IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2017/0087**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50654519 dated 28 March 2017

Before

Andrew Bartlett QC (Judge)

Suzanne Cosgrave

Rosalind Tatam

Heard at Field House, London

Dates of hearing 6, 8, 9 February 2018

Date of decision 29 June 2018

Date decision promulgated: 12 July 2018

Between

ANDREW LOWNIE

Appellant

and

(1) THE INFORMATION COMMISSIONER

(2) THE NATIONAL ARCHIVES

(3) THE FOREIGN AND COMMONWEALTH OFFICE

Respondents

Attendances:

For the appellant: Greg Callus (appearing *pro bono*)

For the 1st respondent: Elizabeth Kelsey

For the 2nd and 3rd respondents: Adam Heppinstall

Subject matter:

Freedom of Information Act 2000 – qualified exemptions – health and safety – national security

Cases:

APPGER v IC and FCO EA/2011/0049-51, [2012] 1 Info LR 258

APPGER v IC and FCO [2013] UKUT 0560 (AAC), [2014] 1 Info LR 79

APPGER v IC and FCO [2015] UKUT 0377 (AAC)

Browning v IC [2014] EWCA Civ 1050

BUAV v IC and Newcastle University EA/2010/0064, [2012] 1 Info LR 52

Callus v IC and Home Office EA/2013/0159, 6 May 2014

Corderoy v IC and Attorney-General [2017] UKUT 0495 (AAC)

Cruelty Free International v IC and Imperial College EA/2015/0273, 16 May 2016

Department of Health v IC and Lewis [2017] EWCA Civ 374

Guardian Newspapers and Brooke v IC EA/2006/0011, 8 January 2007

Hogan and Oxford City Council v IC EA/2005/0026, 17 October 2006

John Connor Press Associates Ltd v IC EA/2005/0005, 25 January 2006

Keane v IC, Home Office and MPS [2016] UKUT 0461 (AAC)

PETA v IC and University of Oxford EA/2009/0076, 13 April 2010

R (Lord) v Home Secretary [2003] EWHC 2073 (Admin)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

The Tribunal upholds the outcome of the decision notice, but not for the reasons given by the Commissioner. In our judgment the s 38 exemption is not applicable. Nevertheless, the information should not be released because s 23(1) applies and the public interest in maintaining the exemption outweighs the public interest in disclosure.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with whether a closed file held by the National Archives as part of the collection relating to the Burgess/Maclean spy ring should be disclosed to the public.

2. In addition to raising issues of fact, it raises some issues of law concerning the correct legal understanding of two FOIA exemptions: s 23(1) – information supplied by or relating to security bodies, and s 38(1) – health and safety.

The request, the public authority's response, and the complaint to the Information Commissioner

3. The National Archives (TNA) is an executive agency of the Department for Digital, Culture, Media and Sport (DCMS). On 12 January 2016 Mr Lownie requested from TNA a number of closed Foreign and Commonwealth Office (FCO) files. These included files under reference 'FCO 158'. The official description of reference 'FCO 158' is that it denotes FCO records 'relating to Guy Burgess and Donald Maclean (known KGB spies), and subsequent investigations and security arrangements'.

4. The particular file which is the subject of this appeal is 'FCO 158/143 – Vetting of [name withheld] 1951-1980'. (In the evidence and submissions the period it relates to is not described consistently but is variously said to be 1951-1980, 1953-1980 or 1959-1980. These differences are of no significance, being merely different ways of describing the same contents.) It concerns the security vetting of a person who was a member of the FCO. The Information Commissioner's decision notice refers to the information in the file having 'implications' with regards to the person's sexuality and unfounded allegations of espionage activities.

5. The file is held by TNA as a transferred public record for the purposes of Part VI of FOIA. The FCO is the responsible authority for the purposes of FOIA s 66. The file was transferred on 1 September 2015 with agreement for closure for a period of 92 years.

6. In order to deal with Mr Lownie's request, TNA consulted the FCO on the question of the application of s 38(1) (health and safety) and the balance of public interest, and subsequently consulted the Advisory Council of National Records and Archives on the question of the balance of public interest. Consequently, on 16 August 2016 TNA refused access in reliance on the exemption in s 38(1). On internal review TNA consulted FCO again and also DCMS pursuant to s66(5). The outcome of the internal review was that on 28 October 2016 TNA confirmed the refusal, relying additionally on s 24(1) (national security).

7. Mr Lownie complained to the Commissioner on 4 November 2016.

8. By a decision notice dated 28 March 2017 the Commissioner upheld the refusal on the ground that s38(1) was engaged and that the balance of public interest favoured maintaining the exemption. In particular the Commissioner took the view that there was a risk of mental distress and that this risk was substantially more than remote. The Commissioner made no finding as to the application of s 24(1).

The appeal to the Tribunal and the questions for the Tribunal's decision

9. Mr Lownie appeals to the Tribunal. He contends that the Commissioner's decision is wrong in fact and in law. In particular he contends that in the circumstances of this case the minimum requirement to satisfy s 38(1) is a proven probability of psychiatric injury.

10. The Commissioner maintains her position on s 38(1) and on the public interest balance as set out in the decision notice. She reserved her position on other exemptions pending review of the evidence.

11. By the Registrar's order of 23 June 2017 TNA was joined as a respondent to the appeal. The FCO was formally joined to the appeal by further directions given on 4 August 2017, which recorded that FCO adopted TNA's response.

12. TNA and FCO, as second and third respondents, resist the appeal, relying on s 38(1), s 24(1), and additionally s 23(1) (information supplied by or relating to bodies dealing with security matters). The application of this exemption was identified and considered in July 2017.

13. In regard to s 23(1), the essence of TNA's response is that the exemption applies to parts of the file because the information in those parts touches or stands in some relation to security bodies. The reason for this is that the process of vetting is an activity relating to the function of security bodies, namely, the protection of national security. The response is equivocal on whether some of the information was provided to the FCO directly or indirectly by a security body.[1]

14. In regard to s 24(1), the essence of TNA's response is that the withholding of information about the vetting process is required for the purpose of safeguarding national security because the vetting process is a vital element in HM Government's ability to protect access

[1] Response, paragraphs 19-23.

to classified information and to protect national security by engaging only suitable persons in sensitive positions. Disclosure would undermine the process, which relies on information supplied candidly in confidence. This is because such disclosure would make it less likely that future participants would be entirely candid. In addition, information regarding methodologies and procedures used in the vetting process would assist those who may have an interest in seeking to counter the effectiveness of the vetting process.[2]

15. In regard to s 38(1), the essence of TNA's response is that there is a real, significant and specific risk that the family of the subject of the vetting file would be caused upset and distress, if not more serious mental health symptoms, if the contents of the withheld file were made known. The living son of the subject is a public figure and media attention, because it concerns a high-profile case of espionage, is very likely. That attention is likely to be unwanted, stressful and harmful.[3]

16. TNA's response contends that the risks of disclosure, in the nature of damage to national security and significant distress to at least one living individual, outweigh any benefits of disclosure. While the contents may be of interest to those concerned with the detail of the Burgess/Maclean matters, the content will not add significantly to the detail already in the public domain, and thus will not materially enhance the quality of public debate and discussion as to these historic national public affairs.[4]

17. TNA's response also contends that redaction or anonymization are not practical options given the nature of the contents of the file.[5]

18. The primary case advanced by TNA and FCO at the oral hearing in February 2018 was reliance on s 23(1). This is normally an absolute exemption. But in this case, because we are dealing with a transferred record, it is subject to the public interest test as a result of s 64(2).

19. The issues before the Tribunal are therefore concerned with the application of each of ss 23(1), 24(1) and 38(1), and with the public interest balance.

20. As part of the above issues there are questions of law in dispute between the parties concerning-

    a. The breadth or narrowness of 'relates to' in s 23(1), where that subsection is concerned with information that 'relates to' a security body;

    b. The degree or degrees of probability intended by the words 'would, or would be likely to' in s 38(1);

[2] Response, paragraphs 24-28.

[3] Response, paragraphs 29-39.

[4] Response, paragraphs 40-45.

[5] Response, paragraphs 46-51.

c. The meaning of 'endanger . . . mental health' in s 38(1).

Evidence

21. Three witness statements were served on behalf of TNA and FCO:

    a. Mr Abraham is a senior TNA official. His statement covered the role of TNA, how the request was dealt with, and why in his view it was right that it was refused.

    b. Mr Aung is a senior official in the Cabinet Office. His statement covered the nature and purpose of the vetting process and why further information about it should not be disclosed.

    c. Mr Tucker is a senior official in the FCO. His statement principally explained the application of ss 23 and 24.

22. Each of these witnesses gave evidence and was cross-examined at the oral hearing. Where they declined to answer particular questions from Mr Callus on the ground that the answer should be given in closed session, the questions were put again by Ms Kelsey during the oral closed session. The closed session also provided the opportunity for questions which Ms Kelsey wished to ask on behalf of the Commissioner irrespective of whether they had been raised by Mr Callus, and for consideration of the closed parts of Mr Abraham's witness statement.

23. We were referred to a number of Government documents and announcements, referred to in witness statements or exhibited to Mr Aung's statement.

24. TNA and FCO also relied upon an expert report provided by Professor Greenberg, an eminent psychiatrist. This related to the issues under s 38(1). Professor Greenberg also gave oral evidence and was cross-examined in open and closed session.

25. The closed materials made available to us consisted of-

    a. The closed parts of Mr Abraham's statement;

    b. The closed parts of Professor Greenberg's report;

    c. The instructions to Professor Greenberg;

    d. The disputed file.

26. The closed material and closed session were dealt with in accordance with the guidance in *Browning v IC* [2014] EWCA Civ 1050, [24], [35]. At the Tribunal's request the index to the closed bundle was supplied to Mr Lownie.

27. The gist of the closed session was reported to Mr Lownie in the terms set out below in numbered paragraphs 1-34.

Tuesday 6 February

Evidence of Mr Aung

1. The Tribunal heard evidence in closed session from Mr Aung.

2. Ms Kelsey put to Mr Aung any questions which had been put by Mr Callus in open session, which Mr Aung had felt unable to answer, or answer fully, in that session.

3. Mr Aung was asked questions about s.23 and s.24 FOIA, including how both provisions were said to be engaged. These questions included which security bodies are said to be relevant, whether information is supplied by and/or relates to those bodies, and what harm to national security would arise if the information was disclosed. Mr Aung was asked to address these questions both generally, in respect of the information as a whole, and with respect to specific documents within the disputed information.

4. In the course of his evidence, Mr Aung indicated he was not as well placed as Mr Tucker and Mr Abraham to answer questions with respect to specific documents in the file. Mr Aung's evidence therefore focused primarily on issues which arose in relation to the file as a whole, rather than specific documents.

5. Mr Aung answered questions as to how similar, or otherwise, security vetting today is to the security vetting carried out between the 1950s and 1980s. This included similarities and differences in the processes applied, as well as the substantive issues considered.

6. In the context of ss.23 and 24 FOIA, Mr Aung stated certain specific documents in the file would give rise to low risks, and, for other specific documents, insignificant risks, in relation to national security considerations. Mr Aung stated that while some documents, when considered alone, may be disclosable, when combined, the information taken together would give rise to national security concerns. This risk arose by way of a 'jigsaw' effect: individual documents – individual pieces of the puzzle – would not disclose meaningful information, but when combined with other disputed documents, or other documents already in the public domain, the pieces may be put together to form a meaningful picture. As it was not possible to identify what information might already be known to threat actors, it was not possible to identify which specific documents could be disclosed without giving rise to the risk of 'jigsaw' effects occurring.

7. Mr Aung also gave evidence as to how disclosure would undermine the vetting process. He stated this might arise both by disclosing details about the vetting process, and by having a 'chilling effect' on the willingness of individuals to seek employment in certain roles and/or engage in the vetting process. This chilling effect would arise in part if candidates were aware information collected in the course of the vetting process might be disclosed.

Thursday 8 February

Evidence of Professor Greenberg

8. The Tribunal heard evidence in closed session from Professor Greenberg.

9. Ms Kelsey put to Professor Greenberg any questions which had been put by Mr Callus in open session, which Professor Greenberg had felt unable to answer, or answer fully, in that session.

10. Professor Greenberg gave evidence about issues touching on s.38 FOIA only.

11. Professor Greenberg was asked questions about the closed sections of his Report, about the disclosed information as a whole, and about specific documents and types of documents within the disclosed information.

12. Professor Greenberg stated there were certain types of documents in the disputed information which would not, in and of themselves (disregarding any information that might be in the public domain) give rise to any concern that s.38 FOIA might be engaged. Professor Greenberg further stated there was certain information in the disputed material which would not, in and of itself, give rise to risk of distress

such as to engage s.38. He stated disclosure of such information would give rise to risk of distress such as to engage s.38, if it were disclosed together with other disputed information.

13. In this context, Professor Greenberg was asked questions about the relevance of information already in the public domain. He distinguished between the impact of official information and information from other sources.

14. Professor Greenberg stated that in his view, disclosure only of the identity of the subject of the vetting file, when considered with the information in paragraph 12 of the Decision Notice, would not give rise to risk of distress such as to engage s.38.

15. He stated that in his view, disclosure of the file carried at least a 10% chance of resulting in mental ill-health of a close relative given the prevalence of mental illness in the population at large, and given that it could be seen as an additional stressor.

16. With reference to the Pridham file, Professor Greenberg stated he was not aware of whether Mr Pridham had any living relatives at the time of the release of the file, or whether any mental health issues had arisen for any relatives as a result of its disclosure.

17. Professor Greenburg identified aspects of the information in the file, the redaction of which would moderate the risk of health impact.

Evidence of Mr Abraham

18. The Tribunal heard evidence in closed session from Mr Abraham.

19. Ms Kelsey put to Mr Abraham any questions which had been put by Mr Callus in open session, which Mr Abraham had felt unable to answer, or answer fully, in that session.

20. In the course of his evidence, Mr Abraham indicated that Mr Tucker would be better placed than he was to address issues relating to ss.23 and 24 FOIA. The Tribunal and both Respondents agreed issues relating to ss.23 and 24 would therefore be addressed by Mr Tucker. Mr Abraham thus primarily gave evidence relating to s.38 FOIA. Mr Abraham gave some limited evidence as to how ss.23 and 24 are said to be engaged in respect of the disputed information generally.

21. Mr Abraham was asked whether, and why, he considered s.38 was engaged in respect of specific documents in the disputed information. In this context, Mr Abraham was asked questions about the relevance of information already in the public domain, including the Pridham file. This included questions about the large number of files released in October 2015. He said that this release was in the public interest, being for historians and researchers to use. He said a time would come in the future when the subject file would also be released for that reason.

22. Mr Abraham stated that in his view, disclosure of the identity of the subject of the vetting file, when considered with the information in paragraph 12 of the Decision Notice, would give rise to risk of distress such as to engage s.38. He also expressed concern that if the file were released subject to major redactions said to be made under s. 38, that in itself could cause distress to relatives.

Evidence of Mr Tucker

23. The Tribunal heard evidence in closed session from Mr Tucker.

24. Ms Kelsey put to Mr Tucker any questions which had been put by Mr Callus in open session, which Mr Tucker had felt unable to answer, or answer fully, in that session.

25. Mr Tucker gave evidence relating to ss.23 and 24 FOIA only.

26. Mr Tucker was asked questions about s.23 and s.24 FOIA, including how both provisions were said to be engaged. These questions included which security bodies are said to be relevant, whether information is supplied by and/or relates to those bodies, and what harm to national security would arise if the

information was disclosed. Mr Tucker was asked to address these questions both generally, in respect of the information as a whole, and with respect to specific documents within the disputed information.

27. Mr Tucker's evidence in this regard included his view that disclosure of the disputed material (with the exception of certain 'cover pages' which are to be disclosed, with names redacted) would harm national security interests because it would disclose details of the vetting process and the involvement of certain security bodies. These details included vetting and investigative techniques, and details about how vetting decisions were made. Mr Tucker gave evidence as to why these concerns arose, considering information that is in the public domain and considering that the disputed information is historic.

28. In addition, Mr Tucker expressed the view that all information relating to the vetting of an individual is confidential, and this confidentiality is necessary to the vetting process. Mr Tucker stated that this 'confidentiality principle' is of such importance that disclosure of any information relating to vetting would harm the vetting process, such as to engage s.24 FOIA or give rise to national security concerns where s.23 is engaged.

29. Mr Tucker was asked to consider the Pridham file, and explained why he considered the disclosure of the Pridham file in the public domain did not lead him to conclude ss.23 and/or 24 were not engaged in this case.

Other points

30. In the course of the closed session, Judge Bartlett QC asked Mr Heppinstall whether paragraph 23 of TNA's Response was correct, and TNA/the FCO sought to rely on s.23 in respect of only parts of the withheld information. Mr Heppinstall stated TNA/the FCO rely on s.23 in respect of the entirety of the withheld information.

31. Also in the closed session, Ms Kelsey stated to the Tribunal that the Commissioner may not be in a position immediately following the evidence to reach a definitive view as to which exemptions are engaged in respect of all the disputed information. Judge Bartlett QC indicated the Commissioner may make closing submissions as far as possible, and indicate where the Commissioner considers she would require more time to form a view.

Friday 9 February

32. Mr Aung gave evidence in closed session.

33. Mr Aung was asked to consider the Pridham file, and he explained that notwithstanding the disclosure of the Pridham file into the public domain he remained of the view that disclosure of the disputed material would result in harm to national security considerations. Mr Aung addressed in particular the impact, if any, of the Pridham file on the 'chilling effect' or 'jigsaw' arguments he had explained in his earlier evidence.

34. Mr Aung similarly addressed the impact of other documents in the public domain, including the Developed Vetting Questionnaire, in respect of such issues. He also gave a general indication of the aspects of the file which he considered more sensitive than others.

[END]

28. At the hearing Mr Callus accepted before us that on the existing authorities at Court of Appeal level the s 23 exemption had been introduced in time to be relied upon by the Respondents, but he wished to reserve his position for a higher court.

29. In his written opening submission Mr Callus sought to persuade the Tribunal to rule at the start of the hearing that the evidence of Professor Greenberg (for which permission had been given by a prior procedural order) was not admissible, but in the event he was content that the Tribunal's ruling on that point should be given in its substantive decision. Despite

the width of the Tribunal's power under Rule 15(2)(a)(i) of the applicable procedural rules to receive evidence that would not be admissible in a civil trial, he submitted that the psychiatric evidence should not be received because it was unnecessary, because the Professor had been asked the wrong questions (concerning distress rather than psychiatric injury), and because it was unhelpful (since the Professor had not consulted with any of the persons who might allegedly be affected by the release of the information).

30. Mr Heppinstall's written closing submission stated:

> The Professor is expert in describing how people react to upsetting and distressing information such as is disclosed by the file and can describe the risk of endangerment to mental health posed by the file. He, of course, cannot say anything about how any one person would react, but his speculation and prediction is informed by his clinical practice and judgment (which the Tribunal does not have). Therefore he has given proper and true expert evidence which the Tribunal would be wrong to disregard or to give anything other than the full forensic weight it requires and deserves.

31. In the Tribunal's view we have power to receive the Professor's evidence, and we consider it right to do so. It is potentially relevant opinion evidence, and he is qualified to give it. Its value is limited by the practical constraint that he could not consult with any of the persons who might be affected. But that goes to weight, not to whether we should consider his evidence at all. In so far as he was asked the wrong questions in his instructions, we are able to make allowance for that, particularly since he gave oral evidence. Accordingly, we reject the application that it should be excluded from our consideration.

Procedure after the oral hearing

32. It became apparent during the closed session that the Respondents needed to do further work to get to grips with the detail of how the various exemptions were said to apply to the disputed information. For this purpose it was clearly going to be necessary for the Respondents to get together to discuss the closed material, in order to sort out to what extent, if at all, the Commissioner disagreed with the other Respondents on the details of the application of the exemptions. The Tribunal directed that the Commissioner and the other Respondents provide written closing submissions and a gist of any closed submissions for Mr Lownie on or before 16 March 2018. His response, if any, was to be served by 21 March 2018. This could also include any additional submissions arising from his opportunity of considering the gist of the closed session.

33. Owing to a number of difficulties which arose, extensions of time were sought and granted. Ultimately the Respondents' closing submissions were due no later than 30 May 2018 and Mr Lownie's no later than 20 June 2018.

34. Accordingly, in addition to the submissions made orally at the hearing, we received final written submissions, both open and closed, from the Second and Third Respondents, dated

23 May 2018, and from the Information Commissioner dated 30 May 2018. The Second and Third Respondents' submissions conceded that about 30 pages of the file should be released, subject to redactions. These formed Appendix C to the Second and Third Respondents' submissions. We also received final written submissions from Mr Lownie dated 20 June 2018.

35. In relation to this timetable we need to mention the Floyd file. This file was released under FOIA (subject to redactions) at the request of another biographer of Burgess. The contents were reported in the Press on 25 February 2018. It transpired that David Floyd, who afterwards became a correspondent for *The Daily Telegraph*, had admitted to being a Soviet spy in 1951, but was spared prosecution, and continued working as a journalist until 1980. His son, Lord Justice Floyd, was reported as describing this information as 'very shocking'.

36. Mr Lownie wished to make submissions based on comparison of the Floyd file with the file sought in the present case. We are told that the Respondents insisted that the release of the Floyd file was a mistake, and also that it was not relevant. Ultimately the Respondents agreed to provide Mr Lownie with a redacted version, and said they would do so in time for Mr Lownie to deal with it in his written submissions, but in the event they did not do so. (He did not apply to us for a yet further delay to conclude his submissions.)

37. Mr Lownie submits:

> It is regrettable that the TNA/FCO have taken [the] unmeritorious position of delayed redacted release (even on *inter partes* disclosure terms) of a file *already made public* so as to avoid comparisons with the present matter. It is, in the Appellant's submission, indicative of a complete loss of perspective on the part of TNA/FCO as to the sensitivity of historic material of this nature, and to the proper approach to a public interest balancing exercise in respect of material already released (even if mistakenly) into the public domain.

38. We note Mr Lownie's complaint and bear it in mind. We have not seen the Floyd file and express no view on whether it is relevant or not. Our duty is to exercise our own judgment after close scrutiny of the evidence which has been placed before us. The complaint reminds us to consider with particular care whether there has or has not been a loss of perspective on the part of TNA/FCO as to the sensitivity of the disputed file.

39. The Tribunal subsequently met on 22 and 29 June 2018 in order to go through the closed material with the final submissions and consider its decision.

Legal issues under s 38(1)

40. Section 38(1) provides-

> Information is exempt information if its disclosure under this Act would, or would be likely to-
>
> (a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

41. The parties are not in agreement as to the degree or degrees of probability intended by the words 'would, or would be likely to' in s 38(1). Nor are they in agreement as to the meaning of 'endanger . . . mental health'.

42. These points are connected, because Ms Kelsey submits that 'endanger' in s 38 has the same meaning as 'prejudice' in FOIA exemptions which are expressly based on a prejudice test: *PETA v IC and University of Oxford* EA/2009/0076, 13 April 2010, [30]. In the context of the prejudice test, the Tribunal has consistently held that the prejudice to be considered must be 'real, actual or of substance': *Hogan and Oxford City Council v IC* EA/2005/0026, 17 October 2006, [30].

43. Mr Callus submits that 'would, or would be likely to' amounts to a test of 'more likely than not'.

44. We note that the assimilation of 'endanger' to 'prejudice' in *PETA* was not a reasoned conclusion but was based on agreement between the three parties involved in that case. The 'prejudice' test is expressly included in a number of FOIA exemptions. In our view, if Parliament had intended s 38 to depend upon the same test as those other exemptions, it would have used the same language. It did not, but instead chose to use different language in s 38. We should follow the Parliamentary intention. In our view, attempting to assimilate the two tests merely muddies the waters. For the purposes of s 38 we must apply the words of s 38, not the words of different exemptions.

45. As an example of the muddying of the waters, the assimilation of the two different tests has led, in our view, to misunderstanding of the phrase 'would, or would be likely to'. The first part of this phrase ('would') refers to something being more likely than not to occur (that is, the probability is greater than 50%). The second part of this phrase, on the basis of authority which we refer to below, refers to there being 'a very significant and weighty chance' of occurrence, such that the occurrence 'may very well' occur, a 'real risk' not being enough. The assimilation with the prejudice test has perhaps contributed to the second part of this phrase being watered down to require only 'a real and significant likelihood' (see paragraph 13 of the ICO's published guidance on s 38, adopted in Mr Heppinstall's submissions; a phrase found also in *John Connor Press Associates Ltd v IC* EA/2005/0005, 25 January 2006).

46. We note that the phrase 'real and significant risk' was used in *Keane v IC, Home Office and MPS* [2016] UKUT 0461 (AAC), but this point was not in issue on the appeal and was not the subject of detailed argument.

47. The phraseology 'a very significant and weighty chance' and 'may very well' (and a 'real risk' not being enough) is derived from the careful and learned discussion in *R (Lord) v Home Secretary* [2003] EWHC 2073 (Admin), Munby J, [96]-[100], as adopted in *Hogan* and also in *Guardian Newspapers and Brooke v IC* EA/2006/0011, 8 January 2007, [53], and in *BUAV v IC and Newcastle University* EA/2010/0064, [2012] 1 Info LR 52, [15]. In our judgment this

provides the appropriate explanation of the degree of likelihood that is meant by 'would be likely to' in s 38.

48. As regards the meaning of 'endanger', Ms Kelsey on behalf of the Commissioner invited us to prefer the exposition in *PETA* to that in *BUAV*. We are not persuaded that we should depart from the views expressed by the Tribunal in the *BUAV* case at [18]-[19]. See also *Cruelty Free International v IC and Imperial College* EA/2015/0273, 16 May 2016, [15]-[16].

49. The Information Commissioner's position appeared to be, at least at times, that the requisite probability of 'distress' to living relatives would be sufficient to meet the requirements of s 38. If that was what was meant, we do not agree. While distress can be a trigger leading to mental ill-health, we do not consider that distress in itself should be equated with mental ill-health for the purposes of s 38. A healthy or unhealthy person may experience distress without suffering any, or any additional, mental ill-health.

Application of s 38(1) to the facts

50. We have indicated the general nature of the disputed file in paragraphs 3-4 above.

51. The evidence confirmed that the deceased person has living family members, one of whom is a person in the public eye.

52. Professor Greenberg's recitation of his instructions included the following:

> I have been informed that the question for the Tribunal will be whether the release of the withheld information poses a real and significant risk (albeit one that is less then 50%) of endangerment of a specific person's or persons' emotional and psychological wellbeing, including 'upset and distress'. I have been informed that the use of the term 'upset and distress' means that those who might be affected by the release of information would not necessarily have to suffer a recognisable psychological injury in order for the exemption to apply. However, the effect must be more than trivial or insignificant.
>
> I have been asked to consider whether any one of the people that the instructing solicitors have provided me the name and status [relationship to the person of interest] of may be at risk of mental endangerment.
>
> . . .
>
> For the sake of clarity, I confirm that I have not interviewed or carried out any form of psychological analysis of those who might be affected by the release of information.

53. In our view these instructions to the Professor were incorrect, since they did not accurately state the degree of probability to be considered, and they wrongly equated upset and distress with mental ill-health. However, as he further explained in his oral evidence, upset and distress may in particular circumstances result in or contribute to mental ill-health.

54. There are two parts to the concern about the possible impact of disclosure upon family members. One is the issue of espionage activities, the other is the issue of sexuality.

55. As regards espionage activities, the Commissioner's decision notice indicates that the file contains allegations which were determined to be unfounded. It seems to us to be obvious, to anyone who thought about it, that any civil servant who had close contact with any one or more members of the Burgess/Maclean spy ring either at work or socially might become the subject of allegations or suspicion and, if so, would necessarily be investigated to see whether they had any involvement in the espionage activities which were discovered.

56. We are not satisfied on the evidence that a revelation to the family of a deceased civil servant that some decades ago their relative was investigated in relation to espionage, and that the investigation concluded that there was no such involvement, would be likely (in the statutory sense explained above) to have an adverse effect on anyone's mental health.

57. Given our review of the contents of the file, our reasoning on the sexuality issue is somewhat similar. We have set this out it in paragraph 1 of the Confidential Annex to this decision.

58. Accordingly, we find that s 38(1) is not engaged in this case.

59. Since in our view s 38(1) is not engaged in this case, we do not need to consider the public interest balance in relation to the maintenance of that exemption.

Legal issues under s 23

60. Section 23(1) provides-

> Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

61. The specified bodies include the Security Service, the Secret Intelligence Service, and a number of other security bodies.

62. The parties are not in agreement on the breadth or narrowness of 'relates to' in s 23(1), where that subsection is concerned with information that 'relates to' a security body.

63. In regard to the meaning of 'relates to' Mr Heppinstall relies on the remarks of the First-tier Tribunal in *APPGER v IC and FCO* EA/2011/0049-51, [2012] 1 Info LR 258, [65]:

> Applying the ordinary meaning of the words "relates to", it is clearly only necessary to show some connection between the information and a s.23(3) security body; or that it touches or stands in some relation to such a body.

64. This seems at first sight to suggest that any connection at all is sufficient. But at [68] the same Tribunal stated that 'relates to' is about the contents of the information: 'is the information about something to do with the security bodies'. And at [70] the Tribunal said

that the application of the exemption was subject to a remoteness test. So, remote connections are not sufficient.

65. Mr Heppinstall submits that the views of the Tribunal on this issue were upheld by the Upper Tribunal on appeal, at *APPGER v IC and FCO* [2013] UKUT 0560 (AAC), [2014] 1 Info LR 79. This is not correct. Ground 2 of the appeal (the meaning of 'relates to') was stayed: see at [45].

66. However, this ground of appeal was considered in the subsequent decision of the Upper Tribunal, *APPGER v IC and FCO* [2015] UKUT 0377 (AAC) at [10]-[33]. At [23] the Upper Tribunal stated that it was 'important not to allow a judge-made formulation' to 'supplant or override' the statutory wording itself, however 'a steer as to the contours of the statutory language' might be helpful. The Tribunal considered that 'a steer or guidance in general terms' was 'impermissible and unhelpful', except that 'relates to' is 'used in a wide sense' [25].

67. The Tribunal added at [26]:

> . . . information, in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions, is highly likely to be information which relates to an intelligence or security body and so exempt under section 23.

68. The 'relates to' test was discussed again in *Corderoy v IC and Attorney-General* [2017] UKUT 0495 (AAC), especially [51]-[54], [59]. The decision in that case shows that 'relates to' is not to be pressed too widely: see [62].

69. We are of course bound by legal decisions of the Upper Tribunal and it is our duty to follow them. The particular steer given in [26] of *APPGER* [2015] is helpful when it is relevant to the facts. The more general steer that 'relates to' is used 'in a wide sense' is perhaps harder to apply, particularly when *Corderoy* shows that the intended width is restricted.

70. The same connecting phrase is used in s 35(1). In *Department of Health v IC and Lewis* [2017] EWCA Civ 374, [13], the Court of Appeal cited, without comment, the views of the First-tier Tribunal in that case that

> (1) the phrase 'relates to' should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context, and
>
> (2) a mere incidental connection between the information and a matter specified in a sub-paragraph of s 35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph.

71. A feature of the legal discussions in *APPGER* [2015] and *Corderoy* is that they never quite state explicitly the core problem of interpreting 'relates to'. If indirect connections are

allowed, the literal meaning of 'relates to' provides no limit at all, since ultimately everything in this world is indirectly related to everything else. Therefore, one has to find the boundary intended by 'relates to' by consideration of the statutory purpose discernible from the context.

72. The statutory purpose is usefully identified in *APPGER* [2015] at [16]. This refers to:

> . . . Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all. There is no point sending a letter making a FOIA request to Thames House. As Ms Steyn put it, Parliament had shut the front door by deliberately omitting the section 23 bodies from the list of public authorities in the Schedule to the Act. Section 23 was a means of shutting the back door to ensure that this exclusion was not circumvented.

73. In other words, FOIA is not to be used in a way that reveals activities of section 23 bodies.

74. This is consistent with the suggestion of Mitting J in *APPGER* [2015], [21], that one possible way of benchmarking a decision on the application of s 23(1) was:

> . . . to ask whether it concerned "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions". So, for example, the functions of the Security Service include "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means" (section 1(2) of the Security Service Act 1989; see also section 1 of Intelligence Services Act 1994 as regards the functions of the Secret Intelligence Service).

75. The Upper Tribunal stated at [33] that this suggestion had 'considerable utility' (see also at [26], as cited above).

76. On 'relates to', Mr Callus also cited *Callus v IC and Home Office* EA/2013/0159, 6 May 2014, [36]-[43]. Since there is more recent guidance from the Upper Tribunal, we do not find it necessary to discuss the reasoning in that case.

77. In sum, we consider that we should follow the guidance concerning the meaning of 'relates to' which we have identified in paragraphs [66]-[69] and [72]-[75] above. We have applied this guidance when considering the application of s 23(1) on the facts.

Application of s 23(1) on the facts

78. The question whether information was supplied by or relates to (in the sense explained above) a security body is a question of objective fact, which (unlike the application of s 24) does not require any judgments concerning matters of national security.

79. The Second and Third Respondents, through Mr Heppinstall, rely upon s 23 in relation to the whole of the file other than the pages which have been redacted and recently released.

80. We were initially sceptical of that submission. Mr Callus made a powerful submission concerning the number of times the file had apparently been considered without anyone realising that s 23 was applicable. However, on further consideration we have come to the conclusion that s 23(1) applies to the remaining parts of the file which have not been redacted and released. The reason for this is that disclosure of the file would disclose specific information about the actual activities of a security body in relation to a particular person. And in the particular circumstances, such disclosure could not practicably be prevented by selective redactions.

81. Redaction from the file of specific references to that body would not prevent such disclosure.

82. We have added further brief explanation on this issue in the Confidential Annex.

Section 23(1) and the public interest balance

83. As to the factors in favour of disclosure, there is a clear public interest in the disclosure of information concerning how government is conducted or, in this case, how it was conducted in the past.

84. The Burgess and Maclean affair was, as Mr Callus put it, a shock to the system. Its importance has been recognised by the very considerable disclosures of official documents which have already been made. There are also additional potential features of historical interest concerning how persons suspected of homosexuality were regarded and dealt with in the relevant period, and how an important department of State conducted itself in subsequent years in the aftermath of the Burgess and Maclean saga.

85. The Commissioner in her decision notice identified the following:

    a. There is a public interest in showing a true and open account of the historical record.

    b. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life.

    c. There is a general public interest in being able to evaluate the foreign and defence policy of government.

86. The Amended Response of the Second Respondent justifiably added some broader perspective when it stated:

> The high-profile case of espionage . . . with which some of the contents of this file is concerned has already received a high degree of public comment and debate. Whilst the contents of the file might be of interest to those concerned with the detail of

> those affairs, it is not assessed that the content will significantly add to the detail already in the public domain, and thus will not materially enhance the quality of public debate and discussion as to these historic national public affairs.

87. On the other side of the balance there is the strong public interest in preserving the secrecy of operation of security bodies, which is reflected in the features that the security bodies are not subject to FOIA and that s 23 is normally an absolute exemption.

88. Mr Heppinstall submitted:

> The fact that section 23 when applied to historical documents becomes a qualified exemption is because Parliament recognised that the passage of time *might* mean that absolute secrecy is not required.

89. In our view, the feature that the s 23 exemption is subject to the public interest test in the case of a transferred record allows for the possibility of cases where the public interest in disclosure is strong, and also indicates Parliament's judgment that at some point the passage of time will so dilute the importance of s 23 that the ordinary public interests in disclosure of governmental information will outweigh it.

90. In the present case the judgment which we must make is a matter of impression, having heard the evidence, read the file and considered the parties' arguments. In our view the policy underlying the s 23 exemption remains relevant in the case of this file. The reasons for disclosure are not particularly strong. Our conclusion is that the public interest in maintaining the exemption outweighs the modest public interest in disclosure.

Application of s 24

91. Because of our conclusions concerning the application of s 23 it is not strictly necessary for us to deal with s 24. We therefore make only some brief remarks concerning our assessment of the facts, which could be relevant in the event of an appeal.

92. We begin by reminding ourselves that, while the Tribunal is given the task of deciding whether s 24 applies, the Tribunal is not itself expert in national security and must take careful note of the evidence provided by Government witnesses and give it all appropriate weight. Such an approach must involve, on the one hand, scrutinising the cogency of the reasoning advanced by Government witnesses and, on the other hand, not indulging in inexpert speculation about what is or is not of value to a threat actor. Several of the witnesses referred to the 'mosaic' or 'jigsaw' effect: a concern that small additional pieces of information, which do not appear important in themselves, may be of material use when a threat actor adds them to what is already known or believed to be the case.

93. Mr Aung's and Mr Tucker's evidence was relevant to our consideration of the application of s 24.

94. Seven factors relied upon in relation to s 24 were listed in the Second and Third Respondents' final submissions.

95. Factor 1 relates to the identity of the person vetted. The question of release of identity arises first under s 23. We are not persuaded that this factor has any additional purchase under s 24. If s 23 did not apply, the name could be released.

96. Factors 2 and 3 do not require discussion because of overlap with the application of s 23(1).

97. Factors 4 and 6 are concerns about revealing information about the vetting process. As regards Mr Aung's evidence, it became apparent that he was unaware of the full extent to which details of the vetting process were already in the public domain. The evidence showed that the current vetting questionnaire is in the public domain, as is a reasonably full explanation of the process. This reduced the value of his assertions about the scope of the information that it was necessary or appropriate to keep under wraps in order to safeguard national security.

98. Factor 5 is a concern that release of vetting information would tend to undermine the process, because candidates and referees would not have assurance that their answers will be kept entirely confidential. The effectiveness of the vetting process is undoubtedly of practical relevance to national security. We consider in principle that this so-called 'chilling factor' can be a valid concern. Its validity depends upon particular circumstances. It would need to be separately considered in relation to (1) the subject of the vetting process, (2) professional referees, and (3) non-professional referees. Because of our view on the application of s 23 it has not been necessary for us to assess the chilling factor in the present case.

99. Factor X is to do with the role of the Security Service in vetting. The evidence shows that the existence of this role is a matter of public record and has been explained in official documents issued to the public. In our view the application of factor X is academic, because, where information in the file is concerned with this role, s 23(1) applies.

Conclusions

100. We uphold the outcome of the Commissioner's Decision Notice, but not for the reasons given by the Commissioner. In our judgment the s 38 exemption is not applicable. Nevertheless, the information should not be released because s 23(1) applies and the public interest in maintaining the exemption outweighs the public interest in disclosure.

101. Subject to any order by a higher judicial authority, the Confidential Annex must remain confidential to the Respondents and must not be disclosed to Mr Lownie or to the public.

Signed

/s/ Andrew Bartlett QC, Tribunal Judge