Neutral Citation Number: [2020] EWHC 3010 (Admin)

Case No: CO/4688/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2020
Handed down remotely pursuant to the Covid Protocol by release to Bailli

Before :

LORD JUSTICE FLAUX
and
MR JUSTICE SAINI

- -

Between :

THE QUEEN (ON THE APPLICATION OF CHARLOTTE CHARLES AND TIM DUNN)	**Claimants**
- and -	
THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS	**Defendant**
-and-	
CHIEF CONSTABLE OF NORTHAMPTONSHIRE POLICE	**Interested Party**

- -

Geoffrey Robertson QC and Adam Wagner (instructed by **Howard Kennedy LLP**) for the **Claimants**
Sir James Eadie QC, Ben Watson, Jason Pobjoy and George Molyneaux (instructed by **Government Legal Department**) for the **Defendant**

Jason Beer QC instructed by **East Midlands Police Legal Services** for the **Interested Party**

JUDGMENT ON PUBLIC INTEREST IMMUNITY

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Lord Justice Flaux and Mr Justice Saini :

I. Introduction

1. The Claimants, Charlotte Charles and Tim Dunn, are the parents of Harry Dunn. On 27 August 2019, Harry was killed by a car driven by Anne Sacoolas ("AS"), the wife of Jonathan Sacoolas ("JS"), a member of the Administrative and Technical Staff at RAF Croughton. The more detailed factual and legal background to these proceedings is set out in our judgment of 24 June 2020, following the Case Management Conference (CMC): [2020] EWHC 1620 (Admin) at paras. [1]-[15].

2. Since that CMC, the Claimants have refined their grounds and now pursue only three of the original five grounds we described in that judgment.

3. In summary, they challenge the Secretary of State's determination that at the time of Harry's death, AS enjoyed diplomatic immunity and in this regard they specifically submit that there was an error in the Secretary of State's interpretation of the Exchange of Notes (Ground 1). They also allege that he unlawfully confirmed and/or advised that AS and JS had immunity from criminal jurisdiction and/or obstructed a criminal investigation (Ground 2), and in consequence breached Article 2 of the ECHR (Ground 3). The Claimants no longer pursue Ground 4 or Ground 5.

4. The "rolled-up" hearing of this claim is due to take place "remotely" on Wednesday 11 November 2020, and this judgment is concerned with the application of the Secretary of State by Application Notice dated 16 July 2020 ("the PII Application") to withhold from disclosure, pursuant to CPR 31.19(1), certain passages from three Ministerial Submissions on grounds of Public Interest Immunity ("PII").

5. The claim for PII is made by the Permanent Under-Secretary of State ("PUS") and Head of the Diplomatic Service, Foreign and Commonwealth Office, Sir Simon McDonald KCMG KCVO, under a PII Certificate, dated 9 July 2020. It concerns specific passages within Ministerial Submissions, dated 23 May 1995, 3 July 2001, and 26 July 2006, respectively.

6. The basis of the PII Application is that there is a real risk that disclosure of those passages would cause serious harm to an important public interest, namely the UK's national security.

7. The Secretary of State asked that this application be dealt with on "the papers". That course was opposed by the Claimants. They asked for an oral hearing and also that the Court appoint a Special Advocate. Given this lack of consensus, we had originally directed an oral hearing of the PII Application for the start of the substantive hearing. However, given the recent announcement of new Coronavirus pandemic restrictive measures, the substantive hearing is now due to be conducted remotely.

8. In those circumstances, and having considered the substance of the application and the helpful submissions of both parties, we decided to deal with the PII Application on paper and this is our judgment on the application.

9. We have each examined the passages (referred to as "the sensitive text") which the Secretary of State seeks to withhold. The application is supported by a "sensitive schedule", which describes the basis of the national security assessments underlying the PII claim. That sensitive schedule has not been disclosed to the Claimants but we have been provided with copies and have considered it.

II. Legal Principles

10. The governing legal principles are not in dispute:

(1) Claiming PII is a duty, rather than the exercise of a discretion on the part of the decision- maker. In R v Chief Constable of West Midlands Police (ex parte Wiley) [1995] 1 AC 274, at 295G-H, Lord Woolf endorsed Lord Bingham's statement in Neilson v Laugharne [1992] 3 All E.R. 617 that,

> "Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation".

(2) More recently, the Court of Appeal in Rawlinson & Hunter Trustees SA and others v Director of the Serious Fraud Office (No.2) [2015] 1 WLR 797 observed that:

> "the person in possession of a document subject to PII is not entitled to disclose it at will, but has a duty to protect the public interest, if necessary by an application to the Court" (at §30).

(3) The approach to making a claim for PII was described by the Court of Appeal (Lord Neuberger) in Al Rawi v Security Service [2010] 3 WLR 1069 as follows (at §24):

> "First, the relevant minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question i.e, that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the minister to balance the public interests for and against disclosure. If the decision is that the balance comes down against disclosure, then the minister states, in a PII certificate, that it is in the public interest that the material be withheld."

(4) As part of the initial consideration of these questions, and in particular the second question, consideration should be given to whether any damage to the public interest through disclosure could be prevented by other means, for example by disclosing a part of the document or a document on a restricted basis: R v Chief Constable of the West Midlands, ex p Wiley [1995] 1 AC 274, at 306-7. Thus, in

the event that it is considered that the overall public interest is against disclosure of parts of the material, then a claim for PII should only be made in respect of those parts of the material that it is necessary to withhold in the public interest.

(5) On any claim for PII it is for the Court to determine whether it should be upheld, and in particular whether the balance of the public interests (the so-called *Wiley* balance) lies against disclosure. The Court is therefore required to weigh:

> "…the public interest which demands that the evidence be withheld . . . against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material", and if "the former public interest is held to outweigh the latter, the evidence cannot in any circumstances be admitted":
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> (Lord Simon in R v Lewes Justices, Ex p Secretary of State for the Home Department [1973] AC 388, 407; cited in Al Rawi (CA) at §25).

III. Submissions

11. Applying the principles set out above, the Secretary of State submits that the PII claim made here is properly founded and invites the Court to uphold it having regard, in particular, to the matters set out in the sensitive schedule.

12. The first two Ministerial Submissions went up to the relevant ministers in 1995 and 2001 prior to them approving the Exchange of Notes. The third Ministerial Submission is dated 26 July 2006 and concerns a request from the US Embassy to increase the number of American staff at RAF Croughton.

13. The PUS explains that he has undertaken the *Wiley* balancing exercise in relation to each of these documents and has concluded, following legal advice (and having consulted other officials) that disclosure of the sensitive text would cause serious harm to national security.

14. He explains that he expressly considered the options of a "gisting" process and disclosure on a more restricted basis but concluded that these are not available options given the nature of the material in issue. The PUS also says in his Certificate that even after the sensitive text is redacted, each of the three documents provides a detailed account of the matters under consideration by the Ministers at the time.

15. The Claimants take a number of points in opposition, which we can summarise as follows. They first submit that a PII Certificate issued by a senior official carries "less weight" than a certificate signed by a Minister. As to the merits of the PII claim itself, they argue that the importance of open justice outweighs any potential harm caused by the complete disclosure of three documents which are 25, 19 and 14 years old, respectively.

16. In this regard, they contend that these documents are highly relevant to the case and it is strongly in the public interest that the public understand the purpose of bases operated by foreign powers on British soil, particularly if those staffing the bases are granted immunity from criminal prosecution. As to what they infer is within the sensitive text, they submit that the true purpose of the Croughton Annex (where AS's

husband was based) is already in the public domain, so it is anticipated that disclosure of the redacted paragraphs would not place material new information in the public domain.

IV. Analysis and conclusion

17. In our judgment, the PII claim succeeds. Although we of course have given the PII Certificate substantial weight, we have reached our own view on the balance of public interests, applying the case law set out at above.

18. Our reasons for upholding the claim are as follows:

(1) We reject the submission that a PII Certificate issued by a senior official, here the PUS and Head of the Diplomatic Service, has "*less force*" than a Certificate issued by a Minister. The Claimants rightly accept that in principle it is permissible to make a PII certificate in this way. The suggestion that doing so in that way confers less force on the certificate is unsupported by any authority
and is wrong in principle. The PII Certificate has in this case been issued by the PUS because, as he explains, the claim "*relates to material in documents that were produced under a previous administration*". A claim for PII in relation to such documents will usually be considered by an appropriate senior official. The original PII exercise (concerning two documents) therefore fell to the PUS, and it was considered appropriate that he should also conduct the PII exercise afresh over all three documents now under consideration.

(2) In our judgment, that approach is entirely unobjectionable, and has no impact on the "force" of the matters stated in the certificate, *a fortiori* given the PUS's nearly 40 years' experience at the FCO.

(3) The Claimants are wrong to argue that because there are inevitable constraints as to what can be said in open about the basis of the national security concerns underlying the PII claim in the PII Certificate, the Certificate should be accorded "little or no weight". As the PUS explains, "Given the national security sensitivities of the redacted text, I cannot in this Certificate provide further details of the harm that its disclosure would cause. Those details are set out in a sensitive schedule, which is available for the Court to consider alongside this Certificate." The PII Certificate was therefore considered - in the ordinary way - alongside the sensitive schedule, which we have independently considered.

(4) As to the argument concerning the passage of time since the 1995 and 2001 Ministerial Submissions, we accept that assessments of the harm which would be caused by disclosure of the sensitive text have been made by reference to the risk of harm *today*.

(5) As to the submission that the sensitive text is of "*central relevance*" to the issues in the claim, our own consideration of the sensitive text leads us to conclude that it is not of central relevance.

(6) Specifically, given the nature of the sensitive text, we consider that non-disclosure will not materially impair either our ability to review the legality of the Secretary of State's decisions, or the ability of Claimants to pursue any of their three Grounds of Review. The Secretary of State can also conduct his defence to the claim without any reliance on the sensitive text.

(7) The focus of the claim in Ground 1 (which is the only potentially relevant ground for present purposes) is the interpretation of the Exchange of Notes, in their international law context, and the sensitive text does not concern that issue or assist in interpretation.

(8) It would not be appropriate for us to address in this judgment the Claimants' conjectures as to what is within the sensitive text since that would undermine the PII claim.

19. In the specific circumstances of this case, we were able to reach these conclusions without the need for the assistance of a Special Advocate. The Secretary of State's application is accordingly granted.