Neutral Citation Number: [2022] EWHC 823 (Admin)

Case Nos: CO/4338/2021, CO/4366/2021 & CO/4176/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2022

Before:

LORD JUSTICE LEWIS

MRS JUSTICE HEATHER WILLIAMS

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Between:

THE QUEEN ON THE APPLICATION OF (1) THE PUBLIC AND COMMERCIAL SERVICES UNION (2) CARE 4 CALAIS	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
THE QUEEN ON THE APPLICATION OF CHANNEL RESCUE	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
THE QUEEN ON THE APPLICATION OF FREEDOM FROM TORTURE	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Chris Buttler QC, James Robottom & Katy Sheridan (instructed by **Duncan Lewis Solicitors**) for the Claimants in CO/4338/2021
James Turner QC, Chris Buttler QC, James Robottom (instructed by **Reed Smith LLP**) for the Claimant in CO/4366/2021
Gayatri Sarathy & Sarah Dobbie (instructed by **Leigh Day**) for the Claimant in CO/4176/2021
David Blundell QC & Julia Smyth (instructed by **Government Legal Department**) for the Defendant

Hearing date: 22 March 2022

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Approved Judgment

Lord Justice Lewis and Mrs Justice Heather Williams:

Introduction

1. This is the judgment of the Court on the Claimants' applications for specific disclosure and the Defendant's application for public interest immunity ("PII"). The applications arise in three linked claims for judicial review, each of which challenge the lawfulness of the Secretary of State's tactical plan to redirect boats carrying migrants out of UK territorial waters and to induce them to return to France ("the Pushback Policy"). The Pushback Policy is contained in three documents (collectively, "the Documents"), namely:

    i) Policy Statement: Enforcement Operations at Sea Against Migrant Boats Through Use of a Tactical Plan to Redirect Boats out of UK Territorial Waters in the English Channel ("the Policy Statement");

    ii) Preventing small boats progressing through UK Territorial Waters -Guidance, version 1.0 ("the Guidance"); and

    iii) Border Force Maritime Command (BFMC) Combined SOP for preventing small boats progressing through UK Territorial Waters, version 1.0 and version 1.2 ("the SOP").

2. The Claimants are as follows:

    i) CO/4338/2021: the Public and Commercial Services Union ("PCSU") and Care 4 Calais ("C4C"). The PCSU is a trade union representing approximately 80% of Border Force ("BF") officials responsible for maritime immigration enforcement in the English Channel, who will be charged with implementing the Pushback Policy. C4C is a charity that assists migrants who travel from France to the UK via the English Channel;

    ii) CO/4366/2021: Channel Rescue, an unincorporated association, concerned with the rescue of migrants at sea and monitoring enforcement actions taken in the English Channel;

    iii) CO/4176/2021: Freedom from Torture ("FFT"), a charity that provides support to asylum seekers in the UK.

3. The Defendant has disclosed redacted versions of the Documents. The Claimants' applications seek disclosure of the unredacted contents (save for redactions made for reasons of legal professional privilege). The Defendant resists the applications on the basis that the redacted sections involve questions on the application of PII. She relies on a PII Certificate signed by Tom Pursglove MP, the Under-Secretary of State for Justice and Tackling Illegal Migration dated 2 March 2022 ("the Certificate"). However, the Defendant's position is that notwithstanding the serious harm to the public interest that would be caused by disclosure, in the exceptional circumstances of the case it would be possible for these concerns to be met by restricted disclosure to a limited list of people with appropriate safeguards. The Claimants do not oppose a form of restricted disclosure, broadly as proposed by the Defendant; understandably, they prefer this to the prospect of having no disclosure at all of the redacted passages.

Nonetheless, as we address below, it is for the Court to evaluate whether disclosure of the currently redacted material is necessary for the fair disposal of the proceedings; if so, whether there is a real risk that disclosure would cause the alleged serious harm to the public interest; and, if so, whether that risk can be sufficiently mitigated such that the balance of the public interest favours a form of limited disclosure.

4. The disclosure and PII applications were heard before us on 22 March 2022. This is our judgment on those applications. The substantive hearing of the claims is listed to commence on 3 May 2022. We express no views on whether or not any of the grounds of challenge will be made out. This judgment is concerned solely with the disclosure issues. In light of the proximity to the final hearing and the outstanding preparatory steps to be undertaken, we have handed down this judgment as soon as possible. (We have earlier given a separate judgment on applications made by the PCSU, C4C and Channel Rescue to rely on expert evidence: [2022] EWHC 517 (Admin)).

5. This is a judgment which will be publicly available. We have included as much of the relevant circumstances and of our reasoning as we are able to make public at this stage. As we detail below, we have set out our specific conclusions in respect of disclosure of particular passages in the Documents over which PII is claimed in three Private Annexes to the Court's order and part of our reasoning is contained in a Private Supplementary Judgment.

The claims

6. Resolving questions of whether disclosure is necessary for fairly resolving an issue requires a close focus on the grounds of challenge.

7. The PCSU and C4C submit that:

    i) The Pushback Policy is ultra vires Part IIA and Sch. 4A of the Immigration Act 1971 (as amended), which sets down a complete code for the BF's enforcement powers ("Ground 1");

    ii) Alternatively, the Pushback Policy directs or positively authorises action which will at least in some cases breach Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and/or breach the statutory requirement that the power be exercised only where necessary and/or breach BF officials' common law duty of care ("Ground 2").

8. The Defendant's response is that:

    i) The Pushback Policy is within the power to stop a ship conferred by para 2(2)(a) of Sch. 4A to the 1971 Act;

    ii) Ground 2 is an impermissible attempt to circumvent the fact that the Claimants cannot show they are "victims" within the meaning of section 7(1) of the Human Rights Act 1998 ("the 1998 Act") and thus lack the necessary standing to advance claims under the Act that the Defendant's policy is incompatible with Convention rights;

iii) As confirmed by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 WLR 3931, the challenge to the Pushback Policy can only succeed if it is shown that it authorises or approves unlawful conduct by those to whom it is directed; and the terms of the Documents indicate this is not the case.

9. Channel Rescue contend that the Pushback Policy:

i) Is internally inconsistent and therefore irrational, in that it mandates compliance with international maritime law, but directs, encourages or permits BF officials to act in a manner that is incompatible with international maritime law ("Ground 1");

ii) Directs, encourages or permits BF officials to breach the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996 ("Ground 2");

iii) Directs, encourages or permits BF officials to act contrary to the ordinary practice of seamen and thereby contrary to implied limitations to the Immigration Act 1971 and/or the common law ("Ground 3").

The Defendant denies that this is the case.

10. FFT submits that:

i) The Pushback Policy is ultra vires, relying on an argument similar to Ground 1 in the PCSU and C4C claim ("Ground 1");

ii) The Pushback Policy is unlawful because it authorises or approves conduct contrary to Articles 3 and/or 4 of the Convention and/or the 1951 Refugee Convention, in particular Articles 1 and 33 ("Ground 2");

iii) The Pushback Policy is unlawful by operation of s.2 of the Asylum and Immigration Appeals Act 1993, as this provides that nothing in the Immigration Rules shall lay down any practice which is contrary to the Refugee Convention. The Pushback Policy contravenes the Refugee Convention because it allows asylum seekers to be sent to a third country without any individual assessment of their potential entitlement to refugee status.

11. We have already indicated that the Defendant denies that the Pushback Policy is ultra vires. Her response to the second ground reflects her defence of Ground 2 in the PCSU and C4C claim regarding Articles 3 and 4 of the Convention. In respect of the Refugee Convention, she contends that the Documents show there will be compliance with its obligations.

The legal principles

Disclosure in judicial review proceedings

12. Defendants may give disclosure of documents as a matter of good practice or as a means by which they ensure that they satisfy the duty of candour to lay before the Court all the relevant facts and reasoning underlying the decision under challenge: *Tweed v*

Parade Commission for Northern Ireland [2006] UKHL 53; [2007] 1 AC 650 at paras 31, 54 ("*Tweed*").

13. Disclosure is not, however, required in judicial review proceedings unless the court orders otherwise: see paragraph 10.2 of the Practice Direction 54A – Judicial Review. Orders for disclosure should only be made where the disclosure "appears to be necessary in order to resolve the matter fairly and justly": *Tweed* at para 3.

14. An application for specific disclosure may be made in judicial review proceedings pursuant to CPR 31.12(1). Documents may be withheld where a defendant establishes that disclosure would damage the public interest, either under the existing common law principles relating to public interest immunity (the basis of the application in this case) or pursuant to CPR 31.19.

Public interest immunity

15. The relevant principles were summarised by Singh LJ in *R (Hoareau & Anor) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 3825 (Admin) ("*Hoareau*") as follows:

> "17. …PII is a ground for refusing to disclose a document which is relevant and material to the determination of the issues. A successful claim for PII renders a document immune from disclosure, depriving both the Court and the parties of relevant material, in contrast to a closed material procedure…A claim to PII can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in the fair administration of justice.
>
> 18. The PII process involves three stages: see *Al Rawi v Security Service & Ors* [2012] 1 AC 531 ("*Al Rawi*") at [24]:
>
> (a) the relevant minister must decide whether the documentary material in question is relevant to the proceedings in question, i.e. that the material should, in the absence of PII considerations, be disclosed in the normal way: see *R v Chief Constable of the West Midlands ex parte Wiley* [1995] AC 275, 280F-281C;
>
> (b) the minister must consider whether there is a real risk that it would cause serious harm to the public interest if the material were placed in the public domain;
>
> (c) the minister must balance the public interest in non-disclosure against the public interest in disclosure of the material for the purpose of doing justice in the proceedings, and, if appropriate, state in a PII certificate that it is in the public interest that the material be withheld.
>
> 19. However, it is the Court which is the ultimate decision-maker. It will consider whether the risk to the public interest that

> would be caused if the document were placed in the public domain can be mitigated sufficiently by other steps such that the balance of public interest favours some form of limited disclosure. These steps include all of the case management tools available to the Court, such as hearings in private, summaries, redactions, restricting the number of copies to be taken and the use of a confidentiality ring…"

16. Thus the first question for the Court is whether disclosure of the material is necessary to resolve the matter fairly and justly. This is to be judged by reference to the issues raised by the parties' pleadings. The Claimants accept that in the context of judicial review, the Court may decline to order disclosure of *part* of a document where it does not meet this test.

17. If the necessity threshold is met, then the Court must proceed to consider whether disclosure would risk serious harm to the public interest. If it would not, then the PII claim fails without more: *Hoareau* at para 25. However, if the Court concludes that disclosure would create a real risk of serious harm to the public interest, then the Court must balance this against the public interest in doing justice in the proceedings and, in particular, consider if there is a more proportionate response that may be adopted which adequately protects the public interest but is short of excluding the material from the proceedings altogether. In considering such measures, the Court has to evaluate whether they would be sufficient to meet the risk of harm that the Court has identified. The balancing exercise was explained by Lord Neuberger of Abbotsbury MR in para 25 of *Al Rawi*:

> "As decided in *Conway v Rimmer* [1968] AC 910 and explained in *Ex p Wiley* [1995] 1 AC 274 it is then for the Court to weigh, as Lord Simon of Glaisdale put it, "the public interest which demands that the evidence be withheld…against the public interest in the administration of justice that Courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted…On the other hand, if the Court concludes that the latter public interest prevails, then the document must be disclosed unless the Government concedes the issue to which it relates…As Lord Woolf said in *Ex p Wiley*…even where material cannot be disclosed, it may be possible and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material 'on a restricted basis'."

18. Lord Clarke of Stone-cum-Ebony JSC gave a similar summary of the Court's task at para 145. Within that passage, he addressed the process to be adopted as follows:

> "(iii) In making that decision, the Court may inspect the documents: *Science Research Council v Nassé* [1980] AC 1028, 1089-1090. This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated…"

19. As indicated in the passages from *Al Rawi* and from *Hoareau* that we have already cited, one of the forms of disclosure that the Court may consider is provision of the material on terms to a restricted number of identified recipients (sometimes referred to as a confidentiality ring). In *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 (Admin); [2014] 1 WLR 1071 ("*Mohammed*"), a case concerning an assertion of PII over documents relating to detention in Afghanistan on grounds of operational security and international relations exigencies, Moses LJ rejected the submission that a confidentiality ring – in that case for lawyers only – was impermissible as a matter of principle, distinguishing *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734 ("*Somerville*") as follows:

> "14. …In *Somerville v Scottish Ministers*…counsel obtained a sight of the very thing he would have been forbidden to see, were the claim to public interest immunity to be upheld. In the instant case, counsel for the Claimant has not seen and will not see any documents in respect of which the claim to public interest immunity is upheld. The proposal only entails disclosure to counsel, on a confidential basis, once the Court has seen the documents and heard argument as to where the balance between the public interest in immunity and in the administration of justice in the particular case lies. There is no question of pre-empting the ruling, as occurred in *Somerville v Scottish Ministers*. That case was concerned with the fact that documents had been disclosed to counsel for the petitioners before the Court had had any opportunity to rule whether the claim should be upheld or not.
>
> 15. A confidentiality ring would only be put in place *after* the Court has considered the documents in respect of which immunity is claimed. It provides an alternative to a ruling either to uphold or reject the claim…If a Court rules in favour of a confidentiality ring, it is deciding that the public interest demands not complete immunity but, rather, can be protected by a more limited form of confidentiality.
>
> 17. I conclude that there is no principle to be found in *Somerville's* case which precludes a confidentiality ring once the judge has had an opportunity to consider whether the public interest immunity claim should be upheld.
>
> 19. A confidentiality ring affords a means whereby the public interest in immunity and in the administration of justice may be protected to an extent without the one having to yield completely to the other…" (Emphasis in original text)

20. *Hoareau* is a further example of a case where the Court considered that the risk to the public interest that would be caused if the relevant documents were placed in the public domain could be sufficiently mitigated by arrangements tightly restricting access to the documents (paras 39 and 45). Lord Justice Singh distinguished *AHK & Ors v Secretary of State for the Home Department* [2013] EWHC 1426 (Admin), where a confidentiality

ring was rejected by Ouseley J, on the basis that the case involved national security. It is not suggested that national security considerations arise in the present case.

21. We agree with the submissions made to us that *Competition and Markets Authority v Concordia International RX (UK)* [2018] EWCA Civ 1881; [2019] 1 All ER 699 is also distinguishable for present purposes. The case concerned an application to discharge or vary a search warrant issued on a without notice basis under sections 28 and 28A of the Competition Act 1998. Limited disclosure to a confidentiality ring was refused by King LJ on the basis that it had already been held that the material was protected by PII and thus it could not be disclosed (para 71; Simon LJ and Dame Elizabeth Gloster agreeing). Lady Justice King explained Moses LJ's decision in *Mohammed* as "no more than the judge, having carried out the appropriate balancing exercise, concluding that certain material is confidential but not subject to PII and its confidentiality can be protected by the use of a confidentiality ring" (para 58).

22. Mr Buttler QC took us to Lord Wilberforce's speech in *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274 ("*Wiley*") at 296G – 297A in the course of submitting that it was not open to the Court to apply a more restrictive approach to PII than that taken by the Minister. It is unnecessary for us to address this further as we have not, as will appear from this judgment, applied a more restrictive approach or reached a more restrictive conclusion on public interest immunity than the Minister.

Open justice

23. It is also relevant to bear in mind the impact of any decision on disclosure on the public interest in open justice. It was accepted by the parties that if the court considered that material should be disclosed on a restricted basis, then that material would not be referred to in open court and any submissions on the material would have to be heard at a private hearing.

24. CPR 39.2 provides as material:

> "(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the Court decides that it must be held in private, applying the provisions of paragraph (3).
>
> (2) In deciding whether to hold a hearing in private, the Court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
>
> (3) A hearing or any part of it must be held in private if, and only to the extent that, the Court is satisfied of one or more of the matters set out in subparagraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice-
>
> (a) publicity would defeat the object of the hearing;
>
> …..

> (c) it involves confidential information…and publicity would damage that confidentiality;
>
> …..
>
> (g) the Court for any other reason considers this to be necessary to secure the proper administration of justice."

25. The applicable principles are helpfully set out in the *Senior Courts Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003. They include the following:

> "9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and Orders are, public: see article 6.1 of the Convention, CPR r 39.2 and *Scott v Scott* [1913] AC 417…
>
> 10. Derogation from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R v Chief Registrar of Friendly Societies, Ex P New Cross Building Society* [1984] QB 227, 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52-53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the Court is under a duty to either grant the derogation or refuse it when it has applied the relevant test…
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417, 438-439, 463, 477… "

26. We were mindful that any acceptance that material could only be disclosed on a restricted basis could impinge upon the wider public interest in knowing what material was being referred to in the process of hearing these claims for judicial review. We therefore considered carefully the claim that disclosure of particular parts of the document would not be in the public interest. If that were not established, and if disclosure were necessary to ensure that the claim was fairly disposed of, then we would order disclosure in the normal way and those parts of the document could be referred to in open court.

27. There are also other provisions governing access to documents which might be affected by an order that we make that disclosure of parts of documents should be on restricted terms. CPR 5.4B(1) provides that a party to proceedings may, unless the Court orders otherwise, obtain from the records of the Court a copy of any of the documents listed in para 4.2A of PD 5A. The list includes pleadings, application notices, written evidence filed in support of an application and judgment or orders given or made in public.

Pursuant to CPR 5.4B(2), a party to proceedings may, if the Court gives permission, obtain from the records of the Court a copy of any other document filed by a party.

28. Access to documents by non-parties is addressed in CPR 5.4C. The general rule is that a person who is not a party to proceedings may obtain from the Court records a copy of a statement of case and a judgment or order given or made in public: CPR 5.4C(1). 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. Additionally, the Court has an inherent jurisdiction to determine what the principle of open justice requires in terms of access to documents placed before the Court that do not constitute "Court records": *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38; [2020] AC 629.

History of the disclosure issues in these proceedings

29. On 6 December 2021 as part of the pre-action process, the Defendant disclosed partially redacted versions of the Documents. She indicated in correspondence that she had concluded that it would be contrary to the public interest for the redacted contents to be published. The PCSU and C4C applied for disclosure of the unredacted Documents in their Claim Form (section 9) and accompanying Statement of Facts and Grounds (paras 16 – 23) on 17 December 2021. Channel Rescue also applied for disclosure of the unredacted versions in its Claim Form (section 9) and in its accompanying Statement of Facts and Grounds (paras –13 – 20) on 23 December 2021. FFT made an equivalent application by an application notice dated 11 February 2022. The Claimants' position, as set out in correspondence, was that the Defendant was not entitled to withhold material that she appeared to have accepted was relevant without a PII application being made: for example, letters dated 10 and 23 December 2021 from Leigh Day, FFT's solicitors.

30. By order dated 8 February 2022 Swift J directed that the Defendant was to inform the Claimants by 4pm on 15 February 2022 whether she intended to make an application for PII and, if so, the matters in respect of which the application would be made. Any such application was to be filed and served as soon as possible thereafter (para 8). A hearing to determine the expert evidence applications, the Claimants' specific disclosure applications and the PII claim (if made) was listed for 25 February 2022 (paras 8 and 9).

31. By email sent on 15 February 2022 the Defendant informed the Court that the parties were discussing the issue of disclosure and if they could not reach agreement on the way forward, the Defendant would make a PII application in respect of the redacted material. However, no PII application was made at this stage or indeed at any time before the hearing on 25 February 2022.

32. By letter dated 21 February 2022 the Defendant wrote to the Court enclosing a draft consent order which she invited the Court to approve. This order provided for the establishment of what was described as a confidentiality ring in which the members would receive the unredacted material on terms; and for the substantive hearing to be held in private where it was necessary to refer to any of the redacted material. The Defendant's letter said that to the extent the Documents contained relevant material, the Secretary of State was concerned about the implications for safety and operational effectiveness if the redacted parts of the documents were released into the public domain; that she was, however, content to proceed by way of disclosure to a

confidentiality ring in the particular circumstances of this case; and she submitted that one or more of the exceptions in CPR 39.2(3) applied so that this material should only be referred to at a private hearing.

33. By a response sent on 22 February 2022, we indicated that we were not satisfied that it was appropriate for us to make this order. We pointed out that we had not seen the redacted parts of the Documents. We expressed concern that we were being asked to approve a consent order that had the effect that certain parts of the hearing would be held in private. The terms of CPR 39.2 state that a hearing may only take place in private where the Court is satisfied that the CPR 39.2(3) test is met and that this is not something that the parties can achieve by consent. We appreciate that the parties were concerned to achieve the best arrangements for their respective clients and to assist the progress of the litigation, but questions of PII and the impact of restricting disclosure on open justice involve broader questions requiring, amongst other aspects, the Court's evaluation of competing public interests and its assessment of what the interests of justice require. This is always of fundamental importance, but all the more so when, as here, there is considerable public interest in the issues raised in the case. We did not consider that these issues could appropriately or properly be dealt with by means of a consent order between the parties to the litigation.

34. At the hearing on 25 February 2022 Mr Blundell QC on behalf of the Defendant initially maintained the position that the issue of disclosure could adequately be resolved by the court approving the consent order. He indicated that he accepted that at least some of the redacted material in the Documents was necessary for the fair disposal of the claim, but that the Claimants' applications for specific disclosure were opposed because unrestricted disclosure would harm the public interest. Giving an *ex tempore* judgment on this issue, Lewis LJ emphasised the unsatisfactory way that the Secretary of State had dealt with matters; that the proper way to address the applications for specific disclosure was via a PII application; and that in the absence of a PII claim having been made, despite Swift J's earlier directions, the Court was left with little option but to adjourn the disclosure applications on terms as to payment of costs by the Defendant. The Court's order, sealed on 2 March 2022, adjourned the applications for specific disclosure to be relisted on the first available date convenient for the parties after 9 March 2022; and provided that, if so advised, the Defendant was to make an application for PII by 4pm on 2 March 2022, which would be listed to be heard at the same time as the applications for specific disclosure. As the Defendant indicated that further material could be disclosed without redaction, we also ordered that an additional set of the Documents be disclosed by 4pm on 2 March 2022 with all redactions no longer relied upon removed. Further versions were duly disclosed by the Defendant on 2 March 2022, with a significant number of the earlier redactions lifted, in particular in respect of detailed passages concerning search and rescue arrangements. We are bound to note that had we approved the earlier draft consent order, this material would have been disclosed in a way that would have prevented it being referred to in open court and to that extent would have impinged on the principle of open justice for no good reason.

The PII claim

35. As we have indicated, the PII application was accompanied by the certificate signed by Tom Pursglove MP on 2 March 2022. Also accompanying it was the Defendant's "Closed Schedule" which listed the redactions that were the subject of the application and the harm to the public interest that was alleged to be caused by disclosure. The

unredacted versions of the Documents were also made available to the Court. These materials have assisted us in carrying out our task. Another beneficial consequence of dealing with the matter by way of an application for PII is that the court has had the benefit of the considered view of the Minister on PII. That would not have been the case if the matter had been dealt with by a consent order as originally envisaged.

36. In para 6 of his certificate, the Minister explained that he had not sought to make a determination of whether disclosure of the material was necessary for the fair disposal of the claim:

> "Although, in some instances there are grounds to dispute the relevance of these passages (for example, where they provide detail of the types of vessels used, or specific details of operational command) to assist the Court I have proceeded on the basis that all of the redactions are at least arguably relevant to some of the Claimants' pleaded grounds. The only instance where I have not done so relates to an 'embedded' document, which is a brief document setting out the relevant operational command structures for operation of the policy."

37. The Minister identified the serious harm to the public interest as arising in the following way:

> "11. …There is a public interest in tackling illegal migration, including migration facilitated by serious organised crime groups, which is at considerable cost both to the vulnerable individuals from whom those groups profit, and also the national interest because of the associated criminality and adverse impact on the integrity of the immigration system.
>
> 14. …the redacted documents set out the limitations of the tactics. If this information is disclosed, I am concerned that serious organised crime groups may encourage vulnerable migrants to undertake the journey in riskier conditions. I am also concerned that disclosure of the limitations of the tactics will reduce the deterrent effect, thereby increasing the likelihood that vulnerable migrants will attempt the dangerous crossing.
>
> 17. …In short, the fundamental concern is to avoid detailed operational information about the procedure getting into the hands of organised criminals and anyone else who would seek to exploit that information to defeat the tactic. Open disclosure and reporting of the contents of the documents would, I consider, bring about serious harm to the public interest, because it could reduce the important deterrent effect of the policy, as well as encouraging risky behaviour during attempts to cross, putting vulnerable migrants as well as Border Force staff at unnecessary risk…"

38. The Minister went on to say that on the exceptional facts of the case and notwithstanding the serious harm to the public interest that would be caused by

generalised, open disclosure, he considered that the risk to the public interest could be sufficiently mitigated by "the creation of a tight confidentiality ring and other steps to prevent the relevant material from being referred to in open Court" (para 19). In this context, he emphasised that the Documents did not contain national security material.

39. The application was also supported by a witness statement dated 2 March 2022 from Nick Jariwalla, Head of the Visas, Visitors & Clandestine Entry Policy Unit within the Home Office. This raised similar concerns to those identified by the Minister.

40. The Defendant's proposals for restricting access to the unredacted versions of the Documents was contained in a draft order and accompanying schedules, also supplied to the Court.

The Claimants' application in advance of the hearing on 22 March 2022

41. By an application notice dated 16 March 2022, the PCSU and C4C sought disclosure of the unredacted versions of the Documents in advance of the hearing to "an interim confidentiality ring". They argued that this was a necessary step to enable the Claimants and their lawyers to participate effectively in the hearing on 22 March 2022 and they said that no more was being requested at this interim stage than the Defendant was willing to agree in terms of the outcome of the PII application. The other Claimants indicated that they took a similar position. The Defendant opposed the application as pre-empting the PII hearing and the decisions that the Court would then make.

42. By order made on 18 March 2022, Heather Williams J refused the application. She observed that it remained for the Court at the hearing on 22 March 2022 to consider and determine: the relevance of the Documents to the issues in the case; whether disclosure was capable of harming the public interest; and whether, balancing the competing interests, a limited form of disclosure could be made with appropriate safeguards. She also concluded that no sufficient reason had been shown to depart from the usual procedure whereby a claim for PII is considered at a private hearing, *prior* to the opposing party having had the opportunity to consider the documents. The usual procedure was summarised by Lord Clarke in *Al Rawi* (para 18 above). The fact that counsel for the opposing party in *Somerville* was given sight of the documents *before* any determination of the PII claim was of particular concern to the House of Lords, as Moses LJ's emphasised in his analysis in *Mohammed* (para 19 above). As Singh LJ observed in *Hoareau* at para 21, *Mohammed* "confirms that a confidentiality ring will only be put in place *after* (and not before) the Court has considered the documents in respect of which immunity is claimed" (emphasis in the original text).

The hearing on 22 March 2022

43. We had indicated to the parties in advance of the hearing that, provisionally, we envisaged adopting the following procedure: (i) a public hearing at which counsel for the parties could make submissions on the applications for disclosure and PII; (ii) a private hearing at which the Court would consider the redacted material and would question counsel for the Defendant; and (iii) a public hearing, with the Court giving its decision, if it had had time to reach it; and in any event the Court hearing submissions on outstanding issues, including the terms of any proposed order.

44. The parties were content with this proposal, save that Mr Buttler submitted to us that the Claimants, or at least their lawyers, should not be excluded from the second stage of the hearing. Ms Sarathy supported this submission on behalf of FFT. Mr Buttler said that the Secretary of State was not, in truth, making an application for PII, since she accepted that the risk of public harm could be met by disclosure on the proposed restricted basis. He relied upon para 10(4) of the Divisional Court's judgment in *R (Dunn & Anor.) v The Secretary of State for Foreign and Commonwealth Affairs & Anor*. [2020] EWHC 3010 ("*Dunn*") where the Court said of the three steps identified by Lord Neuberger in *Al Rawi* (para 15 above):

> "As part of the initial consideration of these questions, and in particular the second question, consideration should be given as to whether any damage to the public interest through disclosure could be prevented by other means, for example by disclosing a part of the document or document on a restricted basis: *R v Chief Constable of the West Midlands ex p Wiley*…at 306-7. Thus, in the event that it is considered that the overall public interest is against disclosure of parts of the material, then a claim for PII should only be made in respect of those parts of the material that it is necessary to withhold in the public interest."

45. Mr Buttler also submitted that the current position was distinguishable from that in *Mohammed* and in *Hoareau*, where the judges had emphasised that disclosure to the confidentiality ring (if appropriate) occurred *after*, rather than before, the Court's consideration of the documents. He emphasised that in those cases the relevant Minister had *objected* to restricted disclosure. He said that the present claim was a PII application "in form, but not in substance".

46. Mr Blundell opposed the application. He said that the passage from Lord Wilberforce's speech in *Wiley* that was referred to in *Dunn* concerned the Minister's consideration of less restrictive measures within a context where PII potentially applied. Furthermore, he emphasised that once PII was raised, it was for the Court to determine the claim, as the ultimate arbiter of where the public interest lies.

47. We indicated during the first stage of the hearing that we refused the Claimants' application and that we would give our reasons for doing so in our reserved judgment. (It was clear by this stage that there would be insufficient time to give a judgment on the day.) We give our reasons now. Firstly, there was plainly a PII application before the Court, as we have described. Secondly, the Minister's assessment that the risk of harm to the public interest could be mitigated by disclosure on a restricted basis was explicitly contingent on disclosure being limited to the "tight confidentiality ring" proposed *and* that the material was not to be referred to in a public hearing, steps which the Court had yet to consider. As such, there was no material distinction from the process adopted by the Courts in *Mohammed* and in *Hoareau*, where the documents were considered at a private hearing with only the Defendant in attendance. Thirdly, as a PII application had been made, it was for the Court to determine each of the issues that arose in accordance with the principles we have set out earlier; whereas the Claimants' application sought to pre-judge the outcome. Fourthly, the Claimants' submission that the Defendant was not making a PII claim was based on unduly artificial linguistic semantics.

48. We therefore proceeded with the hearing in accordance with our provisional indication as to its likely structure. During the course of the morning we heard counsels' submissions in public. Mr Buttler submitted that the policy Documents were central to the Claimants' judicial review challenge. Any limits upon their access to the full documents would impede their ability to advance their case effectively. He reminded us that CPR 31.22(2) restricted the use that could be made of disclosed documents in any event. Additionally, he emphasised that in weighing the Minister's concerns, we should consider what was already in the public domain and thus available to organised crime groups involved in the Channel crossings by migrant vessels. In that regard, he drew our attention to aspects of the unredacted parts of the policy Documents and also to an article that was published in *The Times* newspaper on 8 January 2022 which referred to the Pushback Policy.

49. Ms Sarathy adopted Mr Buttler's submissions. She also pointed out that the redacted material was crucial to FFT's Grounds 2 and 3 and said we should bear in mind that the Defendant had taken an insufficiently rigorous approach to providing unredacted material thus far, as shown by the extent to which redactions were lifted in the versions of the documents served on 2 March 2022.

50. Mr Blundell emphasised the risks of harm to the public interest identified by the Minister in his certificate. He accepted that we should evaluate this by reference to what was already in the public domain. He said investigations had not uncovered any evidence that the information in *The Times* article came from those defending the litigation and that the contents had not been publicly confirmed. He reiterated the Defendant's willingness to provide redacted material on the basis of tightly controlled restricted access to pre-approved persons. He said that any references to the unredacted material at the substantive hearing should only occur in private session in light of the risks of harm. He submitted that the CPR 39.2(3) test was satisfied in relation to (a), (c) and/or (g) (para 24 above).

51. We conducted a hearing in private with only the Defendant's legal team present from 2 pm. We had read and considered the unredacted Documents and the Defendant's Closed Schedule in advance. We took Mr Blundell through each proposed redaction asking him a series of detailed questions so we were in a position to determine the issues before us and in particular, to understand why disclosure of particular passages was said to risk serious harm to the public interest. In asking our questions we bore in mind the points that Mr Buttler and Ms Sarathy had made earlier and, in particular, where it was not already clear to us one way or the other, we checked whether the material in question was already in the public domain. In light of our questions, there were four instances where Mr Blundell asked for further time to consider the points we had raised. We gave him until 4pm the following day to respond in writing on those points. When he did so, he conceded in respect of three of these instances that the redactions should be lifted in whole or in part (as we detail below).

52. After the conclusion of this private session, we held a further open hearing with all counsel from 3.50 pm at which we heard submissions on the appropriate terms of any order we might make and other consequential matters.

PII claim: conclusions

53. In light of the conclusions that we have reached in relation to the respective entries, the passages in the Documents listed in the Defendant's Closed Schedule fall into one of four categories (which we will discuss in turn):

    i) Those where the Defendant has agreed that it was not necessary for the passages to be redacted and they could be disclosed in an unredacted form, following the questions we posed during the private hearing;

    ii) Those where we have concluded that disclosure of the material is not necessary to resolve the issues in this litigation fairly and justly. In these instances the redactions will remain;

    iii) Those where we have concluded that disclosure is necessary but disclosure of the material does not give rise to a real risk of serious harm to the public interest and thus we have concluded that those passages should be disclosed without redactions; and

    iv) Those where we accept that there is a real risk of serious harm to the public interest if there were to be disclosure, but we are satisfied that the risk to the public interest can be adequately mitigated by the steps that we detail ("the Protected Material").

Passages where the Defendant has agreed to remove the redactions

54. As we noted when discussing the hearing, there are three relevant passages where the Defendant no longer asserts PII. Accordingly, these will be disclosed in an unredacted form. The passages in question are:

    i) Policy Statement, p.7, para 21, last bullet point: "The Protocol requires BF to consider for example, weather, sea conditions, condition of the vessel and its occupants etc."

    ii) SOP, p.8 (v.1.0), penultimate redacted bullet point: "The risk of the MV becoming disorientated if turned around at night or in reduced visibility and unable to determine a safe passage."

    iii) SOP p.27, 1st para under Section 11 Phase 3: "A MV which is stopped and turned around [redacted] and then voluntarily returns to French waters will be on the basis that the vessel is not in distress and is unlikely to go into distress."

55. There are words in the third of these passages that will remain redacted for these purposes as we are satisfied that it comes within the Protected Material (discussed below).

Passages unnecessary for the fair disposal of the proceedings

56. There are 16 passages within the Defendant's Closed Schedule where we have concluded that disclosure of the material is not necessary for resolving the proceedings fairly and justly. They are listed in **Private Annex 1** to the Court's order. It is not necessary or appropriate to identify this text publicly as the disclosure is not necessary to enable the claim to be fairly dealt with and so disclosure is not ordered. However, in broad terms, the passages very largely relate to named personnel, the BF command

structure and the allocation of responsibilities, the crewing of particular vessels and/or other aspects of BF equipment. Other passages concern the interception by the French authorities of migrant vessels before they reach English territorial waters and the number of migrant vessels on one particular day some time ago. In dealing with this issue, we have borne in mind that the challenge in the proceedings is to the Pushback Policy and we have kept the Claimants' grounds of challenge firmly in mind (particularly, for these purposes, Ground 2 in relation to the PCSU and C4C; Grounds 2 – 3 in relation to FFT; and Channel Rescue's three grounds). We do not consider, however, that disclosure of this material is necessary for them to be able fairly to advance their respective cases, nor for the Court to resolve the disputed issues. As we indicated at para 36 above, the Minister did not make a determination of whether disclosure was necessary for fairly disposing of the claim and proceeded on the assumption that disclosure was necessary and then considered whether that would be in the public interest (save in respect of one issue, the operational command structure, where we agree with his assessment that the material is not relevant and disclosure is not necessary for fairly dealing with the claim). When we put the point to him, Mr Buttler accepted that it was open to us to make our own assessment of whether the test for disclosure in judicial review was met in relation to particular parts of the Documents.

Passages not giving rise to a real risk of serious harm to the public interest

57. There are eleven passages within the Defendant's Closed Schedule where we have concluded that the relevance test is met and that disclosure in an unredacted form will *not* occasion a real risk of serious harm to the public interest. The passages are listed in **Private Annex 2** to the Court's order and the **Private Supplementary Judgment** sets out the relevant text and in respect of each passage details our reasons for arriving at this conclusion. The usual consequence would be that disclosure would be ordered without redactions and without the imposing of additional restrictions on dealing with the material or referring to the material at an open hearing. However, we accept that those passages should be subject to restriction at least until the Defendant has had an opportunity to consider whether she wishes to appeal this part of the order, since publication of this material at this juncture may defeat the purpose of any such appeal. We address the arrangements for providing these materials in the section below discussing the terms of the Court's order.

58. In arriving at our conclusions in respect of these eleven passages we have kept in mind the terms of the Minister's certificate and the parties' submissions. We stress that the political desirability or otherwise of the Pushback Policy is not a matter for us. We have focused upon assessing whether the concerns expressed in the ministerial certificate are legitimate, in the sense that the alleged risk of serious harm to the public interest exists and, if it does, whether disclosure of the particular passages properly gives rise to those concerns. As to the former, we accept that divulging details of the tactical plan would increase the likelihood of organised criminal gangs and others using counter-measures to defeat those tactics; and in particular that smugglers would encourage migrants to undertake journeys in even riskier conditions, putting lives and safety in even greater jeopardy. We accept that this would involve harm to a public interest analogous to other instances where the courts have accepted that there is a public interest in withholding disclosure.

59. Nonetheless, we do not consider that disclosure of these eleven passages will give rise to the risk of serious harm of this nature. In a number of the instances where we have found that PII is not capable of applying, it is because the material in question is already in the public domain, in particular in unredacted parts of the Documents. In making that assessment we have, of course, borne in mind Mr Blundell's point that provision of a greater level of detail about a topic that is partly public may in itself give rise to the harms identified by the Minister. In other instances the text in question is entirely non-specific or simply reflects existing legal obligations.

Passages where a risk of harm exists that can be appropriately mitigated

60. We agree that the risk of serious harm to the public interest identified by the Minister exists in relation to the remaining, relevant 66 passages in the Defendant's Closed Schedule, which we have listed in **Private Annex 3** to the Court's order ("the Protected Material"). In broad terms this is because we accept the reasoning put forward by the Defendant, which we have already summarised at para 58 above, save that in some instances we have not accepted the entirety of that justification. By way of example, we do not consider that 'operational sensitivity' is sufficient in itself to justify withholding material from disclosure on grounds of PII. However, placed in the context of the factors that we have discussed in para 58 above disclosure of the material is capable of giving rise to a risk of harm to the public interest and the question does arise as to whether disclosure should be withheld on the basis of PII. For the avoidance of doubt, in some of the passages the tactical parameters or limitations upon the tactic are implicit rather than explicit, but we accept in relation to these items that the inference that concerns the Defendant would likely be drawn.

61. The next question for us is therefore whether the risk of harm can be appropriately mitigated by less restrictive means than withholding the material from disclosure completely. For the reasons identified in paras 19 – 21 above, we accept that in this instance we have the power to order disclosure on a restricted access basis and that the cases where confidentiality rings were rejected are distinguishable. Furthermore, having had now had the opportunity to review the Documents, we accept the Defendant's assessment that restricted disclosure provides a workable and proportionate solution in this particular instance. Plainly, where workable, it is in the interests of justice for the Court and the parties to have access to this material for the purposes of resolving the substantive claims; whereas, if PII applied no use could be made of it within these proceedings.

62. The Defendant's draft order listed the proposed recipients of the Protected Material in a schedule. At the time of the hearing there were some 27 individuals listed (once duplications are left out of account). The restricted basis upon which they must handle, store and use the material is set out in a further draft schedule. Subject to some adaptions that we have addressed in the Court's order, we are content with these arrangements. Importantly, we sought confirmation and were assured by Counsel for the Claimants that all those who are listed as the proposed recipients of the unredacted material have been made aware of the proposed terms that they must abide by and the seriousness with which the Court would view any breach of those terms. In the Defendant's draft, there is reference in a schedule to a breach of the terms being treated as a contempt of Court. This did not appear to us to accord sufficient prominence to that aspect. After we raised the matter during the hearing, Counsel accepted that it would be appropriate for the order to contain a Penal Notice and a term in the main body of the order requiring

compliance with the restrictions set out in the relevant schedule and stating the potential consequences of failing to do so. Similarly, it was agreed that the order should be personally served by the Defendant upon all those named in the schedule.

63. We raised with Ms Sarathy the fact that, unlike the other Claimants, the current list of proposed recipients was confined to members of FFT's legal team and did not include anyone from FFT. We were concerned about an arrangement under which access to fuller versions of the Documents was restricted to lawyers only. It appeared to us that in light of the issues in this case, it might well be necessary for Counsel to seek instructions from their client, FFT, after receipt of the Protected Material. We did not consider that the matter raised simply questions of law which lawyers could address. The likelihood is that aspects would arise upon which the instructions of officers of FFT, based on their knowledge and experience, would be required. After taking instructions, Ms Sarathy indicated that a proposed name or names would be supplied to the Defendant by 29 March 2022, with opportunity for her to respond by 31 March 2022 indicating whether she was content for the individual in question to be included. The Defendant agreed to this proposal and the relevant names have now been confirmed prior to the handing down of this judgment.

64. We turn to open justice considerations. We have borne in mind the importance of open justice. Our concern in this regard was one of the reasons why we were not prepared to approve the parties' earlier draft consent order. We are also very conscious that this is a case that has attracted considerable public interest. However, we have now accepted (after seeing the material, hearing submissions and having the opportunity to question Mr Blundell) that some of the redacted passages are capable of causing serious harm to the public interest, if they were disseminated beyond the confines of the restricted access arrangements, and we also accept that the CPR 39.2(3)(g) test is satisfied in that it will be necessary for the Court to sit in private where reference is to be made to the Protected Material in order to secure the proper administration of justice. No interference with the open justice principle should be any greater than is necessary. We will expect the parties to cooperate in their preparation for the hearing in order to minimise the times during the final hearing when the Court will have to sit in private. Furthermore, we have formulated the order in a manner that allows for us to re-consider this issue if, for example, further material from the currently redacted parts of the Documents were to enter the public domain. We mention for completeness that we are not persuaded by Mr Blundell's reliance on CPR 39.2(3)(a) or 39.2(3)(c), but there is no need for us to address that in more detail in circumstances where we are in any event satisfied that the threshold test is met. Equally, we are satisfied that it is necessary and appropriate to make orders pursuant to CPR 5.4B, 5.4C and/or the inherent jurisdiction of the Court, to ensure that those who are not within the restricted access arrangements are unable to access the Protected Material.

The terms of the Court's order

65. The parties were not agreed as to whether it was correct to characterise the PII application as refused or granted if we concluded that the public interest concerns could be met by restricted access arrangements and attendant safeguards. Mr Blundell submitted that in those circumstances our order should say that the application was granted (and his draft order reflected this); whereas Mr Buttler and Ms Sarathy contended that in such circumstances we should say that we had refused the PII claim. We accept that it follows from our earlier conclusions that we have not granted the

Defendant's application for PII. Had we done so, the Documents would be immune from any disclosure. However, we have not rejected the concerns raised by the Minister. We agree with Moses LJ's observation at para 15 of *Mohammed*, that where a restricted access arrangement is ordered by the Court "it provides an alternative to a ruling either to uphold or reject the claim" (para 19 above). This is therefore the approach we have taken in the Court's order.

66. Our order contains detailed provision as to how the Protected Material is to be referred to by the parties in correspondence, in skeleton arguments and in documents bundles prepared for the hearing. None of this was controversial. We have already addressed the restricted access arrangements, inclusion of a Penal Notice and service of the order in paras 62-63 above.

67. The parties were not agreed on how long the Defendant should have to provide further versions of the Documents, whether by way of open disclosure with redactions lifted and/or pursuant to restricted access arrangements. Understandably, the Claimants wanted the material as soon as possible. Mr Buttler pointed out the proximity to the hearing date and that delay had been occasioned by the Defendant's failure to make the PII application on a timely basis. Whilst we have some sympathy with these points, we also recognise that the Defendant will need time to prepare the further versions of the Documents. It also makes sense for the Defendant to provide the revised versions *after* the deadline we will impose for her to indicate whether she proposes to appeal our decision in relation to the Private Annex 2 items, thereby potentially avoiding the need for multiple further versions of the Documents to be produced and served at different times. Mr Blundell proposed Wednesday 13 April 2022; Mr Buttler asked for Friday 8 April 2022 (or earlier). Taking into account the various considerations, we consider that ordering that the material be provided by no later than 2 pm on Monday 11 April 2022 is the fair and appropriate time. If the Defendant were able to disclose the material earlier that, of course, would be helpful. An issue arose post-hearing about the mechanism for disclosure of the restricted access documents. We consider that the sensible course of action, which is likely to minimise the risk of inadvertent further disclosure, would be for the documents to be served physically rather than electronically.

68. We return to the arrangements in respect of the passages listed in Private Annex 2. We have imposed a relatively tight deadline for any application for permission to appeal to be made by the Defendant. She will have had this judgment in its draft form for several days prior to the hand down (it being agreed that the Defendant should check the draft before its circulation in draft to the Claimants, in case we have inadvertently referred to Protected Material). If the Defendant does not seek permission to appeal within the stipulated timeframe, then there is no reason for restrictions to apply any further in respect of these passages or in respect of the Private Supplementary Judgment (and in those circumstances we will make arrangements to hand down the latter). However, if the Defendant applies for permission to appeal then further consideration will need to be given to this. In those circumstances, it may well be that the Private Annex 2 material will need to continue to be treated in the same way as the Protected Material, for the purposes of disclosure. If permission to appeal has been refused before the final hearing, then there will be no difficulty in the parties referring to these passages publicly. If any appeal remains unresolved at that stage, then the parties and the Court will have to consider a number of options, including adjournment of the hearing; arrangements that

submissions made in open court can be made using particular forms of words; or the parties inviting the Court to further consider our powers under CPR 39.2, albeit as we have already concluded that disclosure of this material does not entail a real risk of harm to the public interest, we are likely to take some persuading that hearing references to this material in private would be an appropriate course for that reason. However, if there were an appeal, it may be that we will have to consider whether or not to order that references to the material that is the subject matter of the appeal be made at a hearing in private, at least until the outcome of the appeal, so that the purpose of the appeal is not negated before it has been determined.

69. We also need to give the Claimants an opportunity to seek permission to appeal. However, recognising that they would not be in a position to do so until they have received the Protected Material and further unredacted versions of the Documents on or before the 11 April 2022, we have allowed seven days for them to do so from that date.

70. Because of the importance of handing down this judgment as swiftly as possible, we have listed the material in the respective Private Annexes 1, 2 and 3 by cross-referring to where it appears in the Defendant's Closed Schedules and in the Documents. We have no reason to doubt that the Defendant will give full effect to our decision in the further material that she is to serve in accordance with the terms of our order. The only alternative would have been for us to set out the full wording of each of the 80 plus entries in these Annexes, which would have delayed the production of this judgment.

Conclusion

71. For the reasons given above, we have concluded that:

i) disclosure of the redacted passages listed in Private Annex 1 to the Court's order is not necessary for the fair disposal of the proceedings and that, accordingly, the redactions will remain;

ii) disclosure of the currently redacted passages listed in Private Annex 2 to the Court's order is necessary for the fair disposal of the proceedings and this would not create a real risk of serious harm to the public interest. We set out interim arrangements in our order to allow the Defendant an opportunity to consider whether she seeks to appeal this aspect of our order. We have discussed the position that should apply if she does seek permission to appeal in para 68 above;

iii) disclosure of the currently redacted passages listed in Private Annex 3 to the Court's order is necessary for the fair disposal of the proceedings and that the risk to the public interest that would be caused if they were placed in the public domain can be appropriately mitigated through disclosure on a restricted basis to identified individuals only.