First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0137

Heard at Field House, London
On 4th. July, 2017

Before

Judge

David Farrer Q.C.

Tribunal Members

Paul Taylor

and

Suzanne Cosgrave

Between

Simon Cox

Appellant

and

The Information Commissioner ("The ICO")

First Respondent

and

The Home Office

Second Respondent

Alison Pickup appeared for the Appellant

The ICO did not appear but made written submissions.

David Pievsky appeared for the Home Office.

The Decision of the Tribunal

The Tribunal finds

(i) that the Home Office did not and does not hold information within the scope of the request other than that which has been disclosed.

(ii) that disclosure of the names of the persons identified in the papers as "J", "L" and "N" would breach the First Data Protection Principle ("the FDPP"}, hence that the exemption provided by FOIA s.40(2) applies to such information

The Decision Notice was in accordance with the law. The appeal is dismissed. The Tribunal does not require the Home Office to take any action in response to the Request.

1. Eritrea has, in recent times, experienced serious internal unrest which has resulted in widespread migration. A substantial number of migrants have entered or attempted to enter the United Kingdom. Such migration is a matter of serious concern both to the Home Office, which is responsible for border controls and immigration and to the Eritrean government.

2. In December, 2014 a small team from the Home Office ("the HO") and the Foreign and Commonwealth Office ("the FCO"), led by Mr. Rob Jones of the HO and a senior civil servant from the FCO paid a short visit to Eritrea in order to obtain a clearer picture of the forces driving this migration and the Eritrean government's attitude to migrants who returned. A meeting with Eritrean officials took place in Asmara on 9th. December, 2014. It was

attended by the five civil servants in the party and Mr. David Ward, the British ambassador. Mr. Rob Jones was Head of the Asylum and Family Policy unit. The other three HO civil servants, who were designated "J", "L" and "N" respectively, in the written evidence and at the hearing, were then Grade 7 or Higher Executive Officer ("HEO"). All were policy officials in the International and Immigration Policy Group. Their roles will be further considered later in this decision. Other meetings with Eritrean officials took place and the party made further contacts for the purpose of gauging the attitude of the government and other interested parties to the causes of emigration and the treatment of returning migrants.

3. Following that meeting, Mr. Ward sent a Diptel to the FCO on 16th. December, 2014, recording discussions which the team had had with various Eritrean representatives, including the Foreign Minister, the Head of Political Affairs of the ruling party and the Director of the President's Office.

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4. An email dated 17th. December, 2014 ("the 17/12 email") was circulated by L to a number of senior and junior civil servants when the party returned to the UK. It described relevant impressions formed by the team during the visit, the responses of Eritrean officials at various meetings, the Eritrean government's attitude to migration and the return of migrants, as assessed by L or by the team as a whole and the possible implications for any future action plan within the HO.

5. A series of four notes, two dated 9th. and two 10th. December, 2014, containing apparently direct quotations from the three senior officials referred to in §3 and three other civil servants on important subjects of discussion ("the quotation notes") were created by J and later used in notes published by the HO (see §14 below).

6. In February, 2015 an "Informal report of UK visit to Eritrea, 9 – 11 December, 2014" was prepared, evidently for the briefing of a minister. It covered the same issues as the Diptel and the email of 17th. December and was apparently based, at least in part, on the latter document. It involved more than one draft.

7. Mr. Cox is profoundly concerned over the UK government's handling of Eritrean migration and asylum applications and has a considerable detailed knowledge of the issues involved. On 22nd. May, 2015 he submitted the following request to the HO –

"1 Since 1st. October, 2014, what meetings have Home Office officials (at Grade SCS1 or above) held in Eritrea, Somalia, Ethiopia or Egypt with the governments of any of those countries to discuss migration. Please provide the dates of the meetings and the names of all those present.
2 Please provide the notes of those meetings."

8. The HO responded on 10th. July, 2015 by referring Mr. Cox to a House of Lords written answer in respect of part of his request. It stated that it held further information which it refused to disclose, relying on the FOIA exemptions contained in s.27(1) (prejudice to international relations) and 40(2)(protection of personal data).

9. Mr. Cox's request for an internal review was acknowledged but never met. On 6th. November, 2015, he complained to the ICO both as to delay and the response of 10th. July, 2015.

10. During the ICO's ensuing investigation, the HO added to the cited exemptions s.36(2)(b)(i) (prejudice to the conduct of public affairs). It also informed Mr. Cox that the only meetings within the scope of his request were those in Eritrea during the visit in December, 2014.

11. The Decision Notice ("the DN") was issued on 3rd. May, 2016. The ICO found that s.27(1) was engaged and that the public interest favoured withholding the disputed information, which, at this juncture, comprised only the informal report dated February, 2015 and the submission made to the minister for the purposes of s.36(2)(b)(i). The DN further ruled that the names of J, L and N were their personal data and disclosure was not necessary for the pursuit of any legitimate interest of Mr. Cox. Disclosure would, therefore, breach the First Data Protection Principle ("the FDPP"). There was no ruling on the s.36(2)(b)(i) exemption.

12. Mr. Cox appealed. Initially, he appealed only against the finding that the names of Eritrean officials should not be disclosed and stated that the names of the junior civil servants in the December 2014 team "had never formed part of" his request for information. In August, 2016 he successfully applied to include in his grounds of appeal the withholding of the "notes of those meetings". The HO, in its Response, disclosed an extract from the informal report which disclosed the names of the three senior Eritrean representatives referred to in §3. Subject to that disclosure it supported the findings of the DN.

13. There followed a series of exchanges and directions which it is unnecessary to recite here since the appeal changed course thereafter to a significant degree.

14. Prompted by a letter from Mr. Cox's solicitors ("PLP") which pointed out that the HO had in 2015 published in its Country Information and Guidance Notes ("CIG notes") for Eritrea information about the December, 2014 meetings, the HO disclosed, on 22nd. November, 2016, the February, 2015 informal report. It stated that its witnesses in this appeal had been

unaware of the CIG notes and that, having considered the effect of those publications, it had reassessed the balance of public interests.

15. PLP then drew attention to the inclusion in the CIG notes of quotations from Eritrean representatives that did not appear in the informal report and argued that the HO must hold further information within the scope of the request, which had not been disclosed. The HO immediately responded by disclosing the "Quotation Notes" and unreservedly apologised for the failure to retrieve them in the course of the original search. Mr. Rapport of the Government Legal Department ("the GLD"), acting for the HO, indicated that a fresh search was being undertaken to check whether further relevant information had been missed.

16. A hearing scheduled for 28th. and 29th. November, 2016 was, inevitably, vacated. Directions were given for the HO to identify any further information within the scope of the request.

17. In January, 2017 the GLD answered requests from PLP, provided information to the Tribunal of further searches and disclosed documents which included the 17/12 email, the Diptel and a witness statement made by an HO senior executive officer in High Court proceedings, which referred to the December 2014 visit. The 17/12 email and the Diptel were, apparently, not deemed to be in scope during an internal review in 2015. Both were redacted to protect the names of junior civil servants and the email was further redacted to exclude passages which, it was contended, did not constitute "notes of those meetings". Whether such passages are within scope is a matter for determination by the Tribunal.

18. In the light of these developments Mr. Cox applied a second time for permission to amend his grounds of appeal. In summary, he wished to argue –

(i) that the HO held notes of meetings, which it had not disclosed, either because it had interpreted the request too narrowly or because its searches were inadequate.

(ii) That it held the undisclosed names of those Eritrean officials whom it had not identified.

(iii) That disclosure of the names of J, L and N would not breach the FDPP so that the HO could not rely on s.40(2) to justify withholding them.

19. Grounds (i) and (iii) embrace all the issues which the Tribunal was required to determine. Clearly, if Mr. Cox failed in his submission on (i), he must fail also on (ii). The appeal which finally emerged did not involve the exemptions provided by s.27(1) or s.36(2)(b)(i). The HO had abandoned both in the light of the published CIGs.

The evidence and the submissions

20. Mr. Cox made a witness statement, the contents of which he confirmed. In that statement he questioned the HO assertion that neither J nor N sent emails or messages to HO colleagues on their return from Eritrea. He argued that they had probably not been alerted to HO acceptance that the Diptel and the 17th. December email were "notes". As to J and N, backed by a wealth of organograms and HO publications and intricate cross - referencing, he purported to name them and then to demonstrate that their participation in a range of meetings and the drafting of advice following the Eritrea visit created a strong public interest in their public identification. He gave further oral evidence to justify his change of stance as to the public interest in these names, following the belated HO disclosures. The Tribunal's decision was not influenced by that change.

21. Simon Marsh, Head of the HO Knowledge and Information Management Unit ("KIMU"), a Senior Civil Servant (an "SC") gave evidence for the HO as to the adequacy of searches carried out in response to Mr. Cox's request and HO document retention policy. He explained that any manuscript notes of meetings during the Eritrean visit would have been destroyed as soon as their useful life was over.

22. He stated that the initial searches had been very wide but had focused on the Eritrean meetings as the only meetings within scope. L, from the Border and Immigration Directorate, provided the informal report, the s.36 submission to the minister (now irrelevant), the email of 17th. December and the Diptel. Mr. Marsh acknowledged that the HO was wrong to treat the last two documents as out of scope.

23. The Quotation Notes were not located during these searches. This, according to Rob Jones (see below) was because L, who located the information identified in §22, worked in a different directorate[1] from J, who created them and L would not have known of their existence. J was involved in answering the request, it seems, only when further searches were required in November, 2016.

24. KIMU coordinated the subsequent searches (after the vacated hearing), although they were then particularly directed at the civil servants who participated in the Eritrea meetings. Those involved were asked to locate "anything relating to the February report". They were asked for any record of the names of Eritrean participants in meetings other than those already identified. Nothing further was located.

[1] The HO evidence provided a great deal of detail as to the structure of the organisational units dealing with asylum and immigration. It was a helpful guide to the intricate workings of the HO and the meaning of a range of acronyms but it is unnecessary to set it out in detail in this decision.

25. The evidence as to both sets of searches was substantiated by emails reflecting the commissioning of searches, the requests made to individuals to assist and the responses of those individuals.

26. Mr. Marsh dealt also with the naming of junior officials. He referred to the familiar precept in *Home Office v Information Commissioner EA/2011/0203* to the effect that the personal data, including names, of junior civil servants (in some cases a misleading term) are generally protected from disclosure unless they occupy a public – facing role. He acknowledged that there was no blanket rule and every case had to be treated on its particular facts. Grade 7 civil servants and HEO's have important managerial and advisory functions. They often have significant responsibilities. Their reports and recommendations may go to ministers. However, where serious policy or resource issues are involved, a Grade 7 official or an HEO, must refer the matter to a Senior Civil Servant (an "SC") who is accountable to the minister for the action taken. If a report by a Grade 7 civil servant goes to a minister, it does so because it has been vetted and approved by an SC. The SC, not the Grade 7, carries the can. This principle is enshrined in the HO Guidance which states that *"G7s may contribute significantly to decisions taken by senior grades and ministers".*

27. Mr. Marsh concluded that the names of the officials could be of no use to the public.

28. Rob Jones dealt with the background to the December 2014 visit, the visit itself and both sets of searches. He stated that, in the course of the second series of searches, all participants had been asked and had confirmed that there was nothing relevant that had not by then been located. When cross examined he stressed the role of the SC in taking responsibility for serious decisions based to a greater or lesser extent on the work and recommendations of a junior civil servant. He contended that it would be unfair for a junior to be identified with

a particular policy when he/she had worked on it but had not taken the decision to adopt it. Input is not the same as accountability.

29. Ms. Pickup, representing Mr. Cox, submitted a very full written submission running to 102 paragraphs, which covered the issues now confronting the Tribunal following the second amendment of his Grounds of Appeal. She made further oral submissions at the hearing. The Tribunal considered all the detailed arguments advanced but does not propose to review them at length in this decision.

30. As to the searches, she criticized the HO's initial interpretation of "notes of meetings" as wrongly limiting the scope of the request to documents that described themselves as notes. The term should be construed as including any document (including emails) which records or reports on what transpired during the meetings, including any comments by the author. It was likely that the initial misinterpretation had narrowed the later searches by J, L, N and others, since there was no evidence that they had been alerted to the HO's later, more liberal construction of the term and consequent disclosures. They would, therefore, exclude emails from their searches. It was most improbable that J, L or N had sent no emails to colleagues recording the content of meetings. It was equally implausible that all contemporaneous notes had been destroyed.

31. The Tribunal should assess the exclusions of text from the 17th. December email by reference to this wider interpretation.

32. Both in her skeleton argument and oral submissions, Ms. Pickup raised issues over four documents attached to a disclosed email from L dated 28th. November, 2016. The HO refused to disclose them on the ground that they were outside the scope of the request and maintained that position at the

hearing. The Tribunal received copies of them and the nature of each was disclosed. They were -

- A submission to the minister and a wide range of SCs, proposing future action and objectives following the December 2014 visit;
- A paper setting out objectives for the "Proposed Eritrea visit";
- A paper on migratory flows and Eritrea;
- An "Eritrea Migration Action Plan"

Also attached was a copy of the Diptel, which had been disclosed.

33. Ms. Pickup argued that Mr. Cox was entitled to disclosure of these documents so that he could assess whether, and, if appropriate, argue that, they were in scope. She submitted that a refusal by the Tribunal to order disclosure for that purpose would breach his rights under ECHR Article 10 and violate the principle of open justice. The Tribunal rejected those submissions for reasons summarized at § 61 below.

34. As to disclosure of names, she argued, without doubt correctly, that there was no general rule as to withholding the names of junior civil servants, as the Tribunal in *Home Office v ICO* had acknowledged. There is, in general, she submitted, a legitimate interest in disclosure of the names of public officials exercising public functions and powers in the public interest[2]. The HO Guidance did not bear out Mr. Marsh's contentions and it routinely published the names of officials who were neither SCs nor in public – facing roles, as the exhibits to Mr. Cox's evidence showed. It was accepted by the HO that J, L and N performed highly responsible roles during and after the visit to Eritrea, including submissions to ministers, coordinating policy documents and briefing senior officials and ministers. The immigration issues to which these activities related were and are of great public interest.

[2] There was no reported authority for this bold proposition.

35. The HO case on all three issues can be concisely described;

- A "note of a meeting " is a document which records and was intended to record what was said at the meeting. It does not cover analysis, commentary, feedback or the expression of the author's views, as Mr. Cox asserted.
- The evidence before the Tribunal, from witnesses and documents, demonstrated an ultimately exhaustive series of searches which were very likely to have captured any information within scope. The range of information specified to the searchers was much wider than the request demanded (see §24 above).
- Disclosure of names was not necessary for Mr. Cox's legitimate purposes. Disclosure for FOIA purposes of the roles and functions of J, L and N, which had been provided in exchanges before the hearing to Mr. Cox personally, made the HO case even clearer. Mr. Cox's objective could have been fully achieved by a request for such information at any time.

<u>The reasons for our decision</u>

36. We deal first with the largely academic issue raised by Ms. Pickup as to whether it would be right to dismiss this appeal, whatever our findings, given that the HO abandoned reliance on s.27(1) following the discovery of related material which it had published. An appeal is decided by reference to the issues raised in the Grounds of Appeal. As amended on Mr. Cox's application, they were (i) the adequacy of the HO searches, hence the probability that it held further responsive information, which it had not identified and (ii) whether the names of J. L and N should be disclosed because the s.40(2) exemption failed. Ground (i) was raised for the first time in the amendment and is rejected in this decision. Ground(ii) was dealt with in the DN which rejected Mr. Cox's claim and also fails on appeal. It was open to Mr. Cox to

discontinue this appeal following his success in relation to s.27(1). He did not do so and then failed on the outstanding live issues. The appeal, as ultimately presented, is therefore dismissed.

37. We turn to the issues relating to the adequacy of the searches.

38. "The Notes of those meetings", whether framed in the singular or the plural, is not a term of art but a quite common expression in widespread use. Plainly, the title attached to the document is immaterial. What matters is its content and the purpose for which it was created. A mere reference to a specific meeting does not qualify the document concerned as a note of that meeting. The HO submission that it is a document which recorded and was intended to record what was said, is, in the Tribunal's view, a sensible working definition. It will normally, but not always, be created during or soon after the meeting by a participant. A document, which is prepared from rough notes made at the meeting and intended to replace them, satisfies the definition. A later reference to what was agreed at the meeting in a report, designed to justify a proposed action or brief a superior, does not, because its purpose is not to preserve a record of what was said, whether for the author or a third party, but to show how or why particular action has been or should be taken.

39. Still less is commentary on or analysis of the content of a meeting a note of that meeting because its purpose is quite different. A s.36(2) submission to the minister is not a note of the meeting, although it may well use such a note to describe the discussions at the meeting. Its purpose is not to record but to persuade the minister, as a "qualified person" to issue an opinion as to potential prejudice to specified government activities.

40. In this case Mr. Cox asked for "the notes of those meetings". It may be a minor pointer but the use of the definite article tends to suggest records akin to informal minutes rather than a broader range of referential material.

41. We therefore reject Mr. Cox's much wider interpretation of "notes of those meetings" quoted at §30 as contrary to normal usage and largely unworkable. It could capture a multitude of documents created long after the event by persons who had nothing to do with it and referred to it for purposes quite unrelated to the retention of a record of what was said.

42. The medium in which the note is recorded is, of course, irrelevant. Many notes will be prepared as emails providing a record both for the participant who sends them and the recipient who needs to be apprised of what was said.

43. Applying this interpretation to the central documents here, the Diptel was plainly a note as were the 17th. December, 2014 email and L's "quotation notes". The characterization of the informal February report may be less clear but was readily conceded anyway. The descriptions of the four documents referred to at §32 clearly indicate that they fall well outside what the Tribunal considers the correct definition, as was confirmed when we read them at the hearing. Accordingly, they were not disclosed[3].

44. For the same reasons, we have no doubt that the redacted closing passages in the 17th. December 2014 email are out of scope. They are comments relating to future action, perhaps stimulated by the meeting but in no way recording anything said there.

45. Having regard to our ruling as to the meaning of "notes of those meetings", there was very little risk that searchers involved in the later exercise would interpret their mission to uncover anything relating to the February report in unduly restrictive terms.

[3] The procedural issue relating to these documents is dealt with at § 61.

46. As to the adequacy of the searches, it is understandable that Mr. Cox should scrutinize very carefully the evidence as to searches, given the HO's failures to present the full picture at an earlier stage of these proceedings.

47. However, the Tribunal accepts that, by the conclusion of the later searches, the relevant directorate had conducted as thorough an operation as was reasonable in all the circumstances. The terms of search were wide and all those directly participating in the Eritrea visit were fully engaged in it. As already indicated, we do not believe that they were in any way misled as to the targets of the searches. It is perfectly reasonable for manuscript notes to be destroyed once a more substantial record, such as the 17/12 email has been made. We should not expect the group leader, Rob Jones to make notes, when he was likely to be a prominent participant. It is not obvious that those present would send email reports of what was said to colleagues upon their return.

48. On a balance of probabilities, which is the relevant standard of proof, we reject the submissions that the HO holds further unreported responsive information or that it has redacted information from disclosed documents which was caught by the request or that the four undisclosed documents (§32) were or might be within scope.

49. The names of J, L and N have been withheld in reliance on s.40(2) of FOIA. It is accepted that those names are the personal data of those three persons and that they are disclosable only if, pursuant to DPA Schedule 2 condition 6, disclosure is necessary for the purposes of legitimate interests (pursued in this case, by Mr. Cox and others concerned with the Horn of Africa). If those requirements are not met, disclosure would be unfair, regardless of other considerations and would breach the FDPP, hence satisfy the requirements of s.40(2).

50. As already indicated, the HO provided Mr. Cox with what were broadly job descriptions relating to the three shortly before the hearing, though for the

purposes of conducting this appeal, not under FOIA. Ms. Pickup raised the issue whether they should not be disclosed under FOIA, that is, to the general public. The Tribunal invited written submissions on the question. Ms. Pickup submitted that they should. They had been referred to at an open hearing and the starting point was that they were now public documents and anybody was now entitled to make use of them as they chose. *R. (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] Q.B. 618. This was subject to the Tribunal's power to prohibit disclosure pursuant to Rule 14(1) of the 2009 Rules, though such power must be exercised with due regard to the principles of open justice and fairness. Mr. Pievsky, for the HO, argued that these documents were not within the scope of the request but stated that the HO did not object to disclosing them (subject to redaction of personal data) and was willing to treat an application for disclosure from Mr. Cox (which has been made) as a FOIA request with which the HO would comply. He argued, however, that the last sentence in each document contained the personal data of the individual concerned and that they should be redacted accordingly, although referred to in the evidence. The Tribunal, following subsequent discussion by telephone conference, decided to direct that the redacted passages should not be disclosed because disclosure was unnecessary to any legitimate purpose. Subject to that direction, the job descriptions should be disclosed under FOIA.

51. As to the general issue of disclosure of names, a substantial body of evidence on both sides was concerned with the grades and functions of J, L and N. It is unnecessary to repeat here the undisputed evidence as to their grades and the kind of work each performed. *The Home Office v The Information Commissioner* is a useful starting point as to the desirable limits on protection of personal data in this context but, in each case, much depends on the nature of the legitimate interest (if any) which would be furthered by disclosure.

52. This appeal involves two Grade 7s and an HEO. The important and responsible nature of much of their work has been acknowledged already. The critical limitation, in our view, is that they are not decision makers, however valuable their input to decisions. Rob Jones provided the clearest and most persuasive evidence that every report, advice or recommendation goes to an SC, who is accountable for its subsequent adoption or rejection. He or she takes responsibility if it is submitted as a recommendation to a minister or adopted as departmental policy. Ministers and SCs are policy makers, not Grade 7s. We reject Ms. Pickup's bold contention, unsupported by authority, that there is a legitimate interest "in disclosure of the names of public officials exercising public functions and powers in the public interest". That wide – ranging and indiscriminate formula would strip a high proportion of public servants, including many of quite junior rank, of protection of their personal data.

53. There is a plain public interest in tracing the development of possibly controversial policies from their birth to their implementation, especially in such areas as asylum and immigration, which rouse strong public concerns from very different angles.

54. It may well be that the involvement of a particular junior minister or SC in the development and adoption of a policy is a matter of legitimate public interest because he/she took decisions critical to its implementation. It is far less clear that the public has a legitimate interest in the contributions, great or small, of those who researched, advised, recommended particular strategies underlying the policy to those who took the decisions. If a particular HEO produced a particularly perceptive report which was influential in persuading the Home Secretary or a junior minister to change course in relation to migration from country X, should that HEO be exposed by name to the media because his ideas, not his decisions, led to a particular controversial, perhaps unpopular, policy?

55. Mr. Cox's concerns for relations with the countries of the Horn of Africa and related issues of migration and financial aid are undoubtedly a legitimate public interest for the purpose of Condition 6. The question is whether disclosure of the names of civil servants of middle rank who made important contributions to action programmes but were not accountable for policy or significant decisions are necessary to understanding what the Home Office is doing in this region.

56. We were wholly unpersuaded that identifying the involvement of a named Grade 7 in preparing a particular report, drafting advice and then attending an important related meeting at which particular views were expressed or policies discussed had serious value for one sharing Mr. Cox's concerns. Nowhere in his evidence did he demonstrate any such value.

57. We therefore find that Mr. Cox's case falls well short of demonstrating that the names of the Grade 7 / HEOs are necessary to the furtherance of legitimate interests in UK policy in relation to the countries in the Horn of Africa and their resident and migrating populations.

58. The ready availability of the job descriptions further strengthens the HO case. Even if there were a legitimate interest in learning that particular actions were performed and significant advice tendered by civil servants of a given grade with specific functions and skills, the names of those concerned add nothing to the information supplied. That information is now in the public domain and could have been obtained by Mr. Cox by a FOIA request at any time.

59. His researches designed to identify the three civil servants have no bearing on our decision. The same goes for the evidence that the HO publishes the names of Grade 7s in some circumstances. That is not surprising. All depends on the context and what, if anything, it reveals about the specific work of that

individual. In any case, inconsistency in HO policy, if proved, would not affect the rights of individuals under the DPA.

60. This is a case where the question of fair processing of personal data is best approached by first examining whether the specific requirements of condition 6 are met, regardless of whether, in a more general sense, disclosure of names would be fair. They are not. This ground of appeal also fails.

61. As indicated at §33, an issue arose as to the correct procedure to be adopted in relation to disclosure of the four documents described at §32. Ms. Pickup asserted that they should be disclosed to Mr. Cox personally (i.e., not as a FOIA disclosure) so as to enable him to argue the question whether they were in scope, if so advised. The HO was unwilling to provide them to him on that basis because that would imply an uncontrolled right in a requester to participate in decisions as to what was in scope and would preempt decisions as to whether the document was in scope and, if it was, whether an exemption applied.

62. The ICO was not represented at the hearing so could not perform the amicus role which she commonly does in sessions from which the requester is excluded. The Tribunal did not consider that an adjournment for the appointment of special counsel to represent Mr. Cox's interests was proportionate or furthered the overriding objective, in so far as it requires justice to be administered without unjustifiable delay or unwarranted cost. It therefore proposed that it should read the documents and form a provisional, or possibly a definitive view as to the scope issue. It should then reconvene the hearing and indicate whether it considered there was an arguable case that any of the documents was within the reach of the request.

63. Ms. Pickup argued forcefully that this would breach Mr. Cox's Article 10 rights and deny him his right to open justice. She submitted that this issue was quite

different from that which routinely arises where the Tribunal reads withheld information and hears evidence and argument in relation to it in closed session.

64. The Tribunal disagreed. The general nature of the four documents was apparent from their descriptions and none suggested a record akin to a note of the meetings. It retired and read the documents. All three members were satisfied that none of the four could reasonably be described as a note of a meeting. Each referred to the Eritrean visit. One predated that visit. The others – as their descriptions suggest – were concerned with future policy and problems involving Eritrean migration, not the content of meetings in December, 2014.

65. In *Browning v Information Commissioner [2014] EWCA Civ 1050 [2014] 1 W.L.R. 3848* the Court of Appeal, taking account of the enactment in Rule 35(2) of the 2009 Rules of a power to hold the whole or part of a hearing in private, approved the exercise of such a power where protection of the interests of all parties required it and where all reasonably available measures were adopted to mitigate prejudice to the excluded party and his legal representative. An important measure is normally the acceptance by the ICO of responsibility for raising matters during the closed session which the excluded party would have raised, if present. A corresponding measure was not available on this appeal. However, as already stated, Mr. Cox was provided with informative descriptions of the documents concerned, which strongly indicated that they were not within the scope of his request. The Tribunal considered them in the absence of all parties and heard no submissions from the HO in closed session. It studied the four documents, satisfied itself as to their nature and, in open session, gave its assurance to Ms. Pickup and Mr. Cox that they were not remotely capable of fulfilling his request. It gave further general descriptions of the documents to Mr. Cox when doing so. This was a pragmatic procedure designed to do justice without a lengthy adjournment, which the material did

not justify. If that assurance did not satisfy Ms. Pickup, that is regrettable but cannot affect the outcome.

66. The alternative course of providing the documents to Mr. Cox so that he could make submissions opens the door to demands from a requester to examine any information of which he is aware so as to satisfy himself as to whether he may claim that it be disclosed under FOIA. That is a recipe for delay and increased costs. It also poses formidable problems where exemptions may arise in addition to the question of scope.

67. Article 10 confers a qualified, not an absolute right to receive information. The Tribunal considers that the procedure adopted respected Mr. Cox's convention and common law rights, whilst avoiding unreasonable delay and cost.

68. For these reasons the Tribunal dismisses this appeal.

69. This is a unanimous decision.

David Farrer Q.C.
Tribunal Judge,
27th. July, 2017

Promulgated – 7th August, 2017