

**IN THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**Appeal No. GIA/1243/2019**

**BEFORE JUDGE WEST**

**DECISION ON THE APPLICATION FOR PERMISSION TO APPEAL**

**The application by the Applicant for permission to appeal against the decision of the First-tier Tribunal dated 3 April 2019 under file reference EA/2017/0271 is refused.**

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21, 22 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**REASONS**

**Introduction**

1. This is an application for permission to appeal against the decision of the First-tier Tribunal (Judge Sophie Buckley, Mrs Melanie Howard and Mrs Marion Saunders) dated 3 April 2019 (there was no hearing since the Applicant lives in Gdansk in Poland). An earlier decision dated 2 June 2018 was set aside on 6 August 2018 (because the Tribunal had the power to direct the Ministry of Defence to provide translations of the Polish documents which had been provided to it and it was an error of law not to order the MoD to provide the Tribunal with English translations of that material), although the two pieces of information ordered to be disclosed under that ruling have been made available to the Applicant.

2. Although I have read the earlier decision of 2 June 2018, I have not in any sense relied on it since it was subsequently set aside and have accordingly put it out of my mind in determining this application.

3. For the sake of completeness, however, I should record that the earlier Tribunal held that s.40(2) of FOIA did not apply to

(1) the information in the communication dated 14 July 1947 at page 3 of the closed bundle of documents (other than all information relating to the recipient of the communication, which must be redacted)

(2) the information in the communication dated 20 September 1948 at page 5 thereof (other than the two words immediately following the word “commission” in the first paragraph of that communication, which must be redacted).

4. In accordance with that decision, the two redacted documents were provided to the Applicant on 2 July 2018. The MoD did not seek to challenge that aspect of the decision.

#### **The Decision of the First-tier Tribunal**

5. The decision of the First-tier Tribunal explains the background to the present application as follows:

“6. The Appellant is looking for information about what happened to her uncle, JB, who is of Polish nationality and served under British Command, ultimately in the Polish Resettlement Corps until 16 August 1948.

7. In 1947 JB crossed the Polish/German border near Szczecin illegally. He has not been in contact with his family since. The Appellant believes that her uncle died in 1947 and that he was killed either in Berlin, Eastern Germany or Poland. She does not know the date and place of his death.

8. On 24 August 2016 the MoD’s Army Personnel Centre Disclosure sent an email to the Appellant’s son-in-law which stated that JB “finally relinquished his commission on 16/08/48” and gave the interpretation that “[JB] must have lived on 16.08.1948 when he was released from the Polish Resettlement Corps (PKPR)”.

9. This was contrary to the Appellant’s belief that her uncle had died in 1947.

10. The MoD has since confirmed that the inference that JB “must have lived” at that date was incorrect. “Relinquishing commission” does not mean that the service person voluntarily and proactively resigned his or her commission.

11. The British Red Cross confirmed by letter to the Polish Red Cross dated 25 July 2017 that JB was living in Scotland before he went on leave in May 1947 to travel to Germany and on 1 June 1947 he failed to return from leave in Germany and no other information is recorded about his whereabouts after that date. They stated that there is no indication that he returned to the UK after that date. The British Red Cross said that they presumed that the documents obtained from the Polish Ministry of Internal Affairs confirming the arrest of JB are correct.”

6. The Tribunal then set out the details of the FOIA request, the Commissioner’s decision notice and the subsequent appeal in paragraphs 12 to 16:

“12. The Appellant made the request which is the subject of this appeal under the FOIA on 24 April 2017. It is a 4 page letter, but the Decision Notice extracts the following requests:

*I am looking for information about what happened with my uncle captain [name redacted], of Polish nationality, born on 9.11.1915 in Drawcze, near [Vilnius], son of [name redacted], and [name redacted] family name [name redacted] ...*

*What I need is the application for the final termination of service in the Polish Resettlement Corps of [name redacted], produced in August 1948, with his personal signature or any other document showing that he really lived at the time.*

*... I need the personal files of captain [name redacted] from [the] MoD only to confirm if he really came back to the UK after May 1947 and was still alive in August 1948, when he – according to [name redacted] – finally relinquished his commission on 16.08.1948.*

13. This was a follow-up to a previous request to which the MoD had responded by email to [the] Appellant’s son-in-law on 24 August 2016.

14. The MoD replied on 28 July 2017. It refused to provide the information, which it classed as personal data, under s.40(2) FOIA. There was no further internal review.

15. In her decision notice dated 9 October 2017 the Commissioner concluded that s.40(2) FOIA only applies where the information related to a living individual. She accepted as reasonable the MoD's approach of assuming that an individual under the age of 116 was alive in the absence of a death certificate. She decided that the information was personal data.

16. The Commissioner accepted that the Appellant had a legitimate interest in disclosure, but that disclosure would be an unfair intrusion into the individual's private life. She concluded that disclosure would breach the first data protection principle and upheld the MoD's application of the s.40(2) exemption."

7. After setting out the Applicant's grounds of appeal, the original submissions of the parties and the respective subsequent submissions (submitted after the first decision of June 2018 had been set aside), the Tribunal set out the legal framework in paragraphs 28 to 33:

"28. The relevant parts of s.40 of FOIA provide

*(2) Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which does not fall within subsection (1), and*

*(b) either the first or second condition below is satisfied.*

*(3) The first condition is*

*(a) in a case where the information falls within any of paragraphs (a)-(d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*

*(i) any of the data protection principles ...*

29. Personal data is defined in s.1(1) Data Protection Act 1998 ("DPA") as

*data which relate to a living individual who can be identified – (a) from those data, or (b) from those data*

*and other information which is in the possession of, or is likely to come into the possession of, the data controller.*

30. The first data protection principle is the one of relevance in this appeal. This provides that

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met ...*  
(See para. 1 Sch 1 DPA)

31. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure is

*necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject* (See para. 6 Sch 2 DPA)

32. The case law on section 6(1) has established that it requires the following three questions to be answered:

(1) Is the data controller or the third party or parties to whom data are disclosed pursuing a legitimate interest or interests?

(2) Is the processing involved necessary for the purposes of those interests?

(3) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

33. The definition of “personal data” consists of two limbs:

(i) Whether the data in question “relate to” a living individual and

(ii) Whether the individual is identifiable from those data.”

8. The Tribunal then set out the issues which it had to decide in paragraph 35:

“35. The issues we have to determine are:

- (a) Was the information requested personal data?
- (b) Would disclosing the information be fair?
- (c) If so, are the conditions in schedule 6(1) met, i.e.
  - (i) Is the data controller or the third party or parties to whom data are disclosed pursuing a legitimate interest or interests?
  - (ii) Is the processing involved necessary for the purposes of those interests?
  - (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"

9. The Tribunal then turned to the evidence and made the following findings:

“39. We accept that the MoD is entitled to require the provision of either a death certificate or other formal legal document stating that the individual has been legally declared dead before supplying service records. We have not been informed by any of the parties whether there is an equivalent procedure in Poland for declaring death in absentia, but we think that this is likely to exist.

40. In the absence of a death certificate or other legal declaration of death, the MoD adopts a policy of assuming that a person is alive until the age of 116. We find that this is an acceptable approach. Although the Appellant has produced evidence which suggests that JB is unlikely to be alive, we accept that it is appropriate for the MoD to err on the side of caution in the absence of a death certificate/legal declaration. The Appellant must follow the appropriate procedure in Poland to have JB legally declared dead. In the absence of that declaration it is not for the MoD, or for this tribunal, to make a finding based on the evidence produced by the Appellant as to whether or not, on the balance of probabilities, JB is still alive.

41. We therefore find that the data is personal data because it is plainly about and identifies a living individual. In the light of our conclusions below, we do not find it necessary to decide whether or not the data is sensitive personal data.

42. We conclude that JB would have a strong expectation that his service record would not be released to the world at large without his consent, and that this would cause distress. Because disclosure is to the world at large, it is irrelevant that

the Appellant is a member of JB's family and knows intimate details of his life. Further the tribunal cannot infer that JB would consent to disclosure if he were alive.

43. We accept that the Appellant is pursuing a legitimate interest: finding out what happened to JB in 1947. Having reviewed all the withheld information, including the information translated from Polish, we conclude that there is nothing in the withheld information which supports the Appellant's belief that the MoD is refusing to disclose the service records because it would be embarrassing for the MoD to disclose that information either because it revealed what they knew about JB's arrest in 1947 or for any other reason. The MoD did provide misleading information to the Appellant. That has now been corrected. There is nothing in the remaining withheld information which [it] is necessary to disclose to correct that misinformation. Further there is nothing in there which [it] is necessary to disclose for the purpose of the Appellant's wish to find out more than she already knows about the circumstances and place of JB's death.

44. For the reasons set out above we find that disclosure would be unfair and that condition 6 is not satisfied."

### **The Grounds of Appeal**

10. The Applicant sought permission to appeal against that decision. She submitted that the Tribunal had ignored the historical reality of the Communist regime in Poland in the period from 1944 to 1989.

11. Secondly, she submitted that

(1) the Tribunal was wrong to assume that people live 116 years

(2) the Tribunal was wrong to find that JB would have a strong expectation that his service record would not be released to the world at large without his consent and that such disclosure would cause him distress

(3) the Tribunal was wrong to conclude that there is nothing in the withheld information which it is necessary to disclose for the purpose of the Applicant's wish to find out more than she already knows about the circumstances and place of JB's death

(4) the Tribunal's decision was wrong because it ignored historical reality (which appeared to be a reiteration of the first ground of appeal).

12. On 1 May 2019 Judge Buckley refused permission to appeal on the grounds that

(1) in the absence of a death certificate or a declaration of death, it was not for the Tribunal to make a finding on the balance of probabilities as to whether or not JB was likely to be alive. The Tribunal did not assume that people live for 116 years.

(2) disclosure under the FOIA is assumed to be to the world at large, not just to the requestor. It was therefore not an error of law to assume that JB would have a strong expectation that his personal information would not be disclosed.

(3) the conclusion that there was nothing in the withheld information which it is necessary to disclose for the purposes of the Applicant's wish to find out more than she already knows about the circumstances and the place of JB's death was one which the Tribunal was entitled to reach on the information before it.

13. The Applicant has now sought permission to appeal from the Upper Tribunal.

14. Given that she still lives in Poland (as does her son-in-law, who is her representative), the Applicant has not sought an oral hearing of the application for permission to appeal and has agreed to have the matter determined on the papers. In the circumstances I am satisfied that it is appropriate to determine the matter on the papers before me.

### **The Test to be Applied**

15. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in *Smith v. Cosworth Casting Processes Ltd* [1997] 1 WLR 1538). In the exercise of its



discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal's decision.

### **The Proposed Grounds of Appeal**

16. The Applicant repeats the submission that the Tribunal has ignored the historical reality of Communist rule in Poland from 1944 to 1989 and has attached 4 extra pages of submissions reinforcing that point together with an extract from Norman Davies's *God's Playground: A History of Poland*, vol. II, *1795 to the Present* which covers part of chapter 23 "*Polska Ludowa: The Polish 'People's Republic' (since 1944)*". She also reiterates her original grounds of appeal

17. The additional material in the 4 pages of submissions was not before the First-tier Tribunal and cannot therefore be taken into account. There is nothing to suggest that that material could not have been placed before the Tribunal before the decision last year. It is not therefore admissible under the principles laid down in *Ladd v. Marshall* [1954] 1 WLR 1489 concerning the admissibility of additional material before an appellate tribunal. Moreover, although it refers to various additional documents, such as records held in German and Polish archives, it does not attach or exhibit the relevant documentation so that the accuracy of the information cannot be verified. In any event, I am satisfied that the information, fascinating as it undoubtedly is, does not advance the Applicant's case nor does it alter the outcome of my decision.

### **The MoD Communications**

18. As stated above, the Ministry's Army Personnel Centre Disclosures Department sent an email to the Applicant's son-in-law on 24 August 2016 stating inter alia that JB "finally relinquished his commission on 16/08/48" and subsequently stated that "[JB] must have lived on 16.08.1948 when he was released from the Polish Resettlement Corps (PKPR)". The Ministry has accepted that the email should not have been sent for two reasons:

(1) no personal data, including service history, pertaining to JB should have been disclosed in the circumstances of this case as the policy criteria for the disclosure (see below) were not met

(2) the sender's interpretation that JB "must have lived" at the date when he finally relinquished his commission was incorrect and involved a misreading of the available documentation. The term "relinquishing commission" did not denote that the serviceman in question voluntarily and proactively resigned his commission. The document dated 14 July 1947, disclosed to the Applicant, stated that JB had been an absentee from the PKPR since 1 June 1947, having failed to return from leave in Belgium. As the letter of 28 July 2017 from the Ministry to the Applicant clarified, the information held by the Ministry did not indicate whether JB was alive or not as at that date.

19. The Ministry of Defence referred to a specific occasion when it disclosed the records of a First World War serviceman to the National Archives, but then discovered that he was still alive (and over 110 years old), resulting in a data breach. JB (if alive) would then have been 102, well short of the 116 years of age cut-off.

20. In the absence of a death certificate, the Ministry told the Applicant on 13 October 2017 that it would accept a formal legal document which states that the individual has legally been declared dead, but no such documentation has (as yet) been forthcoming.

### **Analysis**

#### **The MoD Policy**

21. As noted in the Commissioner's decision notice reference *FS50771408* (18<sup>th</sup> January 2019), another case in which Second World War service records were sought, the MOD has explained that the Army alone receives 10,000 requests per annum for the records of deceased service personnel. The MOD's policy is that, in the absence of proof of death, the data subject should be presumed to be alive until the 116<sup>th</sup> anniversary of his birth. This is because the longest living UK citizens in recent times are reported to have died at the age of 115. Moreover, the MOD does not hold information that confirms that the individual is deceased. The MOD acknowledged that its policy of assuming that an individual is alive until 116 years is conservative and may be considered to be "over-cautious", but it explained that it owed a duty of care to its veterans. The Commissioner accepted that position in the decision under

appeal in the instant case and saw no reason to alter her view in the other case decided in January of this year.

22. Although the Applicant has produced evidence which suggests that JB is unlikely to be alive, the Tribunal held that it was appropriate for the MoD to err on the side of caution in the absence of a death certificate or a declaration of death by a court of competent jurisdiction. I can see no error of law in that conclusion. The policy may be conservative, indeed it might even be over-cautious, but the existence of the 110 year old veteran whose records were disclosed without his consent in his lifetime shows that the policy has justification. The Applicant is not, however, thereby left without a means of accessing the records in question until 9 November 2031. What she must do is to follow the appropriate procedure in Poland to have JB legally declared dead.

23. In the absence of that declaration, however, I agree that it is not for the MoD, or for the First-tier Tribunal, or indeed this Tribunal, to make a finding based on the evidence produced by the Applicant as to whether or not, on the balance of probabilities, JB is still alive.

24. Speaking for myself, I have little doubt that, given that nature of the regime which then held sway in eastern Germany and Poland, JB was indeed executed (or died of ill-treatment) at some point not long after his arrest in the middle of 1947, but it does not follow from that that

“The rule of 116 years can be changed in the case of my uncle because in all probability he was secretly killed by Communists”.

The MoD is entitled to formulate a policy to deal consistently and in accordance with the requirements of confidentiality with applications for the production of service records. That policy may be conservative, indeed possibly over-cautious, but it is a perfectly permissible policy for the Ministry to have. As I said immediately above, the Applicant is not thereby left without a means of accessing the records in question until 9 November 2031. What she must do is to follow the appropriate procedure in Poland to have JB legally declared dead, as indeed she is already doing.

### **Personal Data**

25. The Tribunal found that the data in JB's service record was personal data because it was plainly about and identified an individual who for the purpose of the MoD's policy was to be treated as a living person. I can see no error of law in that conclusion, which is plainly correct.

### **JB's Consent**

26. It is important to understand that disclosure under FOIA is disclosure to the world at large and not just to one person (in the person of an applicant) or a limited number of individuals within a family or other small group. The Tribunal was therefore right to conclude that JB would have a strong expectation that his service record would not be released to the world at large without his consent. Nor is there any material from which the Tribunal could conclude that JB would consent to disclosure to the world at large if he were alive. The Tribunal was also therefore right to conclude that it was irrelevant that the Applicant is a member of JB's family and knows intimate details of his life. I am therefore satisfied it was open to the Tribunal to find that the disclosure of JB's service record would have been unfair.

### **Legitimate Interest**

27. The Tribunal held that the Applicant was pursuing a legitimate interest in trying to find out the fate of her uncle, who was last heard of in 1947. I am entirely satisfied that it was right so to conclude. There is a legitimate interest in family members, researchers and the public in general being able to access service records of former service personnel.

### **Is Disclosure Necessary?**

28. The Tribunal read the withheld information. It concluded that there was nothing in the withheld information which supports the Applicant's belief that the MoD is refusing to disclose the service records because it would be embarrassing for the MoD to disclose that information, either because it revealed what they knew about JB's arrest in 1947 or for any other reason. There is nothing to suggest that the Tribunal

was not entitled to reach that conclusion. (I have myself read the withheld information and refer to my own conclusions at end of this decision.) It also found that there was nothing in there which it was necessary to disclose for the purpose of the Applicant's wish to find out more than she already knows about the circumstances and place of JB's death. In the context of the FOIA legislation, "necessary" means more than desirable, but less than indispensable or absolutely necessary. Accordingly, the test is one of reasonable necessity, which involves the consideration of alternative measures and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question. Again, I can see no error of law in the Tribunal's conclusion given that it had read the withheld information.

### **The Balancing Test**

29. Given that the Tribunal reached the conclusion that there was nothing in the service record which it was necessary to disclose for the purpose of the Applicant's wish to find out more than she already knows about the circumstances and place of JB's death, the balancing test did not arise. The test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

30. If the balancing test did fall to be applied, it is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, his interests or rights are likely to override legitimate interests in disclosure.

31. If, however, the balancing test did arise the Tribunal would have been entitled to find in the light of its other conclusions that, although the Applicant was seeking the information for legitimate reasons, those reasons were not sufficient to outweigh the unfair intrusion into the individual's private life which would result if disclosure were to take place. Disclosure would thus have amounted to the unfair processing of personal data. Again, I can see no error of law in that conclusion.

32. As the Commissioner explained in *FS50771408*

“38. The MOD explained that its policy on the release of personal information is publicly available. The MOD emphasised that this policy made it clear that information relating to living individuals will only be released with the express written consent of the data subject, or proof of an appropriate Court Order or Power of Attorney. The MOD explained that it had also stated that information relating to the deceased will only be made available on provision of proof of death. Therefore, the MOD argued that a data subject’s reasonable expectation would be that it would handle his or her information in accordance with this policy and not release any personal information relating to them unless these conditions are met.

39. Furthermore, the MOD explained that disclosure of such information has the potential to cause distress to former service personnel. It explained that there was evidence of families being previously targeted by medal or memorabilia collectors seeking further information about items in their possession, or the previous owner so that they can confirm provenance. The MOD argued that this can be distressing and it has a commitment to protect individuals and their families from such intrusion and distress as far as is reasonable.”

### **The Applicant’s Other Evidence**

33. For the avoidance of doubt it should be made clear that the Tribunal has not accepted the correctness of the information in the document provided by the Polish Ministry of Internal Affairs dated 12 October 1957 that JB was released from temporary arrest in August 1947.

### **Conclusion**

34. The First-tier Tribunal has issued a careful and detailed statement of reasons explaining how it arrived at the decision it did, making its findings and giving reasons for so doing. The First-tier Tribunal directed itself properly on the relevant law under FOIA. Overall the Tribunal reached a decision that was plainly one reasonably open to it. The evaluation of the evidence is ultimately an issue of fact for the first instance Tribunal. The Applicant is in reality seeking to re-argue the case on its merits, which

is not permissible where the right of appeal is confined to points of law. My assessment is therefore that any appeal to the Upper Tribunal would realistically have no prospects of success on any material point of law.

35. In addition to considering the grounds relied on by the Applicant herself, I have subjected the Tribunal's decision to my own scrutiny, particularly since she is acting in person, albeit with the assistance of her son-in-law, and is dealing with an unfamiliar system of law in a language which is not her own. However, that scrutiny has not led me to identify any arguable error of law on its part. In my judgment it reached findings and conclusions which were clearly open to it. It has adequately explained those findings and conclusions. There is nothing to suggest that it might have misunderstood or misapplied the law.

### **The Result of the Application**

36. The Tribunal made its findings of fact in some detail and gave adequate reasons for reaching the conclusion which it did. I can see no error of law in the way in which it went about its task or in the decision which it reached or in the adequacy of the reasons which it gave for that decision. The function of the First-tier Tribunal is to assess whether the Information Commissioner's decision notice "against which the appeal is brought is not in accordance with the law" (s.58 of FOIA). That the First-tier Tribunal has done. I can detect no arguable error of law in its decision.

37. There is no realistic prospect of the Applicant establishing that the First-tier Tribunal's decision was erroneous in law or that there is some other good reason to grant permission to appeal.

38. Accordingly, permission to appeal is refused.

### **Coda**

39. The Applicant makes her final submission with these words:

"I am absolutely sure that it is still possible to discover the truth about the date, place and circumstances of the death of my uncle Captain [JB]. Therefore I request the information from his MoD record produced after 1.01.1947".

40. Having myself read the withheld information, including the material translated from Polish, I am satisfied that

(1) there is nothing in the withheld information which suggests that JB returned to the UK after May 1947

(2) there is nothing in the withheld information which suggests that he was still alive in August 1948

(3) it will not assist her in ascertaining the date or the place or the circumstances of the death of her uncle nor will it clarify what happened to him

(4) there is nothing therein which supports the assertion that the MoD is refusing to disclose JB's service record because it would be embarrassing for the MoD to disclose that information

(5) there is nothing therein which supports the assertion that the MoD is refusing to disclose JB's service record because it would reveal what the Ministry knew about the circumstances of his arrest in 1947 or for any other reason.

41. I am satisfied that the First-tier Tribunal did not make an error of law and that therefore the Applicant's application for permission to appeal must be dismissed.

42. If the Applicant does want to obtain her uncle's service record, she must pursue her application in the Polish courts to have him legally declared dead. There is such a procedure known in Poland under articles 29 to 31 of the Polish Civil Code. She invoked that procedure in March of last year in the District Court in Gdansk and her daughter submitted all of the evidence in support of that application on 29 November 2018. She says that the procedure in Poland is very slow and that she does not know when the family can expect a decision. I cannot comment on the delays or otherwise of the Polish legal system, but it is that route which she must pursue rather than an application under the FOIA.



43. As I understand the procedure under articles 526 to 543 of the Polish Civil Procedure Code, the procedure for obtaining a declaration confirming that a person is dead involves the publication of an announcement or statement that such proceedings have been issued (possibly in a national newspaper, but also on the board in the town hall or court in the place where the person last used to live before his presumed death) asking the public to come forward with evidence that he is (or is not) alive. That, again as I understand it, is obligatory in this type of application. The announcement contains a deadline of at least 3 months and not more than 6 months to come up with such evidence. This element of the proceedings usually follows a hearing during which a claimant has provided the court with evidence which he or she has about the presumed death. (That was the evidence which the Applicant's daughter submitted on 29 November 2018.) I understand that the proceedings may take time owing to the obligation to provide the relevant information and the required duration of the stipulated notice and I appreciate that the claimant probably may have to pay the costs of the announcement. Nevertheless, the procedure is a routine one and I understand that there is a special division of the court to deal with this kind of procedure. It should therefore be possible for a claimant to obtain the desired declaration, albeit not as quickly as she might wish. Once the Applicant has received the declaration from the Polish courts, she should make another application to the MoD for production of her uncle's service record together with the appropriate fee.

44. I am satisfied that there is no nefarious intent on the part of the MoD in adopting the position which it has. There is no skulduggery or a wish to suppress embarrassing or inconvenient revelations about the UK's relations with the Polish Communist government after the setting up of the Iron Curtain. The position is simply that, in the absence of proof of death and thus of a death certificate or an equivalent document, the MoD is entitled to ask for and receive a declaration of death from the relevant legal authorities before it will disclose the serviceman's record, unless 116 years have passed since his date of birth.

45. It is apparent from the material which the Applicant has produced that her uncle was a brave and resourceful man who was prepared to risk his life to return behind the Iron Curtain in immediate post-war Europe, initially to rescue his fiancée and his nephew, but later to assist many more people in their desire to escape. It is apparent

from the dramatic memoir written by the Applicant's cousin that he very nearly succeeded:

“As the secret of our escaping to the West started to spread ... we have ended up with 70 people wanting to join us in the planned escape from the “Socialist Paradise”. He could not refuse.

As such we have travelled to a North-Western town near the Polish-German border, but outside the belt of the restricted area. Then at the arranged day and time, in the evening, we were to meet at the prearranged spot to meet with the guides and proceeded with the crossing.

When the dark fell we commenced what to me seemed as a new adventure. We were walking over rough terrain, crossing dykes where all the men were standing to above the waist in water, passing overhead women, children and their luggage. Search lights were crossing the skies and at times, the terrain we were to cross at which time we were playing dead, to restart when the danger of spotting us seemed to have lessened.

Close to the border we have reached a hill: the main party began to descend. Myself I was on the top of this hill, when suddenly all hell broke loose: we have found ourselves under automatic gunfire coming from the opposite side, followed by much Russian swearing and the appearance of the collaborators of the above commotion, dressed in Polish uniforms.

More by luck than a good sense I have dropped flat to the ground, thus not letting myself to present an easy target against the sky line.

But I was scared and ... they had dogs. This was the reason for me to be picked up as well. Then we were led to the guard-room and interrogated.

The same interrogation followed when we were transported to the nearest town.

[JB] managed to escape the capture. Hired “guides” proved to be Commie collaborators. Struggling on the difficult terrain, he was carrying on his shoulders an elderly lady, a wife of [a] Polish officer awaiting for her in the West. Because of this burden, he fell further behind. Being on the other side of the hill, they have managed to avoid the capture and have reached West Berlin, where he was still originally stationed.”

46. Although there is no direct witness testimony of it, it was there, according to the account of a relative of his landlady, that he was abducted.

47. It is a tribute to him and his courage that, more than 70 years after he disappeared, his niece and her family are still striving to discover what happened to him.

**Signed**

**Mark West**  
**Judge of the Upper Tribunal**

**Dated**

**29 August 2019**