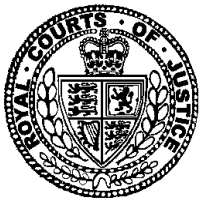

Neutral Citation Number: [2022] EWHC 825 (Admin)

Case No: PTA/05/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2022

Before:

MR JUSTICE CHAMBERLAIN

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Between:

Secretary of State for the Home Department	**Claimant**
- and –	
TL	**Defendant**

- -
- -

Ben Watson QC and Steven Gray (instructed by **the Government Legal Department**) for the **Claimant**
Tim Buley QC and Rachel Toney (instructed by the **Special Advocates' Support Office)** as **Special Advocates**
Tim Moloney QC and Jude Bunting QC (instructed by **Bindmans LLP**) for the **Defendant**

Hearing date: 28 March 2022

- -

Approved Judgment

Mr Justice Chamberlain :

Introduction

1 On 12 March 2021, after considering a paper application consisting of OPEN and CLOSED material, I gave permission to the Secretary of State for the Home Department ("SSHD") to make a terrorism prevention and investigation measure ("TPIM") in respect of an individual, TL. I also permitted SSHD to withhold CLOSED material from TL. Directions were set for a review hearing from 15-17 December 2021. That was converted to a directions hearing, at which I gave amended directions leading to a further hearing in February 2022 and a review hearing in the week commencing 23 May 2022. The February hearing had to be postponed until 29-30 March.

The issues

2 The procedural background has been complicated, but the essence is as follows. TL's OPEN representatives have for some time maintained that the disclosure given to them by SSHD has been inadequate. They say it fails to reveal even the essence of the national security case against TL and so fails to comply with the minimum disclosure requirements applicable under Article 6 ECHR and identified by the House of Lords in *AF (No. 3) v SSHD* [2009] UKHL 28, [2010] 2 AC 269. They also complain that mentoring appointments which TL is required to attend as a condition of his TPIM have been used to obtain from him legally privileged information about his case. It is relevant in this regard that TL has autism and also suffers from a psychotic illness and from post-traumatic stress disorder. TL's OPEN representatives have sought disclosure of various documents which they say are necessary to enable them to advance their complaint that the partly successful attempts to encourage TL to disclose privileged information make the proceedings an abuse of process.

3 At the hearing in December 2021, I gave directions for the resolution in February 2022 of any outstanding issues as to disclosure. This encompassed both TL's complaints about the inadequacy of the disclosure from CLOSED to OPEN and the outstanding requests for disclosure of materials which might support the abuse of process challenge.

The OPEN hearing on 29 March 2022

4 At the OPEN hearing on 29 March 2022, Mr Tim Moloney QC, who appeared for TL, told me that there had been helpful discussions between him and Mr Ben Watson QC, who represents SSHD. As a result of these discussions Mr Moloney was no longer at this stage pursuing any application for disclosure of materials that might support the abuse of process ground. The only outstanding issue was, therefore, the complaint that the disclosure in relation to the national security case was inadequate. This, he accepted, was a matter which could only be pursued the special advocates. He invited the special advocates to scrutinise the CLOSED materials with care, bearing in mind the written submissions of TL's OPEN representatives.

5 The TPIM has now been extended as a result of a decision taken earlier this month and directions have been agreed to allow any challenge to that extension to be considered at the review hearing presently listed in the week of 23 to 26 May 2022.

The disclosure procedure adopted to date

6 The procedure adopted to date has been as follows. Pursuant to CPR 80.24, SSHD filed and served on the special advocates the CLOSED material and a statement of SSHD's reasons for withholding it from TL. The special advocates then filed and served detailed submissions inviting SSHD to disclose further documents and gists. As usual in cases of this kind, the submissions advanced one or other or both of two contentions: the document or information: (i) could be disclosed without damaging national security or any other protected public interest; (ii) fell to be disclosed under Article 6, applying the test in *AF (No. 3)*. There was, as usual, a discussion between the special advocates and counsel for SSHD, as a result of which agreement was reached on 4 November 2021 without the need for a CLOSED hearing, pursuant to CPR 80.25(2)(a). Following conclusion of the process, amended statements and further evidence were served on 10 November 2021.

7 The third national security statement was served on 4 February 2022. There was a further process under CPR 80.25 in which the special advocates made further submissions inviting disclosure into OPEN of certain additional matters. Again, the process culminated in agreement without the need for a hearing. The fruits of that process will be contained in an amended third national security statement, which I was told would be served by 1 April 2022.

8 In preparation for this hearing, the special advocates have reviewed the CLOSED material again and have considered carefully whether any further disclosure is warranted, bearing in mind the complaints as to the adequacy of disclosure made by TL's OPEN representatives. The fruits of this review have been recorded in a CLOSED note, which I have seen. However, the special advocates have not identified any further material which falls to be disclosed into OPEN.

The role of the court in the present circumstances

9 As has been observed many times, a closed material procedure involves derogations from two fundamental procedural principles: natural justice and open justice. Where Parliament has provided for such a procedure, it has authorised the making of rules which safeguard, so far as possible, the rights of the excluded party to be told as much as possible about the CLOSED case without infringing the specified public interests. Where Article 6 ECHR applies, it often supplements these procedural rules, in this case by requiring that the appellant be told the essence of the case against him, whatever the impact of disclosure on the protected public interests.

10 The procedure for making disclosure requests allows the excluded party to make OPEN submissions that the disclosure he has been given is inadequate. Particularly where the request is made on Article 6 grounds, the excluded party's perspective will be an important one. But, as Mr Moloney fairly accepted, a properly informed submission that the disclosure given in OPEN is inadequate will require sight of the CLOSED material. The CPR (in common with the rules governing other closed material procedures) therefore envisage that it is the special advocates who will take the lead in making any submission that further disclosure is required. In performing their important function, the special advocates will of course take into account any submissions of the OPEN representatives.

11 The CPR (again in common with the rules governing other closed material proceedings) make provision for a process by which the special advocates can decide whether they wish to pursue disclosure requests or not. If not, a hearing is not required: see, in this case, CPR 80.25(2)(a). This does not mean the question of disclosure has been forgotten about or addressed in a perfunctory way. Rather, it reflects the established practice whereby special advocates make detailed written requests for disclosure, the party withholding CLOSED material responds at a similar level of detail and a robust discussion then takes place. If, after this process has been completed, the special advocates indicate that there are matters which they wish the court to consider at a hearing, the rules require a hearing and the production of a schedule identifying the issues which cannot be agreed and what each party says on each issue: CPR 80.25(4). The scope of the hearing does not in general extend beyond the issues identified. The court is not required to, and in general does not, satisfy itself of the propriety of the special advocates' judgments on individual issues. Doing so would involve a very substantial deployment of judicial time; and would also elongate the proceedings considerably because the party withholding CLOSED material would have to be given further time to consider any new points picked up by the judge.

12 Where the special advocates indicate pursuant to CPR 80.25(2)(a) that they have no disclosure points to advance, a hearing is not required and in general no hearing will be held. Again, the court is not required under the rules, and in general does not, second guess the individual judgments made by the special advocates. The same points about judicial resources and delay apply.

13 None of this prevents the excluded party from complaining, as TL has here, that the disclosure given to him is inadequate. But the court's response to such a complaint must take into account the procedure provided by the rules and the resource and time constraints I have mentioned.

Further disclosure in this case

14 In this case, I have considered carefully the respects in which the OPEN representatives say that TL has been given inadequate disclosure. I have also had regard to the respects in which OPEN disclosure has already been given of the national security case (summarised in SSHD's OPEN skeleton argument for this hearing at para. 18). I have held a CLOSED hearing and considered a CLOSED note from the special advocates reflecting their review of the disclosure process and confirming that they have no submissions to advance that further disclosure is required, beyond that contained in the amended third national security statement, which is to be served shortly. They have borne in mind the tests for disclosure under CPR Part 80 and under Article 6 ECHR. I am satisfied that the process has been conducted diligently by them and see no reason to undertake the exercise of second guessing their judgments on individual points.

15 However, both they and the judge at the substantive hearing will keep the question of disclosure under review as the case progresses and if any further OPEN disclosure is warranted further directions may be given.