Case No: CO/5488/2016

Neutral Citation Number: [2018] EWHC 977 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 3 May 2018

Before :

LORD JUSTICE IRWIN
MR JUSTICE GREEN

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Between :

(1) ABDEL HAKIM BELHAJ **(2) FATIMA BOUDCHAR**	**Claimants**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
- and -	
(1) SIR MARK ALLEN CMG **(2) COMMISSIONER OF POLICE OF THE METROPOLIS** **(3) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**	**Interested Parties**

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John McGuinness QC and Tom Little (instructed by **the Government Legal Department**) for the **Defendant**
James Eadie QC and Ben Watson (instructed by **the Government Legal Department**) for the **3rd Interested Party**
Zubair Ahmad (instructed by **the Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing date: 15th February 2018

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JUDGMENT

REDACTED CLOSED JUDGMENT MOVED INTO OPEN FOLLOWING HEARING ON 15th FEBRUARY 2018

1. This judgment is the judgment of the Court following a closed hearing on 15 February 2018. It should be read alongside our OPEN judgment arising from the same hearing and dealing with the law, our approach to the law, and the facts so far as they can be rehearsed in OPEN.

2. The point in issue arises from the submission by the Secretary of State that there have been a number of errors in disclosure of the three key documents (the advice provided to the DPP of Richard Whittam QC, the review note by Sue Hemming and the VRR decision by Gregor McGill). The documents have been identified in OPEN but disclosed only into CLOSED. The Secretary of State has indicated that a number (it is said 8) of examples of "overclaim" of legal professional privilege have been corrected, and we have been shown examples of those. Those corrections are in themselves uncontroversial, since of course they lead to greater information being revealed.

3. The argument arises over a larger number (20) of passages where the Secretary of State argues that material was inadvertently left unredacted in the original disclosure, which should have been redacted on the basis of LPP. These "underclaims" were notified by the Secretary of State, and are now sought to be corrected. The fact of this application has been made open in an approved communication to the Claimants' lawyers of 26 January 2018 and a communication request of 7 February 2018 from the Special Advocate which has been made open. No communication has revealed any of the content of an "overclaim" or an "underclaim".

4. The timetable of events is summarised in our OPEN judgment and appears in more detail to be as follows. The application for a s.6 declaration was made on 8 August 2017. The Closed Statement of Reasons made in support of the application by the Foreign Secretary was signed on 17 July 2017. The sensitive schedule to that statement is itself undated but must be taken to be of even date. Annex A to that Schedule contains the three documents with which we are concerned with the content now sought to be revised. Mr Eadie QC and his junior Mr Watson filed a skeleton argument in support of the application for a s.6 declaration dated 18 October 2017. This skeleton is based on the three documents and analysis therein which would, it is said, flow from the disclosure.

5. The Special Advocates were appointed by the Attorney General on 8 September 2017. In a closed skeleton argument dated 27 October 2017, they make it clear that they have read the three relevant documents, and various specific comments are made, bearing on the alleged "underclaim" passages. Although the Special Advocates do express support for the Claimants' arguments that "the Defendant has waived privilege and cannot now cherry pick", that is a reference to the broader argument with which we have dealt elsewhere, and not to the "underclaim" issue.

6. We understand that before the Special Advocates address documents in such a case as this, a senior and experienced specialist solicitor in SASO will have read and

considered the papers. We can make no assumption about how closely or with what aim in mind.

7. It follows that there is no indication that, by the end of October 2017, the lawyers acting for the Secretary of State had communicated any concern about "underclaim" of privilege, or that those acting in CLOSED in the interests of the Claimants had considered there might have been revelations of material in breach of privilege.

8. However, it is clear that the penny had dropped on the government side by the time of the hearing on 2-3 November. Mr Eadie raised in general terms (in CLOSED) that there might be a problem of this kind. This was followed by an indication of such a problem in OPEN and confirmation by the Secretary of State in the CLOSED skeleton of 21 December 2017 from Mr Eadie and Mr Watson that there was such a problem, and amended versions of the three documents were served. There then followed the submissions from the Special Advocates and the communication into OPEN we have summarised.

9. We are bound to note that it did take some time before the errors were identified, on either side.

10. Mr Ahmad has argued that the Secretary of State is "cherry picking" by seeking to correct these passages. With respect to him, it was not always clear what this argument in fact meant. He was not saying that the material concerned was not properly the subject of a claim of LPP. He was careful to say, perfectly properly, that he accused no official or lawyer of bad faith: indeed such a suggestion would be absurd in respect of an underclaim of LPP, unless what was advanced in the material revealed could be shown to bring an advantage to the Secretary of State. Mr Ahmad did not attempt to show this. Having reviewed the material, we do not believe such a construction could be made. In the end, we formed the view that the argument amounted to no more than the complaint that if these passages were permitted to be re-admitted to the protection of privilege, the Special Advocates would be deprived of material from which they might construe what legal advice was given. But that is the point of privilege, and the argument applies no more to these contested passages than to text over which privilege has always been claimed.

11. Mr Eadie in his argument emphasised that there was no evidence of "cherry-picking" and also asked us to bear in mind that the relevant lawyers, experienced and specialist in this unusual and sensitive area of law, must be taken to be well aware of the risks of cherry-picking: the protection of privilege might be lost altogether if a court reached such a conclusion. We do not find that argument particularly persuasive, since it depends on an assumption of expertise and attention here arguably inconsistent with the erroneous disclosure itself. Those who permitted this material to be disclosed may not have been so focussed.

12. In the end the answer to the "cherry-picking" argument is simpler. There is no coherent argument to be made that the passages revealed in breach of privilege could have been chosen to favour the Secretary of State or to favour the defeat of the judicial review claim. There is no basis for concluding there was any bad faith. The passages are agreed to have been privileged. The clear conclusion is that they were opened up in error.

13. Were the errors "obvious" so that the experienced and reasonable solicitor or counsel, aware of the case and the facts, would have realised disclosure had been in error? The strongest argument against this is the length of time before anyone on either side raised the problem.

14. We must bear in mind that this litigation is not an action in contract or tort with two or three parties. The case connects national security, international relations, difficult jurisdictional questions, the use of closed proceedings in a new area, the increasingly familiar "three dimensional" problems associated with the proper management of litigation which incorporates a closed process and a Defendant and Interested Parties who have divergent interests to protect. All that taken together may well mean that what can be regarded as "obvious" may realistically take longer to identify. The legal teams involved will have had a good deal of other (and potentially bigger) issues to consider: whether privilege was waived altogether and whether such issues can properly be addressed in CLOSED are likely to have diverted attention from these relatively restricted contestable passages.

15. We remind ourselves that the test is objective, and that evidence concerning what the lawyers in a given case actually thought and did may be of help, but cannot be determinative: see *Serdar Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB) at paragraph 25(viii) and paragraph 33.

16. We have considered the detail of the passages "underclaimed". Mr Ahmad has made no submissions that there is a pattern to them and no submissions, by reference to theme, time or individuals, which would establish any particular difficulty flowing from the re-assertion of privilege.

17. [REDACTED] However we too find no discernible pattern in the contested passages, and no basis for the inference that special unfairness will arise from the assertion of privilege.

18. For these reasons, and those expressed in OPEN, we conclude that the twenty identified passages of "underclaimed" privilege were errors, were not an attempt at "cherry picking", and were sufficiently obvious, once properly considered, that the errors would and should have been discernible. Bearing in mind that the fundamental principle is fairness we permit the renewed assertion of privilege over these passages in the material.