NCN: [2024] UKFTT 00714 (GRC)

Case Reference: EA/2023/0359; EA/2023/0360

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard at: Field House, London
Heard on: 26 February 2024
Decision given on: 07 August 2024

Before

JUDGE NEVILLE
MRS R TATAM
MRS S COSGRAVE

Between

BAIL FOR IMMIGRATION DETAINEES

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Ms L Dubinsky KC, Ms B Grossman, instructed by Allen & Overy LLP
For the Respondent: Written submissions only

Decision: The appeal is allowed.

Substituted Decision Notice: The Home Office must comply with each request by providing the requested information within 35 days of the date on which this decision is sent.

REASONS

Emergency Travel Documents

1. The Home Secretary can place someone in immigration detention in a number of circumstances, most commonly for the purposes of their removal or pending their deportation. An immigration detainee may then be entitled to apply for immigration bail, either to the Secretary of State or to the Immigration & Asylum Chamber of the First-tier Tribunal ("IAC"). 'Deportation' refers to the removal from the United Kingdom of a 'Foreign National Offender' as a result of a criminal conviction, and 'removal' refers to removing those who require leave to remain but do not have (or no longer have) it. We shall use the word 'removal' to refer to both processes.

2. A relevant factor in deciding whether someone is detained or is granted bail will often be whether they can be removed from the United Kingdom within a reasonable timescale – removal is the purpose of the detention. One possible obstacle to removal is the lack of a suitable travel document. If a British citizen loses their passport on holiday then before setting off on the return home they must persuade the British embassy to issue an emergency travel document. Without it, they will not even be allowed on the plane, train or ferry. Likewise, if the Home Secretary wants to remove someone to another country, then they must have a current document such as a valid unexpired passport or national identity card. Without a document that will satisfy that country's authorities, an Emergency Travel Document ("ETD") must be arranged. This usually requires that the country of return is satisfied of the individual's identity and nationality, for example by reference to documents or verifiable biographical information, and is willing to cooperate with the UK government by issuing the ETD.

3. ETDs are therefore essential to effective immigration enforcement. If a country cannot be persuaded to issue an ETD for one of its nationals, then the individual cannot be removed there. If there is no reasonable prospect of the situation being resolved within a reasonable timeframe, then immigration detention is less likely to be appropriate, and immigration bail more likely to be granted. Of course, a person who wishes to stay in the UK might choose not to cooperate with the documentation process, for example by refusing to provide biographical details requested by the country of return. Such conduct is a criminal offence, and may also be an indication that continued immigration detention remains appropriate.

4. Some countries, such as Somalia with which one of these appeals is concerned, do not require an ETD, but a 'UK Letter' instead. This still requires that the country of return accepts the individual's nationality. The Commissioner considered UK Letters fell within the scope of the corresponding request for information. We agree that there is no material difference for the purposes of these proceedings, and we shall use the term "ETD" as including UK Letters.

The requests for information

5. Bail for Immigration Detainees ("BID") is a registered charity that aims to "challenge immigration detention in the UK through the provision of legal advice, information and representation alongside research, policy advocacy and strategic litigation".[1] On 23 August 2022 and 21 September 2022, pursuant to the Freedom of Information Act 2000, BID made the following requests to the Home Office:

Request 1 (EA/2023/0360)	Request 2 (EA/2023/0359)
1. How many Emergency Travel Document ('ETD') requests for Eritrea were submitted in: a. 2019; b. 2020;	1. How many Emergency Travel Document ('ETD') requests for Somalia were submitted in: a. 2019; b. 2020;

[1] Annual Report 2023: https://www.biduk.org/pages/42-bid-annual-reports

c. 2021 (to date). 2. How many ETDs for Eritrea were issued in: a. 2019; b. 2020; c. 2021 (to date). 3. How many Foreign National Offenders from Eritrea were granted ETDs in: a. 2019; b. 2020; c. 2021 (to date). 4. How many of the people referred to in (3) were subsequently removed? 5. How long on average did it take from the date of application for the document to be issued, for applications made in: a. 2019; b. 2020; c. 2021 (to date). 6. How many ETDs were issued for people deemed not to be cooperating with the ETD process in: a. 2019; b. 2020; c. 2021 (to date).	c. 2021 (to date). 2. How many ETDs for Somalia were issued in: a. 2019; b. 2020; c. 2021 (to date). 3. How many Foreign National Offenders from Somalia were granted ETDs in: a. 2019; b. 2020; c. 2021 (to date). 4. How many of the people referred to in (3) were subsequently removed? 5. How long on average did it take from the date of application for the document to be issued, for applications made in: a. 2019; b. 2020; c. 2021 (to date). 6. How many ETDs were issued for people deemed not to be cooperating with the ETD process in: a. 2019; b. 2020; c. 2021; d. 2022 (to date).

6. In its responses to each request, dated 8 September 2022 and 17 November 2022 respectively, the Home Office accepted that it held the requested information but claimed that it was exempt from disclosure, relying on the following exemptions under FOIA:

Section 27 – International Relations

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

(a) relations between the United Kingdom and any other State

and

Section 31 – Law Enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

...

(e) the operation of the immigration controls

7. Each is a qualified exemption, meaning that it will only exempt information from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Home Office maintained this position on internal review, following which BID complained to the Commissioner. In the complaint, BID observed that a previous appeal relating to similar information concerning Iran had been resolved by way of a consent order; the Home Office had agreed to provide the information. The Home Office subsequently distinguished the Iran request on the basis that requests must be considered against the level of cooperation between the UK and country in question, attitudes to the returns process and levels of cooperation varying considerably.

8. As part of the investigation into the complaint, the Commissioner wrote to the Home Office requiring (i) an explanation as to why the present complaints should not have the same outcome, (ii) that a copy of the withheld information be provided to the Commissioner, and (iii) a clearer explanation of how disclosure of the information would, or would be likely to, give rise to prejudice under both claimed exemptions. The Home Office failed to reply to the Commissioner's correspondence, until eventually on 26 June 2023 the Commissioner was forced to use its statutory enforcement powers to issue an Information Notice under s.51 of FOIA.

9. The Home Office having complied with the Information Notice, on 11 July 2023 in Decision Notices[2] IC-208115-F4Z1 and IC-219611-S5K0, the Commissioner agreed that section 27(1)(a) was engaged and that the public interest in withholding the information outweighed the public interest in its disclosure. That conclusion having been reached, the Commissioner did not find it necessary to address s.31(1)(e). This is BID's appeal to the Tribunal against the Commissioner's Decisions.

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026398/ic-208115-f4z1.pdf https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025910/ic-219611-s5k0.pdf

The appeal

10. Having eventually complied when faced with the Commissioner's statutory enforcement powers, the Home Office made no effort to engage with the subsequent appeals. The Tribunal notified it of these appeals in two sets of correspondence dated 10 August 2023, inviting it to apply to join and put forward its case on why the claimed exemptions apply. It is also the Tribunal's experience that the Commissioner would have liaised with the Home Office in preparing for the appeal. There has been no reply.

11. During the progress of the appeals, Judge Neville made a direction under rule 14(6) enabling the Commissioner to disclose material to the Tribunal without it being disclosed to any other person. This consisted of the withheld information and an unredacted copies of similar letters dated 5 July 2023 from the Home Office to the Commissioner explaining its position on the claimed exemptions. It was also directed that a representative for the Commissioner need not attend the final hearing. The reasons for making that direction, and rejecting BID's submissions that other measures should be taken to ensure a fair hearing, following a case management hearing of 25 January 2024, are annexed. The Tribunal has kept the fairness of the proceedings under review, and we are satisfied that examination of the withheld material without it being disclosed was necessary.

12. We have also considered, in line with our inquisitorial jurisdiction, whether to *require* the Home Office to provide further evidence and submissions. Mindful of the overriding objective to the Tribunal's Procedure Rules and the further delay and cost that would result, we do not consider it appropriate to take that course of action. There is no obvious lacuna in the evidence and submissions provided by BID and the Commissioner, and we are satisfied that we can fairly resolve the appeal without embarking upon what could amount to a fishing expedition. The Home Office has been given a fair opportunity to defend its position, did so to the Commissioner only reluctantly, and if any further material reasons against disclosure could be argued then the Home Office has had the opportunity to have done so already and has not..

13. At the hearing we were provided with open hearing bundles provided by the Commissioner, a supplementary bundle and authorities bundle provided by BID and a skeleton argument prepared on its behalf. The open hearing bundles included the 5 July 2023 letters from the Home Office to the Commissioner, with two paragraphs in each having been redacted. We also indicated at the outset of the hearing that we were minded to request submissions and evidence from BID concerning data tables footnoted in one of the witness statements[3], and the Home Office Country Returns Guide[4] ("CRG") referred to within the witness statements was provided in hard copy during the course of the hearing Evidence was heard from Pierre Makhlouf, BID's Legal Director, and Saria Hassan, Legal Manager of BID's 'Right to Liberty' project. Our decision was reserved.

How the Tribunal approaches the appeal

14. As confirmed in Information Commissioner v Malnick [2018] UKUT 72 (AAC), on an appeal under s.58 of FOIA the Tribunal may review any finding of fact on which the notice in question was based. This means that the Tribunal exercises a full merits appellate jurisdiction, making any necessary findings of fact and then deciding for itself whether the provisions of FOIA have been correctly applied. But it does not start with a blank sheet: the

[3] https://www.gov.uk/government/statistical-data-sets/immigration-system-statistics-data-tables
[4] https://www.gov.uk/government/publications/country-returns-guide

starting point is the Commissioner's decision, to which the Tribunal should give such weight as it thinks fit in the particular circumstances. The issues are to be decided as of the date of the public authority's response: Montague v Information Commissioner and DIT [2022] UKUT 104 (AAC). In this case the responses are dated 8 September 2022 and 17 November 2022, and we have disregarded the parts of BID's evidence that refer to matters occurring after those dates.

15. In determining whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information, the relevant factors are aggregated across the exemptions: DBIT v Information Commissioner [2023] EWCA Civ 1378.

16. Not all our reasons can be set out publicly, and we have issued separate closed reasons. An order has been made prohibiting the disclosure of those reasons to any person save the Commissioner, the public authority and their legal representatives. Notwithstanding that the appeal has now been allowed, the assertions made by the Home Office in support of the claimed exemptions will not be disclosed as to do so would have the potential to cause prejudice to international relations.

Section 27 – International Relations

Principles

17. In establishing whether this exemption is engaged: (i) the applicable interests must be identified (for example, the relationship between the United Kingdom and a particular state); (ii) it must be established that disclosure would, or would be likely to, prejudice those interests; and (iii), the likelihood of prejudice to those interests must be measured.

18. The nature of the prejudice engaged by section 27(1)(a) was described as follows by this Tribunal in Campaign Against the Arms Trade v IC and MOD (EA/2006/0040), with which we independently agree:

> *81. ... we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk.*

19. A risk of harm to relations is enough, it need not be further shown that actual damage will occur. Appropriate weight should be afforded to the public authority's considered view: APPGER v Information Commissioner & MOD [2011] UKUT 153 (IAC); Savic v Information Commissioner and others [2016] UKUT 535 (AAC) at [116], and R. (Lord Carlile of Berriew) v SSHD [2014] UKSC 60. In Savic in particular, the Upper Tribunal held that:

> "116. It must be remembered that what is relevant is an assessment of those reactions rather than the validity of the reasons for them looked at through "English or any other eyes". In this area there is authority to the effect that the courts and tribunals should attach weight to the views of the government expressed through Secretaries of State, Ministers or senior civil servants because of their relevant experience and expertise in assessing such reactions (see for example APPGER v IC and FO [2011] UKUT 153 (AAC) and those cases cited at paragraph 56 of that decision). We accept that approach and comment that the nature of the written and oral reasoning on it in this case reflected its foundations."

20. In R. (Lord) v Home Office [2003] EWHC 2073 at [100], Munby J held that the phrase "would be likely" indicates that there 'may very well' be prejudice:

> "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

(i) Applicable interests

21. The Home Office identified the applicable interests in each request, being relations between the UK and Eritrea and Somalia, and we accept that this has the potential to fall within section 27(1).

(ii) and (iii) Likelihood of disclosure causing prejudice to those interests

22. We have described ETDs in our introduction, and that the country of return must be willing to issue one. As well as the points recorded in the Decision Notices, we have regard to what the Home Office stated in two letters of 5 July 2023 to the Commissioner (each letter being materially identical in their redacted versions, one dealing with Eritrea and the other Somalia):

> "…The returns process is vital to effective immigration control, but the success of the process is heavily reliant on the co-operation of the receiving State. Such co-operation is in many cases hard won and susceptible to being withdrawn. The subject of returns and foreign national offenders is in varying degree a sensitive subject, for many if not most States, in that it requires the receiving State to acknowledge that numbers of its nationals are in the UK illegally or have committed offences here. Large numbers of returns might also be seen to imply that conditions in the home country are poor. Other States generally regard the details of such matters as confidential between them and the UK authorities.
>
> Those requiring emergency travel documents do not hold passports, so the Home Office can only return them if the country of origin agrees to provide such a travel document. Many countries are at best ambivalent about accepting their nationals back, because they often send home remittances which help their economy, whereas they may become a burden on the receiving State if returned. This means that co-operation on documentation is variable and heavily reliant on delicate relationships with embassy staff of the other State."

This is followed by redacted text giving detail specific to the country concerned. Our assessment is as follows.

23. Savic anticipates the Tribunal giving weight to "the views of the government expressed through Secretaries of State, Ministers or senior civil servants because of their relevant experience and expertise in assessing such reactions". We have none of this. Instead, each letter simply sets out thinly reasoned assertions, with no evidential support or identification of who holds the relevant opinion and on what basis. The evidential basis for the opinion and the qualifications of the author are not provided. The author of each letter is a member of the "Information Rights Team", and while they refer to having consulted with the Foreign, Commonwealth and Development Office which agreed with the exemptions being maintained, no more detail is given. This is to be contrasted with Savic, in which the Tribunal heard evidence from the Director of Foreign Policy at the National Security Secretariat, and APPGER, in which the Tribunal heard evidence from the Head of Corporate Information at the Ministry of Defence, and, applying our experience, the great majority of appeals of this nature. This is not to say that there is a formal requirement for any particular level of seniority before a public authority's position can be accepted, but the Tribunal must assess what the public authority has put forward in light of all the circumstances. If, in contrast with most government departments, the Home Office chooses not to supply argument sourced from the expertise of those types of individuals named in Savic at [116], inevitably less weight attaches to its position than if it had.

24. The closed material suffers from the same flaws as described in the above paragraph. While it sets out more specific concerns, directly related to the countries concerned, its assertions remain thinly reasoned and contextualised, with no extrinsic, documentary or witness evidence in support.

25. As to confidentiality, we recognise the force of the general proposition and in the Commissioner's relevant guidance[5], and applied in the Decision Notices, that:

> "The effective conduct of the UK's international relations depends upon maintaining the trust and confidence of other states and international organisations. This relationship allows for the free and frank exchange of information between the UK and its partners. In turn this allows the UK to effectively protect and promote its interests abroad."

26. Yet this principle is difficult to apply to the present requests with any specificity. In the Eritrea Decision Notice it is stated that disclosure "would disregard the confidentiality of the relationship between the Home Office and the Government of the State of Eritrea". In the Home Office letters, it is stated that "other States generally regard the details of such matters as confidential between them and the UK authorities". So why then, asks Ms Dubinsky, is such information freely disclosed for many other states in the Country Returns Guide? No answer to this is provided in any of the material before us, and no basis has been furnished for finding that such matters are generally confidential between states.

27. As to any specific relationship or agreement of confidentiality in relation to Eritrea and Somalia, as observed by Ms Dubinsky, if the requested information were "confidential information obtained from a State" then it would attract the separate exemption at section 27(2). This has never been argued and there is no basis upon which we could find that it

[5] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-27-international-relations/

applies. If separate agreements have been entered into with Eritrea and Somalia, then the Home Office has certainly not said so, let alone provided evidence or detail.

28. On the particular sensitivities relied upon, we accept the requirement for cooperation and the potential sensitivity of the subject, but we hope that the reasons were not meant to be comprehensive. It would betray a rather dim view by the Home Office of other countries' governments to think that "many if not most" only care about money, and whether their citizens commit crimes or migrate unlawfully - as humans from all countries do.

29. In relation to the suggestion that 'large numbers of returns might also be seen to imply that conditions in the home country are poor', we entirely agree with Ms Dubinsky's criticism that:

> "…it is attempts to enter the UK rather than returns which would indicate this position. The number of asylum claimants from particular States might indeed indicate poor conditions, so too might grants of asylum by nationality – and that information is already public including for Somalia and Eritrea. The numbers of returns (which includes individuals who may have resided in the UK for long periods, even decades, but now have no entitlement to remain […]) goes to the efficacy of the removal process, not to conditions in the State of nationality."

30. Even if the number of returns did cause the tensions claimed, Ms Hassan's evidence referenced Home Office statistics showing that much of the data concerning returns (as opposed to ETDs) is available in any event. She gives these examples:

    a. Seven enforced removals of Somali nationals took place in 2022, six of which were from detention;

    b. This was despite 90 people considered to be Somali nationals being detained in that year;

    c. Of the 359 Eritrean nationals detained in 2022, three were forcibly removed from detention.

31. We agree that any sensitivity around the number of removals and their reasons will have already been caused by the publication of data such as that, rather than ETD information.

32. Likewise the suggestion that 'Many countries are at best ambivalent about accepting their nationals back, because they often send home remittances which help their economy, whereas they may become a burden on the receiving State if returned' is entirely unevidenced; nowhere in any of the material before us is it suggested that the 'many' countries include Eritrea or Somalia, and the point can be made again that the requested information for many other countries *is* disclosed.

33. We nonetheless readily accept an overall proposition that sensitivities may well arise in some situations, and that maintaining the efficacy of removal to some countries may require delicate negotiation and cooperation. The Home Office might have added to its list such obvious and less uncharitable reasons for sensitivity, such as unrelated diplomatic disputes or value differences in the criteria that ought to justify removal or deportation in individual cases.

34. We do reject one point made by BID, that any disclosure of non-cooperation is rendered less sensitive by the enactment of section 72 of the Nationality and Borders Act 2022. This permits the Home Secretary to specify a country that does not cooperate with the repatriation of foreign nationals, with consequences for the UK's willingness to grant visas to that country's nationals. Yet the power is discretionary, rather than mandatory, and might not be exercised in relation to a particular country for the same hypothetical reasons that disclosure of ETD information might be sensitive.

35. Finally, Ms Dubinsky asked us to formally draw an adverse inference as to the credibility of the Home Office response given its failure to engage with the Commissioner's investigation and these proceedings despite having a fair opportunity to do so. It has not been necessary for us to draw an adverse inference, as we can fairly approach what the Home Office says on its own terms and in light of the criticisms above. The Home Office's sweeping statements more likely arise from disengagement with the FOIA regime rather than a deliberate attempt to deceive.

Conclusion on prejudice

36. In reaching our conclusions, we take into account our assessment above, without repeating it, and the assessment of the closed material which cannot be set out here.

37. In relation to question 1 of both requests, we find that disclosure would not cause prejudice to the international relations between the UK and either country. Asking how many requests were made for ETDs shows nothing about that state's response or cooperation. Nor does the making of requests reflect poorly on a foreign state, people are removed or deported for numerous reasons and it is the Home Office's open policy position that it will attempt to remove (for example) foreign national offenders regardless of their nationality. Furthermore, multiple requests may relate to the same individual and a request might be made one year for removal in another year. For the reasons given above, there is no basis on which we could find that the 'free and frank exchange' principle would be prejudiced.

38. Questions 2-6 of both requests do meet the lower threshold of "would be likely to" prejudice the identified interests. This is only because of the more specific assertions made in the closed material, and by the narrowest of margins. We have been unable to ascertain any sustainable basis for concluding that such prejudice would occur with such likelihood or would have such severity as to afford it more than minimal weight when we later come to balance the public interest. Our finding is limited to that disclosure would be likely to cause some very minor damage to international relations, which is enough to engage the exemption, but this does not extend to finding that such damage would be sufficiently severe to cause any adverse consequences.

Section 31 – Law enforcement

39. We can deal with this exemption relatively briefly. Section 31 provides that:

> (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice —
>
> […]

(e) the operation of the immigration controls,

40. We accept that if international relations between the UK and another state is damaged in relation to ETDs, *such that* obtaining an ETD becomes more difficult, this will make it more difficult to remove someone to that state. After careful consideration, we conclude that the minimal harm caused to foreign relations is insufficient to establish the "such that" italicised in the previous sentence. This is explained in our closed reasons.

41. We have no basis upon which to accept that the wider consequences claimed by the Home Office:

> "Actual or perceived difficulties with the administration of returns are liable to affect the UK's security and law enforcement in general, as they can increase the incentive for people to arrive in the UK illegally or to overstay once their visa expires. Such difficulties also undermine the public's confidence in the immigration system and increase costs to the taxpayer as greater numbers of returnees may have to be held in detention centres for longer periods, if they cannot be returned quickly."

…would be likely to arise in relation to disclosure of *this* information in relation to *these* countries. Given the minimal nature of the prejudice identified under section 27, these consequences are too remote to meet the "would be likely to" threshold. As observed by BID, and accepted by us above, such information has been available for many countries for many years, as has the CRG with detailed requirements for ETDs, and we have not been referred to any adverse consequences that have arisen. That background really requires that Eritrea and Somalia be shown to be special cases, and the limited specific information in the closed material is insufficient to establish systemic adverse consequences.

Public interest in disclosure

42. The Home Office correspondence, and the Commissioner's Decision Notices, state that disclosure "would be in the general interests of transparency and would assist greater public understanding of how border and immigration control functions and demonstrate the steps which are taken to remove people who have no right to be in the UK (and the difficulties which can be faced in doing so)." While BID does not disagree, it also puts forward the relevance of ETDs to whether, and for how long, an individual is detained.

43. Mr Makhlouf is the Legal Director of BID. He has worked in the sector since 1989 and is registered as a Level 3 adviser with the Office of the Immigration Services Commissioner. He has been the co-convenor of the Immigration Law Practitioners' Association's working group on Removals, Detention and Offences since 2007. He gives evidence of BID's work representing individuals making bail applications to the IAC, its research and publications, its submissions and advocacy to Parliament, government and in response to consultations, and that it has acted as an intervener in a number of landmark cases concerning the lawfulness of immigration detention.

44. He further gives evidence that a delay in obtaining an ETD is a frequent obstacle to removal, which can thus lengthen detention. We can summarise his evidence, and that disclosed by the other documents and material to which we were referred, as follows.

45. While the power to detain for immigration purposes may appear broad on the face of the various statutes, such detention will only be lawful if it complies with what are known as the

'Hardial Singh' principles: the Home Secretary must intend to remove the person and can only use the power to detain for that purpose; an individual may only be detained for a period that is reasonable in all the circumstances; if, before the expiry of the reasonable period, it becomes apparent that the Home Secretary will not be able to effect deportation within a reasonable period, she should not seek to exercise the power; and finally that the Home Secretary should act with all diligence and expedition to effect removal[6]. The relevance of an ETD to these conditions is confirmed in, for example, the Home Office guidance "Detention: general instructions":

> "In all cases, caseworkers must consider on an individual basis whether removal is likely to take place within a reasonable timeframe. If removal is likely to take place within a reasonable timeframe, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be likely to take place within a reasonable timeframe where a travel document exists, removal directions are set or could be set in the near future, where there are no outstanding legal barriers or it is considered that legal barriers can be resolved expeditiously."

46. A person who is detained unlawfully may apply to the High Court for a declaration to that effect, an order for their release, and damages for false imprisonment. Such claims, both successful and unsuccessful, are shown by the evidence before us to be far from infrequent.

47. We have set out in our introduction that a person can apply for immigration bail. In practice, an individual who applies to the IAC for bail will already have had it refused by the Home Secretary according to broadly the same principles and circumstances, save of course that an IAC application affords a hearing and the opportunity for evidence to be given and tested, including perhaps new evidence. While the IAC does not formally decide whether detention is lawful, it will in practice decide if the Home Secretary has justified detention in the individual circumstances. As well as the factors listed in Schedule 10 of the 2016 Act, further considerations are included in the (at the relevant time in force) 'Presidential Guidance Note No 1 of 2018: Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration & Asylum Chamber)'[7], and include that:

> "4. Liberty is a fundamental right of all people and can only be restricted if there is no reasonable alternative. This principle applies to all people in the UK, including foreign nationals.
>
> 5. Immigration detention cannot be used as punishment, as a deterrent or for any coercive purpose. Immigration detention cannot be used to prevent or restrict the establishment of family or private life, or to prevent or restrict an applicant from pursuing lawful action to remain in the UK.
>
> 6. When considering whether to grant bail, judges are not deciding whether continued detention is lawful.
>
> 7. It is generally accepted that detention for three months would be considered a substantial period and six months a long period. Imperative considerations of public safety may be necessary to justify detention in excess of six months.

[6] See further the discussion of the principles in SK (Zimbabwe) v Secretary of State for the Home Department [2011] UKSC 23 at [11]-[13]

[7] https://www.judiciary.uk/wp-content/uploads/2018/10/pgn-1-2018-bail-guidance.pdf

[…]

28. It is for the immigration authorities to show it is more likely than not that there is no reasonable alternative to detention. In all cases involving people detained under immigration powers, the first reason for detention is to enable the immigration authorities to carry out their functions. Safeguarding is a secondary purpose of detention, and includes preventing a person absconding if released.

30. Where immigration detention is no longer justified, bail should be granted."

48. From 1 August 2021 to 31 July 2022 BID prepared 366 bail applications, of which 347 were determined by an IAC judge and 19 were withdrawn. Of those determined by an IAC judge, 313 were granted bail – a 90% success rate. While it would be wrong to treat that as the rate at which judges reach a different conclusion to Home Office officials on the same information, more submissions and evidence being possible at a hearing, it does highlight the importance of being able to locate and deploy such evidence in support of any claim that obstacles to removal make detention inappropriate.

49. BID considers transparency on the feasibility of return to be vital both to its own work and to the many detainees it does not (or cannot due to its resources) assist. The CRG was only published following FOIA proceedings brought by BID, and now enables it to assess individual cases. Not only is the type of evidence required useful, but the numbers matter too: put simply, if a country has issued very few ETDs in recent months or years when set against the likely potential number of enforced returns, then it is less likely that an individual will be issued an ETD within a reasonable timeframe. It is important for BID to be able to point out where removal is likely to fail, otherwise an individual will wait in detention until it *does* fail.

50. The above is only a summary of Mr Makhlouf's compendious evidence of BID's activity over the years in this field. We accept that it is a reputable charity with expertise in safeguarding the liberty of individuals against the state, and its views on the usefulness of the requested information deserve considerable weight.

51. We also heard evidence from Ms Hassan, who has day-to-day responsibility for BID's legal casework. We note her evidence that:

> "In the absence of detailed and accurate data on how many ETDs are produced each year for a specific country, BID will have to rely on statistics produced by the Home Office on detentions and removals. This method is not accurate because it relies on BID making a series of assumptions by checking the number of individuals from certain countries who have been detained under immigration powers in any given period and comparing it to the number of enforced removals during that same period."

and that

> "While the CRG [Countries Return Guide] may contain details of the type of travel document required by each state, the minimum requirements and timeframes for obtaining those documents, it does not currently contain any established timescales for securing an ETD for a Somali or Eritrean national with either original evidence, copy evidence or without evidence. This means that BID is unable to advise Somali or Eritrean clients whose only barrier to removal is the lack of an ETD on the time by which one could be

obtained. This makes the data on how many ETDs are produced per year for the relevant state even more important to BID, as currently there is no information available in the CRG that would assist with assessing whether removal is imminent or not in this context."

52. Rebutting allegations of an individual not cooperating in the documentation process is also important because first, non-cooperation is a criminal offence, and second, it may be relevant to whether support is later provided in the community under section 4(2) of the Immigration and Asylum Act 1999 or Schedule 10 of the 2016 Act.

53. Ms Hassan gives specific examples of Eritrean and Somali individuals supported by BID who could have benefited from the requested information. We need not set it all out, nor the rest of her impressively comprehensive evidence.

54. We accept BID's evidence as set out before us and summarised above, which establishes weighty public interest in transparency in this field in general, and in relation to these countries in particular.

Conclusion

55. Question 1 does not engage either exemption, so the Home Office must provide the information it requests.

56. On the other questions in the requests, we carefully balance the competing public interests identified and weighed above, without repeating our analysis. The public interest in disclosure put forward by BID is compelling. For hundreds of years, the common law has demanded that administrative detention must be justified and be capable of proper challenge. This is in the interests of the wider public as well as the individuals affected: detention that proper scrutiny and transparency would have shown to be unjustified harms the detainee, damages the rule of law, wastes public money, and lowers public confidence in the ability of the government to properly control immigration. The work done by BID, both on behalf of individuals and more broadly, supports that public interest. Disclosure of the requested information would help it to achieve those ends and avoid injustice.

57. In comparison, the public interest in maintaining the section 27(1) exemption is minimal. It is difficult to conceive of a case concerning this exemption where the scales could be less weighted in favour of exemption. Some harm to relations "would be likely to" occur in relation to either country, but the evidence falls far short of establishing that this would have any particular severity or consequences. It is already in the public domain that enforced removals take place to both countries, and nothing before us is capable of showing that disclosure of the requested information would actually lead to ETDs being more difficult to obtain.

58. The public interest in disclosing the requested information heavily outweighs the public interest in maintaining the exemption, and the Home Office is obliged to comply with section 1(1)(b) of FOIA by disclosing it. The Commissioner was wrong to find otherwise in the Decision Notices, and these appeals must be allowed.

59. We conclude by noting our surprise that the Commissioner thought it appropriate to accept the Home Office's bare assertions, given the way in which it had responded to the previous requests described above and the compulsion required before it then properly engaged with these. In turn, the Commissioner's Decision Notices disclose no consideration of the various

public interest factors carefully put forward by BID. A pattern of conduct has been established on the part of the Home Office that is within neither the spirit nor the letter of FOIA, and which can now be seen as having resulted in considerable delay together with expense of resources both on the part of the Tribunal and BID, a charity. We hope that future decisions will be reached after considerably more care and scrutiny.

Signed	Date:
Judge Neville	31 July 2024
Promulgated	07 August 2024

ANNEX

Reasons given for the directions made following a case management hearing on 25 January 2024

1. In these joint appeals, BID seeks information relating to Emergency Travel Documents issued by the governments of Eritrea and Somalia. The Home Office refused to provide the information, relying upon the exemption at section 27(1) of FOIA concerning prejudice to international relations. The Home Office has been given notice of the proceedings by the Tribunal but has not replied with any application to be joined to them. It is also likely that the Commissioner has also informed the Home Office that the appeals are in progress. It has therefore played no part in the proceedings.

2. In accordance with usual practice, and the Tribunal's Practice Note on Closed Material in Information Rights Cases, the Commissioner made an application under rule 14(6) that the Tribunal consider the disputed information, as well as unredacted correspondence from the Home Office to the Commissioner explaining how the section 27 exemption was engaged, without it being disclosed. That application was granted by a Registrar.

3. BID has applied pursuant to rule 4(3) for the matter to be considered afresh by a judge. A hearing was convened today for that purpose. I do not seek to repeat the detailed submissions made in writing and orally by Ms Grossman, nor those made in writing by the Commissioner. Essentially, BID's complaint is that adopting a closed material procedure as presently proposed would be an unlawful derogation from the usual principle that the evidence and documents relied upon by the Tribunal in reaching its decision should be seen by all parties.

4. BID makes three arguments. First, more details should be given as to what was contained within the closed material. Second, the Tribunal should appoint a special advocate to represent BID in the closed part of the hearing. Third, as an alternative to the second, the Tribunal should make the withheld information available to some or all of BID's lawyers within a confidentiality ring, pursuant to rules 14(4) and (5). BID also argues that the Commissioner should be ordered to be represented at the hearing.

5. I start by agreeing with BID that the contents of the closed bundle that was the subject of the rule 14(6) application has been inadequately described, and at the hearing I confirmed its contents as those set out at paragraph 1 of the above directions. I can further confirm that the redacted sections of the letter set out further details in support of the Home Office's position on whether the requested information is exempt from disclosure under section 27(1). No further gist of these short sections can realistically be given.

6. On the other issues, I turn to Browning v Information Commissioner [2014] EWCA Civ 1050. The Court of Appeal held that the closed material procedure used in this Tribunal is capable, in principle, of operating to provide a fair hearing. At [23], Maurice Kay LJ set out the following description of the procedure and its rationale:

> *23. The next milestone was the BUAV case which was to form the basis of the decision of the FTT in the present case. The BUAV case, decided on 11 November 2011, contained a thorough explanation by the FTT, chaired by Mr Andrew Bartlett QC, of the approach, taking into account the most recent authorities on the open justice*

principle such as Al-Rawi v Security Service [2011] UKSC 34 and Tariq v Home Office [2011] UKSC 35.

24. *As it contains the most comprehensive reasoning behind the approach of the FTT it is necessary to refer to some of its content in detail. The reasoning is set out in Appendix 2 to the decision. Paragraph 14 includes the following:*

> *"(g) The Commissioner, though a party to the appeal, does not have the specific objective of trying either to procure or to prevent the release of the particular information. His concern, like the Tribunal's, is to see that the Act is properly applied and to take proper account of the relevant private and public rights and interests. He argues for disclosure or non-disclosure according to his view of the application of the Act to the particular circumstances. Because his commitment is to the Act rather than to a pre-selected result, it is not unusual for his arguments to alter during the course of the hearing as evidence unfolds…*
>
> *(h) In appeals which involve consideration of the requested information in closed session, the role of the Commissioner's counsel is of particular importance. Counsel is able to assist the Tribunal in testing the evidence and arguments put forward by the public authority.*
>
> *(i) However, irrespective of the assistance of the Commissioner, the Tribunal, as a specialist tribunal, can be expected to be able, at least in some cases, to assess for itself the application of the provisions of FOIA to the closed material…the extent to which the tribunal will be in a position to do this will depend upon the particular circumstances.*
>
> *(j) Until the Tribunal has decided whether the information is to be disclosed under FOIA section 1, it must proceed on the basis that it may decide against such disclosure. The Tribunal must therefore be careful not to do anything which might prejudice that outcome.*
>
> *(k) Disclosure to the appellant's counsel on restricted terms would not itself amount to disclosure to the public under FOIA section 1. But it would be attended by risks of prejudicing the outcome. There could be a slip of the tongue. Information could be given away by facial expression or body language, or by the way questions were asked or answered or submissions made, or by inference from advice given. A change in the approach of counsel after seeing the material could make apparent the content of the information, or some of it. Such risks are relevant to the exercise of discretion under the Tribunal's procedural powers.*
>
> *(l) Further risks may arise, beyond the individual appeal, because there are many individuals and organisations who are regular users of the right to freedom of information in pursuance of a particular interest. BUAV is one example out of many. If it became a regular practice to disclose requested information to counsel for the appellant, such counsel would over time build up a bank of knowledge concerning the topic of interest, derived from information which the public has no right to see. This could affect the person's or organisation's strategy in the use of the Act. I have observed*

above that, unlike a special advocate, an ordinary legal representative, authorised to see the closed material on confidential terms, would continue to communicate with the appellant after seeing it, and would take into account the confidential information when advising the appellant and taking decisions on the conduct of the case. By making the information available to counsel, in cases where there is no right to it, the appellant would over time derive illegitimate benefits.

(m) Difficulties would also arise in relation to how appellants should be treated, who are not legally represented. An appellant may be wholly trustworthy and may offer an undertaking not to disclose the information unless the Tribunal so orders. If the information can be made available to counsel, why not to a trustworthy appellant? Yet to give it to the appellant before the Tribunal has decided whether it is disclosable, would be to override the Act and undermine the Tribunal's function. Giving it to a lawyer acting as the appellant's representative is not far different from giving it to the appellant in person."

These observations led to the Tribunal expressing its approach as follows (at paragraph 15):

"These considerations lead me to the conclusion that the type of order now sought should not be made, save in exceptional cases where, as a minimum, the Tribunal take the view that it cannot carry out its functions effectively without the assistance of the appellant's legal representative in relation to the closed material. Whether there will be any such cases remains to be seen. The approach must depend upon the particular circumstances. In some cases the Tribunal will be able to deal with the matter without external assistance. In many cases all necessary assistance will be provided by counsel for the Commissioner. In a few cases it may be necessary to appoint a special advocate, despite the extra expense likely to be occasioned."

This is the passage that was adopted by the UT in the present case (see paragraph 15 above). Since the present case was decided by the FTT, a further Practice Note has been issued in May 2012. It provides for additional procedural protection by a requirement of an application in writing for the withholding of material. Where a party and, by inference, his legal representative are excluded from part of a hearing it states (paragraph 12) that "the judge will explain to the excluded party, usually the citizen, what is likely to happen during the closed part of the hearing. The judge may ask if there are any particular questions or points which he would like put to the other parties while he is absent". It further provides for the Tribunal to discuss with the remaining parties, prior to the end of the closed hearing, what summary of the closed hearing can be given to the excluded party and whether, in the course of the closed session, any new material has emerged which it is not necessary to withhold and which therefore should be disclosed.

7. He then held as follows:

> *33. The crucial task is to devise an approach, in the context of a specific case, which best reconciles the divergent interests of the various parties. In my judgment, the approach adopted in this case and originating in the BUAV case does precisely that, having regard to the unique features of appeals under FOIA where issues of third party confidentiality and damage to third party interests loom large. The features to which reference was made in the BUAV case – the expertise of the Tribunal, the role of the IC as guardian of FOIA etc – make it permissible to exclude both an appellant and his legal representative except in circumstances where the FTT*
>
> > *"cannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interests involved. "*
>
> *In associating myself with this formulation I am accepting that there are features surrounding a case such as this which merit the description of the procedure as being at least in part investigatory as opposed to adversarial.*

8. I take into account Ms Grossman's detailed submissions on the consequences of a closed material procedure for both natural justice and open justice, and the need to ensure that any derogation is justifiable. None of the authorities to which she refers add anything of importance to the analysis in Browning. I reject her argument that the direction sought by the Commissioner under rule 14(6) must fulfil the requirements of rule 14(2).

9. The Tribunal certainly has the power to order that the Commissioner be represented, and regularly does so, but I do not interpret Browning as holding that this is necessary in every case to achieve a fair hearing. It is simply one of the tools that can be adopted in a particular case to achieve the objective described at [33].

10. In some cases, attendance by the Commissioner is likely to be essential, for example as discussed in Lownie v The Information Commissioner & Anor [2023] UKFTT 397 (GRC) at [56]. I accept, in principle, that there might be a case in which it is not enough, and the Tribunal must consider alternatives such as those proposed here. But at the other end of the spectrum, and as recognised in Browning at [24(i)], there are cases where is sufficient for the Tribunal to simply bring its own specialist and independent investigative role to bear.

11. The test for accepting any of the proposals put forward by BID is not whether it is necessary for a fair hearing, but whether it should be permitted in accordance with the overriding objective at rule 2 and the principles in Browning. A course of action may not be strictly necessary, but the pros still outweigh the cons. Those pros and cons must be identified.

12. First, a confidentiality ring. BID proposes that counsel representing it at the final hearing, and its solicitors, be permitted to see the withheld correspondence. They would be directed (and would undertake) not to disclose it to their client. BID has made clear that it does not seek inclusion of the disputed information itself in this arrangement.

13. In Browning, the reasoning of the Tribunal in BUAV as set out above was approved by the Court of Appeal. This includes what was said at paragraphs (k) and (l) concerning the

risks of disclosure to legal representatives. As well as agreeing with what was said by the Tribunal, Maurice Kay LJ himself held at [31] that:

> *31. Our Courts have shown an aversion to permitting counsel to see or hear evidence which he is not at liberty to disclose to his client. In the context of criminal litigation, this is illustrated by R v Davis [1993] 1 WLR 613, 616 to 617, per Lord Taylor of Gosforth CJ; R v Preston [1994] 2 AC 130 at 152-153, per Lord Mustill; and R v G [2004] 1 WLR 2932, at paragraph 13, per Rose LJ. However, such an approach is not confined to criminal litigation. Somerville v Scottish Ministers [2007] 1 WLR 2734 was concerned with an application for judicial review. As in the criminal cases, the issue concerned public interest immunity. An arrangement had been devised whereby documents were to be made available to counsel on condition of strict confidentiality which prevented him from disclosing them or their contents to his client. Lord Rodger said (at paragraphs 152-153):*
>
> > *"Although devised with the best of intentions, this procedure was, in my view, wrong in principle. As a result, it not only gave rise to very real practical difficulties but led the Court to adopt a mistaken approach to the inspection of the documents by the Lord Ordinary.*
> >
> > *...counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of Your Lordships, I am satisfied that no such procedure should be followed in the future."*
>
> *Drawing on the criminal cases to which I have just referred, Lord Mance said (at paragraph 203):*
>
> > *"It puts counsel in an invidious and unsustainable position in relation to his or her client…as in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the Court about public interest immunity."*
>
> *32. I readily acknowledge that the present case is not concerned with public interest immunity. Nor is it concerned with an interlocutory determination of what may or may not form part of a trial. The closed session with which we are concerned was part of the substantive hearing. Nevertheless, in my judgment the FTT and the UT were correct in their analysis of the circumstances and were entitled to derive support from the jurisprudence to which I have referred, acknowledging (as the UT did at paragraph 72) that the context of this case is different. In spite of the difference, I consider that the features most comprehensively spelt out by the FTT in the BUAV case (above paragraph 24) fully justify the approach taken there and subsequently in the present case.*

14. I respectfully agree. Furthermore, and as discussed at the hearing, one of the appendant risks is illustrated by its proposed benefits. Without sight of the withheld information, BID must cover a number of different possibilities when preparing and presenting its case. I agree that such expense of time and cost that should be avoided if possible. But if avoided by means of counsel and solicitors knowing the contents of the withheld

information, the way in which the appeal is then prepared and presented would itself be revelatory to BID itself and any observer.

15. Ms Grossman pointed to the use of confidentiality rings, and her instructing solicitors' experience of them, in other legal contexts. This apparently includes procurement and competition litigation. This may be so, but I was referred to no authority setting out a positive illustration of the use of confidentiality rings in circumstances akin to a FOIA appeal. Ms Grossman did cite Ahmed v Director General of Security Service & Ors [2020] EWHC 3458 (QB), which records that during those proceedings the Lord Chief Justice had made an order permitting Mr Ahmed's legal representatives to view withheld material. Against that single and surely somewhat exceptional example can be set the rejection of confidentiality rings in other legal contexts, see for example the discussion in HK & Ors v Secretary of State for the Home Department [2013] EWHC 1426 (Admin). I agree with the points made in that case at [22]-[25], as well as those in Browning.

16. Turning to the appointment of a special advocate, I accept that the Tribunal has an inherent power under its procedure rules to make such an appointment where required to afford a party a fair hearing – see, by analogy, the inherent power to appoint a litigation friend: AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123.

17. Appointment of a special advocate would raise practical questions. Who selects and instructs the special advocate? What, if anything, would be the role of the Special Advocates' Support Office? Who funds the special advocate? What are the terms of the appointment? How long would it all take? Ms Grossman did attempt to answer some of those questions, and it may be that they must be grappled with in a future appeal. As observed by the Commissioner in his written submissions, his role in an appeal as 'guardian of FOIA' is not fully aligned with that of a Special Advocate for the appellant, and may not always provide a suitable substitute.

18. For all the comprehensive arguments made by Ms Grossman, the Tribunal's task is simply to devise an approach in the context of *this specific case* that reconciles the diverging interests of the parties. This case has the following relevant features. First, the requested information is a simple short list of numbers. While, as argued by Ms Grossman, numbers can have significant and unforeseen implications, disputed information that is lengthy and requires in-depth scrutiny is more apt to require representation of the appellant to achieve fairness. Second, the Home Office has not taken any part in the proceedings and neither it, nor the Commissioner, will call any witnesses. The Commissioner does not propose to be represented at the hearing at all, so proposes to make no closed submissions (these can, if thought appropriate by the Tribunal, be made in writing in any event). This is not a case where a witness for the public authority will give closed evidence that ought to be challenged in cross-examination. Third, there is only a small amount of withheld material that contains the Home Office's reasons for claiming the section 27(1) exemption. While Ms Grossman is right that a small amount of text can still say a lot, overall I consider the Tribunal's reliance on closed material to be at the opposite end of the spectrum to that in cases such as, to pick it as merely one example, Lownie, where oral evidence was given not only on why information ought to be withheld, but which exemption even applied. Fourth, on considering the proposed closed material, I consider that its consideration by the Tribunal is required in order to decide the appeal. Fifth, I consider that disclosure of any of the closed material would

defeat the purpose of the appeal and (subject to the Tribunal's final conclusions) thereby risk the prejudice with which section 27 is concerned.

19. Taking all those matters together, and considering the closed material for myself, I conclude that a rule 14(6) direction is appropriate and that the objective described in Browning at [33] can be met simply by the Tribunal considering the information for itself, as anticipated at [24(i)]. The cons of each of BID's proposals outweigh the pros. The Tribunal will nonetheless remain under an obligation to satisfy itself of the fairness of the proceedings on an ongoing basis, and will keep matters under review.