IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2017/0041**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50610253 dated 6 February 2017

Before

Andrew Bartlett QC (Judge)

Dr Henry Fitzhugh

David Wilkinson

Heard at Fleetbank House, London EC4

Date of hearing: 13-14 November 2017

Date of decision: 11 December 2017

Date of promulgation: 12 December 2017

Between

STEFANIA MAURIZI

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CROWN PROSECUTION SERVICE

Second Respondent

Attendances:

For the appellant Estelle Dehon

For the 1st respondent Robin Hopkins

For the 2nd respondent Rory Dunlop

Subject matter:

Freedom of Information Act 2000 – qualified exemption – investigations and proceedings by public authorities – duty to confirm or deny – public interest test

Cases:

Assange v The Swedish Prosecution Authority [2012] UKSC 22

Department of Health v IC and Lewis [2017] EWCA Civ 374

Puceviciene v Lithuanian Judicial Authority [2016] EWHC] 1862 (Admin)

R (Manzarpour) v Home Secretary [2014] EWHC 1086 (Admin)

R (Raissi) v Home Secretary [2008] EWCA Civ 72

Savic v IC and Attorney General [2016] UKUT 534 (AAC)

Savic v IC and Cabinet Office [2016] UKUT 535 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Julian Assange, the Australian founder and publisher of WikiLeaks, was the subject of extradition proceedings brought in the United Kingdom by the Swedish Prosecution Authority ("SPA"). The proceedings were conducted on behalf of the SPA by the Crown Prosecution Service ("CPS"). In June 2012, in order to avoid extradition, Mr Assange entered the Ecuadorian Embassy in London. He has remained there ever since.

2. This information rights appeal is concerned with information about the unusual circumstances leading up to that situation. The appeal is brought by Ms Maurizi, who is an investigative journalist. She writes for the well-known Italian newspaper *La Repubblica*. She made an information request which asked for information held by the CPS. She has received some of the information that she wanted, but presses for fuller answers.

3. The appeal raises issues about a number of exemptions contained in the Freedom of Information Act ("FOIA"), most notably the public interest balance for the purposes of the exemptions in s30(1) and (3).

4. Broadly speaking, our task is to consider the matter afresh on the evidence before us, and to apply the right of access to information given by s1(1) of the Act, save to the extent that the provisions of the Act justify the withholding of the requested information in the circumstances of the case.

The request, the CPS's response, and the complaint to the Information Commissioner

5. In August and September 2015 Ms Maurizi approached the SPA, pursuant to Swedish freedom of information legislation. She requested copies of correspondence since 2010 between (1) the SPA and Mr Assange's legal defence team, (2) the SPA and the UK Government, (3) the SPA and the United States of America, and (4) the full correspondence with Ecuador. She received a partial response, with some 226 pages of information. The SPA also informed her that the US authorities had not been in touch with them about Mr Assange.

6. Ms Maurizi's request to the CPS was made on 8 September 2015 pursuant to FOIA. It was in five parts. She asked for:

> '1) the FULL correspondence between the Crown Prosecution Service and the Swedish Prosecution Authority concerning the criminal investigation against Mr. Julian Assange
>
> 2) the FULL correspondence (if any) between the Crown Prosecution Service and Ecuador about the case of Mr. Julian Assange.
>
> 3) the FULL correspondence (if any) between the Crown Prosecution Service and the US Department of Justice about the case of Mr. Assange
>
> 4) the FULL correspondence (if any) between the Crown Prosecution Service and the US State Department about the case of Mr. Assange
>
> 5) the exact number of the pages of the Julian Assange's file at the Crown Prosecution Service.'

7. The CPS refused her request, both initially (6 October 2015) and upon internal review (21 December 2015). For question 1) it relied on the exemptions in s27(1) (prejudice to international relations), s27(2) (confidential information obtained from another State),

s30(1)(c) (criminal proceedings), and s40(2) (personal data). For questions 2)-4) it stated that it neither confirmed nor denied that it held such information, relying on s 27(4) (prejudice to international relations or disclosure of confidential information obtained from another State). For question 5) it relied on s12 (cost limit).

8. Ms Maurizi referred the matter to the Information Commissioner on 22 December 2015. During the Commissioner's investigation the CPS shifted its position in two respects. First, for question 5) it relied on s 14 (vexatious requests) instead of s 12 (cost limit). Second, for question 1) it relied additionally on s21 (information accessible by other means) in relation to the information already disclosed by the SPA.

9. The Commissioner rendered her decision on 6 February 2017. She decided:

    a. Section 21 was correctly applied to request 1) to the extent that Ms Maurizi had received information from the SPA.

    b. For the balance of request 1, s27(1)(a) and s27(2) were correctly engaged, and the public interest balance under each provision was in favour of maintaining the exemptions.

    c. Section 27(4) was correctly engaged by requests 2)-4) and the public interest balance was in favour of maintaining the exemption.

    d. Section 14 justified refusal of request 5) because the effort required to answer the question would be disproportionate to the value of the information.

The appeal to the Tribunal and the questions for the Tribunal's decision

10. In March 2017 Ms Maurizi appealed to the Tribunal.

11. During the course of the proceedings before the Tribunal the CPS provided various copy documents to her, subject to redactions, and the parties' positions underwent some refinement. A small number of additional documents were disclosed to Ms Maurizi after the hearing, and Ms Dehon made further written submissions arising from these on 29 November 2017, on which the CPS commented by email of 5 December 2017.[1]

12. Save in relation to a procedural issue (discussed below), the method of application of s40(2) is no longer the subject of controversy between the parties. Ms Maurizi merely asks the Tribunal to check that it has been correctly applied.

13. In relation to request 1) the CPS now places its main emphasis on the application of s30(1) and the public interest in maintaining the exemption. Ms Maurizi and the Commissioner agree that s30(1) applies. Ms Maurizi contests the conclusion on the balance of public interest.

[1] Some of the documents were merely duplicates of what had been disclosed before, and were mistakenly over-redacted as compared with previous redactions. We do not consider that anything turns on this.

14. Ms Maurizi also requests the Tribunal to rule on the proper approach under s21.

15. In relation to requests 2)-4) the CPS argues for the application of 'neither confirm nor deny' ("NCND"), primarily under s30(3). The Commissioner agrees that this is the most relevant exemption. Ms Maurizi challenges the CPS's perspective on the facts and where the public interest balance lies.

16. As regards request 5), Ms Maurizi recognizes that it is not appropriate, given the extent of the information received by her, to press for the exact number of pages, but she wishes still to know the number of electronic files. This issue depends on the application of s14.

17. On behalf of the CPS Mr Dunlop emphasizes, without contradiction from the other parties, that the questions for the Tribunal's decision are concerned with the correctness of the CPS's responses, and hence are to be decided (especially with regard to the public interest balance) by reference to the factual situation as it stood when the CPS dealt with Ms Maurizi's request.[2]

The procedural issue

18. At the commencement of the hearing on 13 November 2017 Mr Dunlop for the CPS made an unheralded oral application for a direction under rule 14(1) and/or 14(2) of the Tribunal's procedural rules to restrain repetition outside the hearing room of the name of one of the CPS lawyers who had handled the Assange case, notwithstanding that the lawyer's name was already in the public domain. This was opposed by Ms Dehon on behalf of Ms Maurizi.

19. In order to preserve the position for the time being the Tribunal made the order as requested.

20. With fuller knowledge of the case, near the end of the second day of hearing the Tribunal heard further argument and reconsidered the order. The Tribunal decided that the CPS had not sufficiently established that the order was justified. It was therefore discharged.

The nature of the open and closed evidence

21. The Tribunal was provided with extensive documentary evidence concerning Mr Assange, the saga of how he came to be in the Ecuador Embassy, contacts between the SPA and the CPS, and the Information Commissioner's investigation.

22. Ms Maurizi gave evidence through her witness statement about her own background in investigative journalism, her work on the Julian Assange story, reasons why there is a public interest in matters relating to his story, and her attempts to obtain additional information from the SPA and the CPS. She also gave evidence orally and was cross-examined.

[2] This is an approach which in certain circumstances can be modified to a limited extent, but those circumstances are not relevant to the present appeal.

23. Mr Cheema is a legal manager who manages the CPS's team of extradition lawyers. He gave evidence in his first witness statement covering the role of the CPS in regard to extradition, an overview of Mr Assange's case, the general nature of the material held by the CPS, and the reasons for the positions adopted by the CPS in relation to Ms Maurizi's information request. He made a second statement concerning the CPS's efforts to ascertain what it held that was responsive to Ms Maurizi's request. He also gave evidence orally and was cross-examined.

24. Mr Smeath of the Government Legal Department gave written evidence about a search which he made at the CPS in June 2017, with the assistance of CPS staff, for papers responsive to Ms Maurizi's request, for the purposes of preparing the closed bundle for the Tribunal.

25. The closed material made available to the Tribunal consists of emails, advices, and similar materials held by the CPS and relating to the request within the period from 10 December 2010 to 8 September 2015, plus the full text of the confidential annex to the Commissioner's Decision (2 pages). One sentence of Mr Cheema's first witness statement was redacted because it gave a specific example of the kind of thing which he considered should be kept confidential.

26. Mr Cheema also gave oral evidence in a closed session, which permitted consideration of the closed material and of the issues without prejudging the outcome of the appeal. He was taken through a written list of questions prepared by Ms Dehon and gave his answers. After the session, the gist of what was said, to the extent possible without revealing closed information, was stated in open session.

27. In addition we received oral closed submissions made by Mr Dunlop for the CPS and Mr Hopkins for the Commissioner. The gist of these was similarly provided.

Facts

28. WikiLeaks is a media organization which publishes and comments upon censored or restricted official materials involving war, surveillance or corruption, which are leaked to it in a variety of different circumstances. Around February to August 2010 it was reported in the media that Mr Assange and WikiLeaks were the subject of investigation by the US authorities, following publication of confidential US materials.

29. In August 2010 Mr Assange made a visit to Sweden. From this there arose some allegations against him of sexual offences involving two women. However, he left Sweden in September 2010 with permission from the SPA. Subsequently a European Arrest Warrant was issued for his detention.

30. He was arrested in London by appointment on 7 December 2010. Extradition proceedings ensued. The first direct contact between the CPS and the SPA for the purpose of progressing the proceedings was on 10 December 2010.

31. When an extradition request is made on behalf of a foreign judicial authority the CPS acts as the representative of that authority in the extradition proceedings. This function is assigned to it by the Extradition Act 2003, s190. This allocates to the CPS, headed by the Director of Public Prosecutions, 'the conduct of any extradition proceedings'. There is some discussion of the role of the CPS in extradition proceedings in *R (Raissi) v Home Secretary* [2008] EWCA Civ 72, [135]-[143],[3] and in *Puceviciene v Lithuanian Judicial Authority* [2016] EWHC] 1862 (Admin), [20]-[24].

32. The same section of the Extradition Act assigns to the CPS also the function of giving 'advice on any matters relating to extradition proceedings or proposed extradition proceedings'. Mr Cheema explained in evidence that it was usual for foreign countries to contact the CPS for advice prior to making an extradition request.

33. On 13 January 2011 the CPS lawyer dealing with the case wrote in an email to the SPA, 'Please do not think that the case is being dealt with as just another extradition request.' Ms Maurizi has taken this to indicate that Mr Assange's case was somehow dealt with in a way that was different from other extradition requests. In our judgment, when read in context, the lawyer's remark does not have that meaning. It is part of a paragraph where the lawyer is referring to the amount of work required to deal properly with the case and is apologising for dealing with issues on a piecemeal basis. The remark was evidently intended to reassure the SPA that the case would be handled diligently.

34. Mr Assange challenged the extradition proceedings and was granted bail, subject to compliance with certain conditions. The proceedings went to the UK Supreme Court, which by a majority dismissed his appeal and upheld the arrest warrant on 30 May 2012: *Assange v The Swedish Prosecution Authority* [2012] UKSC 22.

35. Mr Assange did not surrender as legally required. Instead on 19 June 2012 he sought refuge in the Ecuadorian Embassy in London. On 16 August 2012 Ecuador granted him a form of diplomatic asylum which has a legal status in the law of Ecuador but which is not recognised by the UK Government or by generally agreed international law. Mr Assange has remained in the Embassy since then. A police presence was maintained outside the Embassy for over three years in case he came out, at a cost in excess of £11 million. In October 2015 the continuous physical presence of police was replaced by less visible measures.

36. He challenged the arrest warrant by legal proceedings in Sweden and also filed a complaint to the UN Working Group on Arbitrary Detention. His proceedings in Sweden were not successful, but some of the allegations against him have expired owing to lapse of time. The UN Working Group decided in December 2015 that in its view (with one dissenter) he was subject to arbitrary detention. The Svea Court of Appeal in Sweden, in a judgment issued on

[3] The applicable law in that case was the law in force before s190 came into force, but the amendment made by s190 is noted in the Court's discussion.

16 September 2016, expressed its reasoned disagreement with the decision of the Working Group.

37. According to Ms Maurizi, to media reports, and to arguments made on his behalf in legal proceedings, his concern has been that, if he is arrested and extradited to Sweden, he may be subject to further onward extradition to the United States to face potential charges there, arising in some way from the leaks of US documents. The SPA announced on 19 May 2017 that it was revoking the European Arrest Warrant for Mr Assange. But Ms Maurizi stated that he still has a similar concern about direct extradition from the UK to the US.

38. A notable feature of the facts is that all attempts (either by the SPA or by Mr Assange) to arrange an interview by the SPA of Mr Assange for the purpose of further investigation of the alleged sexual offences, whether by telephone, by videolink or in person, have foundered for one reason or another. On a number of occasions this has not been through Mr Assange's choice. Swedish courts expressed criticism of the SPA's lack of progress with the Swedish criminal investigation.

39. Ms Maurizi expressed a particular interest in advice given by the CPS to the SPA not to come to London to interview Mr Assange. On 25 January 2011 a CPS lawyer wrote in an email:

> My earlier advice remains that in my view it would not be prudent for the Swedish authorities to try to interview the defendant in the UK. Such an interview would need to be pursuant to a letter of request [as it is an attempt to gather evidence rather than an exercise merely to obtain information or intelligence][4]. Even if the defendant was to consent to such an interview [by appointment] on a mutually agreed basis, the defence would without any doubt seek to turn the event to its advantage.
>
> It would inevitably allege it was conclusive proof that the Swedish authorities had no case whatsoever against him and hence the interview was in the hope that he would make a full and frank confession. He would of course have no obligation [under English law] to answer any questions put to him. Any attempt to interview him under strict Swedish law would invariably be fraught with problems.
>
> General experience has shown that attempts by foreign authorities to interview a defendant in the UK, frequently lead to the defence retort that that some inducements or threats were made by the interviewers [such as the prosecutors' approach to bail on the defendant's surrender to the foreign state]. Thus I suggest you interview him only on his surrender to Sweden and in accordance with Swedish law.
>
> As we have discussed your prosecution is well based on the existing evidence and is sufficient to proceed to trial, which is the prosecution's intention.

[4] The parentheses in this quotation are original to the email.

40. The 'earlier advice' referred to in this email appears to have been given in a telephone conversation. As the terms of this written advice show, and as was confirmed by Mr Cheema, the CPS's advice not to interview Mr Assange in London reflected general experience of handling similar extradition cases, not some unusual feature of the particular case.

41. A question arose in evidence about the CPS's records management policy and about the deletion of the email account of one of the lawyers dealing with the matter, who retired. It became apparent that all significant case papers were intended and believed to be collated separately from the email account. Moreover, the deletion was made before Ms Maurizi's information request was received. We conclude that there was nothing untoward in the deletion of the email account.

42. We refer below, in our discussion of the issues, to some further facts concerning the purpose of applicable exemptions and the balance of public interest.

43. We should also mention that the CPS, when providing copy documents to Ms Maurizi in the course of the present proceedings, has made some redactions which the SPA did not make. Since Ms Maurizi has the text in these instances, as a result of the SPA's disclosures, there is no live issue for us to decide as regards those redactions. Conversely, in the disclosures made by the CPS in the course of the present proceedings, some trivial additional information has been included, which the SPA did not disclose, such as informal remarks about a summer crayfish party. These additional disclosures were made in view of the unusually relaxed attitude which by 2017 the SPA was seen to be taking, but they do not impinge on the issue of substance under part 1) of the request, which is the withholding by the CPS of information relating to instructions and advice, being information not disclosed by the SPA. The CPS was not willing to release anything on those topics which the SPA had redacted, and in this respect the position of the CPS did not change.

Part 1) of the request – the full CPS-SPA correspondence – s21

44. Ms Dehon submits that the CPS adopted a wrong approach to reliance on s21, by contending that information was accessible to the requester by other means, because of the disclosures by the SPA, at a time when the CPS had not carried out any comparison of its own files with what had been disclosed by the SPA. She refers to the Commissioner's published guidance on s21 and requests that the Tribunal declare the correct approach, but does not otherwise seek any specific relief.

45. We do not currently see any reason to disagree with paragraphs 9, 10 or 23 of the Commissioner's published guidance. We do not see a need to say more.

Part 1) of the request – the full CPS-SPA correspondence – s40(2)

46. We have perused the closed information and examined the principle on which s40(2) has been applied in the redactions. The application of s40(2) accounts for a large proportion of the redactions. The personal details redacted do not appear to us to bear on the aspects of

the subject-matter relevant to the public interests in disclosure. It was suggested that different lawyers in the CPS might have argued for substantially different approaches to the handling of Mr Assange's case, but we have seen no evidence of this. On behalf of the Commissioner Mr Hopkins expressly agreed with the manner in which s 40 had been applied. We have not checked every application of it in detail, as to do so would be disproportionate. We have noted a few minor inconsistencies, where the redaction of an email under s 40(2) has not been done in exactly the same way on every copy of the same email, where it is repeated in a string. These instances are too trivial to be a matter of concern. Our conclusion is that we have found no reason to disagree with the manner in which s 40(2) has been applied by the CPS.

Part 1) of the request – the full CPS-SPA correspondence – s30

47. The information withheld in reliance on s30 consists substantially of instructions and advice passing between the SPA and the CPS.

48. Section 30(1) of FOIA states:

> Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-
>
> . . .
>
> (c) any criminal proceedings which the authority has power to conduct.

49. This is a qualified exemption, which is subject to the public interest test in s2(2)(b). The duty to disclose the information under s1(1)(b) does not apply if or to the extent that 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'.

50. Extradition proceedings are a form of criminal proceedings which the CPS has power to conduct. As mentioned above, Ms Maurizi and the Commissioner agree that s30(1) applies. The issue to be determined is the balance of public interest. This is of course 'public interest' in the sense of public benefit, not public curiosity. The relevant time for consideration is September-December 2015. (The most substantial change since that time is that in about mid-2017 the SPA revoked the European Arrest Warrant and decided to make additional disclosures to Ms Maurizi.)

51. In the context of this case, the public interest in maintaining the s30 exemption arises from the nature of the work done by the CPS extradition unit. It is generally in the public interest that offences be prosecuted and punished. The purpose of the extradition legislation is to serve the interests of justice by making provision for offenders or suspected offenders to be sent to the country which has prosecuted or is prosecuting them. It is also to ensure that the UK does not become a safe haven for criminals. Further, the existence of effective extradition arrangements provides a reciprocal benefit. When the UK wants to extradite offenders or suspected offenders from another country to the UK, this is much more likely to

happen where the sending country benefits from effective extradition arrangements with the UK.

52. The question of public interest in maintaining the exemption therefore demands a focus on the practical requirements for the effective conduct of extradition proceedings, in a way which not only serves the particular proceedings but also is in keeping with the wider goals of ensuring that the UK is not a safe haven and of encouraging other countries in their reciprocal arrangements with the UK.

53. When conducting extradition proceedings the relationship between the CPS and a foreign authority such as the SPA is akin to the relationship between lawyer and client. On the evidence of Mr Cheema, and also from the viewpoint of English law, it is a relationship of confidence, subject to only very limited exceptions. (For example, if a foreign authority instructed the CPS that it was bringing a deliberately false charge against the individual, and if the foreign authority wished to continue the extradition proceedings in those circumstances, it would be the CPS's duty to reveal such information to the Court in the course of the extradition proceedings.)

54. Speaking generally, the owner of the confidence is the foreign authority, not the CPS, because the foreign authority is in effect the client. In the present case the SPA has released the confidence, to the extent of the SPA's disclosures. That was the SPA's decision, which, as the person in the place of the client, the SPA was in principle free to make. It is the client's decision whether to reveal its requests for legal advice and its instructions for the conduct of proceedings, and what the CPS has told it in response.[5]

55. The SPA has not released the confidence in any material information which it has not disclosed. The CPS is still bound by the obligation of confidence. The public interest in maintaining such confidence is strong, as in the analogous case of maintaining legal professional privilege. It is strong both because it is an obligation still owed to the SPA and because of the potential wider impact on extradition proceedings, both outward and inward, if it were seen that the CPS either did not keep, or without very strong justification was unable to keep, the confidences reposed in it by foreign authorities. See further *Puceviciene* at [24][6] and compare the discussions of legal professional privilege in *Savic v IC and Attorney General* [2016] UKUT 534 (AAC) at [31] and of prospective harm flowing from the reactions of other countries in *Savic v IC and Cabinet Office* [2016] UKUT 535 (AAC) at [116].

[5] This does not mean that there can never in any circumstances be any confidence belonging to a lawyer in communications with a client. But that is not a relevant consideration here. The disclosures by the SPA are water under the bridge. Ms Maurizi is seeking what she has not received, not what she already has in her possession. If there was anything in the disclosed communications which was confidential to the CPS, the question of whether it should have been protected is academic.

[6] 'Confidentiality is plainly necessary to enable the CPS to carry out its statutory function . . . the advice on the conduct of the proceedings must remain confidential whether as a matter of legal professional privilege or as subject to an implied condition of confidence.'

56. We note that both the UK and Sweden (and indeed also Ecuador and the US) have freedom of information legislation. But it does not follow that a foreign country in the position of a client of the CPS, even with legislation such as that in Sweden, would necessarily expect its information to be released by the CPS or be unconcerned if that happened. Moreover, many countries to whom or from whom extradition may be desired do not have freedom of information legislation. On the basis of Mr Cheema's evidence we accept that the CPS has a reasonable concern about how release without Sweden's consent would appear to third countries, not just to Sweden.

57. On the other side of the balance there are significant public interests in disclosing the withheld information:

    a. Disclosure of official information can promote good government through transparency, accountability, increased public confidence and public understanding, the effective exercise of democratic rights, and other related public goods. The potential benefits of disclosure include the pressure to make governmental decisions and use governmental resources in ways that will withstand public scrutiny. They also include the enabling of constructive public debate, which in effect enlists the help of responsible members of the public in fostering good government.

    b. More particularly, in support of the more general goals above, there is a public interest in information being made available that can increase public understanding of how extradition proceedings are handled by the CPS, including the handling of the relationship with a foreign prosecuting authority.

    c. There are some further features unique to this particular case. The matter has dragged on unresolved for a long time. The circumstances have also involved a high cost to the public purse. How this came about, and whether the money has been well spent, are matters of legitimate public concern.

    d. So far as the evidence before us goes, Mr Assange is the only media publisher and free speech advocate in the Western world who is in a situation that a UN body has characterized as arbitrary detention. It is a matter of public controversy how this situation should be understood. The circumstances of his case arguably raise issues about human rights and Press freedom, which are the subject of legitimate public debate. Such debate may even help to resolve them, which would itself be a public benefit.

58. In reinforcement of the above factors, in her evidence Ms Maurizi drew attention to four particular matters on which she said that the public was currently not properly informed, and on which it was desirable that the public should be informed by release of the papers:

a. Why the SPA did not make attempts to come to the UK to interview Mr Assange until March 2015, by which time he had already been in the Embassy for nearly three years.

b. Whether the CPS received an extradition request or inquiry from the US.

c. Whether, in dealing with his case, the CPS and SPA gave consideration to Mr Assange's concerns about his possible onward extradition to the US and its potentially severe repercussions for him.

d. Whether there were discussions between the CPS and the SPA about his decision to seek refuge in the Embassy, or the Ecuadorian decision to grant him political asylum.[7]

59. We have sought to give consideration to all of the above factors in the manner approved by the Court of Appeal in *Department of Health v IC and Lewis* [2017] EWCA Civ 374, [43].[8] We have come to the view that the public interest in maintaining the exemption under s30(1)(c) outweighs the public interests in disclosure of the disputed information under the first part of Ms Maurizi's request.

60. In relation to confidentiality, the situation of the CPS is very similar to that of a lawyer acting for a client. Courts and Tribunals have repeatedly emphasized the importance of maintaining legal professional privilege, and the need for very weighty public interest factors on the other side to tip the balance in a particular case. The present case bears a strong similarity. The public interest in maintaining the confidence of communications from foreign judicial authorities to the CPS is important, for the reasons identified above.

61. Ms Dehon submits that the evidence of prejudice and a 'chilling effect' on extradition proceedings is slight, and that the analogy with legal professional privilege is not exact. There is an element of substance in her criticism of the evidence. The CPS originally relied chiefly on s 27. The evidence of likely prejudice to international relations in regard to part 1) of the request is in our view thin to non-existent. Mr Cheema could not speak to what impact disclosure might have, if any at all, on international relations at the Government to Government level. We also accept that the analogy with legal professional privilege, while close, is not exact.

62. But as regards a chilling effect we are not here concerned with the rather unconvincing claims often made about senior civil servants' supposed reluctance to give proper advice to Ministers if their communications may be disclosed under FOIA. We found convincing Mr Cheema's concerns that disclosure without the consent of the foreign judicial authority would be likely to damage the functions of the CPS in extradition proceedings, with the

[7] For the avoidance of any doubt, Ms Maurizi does not limit her case to these four matters.

[8] We also note that this topic has recently been further discussed in *Willow v IC* [2017] EWCA Civ 1876, [30]-[32].

knock-on effects that we have mentioned for the relationship with the SPA in particular and with other prosecuting authorities or judicial authorities more generally (and in relation to both export requests and import requests). We take into consideration that Mr Cheema was experienced in extradition cases.

63. Ms Dehon submits that the SPA effectively waived its confidentiality in particular types of information, where information of that type was contained in the disclosures that it made; accordingly all information of that type should be released. The matter could therefore be approached as if the SPA had given consent. We reject that submission. In this case the SPA clearly did not consent to the disclosure of the relevant information still withheld concerning instructions given and advice sought, even though some materials of that kind were disclosed, since it drew its own line when it made its own disclosures to Ms Maurizi.

64. Mr Dunlop's submissions on the four points specially highlighted by Ms Maurizi are (in summary):

    a. In relation to explaining why the SPA did not make attempts to come to the UK to interview Mr Assange until March 2015, the advice given by the CPS has already been disclosed, and this explains the situation while the extradition proceedings were actively being pursued. As regards the period after Mr Assange's entry into the Embassy, there is a wealth of information already in the public domain from judicial proceedings and from disclosures by the SPA about the course of events, about how the SPA's thinking on this developed, and about the obstacles encountered.[9] The disputed information would add little.

    b. Her second point really belongs in her challenge to the NCND policy under parts 2-4 of her request. If it fails there, it fails here. If the correspondence between the SPA and the CPS did not contain any mention of an extradition request by the US, this would tell the public nothing about whether such a request had in fact been made by the US or not. If there was such a request from the US mentioned in the correspondence between the SPA and the CPS, disclosing it would tip off Mr Assange illegitimately and undesirably.

    c. Her third point raises similar considerations to her second point. If there was a discussion in the correspondence with the SPA about possible extradition of Mr Assange to the US, to reveal it would be to tip him off about potential extradition. Such a mention in correspondence with a third party would be highly unusual, since the practice of the CPS extradition unit is to keep approaches from a foreign judicial authority confidential even from other parts of the CPS, let alone from other Governments and authorities. If the correspondence between the CPS and the SPA says nothing about the topic, that would tell the public nothing. It is in the public

[9] It was summarised in paragraphs 18 and 76 of Mr Dunlop's skeleton argument. In addition, Ms Dehon referred to an article in The Guardian dated 19 October 2015 which contains information on that topic.

domain already that SPA had not received a request from the US. Therefore, if there was an approach from the US, as between Sweden and the UK it was only the UK that could have received it. It could be un-mentioned in the correspondence between the CPS and the SPA either because the CPS had not received any approach or because it had done so and was following its usual practice of maintaining strict confidentiality.

d. As to Mr Assange's entry into the Embassy, the CPS correspondence in the immediate aftermath has been disclosed. It shows that this action by him came as a bolt from the blue, wholly unexpected both by the CPS and by the SPA. Further disclosure would not add significantly to the picture. As regards the UK's view of the political asylum which he claimed, this is not a matter for the CPS. It has been the subject of public comment on behalf of the UK Government, which does not accept the validity of the form of diplomatic asylum granted to Mr Assange.

65. Mr Hopkins on behalf of the Commissioner, after fresh review of the evidence, expressly concurs with Mr Dunlop's submissions on the four points. Ms Dehon in her oral reply ultimately accepted that the disputed information under part 1) of the request would likely add little on the four highlighted points[10] but maintained her more general submissions about the nature of the public interest balance.

66. Like Mr Hopkins, we accept Mr Dunlop's submissions on the four points. In our view they are judicious and realistic, and fairly reflect what was to be derived from the evidence.

67. We have identified the nature of the balancing exercise and the factors which in our view are to be weighed on each side in paragraphs 49-58 above. Paragraphs 60-66 contain our assessment and reasoning leading to our conclusion that the balance is in favour of maintaining the exemption. In our judgment the balance comes down firmly on that side. We recognise that the present case has unusual features, as mentioned above, which make the public interest in disclosure considerably weightier than it otherwise would be, but we do not consider that they outweigh the strong public interests in maintaining the exemption. In our judgment the dangers from overriding the confidentiality of instructions to and advice from the CPS in extradition proceedings are real and substantial, and are too great to be outweighed by the general and specific public interest factors on which Ms Maurizi relies.[11]

68. It is not appropriate for us to try to specify in general terms what facts would be sufficient to tip the scales the other way for the purpose of the exemption in s30(1)(c) from the way that they come down in this case. The balance must depend on the particular circumstances.

[10] For clarity, we do not understand this submission to be a formal concession, since Ms Dehon necessarily has not seen the closed material.

[11] If our judgment on the public interest were required to be made as at the date of the hearing before the Tribunal, instead of as at September-December 2015, it would not be altered by the change in the SPA's position in mid-2017.

However, to avoid any misunderstanding we would express our disagreement with remarks made by Mr Cheema in his evidence which gave the impression that he regarded non-disclosure as a blanket policy such that only consent from the foreign authority or something like a danger to life and limb would tip the balance.[12] Ms Dehon was right to submit that his approach to upholding the exemption appeared to be too indiscriminate. There are clearly other kinds of considerations than personal safety which would be capable of tipping the balance in particular circumstances. An example might be where there was material misconduct on the part of the foreign judicial authority.

Part 1) of the request – the full CPS-SPA correspondence – other exemptions

69. Section 31 was mentioned but is no longer relied on by the CPS.

70. We have already indicated our view of the inadequacy of the evidence relating to s27(1).

71. Ms Maurizi did not dispute that for the purposes of s27(2) information obtained from the SPA was information obtained from another State. Since we have found in favour of the CPS on the basis of s30 it is not necessary to say more about s27(2).

Parts 2-4 of the request – application of NCND to CPS correspondence about the case of Mr Assange with Ecuador, with the US Department of Justice, and with the US State Department

72. The CPS originally relied on s27(4) in support of its NCND response, but now relies additionally on s30(3). Mr Cheema's evidence and Mr Dunlop's arguments related mainly to the latter.

73. The duty to say what information is held which matches the description in the information request arises under s1(1)(a). It is called the duty to confirm or deny: see s1(6). Section 30(3) provides (among other things) that the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of s30(1), or that would be so exempt if it were held by the public authority.

74. Since s30(1) is a qualified exemption which is subject to the public interest test, a similar requirement applies to s30(3). The test, as prescribed by s2(1), is-

> in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information . . .

[12] 'I have an absolute view that we can never disclose without the permission of the requesting State. . . . If permission is not received, we would still have a look at what the material is, but my practice is that if the State says it is not to be disclosed, that is it. . . . We might have to invoke our own human rights considerations if for example disclosure would save someone's life.'

75. By definition, the application of s30(3) does not depend upon what information is actually held. Rather, it depends on consideration of a hypothesis that information of the requisite description may or may not be held.

76. The skeleton argument served before the hearing on behalf of the CPS informed us that as a matter of long standing policy and practice the UK will neither confirm nor deny that an extradition request has been received until the person concerned is arrested in relation to that request. This policy is also mentioned and discussed in an application for permission for judicial review, *R (Manzarpour) v Home Secretary* [2014] EWHC 1086 (Admin), [7], [10]-[11].

77. In cross-examination of Mr Cheema Ms Dehon challenged the application of s30(3). Mr Cheema had explained in his written statement that the purpose of this policy is to prevent the subject of a request learning about it in advance, and giving them the opportunity to evade justice by leaving the jurisdiction or otherwise seeking to avoid arrest. In oral evidence he said that it was usual for countries to contact the CPS before making an extradition request, so the same policy applied also to preliminary inquiries about extradition, for the same reason. He also said that if a foreign authority directs correspondence to the CPS extradition unit, by definition it would be about either an actual or a contemplated extradition, given the nature of the unit's work. He also emphasized the need for consistent application of the NCND policy if it was to have the desired effect of not giving any clue to whether an inquiry about or request for extradition had been received from a particular country or not. We accept that evidence.

78. As we understand her argument on behalf of Ms Maurizi, Ms Dehon continues to contest that s30(3) was potentially engaged. But her main focus is on the public interest test and on attacking the blanket approach taken by the CPS that in no circumstances would it ever say, prior to a person's arrest, whether there had been correspondence from a particular State seeking or inquiring about extradition. She commends to us the guidance on NCND published by the Commissioner, which states-

> There are situations where a public authority will need to use the neither confirm nor deny response consistently over a series of separate requests, regardless of whether it holds the requested information. This is to prevent refusing to confirm or deny being taken as an indication of whether information is held. . . .
>
> If the public authority doesn't take this consistent approach then the occasions when it provides a neither confirm nor deny response may unintentionally imply whether or not information is held. . . .
>
> This does **not** mean that public authorities should use a neither confirm nor deny response in a blanket fashion. For example, a particular public authority should not provide a neither confirm nor deny response to all requests for all records because some of their records contain sensitive information. They should base their decision on the circumstances of the particular case, with regard to the nature of the

> information requested and with appropriate consideration given to the public interest test. [emphasis original]

79. We agree with this guidance.

80. In regard to parts 3) and 4) of Ms Maurizi's information request, we consider it to be clear that s30(3) is engaged by correspondence, if it exists, between the CPS and the US Department of Justice or the US State Department about the case of Mr Julian Assange. Given the nature of the responsibilities of the CPS, if there were such correspondence, on the balance of probabilities it would be either an inquiry about possible extradition or a request for actual extradition, or a follow-up to such a request.

81. The application of s30(3) to part 2) of Ms Maurizi's information request, that is, to correspondence, if it exists, between the CPS and Ecuador, is less obvious. Ms Dehon points to the high degree of unlikelihood of any such correspondence being about extradition to Ecuador, given that Ecuador is a country that has proved itself friendly to Mr Assange. The slight possibility that an independent judicial authority in Ecuador might take a different view from the Ecuadorian Government does not negate the high degree of unlikelihood.

82. This is a fair point that is made, but the analysis needs to go a step further. In our view it is clear on the evidence that the CPS has no proper role in dealing with the Ecuador Embassy or other Ecuadorian authorities on behalf of the SPA. Any such steps would be outside its statutory functions. We are required to consider the hypothesis that correspondence between the CPS and Ecuador concerning the case of Mr Julian Assange might exist. The unlikelihood of that hypothesis being true is not the point. We are required to consider the possibility of its being true. If we consider that hypothesis, then on the balance of probabilities the only thing that such correspondence would be about, if it existed, would be an inquiry or request concerning extradition of Mr Assange to Ecuador, or a follow-up to such a request. The information would then be held by the CPS for the purpose of prospective criminal proceedings which it had power to conduct. Accordingly, in our view s30(3) applies to part 2) of Ms Maurizi's information request. We also accept Mr Dunlop's argument that making the application of the NCND policy depend upon the likelihood or unlikelihood of a request or inquiry being received from a particular country would tend to undermine usefulness of the policy.

83. Where does the balance of public interest lie?

84. It is plain that the public purposes of the power to bring extradition proceedings would be undermined if there were not a generally consistent NCND policy so as to prevent express or implied tip-offs. In the present context the relevant purpose of the statutory exemption in s30(3) is to enable such a policy to be followed.

85. In *Manzarpour* at [10] it was said: 'Unless the same answer – neither confirm nor deny (NCND) – is given *in every case* then an inference will inevitably be drawn by the questioner in a given case from a refusal to answer' (emphasis supplied). But we are required to apply

FOIA, where the relevant exemption is qualified by the public interest test. And we consider that Ms Dehon rightly argues that the maintenance of a generally consistent policy is not undermined by making an occasional exception to it in appropriate circumstances. So we need to consider carefully the public interests in making such an exception in this case, to see whether the public interest in maintaining the statutory exemption outweighs them.

86. Ms Dehon's skeleton argument summarised Ms Maurizi's case on this question as follows:

> 26. The Assange case is a good example of why a blanket refusal is unjustified. While there is clearly a strong public interest in not tipping-off an individual in relation to an extradition request before that individual is arrested, the circumstances of the Assange case do not fit into the norm. By the time the Appellant made her request in September 2015 and the CPS made its refusal in December 2015, Mr Assange had been in the Ecuadorian Embassy since 19 June 2012. He was, as was well known, subject to very expensive police surveillance in order that he could be arrested immediately upon leaving the embassy. While the 24hr physical surveillance by the police had been removed in October 2015, Scotland Yard had announced on ongoing "number of overt and covert tactics to arrest him".
>
> 27. To suggest that Mr Assange was in no different position to any other person in relation to the potential for tip-off is absurd – the public interest in ensuring he would be arrested if he tried to leave the embassy in order to avoid any extradition request by the US was fully protected by the ongoing police operation in relation to Mr Assange. Confirmation or denial of the existence of the correspondence between the CPS and the US State Department or Department of Justice would not have changed that. The "tip-off" public interest relied on by the CPS does not, in the context of this case, withstand scrutiny.
>
> 28. The Commissioner acknowledges the "weighty public interest" in confirming or denying whether the US and Ecuador Correspondence is held [OB1/1/44 §28, and again in her skeleton argument]. The Tribunal is asked to find that this is the case. In the Appellant's submission, the public interest in maintaining the exemption does not begin to outweigh this weighty public interest in favour if disclosure. The Tribunal is asked to require the CPS to confirm or deny whether the US and Ecuador correspondence is held and, if so, to require the CPS to consider whether that correspondence should be released, whether unredacted or redacted.

87. In oral argument Ms Dehon characterised the CPS's position as a blanket refusal supposedly justified by what were extremely negligible chances of people evading capture. She additionally relies on the fact that Sweden released correspondence with Ecuador and confirmed that there was none with the US, together with the further unusual features of the case which we have already considered for the purposes of part 1) of the information request. She says that the present case is a unique and particular set of circumstances and

that no one could interpret a response as an indication of NCND not being applicable in future in the normal run of things.

88. The CPS and the Commissioner both argue that the circumstances relied upon by Ms Maurizi are insufficient to justify a departure from the usual NCND policy, which they say advances a strong public interest.

89. On this issue we accept the submissions of the CPS and the Commissioner. We are not persuaded by the arguments presented on behalf of Ms Maurizi.

90. No doubt Mr Assange had in September to December 2015, and indeed still has, a strong personal interest in knowing whether the CPS had received inquiries about extradition or a request for extradition from a State other than Sweden. But we are unable to see how it would be of more than marginal benefit to the public for that question to be answered. The terms of parts 2)-4) of the request are of course wider, asking about 'correspondence' not specifically about inquiries or requests for extradition. But it is necessary to consider the specific question about extradition, because the effect of departing from the NCND policy in this instance would potentially be to answer that question. If there is no such correspondence, the inference would be that extradition has not been inquired about or requested. If there is such correspondence, the inference would be that extradition has been inquired about or requested.

91. It is not in the public interest that an individual should be tipped off in such a way. The public interest lies strongly in the opposite direction. The fact that this is a high profile case does not reduce that public interest. We are effectively being asked to say in relation to parts 2)-4) that the slight public benefits that might accrue from requiring the CPS to depart from its usual NCND policy (namely the modest increase in public understanding of an unusual case) outweigh the substantial public benefits of maintaining that policy consistently. In our judgment the balance indicates that the exemption should be maintained. We do not see anything in the special features of Mr Assange's position which raises the public benefits of the disclosure sought in parts 2)-4) to a level which outweighs the desirability of maintaining the ordinary policy in the public interest.

92. Since the application of the public interest test in relation to s30(3) requires that the appeal in relation to parts 2)-4) be refused, it is not necessary for us to discuss the position under s27(4).

Part 5) of the request – the volume of information held

93. The motive behind this part of the request is entirely reasonable. For a journalist, it is important to know whether information released is most of what there is, or whether it is the tip of a large iceberg. But the request is for 'the exact number of the pages of the Julian Assange's file at the Crown Prosecution Service'.

94. On the evidence, the files contain much duplication. When papers are prepared for successive courts, much copying takes place. When emails are printed out, earlier emails in a

string are often copied multiple times. We have seen that feature in the materials shown to us here. Knowing the exact number of pages would tell Ms Maurizi, and hence the public, nothing of value.

95. Accordingly in our view the CPS was justified in raising s14 in the course of the Commissioner's investigation as a reason for not answering this request, on the grounds that it would involve disproportionate work for no real benefit.

96. Ms Maurizi now recognizes that it is not appropriate, given the extent of the information received by her, to press for the exact number of pages, but she wishes still to know the number of electronic files. In our judgment this is subject to the same objection.

Conclusions

97. For the reasons set out above, Ms Maurizi's appeal is dismissed.

98. While the Tribunal has considered the closed materials, and such consideration has played a part in our path to our decision, we have been able to explain our reasoning, we hope sufficiently, without explicit reference to their specific contents. As a result there is not in this case any confidential annex setting out our reasoning more fully.

99. The Tribunal wishes to express its appreciation to the witnesses for their evidence and to counsel for all parties for their helpful and carefully measured submissions as well as for their constructive procedural co-operation, which enabled the hearing to proceed efficiently.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge