Neutral Citation Number: [2024] UKIPTrib 3

Case No: **IPT/22/10/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Judgment date: 21 June 2024

Before:

MRS JUSTICE LIEVEN
JUDGE RUPERT JONES

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Between:

BETH **Claimant**

- and -

THE SECURITY SERVICE **Respondent**

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Charlotte Kilroy KC and Jesse Nicholls of Counsel for the Claimant, instructed by the Centre for Women's Justice

Neil Sheldon KC, Jennifer Thelen and Emmanuel Sheppard of Counsel for the Respondent, instructed by the Government Legal Department

Sarah Hannett KC and Paul Skinner appeared as Counsel to the Tribunal

Hearing date: 9 May 2024

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JUDGMENT

1. This case concerns a claim by the Claimant “Beth” that her human rights have been breached by the Security Service (‘SyS’ or ‘the Respondent’) by reason of the failure to protect her. Beth was in a relationship with X for a number of years and claims he was seriously abusive to her. Beth says that X was a Covert Human Intelligence Source (‘CHIS’) who was working for the SyS.

2. There were two OPEN issues that fell for determination at this interlocutory case management hearing. Firstly, whether the Respondent should be allowed to rely on the policy of Neither Confirm Nor Deny (‘NCND’) in respect of whether X was or was not a CHIS. Secondly, the degree to which information about X should be restricted so that he cannot be identified as a result of these proceedings (it is not in dispute that his name should be anonymised in the OPEN proceedings in public).

3. The first issue is in OPEN and is dealt with in this judgment. The second issue is in PRIVATE and is dealt with in a separate judgment. There is also a CLOSED judgment.

4. Beth’s allegations have already been the subject of extensive litigation in the King’s Bench Division of the High Court. The BBC sought to report Beth’s allegations together with other facts about X and the Attorney General applied for an injunction to prevent them from doing so and restrict what could be reported. Chamberlain J gave a series of judgments, including four OPEN and public judgments: *Her Majesty's Attorney General for England and Wales v British Broadcasting Corporation* [2022] EWHC 380 (QB); [2022] EWHC 826 (QB); [2022] 4 WLR 74; [2022] EWHC 1189 (QB); and [2022] EWHC 2925 (KB).

5. In those judgments Chamberlain J allowed the BBC to publish certain material but restricted information about X, including a schedule of identifying characteristics, in order to protect X’s identity and to protect X from a risk of harm.

6. In her claim form and witness statement Beth has set out the history of her relationship with X. She says that X told her on a number of occasions that he was a CHIS working for the Respondent and that she had strong reason to believe that this was true. In its Detailed Grounds of Resistance the Respondent has pleaded NCND to this allegation.

7. Ms Kilroy, on behalf of Beth, submits that the Respondent should be required by the Tribunal to make a positive pleading, as to whether X was or was not a CHIS.

8. It is agreed that if X was publicly identified that could put his safety at serious risk. This matter was considered in detail by Chamberlain J and he determined that this was established.

9. The need to protect X’s identity has led to agreement that parts of any OPEN hearing which could give rise to the identification of X will be held in PRIVATE, with the public excluded, and Beth and her legal team bound by orders that restrict onward publication of X’s identifying characteristics.

NCND and identification of a CHIS: the Law

10. The use of NCND in respect of the identification of a CHIS is a well-established approach referred to frequently in authorities. The caselaw is helpfully summarised by Bean J in DIL v Metropolitan Police [2014] EWHC 2184 at [25] onwards. The justification for allowing a Respondent to maintain NCND is helpfully summarised by reference to Re Scapattici [2003] NIQB 56, in DIL at [28]:

> 28. A striking example of the application of the NCND rule in a civil case is *In re Scappaticci* [2003] NIQB 56. The claimant alleged that his life was endangered because of newspaper articles and television coverage suggesting that he had been an undercover agent working within the IRA as an informer for the security services. Public denials by the applicant himself had failed to dispel the suspicion, and he sought public confirmation from a minister at the Northern Ireland Office that he was *not* an undercover agent. When this was declined, he applied for judicial review. Carswell LCJ accepted that there was "a real and present danger" to the life of the applicant following the press allegations, and that the confirmation which he was seeking from the minister would be a "simple and quick action for her to take". Nevertheless the application for judicial review of the minister's refusal either to confirm or to deny that he was an agent was refused. The Lord Chief Justice said at [15]:-
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>> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some case endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent so possibly placing his life in grave danger.… If the Government were to deny in all cases that persons named were agents the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be greatly reduced. There is in my judgment substantial force in these propositions and they form powerful reasons to maintaining the strict NCND policy."

11. At [39] of DIL Bean J said:

> 39. I derive the following guidance from the authorities:
>
> (1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against any other competing public interests which may be applicable *(McNally; Mohamed and CF v SSHD)*.
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> (2) There is a well-established exception in a criminal trial where revealing the identity of the informer or the UCO is necessary to avoid a miscarriage of justice (*Marks v Beyfus; R v Agar)*: this does not arise in the present case.
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> *(3)* Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of

allegations in the case where to admit or deny them might endanger other people, hamper police investigations, assist criminals, or reveal police operational methods. (*Savage; Carnduff*).

12. There was initially an issue in the present case as to the correct legal approach by the Tribunal to whether or not to allow the Respondent to maintain NCND. In *Mohamed and CF v Secretary of State for the Home Department* [2014] EWCA Civ 559 at [20] Maurice Kay LJ said:

> 20. Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" ("NCND"), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that MAM and CF or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider MAM's and CF's principal ground of appeal is made out. The approach to their abuse of process applications was largely flawed. I make no comment on the merits of those applications.

13. In *Al-Fawaz v Secretary of State for the Home Department* [2015] EWHC 166 Burnett LJ said at [77]:

> Mr Friedman reminds us of the memorable dictum found in paragraph [20] of Maurice Kay LJ's judgment in *Mohamed v Secretary of State for the Home Department* [2014] EWCA Civ 559, [2014] 3 All ER 760 that "it is not simply a matter of a government party … hoisting the NCND flag and the court automatically saluting it." That is beyond doubt. The court's task is to consider whether the Secretary of State's insistence on NCND on national security grounds in the case in question is rational.

14. Mr Sheldon accepted that *Al-Fawaz* was a judicial review rationality challenge, and as such the Tribunal's approach to deciding the issue should not be one of simply deciding whether the Respondent's approach of NCND is rational. He accepted therefore that the Tribunal must make its own assessment and decision as to whether NCND should be maintained.

15. This is consistent with the Court of Appeal in *Mohammed* at [20] and dicta in *DIL* at [39] that it is for the Court to decide and assess whether the public interest in maintaining NCND is established on the facts of any case in light of any potential harm or damage to national security and whether it is outweighed by any other competing public interests which are applicable.

The parties' submissions

16. Ms Kilroy submits that X has disclosed his identity as a CHIS to Beth, and as such NCND serves no purpose and should not be relied upon. Beth knows the true position and has said so publicly.

17. She further submits that the Respondent has not put in any evidence of specific harm to national security, or even general harm, in this particular case.

18. On the other side of the balance she says that there will be a serious interference with Beth's ability to have a fair trial if NCND is maintained. Most if not all of Beth's factual case will be unable to be dealt with in OPEN because the Respondent is relying on NCND. Given what Beth already says she knows, Ms Kilroy argues that the Respondent should be required to make a positive pleading as to whether X was or was not a CHIS, and any evidence could be dealt with in PRIVATE hearings, in order to protect X's identity and therefore safety.

19. Ms Kilroy submits that under rule 7 of the IPT Rules the Tribunal must balance any harm to national security against other matters of public interest, in this case the need to ensure that Beth has a fair trial.

20. She submits that the correct approach is as follows:

    (1) The IPT must assess the extent of the interference with natural justice which would be caused by non-disclosure of the information.
    (2) Unless there is clear evidence that disclosure of the information in this case would cause prejudice to national security or harm to the public interest, the interference with fairness will not be '*strictly necessary*'.
    (3) The IPT must assess whether disclosure can be made '*to an extent*' and '*in a manner*' which would not prejudice national security or cause harm to the public interest, or the strict necessity test will not be met.
    (4) The more extensive the interference, the more is required by way of justification for it in terms of evidence, and lack of viable alternatives.

21. She goes back to the well-known principles set out in *Al-Rawi* and *AF (No 3)* that a court cannot depart from the basic principles of natural justice, and the fact of the appointment of a Special Advocate (here, Counsel to the Tribunal) is not in itself sufficient to meet the requirement of natural justice.

22. If rule 7(1) does not allow such a balance then Ms Kilroy submits it is ultra vires the enabling power in s. 69(6) of the Regulation of Investigatory Powers Act 2000 (RIPA) which provides:

    S.69(6) In making rules under this section the Secretary of State shall have regard, in particular, to—

    (a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and

    (b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.

23. Mr Sheldon submits that self-identification is largely if not wholly irrelevant to the question of whether NCND can be upheld, by reference to the caselaw set out above.

24. He submits that there is evidence of harm to national security from not permitting reliance on NCND in respect of whether X holds CHIS status, both by reference to the evidence placed before Chamberlain J, and the general position set out in the caselaw.

25. He submits that there will be limited harm to Beth's fair trial rights, both because a significant part of the case can be dealt with in OPEN in respect of challenge to those aspects of the Respondent's policies that are to be disclosed into OPEN; but also Beth's evidence as to X's risk to her, which can be dealt with largely in OPEN albeit in PRIVATE session.

26. He further submits that rule 7(1) does not permit of any balance between national security and natural justice. If disclosure would be prejudicial to national security then rule 7(1) requires it not to be granted. However, the Claimant's fair trial rights are entirely protected by the statutory scheme under which the Tribunal operates and the processes thereunder.

27. There is no argument that rule 7(1) is ultra vires because of the effect of the entirety of the Rules and RIPA.

28. We invited Counsel to the Tribunal ('CTT') to make submissions on rule 7(1) because of the wider implications of the arguments. CTT submits that in determining whether to allow disclosure, considerations of wider public interest do arise. However, in any event if the Tribunal considers that the public interest in non-disclosure of whether X is or is not a CHIS outweighs the natural justice issue, then the interpretation of rule 7(1) does not arise.

Conclusions

29. We will deal with each of the above issues in turn.

30. In relation to the self-disclosure argument, the fact that a third party, here Beth, believes that they know that an individual is a CHIS is largely immaterial as to whether it is appropriate to maintain NCND. The NCND principle fundamentally relies upon the absolute consistency of its application. A CHIS is effectively given a guarantee that their status will not be acknowledged. It would undermine that guarantee if it had to be caveated to the effect that the SyS would undertake a balancing exercise in determining whether to maintain NCND. Conversely, the status of a non-CHIS must be protected in the same way for the reasons explained in *Scappaticci.*

31. The authorities demonstrate that even where an individual has positively and directly identified themselves as a CHIS, e.g. *Savage,* the Court has continued to maintain the policy of NCND. In *DIL*, the only case where NCND was departed from, the lifting of NCND was only applied in the two instances where the State had already itself acknowledged that the two individuals were CHIS.

32. This then leads to Ms Kilroy's next submission, that there is no evidence of national security harm if the Respondent is not allowed to rely on NCND. She submits that any concerns can be entirely met by evidence relating to X's identity being considered only in PRIVATE.

33. She contends that the evidence submitted by the Respondent does not go to the application of NCND but rather to why further directions were required in order to protect X's identity. She submits that the imposition of a confidentiality ring, and the PRIVATE element of the proceedings that follows, is sufficient to protect from any risk to national security.

34. We do not accept the submission that there is no evidence that goes to the need for NCND. However, in any event, we are entitled to rely on the authorities that set out the nature and extent of harm to national security caused by the waiver of NCND in relation to the identity of CHIS, some of which are cited above. We are also entitled to rely on the assessment and judgment on this issue, and the related issue of anonymity orders, by Chamberlain J in the related proceedings involving Beth and X.

35. The rationale for the need to protect the identity of a CHIS and support for the application of NCND on the grounds of national security was accepted by Chamberlain J in *Attorney General v BBC* (QB) [2022] 4 WLR 74 at [26] and [27]:

> **26.** For the Attorney, Sir James Eadie QC submitted that the passage as a whole showed the importance of maintaining the secrecy of the identities of informants, even in cases where criminality was alleged, and was fully consistent with earlier authority to the same effect: see eg *Attorney General v Blake* [2001] 1 AC 268, 287E (Lord Nicholls of Birkenhead); and *Regina v Shayler* [2002] UKHL 11; [2003] 1 AC 247, where Lord Bingham of Cornhill identified information liable to disclose the identity of agents or compromise the security of informers as a prime example of information whose confidentiality the courts were likely to protect. The value of informants and the importance of maintaining the secrecy of their identities was also shown by authorities indicating the courts' acceptance of the NCND principle: see e g *In re Scappaticci's Application for Judicial Review* [2003] NIQB 56 at [15]; *R (Al Fawwaz) v Secretary of State for the Home Department* [2015] EWHC 166 (Admin); [2015] ACD 78, para 75 (Burne LJ).
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> **27.** I accept that there is ample support in the authorities for the proposition that informants play a vital role in preventing crime and maintaining national security; and that disclosure of their identities undermines their ability to carry out that role effectively. The NCND principle is one of the ways in which the value of the role of informants and the need to protect their identities in the public interest has been recognised. *Blake* and *AB* show that the same public interests are also recognised by the law of confidentiality. But there is an important difference between (i) respecting the practice of NCND in relation to the identity of CHIS in the context of OPEN legal proceedings and (ii) granting relief to restrain publication of an allegation that an individual is a CHIS. The former is a procedural device designed to avoid damage to the public interest in legal proceedings. It comes into play once an allegation has been made that an individual is a CHIS. The latter prevents the allegation being made in the first place and so involves a significant interference with one of the core rights on which an effective democracy depends. An application for relief which would have that effect must be clearly and cogently justified.

36. This approach was fully explained and justified in proceedings before Chamberlain J, as incorporated in a witness statement before this Tribunal.

37. We are satisfied that there is cogent evidence before us to support the Respondent's assessment as to the harm to national security of waiving NCND, in addition to that of identifying X. We also do not accept that the Respondent has come close to waiving NCND in its approach or conduct in reply to Beth's allegations. Rather, the Respondent has gone to extensive lengths throughout these and the BBC proceedings to uphold the NCND policy.

38. Ms Kilroy submits that the public interest, both in terms of any national security harm and any Article 2/3 risk of harm to X, can be fully protected by the use of a confidentiality ring. This would provide that confirmation of X's status can be made by the Respondent in private proceedings to her and her legal representatives only and subject to the anonymity order that is in place. Therefore, she argues that it is not appropriate or necessary to allow the Respondent to rely on NCND. She relies upon *R (Mohammed) v Secretary of State for Defence* [2012] EWHC 3454 where Moses LJ at [17] and [20] said:

> 17. I conclude that there is no principle to be found in Somerville's case which precludes a confidentiality ring once the judge has had an opportunity to consider whether the public interest immunity claim should be upheld.
> …
> 20. A confidentiality ring will avoid some, although I acknowledge not all, of the evils which led Lord Dyson JSC to reject the possibility of a closed hearing. Inequality of arms is brought back to a point nearer equilibrium. Even though some of the evidence available to the court and to the other side is kept from the client, at least his legal team within the ring will know of it. Although counsel cannot consult their client as to the contents of the documents disclosed, they can at least deploy them in favour of their client. They are in a far better position to understand the nature and the needs of their client's case than a special advocate. They are in a peculiarly good position to judge the extent to which their client's case would be damaged by an inability to communicate and discuss some of the material.

39. We note that in *Mohammed* the Court did not actually consider that a confidentiality ring would be sufficient to protect national security. There is no case where a Court has relied on a confidentiality ring where national security was in play. The reasons not to rely upon a confidentiality ring in cases concerning national security were carefully set out by Ouseley J in *AHK* at [23]-[25].

40. Such an approach would amount to a material departure from NCND and the absolute reliance that CHIS and potential CHIS can place upon their status not being disclosed. Further there is necessarily a greater risk of inadvertent disclosure, whether by Beth or someone else within the ring. The careful structure and safeguard of security vetting which protects material in CLOSED procedures would not apply.

41. Ms Kilroy next submits that there will be very significant interference with Beth's fair trial rights if NCND is maintained. She says that the vast majority of the final hearing will have to be conducted in CLOSED and will materially impact on Beth's ability to put her case.

42. We accept that maintaining NCND impacts on Beth's fair trial rights because she, through Ms Kilroy, cannot counter whatever evidence may or may not be presented in CLOSED, but that is inherent in any CLOSED procedure case. Further, there are a number of procedural safeguards in place by virtue of the Rules that will reduce the impact on Beth in these proceedings. For instance, her interests will be represented by CTT in CLOSED proceedings. We also note that the impact on Beth by this process is significantly less than in many CLOSED procedure cases where the individual does not know the case against them and may suffer very significant consequences by reason of material in CLOSED which is unknown to them.

43. We also note that the position is not as stark here as Ms Kilroy suggested. The Respondent is to disclose certain policy documents into OPEN, and it will be open to Ms Kilroy to challenge the lawfulness and efficacy of those documents.

44. Overall, although we accept an impact on natural justice in permitting the Respondent to maintain NCND in the OPEN proceedings (both public and private), we consider that the Tribunal will retain the ability to conduct a fair trial into Beth's allegations. We do not consider it necessary to determine whether Article 6 is or is not engaged, because the matter can be considered under the common law on the preservation of natural justice.

45. Central to Ms Kilroy's case is the submission that the Tribunal must balance harm to national security against other public interests, in particular Beth's fair trial rights. To a significant degree the parties agree the analytical approach. The first stage is for the Tribunal to determine whether breaching NCND would cause prejudice to national security. This is a determination for the Tribunal, but in making that determination the Tribunal should give considerable weight, or great respect, to the Respondent's assessment of harm to national security, see the Supreme Court decision in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765. This is not a contentious submission and was accepted in the context of the IPT in *Various Claimants v Security Service* ("the Vetting Case") 2022 UKIP Trib3 at [47]:

> Moreover, it is well established that, in the context of national security, great respect must be paid to the assessment of the responsible authorities. It is not the function of a court or tribunal to substitute its own opinion of national security matters for that of the intelligence services, both on grounds of institutional capacity and democratic accountability: see e.g. *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, at para. 70 (Lord Reed PSC). That limitation on the Tribunal's role does not mean that there is a breach of Article 6 since what is critical is that there is access to an independent judicial body which can consider all the underlying documents and can subject the assessment of the intelligence services to judicial review.

46. As we have set out above, in our view there is no basis to depart from the assessment of the Respondent in respect of the harm to national security that waiving NCND would cause in this case. The importance of the Respondent being able to guarantee to CHIS, and prospective CHIS, that their identities will never be revealed is clear. The degree to which that would be undermined by the Respondent being required to positively plead one way or another to Beth's assertion, is apparent from *Scappatici*.

47. Ms Kilroy submits and we wholly accept that achieving fairness, and the proper hearing and consideration of proceedings, is one of the core functions of the IPT, set out in both the enabling legislation and the IPT Rules themselves. That function and duty sits alongside and in parallel to the need to secure that sensitive information is not disclosed '*to an extent, or in a manner that is contrary to the public interest or prejudicial to national security*', see s.69(6) RIPA.

48. Section 69(6) of RIPA states:

> *"In making rules under this section the Secretary of State shall have regard, in particular, to—*
>
> *(a) the need to secure that matters which are the subject of proceedings, complaints or references brought before or made to the Tribunal are properly heard and considered; and*
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> *(b) the need to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services."*

49. Rule 10(4) of the IPT Rules provides that when exercising its discretion to hold a hearing, the IPT *"must endeavour, so far as is consistent with the general duty imposed on the Tribunal by rule 7(1), to conduct proceedings, including any hearing, in public and in the presence of the complainant."*

50. Ms Kilroy argues that even if the duty to strive for fairness were not explicit in the IPT Rules, it would be implicit: first, because natural justice is a fundamental common law right which all tribunals and decision-makers are required to uphold unless explicit statutory authority authorises departure (*Al Rawi* [2012] 1 AC 531, §27, §39 and §48); and secondly, because RIPA and the IPT Rules were enacted to enable proceedings alleging breach of ECHR rights under section 7 of the Human Rights Act 1998 ('HRA').

51. She therefore submits that either rule 7 of the IPT Rules requires a balance between national security and other public interest, including fair trial rights; or if it does not allow such a balance then rule 7(1) is ultra vires.

52. Rule 7(1) states;

> ***7****(1) The Tribunal must carry out their functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the United Kingdom or the continued discharge of the functions of any of the intelligence services.*

53. In our view the flaw in Ms Kilroy's analysis of rule 7(1) is that she seeks to analyse it in isolation from the rest of the Rules and the statute. Fair trial rights and natural justice,

whether imported through Article 6(1) of the European Convention on Human Rights or through the common law, are protected through the processes that the Tribunal provides under the Rules. The Tribunal addressed this in *Lee and Wilkes v the Security Service* [2023] UKIPTrib 8 at [15]-[18]:

> 15. At the hearing before us Mr Muman made clear that he was not submitting that the Rules are in themselves incompatible with Article 6(1) if it does apply. He was right not to do so. As both the European Court and this Tribunal have said on a number of occasions, the fact that the normal procedures that would apply to civil proceedings cannot apply in the same way in this Tribunal does not mean that this Tribunal's procedures are incompatible with Article 6(1): see e.g. *Kennedy v UK*, at paras. 184-191; and *E & Others*, at para. 56.
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> 16. This Tribunal is under a duty to carry out its functions in such a way as to secure that information is not disclosed to an extent, or in a manner, that is contrary to the public interest or prejudicial to national security or, among other things, the continued discharge of the functions of any of the intelligence services: see rule 7(1) of the Rules. In many cases, this means that the claimant will not even know that they are a person of interest to the intelligence services. At the end of the day, if there is no determination in their favour, it may not be possible, under rule 15 of the Rules (which is expressly subject to the general duty in rule 7(1): see rule 15(6)) to give any reasons for that conclusion, e.g. whether they were a person of interest but no unlawful conduct has taken place or whether they were not a person of interest at all, since to disclose even that much would usually offend against the principle of "neither confirm nor deny" or "NCND", which this Tribunal has long regarded as an important principle which it must uphold in accordance with its duty in rule 7(1).
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> 17. This does not mean that this Tribunal's procedures are unfair or incompatible with Article 6(1). There are other features of the procedural framework that governs this Tribunal which have been put in place so as to ensure fairness in the particular context in which this Tribunal has to operate. For example, a complainant does not have to overcome "any evidential burden" before making a complaint to this Tribunal: see *Kennedy v UK*, at para. 190; the Tribunal's jurisdiction is in part an investigatory one and its role "includes an inquisitorial element": see *Al-Hawsawi v Security Service & Others* [2023] UKIPTrib 5, at para. 39; the Tribunal itself is an independent judicial body with full access to all documents, including classified ones: see *E & Others*, at para. 44; and this Tribunal has, in appropriate cases, the benefit of the assistance of CTT [Counsel to the Tribunal], who have access to the relevant documents and can perform functions such as the cross-examination of witnesses if evidence is heard in the absence of the complainant: see rule 12(2)(c) of the Rules.
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> 18. Against that background, we do not consider that it is necessary for us to reach a final conclusion in this case on the first issue. In the light of the submissions that were made to us, it seems to us that the crucial question is whether, even assuming that Article 6(1) of the ECHR does apply to these proceedings, it requires the minimum disclosure to the Claimants which would be required if the principles in *AF (No. 3)* are applicable.

54. We agree with Mr Sheldon's submission that rule 7(1) provides an absolute prohibition on disclosing material into OPEN proceedings in the Tribunal if such disclosure would harm national security. The balance between the protection of national security and fair trial rights has been addressed by Parliament in RIPA and the IPT Rules, which provide a procedure that protects natural justice, whilst safeguarding national security. There is no breach of the right to fair process, as set out inter alia, in *Al-Rawi* because the material which has been subject to NCND will be fully and fairly considered in the CLOSED part of the proceedings. The position is therefore materially different from a Public Interest Immunity ('PII') application, which if successful leads to the material being entirely excluded.

55. Ms Kilroy submits that if rule 7(1) does not allow a balancing exercise then it must be ultra vires s.69(7). In our view this argument is plainly wrong, because it does not take into account the wider scheme. As Lord Dyson explained in the Court of Appeal in *R(A) v Director of Establishments of the Security Service* [2010] 2 AC 1 at [48]of the predecessor set of IPT Rules (cited in the Claimant's Post-Hearing Submissions at [7], and cited with approval in the Supreme Court at [14]):

> "The 2000 Rules are detailed and elaborate. They are carefully drafted so as to achieve a balance between fairness to a complainant and the need to safeguard the relevant security interests…"

56. Rule 7(1) reflects the detailed enabling power in section 69 of RIPA and is part of the overall statutory scheme. This scheme reflects the requirements of s69(6) of RIPA, which does not require a hearing in the presence of the complainant; nor do they even require that the IPT must endeavour to ensure a hearing in the presence of the complainant. Rather, s.69(6)(a) stipulates the need to secure that matters which are the subject of complaints are "*properly heard and considered*". Therefore, in making the IPT Rules, what must be balanced against the needs of national security in RIPA s69(6)(b) is not the right for the complainant to attend a hearing, but the requirement for the matter to be properly heard and considered.

57. That balance has been met by the scheme set out in IPT Rules 10(1), 10(4) and 7(1): rule 10(1) gives the IPT a discretion to hold a hearing in a variety of ways including with or without the attendance of the complainant at various stages. IPT rule 10(4) elaborates on that discretion, providing that the IPT must "*endeavour*" to conduct "*any*" hearing in the presence of the complainant, whilst making explicit that this requirement to endeavour is subject to the general duty under IPT rule 7(1) - in so far as this does not cause disclosure of information in a manner prejudicial to national security.

58. In the light of our conclusions on the harm to national security, we do not need to consider further submissions by CTT on the construction of rule 7(2) to (9).

59. Therefore, we accept that rule 7(1) is not ultra vires.

60. We conclude that the Respondent is permitted neither to confirm nor deny whether X was or was not a CHIS in response to the claim in the OPEN proceedings (both in public and private).

Post hearing submissions

61. Following the circulation of a draft of this judgment to the parties for corrections on 7 June 2024, the Claimant provided written observations requesting that, "*the final judgments from the Tribunal make clear whether it is the Tribunal's view that the Tribunal's determination/decision that the Respondent shall be permitted to rely on the NCND policy gives rise to a right of appeal pursuant to s.67A(1) RIPA"*. She did not express any view of her own on that issue. The Tribunal directed the Respondent to provide brief submissions in reply to these observations, specifically regarding the question of whether the decision on NCND is appealable.

62. On 17 June 2024 the Respondent filed written submissions arguing that the decision on NCND is not an appealable decision because it constitutes a decision on a procedural matter for the purposes of s.68(4C) of RIPA.

63. We are satisfied that our decision on the NCND issue is a clear example of a decision on a procedural matter for the purposes of s.68(4C) of RIPA so is not appealable. The issue engages the Tribunal's discretion regarding disclosure and the conduct of proceedings under rules 7 and 10 of the IPT Rules. A decision in the Claimant's favour would have involved an exercise of the Tribunal's discretion under rule 7(6) of the IPT Rules (allowing the Tribunal to direct the Respondent to disclose certain information to the Claimant in the PRIVATE part of proceedings). The disclosure and pleading into private which the Claimant requested would have shaped the mode of proceedings by which the Claimant's allegations are to be assessed. As such it was a 'paradigm example of a procedural matter' in the sense noted in *Lee and Wilkes* [2023] UKIPTrib 8 at [42]-[45].

64. The Claimant did not invite us to conclude that our decision on the issue addressed in our PRIVATE judgment, the degree to which information about X should be restricted so that he cannot be identified as a result of these proceedings, could give rise to a right of appeal. Nonetheless, we are also satisfied that this was a decision on a procedural matter for the purposes of s.68(4C) of RIPA and is likewise not appealable.