



Neutral Citation Number: [2023] EWHC 2413 (Admin)

Case No: CO/3889/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

Between :

THE KING

on the application of

CHRISTIAN CRAIGHEAD

Claimant

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

Tim Johnston (instructed by **Harrison Clark Rickerbys**) for the **Claimant**
Oliver Sanders KC and Emmanuel Sheppard (instructed by **the Treasury Solicitor**) for the
Defendant

Hearing dates: 13 & 14 June 2023

Approved Judgment

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. INTRODUCTION

1. The claimant is a former member of the United Kingdom Special Forces ('UKSF', also referred to as 'the Group'). In accordance with the anonymity order made on 21 November 2022, I shall refer to him in this judgment by his pseudonym, "*Christian Craighead*". While serving in Kenya, in January 2019, Mr Craighead engaged in a counter-terrorist operation at the DusitD2 hotel complex in Nairobi ('the Dusit Incident'). He was subsequently awarded the Conspicuous Gallantry Cross, an award which may be given to "*all ranks of the services in recognition of an act (or acts) of conspicuous gallantry during operations against the enemy*". As the Ministry of Defence ('MOD') readily acknowledges, Mr Craighead served the UK with honour, and he is a valued and respected member of the wider UKSF community.
2. By this claim for judicial review, Mr Craighead challenges the Secretary of State's refusal on 25 July 2022 to give him "*express prior authority in writing*" ('EPAW') to publish a memoir he has written which contains an account of his involvement in the Dusit Incident ('the memoir'). The central issue is whether that refusal unlawfully interfered with Mr Craighead's right to freedom of expression. The focus of the claim, and consequently of this judgment, has been on article 10 of the European Convention on Human Rights ('the ECHR'). The jurisprudence in respect of that Convention right is substantially at one with the long-established common law right to freedom of expression: see *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [21] (Lord Bingham); *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, [13] (Lord Sumption JSC).
3. The parties have taken a cooperative approach to this litigation, with the Secretary of State acknowledging that Mr Craighead has approached this matter appropriately first by seeking EPAW and then, as he is entitled to do, by challenging the refusal through these proceedings. Although the courts have considered, in a number of authorities relied on by the parties and discussed below, issues arising in circumstances where former members of UKSF or of the intelligence services have disclosed information without authorisation, this case appears to be the first in which a public law challenge to a refusal of authorisation has proceeded to a substantive hearing. (*R (A) v Director of Establishments of the Security Service* [2009] UKSC 12 [2010] 2 AC 1 concerned an analogous claim which was later transferred to the Investigatory Powers Tribunal – which has jurisdiction in connection with the security and intelligence services – but the proceedings were settled.)
4. Insofar as it is possible to do so, without damaging the interests of national security or defeating the object of the proceedings, I address the claim in this OPEN judgment. I am handing down, at the same time, a Confidential Schedule to this judgment containing additional reasoning which cannot be disclosed publicly. Both parties and their representatives have seen the full judgment, including the Confidential Schedule.

B. HISTORY OF THE PROCEEDINGS

5. On 21 November 2022, I made an order pursuant to CPR 39.2(4) protecting the identity of the claimant. In accordance with that order, on 2 December 2022, the claimant re-filed and re-served an anonymised copy of the claim form, statement of

facts and grounds and supporting evidence, in which he is referred to as “*Christian Craighead*” or “*CC*”, and not by his real name.

6. The Secretary of State filed and served an acknowledgment of service and summary grounds for contesting the claim on 16 December 2022. On 21 December 2022, the Secretary of State filed and served a request for further information/clarification under Part 18 of the Civil Procedure Rules (‘CPR’).
7. On 17 February 2023, Lang J granted permission to apply for judicial review in respect of two of the three grounds relied on by the claimant, namely, that the refusal of EPAW constitutes an unlawful interference with Mr Craighead’s right to freedom of expression pursuant to article 10 of the ECHR (Ground 1) and is irrational (Ground 2). The Secretary of State had not opposed the grant of permission in respect of those grounds.
8. By the same order, Lang J refused permission in respect of Ground 3, by which Mr Craighead contended, in effect, that the contents of the memoir were such that he did not need EPAW, and publication of the memoir would not breach his contracts with the MOD (or the terms of the Official Secrets Act 1989). Lang J observed that “*on the evidence, the incident described in the memoir plainly fell within the scope of the confidentiality contracts signed by the Claimant*”.
9. Mr Craighead did not renew his application for permission on Ground 3. Although he was granted permission on two grounds, in the light of how the case developed following the service of the Secretary of State’s evidence, the claimant did not pursue the allegation that the refusal of EPAW was irrational, expressing the view that Ground 2 did not add anything of substance to his claim based on Ground 1.
10. On 15 May 2023, by agreement between the parties, Lang J made an order in respect of the handling of the Secretary of State’s evidence and documents within a confidentiality ring. Both parties and their representatives are within the confidentiality ring.
11. Following a hearing on 8 June 2023, on the application of the Secretary of State, and for the reasons given in his *ex tempore* judgment (*R (CC) v Secretary of State for Defence* [2023] EWHC 1804 (Admin)), Lane J made an order that securing the proper administration of justice required the substantive hearing of the claim to be held in private. He approved a public statement, agreed by the parties, which was published on the judiciary website on 9 June 2023, and which states:

“This is a claim for judicial review. The Claimant is challenging a decision by the Defendant to refuse permission for the publication of a book. The substantive hearing will take place at the Royal Courts of Justice on 13-14 June 2023. At a directions hearing on 8 June 2023, following the Defendant’s application (which the Claimant did not oppose), Mr Justice Lane determined that this substantive hearing will be heard wholly in private. This means that the public and press will not be able to attend, as they otherwise usually would.

However, the following summary of the case can be provided. The Claimant is a former member of the United Kingdom Special Forces (“UKSF”). He is challenging the Defendant’s refusal to give him “express prior authority in writing” (“EPAW”) for the publication of a book he has written. The Claimant must obtain EPAW before he can publish the book because, as is required of all those upon joining UKSF, he signed a confidentiality contract in which he agreed that, unless he obtained EPAW first, he would not disclose any information about the work of UKSF or statement which purport[s] to be such a disclosure.

The basis of the refusal of EPAW is the Defendant’s assessment that the material in the book is covered by the confidentiality contract and its publication would cause damage to national security. The issue in the case is whether that refusal is incompatible with the Claimant’s right to freedom of expression under Art.10(2) of the ECHR. If so, it would be unlawful under s.6 of the Human Rights Act 1998.

The book contains the Claimant’s account of his involvement in the response to a terrorist attack at the DusitD2 hotel complex in Nairobi, Kenya in January 2019. It is agreed that the draft version of the book contains disclosures or statements caught by the Claimant’s confidentiality contract. However, the Defendant neither confirms nor denies whether the information contained in the book is true or false. Similarly, the Defendant neither confirms nor denies anything in relation to the incident at the DusitD2 hotel and does not comment publicly on the activities of UKSF.

The reason why Mr Justice Lane decided the substantive hearing needed to be in private is because any public discussion of the lawfulness of the Defendant’s national security assessment would reveal the information which the refusal of EPAW was designed to protect, thereby defeating the object of the hearing.

The Court intends to issue public and private judgments on the claim in due course and has requested the parties to make submissions on the matters that may safely be made public in an open judgment.”

12. Mr Craighead has made six witness statements, dated 30 November 2022 (‘CCWS1’), 19 January 2023 (‘CCWS2’), 31 January 2023 (‘CCWS3’), 19 May 2023 (‘CCWS4’), 23 May 2023 (‘CCWS5’) and 7 June 2023 (‘CCWS6’); and he has adduced exhibits, including the first and third drafts of the manuscript of his memoir.
13. The Secretary of State has adduced four witness statements from three witnesses, namely:

- i) A statement dated 27 April 2022 made by Nick Gurr ('GurrWS'). Mr Gurr is a senior civil servant in the MOD who, as Director of International Security, has responsibility for defence policy concerning Africa, the Middle East, the Asia-Pacific region, Latin America and the Caribbean.
 - ii) Two statements, dated 28 April 2023 ('BWS1') and 5 June 2023 ('BWS2'), made by a serving member of UKSF, referred to in these proceedings as "Soldier B" (to protect his anonymity). Soldier B is the Disclosure Officer in the Headquarters Directorate of UKSF. He currently holds the formal rank of Major, although he attained the rank of Lieutenant Colonel before he retired, and then rejoined UKSF on a short commission as the Disclosure Officer.
 - iii) A statement dated 3 May 2023 made by the current Director of Special Forces ('DSF'; 'DSFWS').
14. No application was made by either party to cross-examine any witness. Evidence was given exclusively in writing, as it almost invariably is in judicial review claims: see the *Administrative Court Judicial Review Guide 2023*, §§11.2.1-11.2.2.
15. I heard the claim over two days on 13 and 14 June 2023. The hearing was in private. Both parties were present, and represented, throughout the hearing, and each party had access to all of the evidence and other documents that were put before the Court.
16. Lane J observed in *CC* at [21]:
- "I also bear in mind that the principle of open justice can, in the circumstances of this case, be protected by the fact that it will be possible for the court, following the substantive hearing, to provide a judgment which would be in open as well as in closed form. Accordingly, the public will have the opportunity of understanding the matter to a substantial extent without, importantly, there being any risk of inadvertent disclosure of material harmful to the national interest or to the other interests articulated in CPR 39.2(3)."
17. Given that the hearing was in private, in the interests of open justice, in this OPEN judgment I have sought to set out the evidence more extensively than might otherwise be necessary, so far as I have been able to do so consistently with securing the administration of justice and avoiding damage to national security.

C. THE FACTS

UK Special Forces

18. Soldier B (with whose evidence the DSF has expressed his "complete agreement") has described the role of UKSF in his statement:
- "The government assesses that an operationally effective special forces capability is essential to national security and has charged UKSF with its delivery. We are a tri-service group of armed forces units under the operational command of DSF and a national asset akin to a fourth and armed security and

intelligence service. The exemption for national security bodies in section 23 of the Freedom of Information Act 2000 expressly groups UKSF together with MI5, MI6 and GCHQ at the top of the list. We fulfil national security functions and undertake tasks set by government as part of its foreign, security and defence policy and on behalf of other nations and international bodies such as the UN and NATO.” (BWS1 §4.1)

19. There are three types of unit within UKSF (BWS1 §4.2):
 - i) The regular core units, namely: 22 Special Air Service (‘SAS’) Regiment, the Special Boat Service (‘SBS’), the Special Reconnaissance Regiment (‘SRR’) and the Headquarters Directorate of Special Forces (‘HQDSF’);
 - ii) The reserve core units, namely: 21 and 23 SAS (R) Regiments and the SBS (R); and
 - iii) The regular and reserve enabling/supporting units, namely: 18 (UKSF) Signal Regiment, a Joint Special Forces Air Wing, Special Forces Support Group and additional squadrons of the Royal Air Force, Royal Logistic Corps and Royal Army Medical Corps.
20. UKSF operate independently and in conjunction with others, including domestic and allied armed forces, law enforcement and security and intelligence services. UKSF have four primary, overlapping roles, namely: (i) surveillance and reconnaissance; (ii) offensive action; (iii) the provision of support and influence; and (iv) countering terrorism (BWS1 §§4.3, 4.5-4.9).
21. In order to fulfil their functions, UKSF must be able to operate covertly, often in extremely dangerous environments. As Eady J observed in *Ministry of Defence v Griffin* [2008] EWHC 1542 (QB) at [4]: “*It is clear that much of the work is sensitive and requires that they operate secretly.*” Successive UK governments have adopted a policy of not commenting on UKSF matters, otherwise known as an NCND (neither confirm nor deny) policy (BWS1 §5.5).
22. There have been exceptions to this policy, including Parliamentary statements confirming the deployment of UKSF to specific conflicts, events or places, usually when UK military involvement is a matter of public record and it would have made little sense to maintain special forces and not use this capability in the circumstances (BWS1 §5.6). In addition, a number of published papers, to which Soldier B has referred in his first statement, provide some limited information regarding the role of UKSF, namely: *Strategic Defence Review* (Cm 3999, 1998); the government’s *Observations on the Second Report from the Defence Committee, Session 2001-02* (published as an Appendix to the House of Commons Select Committee on Defence *Fourth Special Report 2001-2: The Threat from Terrorism*, HC 667, 2002); *Adaptability and Partnership: Issues for the Strategic Defence Review* (Cm 7794, 2010); *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review* (Cm 7948, 2010); *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom* (Cm 9161, 2015); Defence and Security Media Advisory Committee, Standing Notice No.3, *Military Counter-Terrorist Forces, Special Forces and Intelligence Agency Operations*,

Activities and Communications Methods and Techniques (2021); and *Defence in a Competitive Age* (CP 411, 2021) (BWS1 §§4.5-4.7).

The contract, disclosure policy and exclusion policy

23. On 4 October 1996, before Mr Craighead joined UKSF, a confidentiality contract ('the contract') was introduced by way of a Defence Council Instruction (DCI JS 107/1996) as a pre-requisite to new or continued service with UKSF (BWS1 §7.1).
24. Those who seek to be selected for service with UKSF are temporarily attached to the Group for the duration of each selection attempt. During the initial stages of selection, after the delivery of a disclosure briefing, they are invited to sign the confidentiality contract as a prerequisite of their continued participation in the selection process. Mr Craighead was selected for 22 SAS, one of the regular core units within UKSF, on his third attempt. Consequently, he signed the contract on three occasions (on 16 July 2000, 8 July 2001 and 18 January 2006), at the start of each selection attempt, as well as signing the accompanying guidance notes on each occasion (BWS1 §§14.2-14.3).
25. The contract is in these terms:

“CONFIDENTIALITY CONTRACT

Between MOD and _____ (full name)

In consideration of my being given a (continued) posting in the United Kingdom Special Forces from _____ (date) by MOD, I hereby give the following solemn undertaking binding me for the rest of my life:-

(1) I will not disclose without express prior authority in writing from MOD any information, document or other article relating to the work of, or in support of, the United Kingdom Special Forces which is or has been in my possession by virtue of my position as a member of any of those Forces.

(2) I will not make any statement without express prior authority in writing from MOD which purports to be a disclosure of such information as is referred to in paragraph (1) above or is intended to be taken, or might reasonably be taken, by those to whom it is addressed as being such a disclosure.

(3) I will assign to MOD all rights accruing to me and arising out of, or in connection with, any disclosure or statement in breach of paragraph (1) or (2) above.

(4) I will bring immediately to the notice of MOD any occasion on which a person invites me to breach this contract.”

26. The contracts and guidance notes signed by Mr Craighead are in the same terms as the contract and “*explanatory memorandum*” considered by the Judicial Committee of the Privy Council in *Attorney General v R* [2003] UKPC 22, [2003] EMLR 24 (*AG v*

R'), [9]-[10] (Lord Hoffmann). In *AG v R*, Lord Hoffmann described the background to the introduction of the contract:

“1. The appellant, designated in these proceedings as ‘R’, is a former member of 22 SAS Regiment, among the most celebrated regiments in the British Army. During the Gulf War in 1991 he was a member of patrol B20 (Bravo Two Zero) which was dropped by helicopter behind enemy lines to find Scud missiles and cut communication cables. The patrol was detected and hunted down by Iraqi forces. Three of the eight members died attempting to escape; one succeeded in getting across the Syrian border and the other four (including R) were captured, tortured and interrogated. After the end of the war they were released and returned to England.

2. At the end of 1992 General Sir Peter de la Billière, commanding officer of the British forces in the Gulf War and himself a former commanding officer of 22 SAS, wrote a book about the war which included a chapter on the Bravo Two Zero patrol. This appears to have been the first time that a member or former member of SAS had published an account of one of its operations. Until then, the ethos of the regiment had been for its members to preserve total secrecy. In 1993 a member of the patrol, under an assumed name, published a book called *Bravo Two Zero* which gave his own account of the affair. It sold very well. In 1995 the member who had escaped published his version under the title *The One That Got Away*. Films were made based on both books and shown on television.

3. The publication of these books and films caused great concern among the surviving members of the patrol who had not gone into print and the regiment generally. They felt that the writers (as might be expected) presented themselves in the best possible light and (in the case of the second book) unfairly blamed a dead member of the patrol for what went wrong. The films were even worse, portraying incidents that were entirely fictitious. The whole controversy, attended by a glare of commercially motivated publicity, was distasteful and contrary to the traditions of the regiment.

4. Some members urged the authorities to make some public comment to correct the errors in the books and films. The Ministry of Defence appears to have taken the view that nothing could be done to suppress what had already been published and that it would not be productive to engage in public controversy with the authors. Least said, soonest mended. R was disappointed and angry at this reaction, feeling that the Ministry had failed to support him and the other members of the patrol, living and dead.

5. There was however a strong feeling in the regiment and among its former members that something should be done to prevent anything similar from happening in the future. The books about Bravo Two Zero had been followed by numerous other accounts of SAS activities, for which the public seemed to have an insatiable appetite. In February 1996 the SAS Regimental Association (to which former and serving members of 22 SAS and other SAS regiments belonged) polled its members on whether they supported a proposal emanating from 22 SAS for all members of the United Kingdom Special Forces (which included the SAS regiments and the Special Boat Service) to sign binding contracts to ‘prevent unauthorised disclosure’. 96.8 per cent of the respondents (who were 73 per cent of the membership) said that they did. In May 1996 the Ministry of Defence accepted the recommendation and arrangements were put in hand for contracts to be signed.”

27. The appellant, ‘R’, signed the contract shortly before deciding to apply for premature voluntary release. Following his return to his home country of New Zealand, R decided to publish his own version of the B20 patrol. He entered into a contract with a New Zealand publisher, and the latter offered the UK rights to a UK publisher. The MOD learned of the proposed publication and, consequently, the Attorney General for England and Wales commenced proceedings in the High Court of New Zealand, seeking an injunction to restrain publication, damages and an account of profits (*AG v R*, [11]). The New Zealand Court of Appeal, overturning the decision of the High Court, held that the contract was valid, R was in breach, and made an order for an account and assessment of profits, but determined that “*the particular and most unusual combination of circumstances*” justified a discretionary decision not to grant an injunction to restrain publication: [2002] 2 NZLR 91.
28. The Privy Council dismissed R’s appeal, holding that the contract was not obtained by duress or undue influence, nor was it an unconscionable bargain. In forbearing from exercising its power to return him to his unit, the MOD had given sufficient consideration for his promise, and the contract was not contrary to public policy. Lord Hoffmann, giving the judgment of the Board (Lord Scott dissenting on the issue of undue influence), observed that although “*return to unit was not ordinarily used except on grounds of delinquency or unsuitability and was perceived by members of the SAS as a severe penalty*” ([17]), “*the MOD was reasonably entitled to regard anyone unwilling to accept the obligation of confidentiality as unsuitable for the SAS*” ([18]), and the contract was one which “*anyone who wished to serve or continue serving in the SAS could reasonably have been required to sign*” ([24]).
29. Under the heading “*public policy*”, Lord Hoffmann observed:
- “35. The argument that the contract did not as a matter of construction prevent publication of the material in question has not been pursued and their Lordships think that it was always hopeless.
36. It is to be noted that neither the New Zealand courts nor their Lordships were invited to consider whether the MOD had

acted unlawfully in refusing consent to publication. The whole basis of R's case has been a challenge to the validity of the contract and not to the way it has been performed. There is no contractual proviso that consent is not to be unreasonably refused; nor do their Lordships think that one could be implied. Nevertheless, an unreasonable refusal of consent by the MOD could have been challenged as a matter of public law and the appropriate tribunal for such a challenge would have been the court having jurisdiction to grant judicial review of decisions of the MOD, namely, the administrative court in England. The principles upon which that jurisdiction should be exercised were recently discussed in *R v Shayler* [[2003] 1 AC 247]. Of course the considerations which the MOD are entitled to take into account in deciding whether to give consent under the confidentiality agreement are different from those which it may take into account under the Official Secrets Act 1989. As the history of this matter shows, the agreement was intended to prevent the disclosures which would not necessarily be in themselves damaging to the public interest and might even be as to matters already in the public domain. It had the broader object of preventing public controversy which might be damaging to the efficiency of the Special Forces. The United Kingdom Parliament has also taken the view that information about the Special Forces is in a special category: see ss.23(1) and (3)(d) of the Freedom of Information Act 2000, which declares information relating to the special forces to be "*exempt information*", excluded from the general right to information under s.1(1)(b). But their Lordships think that the jurisdiction could in principle have been invoked if R had chosen to do so." (Emphasis added.)

30. Soldier B's evidence is that the "*explosion in the publication of insider memoirs about recent UKSF service and operations*" in the early to mid 1990s "*quickly took the Group to the brink of an existential crisis which was only averted by the introduction of the contracts and their subsequent enforcement by MOD*" (BWS1 §§6.2-6.11).
31. An unclassified "*Aide Memoire*" on the contract, based on the confidential guidance notes, was first issued in July 1999. The Aide Memoire explains that the main reasons for protecting information regarding UKSF are "*to maintain operational effectiveness and lead capability across the broad spectrum of SF activity*", to "*ensure the personal security*" of members of UKSF, and to "*maintain UKSF's credibility of confidentiality*", as "*privileged access by UKSF to sensitive information and tasking is based on and requires enduring trust*" on the part of other government agencies and allied nations. The Aide Memoire provides advice regarding the information that can be disclosed for the purpose of seeking alternative employment.
32. The Aide Memoire states:

"What about disclosures which are unlikely to cause harm?"

18. It is extremely difficult to quantify in advance the damage caused to UKSF by the disclosure of apparently innocuous information. However, it is widely recognised that the so-called ‘jigsaw’ effect plays a significant role in providing a depth of understanding on UKSF capabilities to potential enemies or terrorists. The harm caused by such disclosures usually only becomes apparent retrospectively, if at all.

19. Much information within the UKSF Group is tightly compartmentalised. It is therefore highly unlikely that you will be in a position to understand fully the damage which even simple disclosures may cause.

20. Because of the ‘jigsaw effect’, MOD maintains a broad policy of limiting comment on UKSF issues and in doing so minimises the potential for cumulative damage. You should understand that disclosure of any information on UKSF, special units or sensitive organisations is in direct breach of your duty of confidentiality, and, regardless of what you may believe to be the truth, may in fact be damaging.”

33. The MOD’s disclosure policy is set out in a “*UKSF Disclosure Directive*” dated 5 August 2019 (‘the disclosure policy’) which cross-refers to formal reviews undertaken in 1997 and 2002 and largely reflects previous iterations of the policy first formalised when the contracts and the exclusion policy were introduced (BWS1 §9.1). The contractual ban on disclosure of information or documents relating to the work of UKSF is not an absolute ban. It is a ban on disclosure without express prior authority in writing from the MOD. The MOD recognises that “*contract signers may need to make UKSF-related disclosures in a variety of private and official contexts (e.g. job applications, sessions with a therapist or divorce proceedings) and EPAW can easily be given to allow this as and when necessary and subject to appropriate conditions*” (BWS1 §11.1).
34. Under the heading “*Books, manuscripts and academic works*”, Appendix 3 to Annex A to the disclosure policy addresses public disclosures in the following terms:
- “1. **Aim.** The aim of this Appendix is to explain the process that serving and former members of the Group should take when, as single or joint authors or in collaboration with ghost-writers (collectively hereafter referred to as authors), they produce books, manuscripts and academic works or other forms of art or literature in any format, hard copy or electronic, which refer, or may refer, to the Group intended for public consumption.
2. **On no account should an outline or manuscript be shared with a third party before the concept or manuscript has been reviewed by the Disclosure Cell. You should be aware that memoirs about service with the Group will not be approved.**” (Original emphasis.)

35. The decision to introduce the contract was not “*taken lightly or in isolation*” (BWS1 §7.2). The introduction of the contract was accompanied, with effect from January 1997, by a new policy and set of procedures providing for the exclusion from UKSF premises and events of former members who make public disclosures about their service, whether or not such disclosures amount to a breach of contract (‘the exclusion policy’) (BWS1 §7.3(1)). Among others, General Sir Peter de la Billière (‘DLB’), the Commander in Chief of UK armed forces in the First Gulf War in 1990-1991, who had served as the Director of Special Forces a decade earlier, was excluded in January 1997 (for a period of 15 years, until his exclusion was lifted by the (then) DSF in 2012) (BWS1 §7.3(1)). The effect of the exclusion policy is that even if the court were to conclude that authorisation should have been granted for the memoir, if Mr Craighead chooses to publish it, he would be liable (and very likely) to be excluded from UKSF premises and events (as others who have, for example, been given EPAW to appear on television programmes, have been excluded).

36. Soldier B states that:

“In view of the closeness and camaraderie that naturally develops among UKSF personnel, exclusion is widely seen as a serious and unwelcome measure and the prospect acts as a real deterrent to the publication of memoirs and so on. ... Crucially, almost everyone involved was wholeheartedly supportive of and committed to the introduction of the contracts as a necessary response to a disclosure problem which was causing serious damage to UKSF. The accompanying policy on the exclusion of insiders who had written publicly about their service with UKSF also received widespread support as a necessary and inevitable measure. For 22 SAS in particular, this meant that the introduction of the contracts was an immensely painful process that involved real soul-searching and a tangible human cost. The exclusion and consequent alienation of former friends and comrades who had fought alongside us or led us on dangerous operations (including, but by no means limited to, DLB) was not at all easy to deal with.” (BWS1 §§7.3-7.4)

37. Nevertheless, Soldier B’s evidence is that the contracts, together with the steps taken by the MOD to enforce them, and the accompanying policies, have been effective in restoring and strengthening trust and confidence in UKSF (BWS1 §10.10). All the more so as the disclosures made by former members of UKSF who served prior to the introduction of the contracts in 1996 are “*getting staler and staler*”, and with the passage of time and lessening of their contact with UKSF, their knowledge and credibility continually decreases (BWS1 §11.12).

The EPAW process and the challenged decision

38. The Dusit Incident involved a major terrorist attack, by al-Shabaab, at a complex containing shops, offices and a hotel in Nairobi during which it is reported that at least 21 people were killed, and others injured. The incident began on 15 January 2019 and concluded the following day with the deaths of all the al-Shabaab gunmen. The claimant assisted the Kenyan authorities in responding to the incident. The Dusit

Incident was the subject of extensive international media coverage, including on television and in newspapers, at the time.

39. By early 2020, the claimant had begun talking to Soldier C, a close friend and Warrant Officer Class 2 ('WO2') who was working in the Disclosure Cell, about his intention to write a book (CCWS6 §6). In March 2020, the claimant entered into a contract with a literary agent. He incorporated a limited company in April 2020, which he has used as a vehicle for entering into book-related agreements. On 4 May 2020, using his limited company, he entered into an agreement with a ghost writer (CCWS6 §8).
40. On 3 September 2020, the claimant's literary agent contacted a publishing company to offer his memoir for publication (CCWS1 §18). The claimant's last day in the armed forces was Monday 7 September 2020. On 15 November 2020, using his limited company, he entered into a contract with the publishing company ('the publisher').
41. On 10 December 2020, the publisher got in touch with Soldier C, informing him that he had a manuscript of the claimant's forthcoming book ready to share with a view to obtaining clearance. Soldier C wrote to the publisher:

"If the manuscript is finished, then please send it over. Once I have checked it over and MoD are happy then I will grant you EPAW which is your permission to go to print."

The publisher immediately sent Soldier C a copy of the manuscript and the Disclosure Cell began the process of considering the grant of EPAW.

42. Initially, the claimant's request for EPAW was dealt with by Soldier C and the claimant was given cause to believe that EPAW would be granted reasonably swiftly. On 6 January 2021, Soldier C responded to a query from the claimant, saying "[h]opefully should be done next week". On 17 January 2021, Soldier C responded to further chasing messages from the claimant:

"If I don't pick anything major up I will hopefully get your EPAW letter by Friday."

43. The claimant's evidence is that he had a conversation with Soldier C on 19 January 2021 during which he was told that "*only minor changes needed to be made before EPAW would be granted*" but also that "*he would need to ask the Director of UK Special Forces whether the Incident was to be considered part of an ongoing UK Special Forces operation for the purposes of granting EPAW*" (CCWS1 §21). It appears that Soldier C's earlier, more positive messages were based on a misapprehension that information in Mr Craighead's possession regarding the Dusit Incident was not covered by the contract. A WhatsApp message from Soldier C to the claimant on 20 January 2021 stated that the permission of the Secretary of State might be needed and that they were waiting for advice from a policy adviser.
44. As Soldier B has acknowledged, the Disclosure Cell (through Soldier C) "*allowed the claimant to feel more optimistic than he should have been about the prospects of EPAW being granted during December 2020 and January 2021*" (BWS1 §18.3).

Soldier B had allocated the claimant's EPAW request to Soldier C as, given their close friendship, he had "*thought this would help the process run more smoothly*". However, their friendship had the consequence that Soldier C was "*reluctant to be the bearer of bad news' and so [Soldier B] reallocated the request to Soldier D*" (BWS1 §18.2). Soldier D introduced himself to the publisher by email on 29 January 2021 and, on the same day, the (then) Chief of the General Staff, General Sir Mark Carleton-Smith, informed the claimant's literary agent that "*in its current form the book will not be authorised*", and that the Disclosure Cell "*feel they have covered the ground with [CC] as to which elements need redaction*".

45. The claimant, his literary agent and publisher attended a meeting on 27 April 2021 with Soldier A (SO1 Legal) and Soldier D. It was explained to the claimant that sharing the manuscript, prior to the grant of EPAW, with his literary agent and publisher was a breach of contract. The claimant has expressed regret in relation to this episode, observing that any breach on his part was unintentional (CCWS1 §29). The Disclosure Cell followed up, two days later, informing the publisher that they were working with the claimant and "*it is our hope that we can help him produce a book that does not breach the contract and thus is granted EPAW*".
46. On 25 November 2021, the claimant was provided with a table ('the Redaction Table'), in respect of the third iteration of the first draft of the manuscript dated 25 January 2021 ('the first draft'), identifying the parts that were cleared for release and the parts that the MOD required to be removed, on (i) national security, (ii) intelligence, (iii) operational capability, (iv) training, tactics and procedures and/or (v) personal security grounds. The first draft was 249 pages long. It was divided into 32 chapters, plus a prologue and a postscript. The Redaction Table made clear that the MOD did not object to the claimant publishing his draft memoir insofar as it addressed his upbringing and life outside the army, his army career prior to joining UKSF, or concerned his passing selection for UKSF and becoming a "*fully badged*" member of 22 SAS. But he was not authorised to publish any other information in his possession by virtue of his former membership of UKSF and so he was asked to remove the prologue, 23 whole chapters, most of two other chapters and a few names, words and sentences in the remainder of the first draft.
47. On 1 December 2021, Soldier D reiterated that "*nothing has changed regarding the fact that UKSF operations cannot be included*". He followed this up the following day making clear that the claimant could say what he wanted about his childhood "*as well as other periods not captured within the confidentiality contract, basically time within UKSF*".
48. The claimant provided further drafts on 29 November 2021 and 7 December 2021. However, save for a few words, the second and third drafts were almost identical to the first draft. The claimant made almost none of the amendments sought by the Redaction Table. The claimant has explained that he did what he thought the Redaction Table required of him (CCWS1 §34). It is difficult to understand how the claimant could have so fundamentally misunderstood what was asked of him given the plain terms of the Redaction Table and of Soldier D's communications with him. But in circumstances where I have heard no oral evidence, I accept that, as stated in the Statement of Facts and Grounds, Mr Craighead "*has sincerely misunderstood both the Table of Redactions and what has been said to him at his various meetings with personnel within the Disclosure Cell*" (SFGs §39(c)). Although Mr Craighead did not

take it in, I agree with Mr Oliver Sanders KC, Counsel for the Secretary of State, that from late January 2021 the message was clearly and consistently conveyed that he would not be given EPAW to address the Dusit Incident in his memoir.

49. On 25 February 2022, Soldier D sent the claimant an email in the following terms:

“I write further to your submission of the second manuscript ‘One Man In’ to disclosure requesting EPAW. HQ MAB Disclosure have reviewed the manuscript and assess that, in its current state you will not be granted EPAW. The manuscript contains a detailed description [of] a UKSF operation covered by the Confidentiality Contract.

You will recall that you were provided a redaction table for your first manuscript, followed by a face to face meeting within Regents Park Barracks where it was clearly stated that any account of UKSF operations must be removed. However, the accounts of your life, memories and military service outside of UKSF operations would be considered appropriate for EPAW.

Please let me know if you wish to resubmit a further manuscript requesting EPAW in order for one of the team to be allocated to its perusal.” (Emphasis added.)

50. The claimant responded on 24 March 2022 that the MOD’s approach was “*unfairly inconsistent*” and that he was being “*singled out for special treatment*” compared to others who had published books. He requested EPAW to provide materials to his lawyers and asked for a meeting. A meeting was arranged for 27 June 2022 but the claimant chose not to attend in circumstances where the MOD had not authorised disclosure to his lawyers and refused several suggestions that he made of individuals who might be permitted to attend with him. Ultimately, the claimant attended a meeting with Soldier A and Soldier B on 25 July 2022. Soldier A’s attendance note records that they:

“explained that the latest version of the Manuscript was not going to receive EPAW as the contents were still in breach of the Confidentiality Contract. [Soldier A] attempted to go through the manuscript and redaction table with [CC], but he stated that he did not want to and just wanted to know whether he was going to get EPAW. [Soldier A] confirmed again that he would not get EPAW in its current format. [Soldier A] again attempted to go through the manuscript and redaction table to show him where changes needed to be made. Once again [CC] refused to engage. [CC] explained that he did not want to write the book, but he just needed to confirm to his publisher and lawyer that he was not being granted EPAW.

...

[CC] asked if we could confirm the discussions in writing i.e. that he was not being given EPAW for the manuscript and/or to disclose the manuscript to his lawyer.”

51. On 31 August 2022, the MOD provided the claimant with a decision letter. The letter reminded him that in view of the terms of the contract obtaining EPAW for a manuscript is essential and then stated:

“This is especially the case when a manuscript is a memoir of their service with the Group or a fictionalised account of the same. Given the obvious sensitivities, EPAW is very unlikely to be granted in circumstances where a person seeks to disclose information relating to their service in the Group. Consequently, while we have carefully considered the contents of your Manuscript, and as was explained in our meeting of the 25 July 2022, your request for EPAW for the publication of the Manuscript is denied.

As we have explained at our meetings with you, should you wish to amend the manuscript to remove those parts that breach the Contract then please re-submit it to the Disclosure Cell for re-consideration.”

52. At the meeting on 25 July 2022 the claimant had also been refused authorisation to disclose the manuscript to a lawyer but the MOD changed its position in this regard in the letter of 31 August 2022 (following receipt of a letter before claim), granting the claimant EPAW to disclose the manuscript to his solicitor and, if required, an instructed barrister/advocate, subject to certain conditions. The MOD accepts that the claimant should have been given EPAW to disclose his manuscript to his legal advisers (subject to conditions) when he first sought this (BWS1 §18.8).
53. Although the decision was to refuse EPAW for the memoir in the form submitted, rather than for a memoir in *any* form, and the MOD made clear that it remained willing to consider an amended draft, I agree with Mr Tim Johnston, Counsel for Mr Craighead, that the decision should be approached on the basis that the claimant was refused authorisation to include any reference in the memoir to the Dusit Incident. However, during the course of the hearing, Mr Sanders clarified (modifying the position taken in the Redaction Table) that the claimant is not prohibited from confirming – as he has already said publicly – that he was involved in responding to the Dusit Incident. But it is a matter about which the claimant can disclose nothing further.
54. When referring to the information in the memoir below, I am addressing only that information for which the claimant has been refused EPAW (excluding information which, through these proceedings, the Secretary of State has confirmed the claimant is permitted to disclose).

The damage assessment

55. The Secretary of State’s assessment of the damage that would be caused if the memoir were to be published is contained in the statements of the DSF, Soldier B and Mr

Gurr. To a significant extent their reasoning has necessarily had to be addressed in the Confidential Schedule. For this reason, the summary of their evidence, and passages I set out below, may appear generic rather than focused on the harm that disclosure of the memoir itself would cause.

56. The DSF states:

“9. As DSF, I am responsible for the operational command, training, development and management of UKSF and answerable to the Chief of the Defence Staff, the Defence Secretary and, ultimately, the nation for the delivery of special forces capability. For these purposes, I have to: advise the chain of command and ministers on all aspects of UKSF capability, employability and management; provide a Directorate function within MOD as well as a deployable task force level Headquarters; advocate for policy and permissions for all special operations in the short-term; and maintain and develop the capabilities of UKSF for the long-term.

10. These responsibilities are not purely administrative and logistical. Internal morale and cohesion have always been integral parts of military leadership and effectiveness and they are something I need to protect.”

57. The DSF endorses Soldier B’s statement, including what he says about “*the damage done by public disclosures of UKSF information, particularly when made by insiders*”. He has not read the memoir “*from cover to cover*” but he has read “*key passages highlighted to me by Soldier B*” and they have discussed it and their defence of this claim on a number of occasions.

58. The DSF has expressed concern that looking at prior publications by “*a tiny, unrepresentative and very often egotistical minority*” of former members of UKSF gives “*a false and misleading impression of what we are about and what we are like*”. This is not a factor that shifts the balance, nonetheless, I accept his evidence that the “*truth is much less showy and marketable and infinitely more worthy of credit and respect*” (DSFWS §24).

59. The DSF states:

“5. My aim in making this statement is to try and convey to the Court the gravity and seriousness of this case and the fact it genuinely engages real risks to national security and the lives of my personnel and those they protect. I have attempted to do this in as much detail as possible within the confines of a confidentiality ring and on the basis that much of it will need to be considered in private. ...

15. I have attended many disclosure briefings and read many ‘damage assessments’ and ‘harm statements’ and am acutely conscious that they can appear very dry and abstract, particularly when stripped of classified details. My fear is that

something very important could get lost. Although we operate covertly and in secret, we are nevertheless a truly national asset and everyone interested in our national security has a stake in us. Public order, the rule of law, democracy, human rights and our welfare state all depend on and require national security and we are a vital part of the state apparatus which protects and maintains it. The state asks us to go out and risk our lives for its benefit and, in return, we need to know that the state will back us and protect us from harm. I see this as a duty of care issue - duty of care to those acting on our behalf and duty of care to those in front of them.

16. Soldier B rightly refers to our personnel having to take ‘split-second decisions’. These are life or death decisions. Mistakes or even just hesitation can be fatal. Is this a terrorist or a hostage? Is this person concealing a weapon or a bomb? Is my life at risk? Should I shoot? Decisions of this kind are a huge moral responsibility and we should not expect anyone to take them without giving them the best possible chance of getting them right. This of course means training and practice, but it also means ensuring that those concerned have the clarity of thought and purpose to keep focus and ‘do the right thing for the right reasons’. This requires self-confidence and trust in oneself and also implicit trust in one’s comrades and the fact they are also ‘doing the right thing for the right reasons’. ...

18. All of the following can cloud judgement and produce mistakes and hesitation: extraneous anxieties, doubts and concerns about possible public criticism by others; internal thoughts about publicity, fame or glory; and worries that a comrade may be distracted by such thoughts. I do not want my personnel wondering in a critical moment whether they might later be accused of dithering or being too gung ho, whether such- and-such a step might lead to a book deal or whether someone alongside them might be a weak link with an eye for the main chance. Former members of UKSF writing books about their own conduct and the conduct of their comrades on operations would introduce all these factors into people’s minds, corrode and erode morale and jeopardise our effectiveness and safety. It would put lives at greater risk than would otherwise be the case.” (Emphasis added.)

60. Soldier B emphasises the importance of secrecy to the operational effectiveness of UKSF given the “*extremely difficult, dangerous and hostile environments*” in which they work (BWS1 §§5.1-5.7). In order to operate effectively, members of UKSF “*need to have complete and implicit trust, confidence and faith in each other*” (BWS1 §5.2).
61. The trust and confidence of operational partners in UKSF is also “*vital*” to UKSF’s operational effectiveness, given the degree of interconnectedness, integration and close working relationships not only with conventional armed forces and Defence

Intelligence but also with “operational partners in the domestic security and intelligence community, including MI5, MI6, GCHQ, the National Crime Agency and Counter Terrorism Policing; and their allied counterparts within the Five Eyes intelligence alliance, UN and NATO and other alliances and coalitions”. UKSF “have a particularly close working relationship with their counterparts in US Special Forces from which both sides have benefitted enormously” (BWS1 §§4.8, 5.2).

62. Soldier B has outlined, in general terms, “the main heads of damage and our key concerns”, explaining that the “importance of the contracts derives from the fact that insider disclosures concerning UKSF cause particular damage to their operational effectiveness and therefore national security” (BWS1 §8.1). He emphasises that there is:

“an important difference between public disclosures about UKSF by outsiders and insiders. Disclosures by outsiders will always, to a considerable extent, involve speculation and will accordingly be less authoritative and reliable and have less impact. Disclosures by insiders generally contain and are treated as containing more reliable information and represent a far greater threat. This point has been repeatedly stressed to me by our operational partners and has been of long-standing concern within the Group. Indeed, it has been assessed that the effective Iraqi military response in both the western and north-western deserts in 2003 was assisted by books previously written on the 1991 Iraq War by former UKSF insiders.”

63. First, he states that actual or purported disclosures of information relating to UKSF by serving or former members of UKSF can damage operational effectiveness by reason of the:

“8.3 **Compromise of sensitive information** relating to activities, capabilities, contact details, drills, equipment, identities, locations, methods, operations, organisational matters, personnel, plans, procedures, sources, systems, tactics and techniques through direct or indirect publication or disclosure”.

64. In relation to this head of damage he draws attention to:

“(1) **The jigsaw, mosaic or cumulative damage effect** - release of details allowing accurate and inaccurate links to be drawn, deduced and excluded between UKSF and the above matters and thereby compromising: individuals who are, have been or may become rightly or wrongly associated with such matters; and/or the ongoing and future scope for and success of the deployment and redeployment of such matters. A seemingly innocuous disclosure could add to the jigsaw of information in the hands of hostile individuals allowing them to discern or deduce a particular fact either now or in the future. In this regard, disjointed fragments of information can be dangerously revealing when looked at together and no-one is in a position to

know all the information which is or may subsequently become available to our enemies.

(2) **Insider confirmation and reconfirmation** - the credible and reliable confirmation or denial of truth or falsity and/or the fact something remained or remains, or ceased or has ceased to be, true or false. This is often accompanied by material embellishment and the release of further information. The insider amplification, confirmation, embellishment or reconfirmation of prior disclosures can add to the sum of information in the public domain and is capable of causing further damage. The fact that a particular topic has been the subject of previous disclosures (whether by insiders or outsiders) is not decisive. The public discussion of a particular matter need not compromise its confidentiality in whole or in part or the confidentiality of associated information. Even if a previous insider book has revealed that UKSF used a particular technique in one specific time and place, confirmation that they used or were still using that same technique at a later time or in another place not only reveals that fact, it suggests more widespread use of the technique and an inability to devise a more secure alternative.”

65. Soldier B states that the memoir “*contains a significant quantity of sensitive information*” about various topics (which he has identified). He acknowledges that “*some of this content is admittedly basic*” (BWS1 §19.5), some of it is “*fragmentary*” (BWS1 §§19.3, 19.7), and that “*these topics have been the subject of previous insider public disclosures at a comparable level of detail*” (BWS1 §19.3). Soldier B’s assessment is that even the content he describes as “*basic*” gives “*some insight*” into the approach of UKSF (BWS1 §19.5). But there are also, he says, “*points of greater detail*”, including information he describes as constituting “*particularly sensitive*” guidance (BWS1 §19.6). Overall, his assessment is that publication of the memoir would cause “*jigsaw effect*” and “*insider reconfirmation*” damage (BWS1 §§19.3-19.14).
66. In relation to the compromise of sensitive information, Soldier B says that “*other states and more sophisticated terrorist groups monitor, compile, collate and analyse UKSF-related publications in order to build a picture*” of UKSF capabilities and methods (BWS1 §8.6(1)). One area of concern for UKSF is “*the use hostile states and sophisticated terrorist groups could make of the claimant’s book when carefully analysed and triangulated against other insider memoirs*”.
67. However, Soldier B emphasises that UKSF are also concerned about “*less sophisticated adversaries*”, including “*small groups*” and “*lone wolves*”, “*who may ... be planning a repeat of Westgate, Garissa or the incident and who could well think it worth reading an account of how the last of these attacks was ended so much more quickly and with so many fewer casualties*” (BWS1 §§11.7, 19.14). He explains:

“We also face other less sophisticated adversaries who lack the capacity or resources to maintain an intelligence database on UKSF and who hold very few pieces of the jigsaw puzzle.

Those in this category could benefit enormously from being handed a completed jigsaw on a plate, notwithstanding that the pieces are already scattered elsewhere in the public domain. In this regard, some books and other sources are not as readily available in other countries or languages and we do not assume that all our adversaries can speak or read English. A small group of terrorists planning an attack on a hotel complex in the developing world - who lack the time and ability to research UKSF counter-terrorist operations of recent years - could well have the sense to acquire and read at least one explanation of how an identical attack was recently countered. After the diplomatic resolution of the 1984 siege of the Libyan People's Bureau which followed the killing of WPC Yvonne Fletcher, an inspection of the premises showed clear traces of awareness of the techniques used by UKSF to end the Iranian Embassy siege four years previously." (BWS1 §8.6(2))

68. The second head of damage to which Soldier B refers is:

"8.7 The morale effect / the internal suspicion effect - undermining the essential morale of and mutual trust between members of UKSF and the shared values and ethos which all members must adhere to. There has been a long-standing consensus within UKSF that disclosures of related information by former members undermine individual and collective morale and damage operational effectiveness. We work in exposed positions behind enemy lines and in close proximity with terrorists and other dangerous adversaries and our personnel must be able to trust and rely on each other implicitly. When split-second decisions are called for, lives will often depend upon having this degree of confidence in each other. The publication of 'insider' stories can sow seeds of doubt and leave individuals wondering whether colleagues will identify them, reveal the *modus operandi* of their mission or criticise their actions publicly at some later date. The effect is quite cancerous and it cannot be allowed to arise even at a sub-conscious level: members of UKSF must know implicitly that their colleagues will never discuss their service without MOD agreement."

69. The third head of damage to which Soldier B refers is:

"8.10 The suspicion effect / the external suspicion effect - making third parties (such as domestic and allied security and intelligence services and other covert sources) reluctant or unwilling to cooperate with or provide essential assistance or intelligence to UKSF. During the mid-1990s, a number of UKSF's key operational partners raised grave concerns about the volume of insider disclosures and serious reservations about the scope for ongoing cooperation. These concerns came from, in particular, MI5, MI6, GCHQ, the then Royal Ulster

Constabulary, the then HM Customs & Excise (in connection with counter-narcotics functions now conferred on the National Crime Agency) and US Special Forces. In this latter regard, a former DSF was informed by the then Commander in Chief, US Special Operations Forces that the closeness of our relationship depended upon UKSF taking effective action to ensure secrecy. The message was clear from all quarters - UKSF were coming to be seen as untrustworthy and unreliable and we had to get our house in order or face exclusion. This would have been a disaster because the support and assistance of our partners is vital to our operational effectiveness.”

70. The fourth head to damage to which Soldier B refers is:

“8.14 **The snowball effect / the Bravo Two Zero effect** - encouraging further such disclosures by other serving and former members of UKSF or third parties particularly in the case of critical, inaccurate, one-sided or incomplete disclosures. Even without inaccuracy or exaggeration, individuals can quickly feel aggrieved or envious if they feel a former comrade is garnering unfair or unjustified attention, status, recognition or wealth by writing or speaking about their service. The sense of unfairness and injustice is only increased in circumstances where those not seeking publicity and profit have comparable or superior achievements in their histories which remain secret.”

71. In this regard, Soldier B assesses that, although “*the vast and overwhelming majority of UKSF personnel have no interest in and would never contemplate a public disclosure about their service let alone write a memoir about it*” (BWS1 §10.10), nonetheless, UKSF face the most significant challenges of all the UK security and intelligence bodies “*due to a ‘perfect storm’ of internal and external pressures which can push and pull people towards disclosure*” (BWS1 §10.6), namely:

“(1) **Internal demographics.** UKSF are an elite group and we only recruit the best. Selection for and service with UKSF, requires high levels of physical and mental strength, performance and resources. The members of UKSF therefore tend to be naturally ambitious and competitive and have high levels of confidence, ego and self-worth. There will always be some in this cohort who need recognition and validation and can therefore be drawn to want publicity. Furthermore, we are a hierarchical organisation, not everyone can rise to the top and this can cause resentment, particularly among high-achieving and competitive individuals who are used to comparing themselves with others.

(2) **Post-service insecurity.** Service personnel generally ‘retire’ at a relatively young age, often with young families, and many face challenges finding employment and making the transition to ‘civvy street’. These challenges can be even more

acute for former members of UKSF who suddenly lose (a) their involvement in work which is interesting, rewarding and important and (b) the sense of status and belonging that comes with being part of something 'special'. Ideas about a lucrative book or media career and associated attention and admiration can easily appear attractive to those feeling isolated, uncertain and financially insecure.

(3) **External encouragement and marketability.** The public appetite for and interest in UKSF has remained consistently high for decades and shows no sign of diminishing. Stories about well-trained, super-capable and high-tech 'good guys' undertaking secret and dangerous missions against evil forces have an inherent appeal. There is a hardcore of enthusiasts who will buy or watch almost anything labelled 'SAS', 'SBS' or 'SRR' and a much larger group who find these units inherently fascinating. While the number of ex-UKSF personnel who have been able to make life-changing sums of money and achieve celebrity status from service-related disclosures and commentaries is in fact very small, there is undoubtedly a solid and reliable market for insider accounts about UKSF and, as a result, there is a small 'Cottage industry' of people keen to encourage and make money from them. I note that the claimant sold the rights to his book in return for an advance sum of £160,000 plus royalties and newspaper serialisation fees and was paid an advance of £40,000." (BWS1 §10.6)

72. Soldier B observes that:

"... the wider UKSF community is relatively small and close-knit and - like other such communities - can be prone to 'campfire' gossip and rumour. Myths and misunderstandings about publications and broadcasts and the sums of money earned or available abound and related feelings of envy and unfairness can be a further motivation for some." (BWS1 §10.7)

The Secretary of State notes that the evidence given by the claimant in his first three statements (served prior to receipt of the Secretary of State's evidence) as to how unfairly he believed he was being treated compared to others was based on just such misunderstandings.

73. Having regard to these factors, Soldier B explains that the Disclosure Cell "*have to tolerate a de minimis level of disclosures*" and make judgements as to whether to grant EPAW or enforce the contract (BWS1 §§10.8-10.9). He states:

"As with the claimant, we do not tell contract signers that they cannot write books about themselves or their lives or, in many cases, the fact that they were in UKSF, but we do draw a line at detailed accounts about operational service." (BWS1 §11.5)

“While we would prefer contract signers not to speak or write publicly about anything to do with UKSF, some aspects of the selection process are not sensitive and can be discussed without damaging operational effectiveness. ... UKSF selection is extremely arduous, passing it is a real achievement and the process - particularly the hills phase - has an iconic status in the eyes of many. Accordingly, the topic can represent a relatively safe outlet (and something of a lightning conductor) for those who are intent on publicising the fact that they were in UKSF. It does this by providing an opportunity for those who are this way inclined to talk about themselves and ‘safe’ topics like fitness, endurance, mindset, self-motivation, leadership, teamwork and so on without compromising sensitive information.” (BWS1 §11.9)

“Crucially, MOD has never encouraged or granted EPAW for the publication of an insider memoir recounting operational service of the kind proposed by the claimant.” (BWS1 §11.11)

74. Soldier B states that, having read the memoir, he is “*in no doubt that its publication would cause real and serious damage to the operational effectiveness of UKSF*” (BWS1 §19.1). He has set out specific concerns in respect of publication of the memoir by reference to the heads of damage identified above at paragraphs 19.2 to 19.23 of his first statement.

75. Mr Gurr supports the decision to refuse EPAW and he provides an assessment of the impact of publication of the memoir on the UK’s relations with international partners.

76. The claimant’s response to the defendant’s damage assessment is, first, that the information is not confidential. He states that:

“In simple terms, the contents of the Memoir are already very widely available in the public domain in a variety of different formats. I struggle to understand why the Secretary of State considers that I should not publish a memoir about the same incident in those circumstances.” (CCWS1 §89)

77. The claimant has set out “*a non-exhaustive list*” of about 30 “*news articles and websites reporting on the Incident*” (CCWS1 §74), as well as a Wikipedia entry that refers to his involvement in the incident (CCWS1 §75). He notes that:

i) Chris Ryan - the author of “*The One That Got Away*”: see *R v AG*, [2], quoted in paragraph above - has published a book, “*The History of the SAS*” (2019) which refers to the claimant as “*an SAS operator*” and as “*a veteran SAS man*” who “*had been posted to Kenya as a liaison officer, training up local special forces*”. Mr Ryan describes the claimant:

“Grabbing his ballistic body armour, Diemaco C8 assault rifle and Glock 9mm pistol, and with a balaclava pulled over his head to protect his identity, the soldier swept into the

area where the firefight was going on, engaged the enemy and led several civilians to safety outside.”

- ii) Mr Ryan has also published a novel, “*Outcast*” (2022), which incorporates a fictionalised version of the claimant’s story, using a different character name, and changing the location from Kenya to Mali. On the Amazon.com website it is described as a “*thriller ripped straight from the headlines*”. The synopsis begins, “*After single-handedly intervening in a deadly terrorist attack in Mali, SAS Warrant Officer Jamie ‘Geordie’ Carter is denounced as a lone wolf by jealous superiors. ...*”
- iii) One of the civilians involved in the Dusit Incident, Meyli Chapin has written a memoir, “*Terrorist Attack Girl: How I Survived Terrorism and Reconstructed my Shattered Mind*” in which she refers to the claimant by his pseudonym. She also discussed the Dusit Incident as a guest on episode 316 of the “*Mentors for Military*” podcast which is on YouTube.
- iv) The claimant draws attention to several other videos on YouTube which “*demonstrate the extent of detailed public knowledge of the Incident*” (CCWS1 §88; CCWS4 §80).

78. The claimant states:

“I was being filmed, in real time, during the Incident. Many of the actions that I took were viewed on TV news channels as they occurred. The equipment that I used was visible to the world as was the approach that I took and many of the decisions I made. Those actions that were not immediately visible to the cameras were very widely reported in the following days and have been the subject of detailed memoirs, books and analysis by others after the event.”

79. Secondly, the claimant has responded that he believes the Dusit Incident “*can be described without revealing anything about UKSF planning, communications and tactics*” (CCWS4 §11). He questions the sensitivity of the material in his memoir identified by Soldier B, observing that he “*worked very hard to edit any strategic, operational or controversial material from the book*” (CCWS4 §23). But he accepts that he may not have done a “*perfect job*” and says:

“I was always willing, and remain willing, to make all the changes that are necessary to make the book ready for publication. However, I do not think it is necessary [or] justified to require me to edit all references to the Incident. The Incident plays an important part in the book and an important part in my life story.” (CCWS4 §§23, 35)

80. The claimant states that “*the memoir is universally positive about the UKSF and my experience with them*” (CCWS4 §16); and “*the reaction from my former colleagues within UKSF has been universally positive, in relation to the possibility that I might publish a memoir*” (CCWS4 §17). He considers that, if he were to be given EPAW as a result of this claim, members and former members of UKSF would appreciate why,

exceptionally, he had been permitted to publish a memoir about an operation (CCWS4 §§17-18).

81. The claimant contends that as he was the only member of UKSF engaged in the Dusit Incident, and his account is a positive one, there is no risk of publication of the memoir creating a “*snowball effect, leading to other publications and counter-publications*” or leading to “*a return to the ‘Bravo Two Zero days’*” in which there was a “*cycle of blame and counter blame*” in respect of an operation that was not fully successful (CCWS4 §§20, 42, 46). He also asserts, “*There is no other member of UKSF with a ‘story’ to tell about the Incident*” (CCWS4 §11a). The claimant believes that the concerns expressed by the DSF and Soldier B “*about snowballing, counter-memoirs and poisoning the atmosphere amongst UKSF are unrealistic*”, describing them as “*overblown*” and “*not ... a real possibility at all*” (CCWS4 §§16, 20, 40, 42-46).
82. The claimant suggests that the risk identified by the DSF and Soldier B of members of UKSF changing their behaviour by trying to be heroes in active combat, in order to position themselves for a future publication, or causing them to doubt the sincerity and conduct of their colleagues is unrealistic given that they are highly trained professionals and know they require EPAW (CCWS4 §43).
83. The claimant believes that the concerns expressed by the DSF, Soldier B and Mr Gurr about the impact on relationships with foreign partners are “*somewhat vague and, with respect, exaggerated*”. Insofar as any such concerns are based on “*the tone and content of the memoir*”, that was unintentional and would be “*solvable if the Defendant is prepared to work with me to address them*” (CCWS4 §§38-40).
84. The claimant has also questioned why he was not permitted to write a fictionalised version of his story (CCWS1 §83; CCWS2 §29). In this regard, Soldier B states (BWS1 §15.4):

“I accept that the claimant’s presence and role at the scene and his image were publicised at the time and that there has been widespread public speculation linking him with UKSF and the award of the CGC, mostly under his pen name. This has included the claimant giving interviews to John Loveday and Evan Hafer in which (without EPAW) he connected himself, the book, the incident and UKSF, publishing a photo of himself during the incident and discussing the case publicly (however briefly) in an interview with the BBC. Furthermore, the claimant’s book has been the subject of advance publicity (without EPAW) and it will be apparent from the fact of these proceedings that he must have been a member of, and the book must contain actual or purported disclosures about, UKSF. In the circumstances, I think it would be unrealistic to think that the claimant’s book could now be effectively or meaningfully anonymised or fictionalised.”

D. THE LAW

Article 10 of the ECHR

85. It is unlawful for a public authority (which term of course includes the Secretary of State) “*to act in a way which is incompatible with a Convention right*”: s.6(1) of the HRA. Article 10 is one of the “*Convention rights*”, as defined in s.1(1) of the Human Rights Act 1998 (‘the HRA’), and set out in Schedule 1.
86. Article 10 of the ECHR provides:
- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
87. The right to freedom of expression, which includes the right to impart information, and to receive it, is one of the essential foundations of a democratic society. It is one of the “*core rights*” protected by the ECHR, and so the exceptions in article 10(2) must be “*construed strictly and the need for any restrictions must be established convincingly*”: *Sürek and Özdemir v Turkey* (1999) 7 BHRC 339, [57(i)], cited in *Lord Carlile*, [13] (Lord Sumption JSC) and [165] (Lord Kerr JSC).
88. An allegation that a decision made by a public authority is in breach of article 10 gives rise to the following questions:
- i) Does the decision constitute an “*interference*” with the claimant’s right to freedom of expression within the meaning of article 10(1)? In this case, the Secretary of State accepts, rightly, that the refusal of EPAW, which prevents Mr Craighead publishing his memoir (and so imparting information to the public), constitutes an “*interference*” with his article 10 right.
 - ii) Is the interference “*prescribed by law*”? The claimant accepts that this criterion, too, is met. That is obviously right. The decision was made in exercise of the MOD’s contractual rights. The validity of the contract was upheld in *AG v R*, and the position is *a fortiori* in respect of those, such as Mr Craighead, who were new or aspiring members of UKSF when they signed the contract. The decision is governed by the readily accessible legal regimes of public law and contract.
 - iii) Did the interference pursue any of the legitimate aims set out in article 10(2)? It is common ground that the decision was made in the interests of national

security, and so this requirement is met. However, the Secretary of State submits that the decision was also made in the interests of preventing the disclosure of confidential information and protecting the MOD's contractual rights. I will consider each of these aims in addressing the proportionality of the interference.

- iv) Was the interference necessary in a democratic society? This key criterion encompasses the question whether the interference is proportionate to the legitimate aim pursued. As Lord Sumption JSC explained in *Lord Carlile* at [19] (citing Lord Reed JSC's judgment and his own in *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39, [2014] AC 700):

“the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

(Lord Reed JSC gave a dissenting judgment in *Bank Mellat* but Lord Sumption JSC, giving the majority judgment in that case, expressly endorsed Lord Reed JSC's remarks at [68]-[76] regarding the concept of proportionality: *Bank Mellat*, [20].)

89. Where human rights are adversely affected by an executive decision, the court must form its own view of the proportionality of the decision. The court has a duty to decide for itself whether the decision strikes a fair balance between the rights of the individual claimant and the interests of the community as a whole. But the fact that proportionality is ultimately a matter for the court does not entitle the court “*simply to substitute*” its own assessment for that of the decision-maker. As Lord Neuberger PSC observed in *Lord Carlile* at [57]:

“Judges should always be vigilant and fearless in carrying out their duty to ensure that individuals' legal rights are not infringed by the executive. But judges must also bear in mind that any decision of the executive has to be accorded respect – in general because the executive is the primary decision-maker, and in particular where the decision is based on an assessment which the executive is peculiarly well equipped to make and the judiciary is not.”

See *Bank Mellat*, [20] (Lord Sumption JSC), [71] (Lord Reed JSC), *Lord Carlile*, [20], [31], [34] (Lord Sumption JSC), [57], [67] (Lord Neuberger PSC), [87] (Baroness Hale DPSC), [117] (Lord Clarke JSC).

90. The weight to be given to the assessment of the primary decision-maker depends on the nature of the right at stake and the context in which the interference occurs: *Bank Mellat*, [69], [71] (Lord Reed JSC), [20] (Lord Sumption JSC); *Lord Carlile*, [20] (Lord Sumption JSC), [67]-[68] (Lord Neuberger PSC).
91. The implications of an executive decision for national security or the UK's relations with other states are questions of fact. The assessment that taking a particular course gives rise to a *risk* of harm to national security or to the UK's foreign relations involves consideration of two elements. First, what is the *gravity* of the risk? In other words, what are the feared consequences of taking that course? How serious would the harm be if it were to occur? Secondly, what is the *likelihood* of the feared consequences transpiring? The assessed risk then has to be weighed against the interference. It is self-evident that the graver the potential consequences, the more justifiable – and indeed prudent - it is to act cautiously in the face of uncertainty to avoid them materialising. The courts have recognised that a precautionary approach is generally required in dealing with potential threats to national security: *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, [17], [22] (Lord Slynn); *Lord Carlile*, [51], [71] (Lord Neuberger PSC).
92. In *Lord Carlile*, the Supreme Court rejected the claimants' contention that a decision of the Home Secretary, refusing to allow a dissident Iranian politician to enter the UK, for a meeting with members of both Houses of Parliament to discuss issues concerning human rights and democracy in Iran, was incompatible with their article 10 rights. Having considered *Rehman* in detail, Lord Sumption JSC observed at [22] that the assignment of weight to the decision-maker's judgment:
- “has two distinct sources. The first is the constitutional principle of the separation of powers. The second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject matter.”
93. The first source is modified in cases founded on Convention rights (*Lord Carlile*, [27]-[31] (Lord Sumption JSC)), and in any event it seems to me to be less relevant in the context of this case, where I am concerned with a decision made by military officers rather than a decision made by a member of a democratically elected government. However, the second source is highly relevant in considering the evidence adduced in this case.
94. As Lord Sumption JSC observed in *Lord Carlile*:
- “32 ... The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. None the less, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases

often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends on a judgment about the future impact of alternative courses of action, there is not necessarily a single ‘right’ answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range. ...

34 ... The court is the ultimate arbiter of the appropriate balance between two incommensurate values: the Convention rights engaged and the interests of the community relied on to justify interfering with it. But the court is not usually concerned with remaking the decision-maker’s assessment of the evidence if it was an assessment reasonably open to her. Nor, on a matter dependent on judgment capable of yielding more than one answer, is the court concerned with remaking the judgment of the decision-maker about the relative advantages and disadvantages of the course selected ... The court does not make the substantive decision in place of the executive. On all of these matters, in determining what weight to give to the evidence, the court is entitled to attach special weight to the judgments and assessments of a primary decision-maker with special institutional competence.”

Section 12 of the Human Rights Act 1998

95. Section 12 of the HRA provides:

“(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (‘the respondent’) is neither present nor represented, no such relief is to be granted unless the court is satisfied –

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or

which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

(a) the extent to which –

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section –

‘court’ includes a tribunal; and

‘relief’ includes any remedy or order (other than in criminal proceedings).” (Emphasis added.)

96. Although it is common ground (and I agree) that s.12 is unlikely to be dispositive, there is a dispute as to whether it is engaged. The claimant submits that it is. Mr Johnston submits that s.12(1) applies to the exercise in which the court is engaged, and so the court is required to apply s.12(4).
97. Mr Sanders contends that s.12 is not engaged because the focus of s.12(1) is on the grant of relief. He submits that in this case the court must determine the lawfulness of the refusal of EPAW as a substantive issue of law *before* it considers whether to grant “relief” within the meaning of s.12(5). The question of “relief” will not arise, and so s.12 will not apply, unless and until the court finds the refusal unlawful. He submits that this interpretation is consistent with the purpose of s.12, as explained by Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 at [15]:

“When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a ‘serious question to be tried’ or a ‘real prospect’ of success at the trial.”

98. Mr Sanders also draws assistance from the fact that the House of Lords made no reference to s.12 in *R v Shayler* and the Supreme Court made no reference to that provision in *Lord Carlile*.
99. I agree with the claimant that s.12 of the HRA is engaged. In *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, [2018] QB 662 Sharp LJ (with whom Lindblom and Gloster LJ agreed) observed at [62]:
- “Section 12 reflects the central importance which attaches to the right to freedom of expression: per Lord Bingham of Cornhill in *R v Shayler* [2003] 1 AC 247, para 22. It was enacted to buttress the protection afforded to freedom of speech at the interim stage: see the observations of Lord Nicholls of Birkenhead in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, para 15. It is plain from the wording of subsections (1) and (5), however, that it applies where the court is considering whether to grant any civil remedy or order, including therefore a permanent injunction, which might affect the Convention right to freedom of expression.” (Underlining added.)
100. The definition of “*relief*” in s.12(5) includes “*any ... order (other than in criminal proceedings)*”. At this stage of the proceedings, I am considering whether the claimant has made out his claim (and so should be granted a declaration or quashing order), or whether his claim fails (and so an order dismissing it should be made). The claim concerns Mr Craighead’s ability to publish his memoir and so the rival orders sought by the parties are plainly ones which affect his exercise of the right to freedom of expression. While it is true that the court will often hear submissions on the *precise* terms of the order that should be made in light of the court’s judgment, it is artificial and inaccurate to suggest that it is only at that stage that the court is considering what order to make. First, further submissions on the relevant terms of the order may not be necessary, e.g. if the judgment states that the claim is dismissed or that the decision is quashed. Secondly, even if submissions on the terms of the order are required (e.g. on the wording of a declaration), the substantive hearing will still have been a central part of the process of considering what order to make on the claim.
101. Although s.12 is more commonly engaged in circumstances where an order is sought against a defendant which would impact the *defendant’s* right to freedom of expression (as reflected in the terms of s.12(2)), in my view, the ordinary construction of s.12(1) (read with s.12(5)) leads to the clear conclusion that it applies to this substantive hearing. The plain language of s.12(1) makes clear that the purpose of s.12 is broader than buttressing the protection for freedom of expression at the interim stage. There is no warrant for reading s.12 narrowly so as to exclude from its ambit proceedings such as these.
102. The lack of reference to s.12 of the HRA in *Shayler* is to be expected as that was a criminal case, and as s.12(5) makes clear the definition of “*relief*” excludes any remedy or order in criminal proceedings. In my view, the omission of any reference to s.12 of the HRA in *Lord Carlile* does not assist in interpreting that provision. Whether or not s.12 was considered at any stage of those proceedings, it would be unsurprising if – as in this case – the parties considered it would not materially alter the balance.

103. Accordingly, in determining this claim, I must have “*particular regard*” to the importance of the Convention right to freedom of expression. The proceedings relate to material which appears to me to be journalistic or literary, and so it is also necessary to have regard to the extent to which the content of the memoir is available to the public and to the extent to which it would be in the public interest for it to be published. This is not a case where it is suggested that there is any relevant privacy code or that the content of the memoir is about to become available to the public. However, the phrase “*must have particular regard to*” in s.12(4) does not indicate that the court should place extra weight on the matters to which the subsection refers: *Mionis*, Sharp LJ, [64].

The contractual dimension

104. In *Mionis*, the Court of Appeal granted an injunction to enforce an agreement to settle libel proceedings under which the defendant had agreed not to publish stories which referred to the claimant or his family save in certain circumstances. Sharp LJ, having rejected the contention that the defendant had waived their right to freedom of expression, said at [67]:

“...However, the fact that the parties have entered into an agreement voluntarily restricting their article 10 rights can be, and in my judgment in this case is, an important part of the analysis which section 12 then requires the court to undertake. Whilst each case must be considered on its facts, where the relevant contract is one in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues are in play in that litigation, it seems to me that it would require a strong case for the court to conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles.”

105. In light of the Court of Appeal’s judgment in *Mionis*, the Secretary of State does not contend that in signing the contract Mr Craighead *waived* his article 10 rights, such that article 10 is disengaged, but he reserves the right to do so in the event of an appeal. However, the Secretary of State does submit that the nature and extent of the interference is lessened, and the claimant’s article 10 rights are attenuated, by the contract.
106. The claimant disputes this, contending that the court should focus on the impact of disclosing the particular information that he seeks to include in his memoir, applying the guidance given by Lord Bingham in *Shayler* (addressing the Official Secrets Act 1989):

“30. ... Whoever is called upon to consider the grant of authorisation must consider with care the particular information or document which the former member seeks to disclose and weigh the merits of that request bearing in mind (and if necessary taking advice on) the object or objects which the statutory ban on disclosure seeks to achieve and the harm (if any) which would be done by the disclosure in question. If the information or document in question were liable to disclose the

identity of agents or compromise the security of informers, one would not expect authorisation to be given. If, on the other hand, the document or information revealed matters which, however, scandalous or embarrassing, would not damage any security or intelligence interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate. Consideration of a request for authorisation should never be a routine or mechanical process: it should be undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate.

31. ... In considering an application for judicial review of a decision to refuse authorisation to disclose, the court must apply (albeit from a judicial standpoint, and on the evidence before it) the same tests as are described in the last paragraph. It also will bear in mind the importance attached to the Convention right of free expression. It also will bear in mind the need for any restriction to be necessary to achieve one or more of the ends specified in article 10(2), to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end.

32. For the appellant it was argued that judicial review offered a person in his position no effective protection, since courts were reluctant to intervene in matters concerning national security and the threshold of showing a decision to be irrational was so high as to give the applicant little chance of crossing it.

...

33. There are in my opinion two answers to this submission. First the court's willingness to intervene will very much depend on the nature of the material which it is sought to disclose. If the issue concerns the disclosure of documents bearing a high security classification and there is apparently credible unchallenged evidence that disclosure is liable to lead to the identification of agents or the compromise of informers, the court may very well be unwilling to intervene. If, at the other end of the spectrum, it appears that while disclosure may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest, the court's reaction is likely to be very different. Usually a proposed disclosure will fall between these two extremes and the court must exercise its judgment, informed by article 10 considerations. The second answer is that in any application for judicial review alleging an alleged violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. The change was described by

Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 [at [26]-[28]]”

107. The Secretary of State submits that, as in *Mionis*, an important aspect of the proportionality analysis is that Mr Craighead entered into a valid and enforceable contract which subjected his freedom of expression to “*formalities, conditions and restrictions*”. Adopting the language of Sharp LJ in *Mionis*, Mr Sanders submits that Mr Craighead “*consciously*” and “*expressly agreed to forgo*” and “*expressly limited*” what he would be able to publish about service with UKSF in return for being given the opportunity to undertake such service, and he did so “*voluntarily with [his] eyes fully open*” (*Mionis*, [67], [95], [97], [102]-[103]). The Secretary of State contends that it would be directly contrary to his contractual rights, “*to which the law attaches considerable importance*” (*Mionis*, [103]) for the claimant to be permitted to publish “*precisely what [he] agreed not to publish as part of this bargain*” (*Mionis*, [95]). See, too, *Griffin* at [26]-[27] (Eady J).
108. Mr Sanders emphasises that, as Lord Hoffmann observed in *R v AG* at [36] (see paragraph above), the considerations which the MOD are entitled to take into account in deciding whether to give EPAW are more extensive than the matters which may be taken into account under the Official Secrets Act 1989, and include “*the broader object of preventing public controversy which might be damaging to the efficiency of the Special Forces*”.
109. The claimant entered into the contract freely, as an informed and mature adult, in the clear knowledge that if he chose, and had the privilege, to serve with UKSF, he would not be permitted to disclose information about such service. It was open to him to choose not to sign the contract and to continue serving in the Parachute Regiment or the Pathfinder Platoon.
110. The contract is not a settlement agreement, akin to that considered in *Mionis*. The contractual ban on disclosure of information or documents relating to the work of UKSF is not an absolute ban: it is a ban on disclosure without express prior authority in writing from the MOD, in circumstances where a refusal is amenable to judicial review on public law and human rights grounds. But, in my judgment, the attenuation of the claimant’s article 10 rights to which he *agreed* is not merely procedural.
111. The contract is accompanied by a long-standing policy which makes clear that the EPAW process exists essentially to address situations in which members or former members of UKSF may need to disclose some matters covered by the contract, such as in the course of job applications, and “**memoirs about service with the Group will not be approved**” (see paragraph above). In my view, although the proportionality of the refusal of EPAW primarily depends on the justification based on the interests of national security, the contract – and the objectives underlying it, as revealed by the circumstances in which it was brought in and reflected in the disclosure policy – is an important part of the context in which the proportionality of the interference falls to be assessed. Indeed, the interests of national security are central to the key objective of the contract which is to promote and protect the operational efficiency of UKSF.
112. The weight to be given to the claimant’s article 10 right is considerably more limited than if he had not entered into the contract. That is particularly so in circumstances

where the purpose of public disclosure of that which he contracted not to disclose without authorisation is essentially to advance his own personal interest rather than the public interest. As the European Court of Human Rights observed in *Matúz v Hungary* (73571/10, 21 October 2014) at [45]:

“An act motivated by ... the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection”.

E. THE RIVAL CONTENTIONS

113. It is common ground that the decision not to grant EPAW to enable the claimant to publish the memoir constitutes an interference with his article 10 right to freedom of expression; and that the interference was prescribed by law and pursued a legitimate aim (see paragraph above). The essential question, on which the parties disagree, is whether the interference is proportionate to the legitimate aim(s) pursued. As Lord Bingham put it in *Shayler* at [26]:

“The acid test is whether, in all the circumstances, the interference with the individual’s Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve.”

114. The claimant’s original pleaded contention was that he was being treated differently to other former service personnel, in a similar position, who have published books, and that there was “*no rational distinction*” between his case and those other cases (SFGs §65(e); CCWS2 §29). The claimant asserted: “*my request is not unique*” (CCWS1 §90). In support of this contention, he referred to works of non-fiction and fiction published by more than a dozen authors (CCWS1 §91; CCWS2 §29).
115. In light of the defendant’s detailed grounds and evidence, and the refusal of permission in respect of Ground 3, the claimant accepts that “*the contents of the memoir are covered by the contract*” (CCWS4 §6), that “*memoirs that cover UKSF operations are not ordinarily published*”, and that “*Soldier B is right to say that, where EPAW has been granted, the level of detail in those books is more limited than in my book*” (CCWS4 §§7-8). His argument is no longer that the MOD failed to treat comparable cases alike. Instead, he now contends the opposite: the MOD failed to treat dissimilar cases differently. In his reply evidence, Mr Craighead asserts that:

“the facts of this case are highly unusual – indeed unique – and that there are features of this case that are so unusual that, while they fall within the scope of the contract, the contract should be applied to them in a very distinctive way.” (CCWS4 §6, 20)

116. Given the way in which the claimant’s case has developed, I do not consider it necessary to address the detailed evidence regarding each of the books and other disclosures referred to by the claimant. I note that some were not written by members or former members of UKSF at all, others were written by former members who served prior to the introduction of the contract, one was never published and others were not granted EPAW. The relevant category is those who signed the contract and

were granted EPAW, none of whom were given EPAW to publish a memoir about operational service with UKSF akin to that contained in the memoir.

117. The features that Mr Johnston contends are unique, such that it was disproportionate to refuse EPAW, include the impact of information that is already in the public domain about the Dusit Incident, the extent to which the claimant was (he says) encouraged to talk about the incident, the nature of the claimant's involvement in responding to the incident, and the proper way in which he has sought EPAW and approached this case. I have addressed the features relied on more fully in the Confidential Schedule.
118. Mr Johnston contends that the Incident was exceptional because Mr Craighead's actions were covered in real time on live news channels and, subsequently, by international newspapers. He draws attention to a large number of newspaper reports and videos, including YouTube videos, containing reporting about, among other matters, Mr Craighead's involvement in tackling the Dusit Incident, his equipment and the tactics he used (including some footage/photographs of him on the day of the Incident), his membership of UKSF, and the award of a Conspicuous Gallantry Cross.
119. The claimant contends that he was actively encouraged or authorised to speak about the Dusit Incident in various non-secure settings. In December 2019, he was invited to say a few words about the "*special relationship*" and give a toast at the US Ambassador's residence in London. In July 2020, he gave a presentation to about 350 officer cadets at an end-of-course passing out ceremony at Sandhurst. On 7 September 2020, his last day in the armed forces, he gave a presentation to about 640 new recruits to the armed forces at Harrogate, who would mostly have been 16 or 17 years old. He also says that he spoke to UK police forces, and he gave internal presentations to UKSF. The claimant submits that the fact that he was encouraged or authorised to give such presentations undermines the Secretary of State's contention that disclosure of the memoir in its current form would damage national security or international relations, or otherwise harm the public interest.
120. The claimant also contends that during a leaving interview with the (then) DSF, Lieutenant General Sir Roly Walker, he was encouraged to publish a book, and in a separate conversation on the same day Soldier B was positive about his plans to publish a memoir. The claimant also gives evidence that he was encouraged to publish his memoir by the (then) commanding officer and the second in command of 22 SAS, and that the Deputy Chief of Staff was present during one of these conversations. Although he no longer contends, as he did in pre-action litigation, that he has a legitimate expectation that he would be given EPAW, the claimant submits that the encouragement to publish that he received is evidence that what he proposed to write about in his memoir was perceived as unique by senior officers at the time.
121. Mr Johnston submits that the Secretary of State has not established convincingly that there is a pressing social need in this case to prevent publication of the memoir. Each case has to be considered on its merits, avoiding a blanket approach to disclosure. He invites me to subject the defendant's evidence to robust scrutiny and to approach it sceptically and submits that, even in the context of national security, the court should assess claims that disclosure would cause harm robustly, as the European Court of Human Rights did in *Vereniging Weekblad Bluf! v The Netherlands* (16616/90, 9 February 1995) when ruling that an order requiring the withdrawal from circulation of

a weekly magazine publishing a confidential security service report was a breach of article 10.

122. I note that in *Vereniging Weekblad Bluf!*, although the European Court of Human Rights *questioned* whether the information in the quarterly security service report was sufficiently sensitive to justify preventing its disclosure, in circumstances where it was six years old, general in nature, marked only as “*confidential*” (which represented a low degree of security), and the head of the security service had accepted that the various items, taken separately, were no longer state secrets, the court found that the order breached article 10 because a large number of copies had already been distributed and so the information had ceased to be confidential.
123. If the court were to grant relief in this case, Mr Johnston submits it would not have the consequence of returning UKSF to the damaging situation it faced prior to the introduction of the contract because anyone else who wished to disclose information covered by the contract would have to seek and obtain EPAW. He contends that the defendant’s case rests on an implausible ‘floodgates’ argument which I should reject in light of the exceptional, *sui generis* nature of this case.
124. Mr Johnston submits that in addition to weighing the claimant’s right to freedom of expression, the article 10 rights of his potential publisher are also engaged. He relies on *Ministry of Defence v Maclachlan* [2016] EWHC 3733 (QB) in which Kerr J took into account the article 10 rights of third parties.
125. The Secretary of State accepts that the claimant should not be prohibited from confirming publicly that he was involved in responding to the Dusit Incident, and, as the Redaction Table made clear, he is able to identify that he was selected for and served as a “*fully badged*” member of 22 SAS (paragraphs 46. and above). But the defendant does not accept that the information in the public domain is such that he should be able to give an *account* of his involvement in that incident.
126. Mr Sanders emphasises the radical shift in the claimant’s case, in contrast to the Secretary of State’s maintenance of a consistent position that former members of UKSF are not and should not be given EPAW to publish memoirs about operational service. The claimant’s memoir falls into this category. To the extent that the claimant’s circumstances have unusual or even unique features, these do not change the damage assessment or justify making an exception in his case.
127. There is a factual dispute as to whether Mr Craighead was encouraged to write the memoir or assured that he would be given EPAW, as he contends. There is also a dispute as to whether presentations that he has been asked or authorised to give and/or media reporting have put the contents of the memoir into the public domain. Mr Sanders submits that in relation to these matters I should prefer the defendant’s evidence. He submits that features of the claimant’s evidence demonstrate a casual approach to factual claims, and a tendency to make self-serving assertions, which undermine the claimant’s reliability and credibility on the disputed factual issues. Most notably, he relies on the fact that Mr Craighead initially claimed to have retired from the armed forces in reliance on assurances from senior UKSF personnel that he would be given EPAW to publish a book about the Dusit Incident, a claim that has been abandoned and shown to be false by the timing of his setting up of a limited company – used only for book-related business – and of his contracts with a publisher

and ghost writer. In addition, he submits that various assertions were exaggerated, such as the claimant's description of having given a presentation on a platform at the US Ambassador's Christmas party, rather than a toast during which he spoke briefly about the "*special relationship*". He submits that such limited disclosure as occurred through the presentations given by the claimant provides no basis for finding that publication of the memoir would not damage national security.

128. Mr Sanders' fall-back position is that whether or not the information in the memoir is confidential is not dispositive because the contract applies to "*any*" UKSF-related information or statement, irrespective of confidentiality. In support of this submission he relies on *AG v R*, [36] (Lord Hoffmann) (quoted in paragraph above).
129. In any event, he contends that there is no proper basis for departing from the assessment of the defendant's witnesses as to the harm that permitting publication would cause given their experience, expertise, institutional competence and accountability on matters of national security; and in circumstances where the claimant rightly did not contend that the concerns expressed by them are not genuinely held by them.

F. ANALYSIS AND DECISION

The confidential nature of the information

130. The question whether particular information is not confidential because it is in the public domain is a question of degree. Information only loses the quality of confidence when it becomes "*so generally accessible that, in all the circumstances, it cannot be regarded as confidential*": *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109(HL), p.282C-D (Lord Goff); *Barclays Bank Plc v Guardian News and Media Ltd* [2009] EWHC 591 (QB), [22]-[26] (Blake J).
131. There is a considerable volume of commentary about Mr Craighead's involvement in the Dusit Incident. There was also some live coverage. There is a photograph of him with a balaclava on, in which he can be seen carrying his equipment and entering a building in the DusitD2 complex. There is also a photograph of him running with a civilian, assisting her to reach safety. But most of what the claimant did during the Dusit Incident, as he recounts it in the memoir, took place away from the press cameras.
132. I accept the defendant's submission that the memoir discloses an account that is not in the public domain because:
 - i) It is an insider account whereas the material in the public domain is speculative and not authoritative. The only identified memoir by anyone who was present during the incident is that of a civilian, Meyli Chapin. While she does refer to the claimant, she describes him as "*the British SAS guy I read about after the fact*". They met after (not during) the Dusit Incident. Mr Ryan was a member of UKSF several decades ago, and his contacts with the UKSF community are likely to be limited in view of the exclusion policy. His factual and fictional accounts of an incident in which he had no involvement cannot be regarded as authoritative.

- ii) The memoir gives an insider account of what the claimant did away from the cameras, as explained in the Confidential Schedule.
 - iii) The memoir provides this information in a single book, unlike the material in the public domain which would take work to collate.
133. In my view, despite the extensive media (and social media) coverage of the Dusit Incident (including photographs, commentary and analysis by third parties of Mr Craighead's role, actions, clothing and equipment), the contents of the memoir are such that they cannot be said to be generally accessible. The talks and presentations that Mr Craighead was asked to give to non-UKSF military and police audiences, and the toast he gave at the US Ambassador's residence, are by their nature (in particular, the purposes and brief periods for which he spoke) bound to have given a much more limited account than is contained in his book. They were not recorded and there is no evidence that the contents of those talks entered the broader public domain. Those talks did not render the contents of the memoir generally accessible. As Mr Craighead himself says, he wishes to provide an "*insider's account of what happened that day*" (CCWS4 §25). There is no such account in the public domain.
134. As I have accepted the Secretary of State's primary argument that the information in the memoir remains confidential, it is unnecessary to determine his fall-back argument. I merely note that, while the contract applies to *any* UKSF-related information, a finding that information is not confidential by reason of its general accessibility would be bound to affect the assessment of the harm that would be caused by publication of that information, altering the balance between the interests of the individual and those of the community.

The alleged uniqueness of the claimant's account of the Dusit Incident

135. The legal test is not whether the memoir is unique or exceptional. The alleged uniqueness of the account is raised as a factual contention by the claimant, in the light of the MOD's policy of not granting EPAW for accounts of operations, in support of his claim that in this instance the refusal of EPAW was an unjustified interference with his article 10 rights.
136. In the Confidential Schedule I have explained why I do not accept that the nature of the claimant's involvement in the Dusit Incident renders his account unique. So far as media coverage of the Dusit Incident is concerned, while such coverage is unusual for UKSF operations, it is not unprecedented. While most UKSF operations may be covert, the presence of press and cameras is not unique. The defendant's skeleton argument gives the examples of the Iranian Embassy Siege (1980), Mumbai (2008), Westgate (2013) and Garissa (2015). As this was in response to reply evidence, these incidents are not addressed in the defendant's evidence. As far as I am aware, the only one of these incidents in which UKSF engaged was the Iranian Embassy Siege. Nonetheless, I accept that the other terrorist incidents to which the defendant has referred were the subject of extensive media coverage. It is also, sadly, likely that there will be further terrorist attacks around the world in which UKSF could be involved, and which are likely to be subject to similar media coverage. The ever-increasing presence of CCTV cameras on streets, and cameras in the pockets of civilians carrying smartphones, heightens the prospect of future UKSF operations, particularly in response to terrorist incidents in city centres, being filmed.

137. A further factor the claimant relies on is that he was, he says, encouraged to write a memoir about the incident. The claimant's tendency to misunderstand what he was being told about what he could or could not publish is made manifest by the very limited amendments that he made to the manuscript in response to the Redaction Table, and his evidence that he understood those amendments were all that was required (see paragraph above). Given this tendency, and the inherent implausibility of senior officers encouraging the claimant to publish a memoir which would be contrary to the long-standing disclosure policy, and inconsistent with the ethos of UKSF as reflected in the equally long-standing exclusion policy, taken together with Soldier B's first and second statements regarding his and the former DSF's conversations with the claimant, I do not accept that senior officers encouraged the claimant as he contends. He may well, as he says, have *felt* encouraged by those conversations but he cannot rely on his *mistaken* apprehension that others were positive about him publishing a memoir as undermining the defendant's evidence regarding the harm that would be caused by publication.
138. Nor does the fact that Mr Craighead's memoir is positive about UKSF, whether considered alone or cumulatively along with the factors discussed earlier, make it unique or exceptional. And, in any event, I agree with the Secretary of State's submissions that, in applying article 10, it would be unjustifiable for the MOD to favour the publication of books which show UKSF in a good light while refusing EPAW for those which are negative or critical. That is not the approach that has been taken (BWS1 §11.8(3)).

The damage assessment

139. I accept that the defendant's evidence as to the sensitivity of information in the memoir has to be scrutinised with particular care in light of the evidence that the claimant was asked to talk, for example, to about 640 teenage recruits. However, he was asked to give a motivational talk and specifically reminded by Soldier B on 4 September 2020 of the security classification relating to the Dusit Incident, and that he could not go into the same level of detail as he had done in his presentation to members of UKSF. The fact that he was permitted to talk to new recruits about the incident is consistent with the Secretary of State's lack of reliance on the NCND policy in these proceedings; and his acknowledgement of the fact of Mr Craighead's engagement, as a member of UKSF, in the Dusit Incident.
140. As Soldier B states, although "*those involved in operations are provided with a great deal of high-level task-specific secret intelligence, ... there will often be aspects of the overall picture which do not fall within the 'need to know' envelope*". Individuals, such as the claimant, "*are not sighted on every issue and are therefore not well-placed to judge for themselves whether a particular piece of information may be sensitive*" (BWS1 §11.6). Although Mr Craighead has sought to avoid including information where he recognised its sensitivity, nonetheless, I accept Soldier B's evidence that the memoir, in its current form, contains some sensitive information about UKSF. Most of it is basic information and some of it was put into the public domain by earlier publications, but I accept that does not undermine the Secretary of State's case that insider confirmation (or reconfirmation many years after accounts were given in the years before the contract was introduced) would be damaging. By reason of his experience, expertise and role, Soldier B is better placed than the claimant or the court to assess the sensitivity of information contained in the memoir.

141. I also accept that it is important not only to assess the sensitivity of individual pieces of information but also to view the combination. The sensitivity of the memoir derives, in part, from the fact that it brings together information which less sophisticated adversaries may be less able to do, even if individual items of information could be found in the public domain.
142. Given the gravity of the feared consequences of disclosure of such sensitive information, a precautionary approach is clearly justified. However, although the objections to the claimant's account given under this head would justify requiring substantial amendments to the draft, they would not justify the refusal to permit the claimant to give *any* account of his involvement in the Dusit Incident. I am not persuaded that it would be impossible to draft a version that avoids revealing information about UKSF procedures, communications, tactics or equipment. Given the claimant's professed willingness to amend his draft, the Secretary of State's decision that no account can be given is primarily dependent on the other risks identified by the defendant's witnesses (see paragraphs 59.-61. and 68.-above).
143. I have reviewed the assessment of the DSF and Soldier B of the impact of publication of the memoir on UKSF morale and efficiency above. The additional evidence to which I have referred in the Confidential Schedule reinforces the DSF's evidence as to the vital importance of UKSF personnel having implicit trust in each other, and clarity of thought unclouded by the type of distractions referred to in paragraph 18 of the DSF's statement (see paragraph above). The claimant contends it is unrealistic to suggest that highly trained and highly professional members of UKSF would lose focus during an operation as a consequence of thinking about the possibility of a book deal, or anxiety that a comrade may be doing so. Moreover, his assessment is that if he is *prevented* from publishing his memoir this will have a negative effect on morale (CCWS4 §45). However, Mr Craighead's view is not rooted in experience of command. The DSF and Soldier B are far better placed than the claimant – or the court – to make that assessment. The DSF, in particular, is infinitely more qualified than the claimant, or the court, to form an authoritative opinion as to the likely impact on members of UKSF of the claimant being permitted to publish his memoir.
144. I also note that the claimant's memoir demonstrates that he was conscious *during* the operation of the press interest. In my view, the fact that members of UKSF may be aware of press interest, and the presence of cameras, during the course of an operation supports the DSF's assessment that the possibility of writing a book about an operation may cloud the judgement of some in the Group and cause others to doubt (even if only momentarily) the motivation of their comrades.
145. The concerns expressed by the DSF and Soldier B as to the corrosive effect on morale of publications about UKSF by insiders is borne of the experience of what occurred following the B20 patrol. In my view, the need for any other signatory of the contract to obtain EPAW would be likely to dampen the effect of authorising publication of the memoir. However, the risk that members of UKSF may have their judgement clouded in the way described by the DSF is dependent only on their *perception* that books about operational service with UKSF are potentially permissible. The current position is that the MOD draws a line at granting permission for books about operational service. It has not done so, albeit the presence of UKSF has on occasion been disclosed. The grant of permission for a memoir about an operation would be likely to convey the impression to members of UKSF that books about operational

service with UKSF are not off limits. I do not accept that it would be obvious to members of UKSF on operations why the claimant's memoir is exceptional. His own evidence, initially, was that it was "*not unique*".

146. The DSF describes this as a duty of care issue. The nature of the identified risk is to the lives of UKSF personnel and those whom they seek to protect. The DSF's assessment that publication would put lives at greater risk than would otherwise be the case is clearly a rational one, particularly bearing in mind the nature of the cohort and the pressures on them as described by Soldier B. The high importance of protecting the lives of members of UKSF, given the nature and degree of the risks they regularly face in undertaking their vital work, and of giving them the best possible chance of making the right decisions without hesitation during operations, so as to enhance their ability to protect the lives of others, is obvious. In my judgment, this is an important and weighty factor.
147. For the reasons I have explained more fully in the Confidential Schedule, I also accept the MOD's assessment that there is a real and significant risk of publication of the memoir leading to public controversy which would be damaging to the morale of UKSF. The MOD has more control over what members and many former members of UKSF can publish than it did prior to the introduction of the contract. But that would be unlikely to shield UKSF from any public controversy if, for any of the reasons identified by Soldier B (or any other reason), a member of UKSF were to seek to respond publicly to the memoir. Moreover, such control only extends to those who signed the contract. The MOD does not have such control over those outside UKSF, or former members of UKSF who did not sign the contract.
148. In my judgment, this is also a significant factor, albeit not as weighty as the duty of care issue which is ultimately concerned with the protection of life. The gravity of the crisis caused by the slew of publications prior to the introduction of the contract is clear not only from the evidence, but also from the steps taken to respond to it, including the "*immensely painful*" introduction of the exclusion policy (see paragraph above). The risk that publication of the memoir would lead to a further existential crisis seems to me to be low, but I do not consider it unlikely that publication of the memoir, in its current form, would draw UKSF into damaging public controversy. As Lord Hoffmann observed in *R v AG*, that is something that the contract was introduced to avoid.
149. The defendant's three witnesses have all given evidence as to the effect of authorisation to publish the memoir on cooperation with other states. I have addressed their evidence on this issue in the Confidential Schedule. Given their roles, expertise and considerable experience of engaging with the authorities and armed forces of friendly foreign states, and the rationality of their evidence on these issues, I consider that the assessments made by the defendant's witnesses as to how other states would be likely to react to publication of the memoir have high evidential value and should be respected: see *Lord Carlile*, [70] (Lord Neuberger PSC). The claimant does not have such expertise or experience and his views as to how foreign states would be likely to react should be accorded little weight.

Proportionality

150. In my judgment, the Secretary of State has succeeded in demonstrating that the interference with the claimant's article 10 rights entailed in refusing to authorise publication of his memoir was proportionate and justified. There was a clear rational connection between the decision and the important objectives underlying it. In article 10(2) terms, those objectives were protecting national security and protecting information received in confidence, but the significance of the latter objective in this case is that the purpose is, in essence, to protect lives and to protect national security. It is well established that the court should be slow to differ from the executive's assessment of the importance of the objective pursued in a national security context. The DSF clearly attaches "*vital*" importance to those objectives. The third criterion, the "*least restrictive means*" test, requires that "*the limitation of the protected right must be one that 'it was reasonable for the legislature to impose'*"; it does not call for a strict application which would permit of only one executive response to an objective that involved limiting a protected right: see *Bank Mellat*, [20] (Lord Sumption JSC), [75] (Lord Reed JSC). In my view, this criterion was clearly met.
151. In considering whether a fair balance has been struck, I have borne in mind the importance to Mr Craighead of being able to tell his story. I have weighed in the balance his understandable wish to provide "*an insider's account of how a young man with a difficult upbringing served his country and saved lives during the Incident*" (CCWS4 §25). Although he acknowledges that his interest is, in part, financial (CCWS4 §27), he wants to be able to tell his story about the Dusit Incident which, as he says, he thinks "*reflects well on the UKSF and well on me*" (CCWS4 §§23-24). He considers it unfair that so many other people (including Mr Ryan, a former member of UKSF who served prior to the introduction of the contract) are able to comment on the footage and the publicly available information about the Dusit Incident, and yet he is prevented from saying anything about it (CCWS4 §24). I have also borne in mind that the claimant is willing to make amendments and that article 10 protects speech that offends. The weight to be given to the claimant's wish to tell his story is, however, reduced by dint of the fact that he voluntarily entered into the contract (see paragraphs 109.-above).
152. I also agree with Mr Johnston that the article 10 rights of third parties should not be ignored. The interests of the potential publisher, and the interests of members of the public in reading the memoir, should be weighed in the balance, in my view, even though they have not themselves brought claims.
153. In *Lord Carlile*, the decision impeded political communication with Members of Parliament and so was "*at the top of the hierarchy of free speech*" ([61] (Lord Neuberger PSC)). The speech in this case is not near the top of the hierarchy. Although I have no doubt that many members of the public would be interested to read the memoir, there is not a high public interest in the content of the memoir being imparted to the public. Nor do the interests of the publisher carry much weight in circumstances where they were aware prior to contracting with the claimant that the ability to publish was dependent on obtaining EPAW.
154. Although I give some weight to Mr Craighead's wish to tell his story, I also bear in mind that he has not been prevented from publishing any information about his upbringing or life before he joined the armed forces, or about his service prior to joining UKSF, and he has been able to disclose that he was selected for and served in 22 SAS. During the hearing, the Secretary of State also clarified that the claimant is

permitted to state, albeit only in bare terms, that he was involved in responding to the Dusit Incident. He has only been prevented from giving an account of an operation, the Dusit Incident, in which he engaged as a member of UKSF. The decision accords with the clear and consistent policy and practice of UKSF, and the contract he signed.

155. On the other side of the balance are the interests of the community reflected in the defendant's evidence. Those community interests entail the protection of lives, the protection of national security, the maintenance of the morale and efficiency of UKSF and protecting relations with defence partners. On the evidence before me, the interests of the community substantially outweigh the claimant's interest in publishing a memoir about the Dusit Incident (even when buttressed by the interest of the public in receiving the information he wishes to disclose, and by the interest of his publisher). I conclude that the decision did not breach the claimant's article 10 rights.

G. CONCLUSION

156. For the reasons given in this judgment, together with the additional reasoning contained in the Confidential Schedule, the claim is dismissed.