IN THE UPPER TRIBUNAL **Appeal No. GIA/651/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

EDWARD WILLIAMS

Appellant

- v –

(1)

THE INFORMATION COMMISSIONER

(2)

THE CHIEF CONSTABLE OF KENT POLICE

Respondents

Before: Upper Tribunal Judge Jones

Hearing date: 26 April 2021

Representation:
Appellant: In person
Respondents: Did not participate at the hearing but relied on written submissions

DECISION

The decision of the Upper Tribunal is to dismiss the Appellant's application to publish the appeal bundles on the internet or elsewhere.

Order under Rule 14(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. **The Appellant and any other person in receipt or possession of the bundles prepared for the appeals before the First-tier Tribunal and Upper Tribunal in this case ('the appeal bundles') are prohibited from publishing any part of them on the internet or elsewhere by any method.**

2. **Penal notice: Disobedience of this order may constitute a contempt of court and be punishable by imprisonment and / or a fine.**

Directions

3. The Appellant has permission to provide the original or (hard or electronic) copies of the appeal bundles to any legal practitioner (solicitor or barrister) who either a) has been appointed and agreed to act as a legal representative

on his behalf in the appeal; or b) is considering whether to act as the Appellant's legal representative but requires provision of the bundles before making a decision whether to do so.

4. The Appellant has permission to provide the original or (hard or electronic) copies of the appeal bundles to any non-legally qualified person who either a) has been appointed and agreed to act as a representative on his behalf in the appeal; or b) is considering whether to act as the Appellant's representative but requires provision of the bundles before making a decision whether to do so.

5. For clarity's sake, the Rule 14 Order in paragraph 1 applies to any representative or non-party to these proceedings as much as it applies to the Appellant. Any person receiving a copy of the appeal bundle in this case from the Appellant is prohibited from publishing such bundle on the internet or elsewhere by any method. They may only use the information contained within the bundles for the purposes of advising or representing the Appellant in this appeal.

REASONS FOR DECISION

The Hearing

1. On 12 February 2021 the Appellant applied to the Upper Tribunal for permission 'to publish all the documents provided by the Respondents [the Information Commissioner and the Chief Constable of Kent Police], in order to get assistance with the forthcoming appeal'. He was referring to his forthcoming appeal which is listed to be heard on 7 June 2021, the background to which I set out below.

2. On 26 April 2021, I held an oral hearing of the Appellant's application using the online video platform, CVP. The Appellant had consented to this form of hearing and I was satisfied that it was in accordance with the overriding objective, just and fair, to proceed in this manner. The Appellant was able to participate fully in the hearing and was able to make full oral submissions in addition to the written arguments he had previously filed.

3. Neither Respondent participated in the hearing but I had not required them to do so. I had received written submissions opposing the application from the First Respondent, the Information Commissioner and an email on behalf of the Second Respondent, the Chief Constable of Kent Police, consenting to the application.

The Background – the substantive appeal

4. On 2 June 2020 I granted the Appellant permission to appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) – Information Rights - ("the First-tier") dated 5 March 2020. By that decision the First-tier dismissed an appeal against the decisions of the Information Commissioner ('the First Respondent') of 31 October 2018 and 17 September 2019 refusing to require the Chief constable of Kent ('the Second Respondent' or 'public authority') to provide information that the Appellant had requested. Both the Respondents and the First-tier relied on the exemption from disclosure under section 30(1)(a) of the Freedom of Information Act ('FOIA').

5. So far as relevant, the Appellant had sought information from the Second Respondent including a request to:

> i) Provide all records held regarding the decision to invoke Schedule 7 Terrorism Act 2000 or other legislation / powers and to stop / detain an individual (a non-party to these proceedings) in 2018 at Calais, France in order to prevent her from entering the UK.
> ii) Provide the custody record or similar record.
> vi) Provide all material held which was (allegedly) distributed by that non-party in 2018 in the UK.

6. I granted the Appellant permission to appeal the First-tier's decision dated 5 March 2020. I was satisfied that it was arguable that the First-tier may have erred in relying on the exemption from disclosure under section 30(1)(a) FOIA. I was satisfied that the Appellant's ground of appeal was arguable - that the exercise of the questioning powers under Paragraph 2(1) of Schedule 7 to the Terrorism Act 2000 does not constitute '(a) an investigation which the public authority has a duty to conduct with a view to it being ascertained—(i)whether a person should be charged with an offence' for the purposes of section 30(1)(a) FOIA.

7. The substantive decision of the First-tier dismissing the Appellant's appeal on 5 March 2020 has not been published. However, an interim decision of the First-tier refusing to permit the Second Respondent neither to confirm nor deny whether it held the information requested has been published as Williams v Information Commissioner (Allowed) [2019] UKFTT 2019_0244 (GRC) (03 October 2019).

8. As part of their submissions in the substantive appeal I directed that the parties address me not simply on the Appellant's ground of appeal for which I had granted permission, but also on:

> a) Whether the exemption under section 30(1)(b) FOIA might apply to the information requested ('any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct');
> b) Whether the exemption under section 40(2) FOIA (personal information) might apply;
> c) Whether the exemption under section 24(2) FOIA (national security) might apply;
> d) Whether the exemption under section 31 FOIA (law enforcement) might apply; and
> e) Whether, if the First-tier erred, the matter should be remitted to a First-tier (and if so whether it be a fresh panel) or the decision re-made by the Upper Tribunal.

9. Both the Appellant and Neil Basu QC, Counsel for the Second Respondent, have subsequently filed written submissions in support of and opposing the substantive appeal.

The Appellant's application

10. The Appellant first made this application on 12 February 2021 in an email which began:

'I apply for UT consent to publish all documents provided by the respondents, in order to get assistance with [my] forthcoming appeal.

Kent police is represented by Mr Basu QC, I do not have a lawyer, nor the money to hire one. This is not equality of arms, which is required by law as part of a fair hearing. Kent police has threatened me with a costs application.

I attach copy of [*DVLA v Information Commissioner and Williams*] [2020] UKUT 310 (AAC) ['*DVLA*'], which I do not agree with. I am currently seeking PTA from CoA. I also attach commentary from FOIA Journal which raises relevant commentary on that decision……'

11. In submissions dated 26 February 2021 the Appellant expanded upon his application. I address these submissions below.

12. The Appellant made further submissions in support of his application in an email dated 9 March 2021. He made clear that his application for publication was in respect of existing and future documents which may be disclosed in the proceedings by the Respondents. His email stated:

'I may wish to publish material not yet submitted by Kent police or publish material not yet submitted by the ICO.

I do not agree with **Driver and Vehicle Licensing Agency (DVLA) v Information Commissioner and Mr Edward Williams** (Rule14 Order) [2020] UKUT 310 (AAC), 27th October 2020.

If **DVLA** is correct then if a child, who is dyslexic, and who has learning difficulties, shows the OPEN bundle, without the express consent all the parties, to its teacher, who is not a UK regulated lawyer, then the child has breached the 'implied undertaking'.

It is unclear what sanction, if any, the FTT/UT can levy in a situation where the OPEN bundle, or part of it, is disclosed without permission of the relevant tribunal and there is no r14 CMD in place. I agree with the article in PDP Journal 17/2 –

"The decision is also difficult to understand from a principled perspective, as it implicitly accepts that litigants in person may share court documents with friends and family. However, it draws no principled distinction between sharing with those types of non-parties and sharing with other non-parties on the internet.....
Is the key concern the extent of the disclosure (i.e. the number of people) or is it more about scope (i.e. people beyond friends and family)?"

I would like the chance to clarify this important point of law, which is one of general public interest to all tribunal proceedings.'

The Respondents' submissions in reply

13. The Second Respondent does not oppose the application in so far as it relates to publication of the existing bundles of material so far disclosed in the appeal. A lawyer for the Chief Constable stated in an email dated 9 March 2021:

'Further to the order of Judge Jones dated 24 February 2021 and upon consideration of the Appellant's submissions dated 26 February 2021, the Chief Constable withdraws his opposition both to a hearing for permission requested by the Appellant to publish material in connection with his appeal and to publication of such material provided by the Second Respondent. For the avoidance of doubt, such material to which there is no objection to publication is attached. The Second Respondent withdraws opposition on the ground that

the material attached is either deemed to have entered the public domain by virtue of prior disclosure under the Freedom of Information Act 2000 or constitutes pleadings as opposed to documents falling within the scope of Part 31 of the Civil Procedure Rules.

Accordingly, the Second Respondent declines to file and serve any submissions in this regard and elects not to be represented at the permission hearing yet to be listed.'

14. The First Respondent, the Information Commissioner, does however oppose the application.

15. The Commissioner submits that the Upper Tribunal's decision in *DVLA* is correct in the principles it expounds and invites the Upper Tribunal ('UT') to follow the principles expounded in *DVLA*. The Commissioner considers that the UT in *DVLA* was right to conclude a party would need permission to use documents/ information obtained as a result of particular legal proceedings. The Commissioner also agrees that the UT has the power to allow or restrict such use.

16. In terms of this particular application, the Commissioner submits that the UT should refuse the Appellant's application for permission to publish all documents already filed and served and to be filed and served by the Respondents.

17. The Commissioner submits that the Appellant's application is too general in what it is seeking to achieve (stated solely as 'assistance'), lacking in detail about why he considers he needs to disclose the information potentially so widely (with no details of what he means by 'publication') and why he considers a wide-ranging application is required (to all information produced by the Respondents rather than, say, on a particular point).

18. The Commissioner submits that the purpose of exchanging documentation in the course of litigation is to ensure the parties to proceedings can participate as fully as possible in the matter, and for the tribunal or court to have the information it requires to make its decision. Such information may very likely include what would otherwise be confidential information or relating to third party information. The parties to proceedings know what is disclosed and to whom.

19. The UT reached the view in *DVLA* that in the UT there is an implied undertaking by parties that information provided in the course of litigation is to be used only for the purposes of the litigation concerned. It accepted that disclosure to a particular legal adviser would be permitted (see para 21 of the decision) and that it would not have the power to prohibit such disclosure (see para 19).

20. The UT in *DVLA* accepted certain propositions put forward by *DVLA* (see para 39 at 38.6), all of which might have implications for the administration of justice. The UT in *DVLA* further accepted that information exchanged (in that case in a hearing bundle) may include personal information the disclosure of which to the public at large may well be inconsistent with GDPR.

21. In the Commissioner's submission, any further use of documents or information should only be permitted by the Upper Tribunal for the most clear and compelling reason(s). In relation to information in existence or exchanged there has to be the clearest of reasons for disclosure outside of the parties and the court/tribunal, particularly before information may have come out in open court, and/or the court/ tribunal has to been able to determine a substantive matter itself.

22. In relation to information not yet exchanged or possibly produced, the Commissioner submits an application for disclosure of such information is so uncertain that an informed assessment cannot be made.

23. The Commissioner submits that to date the Appellant has failed to set out his reasons or reasons why his application for disclosure should succeed.

24. The Commissioner accepts that on occasion, it may be appropriate for some information to be disseminated to others outside the parties and tribunal/court. However, the Commissioner submits that reaching such a conclusion would require a detailed case-by-case analysis, looking at the actual information in question, the reasons for the request and the timing of the request/ when publication may take place so that the impact on the administration of justice may be fully scrutinised. On the basis of the application made by the Appellant to date the Commissioner considers there is an insufficient level of detail for it to be granted.

25. The Appellant appears to be arguing for an untrammelled right to disseminate all documentation from the Respondents to the world at large including before it is even produced and also before the UT itself has been able to consider it and make a determination. The Commissioner urges the UT to resist this.

The law – the decision in DVLA

26. In October 2020 the UT issued a decision in *Driver and Vehicle Licensing Agency v Information Commissioner & Edward Williams* ([2020] UKUT 310 (AAC)) ("*DVLA*").

27. The decision considered in some detail the issues concerning the basis on which documents or information are exchanged during litigation before the Upper Tribunal and whether a party would require permission from the UT to publish, in that case, the open core bundle on the internet. The Second Respondent in that case is the Appellant in this application.

28. The *DVLA* decision considered the following issues:

a. Whether a party needs permission to publish the hearing bundle on the internet;
b. If so, whether the UT has the power to allow or restrict such publication; and
c. Whether permission should be granted to the Second Respondent in that case (the Appellant in this case).

29. In brief, the UT concluded that:
a. There is no absolute right for a party to publish a hearing bundle on the internet. A party would need permission to use documents obtained in the course of litigation for a 'collateral purpose';
b. The UT had the power to allow or restrict publication of the information in question; and
c. On the facts of that application, the UT did not give permission to the Second Respondent (this Appellant) to publish the open hearing bundle on the internet for the stated reason (seeking legal advice from an unspecified third party/ third parties).

30. I return to the DVLA case in more detail below.

The Applicant's submissions in support of his application

31. The Appellant made two headline submissions in support of his application: a) that publication on the internet of both the First-tier and UT appeal bundles was necessary to ensure equality of arms; and b) that the reasoning in *DVLA* did not apply to him as there were no implied undertakings accepted by a litigant in person when pursuing an appeal to the First-tier or UT.

32. The Appellant further submits that *DVLA* was wrongly decided. It was based on the decision in *Moss v ICO* saying that there was/is no right to a fair hearing under the European Convention on Human Rights ('ECHR').

33. The Appellant submitted that *Moss* did not say that there was no right to a fair hearing under FOIA, *Moss* said there was no human right to receive information. The right to fair hearing is guaranteed by the Overriding Objective and common law.

34. For a hearing to be fair there must be equality of arms. In the present appeal the Appellant submitted he is facing leading counsel, he has no legal training or even access to Westlaw etc. There is inequality of arms.

35. The Appellant submitted he did not have the money to pay for a lawyer, much less a QC. In order to attempt to lessen the inequality of arms he wished to publish the Response of Kent Police, and possibly other documents not yet served. Kent Police have claimed no prejudice.

36. The Appellant attached two recent decisions by UT Judge O'Connor sitting in the First-tier in another of the Appellant's appeals in which he raised the same issue, *Edward Williams v The Information Commissioner* EA/2020/0051. The first was the decision of Upper Tribunal Judge O'Connor dated 1 February 2021 which applied the decision in *DVLA* and provided reasons for making an order under Rule 14 of the Upper Tribunal Rules prohibiting the Appellant from publishing the appeal bundle in that case on the internet but allowing him to share the bundle with legal representatives. The second was a corrected Rule 14 order dated 12 February 2021 permitting the Appellant to communicate the documents to a person regulated by an approved regulator as defined in the Legal Service Act 2007. The Appellant submitted that he did not have a copy of the Legal Services Act 2007 and did not understand the reference to it within the order.

37. The Appellant also attached a recent article by Chris Knight, a barrister at 11KBW chambers. The Appellant submitted that Mr Knight is right to say a new UT/FTT rule is required. The Appellant also contacted the UT rules committee but it had not replied.

38. The Appellant provided a further article by barrister John Fitzsimons, Cornerstone Barristers, which stated at page 11, commenting on the decision in *DVLA*: -

"The decision is also difficult to understand from a principled perspective, as it implicitly accepts that litigants in person may share court documents with friends and family. However, it draws no principled distinction between sharing with those types of non-parties and sharing with other non-parties on the internet. At what point is a litigant in person, or indeed any other party, under an obligation to seek the permission of the Tribunal or the consent of the other parties for publication? Is the key concern the extent of the disclosure (i.e. the number of people) or is it more about scope (i.e. people beyond friends and family)? Many litigants in person may

wish to share the bundle with a wider local community, particularly in the context of an appeal under the Environmental Information Regulations 2004 ('EIRs') concerning planning law issues. It is not entirely clear from this decision whether in doing so, they must first seek permission…."

39. The Appellant also relied on an article published in the ICLR by David Burrows on 21 April 2021 titled '*Release of documents by or before the Upper Tribunal*' which considered the approach of the Upper Tribunal to the question of the access to court documents in the context of an information rights appeal as compared with the approach of the civil and family courts.

40. The Appellant submitted that the UT in *DVLA* relied on litigants being subject to an implied undertaking. The Appellant did not accept that anything is implied in litigation before the First-tier or Upper Tribunal. Litigants in person cannot be reasonably expected to know of implied things. The public and unrepresented parties can only be expected to fill in the appeal form, and then follow case directions set by the Tribunal.

41. The Appellant submitted that *DVLA* was, with respect, a bad decision. He invited the Upper Tribunal in this appeal to take a different course – he submitted that anything which is not subject to a Rule 14 order can be published to the world. The Appellant submitted that this is a simple rule which Appellants can all understand and can be incorporated into the FTT/UT rules. If a party is going to file and serve a sensitive document, it can apply for a Rule 14 order before serving it.

Discussion and Decision

The decision in DVLA

42. First, I agree with the decision in *DVLA* that the Appellant needs the Upper Tribunal's decision to publish the contents of the First-tier and UT appeal bundles to the world whether on the internet or otherwise. In particular, I agree with the reasoning set out at [19]-[23] of that decision:

'19…….. In that context I bear in mind that the FTT and the Upper Tribunal are inquisitorial jurisdictions and in this case the tribunals and Mr Williams have the benefit of the active participation of the Information Commissioner as a neutral third party. *Airey v Ireland*, applied on the present facts, does not require a state either to provide legal assistance or even to permit an unrepresented litigant to broadcast the electronic core bundle to all and sundry on the web. As a matter of common law, and irrespective of Article 6(1), Mr Williams certainly has a right to seek legal advice. I agree I have no power to make an order stopping Mr Williams from seeking legal advice. But that in and of itself does not permit publication of the electronic core bundle to all the world, akin to a FOIA right.

20. It follows that Mr Williams has not persuaded me that he has an absolute right to publish the electronic core bundle on the web. But that may not be quite the same as saying he needs to seek the Upper Tribunal's permission to do so. What is the basis for the DVLA's submission that he must seek permission to do so? The DVLA's argument is that the answer lies in the common law doctrine of the implied undertaking in litigation, namely that "documents and information which are disclosed in litigation are subject to an implied undertaking that these will not be used other than for the purposes of the litigation concerned. The use of those documents should be confined to use within that litigation... The requirement that a party must disclose confidential documents and other private information in any civil proceedings is regarded as a very real invasion of that party's privacy" (Appellant's written submissions at §16).

21. On any sensible construction that principle would permit a party to share documents disclosed in the course of legal proceedings with their legal adviser, but not to publish the material to the world with a view to soliciting advice from as yet unknown individuals who may or may not be legal professionals and may or may not be subject to professional codes of ethics.'……

……..

23. I consider, however, that this is a case where the "Tribunal Procedure Rules are silent and a workable solution has been devised under the CPR which it is equally sensible to apply in the tribunal context". It is not a question of simply importing the CPR. The implied undertaking at common law is codified in relation to civil litigation in the CPR in respect of disclosed documents (in CPR 31.22; see also CPR 32.12 regarding witness statements). CPR 31.22 provides as follows:

"(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.'

43. I also agree with the decision in *DVLA* that the Upper Tribunal has inherent jurisdiction to permit the publication of documents to third parties or the general public at large as discussed at [27] but note that the nature of the publication request in that appeal and the instant appeal are unusual:

'27……..In *Aria Technology Ltd v HMRC and Situation Publishing Ltd*, Upper Tribunal Judge Sinfield concluded (at paragraph 20) that "the UT has an inherent power to grant a third party access to any documents relating to proceedings that are held in the UT records and has a duty under common law to do so in response to a request by an applicant unless the UT considers, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons." Judge Sinfield further recognised as follows:

"25. It is clear from *Guardian News* and the cases cited in it that there is a strong presumption, founded on the open justice principle, that non-parties should be allowed access to documents relating to proceedings that are held in the UT records. That presumption is particularly strong where access is sought for a proper journalistic purpose. Correspondingly, in my opinion, a party that seeks to prevent access for a proper journalistic purpose must provide cogent reasons, supported by evidence, why the UT should not allow access."

44. However, the observations at [30] in the *DVLA* decision also apply to this appeal:

'30. All that said, I agree with the DVLA submission that there are three important points of distinction between the present case and the authorities considered above. First, this case does not involve a request for access by a non-party; it is a request by a party to publish to the world (or, rather an insistence by the party that he has the right to do so). Second, the matter has been raised prior to the hearing and the intention is to publish before the hearing. Third, the request (or rather insistence) is not in fact for the purposes of open justice at all (i.e. to enable scrutiny of the decision making or to understand why decisions are taken); it is for the speculative purpose of allowing one party to seek 'legal advice' via the internet.'

45. I also agree that the Upper Tribunal has the power to make an order prohibiting disclosure of the contents of the appeal bundles as explained at 32-34 of the *DVLA* decision:

'The Upper Tribunal's power to restrict publication

32. So far as the power to restrict publication is concerned, rule 14(1) of the Upper Tribunal Rules further provides as follows: "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of— (a) specified documents or information relating to the proceedings; or (b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified."

33. The DVLA application in the present proceedings has been made explicitly under rule 14(1)(a). It is not premised on the alternative basis of rule 14(1)(b). Nor does it engage with rule 14(2), where the 'serious harm test' referred to by Mr Williams (see above) is applied.

34. So far as rule 14(1) is concerned, the power to make this type of order reflects the fact that "there may be circumstances in which it would not be appropriate for evidence to be disclosed to the public" (see E. Jacobs, Tribunal Practice and Procedure, 5th edn (2019), Legal Action Group, §10.190). But the terms of rule 14(1), and rule 14(1)(a) in particular, only take us so far. As Jacobs observes, "Rule 14(1) contains broad powers to withhold disclosure. However, it only identifies the potential subject matter of the power. It says nothing of the circumstances in which the power should be exercised" and, moreover, "under (a), the only condition is that the document or information must be capable of being specified" (§10.192 & §10.193). As to the exercise of the power, one is therefore thrown back onto first principles so, *DVLA v Information Commissioner and Williams* (Rule 14 Order) [2020] UKUT 310 (AAC) 11 as Jacobs puts it, this "will have to be considered in the light of the overriding objective and of the factors relevant to non-disclosure, including the principle of open justice" (§10.195)'

46. I am not assisted by any of the journal articles criticising the decision in *DVLA*. I reject the Appellant's submission that litigants in person are not or should not be expected to be subject to the same implied undertakings in Tribunal Proceedings that would apply in court proceedings under the Civil Procedure Rules.

47. Any unrepresented Appellant, such as this Appellant who is a litigant in person, is subject to the same Tribunal Procedural Rules as any other party. They are subject to duties when conducting litigation such as under Rule 2(4) to cooperate with the Upper Tribunal generally. Likewise, they must comply with directions and order of the Upper Tribunal in the same way as any other party. In an appropriate and serious case, an unrepresented party may be subject to contempt proceedings for wilful disobedience of a direction or order of the Upper Tribunal (the Upper Tribunal having such a jurisdiction either under section 25 of the Tribunal Courts and Enforcement Act 2007 or by virtue of its designation as a superior court of record under section 3(5) of that Act or as part of its inherent jurisdiction under common law). Further, any Appellant is under a duty to conduct proceedings reasonably or be at risk of incurring a costs order under Rule 10(3)(d) for acting unreasonably in bringing, defending or conducting proceedings.

48. Despite the Appellant's invitation, I decline to list all the duties that an unrepresented litigant is subject to in litigation before the Tribunal, but I am satisfied that any implied undertakings which apply to an ordinary party to litigation apply equally to them. Any unrepresented party to litigation must enjoy the same rights and responsibilities as a represented party, subject to any specified exemptions or qualifications for unrepresented litigants or additional rules that apply to represented parties. It is the responsibility of unrepresented litigants to properly inform

themselves of their duties in litigation and if unaware and necessary, to research them.

49. Having said all that, the Tribunal will attempt to accommodate unrepresented litigants in so far as is reasonable and make reasonable allowances, be flexible and proceed as informally as possible.

Should permission be granted to the Appellant to publish the bundle on the web?

50. These are my reasons for refusing the Appellant's application to publish the appeal bundles (the First-tier and UT bundles) on the internet or elsewhere by any method.

51. I begin by observing that I am required to make a fact-specific decision on whether or not to grant the Appellant's application in the circumstances of this case. I do not seek to lay down any principles of law in so doing. I do however follow the approach in *DVLA* because I agree with it. I do not accept the Appellant's submission that the decision is wrong in law. *DVLA* is simply authority for the fact that publication of the appeal bundles by the Appellant in this case requires the Upper Tribunal's permission and it can prohibit such publication (a matter implicitly accepted by the Appellant in making the application) and that the Tribunal is required to make a fact-specific decision as to whether to grant permission for publication.

The Appellant's stated purpose in seeking publication

52. During the course of the hearing I asked the Appellant to go into further detail as to what documents he wanted to publish, where and for what purpose. The Appellant made clear that he wishes to publish the full First-tier and Upper Tribunal appeal bundles in this case. He seeks to publish them on the internet, specifically in an online forum for those concerned with Freedom of Information law. He stated that by analogy, he uses forums on the internet for those involved in appealing parking tickets (whether tickets issued privately or publicly by local authorities). In these forums participants often post copies of the tickets they have received, their appeal bundles for appeals either before the parking adjudicator or at the County Court and any relevant decisions of the adjudicator or County Court.

53. The Appellant's stated purpose for publishing the bundles in this appeal was in order to obtain assistance – advice and representation – in this appeal. The exact nature of the assistance he seeks varied a little during his submissions. He initially suggested that publication would assist him with obtaining legal representation or obtaining crowdsourced funding for his appeal. At a later point in the hearing he suggested that publication was not primarily to obtain legal representation but his primary purpose was to seek advice and assistance from non-legally qualified members of the forum. I remind myself that the Appellant is currently engaged in an appeal on a point of law only.

54. The Appellant's alternative submission and application was that he be given permission to send the appeal bundles to two individuals he had identified, neither of which is a lawyer. One works for a charity - the campaign for freedom of information - and the other is a journalist who may be able to assist him with the appeal. He would not identify these individuals as he had not sought their consent for their names to be released at the time of the hearing of his application.

The matters taken into consideration

55. I have begun by taking into account the overriding objective under Rule 2 of the Upper Tribunal Rules to ensure that the Appellant is, so far as practicable, able to participate fully in the proceedings. Most fundamentally, I must ensure the case is dealt with justly and fairly and the Appellant has access to legal or other representation.

56. Whether the duty upon the Tribunal to ensure that the appeal proceedings are fair is imported through article 6(1) of the European Convention on Human Rights, the overriding objective or derived from the common law, it is fundamental that the Appellant must be entitled to the opportunity to be legally or otherwise represented in this appeal. I say the 'opportunity' because this does not require that he must be legally represented, let alone instruct a QC to obtain 'equality of arms' – the Appellant himself concedes the latter point.

57. I am satisfied the Appellant has already had the opportunity to seek and gain advice and representation in the proceedings, both in the First-tier and in the Upper Tribunal and has had that opportunity in the Upper Tribunal proceedings since he first lodged his notice of appeal on 20 March 2020.

58. I am satisfied that the Appellant will continue to have such a fair and reasonable opportunity in these proceedings, if he so chooses, to seek advice and representation (legal or otherwise). Refusing the application to prevent the Appellant publishing the appeal bundles on the internet will not prevent him engaging legal or other representatives to advise and represent him. He will still be able to give them access to or a copy of the relevant bundles in the manner I permit below.

59. In the *DVLA* proceedings, the Upper Tribunal directed the Appellant to potential organisations that might advise and represent him for free if he was unable to pay for assistance – including the Bar Pro Bono Unit and the Campaign for Freedom of Information.

60. I asked the Appellant about what steps he had already taken to obtain pro bono legal representation in these proceedings, assuming that he could not afford to pay for such assistance and would not be entitled to legal aid. He stated that Citizens Advice did not deal with FOIA cases because he had had contact with them regarding a previous case last year and the Bar Pro Bono unit (now named Advocate) required a referral from another agency or instructing lawyer. Likewise, FRU (the Free Representation Unit) only takes social security cases or employment cases on referral. I asked the Appellant whether he had looked at the website lawworks.org.uk which is a signposting website which links users to a range of potential free legal representation from organisations such as solicitors and law centres etc. He stated that he had not explored this website or approached any other potential legal representatives. I am not satisfied that the Appellant has explored all reasonable means of obtaining free legal advice and representation. This accords with his change of position during the hearing – that his primary intention is not so much to obtain legal representation as 'other' representation.

61. As is set out above, the Appellant's primary aim in publishing the material is now focussed on obtaining non-legal representation. While he is of course entitled to receive specialist advice from non-lawyers, particularly those familiar with and expert in FOIA, the instant appeal is on a point of law. Furthermore, it appears that the Appellant has already identified two non-legal experts who he seeks to approach,

something to which I return below. This therefore reduces the need to publish the material generally on the internet.

62. In the event that the Appellant is not able to obtain any advice and representation prior to or for the hearing of the substantive appeal, I am entirely satisfied that he will be able to participate fully in proceedings and represent himself to more than a reasonable standard. This is not only evidenced by the articulate and logical way in which he has framed this application both in writing and orally. It is also evidenced by his raising and articulating a ground of appeal in this appeal for which I have granted permission on the basis it had arguable merit. During the course of these proceedings, the Appellant has also issued other applications in order to de-bar the Commissioner from taking part and for costs to be paid by the Commissioner to him. I have so far made at least five sets of case management directions in these proceedings.

63. It is further evidenced by the fact that the Appellant has represented himself in numerous FOIA appeals before the First-tier Tribunal and Upper Tribunal (and has made a request to publish bundles in the *DVLA* proceedings and those decided by UT Judge O'Connor that the Appellant referred me to). I asked the Appellant to estimate the number of FOIA appeals he has lodged at the First-tier and Upper Tribunal. The Appellant suggested he has appeared in at least ten appeals before the Tribunals (and at least this number are reported on the bailii website). The Appellant estimated his success rate in these appeals to be about 25%.

64. It is apparent from the above that the Appellant is an intelligent and articulate litigant in person whose familiarity and experience in preparing and conducting appeals under FOIA is undoubted.

65. The Appellant submits that he only sought to be represented in this appeal after I had granted permission in June 2020 and raised the further points on which I invited submissions (various legal exemptions from disclosure under FOIA). However, I note he only first made the request and application in February 2021 to publish the bundles some eight months after those directions and around four months after the submissions of Mr Basu QC were circulated on 26 October 2020. The Appellant suggested he is struggling to address the reply submissions of Mr Basu QC because they address both the Data Protection Acts 1998 and 2018 in addition to FOIA. However, when I attempted to summarise the reply submissions, it is fair to observe the Appellant was happily able to point out those points which he suggested I had misunderstood.

66. I also note that this application was made about four months after the decision in *DVLA* was released on 27 October 2020 but on 12 February 2021, the same day that UT Judge O'Connor released an amended direction in the First-tier prohibiting him from publishing bundles in the appeal with which he was concerned.

67. All of the matters above satisfy me that the Appellant has had a reasonable opportunity to seek and obtain legal or other representation in this appeal and will continue to have that opportunity up to the date of the hearing of the substantive appeal in June 2021. Furthermore, I am satisfied that if the Appellant is not able to obtain such representation he will be able to represent himself and participate fully in proceedings.

68. They also satisfy me that publication of the bundles on the internet will not significantly assist the Appellant in obtaining legal or other representation in this

case. I now turn to consider in further detail whether publication of the bundles should be permitted and whether it will assist the Appellant further in his stated purpose, primarily to obtain non-legal advice and representation.

Reasons for not permitting publication

69. I am satisfied that publishing the appeal bundles in this case online or elsewhere should not be permitted because there is a real risk of the bundles being used for a collateral purpose and the additional benefits of publication are marginal for achieving the stated purpose of the Appellant.

70. No party has sought to suggest that the Appellant himself has a collateral purpose in seeking to publish the appeal bundles – that he is seeking to distribute or disseminate the information contained therein for a purpose other than seeking representation in the litigation itself. No party has sought to impugn the Appellant's motive or integrity. This decision is premised on the basis that the Appellant's purpose in seeking publication is as he states – to obtain some form of advice and representation in the appeal.

71. However, as the Appellant readily accepts, he has no control over however any third-party might seek to use any of the information that he seeks to publish. I asked him during the hearing why he did not simply write on the online forum that he was seeking representation in the appeal and that he could provide the bundle to any potential representative who was considering representing him. He explained to me during the hearing that there was a danger that not everyone on the forum was necessarily trustworthy and might have other motives for receiving the bundle and seek to publish it thereafter. He also made clear that he believed he could not be held responsible for the actions of a non-party in those circumstances.

72. It seems to me that this highlights exactly the danger in general publication. There is a real risk that non-parties may seek to use the information in this appeal for collateral purposes. The evidence and material in this appeal concerns a port stop of an individual under Schedule 7 to the Terrorism Act 2000. Some of the material relating to the appeal is already in the public domain – see for example the interim decision of the First-tier in 2019 which is referred to above.

73. There is a risk that the precise information contained in the bundles of evidence may prompt others to use the material in ways which are outside the scope of this litigation and the control of the Tribunal. There is a risk that information may be used in a way that is not in the Appellant's interest or even in pursuit of any legitimate public interest, such as the legitimate interest in challenging the lawfulness of police investigations, Freedom of Information or exercising freedom of expression. There remains a risk any published material might be used in pursuit of a third party's own private or even unlawful or unethical interests. Such third parties, particularly non-legal professionals, may well not be bound by any professional ethics or regulatory code.

74. In addition, the same reasons for not permitting publication apply on the facts of this case that applied in the *DVLA* case (see [37]-[39] of the decision):

'37.The DVLA raises a number of arguments as to why Mr Williams should be refused permission in the present case. These include submissions relating to copyright (written submissions at §26-§34). I do not propose to discuss those arguments as I have reached the conclusion it is unnecessary to do so. Rather, I consider that permission should be refused in this case principally for data protection reasons (an issue identified by the Information

Commissioner in her submissions). The DVLA puts the point as follows in its written submissions:

"35. Any trial bundle will contain numerous examples of unredacted email addresses, phone numbers, personal data of all types. Again, it is one thing to allow a non-party (particularly a professional journalist) access to a copy of such documents for open justice reasons; it is entirely another to endorse publication on the internet.

36. Internet publication (as distinct from access which could be managed by say undertakings to the Court not to publish personal data) carries with it practical problems. In order to avoid Court endorsed infringement of the GDPR, someone would need to engage in a process of redaction."

38. Mr Williams argues by way of rejoinder that e-mail addresses and phone numbers, all of which are plainly personal data, are in the public domain by being in the open bundle. The short answer to that is that they are not, or at least not yet, as the public hearing has yet to take place.

39. The DVLA advances a total of 11 different reasons why it contends that publication on the internet should be "approached with caution". In addition to the data protection implications, the first six of those reasons are sufficient, to my mind, to justify the conclusion that permission to publish should be refused in this case. Those reasons, which I adopt and endorse, are as follows:

"38.1. Publication to the world at large is entirely different from granting non-party access to particular individuals (especially journalists) for a legitimate purpose.

38.2. It is contrary to the policy underlying the implied undertaking not to use documents for collateral purposes. This undertaking requires that use of disclosed documents is confined to use within that litigation. Publication on the internet of all disclosed documents, including the trial bundle, would fundamentally undermine that rationale. It would deter parties from agreeing to include documents in a trial bundle if they knew they would end up on the internet.

38.3. An application to publish on the internet is in effect an application for indiscriminate third party access by the world. It is for the applicant to justify why he seeks it and how granting him access will advance the open justice principle. He has not cogently justified third party access by the world which is exceptional.

38.4. This application (because it concerns publication prior to a hearing with a view to publication to the world) is not about open justice nor is it for the purposes of open justice (as expounded by the Supreme Court in *Dring* – namely understanding and scrutinising judicial decision making and that process). It is for a collateral purpose of seeking free legal advice via the internet.

38.5. There is no clear indication of where this is intended to be published or who it is said would be willing to offer free legal advice. There is no limitation to the non-parties to whom disclosure is sought.

38.6. Any documentation authorised to be published by the Tribunal would then be outside the control of the Tribunal and/or the parties – in particular beyond the jurisdiction of the Court."'

75. The bundles in this case contain personal information and while the information contained within them may not be sensitive in the legal sense (relating to national security or police investigations or falling within a FOIA exemption etc.), I am satisfied that they may constitute personal information. Information in the bundles may require very extensive redaction in order to comply with data protection and GDPR obligations. I therefore agree with the reasons relied on by the Commissioner, as set out above, for opposing this application.

76. All of the identified risks are to be balanced against a very marginal benefit in publishing the information contained in the bundles.

77. Firstly, it is arguable whether the information and evidence in the bundles provide any further useful information as regards the legal issues to be considered in this case (interpretation of section 30(1)(a) of FOIA etc.) so the potential relevance for the appeal to the Upper Tribunal of much of the contents of the bundles such as the evidence and correspondence, as opposed to: (1) the pleadings; (2) the First-tier's interim and final decisions in the appeal; and (3) the Commissioner' decision notice, is not likely to be high.

78. Secondly, the Appellant has had the opportunity to obtain assistance and will continue to have that opportunity as set out above. I am satisfied that proceedings are and will continue to be fair.

79. Thirdly, I am not satisfied that publication of the material will assist the Appellant significantly more than simply sharing the bundles and documents with an appointed or potential legal or non-legal representative for the benefit of obtaining of advice and representation. For the avoidance of doubt, I give the Appellant permission to do so and that is encapsulated in paragraphs 3 and 4 of the directions set out above:

> '3.The Appellant has permission to provide the original or (hard or electronic) copies of the appeal bundles to any legal practitioner (solicitor or barrister) who either a) has been appointed and agreed to act as a legal representative on his behalf in the appeal; or b) is considering whether to act as the Appellant's legal representative but requires provision of the bundles before making a decision whether to do so.
>
> 4.The Appellant has permission to provide the original or (hard or electronic) copies of the appeal bundles to any non-legally qualified person who either a) has been appointed and agreed to act as a representative on his behalf in the appeal; or b) is considering whether to act as the Appellant's representative but requires provision of the bundles before making a decision whether to do so.'

80. I am not satisfied that publishing the material on the internet or generally will significantly further assist the Appellant. Even if not able to pay for professional legal representation, he is already aware of the means of obtaining pro bono legal advice and has not yet explored all possible avenues. Further, he has already identified two potential non-legal representatives who might have the experience, specialism and even expertise in FOIA to represent him in this appeal. Finally, he has the experience and ability to adequately represent himself in the event he cannot obtain representation.

81. For all the reasons set out above, I make an Order under Rule 14(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting publication of the appeal bundles on the internet or otherwise by the Appellant or any other person in possession or receipt of them.

82. Despite this order, in addition to contacting the two non-legal representatives the Appellant has already identified, there is nothing to stop the Appellant from posting on the online forum that he is seeking a representative in this appeal. There is nothing to stop him from identifying the case – by reference to the publicly available decision on www.bailii.org referred to above and the issues in the appeal as

identified by him (or as identified in this decision which will also be made publicly available). I am not satisfied that a forum user requires any further material at that stage (such as the full bundle itself) when putting themselves forward as a potential representative to act in the appeal.

83. If the Appellant posts such a request and if a potential representative contacts the Appellant, and if, after discussion, the Appellant is satisfied that the individual is bona fides and sufficiently experienced to represent him, then the Appellant has permission to share the bundle with that person or individual with a view to them confirming whether they wish to represent him and, if appointed, thereafter advising and representing him.

84. Therefore, this is no need to grant the Appellant's alternative application that he be given permission to share the appeal bundles with the two unnamed individuals identified above (one journalist and one charity campaigner) for the purposes of seeking non-legal representation. This is because I give permission for him to share a copy of the bundles in the broader terms I have identified in paragraphs 3 and 4 of the directions set out above. I do not wish to restrict the Appellant's ability to share the bundles with specific potential or actual representatives in order that he can be legally or otherwise represented in the appeal.

85. However, I grant the Appellant permission to share the bundles on such terms with a caveat. This is that any individual or organisation which is in receipt of the bundles from the Appellant pursuant to the purposes for which disclosure is permitted is in turn bound by the same order not to publish the material online or generally and only to use the information in the bundles for the purposes of advising or representing the Appellant. The terms of this caveat are set out in paragraph 5 of the directions set out above.

Conclusion

86. I dismiss the Appellant's application and make an order in the terms set out above.

Rupert Jones
Judge of the Upper Tribunal
Signed on the original on 10 May 2021