Neutral Citation Number: [2021] EWHC 710 (Admin)

CO/0935/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

26th March 2021

Before:

LORD JUSTICE BEAN
MR JUSTICE JAY

- -

Between:

THE QUEEN (on the application of ERIC KIND)	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
INVESTIGATORY POWERS COMMISSIONER	**Interested Party**

- -
- -

Ben Jaffey QC and Jude Bunting (instructed by **Liberty**) for the **Claimant**
Robin Tam QC and Richard O'Brien (instructed by **Government Legal Department**) for the **Defendant**
Tim Buley QC (instructed by the **Special Advocates Support Office**) as **Special Advocate**

Hearing date (for the OPEN proceedings): 16th February 2021

Approved OPEN Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 26th March 2021 at 10.00am.

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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. On 30th November 2017 the Investigatory Powers Commissioner's Office ("IPCO") offered Mr Eric Kind ("the Claimant") the position of Head of Investigations. The purpose of his new role was to lead the investigatory work of IPCO into the security and intelligence services and other relevant bodies. The offer was made subject to "developed vetting" ("DV") security clearance, and the Claimant accepted it on that footing.

2. On 28th November 2018 the Secretary of State for the Home Department ("the Defendant") refused the Claimant DV security clearance and he was therefore unable to take up his post.

3. In this application for judicial review the Claimant challenges the rationality of the Defendant's decision, the procedural fairness of the decision-making process, and its conformity with Article 8 of the Convention.

4. Sir Wyn Williams granted permission on the irrationality and Article 8 grounds. The Claimant has subsequently applied for permission to amend his grounds to include the procedural fairness challenge. It is clearly arguable and we therefore granted that application at the outset of the OPEN hearing.

5. These proceedings have involved both an OPEN and CLOSED procedure. A CLOSED judgment is being handed down on the same occasion as this OPEN judgment. Most of the salient points in this case can be addressed in OPEN.

6. There is also a confidential bundle which contains sensitive personal and financial information as well as the names of all the Claimant's referees. The Court has already directed that:
   (1) pursuant to CPR r.39.2(3)(c), any reference to the confidential bundle be in private;
   (2) pursuant to CPR r.31.22, documents in the confidential bundle not be open to inspection or provided to any non-party;
   (3) any application to vary or set aside (1) and/or (2) above be made on notice to the parties.

The Facts

7. IPCO is the oversight body created by the Investigatory Powers Act 2016 following the publication of *A Question of Trust*, the report authored by Lord Anderson of Ipswich KBE, QC whose recommendations were largely accepted by Parliament. Lord Anderson recommended that "firm rules and strong oversight" were necessary, and that IPCO should aim to attract specialist staff from the domains of intelligence, computer science, technology, academia, law and the NGO sector. It is obvious that the net was being cast wide in order to attract a broad range of individuals from various backgrounds who would be expected to be both expert and independent.

8. IPCO's oversight functions of the three agencies (the Security Service, the Secret Intelligence Service and GCHQ) and other relevant bodies include keeping under review the exercise by them of their core functions and, being particularly relevant for present purposes, carrying out such investigations, inspections and audits as a Commissioner considers appropriate for the purposes of the Commissioner's functions: see s. 235 of the 2016 Act. By s. 238(5), subject to exceptions in s. 238(6), a Judicial Commissioner may delegate the exercise of the above functions to a member of staff.

9. The Claimant is, in his own words, "an independent expert and legal academic specialising in human rights standards and public policy relating to intelligence and surveillance activities". He has spent his career in the academic and NGO sectors. In particular, he was Deputy Director at Privacy International for five years, during which time that organisation initiated litigation challenging various aspects of the legal framework governing the use of investigatory powers. He is a Visiting Lecturer in Surveillance Law at Queen Mary's College, London. He characterises his work in these terms:

> *"I have spent my whole career working in the public interest; researching and advocating, through proper channels, for accountability and transparency around the use of surveillance technologies and investigatory powers."*

10. In March 2017 the Claimant met Sir Adrian Fulford (The Rt. Hon. Lord Justice Fulford, currently Vice-President of the Court of Appeal, Criminal Division), the then newly-appointed Investigatory Powers Commissioner. They discussed the possibility of the Claimant taking up a position at IPCO. He was invited to apply and was offered the position of Head of Investigations. This was, the Claimant maintains, the culmination of efforts made by members of the intelligence community that he join IPCO in order to contribute to diversity of thought within the organisation and build trust between the security and intelligence agencies and law enforcement communities on the one hand and the NGO and activist sectors on the other.

11. The Claimant's intended role would give him access to a high volume of the most sensitive material from each of the three security and intelligence agencies. As the Defendant points out, the purpose of national security vetting is "to provide a level of assurance as to the trustworthiness, integrity and reliability of individuals working in sensitive or critical posts." DV is the highest of the three security levels. The level of assurance needed "is proportionate to the individual's access to sensitive assets".

12. In the present case, the decision on DV security clearance was to be taken by Cluster 2, a division of the Defendant. Cluster 2 was required to follow the Cabinet Office's Guidance, "HMG Personnel Security Controls". As this Guidance makes clear, "all the relevant information is taken into account to reach a reasoned decision on an individual's suitability to hold a security clearance". An application may be refused or withdrawn where "there are security concerns related to an individual's involvement or connection with activities, organisations or individuals associated with the threats described in this Statement …". Central to the process is the vetting interview. Plainly, the evaluation being undertaken will focus on risk, not probability.

13. Para 40 of this Guidance is relevant:

> *"Where a clearance is refused or withdrawn, individuals will be informed, and provided with reasons, where possible. They will also be provided with information about the mechanisms for internal and external appeal …"*

I should add that the Claimant as an applicant rather than an existing employee or office holder had no right of appeal under the Guidance or otherwise.

14. The vetting decision in the Claimant's case was also governed by the Cabinet Office's *Vetting Decision Framework – Policy, Version 2.0 – April 2017* ("the VDF"). Paras 23 and 24 are particularly germane:

> *"23.* [WORDS REDACTED] *Vetting Officers, Assessors and Decision Makers must ensure that comments made reflect an impartial, balanced judgment of both the positive and negative aspects of the individual.*
>
> *24. It is also important that Vetting Officers, Assessors and Decision Makers present specific evidence and examples* [WORDS REDACTED]. *This should be accompanied by an assessment of the level of risk. This will allow decisions to be fairly and transparently documented, which is particularly important if decisions are reviewed at a later date."*

15. Although the decision-maker was Cluster 2, UK Security Vetting ("UKSV"), then an agency of the Ministry of Defence, gathered the material evidence on which the decision would be based. This would come from a variety of sources, including the Security Service.

16. On 12th February 2018 the Claimant completed a vetting form. It set out a range of information including his usage of social media and the internet, and his personal associations. The Claimant nominated four referees including Lord Anderson.

17. In the "Security Risks" section of the Vetting Form the Claimant stated as follows:

> *"I have spent time with a number of members of WikiLeaks including Julian Assange. I am not sure whether WikiLeaks actions are intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means. But I can understand why someone might take that view of them. Certainly at the time that was not the purpose of spending time with them.*
>
> *This was mostly in ~ 2011 to 2013. I don't recall exact dates and nor do I have old diaries and calendars to check. I worked with them on the release of the SpyFiles, which focused on companies unlawfully selling surveillance technologies to repressive countries. I shared a platform with Julian Assange launching the documents and subsequently visited him in the Ecuadorian Embassy on a handful of occasions.*
>
> *I cut ties with Julian and WikiLeaks due to their extreme views and failure to confront the criminal charges before Julian. I have haven't [sic] spoken to him or them for a number of years."*

18. Under "Other Information" he stated:

> *"Due to my career working with activists and charities in a number of countries on a number of issues, there will no doubt be individuals I have met in the court* [this should say, "course"] *of my work that are somewhat unusual. There are none that come to mind that would be particularly concerning, but I wanted to raise it.*
>
> *Additionally, possibly unusually for someone going through vetting, while working for previous charities I have brought claims against the intelligence agencies and provided expert statements to support those claims in the Investigatory Powers Tribunal. I have also worked with journalists analysing material provided to them by the NSA contractor, Edward Snowden."*

19. On 2nd March 2018 UKSV requested further information from the Claimant. He provided it by email the same day. Telephone interviews were conducted with one of the Claimant's referees and two of his supervisors from current and previous employment on dates in March and April.

20. On 19th June 2018 the Claimant attended a vetting interview at the FCO. UKSV's Vetting Officer was Mr Steve Walsh. The interview started at 10:30am and concluded at 2:30pm. The Claimant told Mr Walsh that Snowden had "radicalised" him and made him "more aggressive", although now he appreciated that this was "more complicated than seen at first blush". He thought that the intelligence agencies involved had made "a lot of effort to do things right". He might be more accepting of practices he had previously thought improper.

21. The Claimant told Mr Walsh that in his past employment whilst investigating companies overseas he had attended arms conferences and fairs. He volunteered that he used a false surveillance company name to gain an invitation, although he was "careful to enter under his own name on his own British passport". This could be seen as a standard technique of investigative journalism.

22. The Claimant was recorded by Mr Walsh as being "aware that others may look at his past associations and ponder if he is loyal. In particular his association with the founder of WikiLeaks, Julian Assange that he mentioned on his vetting form raises concerns".

23. On 21st June 2018 Mr Walsh recommended that the Claimant be granted DV security clearance. He noted that the Claimant could, on the face of it, be categorised as an outsider who would "make the perfect inside threat". However, "his background as a person who is steeped in the civil liberties culture and who has many friends … who actively pursue civil liberties causes against the government, plus his extensive knowledge of the law in relation to surveillance powers, is precisely the reason he has been employed". Mr Walsh considered that the Claimant had given "credible reasons" at interview as to why he would not disclose the details of his work to others. Mr Walsh believed that the Claimant "will bring a strong sense of loyalty and integrity to the IPC (these appeared to be character traits)".

24. On 18th September 2018 the Security Service wrote to the DV Operations Manager at UKSV. This letter was then copied to Cluster 2. It expressed "strong reservations" on national security grounds to the Claimant being granted DV security clearance. The Claimant was not made aware of the basis of those concerns before he read para 22 of the Defendant's Detailed Grounds of Resistance. Those concerns were that the Claimant:
    (1) might be deliberately seeking to acquire sensitive information in order to disclose it;
    (2) was insufficiently deferential to the sanctity of confidentiality and the authority and knowledge of those charged with protecting confidence, and the wider public interest;
    (3) had associated and may still associate with individuals whose outlook and approach increases the dangers posed by inadvertent disclosure.

25. On or about the same date, the Claimant's application was assigned to Mr Alistair Jackson, the then Deputy Head of Vetting Decisions at Cluster 2. His first witness statement dated 8th June 2020 contained very little information about the decision-making process in this case, but more has been provided following the disclosure process in CLOSED that was undertaken following a hearing before this Court in October 2020. In para 18D of Mr Jackson's re-amended first witness statement filed on 26th October he stated that the Security Service's letter dated 18th September "included a suggestion … that should a further interview with the Claimant be conducted, [five] aspects could be explored further". These included the concern that the Claimant's principles and beliefs might not always be subordinated to his required loyalty to IPCO, and that the Claimant had not accepted that his past involvement in disclosures of sensitive and confidential information was wrong and had damaged national security; nor was it clear whether he had changed his attitude since 2013.

26. Given its sensitivity, Mr Jackson discussed the Claimant's application with his line manager Mr Luke Fenning, Head of Vetting Decisions, and with Ms Brindha McDonald, Head of Personnel Security. No record or summary of these discussions has been provided.

27. On 24th September 2018 Mr Jackson wrote to the Claimant to inform him that he had been refused DV security clearance on the grounds of national security. The letter stated that, although there was no right of appeal, any representations he might wish to make would be considered.

28. On 28th September the Claimant spoke to Mr Jackson by phone. He was told that his refusal of DV security clearance had "a lot to do with his previous work and associations". Mr Jackson said that he did not have any concerns about the Claimant having been dishonest during the vetting process.

29. Meanwhile, on 26th September a more senior official at Cluster 2 emailed UKSV seeking to highlight "some concerns we have" regarding the Claimant's case. Observing that the Vetting Officer considered the case to be "low risk", she stated that "we take a very different view". He had come to his conclusion "before the checks were returned", but even on the basis of what he knew "we do feel that the risk assessment was extremely optimistic". She invited UKSV "to QA the report". On 2th October Mr Walsh reviewed his notes of interview and amended the assessment in

relation to the Claimant's associations to "moderate". However, the overall recommendation that DV security clearance be granted was not altered. It appears from UKSV's email dated 4th October that Mr Walsh never saw the Security Service's letter dated 18th September.

30. On 2nd October the Claimant emailed Mr Jackson noting that he understood that his previous work meant that this was an unusual situation for Cluster 2. He also stated that he wished to "discuss the matter with the Investigatory Powers Commissioner before deciding whether I wish to make representations to address your concerns".

31. Anticipating that the Claimant would be making representations in due course, on 2nd October 2018 Messrs Jackson and Fenning put together a paper entitled "Eric Anthony King – Options". Given that the parties devoted much time in oral argument to this document, it is necessary to cite extensively from it:

> *"**Recommendations***
>
> * ***Immediate***: *Option 1 as this keeps the case within our control it also keeps the case within the standard vetting process. The other options open to us to* [word or words missing] *further handling complications and delays in resolving this application.*
>
> * ***Long Term****: I think there needs to be a strategy for how IPCO posts are recruited given their internal oversight function of Thames House (TH), our reliance on TH assessments, and the possible claims of conflicting interests.*
>
> ***Option 1 – Maintaining the existing process and refuse***
>
> 1. *External applicants are able to make further representations to the decision maker on their case.*
> 2. *These representations would then be considered by the decision maker.*
> 3. *The decision maker would then seek advice and put up the chain complex cases.*
> 4. *There is no right of appeal but the subject can complain directly to the Permanent Secretary.*
> 5. *The Permanent Secretary will review any such complaint and the vetting decision. It is open to them to either maintain or overturn the decision on the application.*
>
> ***Benefits****: This maintains the integrity of the vetting process. The subject can make further representations for consideration which demonstrate the "reasonableness" of the process. If they were to make a complaint the Permanent Secretary can access and review all the available information.*
>
> ***Risk****: our decision will not be received well by IPCO as the subject was targeted for the job because of their background. IPCO's risk assessment of the subject is different from ours, but what will require careful handling is that our assessment is based on information provided by Thames House who IPCO are there to oversee."*

32. Option 2 was "Maintaining the existing process and issue DV at risk", i.e. the risk would lie with IPCO. This option was not recommended for amongst other reasons that it "would likely be seen … as undermining our relationship with TH". Option 3, which was also not recommended, entailed refusing the application but giving the Claimant a right of appeal to the Security Vetting Appeals Panel ("SVAP").

33. On 4th October 2018 Ms McDonald met Sir Adrian Fulford. She agreed that Cluster 2 would interview the additional referees and that she "as Head of Personnel Security, would again review the case in its entirety and come to a decision". Both she and Sir Adrian agreed that there was no need for the Permanent Secretary to become involved.

34. On 5th October the Claimant emailed Mr Jackson and confirmed that he wished to submit representations to assist the reconsideration of his application for DV security clearance.

35. On 6th October Mr Fenning emailed Ms McDonald, copying in Mr Jackson, with a series of proposals for the way forward:

> *"1. On Monday (8th October) we agree the key questions/areas we wish to question. In my view this falls into broad areas [REDACTED]*
> *…*
> *2. Once the questions are ready we share them with TH with an explanation of what we are doing, and ask for their input on the questions. … We give TH 1 week to respond with their views and any additional questions …*
> *3. In parallel to setting our questions on Monday we approach all 3 remaining referees and ask to conduct telephone interviews or if convenient face to face interviews in 2MS during WC 22nd October. … Interviewing all three does give us a full picture of the subject, all through* [sic] *we have to constantly bear in mind these are not unbiased sources of information.*
> *4. After completing the interviews I think we should share our results with TH and see if based on this additional information they would change their assessment and given them 1 week to respond. I anticipate that they will not change their overall assessment but the benefits of both keeping them in the loop and getting their expert opinion on the case helps demonstrate that we are seeking as wholistic* [sic] *and rounded view point before taking a decision ourselves. The deadline here would be 2nd November.*
> *5. We should be decision ready by 5th November. While our actions are unusual on this case to try to keep in line with existing processes I would suggest that:*
> *a. Alistair makes the recommendation following the conclusion of his investigation …*
> *b. Luke makes the decision based on all the available information.*
> *c. Brindha is the second decision maker or SPOE* [second pair of eyes] *…"*

36. It may be seen that the procedure in fact adopted by Cluster 2 differed from Option 1 in one significant respect. Mr Jackson would now interview the Claimant's other referees.

37. The Claimant submitted a 7-page statement containing his written representations on 10th October. In it he provided examples of specific occasions on which he had access to UK national security information and had not breached confidentiality. The Claimant said that he had been "assisted" by his conversation with Mr Jackson who had informed him that the DV refusal had "a lot to do with my previous work and associations." Further:

> *"I surmised from the conversation with Mr Jackson that part of the DV refusal related to a risk assessment that I may improperly disclose confidential national security information. While the concern was a proper one, in this instance, it is one that I hope my referees will be able to assist in putting to rest. Those referees (David Anderson [OTHER NAMES REDACTED]) have all worked with classified material in their respective roles, will be able to share an unvarnished view of my character, my motivations, and their experience of how I conduct myself professionally."*

38. Nowhere in these written representations did the Claimant address the question of his previous work and associations.

39. Interviews were conducted with the Claimant's referees between 23rd and 31st October.

40. According to para 29 of Mr Jackson's first re-amended witness statement:

> *"I considered all the relevant material and concluded that the existing refusal to grant the Claimant DV clearance should stand. That refusal was also reviewed by Cluster 2's Head of Personnel Security, Brindha McDonald. She also considered all the available relevant material and concluded that the decision to refuse the Claimant DV clearance should be maintained."*

41. There is no contemporaneous record of the basis of or reasons for this decision, and Mr Jackson's first witness statement does not fill this lacuna. Nor, for the reasons addressed more fully in the CLOSED judgment, does Mr Jackson's CLOSED witness statement do so.

42. On 28th November 2018 the Claimant was informed by Mr Jackson that the latter's initial refusal decision must stand. The following additional words of explanation were given:

> *"I am aware that you expressed a desire to meet with me in person yourself, but I have concluded that would be unlikely to add anything to the interview you have already had with your vetting officer.*
>
> *I am afraid I have to inform you that although I do consider that my concerns have been alleviated somewhat, I do not feel they have been reduced to the point where I can justify granting DV clearance …"*

43. The Claim Form in this case was filed on 28th February 2019. After permission had been granted, on 20th January 2020 the Defendant applied for a CLOSED material hearing to be held under s. 8 of the Justice and Security Act 2013. The application

was heard on 6th October 2020 by my Lord, Bean LJ, and Elisabeth Laing J (as she then was) and was granted, subject to the Defendant being required to make specified further disclosure. This explains, at least in outline, the evolution of Mr Jackson's first witness statement. Other originally CLOSED documents, which I have reviewed in the foregoing exposition, have since been placed in OPEN.

44. On 18th January 2021, clearly at a late stage in this litigation, the Claimant was served with a second witness statement made by Mr Jackson on 17th December 2020 and amended on 18th January. Objection has been taken to this statement on the basis that it contains *ex post facto* reasoning rather than the true basis of the decision dated 28th November 2018. At the outset of the hearing my Lord, Bean LJ, indicated that the Court would receive this statement without prejudice to the Claimant's objections to it.

45. According to Mr Jackson's second witness statement, the first of the stated reasons for the decision (as per para 22 of the Detailed Grounds of Resistance) was sufficiently serious on its own to justify the refusal of DV security clearance. As for the second reason, he contended that it has been misunderstood. The reference to "deference" was not intended to suggest that the Claimant should uncritically accept the views of the Home Office and the Agencies but rather that he should not uncritically reject them. The third reason, the Claimant's associations, was said to be "somewhat mitigated" following his discussions with the Claimant's referees but remained a significant concern.

46. Mr Jackson's explanation for not conducting a second interview of the Claimant on an exceptional basis was that "to do so would be unfair to other applicants". Mr Jackson stated that he took into account the suggestions of the Security Service as to which further aspects might be explored in the event that a further interview was carried out, but observed that the decision was not for them but for Cluster 2.

47. On the issue of prejudgment, Mr Jackson stated:

> *"I do not accept that I, or Cluster 2 more generally, prejudged the Claimant's application. I do accept that at the date of the Options paper, which was prepared on 2nd October 2018, I considered it unlikely, on the basis of information then in my possession, that the representations he might make would lead to a different result. Given that at that point the Claimant's application had already been refused, on 24th September 2018, and given the evidence before me at that time, that was a reasonable view for me to have taken … I took into account all material available to me at the time of the decision, and approached it with an open mind. Indeed, as I have set out in earlier in this statement, in some respects my concerns about the Claimant were mitigated as a result in particular of discussions with his referees …"*

The Claimant's Three Grounds

48. By his Ground 1, the Claimant contends that Article 8 of the ECHR requires that there be proper and adequate safeguards in place for the use of investigatory powers, including effective and credible independent oversight. Arrangements under which Her Majesty's Government may refuse DV security clearance to IPCO's senior

employees without any independent oversight and check – for example through a right of appeal to SVAP – are said to provide an inadequate safeguard for the independence and impartiality of IPCO and render the regime of oversight inadequate.

49. By his Ground 2, the Claimant contends that the Defendant's decision was irrational because the three reasons advanced in the Detailed Grounds of Resistance do not withstand scrutiny and/or are infected by irrelevant considerations and/or ignore relevant considerations.

50. By his Ground 3, the Claimant contends that the decision was made unfairly because (1) at no stage before 28th November 2018 was he provided with the essential reasons for the decision which could and should have been disclosed to him previously; (2) the concerns evinced by the Security Service could and should have been explored in a second interview; and (3) the Options document evidences prejudgment. There is clearly an element of overlap between Ground 2 and the first limb of Ground 3.

The Claimant's Grounds Developed

51. In his impressive oral argument Mr Ben Jaffey QC re-ordered his grounds, no doubt alive to which were his strongest points. His sequencing was correct, including the relegation of the Article 8 ground to last place.

52. Mr Jaffey began with Ground 3 and submitted that the Options document betrays clear evidence of prejudgment by the Defendant, and that there is nothing in the contemporaneous documentation or the witness evidence to impel any different conclusion – beyond, that is, Mr Jackson's assertion in his second witness statement that he kept an open mind.

53. Mr Jaffey took the first and second items (see §50 above) together. He distilled six propositions of law from the governing jurisprudence. These were: (1) fairness may require providing a detailed gist of the case the person has to meet; (2) in some decision-making processes, an oral interview may be of particular importance to fairness; (3) these principles apply equally in the context of national security; (4) there is sometimes a difference between grant and deprivation cases, although this taxonomy is never inflexible; (5) whilst the DV process requires intrusive investigation, if a concern may be addressed openly it should be; and (6) given the context of this case as recognised in the Options paper (viz. the Claimant was the Commissioner's preferred candidate, and there was the risk of a conflict of interest), high standards of fairness should be applied.

54. Against the backdrop of these legal propositions, Mr Jaffey submitted that the Claimant should have been informed of the gist of the Defendant's concerns about his application and have had the opportunity to respond to them in a second interview, or at the very least by making further written representations. His reasons were threefold. First, the significance of the refusal decision, carrying with it consequences for his employment and his personal reputation. Secondly, the improvement of the quality of the decision-making that enabling the Claimant to respond to concerns could have brought about. Thirdly, the preservation of the independence of the vetting process and thus of IPCO. Mr Jaffey added that Mr Jackson has proffered inconsistent reasons for not offering the Claimant a second interview.

55. Moving to Ground 2 and the rationality of the Defendant's decision, Mr Jaffey submitted that the two decision letters and Mr Jackson's first witness statement, even in its re-amended iteration, failed to supply any proper reasons for the decision, in breach of the Defendant's own Guidance and basic principles of fairness. In any case, none of the late reasons advanced at para 22 of the Detailed Grounds of Resistance has any merit. As for the first factor (sc. the Claimant might be seeking to acquire sensitive information in order to disclose it), Mr Jaffey submitted that the Claimant's experience outside government, and his voicing of opinions contrary to the current policies and practices of the Agencies, were the very reasons why he was considered to be an attractive candidate. Further, he had been able to provide specific examples of occasions on which he had been entrusted with confidential material and had not disclosed it. As for the second factor, Mr Jaffey submitted that requiring the Claimant to show "deference" to the very bodies his proposed investigatory function would cover amounted to an irrelevant consideration. He further submitted that Mr Jackson's second witness statement is inconsistent with para 22 of the Detailed Grounds of Resistance. As for the third factor, Mr Jaffey submitted that the Claimant had covered his past associations in clear and sufficient detail in his vetting interview, including making it clear that he had cut his ties with Julian Assange and WikiLeaks.

56. Mr Jaffey's submission on Ground 1 was that any interference with Article 8 must be "in accordance with the law"; and, that in order to satisfy this requirement investigatory powers that interfere with Article 8 must be accompanied by proper and adequate safeguards, including their effective and credible independent oversight. In concrete terms it is contended that the Claimant ought to have been afforded an appeal to SVAP.

57. Finally, Mr Jaffey sought to address the Defendant's fall-back submission based on s. 31(2A) of the Senior Courts Act 1981 that it is highly likely that the outcome would have been the same had there been no error of law. Mr Jaffey observed that this was an impossible submission if the Court were to uphold the prejudgment limb of the procedural fairness ground. More generally, he submitted that if the Claimant were afforded a fair procedure the reasonable possibility that he might dispel the Defendant's concerns could not be excluded.

The Defendant's Submissions

58. Mr Robin Tam QC observed that there was an air of unreality about the Claimant's case. He knew from the outset that his personal history posed potential problems for his DV security clearance. He addressed this topic in his vetting form, and Mr Walsh probed him at length about it. On 28th September 2018 the Claimant was told by Mr Jackson that the refusal had a lot to do with his past associations, and he was given every opportunity to dispel Cluster 2's concerns in the written representations that he submitted. This is not a case where the Claimant was taken by surprise or could not infer the difficulties.

59. Mr Tam also argued that the second witness statement of Mr Jackson was both admissible and did not amount to *ex post facto* rationalisation. Its purpose was to answer the Claimant's developing case following the opening up of CLOSED material in the s.8 process, and it served to clarify and expand on, rather than to

contradict, the reasons that had already been provided in the Detailed Grounds of Resistance.

60. Mr Tam submitted that the context of this case did not require the high standards of fairness pressed by Mr Jaffey. Not merely was the Claimant an applicant rather than an existing employee, the vetting interview was a full and fair opportunity for him to provide satisfactory explanations in the areas of potential vulnerability for him.

61. Mr Tam further submitted that it was not incumbent on the Defendant to conduct a further interview. A fair reading of para 18D of Mr Jackson's re-amended first witness statement does not indicate that the Security Service was either recommending or expecting a second interview: rather, MI5 was suggesting further lines of questioning that might be pursued were there to be one. The Defendant was entitled to regulate its own procedure, and the opportunity to make written representations fulfilled the requirements of fairness.

62. Mr Tam submitted that the conclusion that Cluster 2 prejudged the Claimant's application would not be a fair inference to draw. The Options document should be considered in the context of where it appears in the chronology. In particular, the Claimant had not by 2nd October 2018 indicated that he would be submitting further representations, the Defendant did not in fact follow Option 1 as drafted, and it is clear that although there was a perceived unlikelihood that the decision would change the Defendant was retaining an open mind about it.

63. Mr Tam submitted that the final decision was clearly not irrational because the Security Service's strong reservations, which Cluster 2 shared (with slightly different emphasis), had a solid foundation. The Claimant himself understood that his past associations were an issue for him. Furthermore, on any fair reading of the material the final decision was not improperly influenced by Cluster 2's relationship with Thames House (what Mr Tam called the "delicate triangle" which also encompassed UKSV) or by placing erroneous weight on the so-called "sanctity" of confidentiality. All that the latter meant was that anyone in receipt of sensitive and confidential material would need to respect its character and not uncritically reject the assessments of the subject-matter experts.

64. Finally, Mr Tam submitted that this was a case where the Court could be confident on all the material that there was no real possibility of a different outcome if a lawful decision-making process were undertaken: see s. 31(2A) of the Senior Courts Act 1981.

Discussion and Conclusions

General

65. I begin with two opening observations. The first addresses the elephant in the room, the second the status of Mr Jackson's second witness statement.

66. The elephant in the room, creating what Bean LJ described as a "feeling of unease", is that in this case IPCO's preferred candidate for a senior position was being refused DV security clearance largely because one of the three agencies which IPCO oversees

had strong reservations about him on grounds of national security. These reservations were not unrelated to his background in civil liberties work, which was one of the main reasons – apart no doubt from his personal qualities – for him being deemed to be an appropriate candidate. Juvenal's maxim about guarding the guardians has a particular aptness.

67. Mr Tam sought to assuage this feeling of unease, when it was put to him, by submitting that someone had to determine whether the Claimant should have access to highly sensitive material, and that it was not improper for the Security Service to have an advisory role. The element of conflict of interest, to which Cluster 2 was clearly alive, could not be avoided. Insofar as they go, I accept these submissions. It is not for the Court in applying or developing the common law to carve out an additional safeguard, for example by holding that the Claimant should have had a right of appeal to SVAP, and Mr Jaffey did not submit otherwise.

68. However, Mr Jaffey did submit that the context was relevant to the calibration of the flexible standard of procedural fairness, and in this respect I would agree. In *Lloyd v McMahon* [1987] 1 AC 625, at p.702, Lord Bridge pointed out:

> *"… the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory and other framework in which it operates."*

69. Lord Bridge's list of factors was not exhaustive. In my judgment, the particular sensitivities of this case, which Cluster 2 recognised in the Options paper and the email from Mr Fenning dated 6th October 2018, serve to heighten or intensify the applicable standards of fairness to a material degree. This is in the context of both the first stage in the decision-making process, culminating in Mr Jackson's letter dated 24th September 2018, and the second stage, culminating in the letter of 28th November. In reality, there was no difference between these two phases because Ms McDonald told Sir Adrian that the case would be reviewed in its entirety. This did not mean that the Defendant would necessarily start from scratch, but it did mean that Cluster 2 would reach a fresh decision on the merits of the Claimant's application with an open mind.

70. As will become apparent, the heightening of the standards of fairness does not mean that I should be accepting Mr Jaffey's submission that this a case where high standards of procedural fairness are applicable. A consideration of the overall context brings the present case higher up the relevant scale, but as I will be explaining the starting-point is a relatively low one.

71. Secondly, the status of Mr Jackson's second witness statement must be addressed. Neither the Defendant's two decision letters nor Mr Jackson's first witness statement (in whichever iteration) contains an explanation for the refusal of DV clearance. Mr Jackson's second witness statement was provided more than two years after the material events in the context of litigation. The authorities make it clear that the purpose of judicial review proceedings is not to extract an explanation which ought to

have been provided earlier, but once such an explanation has been given its value and weight must be considered. If, for example, the second witness statement contained Mr Jackson's true explanation for the decision, it would be wrong to ignore it (see, for example, *Caroopen v Secretary of State* [2017] 1 WLR 2339).

72. The effect of the jurisprudence on this topic is that late-provided reasons must be treated with caution owing to the obvious risk of the truth becoming "refracted, even in the case of honest witnesses, through the prism of self-justification": see Elias J, as he then was, in *Herefordshire Waste Watchers Ltd v Herefordshire Council* [2005] EWHC 191 (Admin) at paras 45-49. In *R (oao Nash) v Chelsea College of Art and Design* [2001] EWHC 538, at para 34, Stanley Burnton J, as he then was, listed a series of factors which all bore on the need for caution. These included any delay that has occurred and whether the further reasons are redolent of retrospective justification rather than elucidation.

73. The three explanations contained in para 22 of the Detailed Grounds of Resistance were set out at a relatively early stage in this litigation. It is now known that they reflect the Security Service's strong reservations about this case. There is force in Mr Tam's submission that the Court may be satisfied that para 22 contains, at least in bare outline, Mr Jackson's reasons for refusing DV security clearance in September and November 2018. The main factor was, of course, the Claimant's past associations, which Mr Jackson put to the Claimant on 28th September. The reference in November 2018 to Mr Jackson's concerns having been mitigated somewhat may be taken to relate primarily to this topic.

74. On the other hand, I am less convinced by Mr Jackson's rationalisations about the weight he accorded to each of these three factors in November 2018. Contrary to the Guidance (see §13 above) and the VDF (see §14 above), he made no contemporaneous record of his decision-making (or none that has been disclosed) and no record exists of his discussions with Mr Fenning and Ms McDonald. The Claimant's case may have been rather unusual but I am sceptical about the reliability of Mr Jackson's apparent recollection of points of detail after more than two years. Furthermore, there are other difficulties with Mr Jackson's late evidence: first, as to his reason for not holding a second interview (it contradicts the November 2018 letter); and, secondly, as to his protestation that he retained an open mind (this is not borne out by the contemporaneous documentation). I will be reverting to those.

75. My scepticism as to the weight accorded to each of the three headline reasons for the adverse decision in this case matters little. This is because the three reasons really boil down to one: owing to the Claimant's past associations and activities, there was insufficient assurance that he could be trusted. This lack of assurance underpinned the strong reservations of the Security Service, and Mr Jackson's second witness statement indicates that he shared them. Thus, the weighting of the three reasons is a detail rather than being fundamental.

76. On the other hand, the Security Service's strong reservations were not elevated into a negative recommendation. It was Mr Jackson's duty to weigh those reservations against the material in the Claimant's favour, including the vetting interview, the assessments of Mr Walsh and, on the inferential basis that they were favourable on the issue of the Claimant's associations, the input of the Claimant's referees. Mr

Jackson's second witness statement contains much impermissible argument and submission, but the evaluative exercise I have mentioned is not set out in explicit terms. Whether this matters is an issue to which I will be returning.

77. I now turn to address the Claimant's grounds in their original numerical order.

Ground 1: Article 8

78. Mr Jaffey relied on the decision of the Grand Chamber of the ECtHR in *Case of Big Brother Watch v UK* [4th February 2019, Application Numbers 58170/13, 62332/14 and 24960/15] in support of the proposition that the "in accordance with the law" requirement in Article 8.2 necessitated an effective and independent system of supervision of the activities of those implementing secret surveillance measures, which in the circumstances of the present case meant that the Claimant should have had a right of appeal on the merits to SVAP. On the facts of *Big Brother Watch* this requirement was fulfilled by the independent oversight of the Interception on Communications Commissioner, the predecessor to the Investigatory Powers Commissioner.

79. In my judgment, Mr Jaffey's submission fails at first base. In *Big Brother Watch* the applicants all believed that the nature of their activities were such that their electronic communications were likely to have been intercepted by the United Kingdom intelligence services or a foreign government (see para 8 of the judgment). The applicants' Article 8.1 rights were therefore engaged, and the issue in the case was the first limb of Article 8.2. But in the present case the Claimant can point to no relevant Article 8.1 right of his that has been violated. His essential complaint is that the refusal of DV security clearance has denied him the ability to take up particular employment. That inability in my judgment does not create an issue under Article 8 because it has nothing to do with the Claimant's private and family life.

80. The Defendant's skeleton argument lists other difficulties with the Claimant's Article 8 case which it is unnecessary to address.

81. The Court did not invite Mr Tam to address Ground 1 orally. Mr Tam accepted for the purposes of this case only that an appeal before SVAP is a full appeal on the merits rather than a process akin to judicial review. Given the manner in which the issue arose, it was not possible for him to obtain instructions in the limited time available. The Claimant's failure at first base rendered this subsidiary issue academic but it may arise for determination in a different context.

Ground 2: Irrationality

82. In *Home Secretary v Rehman* [2003] 1 AC 153, Lord Hoffmann stated at para 50 of his opinion:

> *"What is meant by "national security" is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty with what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a*

> *matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter of judicial decision. They are entrusted to the executive."*

83. I do not think that Lord Hoffmann was saying that all national security decisions are not justiciable, and to the extent that there may be any doubt about it he made his position clear in *A v SSHD* [2005] 2 AC 68, paras 95-97 (see also the judgment of Lord Reed PSC in Begum v SSHD [2021] UKSC 7, at para 70, where he explained that "some aspects of the [Defendant's] assessment may not be justiciable"). Lord Hoffmann was making the different point that the courts will be very slow to intervene in correcting such decisions on an irrationality or "pure" Wednesbury basis. This is because the relevant expertise and institutional competence lies not with the judiciary but with the executive.

84. In any case, the target of this judicial review application is not any decision made by the Security Service but Mr Jackson's conclusion that DV security clearance should be refused. The point has already been made that his second witness statement does not contain any explicit statement of how, if at all, he balanced the strong reservations coming from one quarter with the material that was supportive of the Claimant.

85. The laconic nature of Mr Jackson's evidence on this particular issue is troubling but it is not decisive. The Claimant, quite rightly in my view, has not mounted a reasons challenge, and Mr Jackson was not required to proceed as if he had. Standing back from the minutiae of this case, the issue for consideration was whether the Claimant has done enough to assure the decision-makers that his past associations and activities were historical. Ultimately, this assessment of present risk could be no more, and no less, than a value judgment. Mr Jackson cannot have ignored the material that was in the Claimant's favour, including the assessment of the Vetting Officer. It is known that Mr Walsh had not seen the Security Service's reservations. In my judgment, Mr Jackson's conclusion, tersely expressed, that his concerns had been mitigated to some extent, but by inference not sufficiently, was not an irrational one, and serves to demonstrate that material in the Claimant's favour was not overlooked.

86. Mr Jaffey also submitted that Mr Jackson had regard to irrelevant considerations in that the second reason advanced in para 22 of the Detailed Grounds of Resistance – "insufficiently deferential to the sanctity of confidentiality" etc. – was incompatible with IPCO's statement of principles, including the need for fearless independence and the rigorous application of the law. His very job description was *not* to be deferential in this suggested manner. Taking these words literally certainly gives Mr Jaffey material to deploy, and Mr Tam in oral argument baulked at the use of the term "sanctity". Further, the point is well made that para 13 of Mr Jackson's second witness statement is rather a tortuous retrospective justification of the position. However, I consider that para 22 of the Detailed Grounds of Resistance should be read with a measure of common sense and textual latitude, recognising also that it represents somewhat of a compressed summary. Mr Jackson was not saying that the opinion of the three agencies should be slavishly accepted. He was saying that their expert assessments should be respected. Put in these more muted terms, Mr Jackson was not in my opinion having regard to an irrelevant consideration.

87. The CLOSED judgment provides further reasoning on this issue.

88. Mr Jaffey further submitted that Mr Jackson paid inappropriate regard to a need not to undermine the relationship between Cluster 2 and Thames House (i.e. the Security Service). This was clearly a factor in differentiating between various options in the Option paper, but I do not consider that there is sufficient evidence to suggest that it infiltrated the decision-making of Cluster 2 once a variant of Option 1 was selected. It is obvious that considerable weight was given to the strong reservations held by Thames House, but that in itself was not objectionable, provided that (1) Mr Jackson did not effectively delegate his decision to them (which was not Mr Jaffey's case) and (2) Mr Jackson did not fail to consider the substance or merits of Thames House's reservations and have regard solely or mainly to the need not to rock the boat. In my judgment, the second proposition has not been made out.

89. In the CLOSED proceedings Mr Tim Buley QC drew our attention to para 80 of the judgment of Beatson LJ in *R (Das) v Home Secretary* [2014] 1 WLR 3538. There, the Court of Appeal, upholding Sales J, as he then was, at first instance, referred to the possibility of the court drawing adverse inferences of fact where a party fails to put before the court witness statements to explain the decision-making process and the reasoning underlying a decision. The precise context in which Mr Buley relied on this authority must remain CLOSED, but his point could go wider. The lacunae in Mr Jackson's evidence have been identified, but in my view these are not such as to generate one or more adverse inferences against the Defendant. Mr Jackson has done just about enough to enable the court to reach fair and balanced conclusions as to the basis of the decision-making process in this case.

90. The Claimant's second ground cannot be accepted. The decision was not irrational.

Ground 3

91. It is convenient to depart from the sequence in which the Claimant's case was advanced in his skeleton argument.

92. The third limb of Ground 3 is that the Defendant did not approach the reconsideration of his case in October and November 2018 with an open mind: in short, it was effectively prejudged. Mr Jaffey's submissions could be advanced regardless of the promise Ms McDonald made to Sir Adrian on 4th October 2018, but were undoubtedly fortified by it.

93. This aspect of the case gives rise to particular concern, not least because a judicial finding that a decision-maker has not approached his or her task with an open mind is a serious matter. However, all the available evidence points to that conclusion. The terms of the Options paper are scarcely free from doubt. Option 1, which the authors recommended, entailed the refusal of the Claimant's application. Furthermore, it was expressly understood that "our decision will not be received well by IPCO as the subject was targeted for the job because of their background". The future tense was used, not the conditional. This was not merely a prediction of the inherent probabilities but a statement of the intended outcome. Mr Fenning's email dated 6th October 2018 recognised the possibility that the Security Service might change its mind, in which case the unspoken consequence would be that Cluster 2 could reach a

different decision. However, the issue was not whether Thames House would keep an open mind but whether Cluster 2, in the event that there was no *volte face* from the Security Service, would do so. The Defendant cannot have it both ways. It accepts that Cluster 2 was the decision-maker and not the Security Service. It must also accept that in the exercise of this function it would review all the evidence for itself on a free and impartial basis, even if the Security Service's reservations were maintained.

94. The email dated 6th October 2018 speaks for itself. In my opinion, its whole tenor is of a decision-making process which was designed to appear to tick the boxes.

95. I also cannot accept Mr Tam's submissions that the Options document presents a snapshot in time, and that it was not clear until the Claimant's email was received on 5th October that he was seeking to make further representations. The Defendant was anticipating that he would do precisely that, hence the meeting between Ms McDonald and Sir Adrian on 4th October. Option 1, with the modification I have mentioned, was implemented.

96. It follows that I also cannot accept what is said in Mr Jackson's second witness statement about his retaining an open mind throughout. This evidence conspicuously fails to grapple with the contemporaneous documentation, which in my judgment bears only one reasonable interpretation.

97. For the purposes of the prejudgment limb of the Claimant's case on procedural fairness, recourse to the terms of s. 31(2A) of the Senior Courts Act 1981 is not propitious. Unless the Claimant's case was so weak that it was always doomed to fail, regardless of the retention of an open mind by the decision-maker, it could not be said that the outcome would highly likely have been the same. The instant case does not fall into that rare category.

98. The prejudgment limb of the Ground 3 must therefore be upheld.

99. The first and second limbs of the third ground may be taken together. The Claimant complains that he was not provided with the gist of the objections from the Security Service so as to make focused representations, and that he was not offered a second interview.

100. Before addressing these limbs directly, there are two further contextual issues which need to be addressed.

101. The first concerns the standard of fairness apposite to this case. I have already said that the general sense of unease that has been identified serves to heighten the standard, but what is the correct starting-point? It is relevant, in my judgment, that the Claimant was applying for a post rather than being deprived of one: see, in particular, *McInnes v Onslow-Fane* [1978] 1 WLR 1520, at pp.1528H-1529C, and *R (Khatun) v Newham Borough Council* [2005] QB 37, at paras 27, 31 and 40.

102. In *Tariq v Home Office* [2012] 1 AC 452 Lord Hope of Craighead DPSC expressed the matter in the national security context in these terms:

> *"75. No one doubts Mr Tariq's right not to be discriminated against on grounds of his race and religion. But it was his own choice to seek employment in a post for which, in the interests of national security, security clearance was required. He was a volunteer, not a conscript. This is not a case where he is the victim of action taken against him by the state which deprived him of his fundamental rights. Furthermore, as I have already said, security vetting is a highly sensitive area …"*

See also Lord Dyson JSC at para 159.

103. In *R (Moseley) v Haringey BC* [2014] 1 WLR 3947, Lord Wilson JSC observed, at para 26, approving Simon Brown LJ, as he then was, *in Ex parte Baker* [1995] 1 All ER 73, that "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit". Clearly, the Claimant fell into the latter category. Moreover, he did not occupy Sir Robert Megarry V-C's intermediate category in *McInnes* of someone with a legitimate expectation that he would be granted the relevant benefit. His only expectation was that he would be appointed if security cleared.

104. Mr Jaffey was right to submit that this taxonomy must not be inflexibly applied, but it is part of the overall juridical context. In my judgment, the starting point in the present case is of a relatively low standard of fairness which is then heightened somewhat to reflect the Court's sense of unease to which I have referred and the fact that the refusal of DV security clearance would cause reputational damage to the Claimant in a high-profile case.

105. It is not possible to be precise as to where on the overall spectrum of fairness the present case should be treated as falling, but in my view it occupies the middle of the range.

106. The second contextual issue is whether the fairness of the decision-making process was for the Defendant to determine, subject to *Wednesbury* review, or for the Court. At para 65 of his judgment in *R (Osborn) v Parole Board* [2014] AC 1115, Lord Reed JSC held that the issue of whether certain prisoners should receive an oral hearing before the Parole Board, consonant with fairness and Article 5.4 of the Convention, was for the Court to determine. In other cases, in particular (at the highest level) *R v SSHD, ex parte Doody* [1994] 1 AC 531, the exigencies of fairness were said to be for the decision-maker to choose.

107. Very little turns on this issue in the instant case but a reconciliation of these decisions of the highest authority is in my view possible. In *Doody* itself, the House of Lords held that the Secretary of State was required to afford to a prisoner serving a mandatory life sentence the opportunity to submit representations on the length of his tariff. This was either a matter for the court or, alternatively, a matter where the *Wednesbury* question permitted only one reasonable answer. *Osborn* may be seen in the same terms. Thus, high-level, first order questions of fairness tend to present binary issues. Lower down the scale of importance, however, Sir Michael Fordham is surely correct in envisaging "procedural fairness as a flexi-principle" (see *Judicial Review Handbook*, Seventh Edition, para 61.2). Into this category would fall decisions

such as whether to adjourn a hearing, whether to control cross-examine of witnesses, or whether to interview a candidate rather than invite written representations.

108. Although Mr Jackson's reasons for not conducting a second interview of the Claimant are mutually contradictory and do not withstand examination, the real question here is whether the Claimant was given a fair opportunity to disabuse the Defendant of its concerns following the decision taken on 24th September 2018. In my judgment, this was not a case (c.f. *Osborn*) where an oral process was mandatory. Part and parcel of such an opportunity *might* include providing the Claimant with a gist of those concerns before he submitted his written representations.

109. The general principles cannot seriously be in dispute. Lord Mustill's canonical passage in *Doody*, at p.560D-G, contains an authoritative encapsulation of them:

> *"What does fairness require in the present case? My Lords, I think that it is unnecessary to refer by name or to quote from, any of the oft-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in … general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards its language and the shape of the legal of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he be informed of the gist of the case that he has to answer."*

110. Item (6) in Lord Mustill's list was applied by this Court in a security context: see *R (Segalov) v The Chief Constable of Sussex Police* [2018] EWHC 3187 (Admin), paras 44-45. In my view, the principle is clear. Unless national security considerations preclude the provision of a gist, one should be supplied if considerations of fairness so dictate.

111. Given the fact-sensitive nature of the exercise, the answer to the key question identified under §108 above will not be derived by seeking to draw analogies from other cases. Instead, the answer is to be found in a close examination of the decision-making process and the precise sequence of events.

112. The Claimant was probed by Mr Walsh on his past associations and present mind-set. He was not given the gist of what appears in para 22 of the Detailed Grounds of Resistance, although he was told by Mr Jackson where the problem lay and he also deduced that there was concern that he would not respect the

confidentiality of sensitive material. He sought to address some of these concerns in his written representations submitted on 10th October 2018, and was aware at that stage that this was his only opportunity to seek to persuade the Defendant that he was reliable. As I have pointed out, the Claimant did not explain whether he now believed that what Julian Assange and others had done was justified, how he would characterise his own involvement in the release of the SpyFiles, and whether he had changed his mind or attitude over time.

113. On the other hand, it was strongly submitted by Mr Jaffey that the detailed matters set out at para 18D of Mr Jackson's re-amended first witness statement, described as being the "aspects that could be explored further" at a second interview, could not reasonably have been anticipated by his client. Furthermore, nowhere does Mr Jackson explain why the matters set out at para 18D of his re-amended first witness statement were never put even in gisted form to the Claimant.

114. Although para 18D itemises five separate matters with a number of sub-headings, these are largely variations on the same theme. The constant refrain was this: does the Claimant now accept that his past actions and associations were "wrong", and has he genuinely changed his mind?

115. The merits of the argument are finely-balanced. Should Mr Jackson have done more to spell out these concerns, or should the Claimant have worked it out for himself on the basis of the limited information he had been given? There was no national security reason that might have precluded Mr Jackson being more forthcoming. Furthermore, Mr Jackson was aware that the Security Service was setting out serious reservations rather than a metaphorical black ball, and that in practice the Claimant himself needed to address their particular concerns.

116. On balance, I have concluded that procedural fairness required that a gist of the para 18D considerations ought to have been provided to the Claimant so that he could provide a more focused written response. It is particularly noteworthy from para 18D that the Security Service was expecting the Claimant to set out his stall on the key issues. His referees could speak to these topics, but they could not speak directly for him.

117. An additional reason for this conclusion is set out in the CLOSED judgment.

118. I cannot accept Mr Tam's submission that the outcome would highly likely have been the same had a fair procedure been followed. This case was far from being straightforward, and it is not beyond the bounds of possibility that the Claimant, who is an intelligent and articulate individual, could have advanced a compelling case.

Disposal

119. This claim succeeds on all three limbs of the procedural fairness ground, but fails on the issues of Article 8 and irrationality.

120. The parties are invited to draw up an Order which reflects these conclusions.

LORD JUSTICE BEAN:

121. I agree.