IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2729 (Admin)

No. CO/4793/2020 &
CO/577/2021

Royal Courts of Justice

Friday, 14 October 2022

Before:

LORD JUSTICE EDIS
MR JUSTICE LANE

B E T W E E N :

THE KING
ON THE APPLICATION OF
(1) HM
(2) MA & KH — Claimants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

ANONYMISATION APPLIES

MR T DE LA MARE KC, MR J POBJOY and MS G PARTHASARATHY (instructed by Gold Jennings) appeared on behalf of the first Claimant.

MR T HICKMAN KC, MS J KERR-STEVENSON and MS B SMITH (instructed by DPG) appeared on behalf of the second Claimants.

SIR JAMES EADIE KC, MR A PAYNE KC and MS C ROONEY (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

LORD JUSTICE EDIS:

1 This judgment deals with the consequences of the decisions made by the court in the judgment handed down on 25 March 2022, [2022] EWHC 695 (Admin). It is the judgment of the court to which we have both contributed. It will be given in this *ex tempore* form in two parts. I shall deal with the factual background and the issue which has been described as the "candour issue". My Lord will then deal with the form of relief which should follow. We are extremely grateful to the parties for their work in narrowing the issues in relation to relief and my Lord will deal with those which remain and establish, therefore, the form of order which the court will make.

2 In this judgment, because the claimants are anonymised and we are dealing with two claims at once, it will be far simpler if we refer to the first claim as JR1, that is the claim by HM in which a pre-action protocol letter was written on his behalf at the end of November 2020 and where an acknowledgement of service was served in January 2021. We shall refer to the second claim as JR2. This is the claim brought by MA and KH. Pre-action protocol correspondence was received by the Home Secretary in January 2021 and the acknowledgement of service in that case was lodged in March 2021. Each claim involves the seizure of mobile phones. They key distinction between the two, for our purposes, is that in JR2 the phones were seized before June 2020, whereas in JR1 the phone was seized after June of 2020 but before November 2020.

3 In paragraph1 of the substantive judgment of the court, we said this:

> "These claims concern the search for and seizure of and the retention of data taken from the mobile telephones of individuals who arrived in the United Kingdom as migrants in small boats from France. The defendant, the Home Secretary, has accepted that she operated an unlawful policy during the relevant period. That policy changed in certain respects during the relevant period, but it was unlawful in some material respects throughout. It is agreed that a further hearing following this judgment will be required to consider what relief is required and to address also the extent and consequences of an apparent failure by the defendant, for which the court has received an apology, to comply with her duty of candour when responding to these claims for judicial review. Her initial stance was that there was no policy of [seizure of all phones from migrants, referred to in these proceedings as a "blanket policy". It is now admitted that there was such a policy and that it was unlawful.]"

4 The facts and legal context relevant to this ruling are set out in the main judgment and are not repeated here. We will deal with the facts relevant to the duty of candour question as identified in paragraph1 of the main judgment and we will, in doing so, set out the basis on which relief is granted.

5 It is right to record at the start that one of the agreements which the parties have reached is that the Secretary of State for the Home Department must pay some of the claimants' costs on an indemnity basis. The reason for that agreement or concession by the Secretary of State is the breach of the duty of candour which is accepted by her and for which, as we have previously recorded, she has apologised. In making that concession as to the basis of assessment of part of the claimants' bill of costs in these two claims, the Secretary of State has taken a wholly realistic and appropriate course. Had it been left to us, we would also have made a costs order on the indemnity basis to reflect the matters to which we are about to turn.

6 It is important before doing so to explain the limited nature of this ruling. The court has received evidence on behalf of the defendant from Mr Lee John-Charles and Ms Victoria Elliott. We have seen the documents which have been disclosed. Since the main judgment, the Secretary of State has disclosed further material which was previously subject to legal professional privilege in order to cast further light on the circumstances in which these events occurred. We have also received evidence from counsel, Mr David Mitchell, who was instructed in the early stages of the case. He advised on and drafted some letters which were used to respond to the pre-action protocol correspondence in JR1 and which were somewhat modified and used again in JR2. He advised in conference at least once, and provided three written advices. He has explained that his involvement in the case came to an end when his appointment to the A list of panel counsel instructed by the Government Legal Department came to an end. He did not apply for its renewal and therefore ceased to be involved in this case.

7 Ms Elliott is a Home Office legal advisor whose evidence is limited to the question of whether or not she was present at a telephone conference which we shall describe shortly. Mr John-Charles is a senior lawyer within the Government Legal Department. He has conducted an investigation into what happened and has produced, attached to his witness statement, a number of documents. His evidence is principally to comment on and suggest inferences from those documents as he was not personally involved. Mr Mitchell was personally involved in the case throughout the period with which we have to deal. He was not, of course, acting on his own. He was, it is clear from the email correspondence we have seen, in regular and close contact with lawyers in the Government Legal Department, who were themselves in contact with the officers who were responsible for processing migrants and their mobile phones and also with the Home Office legal advisors who had been advising those officers.

8 We would not, insofar as there are any, attempt to resolve issues of fact between these witnesses. Neither is it appropriate, in our judgment, for us to make any findings of fact about the conduct of any person who is not a party to these proceedings and whose opportunity to participate has been limited to the extent we have just set out. The lawyers of the Government Legal Department who were involved and the officers who were involved in the work have not made witness statements for the purposes of this consequential hearing, although we have material from them, or some of them, in the original bundles.

9 These are judicial review proceedings against the Home Secretary. We are concerned in this judgment to explain what we can safely conclude about the failure of the Home Office collectively to comply with its duty of candour in this case. It is not necessary for us to apportion blame as between individuals and it would be difficult in judicial review proceedings to do that fairly. This judgment must be read with that reservation clearly in mind.

10 We are concerned with a failure of governance which allowed an unlawful policy to operate for an unknown length of time prior to November 2020. When that policy was challenged by lawyers acting on behalf of the claimants in these cases in November 2020, those responsible for it failed to explain it clearly to the Government Legal Department lawyers and counsel who was instructed in the case. This is very surprising, because those lawyers were in direct contact with the officers who were, at almost exactly the same time, involved in discussions about how the policy should be changed so that the new policy, which was not a blanket seizure policy, came into effect at the end of November 2020, more or less contemporaneously with the issue of the pre-action protocol letter in JR1. Notwithstanding

the opportunity which this must have presented to provide clear and accurate factual instructions to the lawyers, it is apparent that that did not happen.

11 In the early period of these cases, the legal team understood that this blanket policy requiring the seizure of all mobile phones from all migrants, so far as possible, had been abrogated in June of 2020 and had then been replaced by a lawful policy. This understanding was false. There was no change to this aspect of the policy until November 2020. There were at least four significant changes to it, beginning in June of 2020, but those affected the extent to which data would be extracted from the phones which were seized and not whether or not they would be seized in the first place. The surprising failure to provide accurate factual instructions to the legal team is the origin of the subsequent failures of those acting on behalf of the Secretary of State to achieve compliance in the duty of candour in responding to the claimants and the court.

12 It is not alleged that any participant in this process was acting dishonestly or in bad faith. We certainly make no finding to that effect. We approach this issue on the basis that these events occurred because everyone involved was under great pressure in dealing with a crisis of mass migration into the United Kingdom against a formidably complex statutory framework. It almost goes without saying that the work that they were doing attracted a great deal of media scrutiny, as well as legal process and political interest. Events were moving very quickly. All of this would have been difficult enough in normal times, but they were also having to deal with the consequences of the pandemic. This restricted their opportunities to meet face to face; those opportunities may well have helped to achieve the level of communication necessary to produce accurate documents in response to these claims.

13 Having said all that to, we hope, place the failures into their proper context, it appears to us that the documents show that, taken together, the people involved in dealing with these claims and the people involved in the policies and seizures of mobile phones before that all failed to prioritise the need to ensure that everything that was done was lawful. This meant that the policies which were applied were, to use Sir James Eadie's expression, "*ad hoc*". They were not clearly understood by those who were applying them, they were not clearly recorded and it was therefore more difficult than it should have been to communicate accurately and quickly what exactly those policies were. There was, in the pressurised circumstances to which we have referred, it appears to us, a failure to take appropriate steps to ensure that what was done was being done lawfully and thereafter, when those policies were challenged, to conduct rigorous enquiries to establish before making statements in the proceedings what the truth was. Although we are satisfied that this is the explanation of the origin, both of the unlawful conduct and subsequent lack of candour about it which has occurred in this case, we do not consider that it excuses those things.

14 It is right also to record in this judgment that there was a clear investigative purpose for the seizure of phones from migrants. As set out in paragraph110 of the main judgment:

> "We agree with the defendant that there is no bright line that differentiates seeking or discovering evidence in relation to an offence from intelligence-gathering. As a general matter, the defendant's concern to obtain intelligence about the criminal gangs who are putting migrants' lives at risk by selling them places on small boats is not only entirely understandable but also likely to have a direct bearing on bringing members of those gangs to justice, whether in the United Kingdom or elsewhere. Material gathered as intelligence may well be evidence in relation to an offence as well. In these cases, it is likely that analysis of

> the mobile phones of migrants may show common numbers contacted shortly before the voyage. If all the migrants on a boat had been in contact with the same number shortly before the boat sailed, but not otherwise, and particularly if the migrants were not otherwise connected with each other, this would be intelligence which might lead to the arrest and prosecution of a people trafficker and would then become evidence in any such proceedings. Merely because an investigator chooses to describe material as "intelligence" does not mean that it is not capable of being "evidence" for the purpose of search and seizure powers."

It was in pursuit of that important goal that those responsible for this exercise fell into unlawfulness. This was caused by a lack of clarity about the law which they assumed was in the form that they hoped it was. We have called this a failure of governance, and so it was.

The Duty of Candour

15 The duty of candour in judicial review proceedings is very important. It enables the court to adjudicate on issues involving the state without deciding facts or engaging in disclosure processes. That is because the court assumes that it will be supplied with all the information necessary to determine a case accurately. That assumption is made because the law imposes upon the state a positive duty to ensure that this happens. In almost all cases, including this one, it will be unnecessary to analyse authorities concerning the duty of candour. The law is summarised in the Administrative Court Guide for 2022 at paragraph15.3, which contains four important subparagraphs. That sufficiently summarises the law as it applies to defendant public authorities and their representatives.

16 Perhaps less well known and less widely available is a document titled guidance on discharging the duty of candour and disclosure in judicial review proceedings created by the Treasury Solicitors Department in January 2010. That contains a great deal of sound advice. There has sometimes been some doubt as to whether the duty of candour applies before the permission stage or before the stage when proceedings are issued. The Treasury Solicitors Guidance, says this:

> "The duty of candour applies as soon as the Department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings, including letters of response, under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and oral submissions."

We proceed on the basis that that guidance accurately reflects the law. It is an obligation which the executive has assumed on the advice of the Treasury Solicitor, as it was, and the court operates on the basis that that is what is expected of Government defendants when dealing with judicial review proceedings.

The Facts

17 It is now necessary to turn to the facts in a little more detail, focusing on the period between November 2020, when the pre-action protocol letters began to be sent, and June 2021, when an admission was made on behalf of the Secretary of State in open correspondence that there had been a blanket policy of phone seizure and that there had therefore been a breach of the duty of candour. It is that period which is under consideration in these proceedings now. We do that by reference to the documents, principally, as opposed to by reference to the witness statements, for reasons which we have explained above. We are quite content that all of those witnesses are attempting to assist the court by giving reliable and accurate

evidence but to a very considerable extent Mr John-Charles is simply relying on documents which he has seen and which we have now seen. Even Mr Mitchell, who was there at the time, is heavily dependent on those documents because of the length of time which has passed and the speed with which events unfolded during the relevant period. We have now seen those documents and we can draw our own inferences from them.

18 We ought to say something about legal professional privilege. We have already recorded that following the initial judgment some material which had formally been the subject of a claim to privilege and therefore not disclosed was disclosed in redacted form. There has been, in the written submissions, an objection to that and a request for disclosure of unredacted legal advice. We have dealt with that without deciding the merits of that objection. It appears to us that the appropriate course, and the one we adopt, is to proceed on the basis that, whatever may have been the case prior to June 2021, this case is now being conducted with the duty of candour very much at the fore and we are content to decide it on the basis that anything in previously privileged material which we ought to see in order to address these facts is now before us. We made it clear during argument that that was the basis on which we were going to work, and we were not invited to do otherwise by Sir James Eadie on behalf of the Secretary of State.

Chronology of events in summary

19 On 18 June 2020, a report was produced by the Information Commissioner's Office which recognised the legitimate interest that law enforcement officials have in data extraction from phones and set out the importance of having what they called "modern rules" to improve data extraction practices, given the highly sensitive nature of personal information which is carried now habitually by most of the population on their mobile phones. The seizure of these devices and their extraction involves a very considerable intrusion into privacy. The Information Commissioner's Office was therefore concerned to ensure that that occurred only on a proper legal footing.

20 It is worth pointing out at this stage, because this was the origin of the subsequent confusion, that this is all about data extraction. The Information Commissioner's Office does not regulate the exercise by law enforcement agencies of their statutory powers of search and seizure. It does regulate data extraction and processing.

21 Soon after that, perhaps within a matter of days, a revised strategy document was sent to relevant immigration authorities. This limited the extent of data extraction from seized mobile phones. Previously the aim had been to download everything from all of them. This was wholly impractical, as well as being disproportionate and the June revision reduced the extent of the download. It had nothing at all to do with the extent to which phones would be seized in the first place. It made no difference to that policy.

22 The same is true of a further revision in July and two further revisions in September. It is clear from the documents which we have seen concerning those revisions that everybody was still proceeding on the basis that, whenever possible, all mobile phones would be taken from migrants and would be the subject of these new and rather more limited data extraction policies.

23 On 22 November 2020, a discussion paper was produced by an officer called Mr McGrath, which addressed the question of whether seizure of mobile phones should continue to be attempted in respect of all migrants or whether it should be more targeted. That document had legal advice attached to it which has been redacted. We do not know what the advisors thought about the two options which Mr McGrath was considering, but we do know that within a week or so a decision was made only to seize handsets in the highest priority cases

where there was a reason to believe that an individual had facilitated the passage of others across the channel or there was a link to a live investigation into criminal activity. That was the first and only relevant change to the original policy which occurred during the relevant period. As we have said, Mr McGrath was himself involved in that process.

24 As it happens, simultaneously, the claimants' solicitors in JR1 were working on their case and sending the pre-action protocol letter. This was allocated to solicitors within the Government Legal Department on the same day that the new policy was promulgated. No doubt, those were coincidental events, but the fact that the letter arrived while those relevant were actually considering the policy and its lawfulness is of obvious relevance as we have already explained.

25 Counsel was then instructed by the Government Legal Department. He raised some sensible questions about the facts, wanting more information than he had about what was going on. He raised questions during the second week of December 2020 and received some further information, including, it would seem, some written advice from the Home Office legal advisor.

26 A conference was arranged. It took place on 10 December 2020. Because of the pandemic it took place by means of a telephone conference which led to one particular confusion. Mr Mitchell thought that there was a Home Office legal advisor, Ms Victoria Elliott, on the call. No doubt he had been told she would be. It transpired that she was sent an invitation, which she did not open and did not attend. He therefore thought that what he was being told was also being explained at the same time to a lawyer who had been intimately involved in recent events and who would be able to pipe up if anything that was questionable in fact or law was said. That check was, in reality, absent, although he did not know that. That is an illustration of the difficulties which this kind of exercise faces when it has to be conducted in that way that that one was.

27 Counsel clearly understood from his note of that conference that until June of 2020 there was a blanket policy for the seizure of all mobile phones under s.48 but that as from June there was a new policy whereby the collection or seizure of phones was done on a proportionate basis. He was told that there was "still significant amount of phones seized June to Sept". It is the case that, therefore, the phone that was seized in JR1 was seized under what counsel thought was the new and arguably lawful policy, rather that under the old unlawful "blanket policy".

28 It is clear from what followed that both he and the lawyers in the Government Legal Department with whom he was closely working continued to hold that belief for some time after that conference. He received answers to some further questions which he raised, still trying to find out chapter and verse of what he had been told verbally in the course of his telephone conference and he did receive some further information. On 16 December 2020, he received written replies which said that, without giving dates, there had been a time when all the phones were seized but he was told by the officer they were "now implementing change". To a particularly astute reader who had the sort of time that we have had to ponder on those words, that might be a signpost that, in fact, the change to policy was far more recent than June of 2020, but it appears counsel – understandably perhaps – did not draw that conclusion from that answer. Counsel is entitled to expect clear instructions. A similar opportunity arose on 21 December 2020, when Mr McGrath emailed the Government Legal Department saying, among other things, "The previous position to seize… all phones has been discontinued." Again, that is not a form of words which is indicative of the discontinuation having happened as long previously as six months ago.

29 At all events, whatever these straws in the wind amounted to, when counsel came to draft the pre-action protocol letter for use in JR1 on 24 December 2020 his draft included this paragraph:

> "The alleged breach of s.48 of the Immigration Act 2016 is unarguable (please see above). The assertion of a "blanket policy" apparently based on anecdote and surmise ignores the following. Firstly, as a matter of law, any seizure and retention of a digital device from an illegal entrant was lawful under s.48 of the Immigration Act and, secondly, as a matter of fact, devices are not seized in the case of every migrant who is searched."

An electronic comment was attached by the author, Mr Mitchell, to that draft, saying:

> "I have side-stepped the fact that the policy has been applied uniformly, if not at the time of this individual's complaint."

By that note, of course, he put the Government Legal Department on notice of the form of draft which he had decided to offer them and an explanation of the form it took; he did not receive any response saying that that was not an appropriate draft. On the contrary, the draft was used in those terms, both in the pre-action protocol letter and then subsequently in the acknowledgement of service and summary grounds of defence which were served in JR1 on 8 January 2021.

30 There was a further updated draft created between those times in which counsel referred to, in a covering email, "the blanket policy, which I have ducked". He advised that the Home Office should prepare a new policy which was lawful so that it could be referred to when, in due course, it was necessary to plead to the claim in more detail. The Government Legal Department dealt with that draft by emailing it to the officers who had first-hand knowledge of developments and events in relation to this and also asked for some help from the Home Office legal advice about these policies. It will perhaps be becoming apparent why we have said in our summary at the start of this ruling that this was a collective rather than an individual failure; everyone was involved. Although the Government Legal Department and counsel were asking for information, they never received any response from those who had first-hand knowledge of the policies to say that the factual basis on which these documents were being prepared was wrong. It appears to us that in using the words "side-stepped" and "ducked" counsel was highlighting an area of concern which was becoming more pressing as the proceedings progressed. The documents were all circulated for approval by all relevant people, but they went out in the form which we have described. The existence of the "blanket policy", which actually continued until November 2020, was not volunteered. If the documents had accurately reflected the mistaken understanding of the legal team they would have said there had been a "blanket policy" until June but it was abrogated in June and since then, and at the time of your client's phone seizure, it was not being operated. But, as we have said, these documents did not say that.

31 On 19 January 2021, counsel advised briefly in writing. He said in paragraph4:

> "As to prospects, it remains my view that the only potential weakness in the client's case is the complaint that it operated a "blanket policy" of seizing digital devices. The difficulty with such a policy is that its routine application is arguably contrary to the power of search of s.26(b) IA 1971 and the power of seizure and retention of s.48 IA 2016, both of

> which require reasonable grounds for belief on the part of the individual officer."

In paragraph 6 he observed that the policy he had described was not in operation at the time of the seizure in JR1 and said this:

> "The difficulty will arise when the client is faced with a potential claim from the period when the previous policy operated. The issue is, in any event, unlikely to go away in the current claims, given the claimants' solicitor's persistent questions regarding the operation of the policy."

32 Notwithstanding that advice, no-one appears to have told the legal team that the factual basis on which it was given was wrong. It is true that on 5 February 2021, one of the officers engaged in the seizure policy wrote to the Government Legal Department saying: "We are adopting the witness and consent approach with immediate effect." "Witness and consent" means treating the migrant concerned as a witness and asking the migrant for their consent to the extraction of their mobile phone. The words "with immediate effect" uttered in February 2021 might, once again, put an astute reader on notice that the initial understanding they had been given was not right.

33 On 15 February, permission was granted in JR1 and on 17 February JR2 was issued, following a pre-action protocol process in which very similar pre-action protocol letters were used. By that stage, advice was being procured by the Government Legal Department from counsel and a written advice was provided on 1 March 2021 in which counsel refers to the blanket policy and says that in the existing documents in these claims it was dealt with "somewhat obliquely".

34 In a document dated 3 March 2021, counsel emailed the GLD about JR2, saying that he was very concerned about it because of the date. This claim concerned a mobile phone which had been seized during the time when he thought that an unlawful, or arguably unlawful, policy of seizure was in place. He did not draft the acknowledgement of service in JR2, but he did propose amendments and did exchange emails about it with the Government Legal Department. The response, when it was served on 4 March 2021, asserts that the issues in JR2 are the same as those in JR1 and seeks a stay in respect of JR2 because all those issues would be resolved in JR1, which already had permission. That was followed up by a letter to the court on 9 March 2021 which said, after dealing with correspondence about their stay application from the claimants' solicitors: "Whilst from their lengthy grounds the current claimants have managed to identify some six points of supposed differentiation from the lengthy grounds prepared by leading and junior counsel in [JR1], these six points all fall under their headline grounds of challenge, which are the same as those raised in [JR1]. The essential issue in [JR1] was summarised by Lang J in granting permission as boiling down to the lawfulness of the 'policy/practice… being operated by the defendant potentially affecting many asylum seekers'. The resolution of that issue will be determinative of the current claims."

35 That stance was liable to convey a misleading impression to the judge to whom it was ultimately addressed. Mr John-Charles accepts in his evidence that these documents should not have been created in the form in which they were. Sir James Eadie KC, in his submissions to the court today, accepts that these documents should have made it clear that JR2 involved seizures which occurred during a time of a blanket policy for seizure which attempted to recover all phones from all migrants in small boats. Instead of volunteering that information these documents, in our judgment, conveyed the opposite impression.

36 Perhaps for that reason, on 18 March 2021, Lang J stayed JR2. Subsequently, when, after investigation, those acting on behalf of the Secretary of State entirely properly and candidly wrote to the claimants and to the court explaining what had happened, the stay of the proceedings was removed and that is why this court ultimately dealt with the two claims together in January and March of this year. In the long run, therefore, no harm was done. But, of course, these documents were designed to avoid grant of permission in both JRs. If they had succeeded in that aim, who knows what might have happened. One might imagine that given the persistence and industry of the claimants' solicitors in these cases, they would not have accepted that and there would have been a further challenge and, again, ultimately the cases would have been appropriately disposed of. However, all of that adds enormously to the cost and burden imposed on all concerned of the proceedings and it is in part at least, to avoid the necessity for such steps the duty of candour exists.

37 On 20 April 2021, detailed grounds of resistance were served in JR1. Those did not repeat the robust denials in relation to any blanket policy, but neither did they volunteer the full extent of the situation in the clear terms which later appeared in the letter of 25 June 2021. By that stage, Mr Mitchell had advised in writing on the duty of candour on 16 May 2021. That advice we have seen and is in appropriate terms. He gives an explanation of how it came about that he had been labouring under a false impression of fact and makes the point that despite asking on a number of occasions for sight of all relevant documents he never saw anything until after the documents which he had created had been deployed. His explanations for how the mistake arose included reference to instructions that he received that he ought not to disclose the documentation in relation to the data protection aspects of the claim and that the conference had given him the false impression we have described.

Conclusions

38 We consider that there was a collective error of judgment in responding to the pre-action protocol in JR1. The lawyers, by that stage, knew that there had been a blanket policy of seizure which they thought might be unlawful. They wrongly believed that this policy had been abrogated in June of 2020, before the seizure of the phones in this case. They decided that it was appropriate to respond in JR1 without disclosing the existence of the blanket policy about which they knew. We can consider that that was an error. The duty of candour, in our judgment, required the team acting on behalf of the Secretary of State to accept that there had been a blanket policy and to assert their false belief that it had been abrogated before the seizure of the phone in JR1. This would have provoked inquiry by the claimants' solicitor and would, almost certainly, have led to the truth being uncovered before it was. The firm and robust way in which the allegation of blanket policy was refuted in the pre-action protocol letters and the acknowledgement of service and summary grounds of defence suggested that the allegation of blanket policy was fanciful. This was a suggestion that ought not to have been made.

39 The legal team believed genuinely that it was appropriate to undermine the assertion that there had been blanket policy rather than to accept that it had existed and to say that it had ceased to operate before the facts in that case. We do not agree with them, but do not doubt their good faith in that belief. We find that the duty of candour and the duty not to mislead required the Secretary of State's real case, as it was then understood to be, to be set out so that the claimants and the court, when considering permission, could evaluate it on an accurate footing. If it had been set out accurately, this would have led to a much more rapid realisation that the June 2020 change in policy did not affect the seizure policy, but only the policy as to extraction of data following seizure. This should have led to a much earlier resolution of these proceedings. It may even have avoided JR2 altogether, since it was clear that on any view that case was unanswerable on this key issue. We think, therefore, that there is merit in Mr de la Mare KC's suggestion that this documentation and other

correspondence to which we have not referred in detail was excessively robust. That, we consider, is the principal failure in relation to the duty of candour which occurred in JR1.

40 In JR2, the approach was, we regret to say, very unsatisfactory. The court was invited to stay the claim on the basis that the issues were the same as those in JR1, when this was not the case. There was, we think, a clear duty in the circumstances of JR2 to volunteer the true understanding of the position then held by those responsible for creating these documents. Once again, we do not consider that there is any reason to conclude that people were not doing their best in good faith, but this approach to JR2 was the result of an error of judgment.

41 There are a number of other suggestions made of other breaches of the duty of candour, but we consider that we have identified the two most serious and that will suffice for our purposes.

42 In JR2, the court made an order staying proceedings when it should not have done and would not have done if it had been given the information to which it was entitled. That is a matter of regret.

43 So far as action is concerned in the light of those findings, we do not consider that it is necessary to do more than we have done, namely, to set out what has taken place in this case in a public judgment which is a matter of record. We should temper criticisms that we have made by expressing gratitude and acknowledging the frankness and candour with which those errors were corrected in May and June 2021. The court has received an apology for them for which, again, it is grateful. It is reassuring that the matter has been taken seriously, as it has been, within the Home Department. There is no doubt that the Home Department was correct in concluding that what had happened was serious and needed a careful and measured (as well as candid) response.

MR JUSTICE LANE:

44 The court has considered the submissions of the parties concerning the terms of the order which is to accompany the judgment which we handed down in March 2022 and the judgment of the court which my Lord, Lord Justice Edis, has given today. We have also considered the draft order put forward by the parties this week with areas of disagreement highlighted in that document in blue and red type. The draft differs in a number of significant respects from the version filed in June as to which p.83 to p.90 of the consequentials bundle.

45 Subject to my Lord, I would propose broadly adopting what the parties have put before this court insofar as then there is now agreement between them. That includes the provision in proposed para.21 regarding costs. I would, however, make a number of drafting amendments to the order. First, I would replace the phrase “migrants/asylum seekers” with the word “migrants”. This plainly covers all those in small boats who were subject to searches and seizure of mobile phones at the relevant times. Many of these will not have made claims for asylum by the time that they were searched and so would not necessarily be regarded as asylum seekers. Secondly, the definition of the mobile phone policy, at para.3, needs to differentiate between phones seized, on the one hand, before July 2020 and, on the other, after June 2020; otherwise phones seized in the month of June would be omitted from the definition. Finally, I would replace any reference to the defendant’s officer or officers in the order with a reference to the defendant. For present purposes, the Secretary of State for the Home Department operates through her officers.

46 There is disagreement regarding para.7 of the October 2020 proposed draft order. This reads:

> "It is declared that s.48 of the Immigration Act 2016 does not enable seizure of an item of property that comes to light during the search of a person."

The defendant's latest position, articulated in the defendant's written update filed on 12 October, is that the form of declaratory relief contained in para.7 is:

> "…unnecessary and unjustified. The appropriate course is to recognise that s.48 of the Immigration Act 2016 is being considered in the context of these cases. If the judgment has any broader logic or ramifications, so be it, but that can be argued about in any future case."

47 However, as Sir James Eadie KC effectively acknowledged in his oral submissions this morning, the defendant's current stance on the use of s.48 contradicts her position as it was in June 2022. In the defendant's skeleton argument of 22 June, prepared for the consequential hearing which was then anticipated to take place on 28 June, the defendant said at para.38.3 that instead of declaring the seizures made in purported pursuance of s.48 were unlawful, "it would be more appropriate to explain the scope of s.48 Immigration Act 2018 (i.e., that it does not permit seizure following a personal search)". Accordingly, at p.86, the defendant proposed amending what was then para.7 of the draft order so as to make that paragraph read:

> "It is declared that s.49 of the Immigration Act 2016 does not enable seizure of an item of property that comes to light during the search of a person."

That is precisely the wording of para.7 of the draft order put forward this week, to which the defendant now objects.

48 Conversely, para.6 of that draft order contains a declaration that any seizures made pursuant to the mobile phone policy that were predicated on the use of s.48 were unlawful. This covers persons other than the claimants. On the basis of para.6 of the draft order filed this week and of Sir James's submissions, it is evident that the defendant is now content with this approach, subject to an amendment which would omit a phrase which would, in any event, be otiose, were this court to include the proposed para.7 in its order.

49 Mr de la Mare KC submits that para.7 reflects the finding of this court in its March 2022 judgment as to the scope of s.48; namely, that s.48 is not about searches of person but rather premises. In my view, subject to my Lord, that is right, as was the defendant's initial stance is articulated in June. Subject to my Lord, I consider that both para.6 and para.7 of the latest proposed draft order are necessary and appropriate in the light of our March judgment. The scope of s.48 was a key issue of disagreement between the parties at the hearing in January 2022, in the specific context of what had happened to those who crossed the Channel in small boats. Draft para.7 properly captures how the court decided that issue.

50 I would, therefore, include both paragraphs in the order to be made by this court. I would also adopt the amendment to draft para.6 that is proposed by the defendant. As I have indicated, the claimants' longer form of words is, in my view, unnecessary if one retains para.7. I would, however, reverse the order of these paragraphs, since the declaration of the

ambit of s.48 informs the declaration as to the illegality of those searched in purported reliance upon it.

51 I note that the parties are now agreed on the need for draft para.9 in the draft order. That paragraph is plainly necessary to cover any oral or written statements the defendant may have made about the purported need to hand over PIN numbers, quite apart from any such statements in the defendant's phone seizure receipts.

52 The final matter of disagreement concerns paras.18 to 20 of the draft order. These paragraphs concern the dissemination of the judgment and order to those who may be affected by it; that is to say, those who may have suffered illegality at the hands of the defendant as a result of a mobile phone policy and any purported use of s.48. The defendant's written update contends that the notification letters (of which we find a specimen at p.764 of the consequentials bundle which the defendant sent to those whose phones were seized and which informed the data breach under the Data Protection Act 2018) recognised that the policy to seize and extract data was unlawful. Furthermore, each communication was accompanied by a link to this court's judgment. In the light of this, Sir James submits that it is unnecessary and disproportionate to require further information letters to be sent or publication of the judgment order.

53 The claimants, on the other hand, contend that these letters are not sufficient. They were written for the purpose of data breaches under the 2018 Act. Furthermore, at least 439 phones have not been returned to their owners because they are said to be "unattributable" to any individual. These phones have been marked for destruction. Mr de la Mare also points out that there are potential private law claims in tort arising out of the unlawful searches and that individuals who were searched in pursuance of the mobile phone policy may arise, whether or not the search resulted in the discovery and seizure of a phone.

54 In deciding whether action of the kind sought by the claimants is necessary and proportionate, it needs to be appreciated that each case is going to be fact sensitive. There is therefore little to be gained from the case law. In the present cases, the unlawfulness identified by this court is both serious and stems from what can only be described as systemic failings on the part of the defendant. My Lord has referred to it in his judgment today as a "failure of governance".

55 The letters sent to those whose phones were known to have been seized and whose data is known to have been extracted were specifically sent because of the resulting data breach under the 2018 Act. Although the specimen letter refers to the judgment of this court and provides a link to it, the clear thrust of the letter is about the data breach element. The passage particularly relied upon by the defendant is in a part of the letter headed "What happened?" and reads:

> "The Home Office recognises that for a number of reasons this policy to seize and extract data from phones was unlawfully (sic) and, in particular, it breached the Data Protection Act 2018."

I therefore agree with the claimants that these letters are insufficient for present purposes.

56 Furthermore, it appears from the email at p.763 of the consequentials bundle that these data breach letters have not been sent to those whom the defendant knows arrived by small boat and who were processed at Tug Haven but whose phones cannot be linked to them. As the claimants say, there may be as many as 439 such individuals. Regardless of her present inability to link a phone to an individual, the defendant should have some idea of where

these individuals went immediately after they left Tug Haven, albeit this may not be where an individual is currently living. If informed about the judgment, such an individual may be able to establish a claim to one of the retained phones, or at least advance a case that they had a phone that was seized by the defendant. Similarly, those who passed through Tug Haven and who were searched without any phone being found on them have a legitimate reason to be informed. Accordingly, subject to my Lord, I would include draft paras.18 and 19 in the order to be made by this court.

57 In all the circumstances, it is necessary and proportionate to require the defendant to take steps to inform those who may be affected by the unlawfulness identified in the judgment of March 2022.

58 I should add that the proposed obligation in draft para.18 to publish this court's order seems to me to be appropriate, given the significance of the contents of that order and the fact that orders of the court, as opposed to judgments, are not routinely published by the national archive or by others who offer a case reporting service. I would make it clear that the publication should be on the Home Office website and I would specify a minimum period of 12 months for it to remain on that website.

59 Subject to my Lord, I do not, however, consider that draft para.20 is necessary, given that para.22 provides for liberty to apply, and given that anyone with an interest in the issue can inquire of the defendant as to progress in notifying those concerned.

LORD JUSTICE EDIS:

60 I agree.

_____

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge