Neutral Citation Number: [2020] EWHC 2013 (Admin)

Case No: CO/2315/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

THE QUEEN (on the application of JOHN DALTON)	**Claimant**
- and -	
THE CROWN PROSECUTION SERVICE	**Defendant**
- and -	
THE INFORMATION COMMISSIONER	**Interested Party**

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Dr Andreas O'Shea (instructed by **JMW Solicitors LLP**) for the **Claimant**
Mr John McGuinness QC and Mr Dominic Connolly (instructed by **Crown Prosecution Service**) for the **Defendant**
The Interested Party did not appear and was not represented.
Hearing date: 15 July 2020

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Approved Judgment

COVID-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00am on 27 July 2020.

Mrs Justice Andrews:

INTRODUCTION

1. This claim for judicial review came before the court for determination on 15 July 2020, the hearing having been adjourned on two previous occasions for reasons beyond the control of the parties. Both parties were legally represented, though the Claimant ("Mr Dalton"), who is currently in HMP Thameside, had ably represented himself for several months before instructing solicitors in or around February 2020.

2. Unfortunately, the way in which the matter was presented to the court left a great deal to be desired. Although a hearing bundle was lodged with the court in June, I received the updated hearing bundle electronically at 20.45 on the night before the hearing. Mr Dalton's solicitors explained that they had had technical problems uploading it, for which they apologised, but they did not explain why the attempt to upload an updated bundle was left until the day before the case was due to be heard. Many of the key documents were missing from both the original bundle and the updated bundle. In any event the latter was lodged far too late to be of much assistance in preparation. Some of the missing documents were handed up during the hearing. I therefore had no opportunity to consider them in advance.

3. Even more seriously, the substance of the claim advanced at the hearing bore little resemblance to the case for which permission to proceed had been granted. The claim for judicial review, in its original incarnation, related to a decision taken in or around March 2019 refusing a subject access request made by Mr Dalton under section 45(1) of the Data Protection Act 2018 ("DPA"). The Defendant ("the CPS") accepted in November 2019 that the decision had been taken unlawfully. It offered to agree to a quashing order and, without waiting for a response, reconsidered the matter, making a fresh decision addressing and responding to the request – the principal redress that Mr Dalton would have obtained had his claim for judicial review succeeded at that time.

4. That should have brought these proceedings to an end, apart from Mr Dalton's claim for damages, if he sought to pursue it, which could have been made the subject of an order for further directions and transferred to the County Court. The re-made decision of 8 November 2019 appeared to have redressed the aspects of the original decision that were held by the judge who granted permission to be arguable public law errors.

5. Mr Dalton was dissatisfied with the new decision, albeit for different reasons. He asked the CPS to reconsider it and they did, producing a further decision on 25 February 2020. He also made fresh subject access requests, to which the CPS responded at the same time. By then, Mr Dalton was legally represented, though I have been informed since the hearing that funding was not agreed in principle until April. Of course, I acknowledge the practical difficulties of communicating with a client who is in prison in order to take instructions from him, especially in the current pandemic, but they provide insufficient excuse for what happened in this case.

6. CPR 54.15 provides that the court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed, but this is not simply a case of seeking to rely on additional grounds without issuing an application and paying a fee. No steps were taken (even at the hearing) to seek permission to amend the claim form and statement of facts and grounds to challenge

either of the later decisions. The nearest one got to an amended statement of facts and grounds were skeleton arguments from Mr Dalton's counsel, Dr O'Shea. Counsel's skeleton arguments are not a substitute for statements of case in proper form, irrespective of whether the claim is a public law claim or a private law claim.

7. Dr O'Shea's original skeleton argument was dated 27 April 2020 but not received by the CPS until 8 June 2020. The latest version, dated 13 July 2020, was included in the amended hearing bundle. It was therefore served and filed almost a fortnight after service of the CPS' skeleton argument (dated 2 July 2020). In that document, counsel for the CPS had tried to address what the CPS believed was the new way in which the claim was being advanced against it, based on what was said in the skeleton argument received on 8 June. They also provided the Court with an updated position on disclosure. There had apparently been a further tranche of material provided to Mr Dalton on 6 July with previous redactions removed, though this was said to provide no significant additional information.

8. Dr O'Shea's most recent skeleton argument took points of substance to which Mr McGuinness QC and Mr Connolly, on behalf of the CPS, had had no prior opportunity to respond.

9. The CPS was seemingly unconcerned by this highly unsatisfactory state of affairs, but I did not share its complacency. Of course, this Court must be assiduous to avoid form taking precedence over substance in cases where this would inhibit its important function of holding public bodies to account for abuses of power or other serious public law errors affecting the rights of the citizen. However, that does not mean that the parties are free to disregard the rules of civil procedure that apply to public law claims.

10. In *R(Talpada) v Secretary of State for the Home Department* [2018] EWCA (Civ) 84 Singh LJ said that it could not be emphasised enough that public law litigation must be conducted with an appropriate degree of procedural rigour. Both fairness and the orderly management of litigation required that there must be an appropriate degree of formality and predictability in the conduct of public law litigation as in other forms of civil litigation. He added at [68]-[69]:

> "*the courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.*
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> *These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation".*

11. That judgment was handed down in April 2018. Although those observations, with which I respectfully agree, were made over two years ago, and received publicity at

the time, it seems that the message is still not being heeded, or not being heeded sufficiently. Judges of this court have been forced to remind practitioners of what was said in ***Talpada*** on several occasions since. Indeed, only last month May J justifiably complained about evolving grounds of claim (in the face of case management directions that had tried to keep them within bounds) in *R(EG) v The Parole Board* [2020] EWHC 1457 (Admin).

12. I wish to make it clear to practitioners who appear in the Administrative Court that failure to observe the requirements of the rules and/or case management directions, with the result that claims for judicial review evolve exponentially, denying the court any opportunity to consider material changes and evaluate how they impact on the proceedings, may result in orders being made with a view to reinforcing the message in *Talpada*. The court may refuse to allow the claim to proceed on grounds for which permission has not been given. It may also make adverse costs orders, even in cases where the claimant is ultimately successful in obtaining judicial review on new or expanded grounds.

13. This case was even more egregious than the example given by Singh LJ, because it was not just a case of informally evolving grounds of challenge to the decision for which permission to bring judicial review was granted. It was an attempt to bring a claim for judicial review of a *different* decision or decisions, on *different* grounds to those which for which permission was granted, and to do so without giving the Court any opportunity to consider whether there was justification for allowing the fresh claim to be brought within the existing proceedings (as there sometimes is). A line must be drawn somewhere, and this case falls comfortably on the wrong side of it.

14. I understand that Mr Dalton is concerned about delay, and I have some sympathy with those concerns, but if a case is urgent, one can apply for expedition and if there is a good reason for doing so, the timetable will be shortened. Concern about delay does not justify ignoring the need to take stock of the position in the light of concessions made by the opposing party, and to ask for permission to amend the claim if one wishes to challenge a fresh decision, advance new grounds, or both.

15. Since permission had not been given to advance these grounds, or to challenge the November 2019 or February 2020 decisions instead of the decision they replaced, it seemed to me that the fairest course was to treat this as a "rolled-up" hearing of a claim for judicial review of the later decisions or, as Dr O'Shea at one point sought to put it, of the CPS's ongoing failure to comply with its statutory duties under s.45(1) of the DPA. I therefore heard full argument, recognizing that if matters had taken their proper course the CPS would have had an opportunity to adduce evidence as well as put in an amended defence.

16. For reasons that will appear, I am satisfied that if an application for permission to amend and to proceed with judicial review of the later decisions within the existing claim had been made at the appropriate time, it should have been refused, and therefore I am going to refuse permission now.

BACKGROUND

17. On or around 27 February 2019, Mr Dalton, who was then serving a custodial sentence for conspiracy to be concerned in the fraudulent evasion of VAT, made a

subject access request to the CPS under section 45(1) of the DPA for documents falling under the following headings:

i) communications with Eurojust between January 2007 and February 2019 including any responses;

ii) communications with the British Liaison Magistrate in Paris between January 2007 and February 2019 and any responses, excluding those already disclosed;

iii) communications with the French authorities directly between January 2007 and February 2019 and any responses;

iv) communications with the Spanish authorities, both directly and indirectly, between January 2017 and February 2019, including any responses; and

v) communications with the National Crime Agency between January 2016 and February 2019 including responses.

18. Part 3 of the DPA gives effect in domestic legislation to EU Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the investigation and prosecution of criminal offences or the execution of criminal penalties. It is an adjunct to the data protection afforded under EU Regulation 2016/679, (more commonly known as the GDPR) and as its name suggests, specifically addresses personal data that is processed by authorities such as the CPS in the context of the investigation and prosecution of crime.

19. Section 45 of the DPA, which falls within Part 3, provides, inter alia, as follows:

"(1) A data subject is entitled to obtain from the controller—

(a) confirmation as to whether or not personal data concerning him or her is being processed, and

(b) where that is the case, access to the personal data…

(3) Where a data subject makes a request under subsection (1), the information to which the data subject is entitled must be provided in writing —

(a) without undue delay, and

(b) in any event, before the end of the applicable time period (as to which see section 54).

[Note: the applicable period is one month].

(4) The controller may restrict, wholly or partly, the rights conferred by subsection (1) to the extent that and for so long as the restriction is, having regard to the fundamental rights and legitimate interests of the data subject, a necessary and proportionate measure to—

(b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;

…

(e) protect the rights and freedoms of others."

(5) Where the rights of a data subject under subsection (1) are restricted, wholly or partly, the controller must inform the data subject in writing without undue delay—

(a) that the rights of the data subject have been restricted,

(b) of the reasons for the restriction,

(c) of the data subject's right to make a request to the Commissioner under section 51,

(d) of the data subject's right to lodge a complaint with the Commissioner, and

(e) of the data subject's right to apply to a court under section 167.

(6) *Subsection (5)(a) and (b) do not apply to the extent that the provision of the information would undermine the purpose of the restriction.*

(7) The controller must—

(a) record the reasons for a decision to restrict (whether wholly or partly) the rights of a data subject under subsection (1), and

(b) if requested to do so by the Commissioner, make the record available to the Commissioner."

20. Section 51(1)(b) of the DPA specifically addresses the situation where the data controller restricts rights of access to data requested under s.45(1). The subject can request the Information Commissioner to check that the restriction imposed was lawful. The Commissioner must then take such steps as appear to her to be appropriate to carry out that check. If she is not satisfied, she may decide to take steps against the data controller under Part 6 of the Act, which includes wide-ranging powers under sections 142 and 146.

21. The data subject also has a right of complaint to the Information Commissioner under s.165 regarding an alleged infringement of Part 3 of the DPA, and the Commissioner has the right to investigate the complaint and seek an order from the High Court requiring compliance by the data controller with its statutory obligations. One of the things that the Information Commissioner can do is inspect the unredacted data in the hands of the data controller, and perform her own evaluation of whether any redactions were justified in principle, either because the request related to a document that was out of scope, or by reference to one or more of the statutory justifications, and if the latter, whether they were necessary and proportionate.

22. It is important to note that an individual is only entitled to request personal data relating to him or her. So, for example, if a document comprises several pages with a reference to that person in one passage on one page, the data controller is only obliged to disclose that passage. He may choose to disclose the whole document and redact all parts of it that are out of scope, or to disclose just the relevant extract. If that section of the document relates not only to the subject but to other individuals, and disclosure of the data to the subject might lead to the identification of those individuals or otherwise amount to unjustified processing of data relating to them, then the controller may redact references to them under s.45(4)(e).

23. When a person makes a subject access request under the DPA they do not need to have a reason for doing so. However, Dr O'Shea explained that the background to the subject access request is that Mr Dalton considers that the data may assist him in his pending application for permission to appeal to the Court of Appeal (Criminal Division) or in related confiscation proceedings.

24. Mr Dalton was the subject of a European arrest warrant issued by the British authorities in July 2009. He was arrested by the French authorities about a year later, and it appears that he was then held in custody by them until either December 2011 or January 2012, after which he was released and extradited to the UK. Among the points that Mr Dalton seeks to raise on appeal against conviction and sentence are a double jeopardy argument relating to that period of incarceration, based on the Schengen Implementing Convention, and an argument relating to how much of the time that he was held in custody in France should have counted towards his sentence.

25. So far as the confiscation proceedings are concerned, I understand that Mr Dalton believes that the documents may assist him in demonstrating that the available amount is less than the recoverable amount, which the CPS has concluded is £1.5 million. Under the relevant provisions of the Proceeds of Crime Act 2002, the burden of proving that the available amount is less than the recoverable amount lies on Mr Dalton.

26. Whilst the CPS has an ongoing common law duty, notwithstanding a person's conviction at trial, to disclose material in its possession that might cast doubt on the safety of his conviction (see *Nunn v Chief Constable of Suffolk* [2014] UKSC 37 [2015] AC 225) that duty does not extend to responding to wider-ranging requests for evidence that might assist him in an appeal. Therefore, Mr Dalton decided to utilise his rights under the DPA to access any personal data within the categories requested that the CPS might have in its possession.

27. In a brief, undated decision letter which Mr Dalton received on 12 March 2019, the CPS responded to his request in these terms:

> "the information that you have requested relates to a case that is still active. In these circumstances we are unable to proceed with your request in accordance with section 45(4)(b) DPA 2018 … because it would be likely to prejudice the ongoing proceedings. If you wish to pursue your request at the conclusion of the case, please contact us at the address below…"

28. Mr Dalton was understandably dissatisfied with that response, not least because it was a blanket refusal. It appeared that no thought had been given by the CPS as to whether

the requirements of the subsection of s.45(4) that was then being relied on were satisfied in respect of each relevant document. He sent a pre-action protocol letter to the CPS dated 17 April 2019, to which there appears to have been no response.

29. On 27 May 2019 the single judge refused Mr Dalton's application for leave to appeal to the Court of Appeal (Criminal Division). He renewed his application to the Full Court, and I have been informed that, although over a year has elapsed, the renewed application has not yet been considered. It seems likely, though I do not know this for certain, that the application has been stayed pending the outcome of this judicial review.

30. Having received no response to his pre-action protocol letter, on 11 June 2019 Mr Dalton issued the present claim for judicial review seeking to challenge the CPS's refusal to disclose data as required by the DPA in its decision received by him on 12th March. At that stage he sought interim relief in the form of an order for the delivery up of the information that had been withheld. He also indicated on the claim form that he wished to make an application for damages under article 56 of the Directive.

31. On 8 July 2019, the CPS acknowledged service indicating an intention to contest the claim, and filed Summary Grounds of Defence. These documents were absent from both versions of the hearing bundle, but fortunately they were supplied to me separately by the Administrative Court Office, so I was able to see what was in issue and what arguments were being advanced by way of defence to the claim at the time that permission to proceed was granted.

32. The CPS relied on section 45(4)(b) of the DPA, but it also claimed that a substantial part of the material sought was subject to legal professional privilege or had already been disclosed within the criminal proceedings. The CPS asserted that there was nothing in the material which would assist Mr Dalton in his appeals against conviction or sentence. If there were, it would have been disclosed to him already.

33. Mr Dalton also exercised his rights under section 51 of the DPA to make a request to the Information Commissioner, who contacted the CPS. However, that got Mr Dalton nowhere. In a letter dated 6 September 2019 the Information Commissioner simply repeated to Mr Dalton the purported justification for withholding the information that the CPS had given, namely that there was a "live hearing for your case" and that they could not disclose the data at that stage. That tacitly endorsed what the CPS had said. The Commissioner said that she was going to close the file. That decision was maintained in a letter dated 19 September 2019 which said that "where there remains a dispute about data protection matters, it is for the two parties to resolve between them". On the face of it, that does not seem to me to accord with the Commissioner's statutory role and responsibilities, but that is not something I have been called upon to decide in these proceedings.

34. On 29 July 2019 permission to bring judicial review was refused on the papers but Mr Dalton exercised his right to renew his application to an oral hearing. The matter came before Mr Michael Fordham QC (as he then was), sitting as a Deputy High Court judge, on 5 September 2019. Mr Dalton, with the assistance of a litigation friend, appeared by video link from prison. The CPS chose not to attend, as it was entitled to do.

35. Mr Fordham granted permission to proceed with the claim for judicial review. He directed that a 12-page summary that Mr Dalton had prepared for the purposes of that hearing should be served on the CPS. Naturally, I expected to find a copy of that document in the bundle, but it was not there, and although I requested one at the hearing, neither party was able to provide it. Therefore, I was unable to see how the claim was put by Mr Dalton at the time when permission was granted. Fortunately, I was provided at the hearing with a transcript of Mr Fordham's judgment, which clearly explains his reasons and gives some insight into the arguments that he heard.

36. He said that what was at the heart of the case and properly arguable is that invoking s.45(4)(b) of the DPA necessarily requires an evaluative judgment to ask the relevant questions and answer them properly. Disclosure may result because the information involves no risk of prejudice to prevention detection, investigation or prosecution of criminal offences or execution of criminal penalties, in which case on the face of it this exemption could not be relied on. Alternatively, if it does involve a risk, a balancing exercise needs to be performed, the risk needs to be evaluated and assessed and then consideration has to be given as to how to balance it against the rights and interests of the data subject, in order to decide whether it is necessary and proportionate to restrict the information from being provided. On both of those points, the emphasis on "wholly or partly" and "to the extent that" indicates that careful consideration has to be given to that evaluative judgment.

37. Mr Fordham recorded that Mr Dalton did not accept that that particular subsection could be relied on by the CPS anyway, in the circumstances of a criminal trial that was finished and an ongoing appeal, observing that that was "all a matter for argument". He also made the point that some of the arguments that were touched on in the Summary Grounds of Defence appeared to give reasons other than those that were given in the decision letter - presumably a reference to the claim for legal professional privilege. Finally, he stated for the sake of completeness that interim relief had not been pursued and that he would not have been prepared to grant it.

38. It is therefore clear that the only decision for which permission to proceed with judicial review was granted was the decision received by Mr Dalton on 12 March 2019. The grounds of challenge for which permission was granted were those in the original claim form, as further articulated in the 12-page document that was before the judge at the hearing and addressed in his judgment.

39. Mr Fordham said that standard directions for the progress of the claim should apply, and case management directions were made administratively by an order dated 14 October 2019. The date for the substantive hearing was subsequently fixed for 28 November 2019.

40. Upon receipt of Mr Fordham's judgment, the CPS reconsidered Mr Dalton's original subject access request. On reflection, it accepted that its decision was wrong in law because it had failed to give individual consideration to each item of data held, and had adopted a blanket approach of refusing to provide any of the data that fell within the request under section 45(4). The CPS Information Management Unit (IMU) therefore carried out a further review of all relevant data that the CPS held, identified documents that fell within the subject access request, and on 8 November 2019 issued a fresh decision letter to Mr Dalton accompanied by 248 pages of documents. Some of those documents were redacted.

41. The covering letter, written by a Mr Gerard Martin, a specialist prosecutor in the CPS Appeals and Review Unit, stated that some of the information had been withheld in line with section 45(4)(e) DPA because other individuals could be identified from the information. It further stated that information had been withheld which attracted legal professional privilege. It referred to an annex to the letter which gave further information about these exemptions, and it gave details of the Information Commissioner's office and the right to contact them if Mr Dalton was unhappy with the response or the decisions made.

42. On the same date, Mr Martin wrote a separate letter to Mr Dalton inviting him to consent to an order which would have brought these proceedings to an end. The draft order, if agreed by the parties and approved by the court, would have quashed the undated decision that was the subject of the claim for judicial review, on the basis that it was wrong in law because it did not give individual consideration to each item of data held. However, the draft order also referred to the fresh decision made on 8th November. It stated that:

"*subject to appropriate redactions that relate to the protection of third-party data rights and legal professional privilege, the Defendant has provided the relevant documents to the claimant in a letter dated 8 November 2019.*

The Defendant will not restrict the provision of the relevant documents by reference to the exemption under section 45(4) DPA 2018."

I presume that there was a typing error in the last sentence and the reference to section 45(4) was intended to be a reference to section 45(4)(b), that being the section which was originally relied upon. The CPS were still relying on section 45(4), albeit on a different subsection of it, namely subsection (e).

43. Also on 8 November, pursuant to case management directions given in October, the CPS filed a further submissions document with the Court which made it clear that it did not seek to contest the application for judicial review. It explained that it had subsequently re-addressed the original subject access request and provided the documents assessed to fall within it. If Mr Dalton did not sign the consent order, the CPS said it would consent to the Court making an order quashing the decision.

44. Mr Dalton did not sign the draft consent order. That was his prerogative. On 25 November 2019 he sent a 4-page document to the court entitled "Addendum to pleadings following further submission of data by the defendant on 08/11/2019." In it he asserted that: (i)data falling within part 3 of the DPA could not be withheld on the basis of legal professional privilege; (ii) redactions made on the basis that the information related to other individuals were not necessary or proportionate; and (iii) some of the data provided by the CPS was missing or incomplete. He also made the very serious allegation that the withholding of data was a deliberate ploy by the CPS to ensure that his detention in prison was prolonged. I have seen nothing that would justify that assertion, which Dr O'Shea very properly did not seek to pursue.

45. On the same date, Mr Dalton sent a letter to the IMU asking them to review the response provided to him on 8th November. Yet no steps were taken to ask the Court for permission to amend the claim for judicial review by substituting as the target the decision of 8 November 2019 which had superseded the original refusal.

46. The hearing listed for 28 November 2019 was adjourned because the prison was unable to provide a video link, and at that stage Mr Dalton was still representing himself. Mr Dalton then sent letters seeking further specified data from the CPS on 10 December 2019 and 10 January 2020.

47. On 25 February 2020 Mr Martin of the CPS sent a letter to the solicitors who by then appeared to be acting on behalf of Mr Dalton in these proceedings. The letter explained that the IMU centrally processes all requests for access to data under the DPA that are submitted to the CPS. The process involves a page by page review of all information held which is in scope of any request made. The first review is carried out by an information management adviser, which is then followed by a second review conducted by an independent information management adviser, to ensure that redactions have been applied in line with the legislation. Mr Martin stated that, in the light of Mr Dalton's concerns in respect of the application of an exception for legal professional privilege, the IMU had reconsidered the material previously disclosed. All material had been reviewed again, and the only exemptions applied were those under section 45(4)(e).

48. The effect of this concession is that I do not have to decide whether, unlike the position under the GDPR, there is an obligation to disclose material which attracts legal professional privilege. However, it does seem to me that the inability of the court to issue a warrant under Schedule 15 to the DPA in respect of certain categories of legally privileged documents (see paragraph 11(2) of that Schedule) suggests that the position is not as straightforward as either party claims.

49. The letter enclosed an amended version of the information previously disclosed on 8 November 2019 on an encrypted disc marked Bundle 1, for which the password was separately supplied. In addition, it said that whilst conducting the review, further material was identified that could fall within the scope of the original request. That material, similarly redacted in accordance with section 45(4)(e), was also on that disc. The 248 pages originally provided to Mr Dalton thereby became 442 pages. The letter continued by stating that in response to Mr Dalton's queries in his letters of 10 December and 10 January, a further review of the material had been carried out. An index to the letter outlined his specific requests and the CPS responses to them and the further material disclosed which was on a second encrypted disc marked Bundle 2 – which was 745 pages long. It was pointed out that some of these documents were duplicates. The total number of pages disclosed to Mr Dalton on 25 February 2020 was therefore 1187.

50. The letter said that the material was served in this manner "to ensure that we have responded to all of Mr Dalton's questions and we have provided everything held and within the scope of his requests subject to any exemptions that may apply." The right to contact the Information Commissioner was again notified in appropriate terms.

51. I can well understand why, in the wake of the increasing quantity of disclosure, and the fact that in consequence of his persistence he now has 1187 pages of documents instead of fewer than 300, Mr Dalton has treated statements by the CPS that they have given him everything to which he is entitled with a substantial degree of scepticism. Nevertheless, each of the fresh decisions was plainly not a blanket refusal, and appeared on the face of it to have involved the very exercise of judgment which the judge granting permission had stated was (at least arguably) required. The original

justification for refusal to provide the data was abandoned in November. Documents were provided, albeit with redactions, and an explanation was given of the reasons for the redactions. The CPS also engaged with Mr Dalton's request for reconsideration and carried out the exercise again, resulting in further data being released, as well as versions of documents already provided to him which contained fewer redactions.

52. The CPS could not have identified the third parties whose identities were protected by the redactions without undermining the reasons for redacting the documents in the first place. Dr O'Shea has suggested that section 45(4)(e) is not to be applied to protect the rights and freedoms of third parties whose identities have already been revealed to Mr Dalton. I disagree. There are no exceptions for information that has already been supplied to the person making the request. Given the emphasis laid on the protection of the rights of individuals, it accords with the spirit and objectives of the Directive to adopt a restrictive approach to information that would identify persons other than him, irrespective of whether he has received that information by other means. They have the same entitlement to protection of data relating to them as he does in respect of data relating to him.

53. The hearing was re-listed for 26 March 2020, but an order was made by Jay J vacating that date, almost certainly because of the need to make alternative arrangements for hearings in the wake of the COVID-19 Pandemic. (This is how it finally came to be listed for hearing before me on 15 July 2020). Yet even after funding arrangements for Mr Dalton's legal representatives were finalised in May, nothing was done to seek the Court's permission to amend the claim, or to obtain permission to argue new grounds.

54. The failure to seek permission to amend might have been understandable whilst Mr Dalton remained a litigant in person, especially as he is in prison, although when he was representing himself Mr Dalton proved that he was more than capable of finding his way around the complications and legal niceties of the DPA. One might have thought, therefore, that he or his litigation friend might have been able to find out what the Civil Procedure Rules require a claimant to do in that situation. Whatever the excuse that might be afforded to Mr Dalton, it does not extend to his solicitors or counsel who have had ample opportunity to look at the relevant provisions of CPR 54 and PD 54A and to consult the Administrative Court Guide.

55. Had they done so they would have become aware of the clear advice given in paragraph 9.2 of the 2019 edition of the Guide. The relevant passages are worth quoting in full:

> **9.2. Amending the Claim**
>
> 9.2.1. If the claimant wishes to file further evidence or rely on further grounds then the claimant must ask for the Court's permission to do so. To seek permission the claimant must make an application in line with the interim applications procedure discussed at paragraph 12.7 of this Guide.
>
> ….
>
> 9.2.3. The application may be dealt with in advance of the substantive hearing or at the hearing itself. The decision on when the application should be dealt

with is ultimately a judicial one, but the parties should indicate a preference when lodging the application.

9.2.4. The Court retains a discretion as to whether to permit amendments. In *R (Bhatti) v Bury Metropolitan Borough Council* [2013] EWHC 3093 (Admin) the Court warned that, where the defendant intended to reconsider the original decision challenged, it may not be appropriate to seek a stay or to amend the claim. Instead, it may be more appropriate to end the claim (see chapter 22 of this Guide) and, if the claimant seeks to challenge the new decision, to commence a new claim. The exceptions to this principle, where the Court may be prepared to consider the challenge to the initial decision, are narrow, and apply only where:

9.2.4.1. The case raises a point of general public importance; and

9.2.4.2. The point which was at issue in relation to the initial decision challenged remains an important issue in relation to the subsequent decision.

9.2.5. If the defendant has made a new decision which the claimant seeks to challenge, it may in some circumstances be more convenient for the Court to permit parties to amend the claim to allow a challenge to the new decision. Where permission is granted to amend the claim after permission to apply for judicial review has been granted, the parties should ensure that the substantive hearing bundle only includes relevant documentation. Any documentation that is only relevant to the initial decision should not form part of the bundle. The claimant should note the following guidance (as observed at paragraph 22 of *R (Hussain) v Secretary of State for Justice* [2016] EWCA Civ 1111):

9.2.5.1. The Court retains discretion to permit amendments and may make an assessment that overall the proper conduct of proceedings will best be promoted by refusing permission to amend and requiring a fresh claim to be brought.

9.2.5.2. The Court will be astute to check that a claimant is not seeking to avoid complying with any time limits by seeking to amend rather than commence a fresh claim.

9.2.5.3. A claimant seeking permission to amend would also be expected to have given proper notice to all relevant persons, including interested parties.

56. As the Guide states, on occasion when the decision maker re-makes a decision in the course of proceedings for judicial review, the Court will give favourable consideration to an amendment of the original grounds so as to make the new decision the focus of challenge. However, that depends on the circumstances, and it cannot be assumed without asking the Court that the case can evolve to encompass replacement decisions. There is a world of difference between a re-made decision which, for example, takes into account fresh information but results in an identical decision to the first, on essentially the same grounds; and a re-made decision that cures the original ground of complaint and produces an entirely different outcome. This case

falls into the latter category, which would normally require a fresh claim to be brought if the claimant was dissatisfied with the second decision, particularly if the grounds of challenge were completely different from those originally articulated.

57. The hearing of the substantive judicial review before me took place almost two months after the last date on which any claim for judicial review could have been brought of either of the more recent decisions by the CPS to give disclosure (for these purposes I leave out of account the July disclosure which merely removes some of the previous redactions in the documents disclosed in "Bundle 1".) However I must take into account that when he was still representing himself, Mr Dalton did act swiftly to lodge his original "Addendum to pleadings" document, which at that stage was of a manageable length and relatively easy to follow. Therefore he did take some steps, albeit not the correct ones, to challenge the 8 November decision, and he did so expeditiously.

THE NEW CLAIM FOR JUDICIAL REVIEW

58. When I received the updated bundle for the hearing, Mr Dalton's "Addendum to pleadings" document had grown to some 60 pages. It appeared from the index that it had been amended on "various dates". So far as I was able to make out, only one page of it addressed the statutory justification relied on for the redactions in the documents supplied on and since 8 November 2019.

59. A significant part of that document is devoted to complaints about the justification given for the original refusal in the Summary Grounds of Defence, which the CPS no longer seeks to defend. Another lengthy section complains about the period that Mr Dalton has spent in prison, though I understand that since the custodial element of his sentence expired, he has been kept at Thameside awaiting extradition to Hungary on an unrelated matter. Dr O' Shea explained that Mr Dalton's grievance is that if disclosure had been provided sooner, his renewed application to the Full Court would have been dealt with by now, as would the extradition proceedings.

60. I was therefore driven to treating counsel's skeleton argument as if it were a revised statement of facts and grounds, although it does not follow the structure of that type of document and the public law grounds of challenge are not easily discerned from it. The complaint appears to be of an alleged failure to act in a procedurally fair manner in making decisions to restrict data, because of a lack of transparency or adequate explanation of how the balancing exercise was carried out; but it also encompasses a complaint about inadequacy of reasons. There are also examples given of allegedly inappropriate and unjustified redactions which are said to have come to light when the CPS provided the same documents with fewer redactions in them.

61. I have already mentioned that the amended hearing bundle did not include the transcript of Mr Fordham's judgment or the 12-page document he directed Mr Dalton to serve on the CPS. However those omissions paled into insignificance compared with the absence of a copy of the 8 November 2019 letter, the 25 February 2020 disclosure letter and the further requests made by Mr Dalton in the interim, even though those two decisions had now become the focus of the challenge (and all the documents that had been disclosed by the CPS were included in the bundle). This hampered my evaluation of the criticisms of those decisions raised in Dr O'Shea's skeleton argument. When I asked to see the decision letters, I was handed up a slim

clip of documents by Mr McGuinness which contained all the relevant correspondence.

62. This is no way to conduct proceedings for judicial review.

63. The CPS are not without a share of fault in this. When I raised the matter with counsel at the start of the hearing, Mr McGuinness said that he was not inclined to take any objection to the failure to follow the proper procedure, because the CPS had a complete answer to the informally reformulated claim namely, that judicial review was a last resort, and the proper course for Mr Dalton, if he wanted to challenge the redactions made under s.45(4)(e), was to go to the Information Commissioner, as Parliament intended.

64. The fact that the CPS thought it had a complete answer to the changed case which did not involve engaging with its merits, overlooks the rather important point that the rules of civil procedure are not just there for the convenience of the parties. The court needs to be equipped to deal fairly with the arguments too. The answer to the question whether there is an adequate alternative private law remedy or whether the court should entertain the public law claim even though such remedies have not yet been exhausted, may well depend on an assessment of the merits of the public law claim. As Singh LJ observed in *Talpada,* if the rules are not followed, the result is not just unfairness to the parties themselves but unfairness to the wider public interest.

65. Dr O'Shea's response to the alternative remedy argument was that it should have been raised at the permission stage, but, as I pointed out, even if that argument had any force, the CPS never had an opportunity to raise its objection at that stage because permission to amend the grounds and to challenge the 8 November decision or the 25 February decision has never been formally sought. Indeed, as I have already observed, it was not even sought at the hearing before me, and nothing would have been said about it if I had not raised the subject.

66. Dr O'Shea further contended that even if there were a private law remedy available it would take too long to obtain, and the Court has a discretion to grant judicial review. The short answer to that is that Mr Dalton could have approached the Information Commissioner again last November, and much of the delay is due to his decision to pursue this claim for judicial review instead. Whilst a layman may not have appreciated the limited nature of the permission granted by Mr Fordham, his lawyers should have done so when they were instructed. Even if Mr Dalton had made the approach to the Information Commissioner in February 2020 when he had the benefit of access to legal representation, as well as the 1187 pages of documents, the Commissioner would have been able to make a start on her investigations, though it is unclear what effect the lockdown would have had on progress. Mr Dalton could have covered all bases by applying to the Court at the same time for permission to amend his claim.

67. Dr O'Shea submitted that the Information Commissioner could not deal with criticisms of the decision-making process adopted by the CPS, which was insufficiently fair and transparent to satisfy the requirements of the DPA and the Directive. He contended that if the data controller simply refers to one of the reasons for redaction permitted in the statute, that is not good enough to provide justification. The data subject is entitled to be provided with sufficient information to enable him to

make an evaluation of what he has been told and decide whether it seems on the face of it to be acceptable.

68. I was not impressed by these attempts to re-characterise a complaint which is in reality about the substance and merits of the redactions as a procedural fairness challenge. There are no arguable grounds for complaint about the fairness of the process adopted by the CPS in November 20`9 and thereafter. Mr Martin's letter of 25 February 2020 contains the sort of information about the process that was carried out in November and again in February that one might expect to have been put in a witness statement in response to amended grounds, if the proper procedure had been followed. There being no evidential basis for challenging the truth of what he said in that letter, I am satisfied that in and after November 2019, the evaluation process envisaged by the statute was followed by the CPS after permission was granted. Two separate officers of the CPS independently looked at each document and carried out an evaluation which was in accordance with the process it was obliged to follow, assessing the necessity for redaction and whether the redaction was proportionate to protect the interests (and identities) of third parties referred to in those parts of the document in which reference was also made to Mr Dalton.

69. I do not accept Dr O'Shea's submission that it was incumbent on the CPS to provide his client with a witness statement from a solicitor, or with a record of the evaluation of each document, in order to prove that its officers had carried out their duties properly. The DPA requires a record of the reasons for redaction or withholding of information (not the process) to be kept and supplied to the Information Commissioner, if she asks for it, but not to the subject of the request.

70. This Court might be able to consider whether that evaluation was rational, though as Dr O'Shea appeared to accept, it could not even embark on that exercise without seeing the unredacted documents. In any event, it is one thing to decide whether a decision was within the bounds of reasonableness, and another to decide whether it was justified. Only the Information Commissioner has the power to decide the merits, i.e. whether the redactions were *in fact* necessary and proportionate to protect the interests of other individuals. She has wide enforcement powers that are designed to protect the rights of the subject in accordance with the intentions of the Directive.

71. There was plainly an alternative private law remedy available to Mr Dalton which he could and should have exercised if he remained unhappy with the redactions applied to the documents which have been disclosed to him. If the Information Commissioner then failed to carry out her statutory duties, he may have had a public law remedy against her. He would certainly have been in a better position to come back to this court to seek relief against the CPS if he had again tried and failed to get the Commissioner to act.

72. As it was, I was plainly in no position to go through 1187 pages of documents that I had seen for the first time on the night before the hearing. Even if I did, I could not decide whether the redactions made to them fell within the bounds of rational decision-making. Dr O'Shea submitted that the burden was on the CPS to justify the redactions and it could not discharge it. In answer to that, Mr McGuinness fairly pointed out that in civil proceedings a party cannot usually disclose information to the court that it is not prepared to (or believes it cannot lawfully) disclose to the opposing party.

73. Whilst in the context of a dispute about redactions of allegedly privileged material the court has the power to look at the unredacted versions in the absence of the party who has complained, that is recognised to be very much a last resort – and in such a case there is no alternative body who can examine the unredacted documents and provide that party with an effective remedy. In this context there is someone who can do just that. Moreover, Parliament plainly intended that in circumstances where there was a dispute about the justification given for the redactions and their scope, the Information Commissioner should be the first port of call.

74. Insofar as any criticism is directed at the adequacy of the reasons given by the CPS for making redactions, it will be a question of fact and degree in each case whether a sufficient explanation has been given of the reasons why information has been withheld. Mr Martin's letter of 8 November 2019 states in terms that information was withheld under s.45(4)(e) because other individuals can be identified from the information. That is good enough. It goes beyond a "general reference to the rights and freedoms of others". It tells Mr Dalton in clear language why he is not entitled to have that information.

75. Mr Dalton's final complaint is that documents he would expect to have been disclosed are still missing – for example faxes, notes of telephone communications, and certain emails. That complaint is not the proper subject of a public law challenge even if technically it can be characterised as an ongoing breach of statutory duty. The Information Commissioner is much better placed to interrogate the CPS about missing categories of information (or specific documents referred to in documents that have been disclosed). As matters stand, there is no means of telling whether the CPS has disclosed all the data, as it says it has. If this case had proceeded in a more orthodox fashion and, in response to an amended statement of facts and grounds setting out each new ground of challenge, the CPS had provided evidence to that effect, signed with a statement of truth, this court would have been likely to accept it in the absence of some compelling evidence that the CPS was withholding data. I have seen nothing of that kind.

76. For all these reasons I am satisfied that if permission to amend this claim so as to seek judicial review of the November and/or February decisions had been sought at the appropriate time it would have been refused, both on the basis that there was no longer any ground for judicial review that stood a real prospect of success and as a matter of discretion because there was (and is) a far better alternative private law remedy which could and should have been pursued. Once the disclosure was provided, this ceased to be a viable public law claim.

77. Whilst Mr Dalton was within his rights to refuse to sign a consent order that went beyond quashing the original decision on the basis that it was unlawful, he was not justified in prolonging these proceedings once he obtained the remedy that he sought in the claim for which permission to proceed was granted, at least without seeking permission to amend the claim.

78. There is no point in the court quashing the original decision because that has long been superseded, and the CPS has now complied or purported to comply with the request, albeit much later than the DPA required. That leaves the question of the fate of the claim for damages which Dr O'Shea argued on the basis of a loss by Mr Dalton of a chance to be released from prison earlier and have the extradition proceedings

heard earlier. As matters presently stand, without knowing the fate of the renewed application for leave to appeal, and without knowing when it would have been heard if these documents had been disclosed sooner, it is impossible to evaluate whether there has been any such loss or whether the claim even gets across the threshold of establishing that the lost chance was real and not illusory.

79. Leaving that aside, and even if that claim does not get off the ground, I can still see an argument that the failure by the CPS to engage with the original subject access request until 8 months had elapsed should not go without sanction. There may be some basis on which a court would award a general sum by way of damages in a case of breaches of the DPA, but the Administrative Court is not the appropriate venue to determine arguments of that type. It seems to me that the fairest course for me to adopt is to direct that the claim for damages be transferred to the Central London County Court and for Mr Dalton to plead out his claim in a Part 7 claim form. That preserves Mr Dalton's ability to pursue his claim for damages if he so wishes.

CONCLUSION

80. For the above reasons I refuse permission to proceed with a claim for judicial review of the decisions of 8 November 2019 and 25 February 2020 on the grounds indicated in Dr O'Shea's skeleton arguments of April and July 2020. I shall declare that the original decision made by the CPS in response to the subject access request and conveyed to Mr Dalton on 12 March 2019 was unlawful. To that limited extent, the original unamended claim for judicial review succeeds.