IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2023-002298**

ON APPEAL FROM THE ADMINISTRATIVE COURT (SWIFT J)

B E T W E E N:

THE KING on the application of IAB & ors

Respondents

- and -

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

Appellants

- and -

JUSTICE

Intervener

SKELETON ARGUMENT ON BEHALF OF THE INTERVENER

A INTRODUCTION AND OVERVIEW

1. The question in this appeal is whether the Appellants were entitled in these proceedings, and are more generally entitled, to redact the names of junior civil servants (**"*JCS names*"**) in documents disclosed pursuant to their duty of candour.

2. The Court's answer to this question is of considerable wider significance. It will determine the approach of all public authorities in judicial review proceedings to the redaction of the names of their officers. The principles endorsed by the Court will also be applied when public authorities consider redacting other kinds of information. The appeal will therefore shape future compliance with the duty of candour. It will also, in JUSTICE's submission, either reinforce or dilute the constitutional principle of open justice.

3. In light of these important ramifications, JUSTICE has sought to intervene in these proceedings. It did so before the Administrative Court pursuant to permission granted by Swift J. Its application to continue its intervention before the Court of Appeal was granted by Lewis LJ on 11 December 2023. JUSTICE is grateful for the opportunity to assist the Court.

4. The Appellants advance two broad bases on which redaction of JCS names is said to be permissible. The first is relevance; the second is "other good reasons", said to include the "peripheral" relevance of JCS names, a "reasonable expectation of privacy" on the part of junior civil servants, and the potential "chilling effect" of disclosure. JUSTICE will make brief observations in respect of the former, but will focus primarily on the latter. In doing so it will draw out the distinct but related questions of (i) when it is permissible to withhold JCS names from a claimant in judicial review proceedings, and (ii) when it is permissible to withhold JCS names which are before the Court and the claimant from the general public. This distinction is important in identifying the principles and authorities which guide the Court's analysis.

5. In summary, JUSTICE submits as follows.

6. As to ***redaction for relevance***:

   6.1. In determining whether and when it is permissible to withhold information from claimants on grounds of relevance, it is important to recognise that the concept takes colour from its context. In the context of the duty of candour in judicial review proceedings, "relevant" information must mean information necessary to provide a true and comprehensive account of the way the decisions in issue were arrived at.

   6.2. While the principles of open justice do not apply directly, their underlying purposes – including maintaining confidence in the administration of justice – remain salient. It is appropriate for the Court to take account of the impact a permissive approach to redactions may have on public confidence in the process of judicial review.

7. As to ***redaction for "other good reasons"***:

   7.1. Neither a "reasonable expectation of privacy" nor a potential "chilling effect" on public administration provides a proper basis for withholding JCS names from claimants. As to the former, no reasonable expectation of privacy arises in the circumstances. In any event this alone would not suffice, as the concept is merely one component in assessing a potential breach of Article 8 ECHR or misuse of private information. As to the latter, the concerns identified attach not to the disclosure of JCS names to claimants, but to their disclosure to the general public. They are properly evaluated by reference to the principles governing such disclosure: that is, the principles of open justice. Seeking to achieve non-disclosure to the public via non-disclosure to claimants impermissibly circumvents the application of these principles, creating a new exception to open justice "by the back door".

7.2. There is no basis in principle or authority for allowing defendant public authorities to conduct an at-large proportionality assessment in order to determine whether "other good reasons" might cumulatively justify non-disclosure to claimants in judicial review.

8. The sections which follow: (i) summarise the key principles of open justice (**section B**); (ii) offer brief observations on the issue of redaction for relevance (**section C**); and (iii) set out JUSTICE's submissions on the issue of redaction for "other good reasons" (**section D**).

B THE PRINCIPLES OF OPEN JUSTICE

9. A key set of principles in the appeal are those governing open justice and the circumstances in which restrictions on or derogations from it are permissible.

10. The Appellants assert (at [46]-[47] of their skeleton argument) that these principles have no relevance to the question before the Court. In order to understand why this is wrong, it is necessary to recall what the principles are and when they apply.

11. ***First***, open justice – that is, the overarching principle that justice is administered in public – is "a constitutional principle of the highest importance" (*Al Rawi v Security Service* [2012] 1 AC 531, [84]); it is "at the heart of our system of justice and vital to the rule of law" (*R (Guardian News & Media) v City of Westminster Magistrates Court* [2013] QB 618, [1]). It is of particular importance in judicial review proceedings: *R (Corner House Research) v Director of Serious Fraud Office* [2008] EWHC 246 (Admin), [18].

12. ***Second***, the principle has a number of important facets. These are summarised in *Attorney General v Leveller* [1979] AC 440, 450A-B and include that: (i) proceedings in court are open to the public and the press; (ii) all evidence communicated to the Court is also communicated publicly (see also *R (Guardian News & Media) v City of Westminster Magistrates Court*, [33]; *R I v Secretary of State for Justice* [2016] 1 WLR 444, [1]); and (iii) since in reality very few citizens will be in a position personally to scrutinise the judicial process, the media is able to do this on their behalf by reporting on proceedings (see also *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218, [38]).

13. ***Third***, open justice principles serve two key purposes: "[t]he first is to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly … [the second] is to enable the public to understand how the justice system works and why decisions are taken": *Dring v Cape Intermediate Holdings* [2020] AC 629, [42]-[43].

14. ***Fourth***, restrictions on open justice are permissible only where they are strictly necessary in order to maintain the administration of justice or avoid harm to other legitimate interests: see e.g. *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 (approved in *Global Torch v Apex Global Management Ltd* [2013] 1 WLR 2993), [10]. In consequence: (i) the burden of establishing the need for a restriction is on the party seeking it, and must be discharged with "clear and cogent evidence" (at [13]); and (ii) there is no question of discretion: a Court is required either to grant the restriction sought or to refuse it (at [11]).

15. ***Fifth***, the courts have no power to create new exceptions to open justice; this is a matter for Parliament alone, and the courts have warned against the dangers of usurping this prerogative "little but little, under cover of rules of procedure, and at the instances of judges themselves": *Scott v Scott* [1913] AC 417, 477, 485 *per* Lord Shaw; see also *Al Rawi* (holding on this basis that Parliament alone could introduce a "closed material procedure").

16. Importantly for present purposes, open justice principles are routinely applied where a party seeks to withhold a person's identity from the public. The governing provision is CPR 39.2(4), which provides that "[t]he court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary in order to secure the proper administration of justice and in order to protect the interests of that person." This test will be satisfied where:

    16.1. Disclosure to the public would create a "real and immediate risk" of Article 2/3 harm: see e.g. *In re Officer L* [2007] 1 WLR 2135, [19]-[20], [29].

    16.2. Disclosure to the public would result in a breach of Article 8 rights, having balanced these against the competing Article 10 rights of the press and the public: see e.g. *Re Guardian News and Media Ltd* [2010] 2 AC 697, [28]-[29]; *Global Torch Ltd v Apex Global Management Ltd*, [20]. Both a person's fear of their confidence being breached (see e.g. *R (C) v Secretary of State for Justice*, [34]) and their fear of harm from third parties (see e.g. *RXG v Minister of Justice* [2020] QB 703, [35](viii)) may weigh in the balance.

    16.3. The test of strict necessity is met on application of common-law principles: *R (Marandi) v Westminster Magistrates' Court* [2023] 2 Cr App R 15, [43](3). This may include where disclosure of a person's identity would render it impossible for them to continue performing their role, as in cases involving undercover police officers or members of the security services; or where it would expose a witness seeking to assist the Court to objective risks and/or subjective fears of harm (see e.g. *In Re Officer L*, [22]).

17. The test will not be satisfied simply because publicity may generate adverse consequences. Being identified in connection with proceedings is often "painful, humiliating, or deterrent", but this is "tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, and the best means for winning it for public confidence and respect": *Scott v Scott*, 463; *RXG*, [28].

18. These principles apply not only where a party seeks to withhold their own or a witness's identity from the public, but also:

    18.1. Where a third party named in documents seeks to have their identity withheld from the public. This is recognised in CPR 39.2(4), which no longer refers to a "party or witness" but to "any person"; see further *Abbasi v Newcastle on Tyne NHS Trust* [2023] 3 WLR 575.

    18.2. Where one party seeks to withhold the identity of a witness from another, subject to a "confidentiality ring": see e.g. *Kalma v African Minerals Ltd* [2018] EWHC 120 (QB), [9]-[15], [29].

19. Finally, there is no recognised principle that restrictions on open justice – including withholding a person's identity – can be justified on the basis of relevance alone. This would infringe the principles identified above, as material available to the Court would be made unavailable to the public even where this was not strictly necessary. That particular material is ultimately considered irrelevant to the disposition of the case cannot be treated as decisive: absent a sufficiently good reason for non-disclosure,[1] the public and the press have a right to see all the material before the Court and to report on whatever aspect of it they consider to be of interest: see e.g. *Mohamed (No. 2)* [40], [176]; *R (Guardian News & Media) v City of Westminster Magistrates Court*, [33].[2] If and to the extent that *R (Good Law Project) v Secretary of State for Health and Social Care* [2021] EWHC 1223 (TCC) (**"*GLP I*"**) suggests otherwise, it is wrongly decided.[3]

---

[1] Where such a reason is identified – for example, preventing harm to life and limb – the Court will consider the extent to which the restriction sought would compromise "the purpose of the open justice principle and the potential value of the information in advancing that purpose". This in turn may entail consideration of the centrality of the information to the proceedings: see e.g. *Millicom Services UK Ltd v Clifford* [2023] ICR 663, [43]-[44]. This is not the same thing as (ir)relevance alone forming the basis for a restriction.

[2] Open justice principles apply even in respect of material the judge has never read: *Dring*, [44].

[3] The Court was considering a "confidentiality ring" arrangement which did make the relevant material (including JCS names) available to the Court and (subject to restrictions) the claimants. It therefore rightly recognised open justice principles as directly applicable: [23]. Despite this, (i) the principal authority the Court relied on was *Shah v HSBC Private Bank Limited* [2011] EWCA Civ

20. The relevance of these principles to the issues before the Court is addressed below.

C REDACTION ON THE BASIS OF RELEVANCE

21. The Appellants contend that JCS names will not generally be "relevant" save in specific circumstances, and that it is permissible to redact them on that basis. This submission raises a number of closely related questions, including (i) whether it is permissible for a defendant in judicial review proceedings to make redactions within a disclosed document, thereby withholding the redacted information from the claimant, solely on the basis that the information is said to be irrelevant; (ii) if so, what standard should be applied – that is, what relevance means in this context and how clearly irrelevant information must be before it can properly be redacted; and (iii) whether, on application of this standard, it will generally be permissible to redact JCS names on grounds of relevance.

22. JUSTICE makes two short points regarding the proper approach to these questions.

23. The ***first*** point concerns the concept of "relevance".

24. The questions identified above fall to be answered in the specific context of judicial review proceedings. These proceedings differ from conventional civil litigation in meaningful ways. One key difference concerns the approach to disclosure. In brief:

    24.1. In civil litigation, the core obligation is to give standard disclosure under CPR Part 31. This obligation is focused on the provision of documents. The essential test is whether a document "supports" or "adversely affects" the parties' pleaded cases: see CPR 31.6 and *Harrods Ltd v Times Newspaper Ltd* [2006] All ER (D), [12]. The term "relevant" is used as shorthand for whether a document meets this test: *Shah v HSBC Private Bank Limited* [2011] EWCA Civ 1154, [25].

    24.2. In judicial review, the core obligation is the duty of candour. This obligation is focused on the provision of information, whether in the form of documents or statements.[4] The

---

1154, where open justice was not considered at all; (ii) the Court did not consider CPR 39.2(4), which applies the test of strict necessity to the anonymisation of "any person" (not "any person whose identity is of relevance to the issues"); and (iii) in explaining in *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) why it would have declined to lift the confidentiality ring arrangements on application of open justice principles the Court relied on a different rationale, connected not with relevance but with privacy: see [42.2] below.

[4] Documents will be expected where they are "reasonably required for the court to arrive at an accurate decision" (*Bancoult (No 4)*, [184]), or where they are the "best evidence" on the relevant issue (*R (National Association of Health Stores)* [2003] EWCA 3113 (Admin), [49]). See also *R (Police*

test is not limited to information which will assist the claimant's pleaded case, but extends to that which may give rise to further grounds of challenge: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2017] AC 300, [183]; *R (Police Superintendents' Association) v Police Remuneration Review Body* [2023] EWHC 1838 (Admin), [15](10).

24.3. A key reason that candour goes beyond standard disclosure in this way is that in judicial review, unlike in conventional civil litigation, a defendant public authority is engaged in a common enterprise with the Court in seeking to uphold the rule of law and ensure the highest standards of public administration: see e.g. *R (Hoareau) v Secretary of State for the Foreign Office* [2018] EWHC 1508 (Admin), [20]; *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, 945.

25. References to "relevance" must be understood against this background. Relevance is not a single static concept, but a shorthand which takes colour from its context. If it is to be used in the context of the duty of candour, it must reflect the scope of that duty – and mean, not simply information which "bears in a material way on the issues that the court must determine" (Appellants' skeleton, [16]), but information which is necessary to provide "a true and comprehensive account of the way the relevant decisions in the case were arrived at" (*SSFCA v Quark Fishing Ltd* [2002] EWCA Civ 1409, [50]) and to achieve the common enterprise of upholding the rule of law (see [24.3] above).

26. The wider and less precise scope of "relevant" information in the context of candour bears on the answers to the questions identified at [21] above. In particular, it is less likely to be permissible for a public authority, unchecked save on application of the stringent test for specific disclosure in judicial review, to be permitted to determine what information is or is not "relevant" within a document which is otherwise disclosable. It is also less likely that JCS names "will generally be irrelevant", given that – for the reasons identified by the Respondents and by Swift J – their redaction is liable adversely to affect the ability to obtain a full and comprehensive account of the decision-making process.

27. The second point, flowing from the first, concerns ***the relevance of open justice***.

28. The Appellants assert (at [46] of their skeleton) that no open justice issues arise in this case, because "the redaction of irrelevant information is not an exception to the open justice

---

Superintendents' Association) v Police Remuneration Review Body, [15]-[18] ("If documents matter, they should be provided").

principle."[5] This formulation is unnecessarily confusing. As noted at [19] above, it is correct to say that irrelevance alone is not a permissible exception to (in the sense of a permissible basis for restricting) open justice.

29. It may be that what the Appellants intend to say is that the redaction of irrelevant information does not engage the open justice principle. In this regard JUSTICE accepts that, if JCS names can properly be redacted by a defendant public authority on grounds of relevance – such that the names are not before either the claimant or the Court – the specific principles identified in section B are not engaged. This is subject to two important qualifications.

30. ***First***, the broad purposes of the open justice principle remain relevant. One of these purposes is to "maintain the public confidence in the administration of justice": *Attorney General v Leveller*, 450A; see also *R (Guardian News & Media) v City of Westminster Magistrates Court*, [2], [33]. This is particularly important in judicial review, where what is at stake is not only confidence in the justice system generally, but confidence that the courts will ensure that public authorities respect the rule of law and uphold the highest standards of public administration: see [24.3] above. In deciding whether and under what circumstances redaction for relevance is permissible in judicial review, it is therefore appropriate (and indeed important) for the Court to have regard to the potential impact on public confidence in the proceedings. As Swift J correctly observed (at [17] and [20]), this is liable to be undermined if the public sees the courts' vital task undertaken by reference to documents which appear incomplete or extensively redacted.

31. ***Second***, if JCS names may not properly be redacted on grounds of relevance – such that the Appellants must fall back on the alternative "good reasons" summarised at [4] above – open justice principles become highly relevant, for the reasons set out in section D.

D REDACTION FOR "OTHER GOOD REASONS"

D.1 Overview

32. The Appellants contend that, even if JCS names cannot generally be redacted for relevance, they can instead be redacted on the basis of "other good reasons".[6] In making this submission,

[5] The Appellants also say that JUSTICE accepted this at [21] of its submissions below. This is incorrect: all that paragraph does is endorse the uncontroversial proposition that, when determining whether JCS names should be withheld from the public, "the guiding principle is open justice".

[6] The Appellants say that they do not rely on these reasons as permitting the redaction of information which is "relevant": [37]. However, they define relevance narrowly as "bear[ing] in a material way on the issues that the court must determine": [16]. It therefore appears that they fall back on "other good reasons" if the Court considers that JCS names cannot be redacted for

it is unclear what principle or test the Appellants are asking the Court to apply and why. In particular, they do not explain (i) whether one or more of these reasons is said to constitute a freestanding justification for withholding information from claimants and/or the general public; (ii) if so, why; or (iii) insofar as some composite approach or test is proposed (see e.g. the reference at [45.3] to a "proportionality assessment"), how this approach is grounded in principle and/or authority.

33. In order to ensure a sound, principled approach, it is necessary to distinguish between the question of when it is permissible to withhold information from claimants in judicial review proceedings; and the question of when it is permissible to withhold information from the general public. These questions are distinct, though closely related. Each is examined below.

D.2 Withholding information from claimants in judicial review: a principled analysis

34. The first question is whether the reasons advanced by the Appellants, separately or together, constitute a permissible basis for withholding information – and specifically JCS names – from claimants in judicial review proceedings.

D.2.1 "Peripheral significance"

35. The first reason cited is the asserted "peripheral significance" of JCS names: [39]. This could not sensibly be advanced as a freestanding basis for withholding them from claimants, if the Appellants' primary arguments on redaction for relevance have been rejected. It is therefore considered in the context of the wider proportionality argument discussed at D.2.4 below.

D.2.2 "Reasonable expectation of privacy"

36. The Appellants contend that "a reasonable expectation of privacy applies to JCS names": skeleton, [40]. Swift J was correct to dismiss this as a proper basis for redaction vis-à-vis claimants.

37. The concept of a "reasonable expectation of privacy" is taken from European and UK privacy law. It is a component part of a claim for breach of the "private life" limb of Article 8 ECHR, and common-law claims for misuse of private information. Specifically:

---

relevance either because (i) while they are generally irrelevant, this alone is not a permissible basis for redaction; or (ii) they should generally be treated as relevant, in the wider sense for which JUSTICE contends (see [23]-[26] above).

37.1. In claims for breach of Article 8, the concept is used to decide when the right to respect for private life is engaged. If a person has a reasonable expectation of privacy in respect of particular information, the publication of that information without their consent is likely to interfere with their Article 8 rights: see e.g. *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] AC 1065, [4]. This is not, of course, the end of the analysis: whether there is a breach of Article 8 depends on whether the interference is necessary and proportionate in all the circumstances.

37.2. The same is true where Article 8 is relied on as founding restrictions on open justice. There is "no general exception to open justice where privacy or confidentiality is in issue": *Practice Note: Interim Non-Disclosure Orders*, [12]). While a reasonable expectation of privacy means Article 8 will be engaged, the court must go on to consider if it would be breached before authorising a restriction: see e.g. *JIH v NGN* [2011] 1 WLR 1645, [21].

37.3. In the tort of misuse of private information, a reasonable expectation of privacy is part of a two-limb test: *Bloomberg LP v ZXC* [2022] AC 1158, [26]. The courts first ask whether the claimant has a reasonable expectation of privacy in the relevant information, considering all the circumstances. The test is an objective one: ibid, [49].[7] If so, they go on to consider whether the expectation is outweighed by the publisher's right to freedom of expression. This involves the same balancing exercise between Article 8 and 10 rights that would occur in a case brought directly under Article 8.

38. In none of these cases is the existence of a reasonable expectation of privacy decisive of the rights and obligations of the parties. Further analysis is always required.

39. Against this background there are two difficulties with the Appellants' reliance on the concept.

40. ***First***, and as Swift J correctly found (at [25]), it cannot be said as a matter of generality that junior civil servants have a reasonable expectation of privacy in relation to professional communications they exchange, advice they provide, or professional opinions they express. These communications are not personal or social. They arise in the context of public sector employment, where accountability to the public is all the more important. And they arise in a context where civil servants know or should know that their employer may, entirely legitimately,

[7] Relevant factors include "the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher": *Murray v Express Newspapers Plc* [2009] Ch 481, [36].

be required to disclose them in the context of legal proceedings pursuant to its duty of candour. An expectation of privacy in these circumstances would not be objectively reasonable.

41. ***Second***, even if a reasonable expectation of privacy did arise, this alone would not be a sufficient reason for permitting information to be withheld from claimants in judicial review. As explained above, the concept is a component part of larger tests: it is not itself decisive of legal rights and obligations. To treat it as decisive here would be not only to transpose it to a new context, but to give it an entirely new level of significance. There is no proper basis, in principle or authority, for doing this. If disclosing particular information to a claimant could be shown to constitute a breach of Article 8 ECHR or a misuse of private information – with the concept of a reasonable expectation of privacy feeding into this analysis in the usual way – one might argue that this was a proper basis for withholding it.[8] But the Court does not ultimately need to decide this, as it plainly cannot be said as a matter of generality that disclosing JCS names to claimants would breach Article 8. Indeed the Appellants advance no such case.

42. ***Third***, the authorities cited by the Appellants (at [40] and [42] of their skeleton) do not compel or even support a different conclusion.

    42.1. *Cox v Information Commissioner* [2018] UKUT 119 (AAC) concerned, not disclosure in judicial review, but the relationship between the Freedom of Information Act 2000 and the Data Protection Act 1998. Under that specific framework, the question for the Upper Tribunal was whether disclosure of JCS names (and other information) was necessary to satisfy a legitimate public interest in all the circumstances. The only consideration of a "reasonable expectation of privacy" is found at [24], recording the Information Commissioner's conclusion that there was none.

    42.2. The comments at [268] of *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 46 (TCC) (**"*GLP 2*"**) are *obiter*: see [266]-[267]. The Court concludes, in a single sentence and without any supporting reasoning, that a derogation from open justice (the maintenance of a "confidentiality ring") would be necessary because disclosing JCS names to the public would "expose them to an unwarranted invasion of their privacy". This is a different rationale from the one used to impose the restriction,

[8] A breach of Article 8 or common-law principles relating to privacy arising from the unjustified disclosure of private information would certainly be a proper basis for restricting open justice by preventing disclosure of a person's identity to the public: see [16.2] above and *Marandi*.

which had been based on relevance: see *GLP 1*, [28]-[34] and [19] above. In these circumstances the Court's comments should not, with respect, be treated as persuasive.

43. For all these reasons, a reasonable expectation of privacy is not a proper basis for withholding JCS names from claimants in judicial review proceedings.

D.2.3 "Chilling effect" on public administration

44. The Appellants' third contention is that, if JCS names are not redacted, subjective fears of criticism, harassment or abuse would have a "chilling effect" on public administration: skeleton, [43]. It is here that the distinction between withholding names from a claimant and withholding them from the public becomes particularly significant.

45. It is clear from the Appellants' evidence that the risks asserted would (in the vast majority of cases) arise not from the initial disclosure of names to claimants, but from their subsequent disclosure to the general public.[9] This is why, for example:

    45.1. The statement of Joanna Keys refers to names "entering the public domain" resulting in "offensive messages from members of the public" (at [13]); and links the "understanding that [JCS] names will not enter the public domain" directly to the asserted "chilling effect" (at [15]) (emphasis added).

    45.2. The statement of Jonathan Marron refers to protecting junior civil servants from "exposure in public documents that might invite criticism (at [5]) and to "maintain[ing] protection from public exposure and scrutiny" (at [9]) (emphasis added).

46. As the risks relied on do not arise from disclosure to claimants, they cannot be a proper basis for withholding such disclosure. They could only be a basis for withholding the disclosure which actually triggers them: that is, disclosure to the general public. This is ultimately what the Appellants, insofar as they invoke the "chilling effect" argument, are seeking to prevent.

47. It might be suggested that these risks are triggered by disclosure to claimants because, once information is before the claimant and the Court, the principles of open justice are engaged (see in particular [12] above): as a result, disclosure to claimants generally results in onward disclosure to the public. However, as set out in section B, the authorities on open justice fully recognise that risks or other adverse consequences may flow from this onward disclosure –

[9] Where there are reasons for fearing reprisals from the other side – see e.g. the statement of Phillip Keys at [8]-[9] (single example of a "campaign of harassment" of a Senior Presenting Officer by an appellant) – this is appropriately, and obviously, dealt with on a case-by-case basis.

including of a person's identity – and are specifically designed to govern the circumstances in which those consequences will be sufficiently serious to prevent it.

48. Indeed, open justice principles account for the very kinds of concerns on which the Appellants rely – summarised by Ms Key as the protection of "privacy and safety" (at [12]). Thus, on an application to withhold a person's identity under CPR 39.2(4), the Court may take account of objective risks of harm; subjective fears; and interference with private life: see [16] above. If there were "clear and cogent evidence" that junior civil servants would suffer these consequences if their names were made public, appropriate protections would be available. Indeed a very similar type of request, concerning third-party medical practitioners involved in the care and treatment of a child, was considered and rejected in the case of *Abbasi*.

49. The problem for the Appellants is that, as Swift J rightly concluded (at [26]-[29]),[10] the evidence comes nowhere close to what would be required for such an application to succeed: see further section D.3 below. As a result, what the Appellants seek to do is to circumvent the application of principles which they cannot satisfy, but which are directly applicable to what they are seeking to do (prevent disclosure to the public), by applying instead to withhold information at the earlier stage of disclosure to the claimant.

50. This approach is impermissible. To endorse it would amount to creating, "by the back door", a significant new exception to open justice – something the courts have no power to do: see [15] above and *Abbasi*, [116]-[120].

D.2.4 Proportionality

51. Finally, the Appellants appear to suggest that even if no one of their "good reasons" is sufficient for withholding JCS names from claimants, they may be taken together and weighed in some kind of "proportionality assessment": skeleton, [45.3].

52. It is important to appreciate what is being suggested here. This is not a test the Appellants suggest a Court should apply. Nor can it be confined to the specific case of JCS names. If the approach is correct in principle, it is one which will be applied by defendant public authorities in all cases where they contemplate the redaction of information in a document otherwise being disclosed pursuant to their duty of candour.

[10] While Swift J was not directly applying open justice principles, he was plainly doing so by analogy: see e.g. [28]. Again he was also correct to do so, as for all the reasons given in section D.2.3 the "chilling effect" argument could only properly succeed if open justice principles were satisfied.

53. The submission appears to be that, in this scenario, a public authority is entitled to conduct some form of at-large proportionality assessment – the parameters of which are unclear, but can (evidently) include matters such as perceived "peripheral" relevance and potential (even if unevidenced) impact on public administration – and redact information on this basis. A claimant will then be unable to access this information save on an application for specific disclosure.

54. The Appellants have cited no authority for this proposition, and offered no principled basis for it. There is none.

D.2.5 Conclusion

55. For all these reasons, on a principled analysis, the "good reasons" put forward by the Appellants do not – individually or cumulatively – yield a proper basis for withholding JCS names from claimants in judicial review.

D.3 Withholding information from the public

56. If the Appellants are not permitted to withhold JCS names from the Respondents in this case (or from claimants generally), they do not seek – in the alternative – orders enabling them to withhold the names from the general public.

57. This is a surprising position given the substance of the concerns they express. As to the asserted "reasonable expectation of privacy", disclosure to the general public plainly constitutes a far greater interference with any such expectation than disclosure to the other side alone. As to the asserted "chilling effect" due to fear of abuse or harassment, this could be almost entirely avoided if JCS names went no further than the other side. As noted above, breach of privacy rights under Article 8 ECHR, objective risks of harm, and genuine subjective fears are all capable of founding a restriction on open justice in an appropriate case.

58. In these circumstances, one might have expected the Appellants to apply under CPR 39.2(4) for the non-disclosure of JCS names. This would be the proper course for addressing their concerns about the consequences of these names being made public. The Appellants have not done so – by inference, because they accept that such an application would not succeed.

59. Swift J observed that the Appellants had raised "generalised concerns, unsupported by anything approaching compelling evidence": [28]. This was undoubtedly correct in circumstances where:

59.1. The evidence of objective risk is limited to just two concrete examples, at [13] of the statement of Ms Key and [8]-[9] of the statement of Mr Marron (the latter relating to disclosure to a litigant rather than to the public).

59.2. Although the Appellants stress the significance of subjective fear, there is no direct evidence of this from junior civil servants. Even the indirect evidence is scant: Ms Key refers to it only hypothetically ("if junior civil servants fear their names may be disclosed": [15]) and Mr Marron confines himself to a generalised assertion (allowing the application "would be disproportionately distressing": [7]) (emphasis added).

59.3. The evidence of a "chilling effect" flowing from these fears is limited to generalised statements of opinion or possibility: Ms Key says that disclosure "could… have an adverse impact on Government policy delivery" (at 12]) and "could have a chilling effect on government"; Mr Marron opines that redaction is "incredibly important" (at [5]) and speculates that disclosure "could negatively impact" recruitment (at [8]) (emphasis added). Again, there is no evidence from junior civil servants themselves.

60. This evidence would not come close to meeting the requirements of a successful application under CPR 39.2(4), applying the principles summarised in section B; see also *Abbasi*.

61. This analysis only underscores the point made at [49]-[50] above: namely, that permitting the Appellants to withhold JCS names from claimants on the bases identified would allow them to obtain a result which is properly governed by open justice principles – that is, preventing disclosure to the general public – while avoiding the application of these same principles, thereby creating a significant exception "by the back door".

E CONCLUSION

62. For all the reasons given above, in addition to those set out by the Respondents, JUSTICE respectfully submits that the appeal falls to be dismissed.

GUY VASSALL-ADAMS KC

ELEANOR MITCHELL

Matrix

20 December 2023