First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0253

Heard by CVP on 26-27 July 2021

Before

JUDGE ANTHONY SNELSON
MS JEAN NELSON
MR STEPHEN SHAW

Between

THE HOME OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Second Respondents

DECISION

On hearing Mr D Mitchell, counsel, on behalf of the Appellant, Mr W Perry, counsel, on behalf of the First Respondent, and Ms K Hafesji, counsel, on behalf of the Second Respondents, the Tribunal determines that:

(1) The appeal is allowed to the extent specified in the substituted Decision Notice under para (2) below, but is otherwise dismissed.
(2) A substituted Decision Notice is issued in the following terms.
    (i) The Appellant has correctly applied exemptions under the Freedom of Information Act 2000, ss 27(1) (a), (c) and (d) and 31(1)(a) and (e) to the information referred to in the accompanying Open Reasons as 'the Annex A paragraphs' and the public interest in maintaining those exemptions outweighs the public interest in disclosing that information.

(ii) No later than 28 days after the date of promulgation of this Decision Notice, the Home Office shall disclose to Mr Chai Patel the information requested by him in his communication of 29 August 2019, save for the Annex A Paragraphs.

OPEN REASONS

Introduction

1. On 28 August 2019, Mr Chai Patel, acting, as we understand it, on behalf of the Joint Council for the Welfare of Immigrants ('JCWI') wrote to the Home Office, requesting, pursuant to the Freedom of Information Act 2000 ('FOIA') a copy of "an unpublished Policy Equality Assessment" setting out "the Government's consideration of the impacts of the EU Settlement Scheme on those who share a protected characteristic."

2. The EU Settlement Scheme ('EUSS') operates to enable citizens of the EU, the European Economic Area and Switzerland resident in the UK at the end of the 'transition period', and their families, to apply for the immigration status required to enable them to remain after 30 June 2021.

3. A Policy Equality Statement ('PES') is a document which analyses and assesses equality considerations relating to persons sharing 'protected characteristics' (such as age, race, sex, disability and religion or belief). There is no statutory obligation to prepare a PES, but doing so is seen as a beneficial administrative measure to ensure that Government is compliant with its 'Public Sector Equality Duty' ('PSED').

4. The PSED (fuller detail on which is given below) obliges public authorities to eliminate discrimination, advance equality of opportunity and foster good relations between those with protected characteristics and those without.

5. The Home Office responded on 19 September 2019, confirming that it held "a" PES and that "this will be published shortly".[1] But it refused to supply the information requested, citing FOIA, s22(1) (information intended for future publication).

6. Mr Patel challenged that response but, by a letter dated 6 November 2019 following an internal review, the Home Office maintained its refusal based on s22(1).

[1] As will be explained, in fact (a) the Home Office held a number of PESs and (b) on its own case, the PES which it said it intended to publish (the "this") did not at that stage exist.

7. On 17 December 2019, Mr Patel complained to the First Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed.

8. By a decision notice ('DN') dated 22 July 2020 the Commissioner determined that the exemption relied upon was not engaged and required the MoJ to disclose the requested information.

9. By a notice of appeal dated 18 August 2020, the Home Office challenged the Commissioner's adjudication. In the accompanying grounds it re-stated its reliance on s22(1) but also prayed in aid for the first time 35 (formulation of government policy). In addition, it pleaded ss27 (international relations) and 31 (law enforcement) in relation to parts of the disputed information concerned with immigration control.

10. The Commissioner resisted the appeal in a document dated 21 October 2020.

11. Having been joined as Second Respondent pursuant to a direction of the Tribunal, JCWI delivered a response to the appeal dated 3 March 2021.

12. The appeal came before us in the form of a 'remote' hearing by CVP. All parties were content for it to be held in that way. Open and closed bundles were presented. We also had the benefit of detailed skeleton arguments from counsel. We heard evidence from two Home Office officials, Mr Simon Dilly, a Policy Adviser in the European Migration and Citizens' Rights Unit, and Mr Martin Vernon, Assistant Director of Immigration Enforcement Intelligence Analysis, a unit responsible for assessing threats to the UK immigration system resulting from from abuse of the rules. It was necessary to hear some of evidence in private, 'closed' sessions (from which the Second Respondents were excluded), following which Mr Mitchell and Mr Perry helpfully drafted a 'gist', which was read out as soon as the 'open' hearing resumed. Concluding submissions were likewise divided between 'open' and 'closed' sessions, the latter followed by an agreed 'gist' presented in open session. The hearing occupied the two sitting days allowed and we reserved our decision, completing our private deliberations on 28 July.

Legislation and Principal Authorities

The Public Sector Equality Duty

13. The Equality Act 2010, s189 includes:

> **(1) A public authority must, in the exercise of its functions, have due regard to the need to—**
>
> **(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;**

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to —

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

14. In *R (Bridges) v Chief Constable of South Wales Police* [2020] 1WLR 5037 CA the Court of Appeal observed:

> **175 … For present purposes we would emphasise the following principles, which were set out in McCombe LJ's summary in *Bracking* and are supported by the earlier authorities:**
> **(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.**
> **(2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.**
> **(3) The duty is non-delegable.**
> **(4) The duty is a continuing one.**
> **(5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required.**
> **(6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.**
>
> **176 We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance. Public law is often concerned with the process by which a decision is taken and not with the substance of that decision. This is for at least two reasons. First, good processes are more likely to lead to better informed, and therefore better, decisions. Secondly, whatever the outcome, good processes help to make public authorities accountable to the public. We would add, in the particular context of the PSED, that the duty helps to reassure members of the public, whatever their race or sex, that their interests have been properly taken into account before policies are formulated or brought into effect.**

Freedom of Information

15. FOIA, s1[2] includes:

[2] All section numbers hereafter refer to FOIA.

(1) Any person making a request for information to a public authority is entitled–

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.

16. Under the Act, "information" means information recorded in any form (s84).

17. S22 includes:

(1) Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
(b) the information was already held with a view to such publication at the time when the request for information was made, and
(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

18. In *Coppel on Information Rights*, 5th ed (2000), a commentary on s22 includes the following (para 25-008):

> **Section 22(1) does not require that a date is fixed for publication in order to allow reliance on the exemption, although the more uncertain the timetable for future publication, the less likely it is that the information is held with a view to its eventual publication and the less likely it is that it would be reasonable to withhold the information. The exemption applies to *information* held with a view to final publication. It will be a question of fact and degree whether the information contained in a draft *document* which the public authority holds with a view to publication once finalised, can properly be said to be held with a view to its future publication. In these circumstances, the degree to which the public authority anticipates the final version will include information not in the draft and vice versa is likely to be decisive.**

19. By s27 it is provided that:

> **(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—**
>
> **(a) relations between the United Kingdom and any other State,**
> **…**
> **(c) the interests of the United Kingdom abroad, or**
> **(d) the promotion or protection by the United Kingdom of its interests abroad.**

20. Under s31, it is stipulated (materially) as follows:

> **(1) Information … is exempt information if its disclosure under this Act would, or would be likely to, prejudice—**
>
> **(a) the prevention or detection of crime,**
> **…**
> **(e) the operation of the immigration controls …**

21. We direct ourselves that the correct approach under ss27 and 31 (as with all prejudice-based exemptions) is to apply the test set out by the FTT in *Hogan and Oxford City Council v ICO* (EA/2005/0026) which poses three questions. First, what interest (if any) is within the scope of the exemption? Second, would or might prejudice in the form of a risk of harm to such interest(s) that was "real, actual or of substance" be caused by the disclosure sought? Third, would such prejudice be "likely" to result from the disclosure in the sense that it "might very well happen", even if the risk falls short of being more probable than not? (*Hogan* is, of course, not binding on us but it draws directly on high authority[3] and has long been accepted as a correct statement of the law.)

22. In *APG v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC) the Upper Tribunal, (para 56):

> **Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by the disclosure of particular information.**

In the realm of international relations, such caution is required because the executive is likely to be much better equipped than any judge to assess the likely consequences of publication of the information under discussion (see *R (Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 CA, para 131).

23. By s35 it is enacted, so far as relevant, that:

> **(1) Information held by a government department … is exempt information if it relates to –**
>
> **(a) the formulation or development of government policy …**

24. The Upper Tribunal has provided valuable guidance on the proper approach to be taken when considering prejudice arguments under ss 35 and 36 (prejudice to effective conduct of public affairs). In *Davies v IC and the Cabinet Office* [2020] UKUT 185 (AAC) a three-judge constitution offered these remarks:

> **25. There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:**
>
> > **"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence**

[3] In particular, on the meaning of "likely", the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

> **that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. …**
>
> **26. Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in DEFRA v Information Commissioner and Badger Trust [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:**
>
> > **"75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it…**
> >
> > **76. …They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."**
>
> **27. In Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), [2017] AACR 30 Charles J discussed the correct approach where a government department asserts that disclosure of information would have a "chilling" effect or be detrimental to the "safe space" within which policy formulation takes place, as to which he said:**
>
> > **"27. …The lack of a right guaranteeing non-disclosure of information ... means that that information is at risk of disclosure in the overall public interest … As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that … a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed…**
> >
> > **28. …any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.**
> >
> > **29. … In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way: i) this weakness, … is flawed."**
>
> **28. Charles J discussed the correct approach to addressing the competing public interests in disclosure of information where section 35 of FOIA (information relating to formulation of government policy, etc) is engaged. Applying the decision in APPGER at [74] – [76] and [146] – [152], when assessing the competing public interests under FOIA the correct approach includes identifying the actual harm or prejudice which weighs against disclosure. This requires an appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice.**

25. If a qualified exemption, such as any under ss22, 27, 31 or 35, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, "in all the circumstances of the case, the

public interest in maintaining the exemption outweighs the public interest in maintaining the exemption".

26. Under s50 a person aggrieved by a response to his or her request for information under the Act may complain to the Commissioner.

27. The right to appeal against a decision notice of the Commissioner is provided for under s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal considers –**
>
> **(a) that the notice against which the appeal is brought is not in accordance with the law; or**
> **(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**
>
> **the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

28. The authorities are clear that the proper approach to be followed by the Commissioner and any tribunal or court on any subsequent appeal is to determine the correctness (or otherwise) of the refusal to disclose as at the date of the refusal (see *APPGER v ICO and FCO* [2015] UKUT 377 (AAC) (paras 48-53), *R (Evans) v Attorney-General* [2015] AC 1787 (SC) (paras 72-73) and *Mauritzi v IC and Crown Prosecution Service* [2019] UKUT 262 (AAC) (para 184)). We agree with Mr Perry that, as these authorities tend to show (although the reasoning does not seem to be explicitly spelled out in any of them), the date of the refusal is properly understood be the date on which the public authority gives its *final* decision on the request and accordingly, where an internal review is conducted, the date on which that process comes to an end is the material date.[4] Until that date there has been no complete and irreversible determination of the request and the response initially given is in that sense provisional.

29. We note Mr Perry's apparent qualification of the general principle where s22 is in play (skeleton, para 9), suggesting that the wording of s22(1)(b) "points toward assessment at the time of the request only." We respectfully disagree with Mr Perry on this point. In our view, in a case where the exemption under s22 is in play, the general rule applies. The question for the Commissioner, the Tribunal and any higher court is whether the refusal of the request was correct at the date of the refusal. The wording of s22(1)(b) is, of course, of critical importance to the issue of whether the public authority properly treated the

[4] See to like effect *Coppel*, *op cit*, para 45-008, p1106.

exemption as engaged; but that is not to say that the validity of the refusal is to be determined as at the date of the request. The law would surely be in an odd state if it required the Tribunal to base its decision on a fiction, namely that the request was refused on the date it was presented.

The Rival Cases - Outline

30. For the Home Office, Mr Mitchell contended that:

(1) The exemptions under s22 and 35 applied to the entirety of the disputed information.
(2) The public interest balance favoured maintaining the exemptions under ss22 and 35.
(3) Accordingly, the appeal should be allowed, and the Home Office not required to disclose any part of the disputed information.

Alternatively,

(4) The exemptions under ss 27 and 31 applied to the parts of the disputed information in relation to which they were maintained (hereafter 'the Annex A paragraphs')[5].
(5) The public interest test favoured maintenance of those exemptions.
(6) Accordingly, the appeal should succeed in relation to the Annex A paragraphs.

31. Mr Perry, on behalf of the Commissioner, responded as follows:

(1) The exemption under s22 was not correctly applied.
(2) The exemption under s35 was correctly applied.
(3) In relation to both ss22 and 35, the public interest balance favoured disclosure.
(4) The exemptions under ss27 and 31 were correctly applied in relation to the Annex A paragraphs.
(5) The public interest balance favoured maintenance of those exemptions.
(6) Accordingly, the appeal should succeed in respect of the Annex A paragraphs but should otherwise be dismissed.

32. Ms Hafesji, for JCWI, argued as follows:

(1) The submissions of Mr Perry on whether ss22 and 35 were engaged were adopted, save that it was disputed that, in the particular circumstances of the case, it was open to the Home Office to rely on both exemptions: they were mutually exclusive.
(2) The submissions of Mr Perry on the public interest test under ss22 and 35 were adopted.
(3) It was not accepted that the exemptions under ss27 and 31 were engaged.

[5] The relevant passages were collected in Annex A to Mr Vernon's witness statement.

(4) As to ss27 and 31 the Tribunal should reach its own view on the public interest test.[6]

Facts

33. The following facts emerge from the open material. For the sake of collecting the narrative in one place, we will include some detail already contained in the introduction above.

(1) In early 2017 the first PES, intended to inform the decision-making of the then Government in relation to the EUSS, was produced (but not published).
(2) There have been many different iterations since the first PES (Mr Dilly's witness statement, para 34).
(3) The policy of the Home Office was not to publish PESs. The first and only PES made public was that of November 2020 ('the November 2020 PES').
(4) On 30 March 2019 the EUSS entered into full operation.
(5) In his witness statement of 30 September 2020, Mr Dilly stated that more than 3.9 million applications under the scheme had been made by 31 August 2020. Before us the evidence was that the number had risen to some 6 million.
(6) On 22 May 2019 the PES to which Mr Patel's request relates was completed. It was submitted to ministers the following day. The document was referred to before us as 'the August 2019 PES' because it was the current PES on the date of his request, and we will adopt the same language.
(7) On 11 June 2019, in answer to a Parliamentary Question, Caroline Nokes, the Immigration Minister, stated that:

> **A Policy Equality Statement, which sets out the Government's consideration of the impacts of the EU Settlement Scheme on those who share a protected characteristic, will be published shortly.**

(8) In a further written answer on 2 July, Ms Nokes gave an almost identical assurance.
(9) On 17 July, in answer to a further Parliamentary Question, Ms Nokes stated:

> **…we have had due regard, in accordance with the public sector equality duty under section 149 of the Equality Act 2010, to impacts on those who share protected characteristics. This is reflected in the Policy Equality Statement for the EU Settlement Scheme, and a copy of this will be placed in the Library shortly.**

(10) On 24 July 2019 there was a change of Government. After that date, fresh assurances were given concerning publication of a PES. The

[6] Ms Hafesji understandably did not feel able to put her case higher than this, not being privy to the closed evidence.

apparent assurance of 17 July that the PES current on that date (the August 2019 PES) would be published was not repeated.

(11) The August 2019 PES was submitted to ministers in the new Government on 5 and 22 August 2019.

(12) On 29 August 2019 Mr Patel submitted his request for information to the Home Office.

(13) On 3 September 2019 Home Office officials submitted a new PES to Ministers ('the September 2019 PES'). A "working version" of this document was in existence by 29 August 2019.

(14) The September 2019 PES was not put before us (even in 'closed') and the Home Office has not disclosed the differences between its content and that of the August 2019 PES. It seems that the September 2019 document reflected a revision of Immigration Rules which took effect that month but we have no detailed information about that and no information whatsoever as to any other departures from, or additions to, the content of the August 2019 PES. As we understand it, the September 2019 PES was not supplied to the Commissioner in the course of her inquiry.

(15) On 19 September 2019 the Home Office refused the request on the ground that the requested information was held with a view to publication. In an annex to the response it stated that it planned to publish "the" PES "shortly".

(16) On 30 September 2019 the Independent Chief Inspector of Borders and Immigration ('ICIBI') sent his second report to the Home Secretary. The report was critical of the failure to publish the PES (or a PES), remarking that it gave rise to "accusations that the Home Office had not fully considered the impacts of the EUSS" and went on to recommend that the Department should publish the PES or such parts of it as "provide reassurance that the impacts of the EUSS have been fully considered, in particular for vulnerable and hard-to-reach individuals and groups."

(17) On 6 November 2019 the Home Office wrote to Mr Patel explaining that, following an internal review, its initial response was affirmed. In answer to Mr Patel's concern about the delay in publishing the PES (or a PES), the Department stated that it was not under any obligation to give an exact date of intended publication. Prior assurances that the document (or a document) would be published "shortly" were not repeated.

(18) On 27 February 2020 the ICIBI's second report (sent to the Home Secretary five months earlier) was published. In an immediate public response, the Home Office promised to publish a PES "in Spring 2020".

(19) On 13 May 2020 a further PES was produced ('the May 2020 PES'). A copy was eventually provided to the Commissioner. That document has not been published and was not put before us (even in 'closed'). The Home Office told the Commissioner that its content had been updated to reflect "various policy changes". Again, we have no information as to

the nature, scope or extent of the differences between it and its predecessors.

(20) On 22 July 2020 the Commissioner's DN was issued.

(21) On 18 Aug 2020 the Home Office appealed against the DN. Grounds which (*inter alia*) raised three fresh exemptions followed on 2 September 2020.

(22) On 1 September 2020 Kevin Foster, Parliamentary Under-Secretary, responding to a Parliamentary Question of 22 July, gave an assurance that a PES would be published "shortly".

(23) On 18 November 2020 the Home Office published a PES for the first time ('the November 2020 PES'). This document was included in the bundle before us.

(24) The November 2020 PES is about twice the size of the August 2019 PES. Mr Dilly told us (witness statement, para 73) that it included "a more comprehensive, up-to-date and clearer analysis of the equalities impacts of the EUSS, as these have informed Ministerial decision-making … It reflects … significant further policy changes …" To say that the August 2019 and November 2020 documents are significantly different in both form and content is to state the obvious. Two examples offered by Mr Dilly (witness statement, para 80) of categories of EUSS applicants or otherwise affected parties covered by the November 2020 PES but omitted from the August 2019 PES[7] were victims of domestic violence or abuse and family members of residents of Northern Ireland. One example of material in the August 2019 PES which is not to be found (for obvious reasons) in the November 2020 PES is analysis of the equality implications of a 'no-deal Brexit.'

Analysis and Conclusions

34. It is convenient to address the exemptions under ss22 and 35 first, before turning to the narrower dispute under ss27 and 31.

Section 22(1): is the exemption engaged?

35. We agree with Mr Perry (skeleton, para 13) that s22(1)(a)-(c) poses two questions for the Tribunal.

(1) At the time of the request, did the public authority hold the disputed information with a view to its publication at some future date (whether determined or not)?

(2) If so, is it reasonable in all the circumstances that the information should be withheld from disclosure until that future date?

We will refer to them as the first question and the second question and will take them in turn.

[7] We do not know if they were also omitted from the two intervening PESs as they have not been disclosed.

The first question

36. We have considered the parliamentary draughtsman's choice of language. For the phrase "with a view to", most reputable dictionaries offer as the primary definition "with the aim of". Some propose "with the hope of". We bear in mind that countless stronger formulations were available, such as "with the intention of" or "with the expectation of".

37. In her DN, the Commissioner asserts that, to make out the exemption, a public authority must be able to identify "the exact information" which, at the date of the request, it has a view to publishing (para 45). This is in line with her published Guidance (referred to in para 37 of the DN), which includes: "The information that the public authority intends to be published must be the specific information the applicant has requested." We think that that goes too far and ignores the deliberately loose language of s22. We do not consider that the requirement to show that a body of information is held "with a view to publication" necessarily demands proof of an intention, or even expectation, that every component part of that body will be published. This would set the standard unreasonably high and make the exemption unworkable in many cases of the kind for which it was designed. We respectfully agree with and adopt the passage from *Coppel* quoted above, which argues that a question of "fact and degree" may arise as to whether information contained in a draft document can properly be seen as being held "with a view to publication" and that the extent to which the public authority anticipates significant differences between the draft and the ultimate document may be decisive. This approach, we think, makes the operation of the exemption workable. So, for example, research data being collated with a view to publication in a report might, depending on the evidence, properly attract protection under s22 notwithstanding the fact that they are incomplete and/or that anticipated further moderation or analysis may make it necessary to discard some material and/or assemble additional data and/or revise draft conclusions. In such a case, it seems to us that the section might well be engaged even if, at the date of the request, the public authority believed that the (provisional) data and conclusions in the draft would, or might, need to undergo quite appreciable changes prior to publication. To insist that the public authority identify *precisely* the held information which, as at the date of the request, it aims or expects to publish would be to set the bar too high. Mr Perry (skeleton, para 24) submitted that, to make out the applicability of the exemption, it must show "which information in the August 2019 PES it expected to publish at the time of the request and which information it did not." We accept that formulation subject to the qualification that the obligation is not absolute: rather, it is to identify the information intended to be published with a sufficient degree of particularity. What degree of particularity is sufficient must depend on the circumstances of the case under consideration.

38. With this understanding of the proper approach to s22(1)(a) and (b) (which favours the Home Office), and having reminded ourselves of the elementary fact that the burden rests on the public authority to make out in evidence any exemption relied upon, we address the first question.

39. In doing so, we remind ourselves of a second elementary fact, namely that the Tribunal is not in a position to attribute to a party a case which it has not advanced. It would have been easy to understand a case on behalf of the Home Office to the effect that, as at 29 August 2019, it had held "with a view to publication" so much of the information contained in the August 2019 PES as was replicated in the "working version" of the September 2019 PES, finalised and sent to ministers a few days later. Such a case would have been confronted with the embarrassing facts that (a) the notional aim was wholly unfulfilled, (b) *no* PES was published for a further 15 months and (c) the PES ultimately published was twice the length of the August 2019 PES, excluded substantial amounts of material contained in it (such as everything to do with the possibility of 'no deal') and included much that was not contained in it. Although these circumstances might have caused the Tribunal to question the credibility of the supposed aim[8], a case so put would at least have sustained as a matter of legal logic the argument that (subject to the second question) s22 was engaged in relation to all the disputed material bar that which was not reproduced in the September 2019 PES. But that was not the Home Office's case before us.[9]

40. Rather, Mr Mitchell's argument was to the following effect.

    (1) Contrary to the submissions of the Respondents, the August 2019 PES was properly seen as one iteration of a "living document", which evolved over time from 2017.
    (2) The intention, both prior to and after the request, was for the "living document" to be published in an updated form.
    (3) The intention at the time of the request was that the published, updated, "living document" should include the disputed information.
    (4) That intention was fulfilled when the November 2020 PES was published.
    (5) The Commissioner was wrong to compare the August 2019 PES with the May 2020 PES: the correct comparison was with the November 2020 PES. And the fact that such a comparison was impossible at the date of the DN reinforces the applicability of the exemption.
    (6) In any event, the content of the November 2020 PES was not inconsistent with the Home Office's asserted intention to publish the disputed information.

[8] It might have faced any number of other credibility hazards: we have no way of knowing, given that the case was not put in this way and the September 2019 PES has never been disclosed.
[9] Nor did the Home Office pursue the case attributed to it by Mr Perry (skeleton, para 25), namely that it had had an intention at the date of the request to publish any information in the August 2019 PES that was (much later) included in the November 2020 PES.

(7) The delay in publication (for which certain excuses were offered) was irrelevant to the issue of the Home Office's intention at the date of the request.
(8) The DN was inconsistent with prior adjudications of the Commissioner.
(9) The challenge raised by JWCI was 'academic'.

41. We reject Mr Mitchell's submissions. We will deal with them in order, adopting the above numbering.

42. As to (1), the characterisation of the series of PESs as a single "living document" is tactical and does not correspond with the reality. The analogy with a travelling draft of a report or policy is false.[10] As Mr Dilly himself stated in evidence, each PES is a "snapshot" of EUSS equality assessments and analysis thereof up to the date it bears. It is an historical document. It is in the nature of each PES that it must update the information contained in the predecessor document and, if need be, earlier ones. The updating process is likely to consist of amending material in the predecessor PES (and perhaps, prior iterations), adding fresh content and deleting content that has been superseded or become irrelevant or otiose. In this way, as one PES succeeds another, information is not preserved; on the contrary, it is gradually shed. So, to cite the example already given, the material in the August 2019 PES directed to a possible 'no-deal' exit from the EU is nowhere to be seen in the November 2020 document.

43. Moreover, the fact that a successor PES deals with a topic covered in an earlier PES does not warrant the conclusion that the *information* on that subject is preserved. By way of illustration, in his witness statement, para 81, Mr Dilly told us that the November 2020 PES had identified discrimination in specified areas overlooked in the August 2019 PES, and that the "evidence base" supporting some assessments in the August 2019 PES had been "updated and developed" in the November 2020 document. Cross-examined about that paragraph, Mr Dilly sidestepped the question whether the Home Office had "got it wrong" in the August 2019 PES but agreed that the November 2020 document had served as an opportunity to "explain the arguments better".

44. We are in no doubt that the Home Office knew at the time of the request and at all times thereafter that successive PESs were discrete, time-specific documents and it was not real to treat them as a single "living document". Moreover, they cannot have been unaware that to withhold the August 2019 PES pending preparation and publication of an "updated PES" would result in parts of the information contained in the August 2019 PES being suppressed altogether (some were redundant by 3 September, and there would have been no possible reason to retain them in any later version) and would provide them with an opportunity to re-present other parts in such a way as to substitute new information for that contained in the August 2019 document.

[10] We return to this argument under point (8) below.

45. As to point (2), we are prepared to accept that, at the time of the request, the Home Office had plans to publish *a* PES. Several public assurances had been given to that effect, including one after the change of government. We assume that those assurances were given in good faith. The answer of Ms Nokes on 17 July 2019 suggested an intention to publish the then current document (the August 2019 PES) but, even if that is right, we are clear that any such intention had been abandoned by 29 August since by then a "working version" of the September 2019 PES was in existence. The Home Office did not on that date plan to publish a document which it knew to be out of date; it planned to publish an updated version.

46. We have already noted that the Home Office did not contend before us that its intention on 29 August 2019 was to publish the material in the "working version" of the September 2019 PES. In the circumstances, we can only find that its aim was to publish *a* PES, the content of which was yet to be decided upon, at some indeterminate point in the future.

47. The fact of an aim or intention to publish *a* PES does not of itself meet the requirements of s22(1)(a) and (b). As Ms Hafesji (skeleton, para 20) observes, an intention merely to publish a document *of the same kind* as the document which contains the disputed information is not enough. The question is whether there was an intention to publish *the disputed information*, namely that contained in the August 2019 PES.

48. As to point (3), it seems logical to assume that the Home Office's aim as at the date of the request was to publish information on so much of the subject-matter of the August 2019 PES as remained relevant at the point of publication of the "updated PES" (whenever that might be). However, for want of evidence, we are quite unable to make findings as to (a) when the "updated PES" was expected to be published; or (b) what part(s) (if any) of the information contained in the August 2019 PES were, on 29 August 2019, intended or expected to be included in the "updated PES." But on any view the aim was not to include all of it since, as already stated, some of the content was, even by the date of the request, already judged to have become out of date and no longer relevant.

49. As to point (4), we accept that in publishing the November 2020 PES the Home Office achieved its objective of publishing *a* PES containing updated information. We remind ourselves, however, that our interest is not in what ultimately happened but in the public authority's aim at the time of the request. Moreover, for reasons already given, we find that the published PES did not contain "the disputed information", although no doubt it included parts of it.

50. As to point (5), we agree with Mr Mitchell that comparisons between the disputed information and the May 2020 PES are unhelpful. We take the same

view about comparisons with the November 2020 PES. In each case the proponent of the comparison is seeking with the benefit of hindsight to spell out an aim or intention of the part of the Home Office as at 29 August 2019. It is for the Department to prove the requisite aim or intention. Evidence of the sort which would be required to discharge the burden is conspicuously absent.

51. The argument that the "impossibility" of the comparison with the November 2020 PES reinforces the applicability of s22 is puzzling. We content ourselves with saying that the comparison is inapt and the fact that it would have been impossible for the Home Office to envisage what a PES published 15 months after the request would contain adds nothing. It obviously does not make good the applicability of the exemption. That turns on the statutory language, which does not propose any comparison of the sort canvassed before us.

52. As to point (6), we repeat our comments above on points (4) and (5). Absence of inconsistency between the August 2019 and November 2020 PESs would not greatly assist the Tribunal to determine the aim of the Home Office at the date of the request. In any event, there are, as we have noted, significant inconsistencies.

53. As to point (7), the delay in the publication of *a* PES is, we agree, a matter of limited relevance for the purposes of the first question (although it certainly reflects poorly on the Home Office). Our focus is on the public authority's aim at the date of the request. We do, however, note that there was no evidence on behalf of the Home Office that completing a PES suitable for publication was, on 29 August 2019, regarded as a priority and, after September 2019, the promise to publish "shortly" was mothballed for a year. The more uncertain and 'long term' the aim becomes, the harder it is for the public authority to identify with particularity the information which it claims to intend to publish.[11]

54. As to point (8), we make three observations. First, to state the obvious, decisions of the Commissioner are not binding on the Tribunal. Second, any inconsistency between the DN under challenge and any prior adjudication of the Commissioner would be irrelevant for our purposes. The only question for us under s58(1) is whether the DN which the Home Office challenges in this appeal is in accordance with the law. Third and in any event, we reject the charge of inconsistency. The earlier decisions of the Commissioner to which Mr Mitchell took us arose out of requests for the content of draft documents (or analogous material) in the course of preparation. Mr Patel's request was for disclosure of a complete document dated 22 May 2019 and submitted to ministers the following day. As we have observed when considering point (1), to describe the series of PESs between 2017 and 2020 as a single "living document" is misleading. It would be no more real to invoke s22 in respect of

[11] We return to the issue of delay below when addressing the second question. There, we attach greater significance to the prospect of a delay in publication of the "updated" PES.

one of a series of complete, dated, annual reports on the performance of a public body on the basis that the series as a whole amounted to a "living document" and there was a plan to publish an "updated version" at some future point.

55. As to point (9), we did not understand Mr Mitchell ultimately to press the argument that the appeal was academic. In particular, he did not submit that JCWI had, following publication of the November 2020 PES, all the information sought by the request. (If that had been his submission, it would have been plainly wrong: as already explained, it was beyond dispute that there was information in the August 2019 PES that was nowhere to be found in the November 2020 document.) The 'academic' point, in so far as persisted with, seemed to consist of or include or merge into a somewhat confused allusion to recent Administrative Court proceedings between JCWI and the Home Office, in which JCWI's application for judicial review was unsuccessful. At para 5(b) of his skeleton argument Mr Mitchell referred to the outcome of the Administrative Court case and contended (*inter alia*) that the appeal before us was a misconceived and an impermissible attempt to procure documents which the Home Office had not been obliged to disclose in the judicial review proceedings. With all due respect to Mr Mitchell, there is nothing in any of this. The appeal arises as a consequence of a perfectly proper exercise of the important right to freedom of information. The attack on JCWI for resisting (with the Commissioner) the Home Office's appeal is itself misconceived and regrettable.

56. Stepping back, we think that the central flaw (by no means the only one) in the Home Office's case is the error which Ms Hafesji identifies, to which we have already referred. It amounts to saying: "We plan to write and at some point, publish a new, up-to-date PES. Therefore, subject to the 'reasonableness' issue and the public interest balancing test, s22 is engaged". A case put in that way misunderstands the purpose of the exemption and ignores the language in which the legislative scheme is framed.

57. Despite the Home Office's flawed case on the first question, we have asked ourselves whether on the evidence the burden of making out the requirements of s22(1)(a) and (b) is nonetheless discharged. To that question the Home Office provides its own answer. In its grounds of appeal, para 21 it asserted the "impossibility" of comparing the content of the August 2019 PES with that of the November 2020 PES (then yet to be drafted). And in closing submissions Mr Mitchell put the Home Office's position in even starker terms, arguing that it was a "counsel of impossibility" to seek to ascertain the information which, as at the date of the request, it had intended to publish. As we have explained, that was (in our view) the very question which the Home Office needed to address in evidence. It simply did not do so – with particularity or at all. For reasons already stated, it is plain that *some* of the disputed information was not, by the date of the request, held "with a view to publication". It seems *likely*

that *some* of the disputed information was, at the date of the request, held "with a view to publication". But because of the way in which the appeal was put, and the matters to which the evidence was directed (or not directed), we have no forensic means of identifying those parts of the information within the reach of s22(1)(a) and (b) and those parts outside it. Since it is for the public authority to make out the exemptions relied upon, we are driven to conclude that the proper answer to the first question is that the Home Office has failed to establish that, on 29 August 2019, it held any identifiable part of the disputed information "with a view to publication" at some future date. It follows that the exemption under s22 is not engaged.

The second question

58. In case we are mistaken on the first question, we are satisfied in any event that the second question must be answered against the Home Office and in favour of the Commissioner and JCWI.

59. We have explained our view that the issue of reasonableness raised by s22(1)(c) must be assessed at the date of the (ultimate) refusal of the request, namely the date when the outcome of the internal review was delivered.

60. In our view, the 'reasonableness' balance comes down overwhelmingly against withholding disclosure and the arguments to the contrary on behalf of the Home Office are notably weak. We have a number of reasons. First, it was contended that withholding disclosure pending publication of the "updated" PES would avoid the dangers inherent in a practice of publishing a series of "iterative versions", which might risk confusing and misleading the public and generating legal challenges (Mr Mitchell's skeleton, para 24). We regard this argument as tactical and not entirely ingenuous. The Home Office knew and knows very well that the November 2020 PES was not, and was not conceived as, the final, definitive PES. It was merely, when issued, the last in a series of time-limited historical documents. Like its predecessors, it would in its turn require replacement. Mr Dilly's evidence was entirely to this effect (see *eg* his witness statement, para 26 in which "the PES" is described generically as a "vital and constantly evolving tool for EUSS policy formulation and development"). The implication that the document planned for publication at the time of the refusal (a year before publication happened) would serve as a 'once-and-for-all' PES (in the notice of appeal settled by Mr Mitchell and dated 2 September 2020 it was described as "the finalised document suitable for publication") was misleading and wrong. That implication was an important component of the argument: once it is seen for what it is, the warning of the dangers of publishing a series of "iterative versions" can be seen as groundless. On the contrary, the Home Office having accepted that the November PES should be published, the argument in favour of publication of all its successors becomes compelling.

61. Second, for reasons already stated, it was inevitable at the time of the refusal that the PES ultimately published would not contain all the information in the August 2019 PES because, in the nature of things, some material included in the latter document would have become redundant and accordingly would be omitted from the published document. Such changes in content had already happened by 3 September 2019, when the September 2019 PES was completed. Accordingly, publication of the "updated" PES would not put into the public domain all the information needed in order to ascertain whether, at the time to which the August 2019 PES related, the Government was complying with the PSED in relation to the EUSS and, if not, how it was failing and what consequential lessons should be learned.

62. Third, we are bound to say that the claimed concern to protect the public from confusion and misunderstanding has a condescending feel about it. The fact that a document contains some material that is inaccurate or has become out of date is not of itself a reason to shield it from the public gaze. We see no reason to assume a readership struggling to grasp the fact that a document providing analysis and commentary on the operation and effects of a scheme up to 22 May 2019 cannot be safely read as guidance on its operation and effects after that date. In any event, any possibility of misunderstanding can be mitigated by appropriate measures to explain that disclosure is given in response to a FOIA request, place the disclosed information in context, draw attention to its historical status and to errors which it contains and/or subsequent changes in legislation and/or practice, and identify separate sources of information (including any subsequent PES (the September 2019 PES had been completed before the final refusal, on review, of the request for the August 2019 PES) and any anticipated future revision).

63. Fourth, the likelihood of delay in the publication of the "updated" PES argues against the reasonableness of withholding disclosure. We have found that publication was not shown to be a priority at the date of the request. By the date of refusal (6 November 2019), six months since the first ministerial promise to publish "shortly" and more than a year before the November 2020 PES was published, there is no evidence of it having become any more of a priority. The prospect of delay was a highly significant consideration for at least three reasons. First, eligibility for the EUSS was (and is) time-limited. As at November 2020, in the event of a 'no-deal Brexit', the scheme was due to close on 31 December 2020. Second and more generally, given the unquestioned importance of the subject-matter of the August 2019 PES, which (as was common ground in the open proceedings before us) included analysis of various directly and indirectly discriminatory effects of the EUSS, any material delay in disclosure, which could only prejudice proper understanding of, and debate about, the equality implications of the scheme, was inherently detrimental. Third, as the ICBI pointed out in his report of 30 September 2019, delay in disclosure of the content of the August 2019 PES would ignore the need for public "reassurance that the impacts of the EUSS had been fully

considered, in particular for vulnerable and hard-to-reach individuals and groups".

64. Fifth, the factors considered below in addressing the public interest balancing test, which are equally germane to the 'reasonableness' issue, argue compellingly against the disputed information being withheld.

Section 35(1)(a): is the exemption engaged?

65. As we have noted, the Home Office and the Commissioner are agreed that s35(1)(a) is engaged. Ms Hafesji for JCWI challenges that stance.

66. Here we agree with the Commissioner and the Home Office. We have referred above to the nature and purpose of a PES. Given the loose language of s35(1)(a), which requires only that the information in question must "relate to" the formulation of government policy, we are in no doubt that the subsection applies.

67. Ms Hafesji contended (skeleton, para 24) that there was a contradiction in the Home Office's case: either the information in question was held for the purposes of <u>developing</u> policy (s35(1)(a)), or it was information that was "specifically intended for publication" (s22(1)). Accordingly, on the present facts, reliance on both exemptions in the alternative was impermissible. We do not accept this submission. It seems to us that it makes the mistake of reading the legislation too narrowly. For the purposes of s35(1)(a), we see no reason why, even if a particular government policy has been formulated, a document which provides scrutiny and analysis on the operation of the policy and its effects cannot be said to "relate to" the "formulation or development of policy". Such a document, which might prompt an adjustment, or even wholesale reversal, of the policy, would in our view fall full square within the scope of the exemption. As for s22(1), we think that Ms Hafesji's use of the word "specifically" betrays a misreading of the subsection (see above). Certainly, in the context of the case before us, we are satisfied that it is open to the Home Office to rely on both exemptions.

Sections 22(1) and 35(1)(a): the public interest balancing test

68. On the grounds which follow, we hold that, if and to the extent that the exemption under s22(1) is engaged, the public interest in disclosure outweighs the public interest in maintaining the exemption. And in relation to s35(1)(a) which, as we have accepted, is engaged, we have arrived at the same conclusion.

69. In relation to s22(1), we have four reasons for our view. First, there was and is a clear public interest in transparency and accountability in government and that interest is particularly strong and obvious in the present context given the

subject-matter of the request and its importance to the huge number of individuals directly affected by the EUSS and to the wider population, which may be indirectly affected and is in any event entitled to be properly informed as to the equality implications of policy questions which are likely to shape British society for many decades to come.

70. Second and more specifically, given that, even before the request, the EUSS had been in operation for some months and it was public knowledge that a PES existed and there were plans for a PES to be published, there was and is a compelling public interest in disclosure of the document directed to the equalities implications of the scheme as it operated at the time of the request. And that public interest was not diminished at the date of refusal (6 November 2019): on the contrary, if anything, the longer the delay, the greater the public interest in disclosure became.

71. Third, it was submitted on behalf of the Home Office that the public interest favoured maintaining the exemption because of the importance of ensuring that any published PES "reflected the Home Office's position", met the "standards set for publication" and had the necessary clearance. But there was no evidence that the August 2019 PES did anything other than reflect the Home Office's position at the date it bore (22 May 2019) or that it failed to meet any particular standard. And if the August 2019 PES was in any respect deficient, it seems to us that it is plainly in the public interest for that fact to be made known and the error(s) examined and understood. In this way, lessons can be learned and service to the public improved. The fact that disclosure might cause a degree of embarrassment to a public body is not a good ground for suppressing disputed information. As for the argument that the document was not approved for publication (although Ms Nokes's Parliamentary Answer of 17 July rather suggested that it was), that is plainly not a point of any weight in the public interest balance. We cannot accept that the fact that a public authority has not approved publication of disputed information should of itself be seen as an argument against disclosure.

72. Fourth, our entire reasoning under the second question ('reasonableness') applies with equal force to the public interest balance test.

73. Turning to the exemption under s35(1)(a), we rely on the reasoning already applied to s22(1). In addition, we must address the further submission on behalf of the Home Office that the public interest favours maintenance of the exemption because of the need to protect the "policy-making process". We accept, of course, that government must be free to formulate policy. That said, we are mindful of the caution that must be applied to public bodies' protestations about "chilling effects" and "safe space" (see the *Davies* case, cited above). In so far as such arguments were advanced before us (there were brief references to them in Mr Dilly's witness statement, paras 90 and 91), we reject them. In the first place, we were not told *how* publication of the disputed

information would endanger the formulation of government policy. Mere routine assertion of a risk will not do. As *Davies* makes clear, what is required is "appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice." Nothing of the sort is offered. A second, and obvious, difficulty for the Home Office is the fact that its case on the public interest balance is hopelessly contradictory. At the date of refusal (and for that matter at the date of request), it had plans to publish a PES, and those plans have ultimately been fulfilled. It has not argued that differences in the content of the August 2019 and November 2020 PESs were such that publication of the former would have prejudiced policy-making while publication of the latter did not. Perhaps that is not surprising, since its stated case (of course, not accepted by us) is that the information in the former is contained in the latter. Nor (again not surprisingly) has it argued that its voluntary act of publishing the November 2020 was prejudicial to the "policy-making process."

Sections 27(1) and 31(1): are the exemptions engaged?

74. Under our law, direct discrimination in the immigration control system, based on nationality, is in certain circumstances lawful. One such circumstance is where the discrimination is permitted under a Ministerial Authorisation issued in accordance with the Equality Act 2010, schedule 3, para 17. The current Ministerial Authorisation was made on 26 February 2015. It is, of course, a public document. It permits officials to subject persons of nationalities appearing on a list approved by the Minister to less favourable treatment in relation to, *inter alia*, out-of-country and in-country immigration applications, than others whose nationalities are not so included. The system is subject to certain safeguards. One is the requirement for the statistical information to be reviewed quarterly and for the Lists (as revised) to be approved by the Minister. Another is oversight by the ICIBI.

75. In his open evidence, Mr Vernon explained that the Annex A paragraphs contain 'Nationality Lists', a 'Quarterly Threat Assessment' and 'EEA – non-EEA comparison material'. All three are compiled by Immigration Directorates (arms of the Home Office) and are produced quarterly, based on statistical evidence, in order to identify nationalities seen as posing a particular risk to UK immigration control. The main sources of information used are breaches of immigration laws and rules (such as presentation of forged papers or arriving without travel documents) and 'adverse decisions' (such as refusals of asylum or refusals of visa applications). The primary function of the Annex A material is to provide evidence to the Immigration Minister for the purposes of his or her quarterly approval of the updated Nationality Lists in accordance with the applicable statutory Ministerial Authorisation. Secondly, it constitutes a valuable resource of general utility in support of the UK's immigration control policies and procedures.

76. Mr Vernon made a number of compelling points concerning the risks to international relations (s27) which disclosure of the Annex A paragraphs would entail. In the first place, it would be likely to provoke a negative reaction from countries identified as 'high risk'. In addition, that reaction would be likely to have diplomatic consequences, including the danger of retaliatory action. Such action might involve risk to UK nationals, resident in the affected state, the withdrawal of co-operation (for example in relation to the return of persons without the right to remain in the UK) or damage to trade or investment interests.

77. Mr Vernon also pointed out that, while some states that one might expect to see on a list of 'high risk' states might not have good relations with the UK in any event, publishing a shorter list confined to these would have presentational consequences and could lead by the 'mosaic effect' to those not disclosed being identified.

78. In relation to law enforcement (s31), Mr Vernon made the obvious point that identifying the 'problem states' would alert those in such states involved in or contemplating breaches of immigration controls that they could expect close scrutiny. No less important, malign agents would be likely to see opportunities to evade such controls between the UK and states *not* listed in the highest risk category.

79. Ms Hafesji argued that the evidence relied upon on behalf of the Home Office was insufficient to make out either of the relevant exemptions. That evidence took the form of opinions from officials in various directorates about the nature and extent of the risk of harm that publication of the Annex A paragraphs would occasion. She complained that it was insufficient to say (as some did) that a danger "could" or "might" arise.

80. Despite the efforts of Ms Hafesji, it is very clear to us that the exemptions are properly applied. We do not accept that the Home Office was required to show that the dangers adverted to "would" occur. That is to ignore the statutory language. We have reminded ourselves of the applicable law summarised above. It is sufficient if the prejudice, at the date of the refusal, was "likely" and something can be said to be "likely" if it "could well happen". In our judgment, the risks, at the date of refusal, of prejudice to international relations and law enforcement are plain and obvious and are established to a considerably higher standard than the applicable subsections require.

Sections 27(1) and 31(1): the public interest balancing test

81. We are entirely satisfied that the public interest balance comes down firmly in favour of maintenance of the exemptions. We have borne in mind the importance of the subject-matter of the disputed information and the obvious public interest in transparency and accountability. These considerations are

certainly significant, but they are comprehensively outweighed by the countervailing public interest in avoiding the self-evident risk to the national interest which, we have no doubt, disclosure of the Annex A paragraphs would (at the relevant time) have occasioned.

Outcome and Postscript

82. For all of these reasons, the appeal succeeds to the extent that the Home Office is entitled to withhold disclosure of the Annex A paragraphs. Otherwise, the appeal is dismissed.

83. We have been able to reach our decision on the ss27 and 31 exemptions without the need to rely on the evidence and submissions presented to us in 'closed' sessions. In the circumstances, we are glad to deliver an outcome without the unsatisfactory measure of resorting to closed reasons, which inevitably exclude a party with a legitimate interest from the judicial process. But, for the reassurance of Mr Patel and JCWI, we would add that, had we felt the need to have regard to the closed material, we would have seen it as clearly vindicating the positions taken by the Home Office and the Commissioner.

Anthony Snelson

Judge of the First-tier Tribunal
Date: 9 August 2021
Date promulgated: 10 August 2021