Neutral Citation Number: [2024] UKIPTrib 1

Case No: **IPT/15/110/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 29 February 2024

Before:

LORD JUSTICE SINGH (PRESIDENT)
MRS JUSTICE LIEVEN

B E T W E E N:

PRIVACY INTERNATIONAL

Claimant

- and -

(1) SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS
(4) SECURITY SERVICE
(5) SECRET INTELLIGENCE SERVICE

Respondents

Thomas de la Mare KC, Ben Jaffey KC and Daniel Cashman for the **Claimant**
Sir James Eadie KC, Andrew O'Connor KC and Richard O'Brien for the Respondents
Jonathan Glasson KC and Jesse Nicholls appeared as Counsel to the Tri unal.

JUDGMENT

Lord Justice Singh and Mrs Justice Lieven:

Introduction

1. This is an application by the Claimant to re-open the Tribunal's fact findings and partial determination in proceedings known as the "BPD/BCD Claim". This Claim has been ongoing for approximately the last 8 years, and there have been four judgments. However, the application to re-open focuses on judgments dated 17 October 2016 and 23 July 2018.

2. The application to re-open follows from findings the Tribunal made in *Liberty and Privacy International v Security Service and SSHD* (IPT/20/01/CH) ("*Liberty/Privacy International*"), that MI5 had breached its duty of candour in respect of handling of data. In *Liberty/Privacy International* the Tribunal made findings and relevant orders on 30 January 2023, but determined that the issue of whether the BPD/BCD Claim should be reopened would be dealt with separately.

3. On 27 February 2023 the Claimant made written submissions applying to reopen the BPD/BCD Claim and asking the Tribunal to find that MI5's regimes for BPD and BCD were unlawful until 2019. On 15 September 2023 the Claimant made further submissions that the BPD/BCD Claim should be reopened by reason of further disclosure ("the New Disclosure"), that had been given by the Secret Intelligence Service ("SIS"). The two Grounds for reopening, although relating to the same decision, raise somewhat different issues.

4. The Tribunal has received written submissions, including Replies, in OPEN from the Claimant and Respondent and in CLOSED from the Respondent and Counsel to the Tribunal ("CTT").

The test for reopening

5. There is extensive, but not complete, common ground between the parties as to the legal test which this Tribunal should apply in considering the Claimant's application to re-open its earlier judgments.

6. As the Claimant observes, at [16] of its submissions dated 27 February 2023, the Tribunal has previously considered this issue, in its judgment of July 2018, when an application had been made to re-open its October 2016 judgment. At [98] the Tribunal said:

> "It is common ground between the parties that, if our Judgment was flawed, based upon materially inaccurate evidence, i.e. if evidence, which was material to our decisions, was materially inaccurate, we would reopen the Judgment, at least to the extent of reconsidering the issues in the light of all the evidence. It is clear that no such reopening of a concluded Judgment would occur unless such material evidence was fresh evidence, that is evidence which neither was nor could reasonably have been known to the Claimant at the time of the original Judgment."

7. In support of its application, the Claimant draws our attention to the decision of the Supreme Court in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35; [2017] AC 300 ("*Bancoult (No 4)*"). The Claimant accepts that that is authority "only by analogy", given that it was concerned with the particular circumstances of the Supreme Court as the ultimate appellate court in the United Kingdom. It is, however, submitted that the decision demonstrates, that, unless the outcome would inevitably have been the same absent the breach of candour, the Claimant will be taken to have suffered an injustice unless the matter is re-opened. In particular, the judgments of Lord Kerr JSC and Lady Hale DPSC in *Bancoult (No 4),* at [160] and [191], are cited by the Claimant.

8. In the Respondents' submissions dated 27 March 2023, it is not accepted that the test cited by the Claimant represents the law because the passages cited from the judgments of Lord Kerr and Lady Hale were those of the dissenting minority, not the majority.

9. The Respondents submit that the need for an earlier judgment to have been flawed or based upon materially inaccurate evidence is a necessary, but not sufficient, condition for re-opening that earlier judgment. They submit that the Tribunal still has a discretion whether or not to re-open the judgment, as the Tribunal noted in its July 2018 judgment, at [111]. We consider that proposition, which does not appear to be disputed by the Claimant, to be correct. One of the factors to be taken into account in exercising that discretion is the seriousness of the breach of the duty of candour; another is the proportionality of re-opening an earlier judgment.

10. As the Respondents note, it appears to be common ground that a judgment will not ordinarily be re-opened if any material inaccuracy in the evidence taken into account would inevitably have made no difference.

11. The Respondents submit that there is an undecided question as to the degree of likelihood of a different outcome which is required before non-disclosure justifies re-opening a judgment. In particular they cite Lord Mance JSC (with whom Lord Neuberger PSC expressly agreed and with whom Lord Clarke JSC agreed in a separate judgment), at [8]:

> "… For my part, particularly where, as here, a party has failed to disclose the documents which it is now submitted constituted important evidence, I prefer to leave open whether a test of 'probability' or, in the context of fresh evidence, 'powerful probability' is too inflexible to cater for all possibilities. The egregiousness of a procedural breach and/or the difficulty of assessing the consequences of such a breach or of the significance of fresh evidence might, it seems to me, in some situations militate in favour of a slightly lower test, perhaps even as low as (though I do not decide this) whether the breach 'may well have had' a decisive effect of the outcome of the previous decision. I shall consider the present application in that light also, although I do not in the event consider that the outcome of this application depends at any point on the test applied."

12. The Respondents submit that this represents the correct approach in principle and rely in particular on the proposition that the more egregious breach of the duty of candour

(for example, if it was deliberate) the lower the degree of likelihood of a different outcome needed for a judgment to be re-opened; conversely, the more innocent the breach, the higher the degree of likelihood required.

13. In our view, it is important to note the origins of the jurisdiction to which Lord Mance referred. It lay in the decision of the Court of Appeal in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528, which had been followed by the Privy Council in *Bain v The Queen* [2009] UKPC 4. Lord Mance said, at [6] of his judgment, that in *Bain*, at [6], the Privy Council had quoted Lord Woolf CJ in *Taylor*, at page 547, in the following terms:

> "What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative remedy." (emphasis added)

14. At [61], Lord Mance summarised the "essential issues" as including (as the second issue before the Supreme Court) "whether it is likely that such a challenge would have resulted in a different outcome in the House of Lords ..." (emphasis added).

15. At [64], Lord Mance formulated the question slightly differently and said that the question reduced itself ultimately to a question "whether it is probable or likely, or whether it may well be, that the material now available would have led the Court ... to conclude that it was irrational or unjustified for the Secretary of State ..." (emphasis added). In the same paragraph, Lord Mance said that the question was:

> "Is it either probable or likely, or may it well be, that the Court would have concluded that the material now shown to have been within the executive's possession or knowledge at the relevant date ... undermines the rationality or justifiability of the Secretary of State's decision to rely on such Conclusions?" (emphasis added)

16. On the face of it, there would appear to be different tests set out there: probability or likelihood on the one hand; and, on the other, a lower threshold of whether the breach of the duty of candour "may well" have made a difference.

17. At [65], Lord Mance said that the answer to that question was clear, whichever formulation was adopted. In his view, there was no probability, likelihood or prospect (and, for completeness, he expressed the view that there was also no real possibility) that a court would have seen anything which would or should have caused the Secretary of State to doubt the conclusions. On that basis, the application to set aside the earlier judgment of the House of Lords in *Bancoult (No 2)* failed.

18. We consider that, when the judgment of Lord Mance is read as a whole, the test is usually one of probability or likelihood that the evidence which has now been disclosed would have led to a different outcome on the earlier occasion, although he did not rule out that there might be a lower threshold in particular circumstances, depending (for example) on the egregiousness of the breach of the duty of candour. The reasoning of Lord Mance is to be preferred because it was supported by a majority of the Supreme Court.

19. We therefore accept the Respondents' submission that the test is not one of a real possibility that the disclosure would have led to a different outcome on the earlier occasion. There is required to be a probability or likelihood but, in assessing the degree of likelihood required, all the circumstances of the case must be taken into account, including for example whether the breach of duty of candour was deliberate.

The October 2016 Judgment

20. The Tribunal's judgment in October 2016 (reported at [2017] 3 All ER 647) summarised the issue it was considering at [17(i)]: "the claim concerns the arrangements for and safeguards attaching to the acquisition, use, retention, disclosure, storage and deletion of bulk data, whether obtained under s.94 [of the Telecommunications Act 1984] or by other means." In summary, the Tribunal found that the Respondents' (including MI5's) BPD and BCD regimes were unlawful under the ECHR prior to their public avowal, but were lawful thereafter. The BPD regime's existence was publicly acknowledged in March 2015; the BCD regime was avowed in November 2015 (shortly after its existence had been alleged in the Amended Grounds of Claim in this litigation), when the use of s.94 directions to obtain BCD was disclosed in the context of the draft Investigatory Powers Bill then being presented to Parliament.

21. The Tribunal's conclusion was premised in particular on the Handling Arrangements governing the regimes. Handling Arrangements for BPD and for s.94 were both published on 4 November 2015, supplemented by CLOSED Handling Arrangements.

22. In its judgment, the Tribunal summarised the ECHR jurisprudence at [62]. This included:

> "(i) There must not be an unfettered discretion for executive action. There must be controls on the arbitrariness of that action. We must be satisfied that there exist adequate and effective guarantees against abuse.
> ...
> (vi) The degree and effectiveness of the supervision or oversight of the executive by independent Commissioners is of great importance, and can, for example in such a case as *Kennedy* be a decisive factor.
>
> As we concluded at paragraph 125 of *Liberty/Privacy*, there must be: 'adequate arrangements in place to ensure compliance with the statutory framework and the Convention and to give the individual adequate protection against arbitrary interference, which are sufficiently accessible, bearing in mind the requirements of national security and that they are subject to oversight.'"

23. At [91] the Tribunal said:

> "The most significant of the points emerging from the July Review and from the claimant's submissions relating to it are these:

(i) There is no present limit on the duration of a s 94 direction, i.e. to the period during which the PECNs should continue to comply with it and provide data. The Commissioner did not make a recommendation that there should be a maximum duration imposed on directions made under s 94, but advised at para 4.14 its proposed inclusion in a code of practice; such a requirement was not included in his recommendations in section 12. However, we are satisfied that under the handling arrangements (and as appears in the agreed facts, at para 19(a) (v)) there are adequate restrictions imposed on the SIAs in relation to the duration for which the data can be retained (thus protecting the interests of the persons whose communications data has been obtained), and there are also provisions for a review of the directions.
(ii) The Commissioner did recommend that there should be standardised processes for the review of direction, and the reporting of errors. We consider that the comprehensive handling arrangements, combined with proper oversight by the Commissioners, do provide adequate safeguards.
(iii) There are recommendations by the Commissioner as to what should be included in a s 94 direction. A further specification may in due course be introduced, but in our judgment, given the adequacy of the safeguards provided by the published handling arrangements, such is not necessary for compliance with art 8.

The ICC concluded (at para 11.10) that the relevant agencies had introduced comprehensive procedures, in accordance with the handling arrangements, to ensure that they only acquired and retained bulk communications data, and then accessed and undertook analysis of that data, in order to pursue their functions under SSA 1989 or ISA 1994. The essential protection against a potential abuse of power under s 94, namely a requirement that the BCD may only be obtained and used for proper purposes, is thus provided by law, and subject to effective oversight."

24. At Appendix A to its judgment the Tribunal annexed schedules produced by the Respondents setting out the safeguards applied to BCD.

The 2018 Judgment

25. The Tribunal refused the Claimant's application to reopen the October 2016 judgment on the grounds that the oversight regime had failed to provide effective safeguards in practice. At [14] the Tribunal held:

"On 16 November 2017 the Tribunal requested further details about the process by which s.94 directions were obtained from the Foreign Secretary. On 15 December 2017 the 10th witness statement of the GCHQ witness was served. That statement made a number of substantial corrections to the evidence which had been set out in his 4th witness statement. The witness accepted that in a number of cases the submissions to the Foreign Secretary did not specify the data to be sought from the CSP, the directions were of a general nature and the specific data to be

provided were specified by GCHQ in trigger letters or orally. The explanation given for the errors was that the witness had relied on his own knowledge and understanding, and that it was only after the Tribunal had requested further information that further searches had been undertaken to identify the underlying documentation which was then analysed."

26. And at [111]:

> "We have no doubt that, just as the previous Commissioner pointed out errors by the Agencies, and just as the Agencies themselves produced some incorrect evidence to us, to which we have referred above, there have been continuing mistakes and lacunae, some of which have been picked up over the period of years. We however remain of the view that there is no basis for reconsideration of the conclusions we reached as to adequacy of oversight in our First Judgment. There is and has been a genuine determination both on the part of the Commissioners and the Agencies themselves to get things right. As we said at the outset of this Judgment, the very involvement of this Tribunal, which has in this case been stimulated and prompted by the diligence and hard work of the Claimant, contributes towards an ever increasing improvement in the safeguards without, it is to be hoped, endangering the vital work which the Respondents are carrying out. The reopening of a judgment is in any event a matter of discretion, and it is significant that the oversight regime has now been replaced by an entirely new system."

The July 2021 Judgment

27. On 22 July 2021, the Tribunal considered the CJEU's answer to the Tribunal's preliminary reference (see its judgment from September 2017) in C-623/17 *Privacy International*. The Tribunal held that: "in light of the judgment of the CJEU, which is binding on this Tribunal, it is now clear that section 94 of the 1984 Act was incompatible with EU law". This was on the basis of the Respondents' concession, recorded at [19]-[21]:

> "19. The Respondents also accept that section 94 was not compliant with EU law in the following ways. First, the legislative scheme did not provide for sufficiently clear and precise rules governing the scope and application of section 94. The legislative scheme was broadly framed and permitted the Secretary of State to give directions of either a general or a specific character. The only pre-conditions set down in the legislation were that (1) the Secretary of State had to consult the providers concerned; (2) the directions appeared to the Secretary of State to be necessary in the interests of national security or relations with the government of a country or territory outside the UK; and (3) the Secretary of State believed the conduct directed to be proportionate to what was sought to be achieved thereby. It is accepted that these were inadequate for the purposes of EU law.

20. Secondly, the legislative scheme did not provide for any limit to the duration of any directions. Although there were internal handling arrangements requiring a review at intervals of no less than six months, the direction did not automatically expire by virtue of a legislative limit.

21. Thirdly, the legislative scheme did not require that any direction should be subject to review by a court or an independent administrative authority whose decision was binding."

28. The Tribunal noted, at [25], that the issue of remedies had been stayed in the proceedings. The Respondents specifically emphasised (as recorded at [22]) that:

> "the CJEU did not consider whether any data acquired had in fact exceeded the bounds of what might properly have been authorised under a statutory scheme that did not comply with the requirements of EU law. The national court (in other words this Tribunal) alone is responsible for determination of factual matters."

The Liberty/Privacy International Judgment

29. The Tribunal found at [113]:

> "The Respondents' evidence is that no BCD, obtained under section 94 directions, were ever held within TE or TE2 Areas 1 or 2. For the reasons given in the CLOSED judgment the Tribunal has accepted that there was a substantial failure in the use of BCD. That was an error which gave rise to the duty to make disclosure to the Tribunal in the BPD/BCD Claim, which MI5 failed to do."

30. The Tribunal concluded at [160(4)] that "[t]here was a breach in the duty of candour in the conduct of the BPD/BCD Claim in failing to disclose use made of BCD". However, in light of the findings at [113], the detail of this finding is addressed in the Tribunal's CLOSED judgment.

31. By its order dated 6 February 2023, the Tribunal made declarations that:

> "1.1 The Security Service unlawfully held data within TE, contrary to the applicable statutory requirements, in the period between late 2014 and 5 April 2019.
>
> 1.2 The Secretary of State for the Home Department failed to make adequate enquiries as to whether the applicable statutory requirements had been complied with, and thereby acted unlawfully in granting warrants to the Security Service in the period between 15 December 2016 and 5 April 2019 in respect of cases in which the applicable statutory requirements had not been complied with."

Submissions

32. The Claimant submits that it has been subject to an unfair process and that there is a real possibility, indeed an "unavoidable conclusion", that the outcome would have been different if the Tribunal had known the information now disclosed. The RRD regime did not operate as the Tribunal had been told, and the safeguard of the Secretary of State ("SoS") was in practice ineffective. MI5 had been aware of non-compliance issues from late 2014 but the SoS had failed to provide effective oversight.

33. The Claimant submits that if MI5 had met their duty of candour the Tribunal would have found there was a systemic failure in the handling and treatment of data. It follows that the Tribunal would not have found that there was ECHR compliance by MI5 for the period following November 2015.

34. The Claimant submits that the matter is not rendered academic by the subsequent Tribunal finding that s.94 was contrary to EU law, because the issue of remedies remains outstanding; and because there are consequences of MI5's failings for BPD, which was therefore also non-compliant with Article 8 ECHR.

35. The Respondents submit the Tribunal should limit its consideration solely to the issue of breach of the duty of candour in respect of BCD rather than more general matters relating to the Technological Environment ("TE") subject to the *Liberty/Privacy International* proceedings.

36. As a matter of approach we do not consider this can be correct. The issue for the Tribunal must be whether, by reason of the Respondents' breach of the duty of candour, the Tribunal was misled as to material facts or matters. To the degree to which there is an interrelationship between the relevant facts, then the Tribunal is not limited to only considering the precise matters upon which there was a breach of the duty of candour.

37. The Respondents' grounds for opposing the application split into two parts. First, the irrelevance/immateriality of the matters covered by the breach of the duty of candour. Secondly, discretionary issues which militate against reopening.

38. The first aspect can only be fully dealt with in CLOSED. In summary in OPEN, the breach of the duty of candour went only to the BCD aspect of the October 2016 decision. In respect of the July 2018 decision, the two parts of the decision which have any relevance are Issue 4 (proportionality) and Issue 5 (reopening), but the evidence there was focused on GCHQ, and material about the practices of MI5 had little or no relevance to that decision.

39. On discretion, the Respondents submit that the regime which was in issue in these decisions has now been replaced by an entirely new statutory regime under the Investigatory Powers Act 2016 ("IPA"), in respect of BCD. The non-disclosed issue has since 2019 been under the active scrutiny of IPCO, which has the capacity to ensure that all such issues are remedied. The non-disclosed issue concerns only one agency, namely MI5. There will be no substantial benefit in reopening, given that effectively the Tribunal has already made findings that will inform future decision making.

40. Subsequent to these submissions being made, the Claimant then made further submissions in respect of the New Disclosure, pursuant to an order of the President dated 16 June 2023. The background to this disclosure was that the Claimant had flagged a concern about the handling of BPD by the SIS. SIS provided further disclosure in July 2023. Much of the New Disclosure is redacted in OPEN and therefore can only be dealt with fully in CLOSED.

41. In summary, the redacted material shows that on 17 May 2019 the SIS wrote to Sir Adrian Fulford, the IPC, indicating that it had "recently revisited a risk assessment of the system that we conducted in 2018 and which identified a number of issues that have yet to be fully addressed." There were three 'broad areas of risk':

> "[Redacted]
>
> [Redacted]
>
> The way [redacted] is used has evolved over time and the handling arrangements for data in [redacted] may not be well-understood or applied by all users …
>
> However, we have mitigated, to a significant extent, the risks first identified in 2018:
>
> [redacted]
>
> We have manual review/retain/delete processes in place to remote files we no longer require …
>
> We have some automatic delete capability, which we are expanding …
>
> We are carrying out urgent work to ensure that the full extent of the compliance risks that we face with … are understood and mitigated as soon as possible.
>
> During 2017-18 we undertook risk assessments of [the systems and applications] that we considered to be carrying the most compliance risk … and have implemented mitigation plans where possible and practical.
>
> There remain, however, a [redacted] number of … legacy systems, [redacted] where we cannot yet be fully confident that we understand the data-handling risks. We are taking a proactive and risk-based approach to the analysis of our systems, starting with the highest risk and those which contain the majority of our warranted data. We plan to work through the remaining systems but this will take some time. …"

42. There was then a series of correspondence up to November 2022 between SIS and IPCO setting out various issues and concerns with the handling of BPD. We also took into account the further disclosure made by SIS on 15 December 2023 and the submissions made on behalf of the claimant on 19 December 2023. The materiality of these issues,

which is central to the determination of whether it is appropriate to reopen the earlier judgments, is impossible to assess in OPEN.

43. The Claimant submits:

> "In conclusion, the New Disclosure, even in this partial and redacted form, makes clear that:
>
> a. There were 'systemic' (to use the IP Commissioner's words) issues in the way that SIS held its BPDs, problems that must have started well before the passage and implementation of the IPA (which, if anything, led to a tightening of practices and consequences of non-compliance), and thus during the factual period under scrutiny in the October 2016 Judgment.
>
> b. By December 2018 at the latest, SIS knew that there were (and had long been) issues with its legacy systems' holding of BPDs. In respect of almost all systems, full end-to-end audit and monitoring processes were not in place.
>
> c. There was a historically poor administration process in the handling of certain BPD-containing media, or an inadequate understanding of systems content. There was an inconsistent approach and shortcomings in deletion processes, which meant some BPDs were not deleted when they should have been. The Handling Arrangements were not 'well-understood or applied by all users'.
>
> d. There was a fundamental difficulty faced by SIS in its transition to the IPA arrangements because it did not know where all of its BPDs were located, again a clear marker as to the inadequacy of the arrangements before the passage of the IPA as reviewed in the October 2016 Judgment (and a live issue thereafter). That is a risk that was continuing to manifest through pre-IPA BPDs being identified as recently as November 2022."

44. The Claimants refers to the 2016 Judgment and submits that the Tribunal's findings about adequate safeguards, and its reliance upon the SIS witness statement dated 8 July 2016, have now been undermined by the New Disclosure.

45. The Respondents submit that the errors notified by SIS to IPCO were only discovered shortly before they were reported and were not known at the time of the relevant judgments which are sought to be reopened.

46. SIS did not disclose this material to the Tribunal because those with conduct of the litigation did not appreciate they were disclosable errors in respect of the pre-IPA regime. They were, however, notified to IPCO under the IPA regime.

47. The Respondents submit that there was no breach of the duty of candour because the errors were not known until after the 2016 and 2018 Judgments.

48. On the nature of the material itself, the Respondents submit that the Tribunal's focus in the 2016 Judgment was whether the legal regime for BPD was "in accordance with

law", and this turned on whether there were "adequate safeguards against arbitrary use": see [59] and [62].

49. The fact that there were errors in the handling of data do not render the legal regime not "in accordance with law". Indeed, the Tribunal was aware that there had been errors in SIS's use of BPD, which had been referred to in the Confidential Annexes to reports of Sir Mark Waller, the Intelligence Services Commissioner.

50. The Respondents relied on effectively the same points on discretion as they had done in the earlier submissions.

Conclusions

51. The test we apply is whether it is probable that the Tribunal in 2016 and 2018 would have reached different conclusions if the material which has subsequently been disclosed at the time. We conclude that test is not met.

52. The breach of the duty of candour found in *Liberty/Privacy International* decision related only to BCD. The issue turns on the scope of the breach and of the material which should have been disclosed. This is a matter which can only be properly assessed in CLOSED. However, our conclusion is that given our findings in CLOSED and given the information the Tribunal already had before it, the further disclosure would probably not have led to a different decision.

53. We reach the same conclusion in respect of the New Disclosure. We do not accept the Respondents' submission that the fact the Tribunal was considering the "in accordance with law" test means that the existence of errors in handling is effectively irrelevant. However, the question must turn on the extent of those errors and the degree to which the Tribunal was already aware that errors did and would occur. It is inevitable that in a data system as broad and as complex as this that there will be handling errors. It is apparent from Sir Mark Waller's report, and in particular the Annexes, that this was both known and accepted.

54. In respect of the New Disclosure, we are not in a position to determine whether the failure to disclose was inadvertent or not. We accept that the fact that SIS were apparently not aware of the material until 2019 does not in and of itself mean that the breach of the duty of candour did not arise. If the Governmental body failed to make reasonable efforts to discover relevant material, then it would be possible for that to be a breach of the duty of candour.

55. We are not impressed by SIS's explanation for not producing the material earlier (see Respondents' submissions at p.47, para 8.3), namely the failure to realise there was an ongoing duty of candour, in the BPD/BCD case. As the Claimant points out there had been frequent reminders that the case remained live.

56. However, for the reasons set out in CLOSED, we do not consider that the material now disclosed would have been likely to lead the Tribunal to a different conclusion.

57. Further and in any event, as a matter of discretion we do not consider it to be proportionate to reopen the BCD/BPD claim. Most importantly, there is now an entirely new regime in respect of BCD, with a different structure in respect of oversight. The

non-disclosed issue has since 2019 been under the scrutiny of IPCO, which is fully aware of the issues and has the capacity to ensure that matters of concern are raised and remedied.

58. The *Liberty/Privacy International* litigation has ensured a great deal of scrutiny and reopening of the issues around handling of BCD under the IPA, and the errors that occurred. Therefore, for the purposes of lessons to be learnt, this exercise has already been largely undertaken.

59. There is no evidence to suggest that reopening the BCD/BPD claim would have any impact on the assessment of the remedies sought by the Claimant.

Is this decision amenable to an appeal?

60. Before making a determination or decision which might be the subject of an appeal, the Tribunal must specify the Court which is to have jurisdiction to hear the appeal: see section 67A(2) of RIPA. If this decision were amenable to an appeal, the relevant appellate court would be the Court of Appeal of England and Wales. However, we have reached the conclusion that the decision is not amenable to an appeal.

61. It appears to be common ground that this decision does not fall within section 68(4). The parties are in dispute about whether it falls within section 68 (4C). We accept the Respondents' submissions that (i) this decision is not "a final decision of a *preliminary* issue in relation to any proceedings" (emphasis added); and (ii), in any event, it is "a decision relating to a procedural matter". On what constitutes a "procedural" matter, see the decision of this Tribunal in *Lee & Wilkes v Security Service* [2023] UKIPTrib 8, at [43]. We have reached the conclusion that our decision here relates to a procedural matter.