Neutral Citation Number: [2023] UKIPTrib 10

Case No: **IPT/22/11/H & IPT/22/12/H**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 24 November 2023

Before:

LORD JUSTICE SINGH (PRESIDENT)
JUDGE RUPERT JONES

- -

Between:

(1) CHRISTINE LEE **(2) DANIEL WILKES**	**Claimants**
- v -	
SECURITY SERVICE	**Respondent**

- -
- -

Ramby de Mello, Tony Muman and Muhammad UI-Haq (instructed by Luke & Bridger Law) appeared on behalf of the **Claimants**
Victoria Wakefield KC, Rosemary Davidson and Ros Earis (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**
Jonathan Glasson KC and Jesse Nicholls appeared as Counsel to the Tribunal

Hearing date: 20 October 2023

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OPEN JUDGMENT

Lord Justice Singh :

Introduction

1. This is the OPEN judgment of the Tribunal on an interlocutory application. There is no CLOSED judgment since we were able to consider this application entirely in OPEN, including at an OPEN hearing which took place on 20 October 2023. The Claimants' main application is for the Tribunal's permission to disclose certain documents to the Special Advocates in separate proceedings, brought by two applicants known as C17 and C18, which are taking place before the Special Immigration Appeals Commission ("SIAC").

2. The background to the present claim before the Tribunal is set out in the judgment of this Tribunal dated 22 September 2023: [2023] UKIP Trib 8, at paras 4-11. The claim arises from a Security Service Interference Alert ("IA") dated 13 January 2022 issued by the Respondent to the Parliamentary Security Director of the United Kingdom ("UK") Parliament. That judgment followed an OPEN hearing on a procedural issue which took place on 11 July 2023. For the purpose of that hearing there was an agreed bundle, which included the Respondent's Preliminary Open Response to the claim. The present application for disclosure covers in particular that Preliminary Open Response; the Claimants' response to that document; and correspondence between the parties and the Tribunal.

3. In the proceedings before SIAC, C17 and C18 seek to challenge decisions by the Secretary of State for the Home Department to exclude them from the UK. They are Chinese/Hong Kong nationals and former clients of the First Claimant in these proceedings, Christine Lee.

4. The basis for the application for disclosure is that the documents are reasonably necessary to explain the legitimate professional connection between the First Claimant and C17 and C18. It is submitted that the interests of justice require disclosure, which will assist the Special Advocates before SIAC to understand the full reasons why the IA was issued and its underlying connection to the exclusion of C17 and C18 from the UK. It is also submitted that there is a public interest in disclosure so that the First Claimant can vindicate herself before this Tribunal.

Procedural background

5. The Preliminary Open Response was filed by the Respondents [*sic*] in order to comply with a direction from the Tribunal. On 13 December 2022 the President of the Tribunal directed that:

> "The disclosure being made by the Respondents at the President's direction is only for the purposes of the proceedings in the Tribunal unless permission for another purpose is sought and granted by the Tribunal."

This direction was made under section 68(1) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), which we set out below.

6. At one time the Claimants' representatives appeared to take the position that they were entitled to disclose the contents of the OPEN bundle for the hearing that took place on 11 July 2023 without the permission of the Tribunal, but that is no longer their position. On 14 September 2023 the Claimants' solicitors sought the permission of the Tribunal to disclose the documents concerned.

7. On 19 September 2023 the Respondent submitted as follows:

> "4. In summary, the Respondent submits that: (a) under IPT Rules rule 7 the Tribunal does not have the power to make onward disclosure of material falling within rule 7(2), absent the consent of the provider of that material; and (b) the Respondent does not give its consent.
>
> 7. Tabs 8 to 17 and 22 to 25 of the OPEN bundle comprise material originating from the Complainants themselves, or in the public domain. It does not therefore fall to the Respondent to give consent to the onward disclosure of that material, and in any event the Respondent would have no objection to its disclosure.
>
> 8. The remaining Tabs of the OPEN bundle comprise material provided in whole or in part by the Respondent. The Respondent does not consent to the disclosure of that material."

8. As will become apparent, the Respondent's position has subsequently been refined. In particular, the Respondent no longer contends that the Tribunal has no power to permit disclosure of documents in an OPEN bundle without its consent.

9. In view of the fact that there was to be an OPEN hearing (which took place on 20 October 2023) to consider the interlocutory application for disclosure, the President made an interim direction on 12 October 2023, that the relevant documents should not be available for inspection by the public or be disclosed pending further order. If that had not been done, it would have defeated the very purpose of the hearing which was

then to take place. Notice was given to the Press Association's subscribing media organisations since the issues might affect the media's rights under Article 10 of the European Convention on Human Rights ("ECHR"), which is one of the Convention rights set out in Schedule 1 to the Human Rights Act 1998 ("HRA").

10. At the hearing on 20 October 2023 we had the benefit of submissions from Mr Ramby de Mello on behalf of the Claimants; from Ms Victoria Wakefield KC on behalf of the Respondent; from Mr Jonathan Glasson KC as Counsel to the Tribunal ("CTT") and from Mr Sam Tobin, a representative of the media.

11. In the light of developments which took place at the hearing, we gave the Respondent permission to file brief written submissions following the hearing by 24 October 2023; and gave the Claimants, CTT and the media permission to file written submissions in response by 1 November 2023. In the event we received written submissions from the parties and CTT but not on behalf of the media. We are grateful to all concerned for their written and oral submissions and have taken them into account in arriving at this judgment.

Material legislation

12. Section 68(1) of RIPA provides that, subject to any rules made under section 69,

> "… the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them."

13. Section 69(1) of RIPA confers power on the Secretary of State to make rules for, amongst other things,

> "(b) any matters preliminary or incidental to, or arising out of, the hearing or consideration of any proceedings, complaint or reference brought before or made to the Tribunal."

14. Section 69(6) makes it clear that, in making rules under this section, the Secretary of State shall have regard, in particular, to:

> "(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to

> national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."

15. The present rules made under section 69 of RIPA are the Investigatory Powers Tribunal Rules 2018 (SI 2018 No. 1334) ("the Rules"). Rule 10(1) provides that the Tribunal are under no duty to hold a hearing, but they may do so by holding, at any stage of their consideration:

> "(a) a hearing at which the complainant and the respondent may make representations, give evidence and call witnesses,
>
> (b) a hearing in the absence of the respondent at which the complainant may make representations, give evidence and call witnesses, or
>
> (c) a hearing in the absence of the complainant at which the respondent may make representations, give evidence and call witnesses."

16. Rule 10(4) provides that, in exercising their discretion to hold a hearing, the Tribunal must endeavour, so far as is consistent with the general duty imposed on the Tribunal by rule 7(1), to conduct proceedings, including any hearing, in public and in the presence of the complainant.

17. Rule 7(1) provides that:

> "The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being or the United Kingdom or the continued discharge of the functions of any of the intelligence services."

The rest of rule 7 needs to be set out in full in order to understand the particular (perhaps unique) constraints under which this Tribunal must operate:

> "(2) Without prejudice to this general duty, but subject to paragraphs (3) to (6), the Tribunal may not disclose to the complainant or to any other person other than Counsel to the Tribunal—
>
> (a) any information or document disclosed or provided to the Tribunal in the course of a hearing under rule 10(1)(c);

(b) any information or document otherwise disclosed or provided to the Tribunal by any person pursuant to section 68(6) of the Act, or provided voluntarily by a person specified in section 68(7)(9);

(c) any information, document or opinion provided to the Tribunal by a relevant Commissioner pursuant to section 68(2) of the Act;

(d) the fact that any information, document, or opinion has been disclosed or provided in the circumstances mentioned in sub-paragraphs (a) to (c);

(e) the identity of any witness at a hearing under rule 10(1)(c) or the fact that any witness was called.

(3) The Tribunal may disclose anything described in paragraph (2) with the consent of—

(a) in the case of sub-paragraphs (a) and (b), the person who disclosed or provided the information or document;

(b) in the case of sub-paragraph (c), a relevant Commissioner and, to the extent that the information, document or opinion includes information provided to a relevant Commissioner by another person, that other person;

(c) in the case of sub-paragraph (d), the person whose consent is required under this rule for disclosure of the information, document or opinion in question;

(d) in the case of sub-paragraph (e), the witness.

(4) Paragraphs (5) and (6) apply where—

(a) the Tribunal is prohibited by paragraph (2) from disclosing to the complainant something falling within sub-paragraph (a), (b), (d) or (e) of that paragraph, and

(b) the respondent refuses to consent to such disclosure, or a gist or summary thereof.

(5) The Tribunal may direct the respondent to make representations to the Tribunal which provide their reasons for withholding any document or information from the complainant.

(6) The Tribunal may, after considering any such representations, direct the respondent—

(a) to disclose to the complainant documents or information supplied to the Tribunal by the respondent, or

(b) to provide to the complainant a gist or summary of such documents or information.

(7) Where the Tribunal has directed the respondent under paragraph (6) —

(a) the respondent is not required to disclose to the complainant documents or information or (as the case may be) provide to the complainant a gist or summary, but

(b) if the respondent does not do so the Tribunal may—

(i) if they consider that anything required to be disclosed or provided might adversely affect the respondent's case or support a complainant's case, direct that the respondent is not to rely on such points in the respondent's case, or that the respondent must make such concessions or take such other steps, as the Tribunal may specify, and

(ii) in any other case, direct that the respondent must not rely in the proceedings on anything required to be disclosed or provided.

(8) The Tribunal may also disclose anything described in paragraph (2) as part of the information provided to the complainant and respondent under rule 15(2), subject to the restrictions contained in rule 15(6) and (7).

(9) The Tribunal may, subject to the general duty imposed on the Tribunal in paragraph (1), disclose the fact that the Tribunal has held, or proposes to hold, a hearing under rule 10(1)(c) (in whole or in part) in private or in the absence of the complainant.

(10) The Tribunal may not order any person to disclose any information or document which the Tribunal would be prohibited from disclosing by virtue of this rule, had the information or document been disclosed or provided to the Tribunal by that person.

(11) Subject to paragraph (12), the Tribunal may not, without the consent of the complainant, disclose to any person other than Counsel to the Tribunal—

(a) any information or document disclosed or provided to the Tribunal by or on behalf of the complainant or the fact that any such information or document has been disclosed or provided;

(b) the identity of any witness called by or on behalf of the claimant or the fact that such a witness was called.

(12) The Tribunal may disclose the information provided by the complainant described in rule 8(2)(a) and (b) or, as the case may be, rule 9(2)(a) and (b)."

The principle of open justice: general

18. In *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629 the Supreme Court set out the basic principle of open justice. The judgment of the Court was given by Lady Hale PSC. At para 41, she said:

> "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, *unless inconsistent with statute or the rules of court*, all courts and tribunals have an inherent jurisdiction to determine what the principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (*save to the extent that they may contain a valid prohibition*). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case." (Emphasis added)

19. At paras 42-43, Lady Hale explained that the two principal purposes of the open justice principle are, first, to enable public scrutiny of the way in which courts decide cases and, secondly, to enable the public to understand how the justice system works and why decisions are taken. She noted that the general practice in modern times has changed so that often documents are no longer read out in court. It is therefore difficult, if not impossible, in many cases to know what is going on unless you have access to the written material.

20. At para 44, Lady Hale noted that in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618, it was held that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be limited to those which the judge has been asked to read or has said that he has read. However, she continued at para 45, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the principle of open justice. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access, but there are others who may be able to show a legitimate interest in doing so. Lady Hale explained, by reference to earlier authority, that the court has to carry out "a fact-specific balancing exercise". On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose". But, as she continued at para 46,

on the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access: one of "the most obvious ones" that Lady Hale mentioned is national security. This is of particular relevance to this Tribunal.

21. At para 47, Lady Hale said that also relevant must be the practicalities and the proportionality of granting the request.

The principle of open justice in the specific context of this Tribunal

22. In *Various Claimants v Security Service and Another* [2022] UKIP Trib 3; [2023] 2 All ER 949, at paras 71-79, this Tribunal (in a judgment given by the President) considered the application of the principle of open justice in the specific context of this Tribunal: for convenience we will refer to this as the *Vetting* judgment. At para 71, the Tribunal said:

> "Open justice is a foundational common law principle. The statutory provisions establishing this Tribunal (ss 68 and 69 of RIPA) and the rules made under them (the Investigatory Powers Tribunal Rules 2018 (SI 2018/1334) ('the Rules')) contain derogations from this principle, in furtherance of other important public interests. The principle of legality, however, requires that the derogations be stated expressly (or be evident by necessary implication) and strictly construed: see e.g. *R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400 at 412, [2000] 2 AC 115 at 131 (Lord Hoffmann)."

23. Having considered the decision of the Supreme Court in *Dring*, this Tribunal said the following, at paras 75-77:

> "[75] The procedures of this Tribunal, however, differ from those applicable in other court and tribunal proceedings. In the first place, non-parties have no general right of access to any documents filed by parties with the Tribunal. Indeed, there are procedural rules going in the opposite direction.
>
> [76] The legislative context in which this Tribunal has to operate is very different from that which governs ordinary civil proceedings. In *Dring*, at paras [16]–[33], Lady Hale referred in detail to the provisions of the Civil Procedure Rules which either confer a right on third parties to obtain access to certain documents which have been filed with the court, or at least confer a wide discretion on the court to afford such access. In contrast, this Tribunal is subject to a very different legal

> regime, in particular by r 7 of the Rules. For example, r 7(11) provides that, subject to para (12), the Tribunal may not, without the consent of the complainant, disclose to any person other than Counsel to the Tribunal—
>
> > '(a) any information or document disclosed or provided to the Tribunal by or on behalf of the complainant or the fact that any such information or document has been disclosed or provided; ...'
>
> [77] It may be that, in an appropriate case, the Tribunal could grant access to certain information or documents to a non-party on application, exercising its general power under s 68(1) of RIPA to determine its own procedure in accordance with the principles enunciated in *Dring* and subject always to the overriding duty to secure that information is not disclosed to an extent or in a manner that is contrary to the public interest (see r 7(1) of the Rules)."

24. At one stage the Respondent appeared to submit that what was said by the Tribunal at para 77 of the *Vetting* judgment was wrong in law but it became clear at the hearing before us, and in written submissions which were filed after that hearing, that the Respondent does not suggest that the Tribunal was wrong.

The Respondent's final position

25. In written submissions dated 24 October 2023, the Respondent's final position, which differs from the position it took in earlier submissions in its skeleton argument and even to some extent at the hearing before us, is set out in the following way.

26. The Respondent submits that it may be helpful to analyse the application of rule 7 by reference to the following stages of Tribunal proceedings:

(1) A complaint has been issued and the Respondent has disclosed and/or provided the Tribunal with information and/or documents pursuant to section 68(6) of RIPA.

(2) The Respondent has consented to disclosure of such information and/or documents to the complainant.

(3) An open hearing has taken place at which there has been relevant reference to such information and/or documents.

27. At stage 1, it appears to be common ground, at least insofar as CTT are concerned, that the Respondent may refuse to consent to the disclosure of documents or information to a complainant or a third party. A refusal to consent to disclosure to the complainant may result in procedural consequences following the exercise of the Tribunal's discretion in rule 7(4) – (7). A refusal to consent to disclosure to a third party, however, would not have those consequences.

28. At stage 2, the Respondent submits that disclosure to a complainant brings an end to the application of rule 7(2) so far as the person to whom disclosure was made, with the effect that any application by that person for collateral use of those documents would fall to be determined by the Tribunal.

29. So far as an application by a third party is concerned, the Respondent now accepts CTT's submission that the Tribunal has jurisdiction to make the final decision with respect to any application for access to that material. The Respondent does so noting the cautious terms in which this Tribunal described its jurisdiction in para 77 of the *Vetting* judgment.

30. The Respondent agrees with the Tribunal that the exercise of such a power would always be subject to the overriding duty in rule 7(1). It also submits that it would only be in the most exceptional circumstances (if ever) that it would be appropriate for the Tribunal to grant an application for third party disclosure of documents at stage 2 without the consent of the Respondent.

31. At stage 3, the Respondent accepts that any third party application for access to documents or material relevantly referred to at an OPEN hearing is not governed by rule 7(2). Instead this falls within the Tribunal's jurisdiction under section 68(1) of RIPA to determine its own procedures and any relevant common law principles as modified by the statutory scheme (as per para 77 of the *Vetting* judgment).

32. Finally, the Respondent submits that, where only a severable part of a document has been relevantly referred to at an open hearing, (1) the provision of the part that has been relevantly referred to at an open hearing would fall within the stage 3 jurisdiction; but (2) the provision of the rest of the document would (unless consented to by the Respondent) fall within the more limited stage 2 jurisdiction.

Submissions from CTT

33. In their note dated 1 November 2023, CTT agree that the Respondent's three-stage analysis of rule 7 is helpful. They also agree with the Respondent's submissions in respect of stage 1. We endorse that analysis of stage 1.

34. So far as stage 2 is concerned, CTT submit that it is not appropriate to refer to a respondent "consenting" to an application for disclosure by a third party. They submit that the Tribunal would consider submissions from a respondent as well as from a complainant and determine the application mindful of the Tribunal's duty in rule 7(1).

35. CTT broadly agree about the Respondent's summary of the approach to stage 3. They would, however, enter a note of caution in respect of the emphasis on documents or material "relevantly" referred to at an open hearing and a "severable" part of a document being referred to at such a hearing. They submit that this risks over-complicating the question for the Tribunal. They submit that the primary question for the Tribunal at stage 3 is whether providing access to the information or document is required in accordance with a tailored fact-sensitive balancing exercise of the kind identified in *Dring*. Since one of the purposes of the open justice principle is to enable the public to understand how the justice system works and why decisions are taken, CTT submit that, even where they have not been referred to during the hearing, the Tribunal may consider that access to such information or material will further the open justice principle and this must be weighed in the balancing exercise. We accept those submissions by CTT in relation to stages 2 and 3.

36. Finally, CTT invite the Tribunal to review the interim order made by the President on 12 October 2023 for the purpose of the hearing on 20 October rather than making it a final order as was contemplated during the oral hearing.

The general legal framework

37. Before we address the particular application for disclosure made in this specific case, we hope it will be helpful for us to set out the general framework which governs the work of this Tribunal, not least for future reference in other cases. For ease of exposition we will refer to "complaints" to include claims and other proceedings that come before this Tribunal: this accords with the terminology used in rule 3, where "complainant" is defined to include a claimant under section 7(1) of the HRA.

38. As this Tribunal noted in the *Vetting* judgment, at para 78:

> "[78] … in most courts and tribunals, unless the proceedings are withdrawn or settled, there will at some point be a public hearing followed by a public judgment or decision. In this Tribunal, many complaints and claims (in fact the vast majority) are determined without any public hearing. Rule 15 of the Rules imposes duties and confers powers to provide determinations, or summaries, together with reasons in certain cases. But the Tribunal does not publish every such determination. Most of the judgments and decisions published are rulings on preliminary issues of law decided after OPEN hearings or after considering OPEN submissions."

39. There are various reasons why most of the complaints which are made to this Tribunal can be dealt with by its members without the need for any hearing. For example, it may be clear on the face of the complaint that it is unsustainable because it appears to the Tribunal to be, in the language of the statute, "frivolous or vexatious": see section 67(4) of RIPA. The complaint may be out of time: the usual time limit is one year (see section 67(5) of RIPA and section 7(5) of the HRA) but this may be extended where the Tribunal consider that it is equitable to do so in all the circumstances. Finally, it may be clear that the complaint is outside the jurisdiction of the Tribunal, for example if it is brought against a body which does not fall within the remit of the Tribunal or does not concern conduct or the use of covert or coercive powers defined in section 65(5) of RIPA.

40. It must also be recalled that the Tribunal is not a traditional court or tribunal because its procedure is not only a conventional adversarial one. It also has an inquisitorial role: see section 67(3) of RIPA, which talks of an "investigation" where the Tribunal consider a complaint made under section 65(2)(b).

41. Most importantly, by reason of the nature of the work which the Tribunal does, its process is often necessarily conducted in secret or at least in private. Sometimes it is secret, even to at least one of the parties, but in other cases it is private in the sense that only the parties are aware of the process followed (and the determination of the Tribunal).

42. At the end of the process, the Tribunal must give notice to the complainant and the respondent of their determination, in accordance with section 68(4), (4A) and (4C) of RIPA. In particular, section 68(4) refers to either (a) a statement that they have made

a determination in the complainant's favour; or (b) a statement that no determination has been made in his favour.

43. Rule 15(1) requires the Tribunal, in addition to giving notice under section 68(4), (4A) or (4C) of RIPA, to provide information to the complainant and respondent in accordance with that rule.

44. Rule 15(2) provides that, where they make a determination in favour of the complainant, the Tribunal must provide the complainant and respondent with the determination including any findings of fact.

45. Rule 15(3) provides that, where they make a determination which is not a determination in favour of the complainant, the Tribunal must, if they consider it necessary in the interests of justice to do so, provide the complainant and respondent with a summary of the determination.

46. Rule 15(6) makes it clear that the duty to provide information under that rule is in all cases subject to the general duty imposed on the Tribunal by rule 7(1). In practice, therefore, the Tribunal may in fact be unable to provide any reasons to the complainant, as it would breach rule 7(1) to do so.

47. Moreover, rule 15(7) states that no information may be provided under that rule whose disclosure would be restricted under rule 7(2) unless the person whose consent would be needed for disclosure under that rule has been given the opportunity to make representations to the Tribunal. It is clear from that provision that, even in the circumstances where it applies, the person whose consent would be needed under rule 7(2) does not have a "veto" but rather must be given the opportunity to make representations to the Tribunal. Those representations will then be considered by the Tribunal, which will arrive at a judicial decision. This is important for the rule of law, because it is ultimately the Tribunal (a judicial body) which makes decisions and not the executive.

48. As we have already said, the Tribunal is under no duty to hold a hearing: see rule 10(1). It must endeavour, so far as is consistent with the general duty imposed on the Tribunal by rule 7(1), to conduct proceedings, including any hearing, in public and in the presence of the complainant: see rule 10(4).

49. Most importantly, rule 7 contains not only the fundamental duty in para (1) but also the detailed code of provisions in the rest of that rule. It is clear from that code that the Tribunal is subject to severe constraints as to what it can disclose even to another party to the case before it, let alone to third parties.

50. In those cases where there is no hearing, therefore, there can be no question of a third party having the right to disclosure of documents which have been provided to the Tribunal. It seems to us that, in that situation, the Tribunal would have the power to grant an application for disclosure to a third party (in particular the media), but this would be highly unusual and would have to be subject to the requirements of rule 7.

51. Furthermore, it is obvious that, in those cases where the Tribunal has to hold a CLOSED hearing (that is, a hearing in accordance with rule 10(1)(c)), there can again be no question of a third party having the right to documents which have been considered by the Tribunal. Indeed, it is inherent in the scheme of the Rules and the nature of the Tribunal's work that, where there is such a CLOSED hearing, even the complainant and their representatives will not have access to CLOSED documents. The unfairness that this would otherwise cause is mitigated by the Tribunal's power to appoint CTT to assist them, in particular by taking part in CLOSED hearings: see rule 12. The Tribunal's procedures have been held by the Grand Chamber of the European Court of Human Rights to provide a "robust" and "effective" judicial remedy: see *Big Brother Watch v UK* (2022) 74 EHRR 17, at paras 413-415 and 467.

52. This leads us on to an important distinction which may need to be drawn between two principles which often overlap but are not the same. The first principle is the principle of procedural fairness, in particular fairness to the complainant, who may otherwise be in the dark about the case against them. The other principle is the principle of open justice. Often the two principles coincide but this will not always be so. As Ms Wakefield submitted before us, there may be situations in which a respondent is willing (in the interests of fairness) to disclose certain documents or information to the complainant and their representatives, but where it would not be appropriate for those matters to be disseminated more widely or made public. The Tribunal has ample, flexible powers to regulate its own procedure to ensure that justice is done while balancing those various interests.

53. This brings us finally to the relatively rare situation with which this case is concerned. That is where the Tribunal has been able to conduct an OPEN hearing in accordance with rule 10(4) and for that purpose there will often be an OPEN bundle of documents.

54. We do not accept the original submission of either party as to what should then happen. We do not accept the suggestion that was made at one time on behalf of the Claimants that they had the right to disclose documents in the OPEN bundle to third parties in their discretion. In our judgment, it is clear, on the true construction of RIPA and the Rules, in particular rule 7, that the permission of the Tribunal is required if such disclosure is to be made beyond the parties. This is certainly so in a case like the present, where the President expressly made a direction that the information disclosed by the Respondent was to be used only for the purpose of these proceedings. For future reference, it may be that such a direction should be made in any case where there is any significant risk that disclosure of documents in an OPEN bundle to non-parties or for collateral purposes may damage the public interests set out in rule 7(1). This will not preclude such disclosure, but it will ensure that it cannot take place without the permission of the Tribunal.

55. Conversely, we do not accept the submission that was made at one time on behalf of the Respondent that, in effect, it had an absolute "veto". In our judgment, CTT were correct to submit that the provisions of rule 7(2) apply to CLOSED proceedings and not to OPEN proceedings.

56. In our judgment, the correct legal position is that, where there has been an OPEN hearing and a bundle prepared for use at that hearing, the Tribunal must conduct a "fact-specific" exercise in accordance with the principles set out by the Supreme Court in *Dring*. In applying those principles to the specific context of this Tribunal, they must comply with the provisions of rule 7(1) in particular, but they must also seek to implement the principle of open justice so far as it is possible to do so.

The Civil Procedure Rules

57. On behalf of the Claimants Mr de Mello relied on the Civil Procedure Rules 1998, in particular CPR 31.22 and CPR 5.4C.

58. CPR 31.22 governs subsequent use of documents which have been disclosed in civil proceedings. Para (1) provides that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree. Further, para (2) provides that the court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

59. We were referred by Mr de Mello to a number of authorities on CPR 31.22, including *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002] EWCA Civ 2; [2002] 1 WLR 2253.

60. We do not accept the suggested analogy with CPR 31.22. Civil proceedings are very different from the cases which come before this Tribunal and the legal framework which applies is fundamentally different. As Lady Hale made clear in *Dring*, at para 41, which we have cited above, the way in which the principle of open justice is applied in a specific context must be consistent with the rules which provide the legal framework in which a particular court or tribunal operates.

61. CPR 5.4C provides, in para (1), that:

> "The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –
>
> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
>
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing)."

62. Para (2) provides that a non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.

63. Para (3) provides that a non-party may obtain a copy of a statement of case or judgment or order under para (1) only if there has been an acknowledgement of service or a defence filed; or the claim has been listed for a hearing; or judgment has been entered in the claim.

64. Mr de Mello also drew our attention to a number of decisions on CPR 5.4C, in particular the judgment of Bean J in *MAB v Serco Ltd* [2014] EWHC 1225 (QB); the judgment of Swift J in *R (Yar) v Secretary of State for Defence* [2021] EWHC 3219 (Admin); and the judgment of Leggatt J in *Blue v Ashley* [2017] EWHC 1553 (Comm).

65. As we have said, we do not consider that there is any helpful analogy to be drawn between the specific procedures which govern this Tribunal and ordinary civil proceedings, which are governed by the Civil Procedure Rules.

66. Mr de Mello also relied upon what was said by this Tribunal in *Liberty v Security Service* [2022] UKIP Trib IPT_ 20_ 01_ CH, in a judgment given on 14 February 2022 by Lieven J and Charles Flint QC, at para 5. It was said that:

> "The applicable law on collateral use of material disclosed in the courts is codified in CPR Rule 31.22."

The facts of that case were very different from those of the present. It did not concern an application by or on behalf of a non-party. In any event, this Tribunal has had the advantage of detailed submissions, and in particular has the advantage of the judgment of this Tribunal in the *Vetting* case, which was given after the decision in *Liberty* and which considered the application of the principles in *Dring* to the specific context of the Tribunal, something which the Tribunal did not have to do in the *Liberty* case. We therefore do not find that judgment to be of material assistance in the present case.

67. As we have said, we do not accept the suggested analogy with CPR 31.22. Nevertheless, we agree with Ms Wakefield that, insofar as the Tribunal's discretion can properly be informed by the factors that may arise under that provision, it is noteworthy that it is well established on authority that "cogent and persuasive reasons" are required before the court will give permission for collateral disclosure under CPR 31.22. This was explained by Eder J in *Tchenguiz v Director of the Serious Fraud Office* [2014] EWHC 1315 (Comm), at para 18:

> "In considering these submissions, there is the obvious point that the grant of the permission contemplated by CPR 31.22 is *ex hypothesi* one which is to be exercised to enable documents to be used for purposes other than the proceedings in which the documents have been disclosed; and that therefore the fact that the documents in question are to be used for some collateral purpose cannot, of itself, be a bar to the grant of permission. However, given the compulsive nature of the disclosure process in legal proceedings and consistent with *Marlwood* and *Crest Homes*, I fully accept that the burden of proof lies on the applicant seeking permission and that the bar is high i.e. the applicant must show '*cogent and persuasive reasons*' why any particular document should be released amounting to '*special circumstances*'. In my view, it is important that these requirements are not in any way watered-down. …" (Emphasis added)

The correct approach to the present application

68. Having set out above our analysis of the open justice principle and its interaction with the Rules, in particular rule 7, and having set out our acceptance of the three-stage approach set out by the Respondent/CTT, we will now apply those principles to the present application, which arises at stage 3. In summary, we must conduct a fact-sensitive balancing exercise in accordance with *Dring*, subject to rule 7 and national security considerations, fortified by the common law principle requiring cogent and persuasive reasons for disclosure to a non-party. In addition, there must also be a fairness assessment alongside the open justice assessment, as we have made clear that these are two separate exercises operating in parallel.

The Claimants' application for disclosure

69. In outline we have reached the following conclusions:

(1) There is no cogent or persuasive reason (nor evidence) that has been put forward for why either the Special Advocates, or C17 and C18 or their legal representatives, require sight of the Preliminary Open Response to act in the SIAC proceedings (beyond the broad implication that there is a connection between the two sets of proceedings).

(2) The extent to which the Preliminary Open Response was referred to at the hearing on 11 July 2023 was minimal and relevant reference to it has already been covered by the skeleton arguments which have already been disclosed to the media.

(3) Fairness does not require disclosure to C17 and C18 or their legal team because the Secretary of State is subject to the exculpatory duty to disclose relevant documents in SIAC proceedings.

(4) The disclosure sought does not assist in vindicating the Claimants' case in the proceedings before this Tribunal; there is no cogent or persuasive case put forward as to why such disclosure to third parties would assist the complainants in these proceedings; nor is the fairness of these proceedings advanced by such disclosure in circumstances where CTT is instructed.

(5) The question of disclosure both to the Claimants (and potentially others) will be kept under review both by the Tribunal in these proceedings and by SIAC in its proceedings as part of each tribunal's continuing duties.

We will develop our reasons below.

70. As it was initially framed, the Claimants' application was for certain documents to be disclosed to the Special Advocates in the proceedings brought by C17 and C18 in SIAC. At the hearing before us, Mr de Mello applied to add that there should also be disclosure of the relevant documents to C17 and C18 themselves and the legal team acting for them in SIAC. He informed this Tribunal that he himself is instructed by C18 in the SIAC proceedings and that his instructing solicitor in this case is also instructed by both C17 and C18 in those proceedings.

71. The main document on which Mr de Mello's submissions focussed was the Preliminary Open Response by the Respondent in this Tribunal. Mr de Mello observed that this document was referred to in the parties' OPEN skeleton arguments and that those skeleton arguments had been provided to the media at the time of the hearing on 11 July 2023. The document was also referred to in part during the course of that OPEN hearing.

72. It seems to us that, if anything, the fact that the media have already had access to the parties' skeleton arguments means that they and others have sufficient access to what is said in the Preliminary Open Response in order to be able to report fairly the OPEN proceedings that were before this Tribunal. Furthermore, the media and the public generally have available to them the OPEN judgment of this Tribunal dated 22 September 2023. The issue before the Tribunal which is the subject of that judgment was principally an issue of law relating to whether the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 applies to the present context. In our judgment, in order to have a fair understanding of that issue and the judgment about it, it is unnecessary to have access to the Preliminary Open Response itself.

73. In this context, Mr de Mello submitted that the Preliminary Open Response should be regarded as being in the nature of a "pleading". He therefore drew directly on the provisions of CPR 31.22 and CPR 5.4C. In the alternative, he submitted that an analogy can be drawn with those provisions and therefore the Tribunal should grant permission for disclosure of what is in effect a "statement of case".

74. We do not accept those submissions on behalf of the Claimants. The Rules do not refer to pleadings or statements of case. This is important because, in many cases, in particular where the complainant is unrepresented, it would be inappropriate to impose a requirement for such formality in this Tribunal. While it is true that, in the present case, the Respondent is a sophisticated body and is legally represented, nevertheless the Preliminary Open Response is in substance disclosure to the Tribunal

under section 68(6) of RIPA and rule 7. Section 68(6) provides that it shall be the duty of the persons specified in subsection (7) – which include the Respondent in this case – to disclose or provide to the Tribunal "all such documents and information as the Tribunal may require" for the purpose of enabling them (a) to exercise the jurisdiction conferred on them by or under section 65; or (b) otherwise to exercise or perform any power or duty conferred or imposed on them by or under RIPA or the Investigatory Powers Act 2016.

75. We are inclined to agree with Ms Wakefield that, even in the absence of an express direction such as that made by the President on 13 December 2022, there would be an implied condition of confidentiality attached to documents disclosed by a Respondent under that provision so that collateral use by a party of it would require the permission of the Tribunal. It is unnecessary to decide that point in the present case. What is important in the present case is that there was an express direction to that effect in this case.

76. On behalf of the Respondent, Ms Wakefield's fundamental submission is that, in fact, the procedure in SIAC can accommodate disclosure to the Special Advocates if it is necessary in advance of their going into "purdah". In any event, she submits that any "exculpatory material" must be disclosed in order to ensure that the proceedings before SIAC are fair. She submits that, therefore, the Special Advocates in the SIAC proceedings will have access to any relevant material, including exculpatory material, as this is required by the SIAC (Procedure) Rules (SI 2003 No 1034), para 10A.

77. Ms Wakefield submits that the only practical effect of the present application for disclosure to the Special Advocates would be to bring forward in time the moment at which the Special Advocates would obtain the material which is in issue. But she submits an insufficient case has been made out to justify taking that course. She also submits that SIAC would be better placed than this Tribunal to assess what material the Special Advocates in those proceedings need since it will be familiar with the entirety of the case, which this Tribunal is not. We agree.

78. At the hearing before us Ms Wakefield made clear that she would not resist the application for permission to disclose those parts of the Preliminary Open Response which were referred to in the parties' skeleton arguments for the hearing on 11 July 2023 or were referred to orally at that hearing. On the face of it, even those parts would be covered by the direction made by the President on 13 December 2022, but she would not resist the grant of permission to disclose those parts. We will therefore grant permission to that extent and will ask the parties, in liaison with CTT, to agree a schedule of those parts which can properly be disclosed for collateral purposes.

79. We agree with Ms Wakefield that other documents whose disclosure is now sought have never been referred to in the same way as the Preliminary Open Response. We do not consider that any good reason has been provided as to why those should be disclosed for collateral purposes. That said, if it is the case that at least some of those documents are not the subject of the direction made by the President on 13 December 2022, for example there is correspondence which was produced by the Claimants or their representatives themselves, they would not require the permission of the Tribunal because the Claimants would be free to use them as they wish. In the interests of certainty, we would invite the parties, again in liaison with CTT, to agree a schedule of those documents which do not require the permission of the Tribunal for disclosure for collateral purposes.

80. One particular set of documents which the Claimants seek to disclose to the Special Advocates in SIAC are the skeleton arguments for the hearing on 11 July 2023. Although the Respondent at one time objected to that disclosure, as Ms Wakefield told us at the hearing before us, the fact that they have already been referred to at an OPEN hearing and indeed were disclosed to the media, leads to the conclusion that there is insufficient reason to restrict their disclosure to the Special Advocates in SIAC. We would therefore grant permission for disclosure to that limited extent as well.

81. We do not consider that disclosure to C17 or C18, their legal representatives or the Special Advocates is necessary in order for the Claimants to have a fair hearing in the case before *this* Tribunal. That was not the basis of the original application and no evidence has been placed before this Tribunal to explain why it is necessary for that purpose. Furthermore, the Tribunal will have the assistance of CTT in order to ensure that there is a fair process in the present proceedings. If the time should come when CTT feel that disclosure is necessary beyond what the Respondent is prepared to agree, that can be brought to the attention of the Tribunal: that is indeed one of the classic functions of CTT.

82. Finally, we have considered carefully whether the public interest in the reporting of the proceedings before this Tribunal should lead us to order further disclosure. We bear in mind the important role played by the media as "watchdogs" which act on behalf of the public. We also bear in mind the importance of the principle of open justice but, for the reasons we have given above, we have reached the conclusion that the proceedings in this Tribunal can be reported fairly on the basis of the material that is already in the public domain, in particular the OPEN judgment of 22 September 2023.

83. Save to the limited extent indicated above, we agree with Ms Wakefield that the reasons which have been put forward on behalf of the Claimants in support of the

present application for disclosure are not cogent and persuasive, even if and to the extent that an analogy can properly be drawn with CPR 31.22.

84. We would also stress that an order for non-disclosure of material to a third party places a heavy burden or duty on a party not to facilitate onward disclosure to that third party or generally; and in particular in circumstances where there are common legal representatives between a party and a third party, the representatives must be careful to conduct themselves in such a way so as not to undermine the effect of the non-disclosure order.

Conclusion

85. For the above reasons we refuse the Claimants' application to permit disclosure except to the limited extent we have indicated above.