the highest standards of public administration"* (***ex p. Huddleston***).

OPEN JUSTICE

4. Open justice is a fundamental constitutional principle at common law: ***Al Rawi v Security Service*** [2011 3 WLR 388. It has two dimensions. The first is that cases are heard in open court to which the general public and the media have access. The second reflects the fact that, as Judge LCJ put it in ***R(Binyam Mohamed) v Foreign Secretary*** [2010] 3 WLR 55, "*In reality very few citizens can scrutinize the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens*." Accordingly, "*as respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this*": ***AG v Leveller Magazine*** [1979] AC 440.

5. The seminal case of ***Scott v Scott*** [1913] AC 493 established a number of fundamental principles which remain the corner stones of the open justice principle today. In summary, these are:

(1) The open justice principle is integral to the fair trial rights of the parties and to maintaining public confidence in the administration of justice.
(2) While hearing a case in public *"may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses….all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect"* (Lord Atkinson, p.463).
(3) The starting point is that of open justice and the burden lies on the party seeking to persuade the Court to derogate from open justice to persuade it to adopt that exceptional course.
(4) The only exception to the open justice principle permitted at common law is where the departure is strictly necessary because hearing the case in public would frustrate or render impractical the administration of justice: "*It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court"* (per Earl Loreburn, p.446).
(5) As Lord Diplock put it in ***AG v Leveller Magazine*** [1979] AC 440: "*However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."*
(6) Judges have to be extremely vigilant to safeguard the principle because there is no greater danger to the open justice principle *"than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves"* (Lord Shaw, p.477).

6. *Scott v Scott* also established the principle that the courts do not have the power at common law to create new exceptions to the open justice principle; that can only come about through legislative action by Parliament. As Lord Shaw put it at p.478, *"Courts of justice must stand by constitutional rule. The policy of widening the scope of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider."* All of the new exceptions to open justice since *Scott v Scott* have resulted from Parliamentary intervention. When the courts were invited to develop a major new exception to open justice for closed material procedures in national security cases, the Supreme Court held that they had no power at common law to do so: ***Al Rawi v Security Service*** [2011] 3 WLR 388.

7. In 2011 Lord Neuberger of Abbotsbury MR issued ***Practice Guidance (Interim Non-Disclosure Orders)*** [2012] 1 WLR 1003, which contains a highly authoritative summary of the key open justice principles, cited with approval by the Court of Appeal in ***Global Torch v Apex Global Management Ltd*** [2013] EWCA Civ 819:

> *"9 Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and Scott v Scott [1913] AC 417 . This applies to applications for interim non-disclosure orders: Micallef v Malta (2009) 50 EHRR 920, para 75ff; Donald v Ntuli (Guardian News & Media Ltd intervening) [2011] 1 WLR 294 , para 50.*
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> *10 Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society [1984] QB 227 , 235; Donald v Ntuli [2011] 1 WLR 294 , paras 52–53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.*
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> *11 The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: M v W [2010] EWHC 2457 (QB) at [34].*
>
> *12 There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: Ambrosiadou v Coward [2011] EMLR 419, paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.*
>
> *13 The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: Scott v Scott [1913] AC 417 , 438–439, 463, 477"*

8. In ***R (on the application of M) v Parole Board*** [2013] EMLR 23, the Divisional Court noted at [26] that "*Upon the importance of the principle of open justice and the freedom of the press to report proceedings of public interest the common law and the European Court of Human Rights walk step in step*." Article 6 confers a right of public hearings and public pronouncement of judgment, while Article 10 case law recognises the important "*public watchdog*" role of the media in a democratic society when reporting cases before the Courts that raise matters of public interest: ***Sunday Times v UK*** (1979-80) 2 EHRR 245.

9. In ***Global Torch***, the appellant sought an order for a private hearing on the basis that seriously reputationally damaging allegations were being made in hard-fought commercial litigation. The Court of Appeal considered how the balance should be struck between open justice, Article 6, Article 10 and Article 8. In relation to balancing Article 10 and Article 8, Maurice Kay LJ observed at [25]: "*Thus the competing rights do not exist within a presumptive* legal *hierarchy but that does not mean that in given situations – for example, open justice vs reputational damage – one will not generally trump the latter*." He also observed at [27] that just because a litigant "*waves an article 8 fla*g" in favour of a private hearing that should not result in a protracted and expensive hearing to determine the issue: "*Often, indeed usually, experience shows that the*

application can be determined very quickly. It also shows that, in most [Article 8] cases falling outside the area of recognized exceptional circumstances (which will often fall within CPR r.39.2(3)(a)), the open justice principle will prevail."

10. The same has been true in the context of the many unsuccessful applications for anonymity based on Article 8 (where the subject matter of the claim has not itself involved private information): see ***In re S (A Child)(Identification: Restrictions on Publication)*** [2004] UKHL 47, [2005] 1 AC 593 (Article 8 invoked unsuccessfully by a child seeking injunctive relief where it would have prevented the defendant mother from being identified in criminal proceedings); ***In re Trinity Mirror*** [2008] EWCA Crim 50, [2008] QB 770 (Article 8 invoked unsuccessfully to prevent a defendant in criminal proceedings from being identified); ***In re British Broadcasting Corporation*** [2009] UKHL 34, [2010] 1 AC 145 (Article 8 did not prevent the lifting of an anonymity order relating to a person facing the prospect of re-trial for a criminal offence); ***In re Guardian News and Media Ltd*** [2010] UKSC 1, [2010] 2 WLR 325 (Article 8 did not prevent the lifting of anonymity relating to persons subject to directions made under the United Terrorism (United Nations Measures) Order 2006).

11. Furthermore, the ability of the media to report cases in a way which is interesting and engaging to the readers and viewers is itself protected by Article 10, which protects not only the substance of ideas and information but also the media's editorial judgement about the presentation of journalistic material: ***Jersild v Denmark*** (1994) 19 EHRR 1, para 31. This principle has been endorsed by the House of Lords and the Supreme Court in two cases concerning applications for anonymity which emphasized the importance to the media of being able to name individuals when reporting stories in the public interest: ***In re BBC*** [2010] 1 AC 145; ***In re Guardian News and Media*** [2010] 2 WLR 325.

SUBMISSIONS

12. JUSTICE submits that it is important to consider separately two distinct questions in two distinct stages, which must not be conflated. (1) What information should be disclosed to parties to litigation; and (2) what information can be reported to the general public? In the first stage, the focus is on the duty of candour and the ability of the claimant to have a fair hearing through disclosure of relevant documents and information. But it is not necessarily the case that all information presented to a court is made public. At the second stage, the focus is on the hearing of the case in open court, the ability of the media to report the case and the interests of persons affected by that publicity, which is governed by the open justice principle. Stage 2 determines what information is provided to the general public.

Stage 1: The Duty of Candour

13. The starting point is that public authorities must give fair disclosure of all relevant documents <u>and information</u> to claimants in judicial review proceedings. The critical issues are what information is relevant and what fair disclosure to the claimant requires. By definition the question of redactions only arises when a public authority has already decided that a document contains information that is relevant to the proceedings and must be disclosed pursuant to its duty of candour. It is a relevant document.

14. The question then arises as to what information may properly be redacted from a relevant document. This is addressed expressly in the Treasury Solicitor's "*Guidance on Discharging the Duty of Candour*" at paragraph 4.3, where it is explained that redaction "*is not the norm and arises for consideration only when dealing with matters such as legal professional privilege, PII, national security, international relations or other similar redactions*". The Guidance explains, "*Its purpose is to extract material that the department is not prepared to disclose because it is privileged, or subject to a PII claim, or to statutory constraints on disclosure, or because it is irrelevant but sensitive*". One of the guiding principles is, "*Do not redact where you can disclose*".

15. In summary, the Treasury Solicitor's Guidance proceeds from the (correct) basis that there are only two situations where redactions can be made: where there is an overriding public interest which is so important that it takes precedence over the general principle that all relevant information should be disclosed, such as LPP, PII or national security, or where the information is "*irrelevant but sensitive*".

16. If the position of a Government department is that a document which falls to be disclosed under the duty of candour should be redacted, it bears the burden of satisfying the Court of the correctness of its position. This is in accordance with the usual principle that he who asserts must prove. As the Government department concerned will necessarily have to had consider the basis for the redactions when making them and will have a record of its decision making (Treasury Solicitors Guidance, para 6.1), it should be well placed to explain the basis of them to the applicant and the Court and the additional costs of doing so should be relatively modest.

17. Public authorities should therefore be required to explain the basis for redactions made on the conventional grounds above at the time they are made. This will avoid applicants in judicial review proceedings from having to guess what lies behind the redactions and from having to apply for specific disclosure of further information, with all the additional cost and delay that this necessarily involves.

18. In addition, for specific disclosure applications the costs risks bears unequally on the parties given the greater resources of the public authority compared with those of the applicant. For these reasons, where redactions are made on conventional grounds, public authorities should provide an explanation for the redaction at the same time as the relevant documents are served.

The names of civil servants

19. In this case JUSTICE understands that the Defendants have identified a number of relevant documents that they propose to disclose pursuant to their duty of candour and have applied to redact the names of all the junior civil servants as a class. JUSTICE has not seen the evidence on which the Defendants rely, but it is understood that they contend that there should be a general policy in favour of redacting their names.

20. The question for the Court therefore, at stage 1, is whether fair disclosure requires that the names be disclosed to the claimant and the court. As to that, JUSTICE's position is that the names of civil servants which appear in relevant documents which fall to be disclosed under the duty of candour is plainly relevant information about that document. Knowing who created a document, who edited it, who suggested changes to it, who it was circulated to,

who approved it and when these events took place is relevant information that will help the claimant and the court understand the document and its role in policy making or government decision-making. JUSTICE respectfully adopts and endorses the observations of Mr Justice Swift in *FMA and others v Secretary of State for the Home Department* [2023] EWHC 1579 (Admin) at [48].

Stage 2: Open justice

21. On the premise that the names of civil servants are relevant and should be disclosed to the claimant and the Court, absent one of the established exceptions which make redactions of those names necessary, the question arises as to what further steps, if any, the court should take to prevent those names from entering the public domain. At this second stage of the analysis, the guiding principle is open justice.

22. It is a feature of the Defendants' submissions that they erroneously and impermissibly elide the question of disclosure with the question of what information should become available to the public. The submission at paragraph 2(4) of their skeleton argument that the scope of disclosure should reflect "*the general but real concerns across Government about the disclosure of documents*" is wrong in principle. It is the tail of feared publicity wagging the dog of disclosure.

23. For over a century, the principles governing any application to depart from open justice have been clear. The starting point is one of openness, with the burden falling on the party contending for a derogation from open justice to persuade the court that it is strictly necessary in the interests of justice.

24. If a witness or a person who might be named in open court because they are referenced in a document wishes their name to be with-held from the public in the proceedings, they must apply for anonymity in the usual way. Such applications must demonstrate why it is strictly necessary for that person to be granted anonymity. They must be supported by clear and cogent evidence. Unless these stringent tests are met the application must fail: ***Practice Guidance (Interim Non-disclosure Orders*)** [2012] 1 WLR 1003. These principles apply as much in judicial review proceedings as in any other case: ***R(M) v Parole Board*** [2013] EWHC 1360 (Admin) (DC).

25. Civil servants are no different from any other person before the courts in terms of the principles governing their anonymity. They do not, as a class, have any claim for special treatment. On the contrary, civil servants discharging an official function must expect a degree of scrutiny, and sometimes of criticism, arising from their role. The Strasbourg case law suggests that, if anything, they should be more tolerant of public scrutiny and criticism than ordinary members of the public given the nature of their role: ***Morice v France***, 2015 ECHR Judgment, no 29369/10 (GC). They must apply for anonymity in the usual way. They cannot use redactions at stage 1 to circumvent the requirements of open justice and s.12 of the Human Rights Act 1998 at stage 2.

26. The contention that all civil servants as a class enjoy a "*reasonable expectation of privacy*" in respect of their names does not represent the law. The "touchstone" of whether information concerns private life so as to engage Article 8 is whether the person

has a reasonable expectation of privacy in respect of the information.[1] The underlying question in all cases is whether the information is private.[2] A person's name is not private information, it is public information. If information in a document is not private the addition of a person's name does not engage their Article 8 rights.

27. A reasonable expectation of privacy must be possessed by the particular claimant in respect of particular private or confidential information e.g. medical information, financial information, information relating to intimate relationships, or in government, that person's identity as e.g. an officer of the intelligence services. No reference is made in the Defendants' submissions to any private or confidential information that could attract a reasonable expectation of privacy. A mere desire to avoid potentially embarrassing publicity in connection with your work is wholly insufficient.

28. Under the open justice principle, it is recognised that necessarily the hearing of cases in public and the provision of full information to the court may involve the individuals concerned being exposed to unwanted publicity and may be embarrassing, painful or humiliating for them: paragraph 5(2) above. There is a reference to some people having received abuse as a result of their names becoming known through litigation, but even attacks by ill-intentioned persons are not to be regarded as a natural consequence of reporting of proceedings and should not cause the court to depart from well-established principles.[3]

29. The appellate courts have repeatedly emphasised that the greatest threat to open justice arises from the courts themselves creating what are in effect new exceptions to the principle through modification of the court's procedures or practice: see paragraph 5(6) above. Accordingly, Judges down the ages have been urged to exercise extreme vigilance to make sure this does not occur.

30. The contention that junior civil servants as a class should in effect be granted anonymity by the back door through redactions at stage 1 instead of having to apply for it in the usual way on a case-by-case basis at stage 2 not only undermines the procedural safeguards of open justice and s.12 of the Human Rights Act 1998, it is also a demand for this Court to create what is in effect a new exception to the open justice principle. But the courts have no power at common law to create new exceptions to open justice; these require statutory authority: see paragraph 6 above.

31. For all of the reasons, the Court is respectfully invited to dismiss the application.

GUY VASSALL-ADAMS KC
MATRIX
7th November 2023

[1] ***Campbell v MGN Limited*** [2004] 2 AC 457, Lord Nicholls at [21].

[2] ***Campbell***, Lord Hope at [92].

[3] ***R v Newtonberry Magistrates Court, ex p. Belfast Telegraph Newspapers*** [1997] NILR 309; cited for this point in the Judicial College's Guidance – *Reporting Restrictions in the Criminal Courts*, p. 31.