

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



No. CO/3889/2022

Neutral Citation Number: [2023] EWHC 1804 (Admin)

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 8 June 2023

Before:

MR JUSTICE LANE

B E T W E E N :

THE KING
on the application of
CC

Claimant

- and -

SECRETARY OF STATE FOR DEFENCE

Defendant

MR T JOHNSTON (instructed by Harrison Clark Rickerbys) appeared on behalf of the claimant.

MR O SANDERS KC and MR E SHEPPARD (instructed by the Government Legal Department) appeared on behalf of the defendant.

J U D G M E N T

MR JUSTICE LANE:

1 This is an application by the defendant, the Secretary of State for Defence, that this judicial review claim, listed to be heard substantively next week, should be heard in private pursuant to CPR 39.2. That provision provides as follows:

“General rule – hearing to be in public

39.2

(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties’ consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).

(2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.

(2A) The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.

(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontested matters arising in the administration of trusts or in the administration of a deceased person’s estate; or

(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.

(4) The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.

(5) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4), a copy of the court's order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order."

2 Before going into the facts of the matter, I consider it necessary briefly to outline the relevant legal principles. As CPR 39.2 makes plain, there is a strong presumption in favour of hearings being in public, to the extent that that is possible compatibly with the matters articulated in 39.2(3), as to which it is common ground that sub-paragraphs (a), (b), (c) and (g) are relevant in the present case.

3 In *Cape Intermediate Holdings v Dring* [2019] UKSC 38, Lady Hale explained that the principal purposes of the open justice principle are two-fold. The first is to enable public scrutiny of the way in which courts decide cases, holding judges to account for their decisions, and to enable the public to have confidence that they are doing their job. The second purpose is to enable the public to understand how the justice system works and why judicial decisions are taken.

4 Nevertheless, it is established that there may be circumstances in which the interests of justice require a private hearing. For that the leading authority remains *Scott v Scott* [1913] AC 417. There, Lord Haldane explained that the principle of open justice is subject to exceptions which underscore the yet more fundamental principle that the chief object of the courts of justice must be to secure that justice is done. As a result, the court will not order a private hearing unless it is satisfied that it is necessary to exclude the public from some or all of the hearing and the burden is on the party seeking the private hearing. The nature of

that burden is to show that the ordinary rule must be superseded by the paramount consideration of ensuring that justice is done.

5 I also bear in mind that Article 10 of the ECHR, which provides that the exercise of freedom of expression 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.

6 As a result, the court will only order a private hearing if it concludes that there is no other less intrusive alternative by which the relevant interests may be protected. That may be by means of anonymisation, the holding of a partly open and partly closed hearing and by the publication of a partly open and partly closed judgment.

7 Having articulated the relevant legal principles, it is necessary to explain the factual background to the application. The claimant is a former member of the UK Special Forces (“UKSF”). He challenges the defendant’s decision to refuse express prior authority in writing (“EPAW”) for the publication of a book, which the claimant has written. The defendant refused EPAW because he assesses that publication would damage national security. The central issue, therefore, is whether the defendant’s refusal was justified under Article 10(2) of the ECHR; that is to say, whether in all the circumstances the refusal was a proportionate interference with the right expressed in that Article.

8 The evidence and submissions of both parties focus on the contents of the book and the lawfulness of the defendant’s national security assessment. The defendant’s case in advancing this application is that dealing with these matters in public would reveal those contents and cause or compound the effects of publication. That would defeat the object of

the hearing by bringing about the outcome which the decision is intended to prevent. That engages subparagraphs (a) and (c) of CPR 39.2(3).

- 9 In addition, large parts of the evidence and submissions are said by the defendant to be sensitive for national security reasons and should be protected from publicity.
- 10 The book in question exists at present in manuscript form. It describes the claimant's involvement in response to a terrorist attack that occurred in January 2019. Importantly, the defendant does not comment publicly on the activities of UKSF but maintains a policy of neither confirming nor denying.
- 11 It is common ground that these matters mean that part at least of the hearing next week should be in private. The fact that it is common ground is not, of course, determinative of the matter, as CPR 39.2 makes plain. It is for this court to decide whether that common ground is justified.
- 12 There have already been case management decisions, as a result of which there has been created a so-called "outer confidentiality ring" and an "inner confidentiality ring" in respect of certain of the materials to be considered by the court.
- 13 I am in no doubt that, compatibly with CPR 39, part at least of the hearing next week must be held in private. If the position were otherwise, then I agree that matters would come into the public domain which would, in effect, make the proceedings a dead letter. I am also of the view that national security interests concerning UKSF will play a prominent part in the hearing and that those matters should not be disclosed in open court. I also accept what Mr Sanders KC says, that the policy of neither confirm nor deny on the part of the defendant would be put at risk if the proceedings were held entirely in open.

- 14 The next question, therefore, is whether, compatibly with CPR 39.2, part of the hearing could nevertheless be held in public. In that regard, I note, in particular, that CPR 39.2(1) provides that a hearing may not be held in private unless and to the extent that the court decides that it must be held in private.
- 15 For the claimant, Mr Johnston submits there are matters that could be dealt with in public. In particular, he says that there would be no threat to national security if the parties discussed in open court the fact that the claimant is the individual who is widely reported to have participated in the incident to which I have made reference. The same applies as regards the claimant's wish to publish a memoir about the incident and the challenges to the defendant's decision. Those matters are said to be well-known and widely reported. Furthermore, Mr Johnston submits that the legal matters could be dealt with in public.
- 16 I bear those submissions very much in mind. I have, however, concluded that Mr Sanders is right to draw attention to the following considerations. There will be difficulties in drawing the line as between what might be discussed in open and what might be discussed in closed. In that regard, he draws attention to the appendix to his skeleton argument, showing an analysis of passages from the memoir of the claimant, which may or may not raise issues of national security.
- 17 Furthermore, as I have said, the defendant has a consistent policy in this area of NCND and it is not suggested that that policy is in any way inappropriate in relation to UKSF. I consider that it would be difficult to maintain that stance if proceedings were held in open to any extent.

18 Thirdly, and in my view most importantly, there would, notwithstanding what Mr Johnston has suggested, be the very real risk of an inadvertent slip or comment either from the court or from the parties during any open proceedings, which would risk damaging the very interests that CPR 39.2 seeks to preserve. In that regard, I have, with the parties' consent, considered a passage from part of the controversial evidence of Soldier B. Given that this is an open judgment, I cannot explain what the substance of that evidence is. I am, however, satisfied that it raises an issue which underscores the extreme problems that may be caused by such an accidental slip.

19 Mr Sanders submits that the matters which could be discussed in an open hearing would be in the nature of a cosmetic exercise. He questions whether that would be in the interests of justice. In this regard, reference is made to a short judgment which has no precedent force but which is nevertheless of relevance. This is the judgment of Swift J in the case of *R (UCPI Designated Lawyer Officers Core Participant Group) v Chairman of the Undercover Policing Inquiry & Anor*, CO/4936/2019. In that case, Swift J considered whether part of the hearing in that case could take place in public. Having considered the submissions of counsel, he decided that it could not. Swift J said this:

“It would be possible for some part of the legal submissions to be made without direct reference to the facts of the claim. However, two matters weigh against requiring the hearing to take place in public even to this limited extent. The first is that the ambit of the public hearing would be very limited indeed, and would realistically extend beyond consideration of some legal principles at a very high level of generality. The extent to which such an exercise would further the public interest in transparency would be slight. My conclusion is that such an exercise may well turn out to be little more than a gesture that would not serve any worthwhile purpose.”

20 I consider that, in the present case, such matters as may be capable of being dealt with in open fall to be similarly characterised. The interest, therefore, of the public in having such

parts of the hearing in open is accordingly limited. Against that, however, must be balanced the real risk of inadvertent slips, to which I have made reference.

- 21 I also bear in mind that the principle of open justice can, in the circumstances of this case, be protected by the fact that it will be possible for the court, following the substantive hearing, to provide a judgment which would be in open as well as in closed form. Accordingly, the public will have the opportunity of understanding the matter to a substantial extent without, importantly, there being any risk of inadvertent disclosure of material harmful to the national interest or to the other interests articulated in CPR 39.2(3).
- 22 Accordingly, I conclude that it is not appropriate for any part of the hearing to be held in open. I consider this is justified by CPR 39.2(3)(g). In all the circumstances, securing the proper administration of justice requires the hearing to be in private.
- 23 I should, however, make it plain that one consideration which featured in the submissions of counsel does not find favour. This is the consideration that moving from open to closed sessions will inevitably take time and therefore imperil the conclusion of the case within the 1.5 day time estimate, which Lang J posited in her order and which has not been challenged by the parties. To take account of such a matter in the context of CPR 39.2 would, in my view, put the cart firmly before the horse. The case should be allotted time, which takes account of the inevitable delay that would be involved in moving from open to closed and also, perhaps, back again. The public interest in open justice is too important to be diluted by such considerations.
- 24 It will, of course, be for the trial judge to keep the matter under review. In that regard, I observe that the order which I am invited to make will, compatibly with CPR 39.2 and the Master of the Rolls' Practice Guidance of April 2019, be published on the website of the

judiciary of England and Wales and it will, therefore, be possible for anyone who wishes to raise the matter of open justice to do so before the judge.

25 I also accept the suggestion of Mr Sanders that the parties can agree a public statement for this court to approve and for the Judicial Communications Office to issue, in the event that there are public enquiries about the hearing. That seems to me to be particularly important since, although I am giving this judgment *ex tempore* in open court, it is perhaps unlikely that it and approved before the hearing next week¹.

26 This concludes my judgment on the application.

¹ As proved to be the case.

