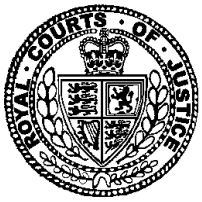

Neutral Citation Number: [2023] EWHC 2930 (Admin)

Case No: CO/2593/2023; AC-2023-LON-002143

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2023

**Before**

**MR JUSTICE SWIFT**

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**Between**

**THE KING**
**on the application of**

**IAB and others** — **Claimants**

**-and-**

**(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES** — **Defendants**

**-and-**

**JUSTICE** — **Intervener**

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**Laura Dubinsky KC, Michael Spencer and Alice Irving** (instructed by **Duncan Lewis**) for the **Claimants**
**Sir James Eadie KC, Jack Holborn and Jack Smyth** (instructed by **GLD**) for the **Defendants**
**Guy Vassall-Adams KC** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Intervener**

Hearing date: 8 November 2023

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# Approved Judgment

**MR JUSTICE SWIFT**

## A. Introduction

1. These proceedings were commenced on 13 June 2023. The Claimants challenge a decision by the Secretary of State for Levelling Up, Housing and Communities ("the Levelling Up Secretary") to make the Houses in Multiple Occupation (Asylum-Seeker Accommodation)(England) Regulations 2023 ("the Regulations"). The Regulations were laid before Parliament in exercise of powers under the Housing Act 2004. That was as long ago as 30 March 2023. They will be made and come into force only when approved by both Houses of Parliament. So far, such approval has not been sought, and the Regulations remain in draft. Put very briefly, if the Regulations come into effect, they will remove premises the Home Secretary uses to accommodate asylum claimants in exercise of his powers under the Immigration Asylum Act 1999 ("the 1999 Act") from the scope of the scheme of regulation for houses in multiple occupation contained in Part 2 of the Housing Act 2004. This step is being taken in aid of an objective to increase the pool of accommodation available to Home Secretary for use by asylum claimants, and to reduce the need for him to resort to using hotels for that purpose. The Claimants also challenge what they describe as the Home Secretary's policy on how he will use the opportunity that the Regulations will provide.

2. Johnson J gave permission for the challenge directed to the Home Secretary but refused permission so far as the claim concerned decisions of the Levelling Up Secretary. At a renewed application for permission to apply for judicial review on 19 October 2023 I gave permission on some of the remaining grounds of challenge to the decision of the Levelling Up Secretary. In short summary, the grounds of challenge cover: whether under section 254 of the Housing Act 2004 the Levelling Up Secretary had the power to make the Regulations; whether decisions by each Secretary of State were made consistent with the *Tameside* obligation to consider relevant matters and to take reasonable steps to obtain relevant information so as to identify relevant matters (see [1977] AC 1014 per Lord Diplock at pages 1064H – 1065B); and compliance with the public sector equality duty.

3. This judgment concerns matters arising from disclosure made by the Secretaries of State. Although the permission stage of these proceedings has only recently concluded and the date for the Secretaries of State to file and serve Detailed Grounds of Defence and evidence has not yet passed, the Secretaries of State have already served three tranches of disclosure. The first came on 20 July 2023 under cover of the Secretaries of State's response to the pre-action protocol letter. The second came on 5 September 2023 when the Secretaries of State filed and served their Acknowledgement of Service and Summary Grounds of Defence. The third tranche of disclosure was served on 18 October 2023 (the day before the hearing of the renewed application for permission to apply for judicial review). In total the documents disclosed, across four bundles, run to more than 500 pages.

4. Each of the tranches of disclosure included redacted documents. Disclosure was given without explanation (either generally, or document by document) of why the passages had been redacted. In a skeleton argument filed for the hearing of the renewed application for permission to apply for judicial review on 19 October 2023, the Secretaries of State referred to redaction of the names of "junior civil servants" (by

which they meant any civil servant outside the grades that comprise the Senior Civil Service, regardless of age or experience). While it was obvious from context that some of what had been redacted was likely to be names, it was equally obvious that other redactions were of other material. At my request the Secretaries of State provided a list (by reference to page numbers in the various disclosure bundles) stating whether these other redactions were on grounds of relevance or legal professional privilege ("LPP"). Since first provided, that list has gone through various iterations. None of the iterations has provided information beyond a bare label – "relevance", "LPP" etc. The lists provided have not been easy to follow, primarily because of the different pagination applied to the documents in the disclosure bundles from time to time. Nevertheless, the lists have assisted the parties to discuss the appropriateness of the redactions made and, in large part, agreement has been reached.

5. The issues for me to decide are these. (1) Is it permissible for the Secretaries of State, as a matter of routine, to redact the names of civil servants outside the Senior Civil Service from documents disclosed in proceedings? (2) In these proceedings, are the Secretaries of State entitled to redact material from a document dated 13 January 2023 on grounds of legal professional privilege? (3) Was a redaction to another document made on grounds of relevance, properly made? (4) The procedure that a disclosing party should take when seeking to disclose redacted documents into judicial review proceedings. Issues (1) and (4) concern the general practice to be followed in judicial review proceedings. They fall for consideration in litigation challenging decisions that are entirely run of the mill in the sense that neither the decisions nor the decision-making process touch on any matter that could claim to be sensitive.

6. I have heard submissions from the Secretaries of State and the Claimants. In addition, I have had the benefit of written and oral submissions from Guy Vassall-Adams KC on behalf of Justice which, with my permission, intervened in these proceedings for the purposes of the hearing on issues (1) and (4) above.

## B. Decision

### *(1) Redacting names of civil servants who are not members of the Senior Civil Service, and names of persons outside the civil service*

7. The redactions occur across a range of documents disclosed in these proceedings. The names of those who have sent emails or other correspondence, have received them, or have been copied in to the same, have been removed. Names within the bodies of emails and correspondence have also been removed. The same approach has been applied to minutes of meetings. Some of the disclosed documents are submissions prepared by civil servants for consideration by ministers. Names have been removed from these documents too, including the names of those who wrote the documents.

8. The Secretaries of State's explanation is that the names redacted are the names of civil servants who are in Grades 6 or 7, or Executive Officer, or Administrative Officer grades, i.e. the grades below the Senior Civil Service. It is apparent that these names have been redacted in pursuance of a general approach that is now being applied, across government, in all claims for judicial review. In this instance, it is also apparent that names of persons working for contractors have been redacted. The contractors are companies who supply accommodation to the Home Office used to provide support for

asylum claimants. For example, the name of the managing director of one contractor has been blanked out.

9. The submission for the Secretaries of State focussed on redaction of names of civil servants outside the Senior Civil Service. The submission made is a general submission; it does not depend on anything touching on the circumstances of the present case. The submission referred first to the duty of candour, the obligation on parties to judicial review proceedings, in particular on public authorities who are defendants in such proceedings, to ensure the court has sufficient information to determine the legality of any decision under challenge. The Secretaries of State submit that names of civil servants outside the Senior Civil Service fall outside the candour obligation and can be removed from all disclosable documents on grounds of relevance. Relevance permits this redaction in all cases save for those in which the identity of a civil servant involved in a decision or the decision-making process bears upon the legality of the decision under challenge. Grounds of challenge raising such a point will be infrequent; one example would be where a decision is challenged on grounds of bias, whether apparent or actual. Such situations apart, counsel for the Secretaries of State contended that any argument that these names ought not to be redacted from disclosable documents was no more than an argument in favour of "making reading documents a little bit easier" and, in this sense was somewhat trivial.

10. The Secretaries of State further submit that, relevance apart, there is good reason to remove names of civil servants outside the Senior Civil Service from all disclosable documents. This submission too, is made across the board. The Secretaries of State rely on statements made in these proceedings by Philip Smith, Head of Specialist Appeals and Litigation at the Home Office, and Joanna Key, Director General of Regeneration, Housing and Planning at the Department for Levelling Up, Housing and Communities, and on statements filed in an earlier case, *R (Good Law Project) v the Secretary of State for Health and Social Care* [2021] EWHC 1223 (TCC).

11. I do not accept these submissions. The obligation of candour is an important duty. As Laws LJ observed in his judgment in *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 (at paragraph 50) the obligation of candour imposes

> "… a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide."

The issue now is not so much about the duty of candour *per se*, as about the steps that a public authority needs to take to discharge that obligation.

12. Two points of context are material. The first is that it is well-established that the duty of candour is an obligation of explanation rather than simply an obligation of disclosure. The substance of the obligation is well put by Sir Clive Lewis in his "*Judicial Remedies in Public Law*" 6th edition 2021, at paragraph 9-098. The obligation exists to ensure that a defendant explains, whether by witness statements, or the provision of documents, or a combination of both, the reasoning process underlying the decision under challenge. In the present case the Secretaries of State have, to date, chosen to discharge their candour obligation by disclosure of the documents in the four disclosure bundles.

No witness statements have been provided. The second point of context is the criterion for disclosure of documents in judicial review proceedings. The standard applied by the court when asked to decide whether disclosure of a document is required is whether disclosure is necessary for the fair and just determination of an issue in the case: see *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 per Lord Bingham at paragraphs 3 and 4, Lord Carswell at paragraph 38, and Lord Brown at paragraph 52.

13. It follows that the correct premise is that by making the disclosure they have already made, the Secretaries of State accept that disclosure of those documents is necessary for the fair and just disposal of the issues in this case or, at the least, per Lord Bingham at paragraph 4 of his speech in *Tweed*, that the disclosed documents are "significant to its decision". In this case the documents disclosed, which evidence the decision-making process were, no doubt, disclosed in support of the Secretaries of State's response to the challenges on the *Tameside* ground: the Secretaries of State will rely on these documents to support their case that the decisions rested on proper enquiry into and consideration of relevant matters. This is the context within which the Secretaries of State's general submission on relevance must be considered.

14. The practice of redacting, of blanking-out parts of documents disclosed in litigation on the ground that the part redacted is irrelevant, is long-established. One obvious situation is where a part of a disclosable document does not concern the subject matter of the litigation. The position in claims under CPR Part 7 goes significantly further. In *GE Capital Corporate Finance v The Bankers Trust* [1995] 1 WLR 172, Hoffmann LJ stated (at pages 174B and 175G and H):

> "It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant …
>
> … In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. … There is no additional requirement that the part must deal with an entirely different subject matter than the rest.
>
> The *Peruvian Guano* test must be applied to the *information* contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so."

15. The Secretaries of State's submission on relevance relies on the logic explained by Hoffmann LJ. The submission is to the effect that notwithstanding that each document under consideration was properly disclosable, it is then possible to remove by redaction any part of the document that does not directly bear upon one or the other of the Claimants' grounds of challenge. This includes the names of the civil servants, though could also include much else.

16. The logic that drives the Secretaries of State's submission extends well beyond the mere redaction of the names of civil servants outside the Senior Civil Service. It would permit redaction of the name of any and every civil servant, save where the identity of the person went to the legality of the decision, and would permit the removal of any part or word in the text of a document that did not in some way directly concern a ground of challenge. Moreover, the same reasoning would apply for all public authorities before the courts in all judicial review claims; the submission made does not identify any logical distinction between civil servants in government departments and persons employed by local authorities or by any other decision maker whose powers are derived from public law.

17. I accept that the outcome of the grounds of challenge in this case will not depend either on the identity of the decision-maker or of any other person involved in the decision-making process. The Claimants do not contend otherwise. However, I do not consider the correct approach to redaction of disclosed documents in judicial review pleadings can be driven only by the purity of Hoffmann LJ's logic. What is required to discharge the obligation of candour when a public authority chooses to meet that obligation by disclosure of documents must, at the least, be fully informed by the purpose of the candour obligation. Redaction, sentence by sentence or line by line, as a matter of course, runs against the grain of an obligation aimed at ensuring public authorities responding to judicial review claims should explain the reasoning underlying the decision under challenge. In *R v Lancashire County Council Exp. Huddleston* [1986] 2 All ER 941 Sir John Donaldson MR explained the position of a public authority defendant in judicial review proceedings in this way:

> "… the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure.
>
> Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.
>
> With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to enquire whether a particular authority

> has been successful in its endeavours … In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.
>
> … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if he considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

This explains the premise and extent of the duty of candour. A document that has been disclosed in judicial review proceedings ought not, absent good reason, be redacted on grounds of relevance in any way that impairs either the actuality or the appearance of a "cards face upwards" approach. So far as concerns the relationship between the courts and public authorities described by Sir John Donaldson (no longer a "new" relationship), the "cards face upwards" reference also makes the point that appearance has a part to play, not the least because the premise for disclosing the document at all is that disclosure is necessary for the fair and just determination of the case.

18. Redaction leads to significant practical difficulties. The present case is an example of a common situation where email exchanges and other contemporaneous documents are disclosed to explain a decision-making process. Most decisions made within central government now involve significantly sized groups of civil servants. On any occasion one civil servant within the group might be the sender of the message, might be the recipient of the message, or might (usually, will probably) be copied in. Sometimes (as in this case), the civil servants within the group are spread across different government departments. At the least, redacting names makes the decision-making process and the significance of each document disclosed more difficult to understand. In some instances, it may obscure the significance of a document almost completely. When correspondence and other documents are disclosed for the purpose of evidencing a decision-making process it will rarely be the case that it will not assist the court's understanding of that process and the decision itself to know by whom or to whom documents were sent, forwarded, or copied. In most cases, when this information is redacted, any outsider's understanding of the documents (and for this purpose the court is an outsider) is significantly hampered. Misunderstanding and misinterpretation become commonplace. When documents are disclosed, and parties then rely on them by including them in the hearing bundle, the court is under a practical obligation to consider those documents with a view to making sense of how the information in the documents bears upon the legality of the decision under challenge. All this is made much more difficult and much more time-consuming when (for example) successive strings of email correspondence, each pages long, are entirely anonymised. The same point applies to names redacted in the body of correspondence or other documents. All such redactions only detract from the intelligibility of the document and impair achievement of the purpose for which the document was disclosed in the litigation.

19. The Secretaries of State's response, that any concerns are about no more than "making reading documents a little bit easier", is glib. *First*, ensuring that documents disclosed in litigation to explain a decision-making process are readily intelligible is an objective worth achieving for its own sake. It is notable that the Secretaries of State's proposal

to deal with problems of intelligibility (both in this case, and generally) was to replace redacted names with a list of ciphers; an approach that would be laborious, prone to error, and even when error-free would only add a new layer of complexity to the task of understanding the narrative of the decision-making process from the documents disclosed.

20. *Second*, an approach to compliance with the obligation of candour that, as a matter of routine, hides detail that aids the court's understanding of the public authority defendant's explanation of the decision under challenge, is antithetical to the purpose of the candour obligation. *Third*, the appearance created by the Secretaries of State's approach is a matter of genuine concern. Reasonable and well-informed members of the public will readily understand that there are occasions (few in number) when documents disclosed in aid of the fair and just determination of legal disputes must be redacted as some information in the documents is sensitive. Considerations of national security and instances where public interest immunity can be asserted are obvious examples, and there will be others. However, a practice by which information, not sensitive *per se*, is routinely removed from documents risks undermining confidence that appropriate legal scrutiny is taking place under fair conditions, because it will be apparent that the routine redaction builds in a possibility that the sense or significance of a document may be overlooked.

21. The parties' submissions also addressed whether in other litigation, outside CPR Part 54, disclosable documents could be redacted on grounds of relevance alone or whether information removed must be both irrelevant and for example, confidential. Hollander's view seems to be that redaction is permitted only when information is both irrelevant and confidential (see *Documentary Evidence* 14th edition, at paragraph 10-14). This is also the practice in the Business and Property Courts: see CPR Part 57A, Practice Direction 57AD, at paragraph 16. The Secretaries of State place particular reliance on the judgment of the Court of Appeal in *Shah v HSBC Private Bank (UK) Ltd.* [2011] EWCA Civ 1154 in support of the submission that relevance alone is a sufficient reason for redaction. I do not consider that close analysis of the judgments of the judges of the Court of Appeal in that case, which are inevitably firmly rooted in the specific circumstances then before them, assists resolving any issue before me. Whatever the position may be in private law litigation, that will not determine the practice in public law litigation. The requirements of public law are different.

22. Drawing these points together, the principle that ought to guide the approach in judicial review proceedings is that absent good reason to the contrary (which might, for example, include that the information in question was subject to a legal obligation of confidentiality), redaction on grounds of relevance alone ought to be confined to clear situations where the information redacted does not concern the decision under challenge. The names the Secretaries of State seek to protect are not in this class. Names of civil servants should not routinely be redacted from disclosable documents; redaction should take place only where it is necessary for good and sufficient reason. This conclusion is consistent with the obligation of candour and with the general principle of cooperation between public authorities and the court that is one foundation for judicial scrutiny. This approach will also guard against the practical difficulties caused by excessive redaction, see Hollander's book at paragraph 10-15.

23. The question that remains is whether, set against this general position, there is sufficient reason to support the Secretaries of State's submission that the names of civil servants outside the Senior Civil Service should, as a matter of routine, be redacted from disclosable documents.

24. The Secretaries of State advance several points relying on the contents of the witness statements referred to at paragraph 10 above. The first is that the names of civil servants outside the Senior Civil Service should be removed because they have a "reasonable expectation of confidentiality" i.e., that civil servants have a general expectation that the fact they have been involved in a particular decision-making process will remain confidential even when the decision is subject to legal challenge. This expectation does not arise from any matter connected to the subject matter of any decision; it rests simply on the fact they are civil servants.

25. I do not consider any such general expectation (even assuming it exists in practice) could be reasonable. No such expectation would attach to any person as a matter of general employment law. Moreover, when at work civil servants are not involved in anything that can be described as a private activity, they are exercising public functions as part of the public service of the country. It is also material that while the Secretaries of State's submission refers to the class of "junior civil servants" this label was applied only to distinguish them from the civil servants working in grades comprising what the government refers to as "the Senior Civil Service". Therefore, the distinction between "junior" and "senior" civil servants is akin to the distinction between junior and leading counsel and is not necessarily any indication of age or experience. The class of "junior civil servants" includes civil servants with significant responsibilities.

26. The Secretaries of State advance a further, related point by reference to paragraph 15 of Ms Key's witness statement:

> "15. More generally, redactions of the names of junior civil servants encourages open conversation within Government. Officials within the department conduct their work on the understanding and expectation that their names will not enter the public domain where this is not necessary. If junior civil servants fear their names will be disclosed in legal cases, it could have a chilling effect on government as they might be hesitant to express concerns or provide candid advice, which could hinder effective decision-making, or may widely discourage participation in public service."

Her point is that the general effectiveness of the civil service depends on civil servants not being associated with the work they undertake in the public interest. Ms Key's opinion must rest on what is said earlier in the statement at paragraphs 12 and 13. She says that if civil servants become associated with contentious decisions they could become "… targets of unwarranted personal blame and through that, harassment, threats, or retaliation". She continues at paragraph 13:

> "I understand from Mr Andrews of the GLD [the solicitor with the conduct of this case for the Secretaries of State] that in recent

> years there have been examples of names and contact details of civil servants entering the public domain in association with contentious decision-making, resulting in their identification with the decision concerned with social and even main stream media. In one specific case, this involved the publishing of Mr Andrews' correspondence on behalf of the GLD. This exposed Mr Andrews to offensive messages from members of the public. The civil servants involved in these examples, and Mr Andrews, a relatively junior GLD lawyer were simply carrying out their public duty pursuant to Government policy and were in no position publicly to defend themselves on their own account, which makes this particularly concerning. Whether or not the relevant individuals have the same expectation of privacy as junior civil servants, the incident is illustrative of the general risks."

In his witness statement, Mr Smith gives one similar example. He refers to a Home Office Presenting Officer who, after acting as advocate for the Home Office in Upper Tribunal proceedings, received "abusive communications" from the (unrepresented) other party to the appeal.

27. I do not consider these examples compelling. In fact, they come nowhere close. Occasionally, professionals such as lawyers and others whose job is to act as representatives in Tribunal proceedings do come in for personal abuse. That is very regrettable, and it ought not to happen. However, the two examples in the evidence do not suggest any widespread problem, and there are no examples in the evidence to suggest that any practical problems have arisen because of the disclosed documents in this case. To the extent that any such general risk might exist there are obvious steps that can be taken that would not have any adverse impact on the quality of disclosed documents. For example, email addresses and phone numbers might be removed from documents before they are disclosed.

28. Moreover, as a matter of principle, generalised concerns of the sort raised by Ms Key and Mr Smith, unsupported by anything approaching compelling evidence, ought not to provide a touchstone for an approach to disclosure in judicial review claims. In a different context, that of an application by litigants for anonymity in *Various Claimants v Independent Parliamentary Standards Authority* [2021] EWHC 2020 (QB), Nicklin J made the following observation:

> "52. Finally … the evidence put forward by the Claimants falls a long way short of demonstrating a credible risk that if the Claimants were named (and their addresses provided) that they would be exposed to some risk of harm. There might exist a very small number of people whose attitude towards MPs (and those who work for them) is so hostile that they might conceivably be moved to offer some threat of physical violence to them, but this risk is remote. The Claimants have not put forward any credible and specific evidence that one or more Claimants is at particular

> risk of any such threat. The civil justice system and the principles of open justice cannot be calibrated upon the risk of irrational actions of a handful of people engaging in what would be likely to amount to criminal behaviour. If it did, most litigation in this country would have to be conducted behind closed doors and under a cloak of almost total anonymity. As a democracy, we put our faith and confidence in our belief that people will abide by the law. We deal with those who do not, not by cowering in the shadows, but by taking action against them as and when required."

This sentiment is relevant for present purposes too. The Secretaries of State's contention is that the treatment of disclosable documents ought to be conditioned for the sort of reasons Nicklin J described. I do not accept the Secretaries of State's contention; it is a counsel of despair. Reasonable members of the public well understand that civil servants perform their duties of informing and advising and assisting ministers in the public interest. Ministers are responsible for policy. It is irrational to associate civil servants with, or hold them responsible for, ministerial decisions or decisions made in pursuit of policies set by ministers. The ordinary and proper course of litigation – in this case the treatment of disclosable documents – ought not to be altered for fear of the possibility that some people, likely few in number, either may not, or may choose not to understand. Social media provides the opportunity for all opinions, however wrong-headed, to be broadcast. Sometimes those with the least to say will shout it loudest. That is as it may be. But the general approach to the conduct of litigation cannot be dictated by fear of the baser instincts of a misguided few.

29. Moreover, in this case the chance for such behaviour is very slim. Ms Key says that the proposal to make the Regulations, excluding houses in multiple occupation used to provide asylum support accommodation from regulation under Part 2 of the Housing Act 2004, has been "subject to media scrutiny and active engagement on social media". But public discussion of government policy is a long way distant from any possibility that civil servants might be harassed. On this point in this case, no specific evidence is advanced.

30. Overall, therefore, I do not consider there is any sufficient reason either arising from general considerations, or from the circumstances of this case to warrant the redaction from disclosable documents of the names of civil servants outside the Senior Civil Service.

31. In this case, the same conclusion applies to redaction in the documents disclosed to evidence the decision-making process of names of those who are not civil servants. Those concerned appear to be employed by contractors working with the Home Office to provide the premises needed by the Home Secretary to discharge his obligation under the 1999 Act of providing accommodation for asylum claimants who would otherwise be destitute. Here too, a blanket approach has been taken. There is no good reason for that approach.

*(2) Should the redaction claimed for LPP be maintained?*

32. The redaction occurs in an email dated 13 January 2023, sent by the Managing Director of Ready Homes to a civil servant in the Home Office. The explanation for the redaction is set out in a Note date 7 November 2023 prepared by junior counsel for the Secretaries of State.

> "7. The redactions to the substantive text … has been redacted on the grounds of common interest privilege. It is accepted that the Court will need to review this document to consider the issue.
>
> 8. The Defendants are prepared to un-redact the beginning of the opening line, as it assists in the explanation. The line opens "Finally, a piece of legal advice …". It can be inferred from that and the text that follows that CRH are passing on advice from a lawyer they instructed.
>
> 9. The Defendants' position is that the advice is covered by both the litigation and advice privilege limbs:
>
> > (a) Whilst it can be accepted that, on reflection, the advice itself may not have been in contemplation of this kind of litigation (or at least there is uncertainty) it was plainly given to CRH in contemplation of a different kind of litigation, in which the First Defendant would have a common interest (whether or not they were a party);
> >
> > (b) In any event, it is legal advice in which the First Defendant and CRH had a common interest. Common interest privilege is not restricted to litigation – see *Svenska Handelsbanken v Sun Alliance and London Insurance Plc (No.1)* [1995] 2 Lloyd's Rep. 84."

33. No witness statement has been provided in support of the claim to LPP. At the hearing, the Secretaries of State requested further time to file a witness statement. I refused that request. They have had ample time to prepare and file evidence. The importance of supporting claims to LPP with evidence is very well-known.

34. In any event, junior counsel for the Secretaries of State explained that any witness statement that had been (or might in future be) filed would say no more than what is set out, on instructions, in the Note. What is said in the Note is not capable of making good this LPP claim. The email itself is a communication between non-lawyers from different organisations. There is nothing in the context or in the nature of the document from which it is obvious that the part redacted is subject to LPP. The assertion of litigation privilege is insufficiently evidenced. This email was written some six weeks before the Regulations were laid. The Note suggests the communication was not in contemplation of this claim but "… of a different kind of litigation". But what that might have been is not explained. Similarly, the basis on which it is claimed that the situation gives rise to common interest privilege is unexplained.

35. The last part of the submission is that notwithstanding the absence of a witness statement to explain the relevant circumstances, I should inspect the redacted part, and the claim to LPP could be made good in that way. Although inspection by the court, *ex parte*, is no longer a step of absolute last resort, it is still a course to be taken with caution: see the judgment of the Court of Appeal in *WH Holdings Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652 at paragraphs 35, 39 and 40. In this case I declined to review the redacted text for myself because the likelihood that inspection would make good either the claim to litigation privilege or the claim to common interest privilege seemed very remote indeed. Making good either claim in this case would require an appreciation of the circumstances in which the email communication was made. There is nothing to suggest that this would be apparent from any part of the redacted text. The point made at paragraph 8 of the Secretaries of State's Note does not come close to what is required.

36. For these reasons the claim to redact this document on the ground of LPP fails.

*(3) Should the redaction claimed on grounds of relevance be maintained?*

37. The redaction is in a letter dated 10 November 2022, sent by the Levelling Up Secretary to the Prime Minister. A number of passages in the letter are redacted but only one is in dispute. That passage is as follows:

> "Finally, I understand Home Office and No10 are interested in removing the need for Houses in Multiple Occupation (HMO) to get licenses when providing accommodation for asylum seekers. [*words redacted*]. Landlords of larger HMOs – and in some areas, smaller HMOs – must be licensed and properties must meet standards. This is for safety reasons, for example there is a significantly higher risk of fire in HMOs. Home Office officials have suggested that this licensing system may be a barrier to housing asylum seekers and have requested exempting HMOs from licensing requirements. I have seen no evidence on how licensing is a barrier, and this move [*words redacted*] risks incentivising lower quality housing. [*words redacted*]"

38. The written submission in the Note is that the redacted passage comprises:

> "11. … political views expressed personally by the Secretary of State. They were expressed prior to the decision to pursue the policy made in January 2023, and long prior to the decision under challenge in March 2023. Such views are generally irrelevant to the decision under challenge. Once the decision to pursue the policy was taken, and bearing in mind the Draft Regulations were laid by the Junior Minister, with agreement from the Second Defendant personally, it is plain that Second Defendant considered the Draft Regulations "appropriate" (in the words of section 254(6) of the 2004 Act), whatever political

> views might have been expressed prior to the January 2023 political decision."

The submission goes on to contend that the words redacted were confidential because the letter is subject to the principle of cabinet collective responsibility.

39. I do not accept this submission. The submission that the contents of the letter are confidential because of the convention of cabinet collective responsibility fails because for the most part, the contents of the letter have been disclosed and there is no reason to think the part redacted that is in dispute has any greater claim to confidentiality on that ground than the remainder, for which any possible claim to confidentiality has been waived through disclosure.

40. The contention that the part redacted comprises "political views expressed personally" does not make good the submission that what is redacted is irrelevant. The remainder of the explanation in the Note suggests that this might be an occasion when a Secretary of State expressed doubt or concern about a proposed decision that was subsequently made notwithstanding his doubt or concern. If that is right, the part redacted might be relevant. While it is true that the part redacted might comprise no more than a comment showing no more than that the Secretary of State had doubts, a comment that would probably lead nowhere so far as concerns the legality of the decision to lay the Regulations, given that the greater part of this document has already been disclosed, showing an entirely sensible, wider rather than more narrow, approach to disclosure, I can see no compelling reason to support redaction of the part that is now in issue. The application to redact on grounds of relevance is refused.

*(4) Procedure.*

41. The parties made submissions on the procedure to be adopted by a party who wishes to disclose redacted documents in judicial review proceedings. The principal point in issue is whether there is any obligation on the disclosing party to explain a redaction at the point of disclosure or, whether redacted documents may be disclosed without explanation, so that the onus is on the receiving party to make an application for specific disclosure to see the part redacted, and the disclosing party's obligation to explain the redaction would only arise if and when an application for specific disclosure is made.

42. Both parties submitted that any guidance given ought to favour a process that is as simple and efficient as possible. I entirely agree.

43. A party disclosing a redacted document ought to explain the reason for the redaction at the point of disclosure. The explanation need not be elaborate; the simpler and shorter it can be the better. The explanation ought to be such that it affords the receiving party a sensible opportunity to decide whether to apply for disclosure of the document, unredacted. The approach taken by the Secretaries of State in this case, the provision of single word explanations, "relevance", "privilege" and so on, will rarely be sufficient. All will depend on context. I do not consider the approach I suggest will be unduly onerous for the disclosing party. Before deciding to provide a disclosable document in redacted form at all, the disclosing party will have given careful thought to the reason for redaction. It is neither unreasonable nor onerous to expect the

disclosing party to reduce that reason, succinctly, to writing. A requirement to explain at the point when the documents are served reflects in part the provision made in CPR 79.24. That Rule has no application either to these proceedings or to the general run of judicial review claims, but is certainly a model for an efficient and pragmatic approach.

44. When redacted documents are exhibited to a witness statement it may be appropriate for the reason for redaction to be given in that statement. All will depend on the reason for the redaction and the identity of the person making the witness statement. If the redaction is made on LPP grounds it will usually be better for the explanation to be given in a witness statement made by the solicitor with conduct of the case. If the redaction is made for some other reason, it will be for the disclosing party to decide who is best placed to provide the explanation. Whoever provides the explanation should do so in a witness statement. Experience shows that the process of reducing an explanation into a signed statement produces decisions that are better considered. A party receiving a redacted document can decide, taking account of the explanation provided, whether to apply for disclosure of an unredacted version of the document.

45. I consider that the steps sketched above will ensure matters are addressed fairly and proportionately.

## C. Disposal

46. The Secretaries of State's application to redact names from the disclosed documents is refused. Permission to redact the two specific passages is also refused. All documents affected will be re-served without redaction.

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