FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA / 2015 / 0213
Appellant:	The Home Office
Respondent:	The Information Commissioner
Second Respondent:	Mr Colin Yeo
Judge:	Peter Lane
Member:	Anne Chafer
Member:	Paul Taylor
Hearing Date:	15 January 2016
Decision Date:	14 April 2016
Date of promulgation	15th April 2016

Appearances

For the Appellant: Mr Aidan Eardley, Counsel, instructed by the Government Legal Department

For the first Respondent: Ms Laura Elizabeth John, Counsel, instructed by the Legal Advisor, Office for the Information Commissioner

For the second Respondent: Mr Colin Yeo, Counsel (acting in person)

DECISION

Home Office Presenting Officers

1. In the year ended 30 September 2015, the Immigration and Asylum Chamber of the First-tier Tribunal received 91,127 appeals. During the same period, the Immigration and Asylum Chamber of the Upper Tribunal received 15,955 applications for immigration judicial review, in addition to appeals on points of law against decisions of the First-tier Tribunal.

2. Subject to paragraph 5 below, before the First-tier Tribunal, the Secretary of State for the Home Department is, in almost all appeal hearings, represented by a Presenting Officer (HOPO). In the First-tier Tribunal, HOPOs are Higher Executive Officers, whereas in the Upper Tribunal they are Senior Executive Officers. The Home Office has a total of 145 HOPOs, based in central and west London, Cardiff, Birmingham, Stoke, Manchester, Leeds, Newcastle and Glasgow.

3. Although many HOPOs have legal qualifications, they do not represent the Secretary of State in the capacity of solicitor or barrister. They are civil servants, deriving their right of audience from section 84 of the Immigration and Asylum Act 1999.

4. Although the vast majority of appeal hearings in the First-tier Tribunal involve HOPOs, in exceptional circumstances, the Secretary of State instructs Counsel to appear in that Tribunal. The same is broadly the case in the Upper Tribunal, so far as appeals are concerned. In immigration judicial review proceedings, rule 11 of the Tribunal Procedure (Upper Tribunal) Rules 2008 restricts legal representation of the parties to a person who has a right of audience in the High Court and above. In practice, the Secretary of State instructs Counsel in these proceedings.

5. A limited number of law graduates have been recruited at Executive Officer level (the grade immediately below HEO) by the Home Office's Appeals, Litigation and Subject Access Requests Directorate, in order to act as HOPOs on fixed term contracts in what are considered to be more straightforward cases, not involving issues of public harm; in particular, cases involving foreign national offenders.

6. HOPOs who are HEOs or EOs are managed by Senior Executive Officers (SEOs). As a general matter, HOPOs spend three days a week at Tribunal hearings, with the remaining two working days allocated for preparing cases for hearing.

Immigration Act 2014

7. The Immigration Act 2014 extensively amended the Nationality, Immigration and Asylum Act 2002, which is the main legislative source of appeals to the First-tier Tribunal against decisions of the Secretary of State in the immigration field. One particular amendment effected by the 2014 Act was the insertion in the 2002 Act of a new Part 5A entitled "Article 8 of the ECHR: public interest considerations". Part 5A imposes on courts and tribunals an obligation to have regard to the considerations listed in section 117B and, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C, where the court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article

8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. The obligation arises where the court or tribunal is considering the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR.

8. Part 5A came into force on 28 July 2014. On the same date, certain of the Secretary of State's Immigration Rules, made under section 4 of the Immigration Act 1971, were amended, with the avowed aim of achieving consistency with Part 5A.

The training sessions

9. In July 2014 the Home Office delivered training in four sessions over two days to SEOs in its Appeals, Litigation and Subject Access Request Directorate. The SEOs included both Senior HOPOs and senior caseworkers. The training had been developed by the Immigration and Border Policy Directorate, within the Home Office, which is responsible for developing and managing delivery of policy and preparing guidance for staff on making consistent decisions on applications. The SEOs who attended the training were asked, where appropriate, to deliver its key messages to HEO HOPOs in their respective teams.

10. Mr Yeo, a barrister specialising in immigration law, made a request to the Home Office under the Freedom of Information Act 2000 (FOIA) for the "release of any or all training materials relating to the immigration law changes that took effect on 28 July 2014, both the changes to human rights Rules and the changes to deportation appeals" (6 August 2014).

11. The Home Office's initial response was a "blanket" refusal in reliance on the exemption provided by section 21 of FOIA (information accessible by other means). Subsequently, however, during the Information Commissioner's investigations, the position of the Home Office changed. It disclosed the majority of the information sought. This, together with the currently withheld material, takes the form of printed versions of slides used in the training. The material disclosed to Mr Yeo consisted of extracts from the relevant legislation itself and material said to be substantially identical to published guidance on the legislative and Rule changes.

12. Nine full slides and two partial slides were, however, withheld by the Home Office, on the basis that disclosure was exempted by section 36(2)(c) (prejudice to the effective conduct of public affairs); section 42(1) (legal professional privilege); and section 31(1)(e) (prejudice to the operation of immigration controls.

The decision notice

13. In his decision notice dated 12 August 2015, the Information Commissioner decided that the withheld information should be disclosed, since neither the exception in section 31 nor that in section 36 demonstrated that the weight of public interest in maintaining the exemption was greater than the public interest in favour of disclosure. So far as concerns the exception based on section 42, the Information Commissioner decided that the excepted portions of the slides were not covered by legal professional privilege because they had not been produced "for the purpose of providing or obtaining legal advice about specific litigation. The commissioner considers that this information is too far removed from specific litigation for it to be covered by LPP". Accordingly, the Information Commissioner did not go on to consider the balance of the public interest, as regards the section 42 exemption.

The appeal

14. The Home Office appealed to the First-tier Tribunal against the decision notice. Following receipt of the appellant's reply and the witness statement of Mr Daniel Hobbs (until recently, the Director of Appeals, Litigation and Subject Access Request Directorate), the Information Commissioner's position changed. Having read the detailed explanation of the roles of HOPOs and Senior HOPOs, and having accepted that these officers were engaged full-time on litigation work before the First-tier Tribunal and the Upper Tribunal, the Information Commissioner now accepted that the training received by the HOPOs was for the dominant purpose of conducting litigation and that the disputed information was, accordingly, covered by the "litigation privilege" aspect of legal professional privilege. The Information Commissioner took the view that there was an "inbuilt public interest in withholding information under section 42 FOIA" which was "significant". He concluded that the public interest factors in favour of disclosure did not outweigh those countervailing factors and that, as a result, the remaining information in question had been properly withheld under section 42.

15. Whilst the Information Commissioner continued to maintain that his discrete conclusions on sections 31 and 36 were correct, since section 42 covered the entirety of the disputed information, it appeared to him to be unnecessary to determine those other matters.

16. In the light of this, the Home Office decided not to proceed with its appeal in relation to the section 31 and 36 exemptions. As a result, the hearing before us was confined to whether the section 42 exemption applied to the withheld information and, if it did, whether the public interest in withholding it outweighed the public interest in disclosure.

The evidence of Mr Hobbs

17. The Tribunal heard oral evidence from Mr Hobbs. As well as providing information regarding the status and duties of HOPOs, Mr Hobbs estimated that between 80 and 90% of appellants had legal representation at their hearings. Several firms of solicitors representing immigration appellants had, according to Mr Hobbs, a national profile, and there were other such firms which enjoyed significant regional profiles. Various barristers' chambers specialised in immigration matters, again at a national or regional level.

18. Mr Hobbs considered that the hearings in the First-tier Tribunal were adversarial in nature. They were governed by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. HOPOs appearing at such hearings were expected to demonstrate a high degree of professionalism and to behave consistently with the values of UK Visas and Immigration, "including being consistently competent, high performing and customer focused". The intention was to ensure that HOPOs retained the confidence of all those with whom they had dealings.

19. Mr Hobbs described the Home Office's litigation strategy in immigration cases. Owing to the very high volume of immigration appeals, as well as immigration judicial review proceedings, it was, he said, necessary to develop particular litigation strategies and "lines to take", in order to ensure that cases were being argued consistently before tribunals. This was achieved in part by HOPOs being familiar with published guidance on a particular legal or policy issue. However, in some cases there were:-

> "… bespoke litigation strategies developed and these must be used by [HOPOs] as they represent the Home Office position, and also by Counsel who are instructed to represent the Home Office in the Tribunal or the higher courts. In many respects the litigation strategies reflect how an individual would instruct Counsel to adopt a particular line of argument to best reflect their understanding of the applicable law and policy".

20. Such litigation strategies are in general developed in conjunction with Home Office legal advisors, the Government Legal Department and Litigation Operations (being a part of the Appeals, Litigation and Subject Access Request Directorate, dealing with judicial reviews). The purpose of the strategies was to inform how litigation was to be managed; the arguments to deploy; and how to present Home Office policy. It was focused directly on dealing with litigation, whether in the Tribunal or the higher courts. The same strategies were deployed by HOPOs and by the GLD. Mr Hobbs said that these "lines to take" were, accordingly, "a key part of litigation management".

21. A "line to take" might, according to Mr Hobbs, set out an interpretation of case law or explain a particular policy line that is to be advanced in litigation. Without such guidance, different HOPOs might argue different

interpretations of law and policy, which would be contrary to the need for similar cases to be treated alike. If different arguments were adopted by different representatives, this could lead to a very complex legal landscape. Lines to take might also cover procedural and tactical matters, so as to ensure that all cases were dealt with consistently. Such lines were not, however, developed for every legal issue that might arise. Lines to take were used not only by HOPOs but also by Counsel representing the Home Office in the tribunals and courts. Lines to take were conveyed to HOPOs through documents published on the Home Office internal intranet site. There were currently around twenty such lines. Others were likely to be held within the GLD for use in judicial review. Lines to take were also conveyed to HOPOs in the course of their initial and ongoing training, as occurred in the case of the withheld information that is the subject of the present appeal.

22. According to Mr Hobbs, instructions on lines to take were different in character from the Secretary of State's published guidance. The latter set out in comprehensive form, policies that the Home Office's decision makers apply when making immigration decisions and were designed to give a reliable indication of what approach will be taken in any given scenario. The Home Office's decisions can be challenged in the First-tier Tribunal on the grounds that the decision maker has deviated from published guidance. "By contrast, lines to take do not relate to the initial decision which may be the subject of the appeal, but to the manner in which that decision should be defended on appeal". Such lines develop arguments regarding ongoing cases, which naturally develop and change over time, based on legal advice. It was not possible to outline all such possible arguments and in any event "the lines are not meant to be guidance to be applied, like a policy document, but a 'guide' or steer on how to conduct the litigation".

23. Mr Hobbs gave evidence about the detriment that, in his view, would be likely to occur if the Home Office's litigation strategy were to become accessible to the public. Such disclosure would impact on how the Home Office managed its litigation. The outcome would be that parties opposing the Home Office would be able to anticipate the Secretary of State's strategy and thus "able to wring concessions", as well as being aware of the Home Office's "own view of the strength of its position on key legal issues". This would put the Home Office at a disadvantage in relation to other litigants, who do not have to disclose discussions between them and the lawyers who represent them; including on what might have been agreed as the best way to approach a case. Such discussions were protected by legal professional privilege.

24. Mr Hobbs considered that disclosure of a strategy, applicable across a range of cases where the same issue may arise, in its view had a much more damaging effect on the fairness of proceedings than disclosure of a piece of information that was relevant only to one specific case. The Secretary of State would, thus, be put at a "persistent disadvantage". Since lines to take

were anticipatory in nature, representing advice from lawyers to HOPOs on what position to adopt where a particular argument was advanced, if they were published there was a risk that an appellant "would raise every argument set out in that document", with the result that cases would take longer. A further risk was that appellants might focus their submissions on the content of the Home Office's litigation strategy, rather than on the facts of the case. This, again, would add to the likely length of the proceedings.

25. Mr Hobbs was anxious to reiterate the Home Office's view that publication of lines to take would result in those lines acquiring the status of policy documents. There was, accordingly, a risk that they would be prepared accordingly: "i.e. as comprehensive documents aimed at covering all possible scenarios and providing a reliable indication of what approach should/will be taken in a given scenario." This would fundamentally change the nature of training for HOPOs, in that the training would in effect involve the handing down of a policy document. But that would not be either effective or possible in the timescales available when preparing training on any new law or published policy. According to Mr Hobbs, the result of disclosing the withheld material was likely to be that the Home Office would conduct its training without written materials. That would be far less effective.

26. Mr Hobbs was asked whether, between the delivery of the training and the request by Mr Yeo on 6 August 2014, cases would have been heard where the lines to take regarding the new legislation might have become apparent. Mr Hobbs said that there might have been cases where lines to take had been adopted.

Closed session

27. Mr Hobbs gave then gave evidence in closed session, at which Ms John, representing the Information Commissioner, was present. The Tribunal informed Mr Yeo, following the conclusion of the closed session, that during it we had looked at the slides involving the withheld material and Mr Hobbs had been questioned as to whether it was possible to "un-redact" portions of the relevant material, on the hypothetical assumption that, as a matter of law, that material was subject to litigation privilege. We also said that, in the closed session, the Tribunal's questions regarding the lapse of time between the date of the legislative changes and the training and the date of the request had been further explored. Mr Hobbs had been asked whether it was likely that lines to take would have featured in a judgment. His reply was that the arguments in a particular case could be summarised in the judgment as part of the Home Office's position in that case.

Discussion

(a) Does legal professional privilege apply in the case of HOPOs?

28. The first issue is whether the instructions given by the Home Office to its HOPOs (either directly or through the SEOs) regarding its litigation strategy in the light of the changes made by the Immigration Act 2014 and associated Rules, is subject to legal professional privilege and, accordingly, within the exemption contained in section 42 of FOIA. Mr Yeo contends that it is not. Although legal professional privilege has two separate categories: namely, legal advice privilege and litigation privilege, legal professional privilege "is a single integral privilege," (Three Rivers District Council and Others v Bank of England [2005] AC 610 per Lord Carswell at paragraph 105). Although Three Rivers concerned the extent of legal advice privilege, the House of Lords examined the origins and scope of legal professional privilege in general. Lord Scott noted at paragraph 10 that:-

> "Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given".

29. At paragraph 52 Lord Rodger said:-

> "Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations …".

30. At paragraph 65, Lord Carswell held that:-

> "[Legal advice privilege] covers communications passing between lawyer and client for the purpose of seeking and furnishing legal advice, whether or not in the context of litigation. [Litigation privilege], which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal advisor and potential witnesses …".

31. Mr Yeo relied heavily on the Supreme Court judgments in R (on the application of Prudential plc and Another) v Special Commissioner of Income Tax and Another [2013] 2 AC 185. In this case, the issue was whether a company had to disclose advice received from accountants regarding tax affairs. The company claimed that the advice was covered by legal advice privilege.

32. The majority of the Supreme Court held that legal advice privilege applies only to advice given by qualified lawyers and not by other professionals. Although the Court recognised there was a strong case for extending legal advice privilege to cover such professionals, the majority declined to do so.

34. Whilst Mr Yeo acknowledged that Prudential involved legal advice privilege, rather than legal professional privilege, he submitted that the fact the two categories formed a "single integral privilege", as held in Three Rivers, meant that the Home Office's instructions to HOPOs were not covered by legal professional privilege. This was because HOPOs, like accountants, were not professional lawyers and, furthermore, the Home Office was not a separate legal entity from the HOPOs, to whom it was giving instructions.

35. Both Mr Eardley and Ms John rejected Mr Yeo's submissions. According to Mr Eardley, the only requirements for litigation privilege to apply are that:-

(1) at the time the material in question is created, there must be a real prospect of litigation between the person claiming privilege and a person or class of persons (United States v Philip Morris [2004] EWCA Civ 330 at [46]);

(2) the contemplated proceedings are adversarial in nature (Re L [1997] AC 16 at [25]); and

(3) the material must have been brought into existence for the dominant purpose of the contemplated proceedings ([Waugh v British Railways Board [1980] AC 521).

36. We agree with Mr Eardley and Ms John on this issue. Notwithstanding its overarching nature, legal professional privilege has two separate but related sub-headings. The fact that legal advice privilege concerns only advice given by professional lawyers does not in any way lead to the conclusion that litigation privilege can exist only where relevant communications are made with professional lawyers. Ms John pointed to the opinion of Lord Simon in Waugh v British Railways Board [1979] AC [521 at 536], where the rationale for litigation privilege derived from the principle that "a litigant must bring forward his own evidence to support his case, and cannot call on his adversary to make or aid it"; with the result that "communications between lawyer and client should be confidential, since the lawyer is for the purpose of litigation merely the client's *alter ego*" (536).

37. This point is made plain by Laws LJ in R (Kelly) v Warley Magistrates' Court [2008] 1 WLR 2001:-

> "18. … but it is clear that LP can arise without the involvement of any legal advisor. A litigant in person enjoys it. He was described by Lord Rodger of Earlsferry in *Three Rivers District Council v Governor and Company of the Bank of England (number 6)* [2005] 1 AC 610, para 52 as follows:
>
> [see our paragraph 29 above].

38. These pronouncements in our view undermine Mr Yeo's stance on this matter. Whilst we accept that Mr Yeo might draw some mild support from certain *obiter* comments of Akenhead J in Walter Lilly & Company Limited v Mackay and DMW Developments Limited [2012] EWHC 649, Mr Eardley is entitled to rely upon Grazebrook Limited v Wallens [1973] ICR 256, as a "fall back" argument. In Grazebrook, the National Industrial Relations Court (the precursor of the EAT) held that, even if litigation privilege required a professional lawyer, in order to apply in the courts, the position was different in tribunals, where it was the rule rather than the exception for parties to be represented by persons other than lawyers and that it was "the policy of Parliament to encourage such representation". But, in any event, Three Rivers has, we consider, clarified the law as it applies to both tribunals and courts, in a way that undermines the submissions with which the NIRC was dealing, when it said what we have just summarised.

39. Our conclusion, that litigation privilege does not require the recipient of the relevant communication to be a qualified lawyer, also disposes of Mr Yeo's contention that the Home Office is not, for this purpose, a legal entity separate from its Presenting Officers. If the Home Office and its HOPOs are regarded as an entity, then that entity is, in practice, a litigant in person. The lines to take would, on this view, be an *aide memoire* written by the Home Office for its own litigation purposes.

40. But this is not the end of Mr Yeo's submissions on this matter. He takes issue with Mr Eardley's contentions that the requirements in (1) to (3) in paragraph 35 above are satisfied.

41. Mr Yeo submits that, in order for litigation privilege to arise, there has to be a specific case to which the relevant communication must refer. The generalised form of the instructions, which the Home Office delivered in the training, cannot satisfy this requirement.

42. The Tribunal finds that this submission is incorrect. It is contrary to the judgments of the Court of Appeal in United States of America v Philip Morris Inc and Others [2004] EWCA Civ 330. In that case, disclosure was sought of communications dating back to 1985, a point in time when no litigation existed in the United Kingdom between smokers (or their relatives) and tobacco manufacturers, concerning the deleterious effects of smoking; but when such cases had begun in the USA. The Court of Appeal agreed with the trial judge, who held that the test was whether litigation was "reasonably in prospect" between the person concerned "and a particular person or class of persons", where litigation was "a real likelihood rather than a mere possibility" (paragraph 67 and 68).

43. In the present case, the evidence of Mr Hobbs is plain and un-contradicted; namely, that the HOPOs were being given instructions on the lines to take in the large number of forthcoming appeals, in which the changes brought by the 2004 Act, and the attendant Rules, were highly likely to feature.

44. We find that the dominant purpose of bringing the lines to take strategy into existence was for those lines to be adopted by HOPOs in those forthcoming appeals. That emerges not only from the evidence of Mr Hobbs in "open" but also from the closed materials (subject to the point to which we will come in due course).

45. The Tribunal also accepts the evidence of Mr Hobbs, that the proceedings in appeals before the Immigration and Asylum Chamber of the First-tier Tribunal are, in essence, adversarial in nature. That has long been recognised in the case law of the Upper Tribunal (and its predecessors), as well as by the higher courts. That is not to say that those proceedings cannot, on occasion, have an inquisitorial flavour.

46. Our conclusion on this first issue is, accordingly, that the withheld material falls within the scope of section 42 of FOIA. It is covered by litigation privilege.

(c) The balance of the public interest

47. We therefore turn to the public interest balance. The Information Commissioner's stance is that, having accepted section 42 applies, legal professional privilege carries an inherently large weight. The Home Office makes reference to the "chilling effect" on the future training of HOPOs, which is likely to result from disclosing the withheld material.

48. As the Upper Tribunal (*per* Charles J) has made plain in Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), the concept of "inherent weight" for particular exemptions and of reliance upon the "chilling effect" of disclosure upon a public authority's future discharge of its functions need to be approached with some care. From Lewis the following propositions can be derived:-

(a) FOIA introduces a regime that recognises the existence of, and the need to take into account, competing public interests and thereby to promote a result that requests are dealt with in the overall public interest after the competing facets have been taken into account [12];

(b) the class-based approach to assigning weight to qualified FOIA exemptions is wrong. It has spawned the "arid and, in my view, incorrect approach or analysis by reference to whether a particular exemption carries inherent or presumptive weight" [18]-[22];

(c) the correct approach is that set out in [149] of APPGER v FCO [2013] UKUT 0560 (AAC); namely, what is required is an assessment and comparison of actual harm and benefit by reference to the contents of the requested information that falls within the qualified exemption [23];

(d) actual harm includes risk of actual harm and actual benefit includes a real chance of benefit [25];

(e) arguments relying on the alleged "chilling effect" of disclosure or on the importance of a "safe space" are likely to be flawed if they do not acknowledge that in the case of any qualified FOIA exemption any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest. So, a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of policy) and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. But this "contents" approach still means that the information can be considered as a package [26]-[29];

(f) the effect of section 2(2)(b) of FOIA is that where the competing public interest for and against disclosure are found to be evenly balanced, disclosure will be required. Except in this narrow sense, however, FOIA does not involve any presumption in favour of disclosure [38].

49. Mr Yeo submitted that the public interest plainly favours disclosure. He is concerned that the withheld material might enable some appellants, at least, to win appeals, which they would otherwise have lost. Mr Yeo said that it was "truly extraordinary" for the Home Office to seek to prevent such appellants from winning their appeals against decisions that, by definition, must be regarded as unlawful.

50. Mr Yeo disputed the submission made on behalf of the Home Office, that some appellants at least, may have formed a "litigation strategy" with their solicitors or counsel. As for the suggestion from Mr Hobbs that judges might be distracted by irrelevant arguments if the withheld materials were disclosed, Mr Yeo contended that judges are well-placed to assess what is or is not a relevant argument.

51. Insofar as the Home Office appeared to be asserting that the withheld material added nothing of real value to publicly available information, Mr Yeo considered that this contradicted the concerns expressed by the Home Office. Although difficult to address without knowing the contents of the withheld material, Mr Yeo submitted that it would generally be in the interests of justice for the legal position of the Home Office to be made plain, so that informed and proper arguments could be advanced in rebuttal.

52. Since lines for HOPOs to take would by their nature be expressed in courts and Tribunals, they could not, according to Mr Yeo, be regarded as private and confidential. It was, he submitted, wrong for the Home Office to try to conceal from one notional litigant (and judge) what is said by the Home Office about the same issues in another case. Drawing on what was said by

Counsel for the Home Office in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, that "the new Rules do not seek to change the law" – a stance Mr Yeo said came as a surprise to those who had been following prior Home Office submissions on the issue – Mr Yeo was interested to see from the withheld materials whether the Home Office's position had changed in the intervening time.

53. Mr Yeo contended that there was an imbalance between the Home Office and appellants in immigration appeals which, in part, arises from an inequality of resources and, in part, from the fact that the Home Office is able to coordinate its strategy across multiple appeals. Given that HOPOs are not, according to Mr Yeo, "as carefully educated and trained in fair process and procedure as regulated lawyers", one could not have faith that a HOPO will adhere to instructions or behave "as if under a duty to the court and generally behave in a way that is fair to the other party". Mr Yeo mentioned newspaper reports that HOPOs are incentivised by the reward of gift vouchers "to achieve a certain percentage of outcomes favourable to their employer".

54. The Tribunal fully accepts that there is a significant public interest in ensuring that the system of immigration appeals operates fairly and that, in particular, the Home Office is not permitted to exploit its position, to the detriment of appellants. The Home Office's rationale for nondisclosure must, accordingly, be scrutinised with some care, which we have endeavoured to do. In particular, bearing in mind what Charles J said in Lewis (see above) the Tribunal must be wary of any arguments that tend to rely on generic issues, such as "inherent weight" or a "chilling effect", rather than the risk of actual harm, if the withheld material were to be disclosed.

55. Without resiling from that position, it is, however, important to observe that there is nothing in the case law to suggest that, in so-called citizen versus State cases, the State enjoys a lesser form of litigation privilege, compared with the citizen. The privilege expresses, we consider, an essential feature of the adversarial system, which is that a party of whatever kind should be free to prepare its case in private, without having to disclose anything to an opponent until such time as is required by the applicable rules or by the court or tribunal dealing with the case: Re L [1997] AC 16 at [25].

56. Moving from the general to the specific, in the light of the extremely large number of immigration appeals and of judicial reviews (where, as we have noted, Counsel rather than HOPOs are engaged), and in the light of the complex and frequently-changing nature of immigration law, there is a strong public interest in enabling the Home Office to develop and implement a coherent litigation strategy, for HOPOs and Counsel to adopt, thereby allowing the Home Office to have its case put as effectively and consistently as possible. We accept what Mr Hobbs has to say on this issue.

57. Whilst there is a superficial attraction in Mr Yeo's submission that the public should be able to know if the Home Office is devising ways in which appellants who should win their appeals can be made to lose them, when examined, this submission loses its apparent force. Litigation privilege applies to instructions which, if analysed, might transpire to be bad, misconceived or even improper. A court or tribunal can be expected to deal robustly with bad legal or procedural arguments. Furthermore, we reject Mr Yeo's submission that HOPOs do not owe a duty to a tribunal or court, which surpasses their obligation to act in accordance with the instructions of their client. Far from demonstrating the opposite, as Mr Yeo tried to suggest, Mandalia v Secretary of State for the Home Department [2015] UKSC 59 seems to us to recognise that duty:-

> "But it was still more unfortunate that no reference had been made to the process instruction before the First-tier Tribunal. Mr Mandalia could not be expected to have been aware of it. But, irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office Presenting Officer clearly failed to discharge his duty to draw it to the Tribunal's attention as policy of the agency which was at least arguably relevant to Mr Mandalia's appeal: see *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 at para 13" (Lord Wilson at [19]).

58. If legislative authority is required for this obligation of the HOPO, it can be found in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which imposes a duty on the parties to cooperate with the Tribunal in achieving the overriding objective, of dealing with cases fairly and justly. A parallel obligation is to be found in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

59. At this point, it is necessary to address an issue that arose at the hearing. The Tribunal was concerned to know whether lines to take by HOPOs, as indicated in the withheld materials, might have been the subject of appeal decisions by the time Mr Yeo made his request (and, by extension, by the time the Home Office refused it). Mr Hobbs indicated that this may have happened. We have not, however, seen anything in "open" or "closed" to suggest that the litigation strategy (or any aspect of it) has been articulated publicly in such a way as to diminish in any material respect the public interest in withholding it. In particular, the procedural aspects of the strategy would, we consider, be inherently unlikely to emerge from First-tier Tribunal decisions (which are, in any event, not usually published).

60. We have already made reference to the Procedure Rules. Besides the overriding objective in rule 2, the First-tier Tribunal possesses extensive case management powers (rule 4), as well as powers regarding the summoning of witnesses and production of documents (rule 15). These powers, we consider, give judges of the First-tier Tribunal (and of the Upper Tribunal, which possesses similar powers) the ability to ensure that

all matters bearing on the particular case are properly ventilated in the proceedings. Significantly, however, rule 15(3) provides that:-

> "(3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are to be determined".

61. Thus, the First-tier Tribunal cannot order the production of a document which, amongst other things, is subject to litigation privilege. The fact that Parliament has seen fit expressly to restrict the Tribunal's powers in this regard, in the context of immigration appeals, strikes us as a recognition of the importance of litigation privilege, in this particular context.

62. Mr Yeo said that, in practice, the Home Office, unlike appellants, is rarely required by the Tribunal to produce skeleton arguments. The fact that judges may not routinely impose such a requirement does not, however, in our view strengthen the case for compelling the Home Office to disclose its litigation strategy under FOIA.

63. We have already explained why the fact that the subject matter involves citizen versus State litigation cannot automatically mean that the State is unable to enjoy litigation privilege. So far as concerns the specifics of the present case, we accept the evidence and submissions of the Home Office that, if the latter's litigation strategy were made public (both as to its interpretative and procedural aspects), appellants would, as a general matter, be placed at an unfair advantage. Notwithstanding the evidence that the majority of appellants still have professional legal representation before the First-tier Tribunal, and that at least some of that representation is of a very high order, we recognise that immigration appellants (particularly those seeking international protection) often face significant difficulties, which are inherent in being in a strange and foreign country, unable to speak its language, without any (or any significant) understanding of the United Kingdom's system of immigration law. But the correct response to this is not, we find, to remove or diminish the Home Office's ability to rely on legal professional privilege. Rather, it lies in advancing the case for appellants to have appropriate and timely access to quality legal advice and assistance. There are, we accept, financial reasons why that may, on occasion, prove difficult and may be getting more difficult. Nevertheless, the answer still does not lie in giving appellants access to the instructions etc., which the Home Office gives to its HOPOs and Counsel.

64. We therefore conclude that the Home Office has established a sound basis for contending that it should not be put in a less favourable position regarding the availability of litigation privilege, since the factors which have led the higher courts to identify and protect that privilege apply to the Home Office, in the particular context of immigration litigation, as they do to any other litigant.

65. In addition, we find that the Home Office has demonstrated a real risk of actual harm, which it is in the public interest to avoid. First, the disclosure of lines to take in putting the Home Office's case at a hearing (whether as regards substance or procedure) is in our view likely to encourage appellants (whether represented or not) to "fashion arguments or procedural manoeuvres" (in the words of Mr Hobbs) by reference to those lines to take, rather than focusing attention on the facts and issues of the particular case. We agree with Mr Eardley that this risk is aggravated by the fact that the material in question was presented in the form of slides and was in the nature of a speaking note, to be expanded orally. Having seen the relevant material, we agree that, taken out of context, it could be misinterpreted or misused.

66. It does not appear to us to be a satisfactory answer to say that judges at both levels of the immigration jurisdiction can be expected to deal appropriately with extraneous or tangential matters. The effort involved would come at a price, in terms of both time and resources. The risk of actual damage to the appeal system is, accordingly, real and of a different order from the scenario described in paragraph 57 above.

67. The second point flows from the first. Anyone involved in immigration appeals will be aware that, in the years since the Court of Appeal decision in R v DS Abdi [1996] IAR 148, the role played by Home Office policies has assumed great significance. A decision of the Secretary of State may be found to be unlawful, if and insofar as it has been taken without regard to a published policy. Although the scope for challenge on such grounds may have diminished, so far as appeals are concerned, in the light of the changes made by the 2014 Act, challenges based on the alleged failure to have regard to a policy may be brought by means of judicial review.

68. Against this background, we accept Mr Hobbs's concern that, if lines to take were disclosed, the Home Office would be very likely to prepare them henceforth as if they were policy documents. This would mean attempting to make them comprehensive, which would often not be practicable in the timescales available when preparing training on new law. The timetable for delivering training on the implementation of Part 5A of the 2014 Act is, we consider, a case in point (see above).

69. Even if the higher courts were eventually to take the view that the Home Office's litigation strategy, even though published, is not akin to its other published policies in the immigration field, there would, we consider, in the interim be scope for arguments to be advanced to the contrary, both in the context of immigration appeals and in immigration judicial reviews. There is, we find, a strong public interest in avoiding such a situation.

70. We turn to the issue of the alleged "chilling effect" of disclosure. Again, we bear in mind the dicta in Lewis. We find that the Home Office has demonstrated a real risk of actual, specific harm under this heading. We

accept Mr Hobbs's evidence that, if written training materials on the Home Office's litigation strategy could not be produced on the assumption that these would be subject to litigation privilege, then – particularly given the problems we have just identified – there is a significant risk that HOPOs (and Counsel) would fail to make the arguments that the Home Office considers best promote its litigation aims. The Home Office would, in effect, be forced to choose between time-consuming and impractical formulations of the strategy in policy terms and letting its representatives at hearings conduct cases without what it regards as necessary instructions. The option of formulating and conveying a strategy purely by word of mouth, without documentation, strikes us as entirely fanciful. The sheer number of immigration appeals and judicial reviews serves further to underscore the extent to which these actual disadvantages would impact upon the Home Office.

71. Having balanced the public interest factors in favour of disclosure against those favouring the section 42 exemption, we have come to the firm conclusion that the balance lies firmly on the side of withholding the information, which falls to be categorised as the Home Office's litigation strategy.

72. The obvious public interest in the Home Office's responsibilities in the field of immigration has been highlighted earlier in this decision. Both the strength of that interest and what Charles J says in Lewis mean that it is, in our view, important to ensure that the dividing line between the slide material comprising descriptions of the law and the material comprising litigation strategy is carefully observed. In other words, the only material that should be withheld is that which actually comprises litigation strategy.

73. As we have already mentioned, in closed submissions, the Tribunal accordingly explored with Mr Eardley and Ms John the question of whether some (albeit quite modest) passages in the withheld material could be "un-redacted".

74. We were unpersuaded by the submissions that this could not, or should not, be done. The suggestion that, in Mr Eardley's graphic phrase, there was a risk of "death by a thousand cuts" does not strike us as persuasive. The Home Office has to appreciate that, as a public authority within the scope of FOIA, it may well need, in future, to give more thought to how it presents its litigation strategy to HOPOs, in the context of a training exercise that also involves telling HOPOs what legal changes have been made to legislation or to the Immigration Rules. This is an example of the point being made in Lewis.

Decision

75. We accordingly unanimously allow the appeal and substitute for the Information Commissioner's decision notice a notice which, in addition to the slides and passages from slides already disclosed, also requires the Home Office to disclose the additional information specified in the closed annex to this decision.

Chamber President

Dated 14 April 2016