IN THE FIRST TIER TRIBUNAL GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)
AND
IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal Nos. EA/2011/0265/0266/0280

BETWEEN:

THE HOME OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

AND BETWEEN:

THE HOME OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

1st Respondent

and

JOHN O

2nd Respondent

AND BETWEEN:

JOHN O

Appellant

and

THE INFORMATION COMMISSIONER

1st Respondent

and

THE HOME OFFICE

2nd Respondent

BEFORE:

DAVID MARKS QC
(Tribunal Judge)

DAVID WILKINSON & MICHAEL JONES

APPEARANCES:

For John O:	Philip Coppel QC Shahram Taghavi (Counsel)
For Information Commissioner:	Eric Metcalfe (Counsel)
For Home Office:	Oliver Sanders (Counsel)

Subject Matter:

Section 27 Freedom of Information Act 2000; Prejudice to International Relations; Public Interest Balance

Cases and Statutory Authorities Cited in Open Judgment and Open Annex:

- **Equality Act 2010, sections 9, 13, 27 and 31 and Schedule 3**
- **Equality (Transit Visa, Entry Clearance, Leave to Enter, etc) Authorisation 2011**
- **The Immigration (Leave to Enter and Remain) Order 2011 (SI 2000 No 1161)**
- **Race Relations (Northern Ireland) Order 1997 (SI 869/1997) (NI6);**
- **Race Relations (Northern Ireland) (Transit Visa, etc) Authorisation 2011**
- **section 27(1)(a) Freedom of Information Act 2000**
- ***Hogan & Oxford CC v IC* (EA/2005/0026 & 0030)**
- ***Campaign against the Arms Trade v IC* (EA/2006/0040)**
- ***Gilby v IC* (EA/2007/007, 0071 & 0079)**
- ***John Connor Press Associates Ltd v IC* (EA/2005/005)**
- ***R (Lord) v SSHD* [2003] EWHC 20073 (Admin)**
- ***OGC v IC* [2010] QB 98**
- ***APPGER v IC & FCO* (EA/2011/0049-51)**
- ***HMT v IC* [2010] QB 563**
- ***Hoffmann–LaRoche v Secretary of State for Trade and Industry* [1975] AC 295**
- **section 7(1) Human Rights Act 1998**
- ***British Union for the Abolition of Vivisection v IC* (EA/2010/0064); *DEFRA v IC* (EA/2009/0076)**
- ***In Re A (Forced Marriage: Special Advocates)* [2010] EWHC 2438 (Fam)**
- ***Claymore Dairies Ltd v Office of Fair Trading* [2003] CAT 12**
- ***National Grid Electricity v AB Ltd* [2011] EWHC 1717**
- ***Al Rawi and others v Security Service* [2011] UKSC 34**
- ***Roberts v Parole Board* [2005] UKHL 45**
- ***Sugar v IC and BBC* (EA/2005/0023)**

Decision

In appeal numbers EA/2011/0265 and 0266, the Tribunal upholds the Decision Notices of the Information Commissioner (the Commissioner) Reference Nos. FS50390172 and FS50390485 each dated 13 October 2011 with regard to the so-called "detriment" countries, but substitutes the said Decision Notices with regard to the so-called "non-detriment" countries being those countries the disclosure of whose identities would not, according to the Commissioner's original decisions, prejudice the UK's international relations, by a ruling that the relevant exemption under the Freedom of Information Act 2000 (FOIA) relied on by the public authority, namely the Home Office, ie section 27(1), can also properly be invoked by the Home Office with regard to the so-called non-detriment countries for the reasons more particularly set out in this judgment, as well as the reasons set out in the closed Annex marked "B" hereto.

In addition, the Tribunal dismisses the appeal of the Appellant, John O, in appeal EA/2011/0280.

Reasons for Decision

General

1. There are three separate appeals which are the subject of this judgment. The background is not entirely straightforward and involves immigration law and practice. A list, or more particularly, lists of certain countries are maintained by the Home Office. In general terms an immigration officer or an entry clearance officer can lawfully (at least in the views of the Commissioner and the Home Office) discriminate against an Applicant for a transit visa or for an entry visa if the Applicant is from, or claims to be from, one of a number of countries which are listed enabling the officer to act in that fashion. All three appeals concern requests for the list or lists in question. The lists exist on account of the passage of formal instruments which are called authorisations.

2. By two Decision Notices dated 13 October 2011, the Commissioner determined that some of the countries which were listed could be disclosed, but others could not in the light of a specific exemption in FOIA which is relied on by the Home Office and the Commissioner, namely section 27(1). That provision provides that an exemption from disclosure under FOIA is maintainable if disclosure "would, or would be likely to prejudice" the various types of relations and interests more particularly described in section 27(1) under the general heading "International Relations". The legal background to that provision will be set out in further detail below.

3. In two of the appeals, namely appeal no EA/2011/0265 (appeal 265), and EA/2011/0266 (appeal 266), initially and prior to the first hearing of this appeal, the Home Office took issue with the Commissioner's principal determination which was to the effect that disclosure of a limited or partial list would not be detrimental or damaging to the UK's relationships with other States. In the third and further appeal, the complainant is John O (Mr O) (appeal 280). Mr O takes issue with the same determination by contending that there should be disclosure of the entire list or lists which are being sought.

4. The relative complexity, both as to the background to the appeals and as to the degree of detailed evidence which has emerged in this appeal (much of it by definition being considered in closed session), was not made any easier by an extended delay between two sets of oral hearings with the intervening gap being one of several months. In that period, the position of the Commissioner altered radically. Initially, and certainly at the time of the first two day hearing on 27 and 28 September 2012, the Commissioner took the view that the distinction between detriment and non-detriment countries should be maintained. Having considered the overall position in the intervening period between the two hearings, the Commissioner

accepted the view that the Home Office's stance which had taken into account a much wider examination of the position prior to the first hearing was that there should be a ban on all listed countries, whether non-detriment or detriment countries, and therefore the exemption in section 27(1) should be respected in general terms. The Commissioner therefore, having taken a considered view, expressed his views in open written submissions filed in advance of the adjourned hearing that the Home Office's blanket ban should be upheld. The Commissioner took no active part and was not represented by Counsel as he had been at the initial hearing of the appeal, at the adjourned hearing.

5. During the first two days of the hearing which constituted the first set of hearings in this appeal, evidence was heard both in open and in closed session (as indeed it was at the adjourned hearing). Prior to the examination being heard and at the opening of the appeal, Leading Counsel on behalf of Mr O contended that he should be allowed to participate in any closed session that might take place. The Tribunal ruled against that application and reasons for that determination are set out in an open Annex attached to this judgment marked Annex A.

The factual and legal background

6. The Equality Act 2010 by section 13(1) contains a definition of discrimination, or more particularly, what is called direct discrimination in terms of the same constituting the application of unfavourable treatment by reference to what are called "protected characteristics". Section 9(1)(b) of the same Act provides *inter alia* that nationality (along with colour and ethnic or national origins) constitutes a potential characteristic for the purposes of that Act. Section 29(1) of the Act provides as follows, namely:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service"

7. Section 29(6) then provides:

> "(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

8. The Tribunal pauses here to note that at one stage of the hearing, Leading Counsel for Mr O suggested that section 29(6) imposed a form of constraint on an immigration officer. However it is difficult, in the Tribunal's judgment to see how that provision adds anything material to the basic principle enshrined in section 29(1) which, on its

face, already imposes a general limitation on such an individual acting as a service-provider.

9. Section 31(10) of the same Act and Schedule 3, paragraph 17 to the said Act then provides that with regard to discrimination on the basis of nationality:

> "(2) Section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment.
>
> (3) A relevant person is
>
> (a) a Minister of the Crown acting personally, or
>
> (b) a person acting in accordance with a relevant authorisation.
>
> (4) A relevant authorisation is a requirement imposed or express authorisation given –
>
> (a) with respect to a particular case or class of case, by a Minister of the Crown acting personally,
>
> ***
>
> (5) The relevant enactments are –
>
> (a) the Immigration Acts …"

10. On 10 February 2011, one of the authorisations which is in issue in the present appeals was made. It is the Equality (Transit Visa, Entry Clearance, Leave to Enter, Examination of Passengers and Removal Directions) Authorisation 2011, to be called for the sake of convenience the "Equality Authorisation". It was made by the Home Office's Minister of State pursuant to paragraph 17(4)(a) of Schedule 3.

11. It is perhaps appropriate here to refer to the relevant provisions of the Immigration Act 1971 which were put before the Tribunal. They need not be recited in full. Schedule 2 to the 1971 Act sets out what are called Administrative Provisions as to control on entry, etc. These provisions in general terms allow immigration officers to conduct examinations, and for this purpose, medical examinations are included; officers can also seek information and documents with regard to the carrying out of the officers' functions. For obvious reasons, refusal of leave to enter can be applied in appropriate cases.

12. The Tribunal was also shown a copy of The Immigration (Leave to Enter and Remain) Order 2000 (SI 2000 No 1161). It deals principally with entry clearances. An entry

clearance may specify the purpose for which the holder wishes to enter the UK. By article 7, an immigration officer, whether or not in the UK, may give or refuse a person leave to enter the UK at any time before his departure for the UK and in order to determine whether or not to give such leave, an officer may seek such information and the production of such documents as he would be entitled to obtain in an examination made under the relevant provisions of Schedule 2 to the 1971 Act. As the relevant Explanatory Note states, the subsequent articles, in particular those in Part III (which deals with the form and manner of giving and refusing leave to enter) make further provision as to the form and manner of giving and refusing to leave to enter the UK. In particular, article 7 specifies that an immigration officer, whether or not in the UK, may give or refuse a person leave to enter the UK at any time before his departure for or in the course of his journey to the UK. It also gives officers powers to seek information necessary to come to a decision as to whether or not to give such leave.

13. The Equality Authorisation by paragraph 3, which together with the remainder of the paragraphs in the Authorisation falls under the general heading of "Part II: Discrimination on Ground of Nationality", is headed before the terms of paragraph 3 itself "Scrutiny of Applications for Persons seeking a Transit Visa or Entry Clearance". It provides:

> "3(1) This paragraph applies where a person is required to apply for a transit visa under the Immigration (Passenger Transit Visa) Order 2003 or entry clearance.
>
> (2) If the condition in paragraph 7 is satisfied the application may, by reason of the applicant's nationality, be subject to a more rigorous examination than applications from other applicants in the same circumstances."

14. Paragraph 4 addresses the case of persons wishing to travel to the UK. It provides that if the condition set out in paragraph 8 is satisfied, the immigration officer or the Secretary of State may, by reason of the person's nationality, decline to give or cancel leave to enter and exercise the powers referred to under SI 2000 No 1161. Paragraph 5, in similar terms, applies where a person is liable to be examined by an immigration officer under the relevant paragraphs of Schedule 2 to the 1971 Act. Again, in similar terms to those set out in paragraph 4, paragraph 5 states that if the condition in paragraph 8 is satisfied, the immigration officer may, by reason of that person's nationality, subject a person to a more rigorous examination than other persons in the same circumstances, exercise the relevant powers under Schedule 2 to the 1971 Act, detain the person pending his examination or decline to give notice

of grant or refusal of leave to enter in a form permitted under the 2000 Order and impose a condition or restriction on a person's temporary admission to the UK.

15. Paragraph 6 says that responsible persons may give priority to setting directions for removal if the condition in Paragraph 8 is satisfied. Paragraph 7 provides as follows, namely:

> "(i) The condition is that the person is, or claims to be, of a nationality which appears on the list of nationalities approved personally by the Minister for the purpose of this authorisation.
>
> (ii) The conditions for inclusion on the list of nationalities are that the Minister is satisfied that:
>
> (a) there is statistical evidence showing that in at least one of the preceding three months, the total number of UK visa refusals, adverse decisions or breaches of the immigration laws and/or the Immigration Rules by persons of that nationality exceeds 150 in total and 50 for every one thousand admitted persons of that nationality; or
>
> (b) there is specific intelligence or information which has been received and processed in accordance with the IND Code of Practice for the recording and examination of intelligence material and which suggests that a significant number of persons of that nationality have breached or will attempt to breach the immigration laws and/or the Immigration Rules; or
>
> (c) there is statistical evidence showing an emerging trend of UK visa refusals, adverse decisions or breaches of the immigration laws and/or the Immigration Rules by persons of that nationality that exceeds the criteria expressed in paragraph 7(ii)(a) within a timeframe shorter than a single month." (*emphases in original*)

16. Paragraphs 4 to 6 of the Equality Authorisation have already been mentioned. The criteria as to those persons subject to paragraph 4 are very similar to those just set out and referred to in paragraph 7. In very general terms the criteria for those persons wishing to travel to the UK (paragraph 4) are different from those applying to persons seeking a transit visa or entry clearance (paragraph 3). The condition in paragraph 8 is very similar to that in paragraph 7 but the numbers in paragraph 8 are lower than those in paragraph 7. The significance of the different thresholds will be touched on later in this judgment.

17. Both in written submissions, as well as in argument, Leading Counsel on behalf of Mr O contended that the Equality Authorisation was, to paraphrase his submission, something which purported to authorise something which would otherwise be unlawful. In a written statement, namely his first, provided on behalf of the Home Office, Mr Kristian Armstrong states at paragraph 7.1 as follows in dealing with what he calls the policy aim of the authorisations, namely:

> "The authorisations permit lawful differentiation on the basis of nationality when scrutinising applications for entry clearance and transit visas as well as applications for leave to enter at the border and in prioritising removals. Without them such differentiation would be prohibited under the provisions of the Equality Act 2010 which would inhibit the effective management of the immigration system and the sensible use of limited public resources."

18. Reference to the authorisations in the plural is a reference not only to the Equality Authorisation, but to a similar authorisation enacted in Northern Ireland which will be referred to below.

19. Elsewhere in his first statement and in referring to paragraph 17 of Schedule 3 to the 2010 Act (in large part reflecting the former provision, namely section 19(D) of the Race Relations Act 1976), Mr Armstrong stressed that in exercising immigration functions, direct discrimination is allowed either by the immigration legislation as specified in the 2010 Act, or by a ministerial authorisation. He adds that:

> "Direct discrimination which is not authorised in one of those ways is unlawful."

This matter will be revisited below in connection with Mr O's evidence, but in the Tribunal's judgment insofar as it is appropriate to consider this issue as part of the real issues before the Tribunal on the appeals, the Tribunal is minded to accept Mr Armstrong's explanation and reject the submission made on behalf of Mr O.

20. As will also be seen below, Mr O has laid much stress on the contention that an authorisation such as the Equality Authorisation, being an instrument made under or by virtue of another enactment, cannot be kept secret from those who stand to be affected by it since this would be taken to constitute a contradiction or some form of affront to the rule of law.

21. Apart from observations which will be made below, the Tribunal is not minded to reach any conclusion on that specific contention. Nor can it, since in the Tribunal's view, this would be tantamount to acceding to what would in effect be an application for judicial review. It is well established that this Tribunal is not entitled, nor

empowered, to issue a judgment or provide a declaration which amounts to a determination which could in effect be said to reflect a judicial determination by way of judicial review with regard to a statutory or regulatory enactment.

22. Mr O also seeks recourse to the provisions of the Human Rights Act 1998, in particular, by means of an allegation that the effect of any decision taken pursuant to an authorisation will offend article 8 of the European Convention on Human Rights. This particular contention is more conveniently dealt with in relation to a consideration of the competing public interests in play in relation to the applicable exemptions set out in section 27(1) of FOIA.

23. In passing, the Tribunal was shown a letter from the Immigration Law Practitioner's Association dated 21 March 2011 to the then Minister of State for Immigration, Damian Green MP. The letter deals with a number of matters, but its principal theme is to urge the Minister to withdraw the Equality Authorisation. The letter states, in particular at page 4, as follows, namely:

> "For the reasons set out in the Immigration Directorate Instructions cited above they are likely to be vulnerable to challenge in the courts."

24. Later, the letter states at page 8:

> "We consider that there are likely to be challenges to the Orders that you have made, under equalities legislation, on public law grounds and as a matter of statutory construction."

25. The Equality Authorisation is said to be only one of "various Ministerial authorisations" made over the years. At the end of the letter, there is specific criticism of the fact that the criteria which are set out, eg in paragraph 7 of the Equality Authorisation "are not susceptible to objective proof and the evidence on which they are based is not publicly available." The letter adds that in the circumstances "it therefore appears that the basis for discrimination in many immigration refusals is not prescribed by law/in accordance with the law within the meaning of the term ascribed by the European Court of Human Rights."

<u>The Northern Ireland legislation</u>

26. Appeal 265 is concerned with the particular position in Northern Ireland. The Race Relations (Northern Ireland) Order 1997 (SI 869/1997 (NI6)) (the Northern Ireland Order) makes it unlawful for a public authority to "discriminate against a person on the grounds of race or ethnic or national origins. By virtue of the Northern Ireland Order, article 20A(5) makes this prohibition subject to articles 20B to 20D and so far as material, article 20C provides:

> "(1) Article 20(A) does not make it unlawful for a relevant person to discriminate against another person on the grounds of ethnic or national origins in carrying out immigrations functions."

27. Article 20C(2) and (3) then define the term "relevant person" as meaning a Minister of the Crown or any other person acting in accordance with the relevant authorisation and this last term, namely "relevant authorisation" includes a requirement imposed or an express authorisation given with respect to a particular case or class of case by a Minister of the Crown acting personally.

28. The Northern Ireland authorisation, whose full title is the Race Relations (Northern Ireland) (Transit Visa, Entry Clearance, Leave to Enter, Examination of Passengers and Removal Directions) Authorisation 2011 was made pursuant to the Northern Ireland Order and has been called in the papers before the Tribunal, the Race Relations Authorisation, although for present purposes it will be called the Northern Ireland Authorisation. When the terms authorisation and authorisations are used in this judgment, they will refer both to the Equality Authorisation and to the Northern Ireland Authorisation.

The Requests and the Notices of Appeal

29. Appeal 265 relates to a Decision Notice dated 13 October 2011 issued by the Commissioner bearing the reference FS50390485. The complainant is the Northern Ireland Human Rights Commission. By an email dated 5 April 2011, the complainant wrote to the UK Border Agency, the public authority in relation to which is the Home Office, in relation to the Northern Ireland Authorisation. The request stated as follows, namely:

> "… paragraph 7 of the Authorisation sets out the criteria (or conditions) for a particular nationality to be included on the list but does not set out the list of nationalities presently included on the list … We would therefore seek a copy of the present list of nationalities approved by the Minister and accompanying evidence base for the same."

30. It will be noted that this request seeks not simply the relevant list, but also disclosure of the evidential basis referred to in the content of the authorisation which provides due justification for the assembling and compilation of the list or lists.

31. In its response of 5 April 2011, the Border Agency, again acting on behalf of the Home Office, told the complainant that the requested lists of nationalities covered by the authorisation in question "are not published for operational reasons". The reference to lists in the plural is to the fact that two lists are involved for present

purposes, namely the list with regard to entry clearance and the list with regard to border control. For present purposes, there is no real material difference between them and the term "list" and "lists" will be used interchangeably where appropriate in this judgment. The Border Agency went on to explain that disclosure could adversely affect the UK's bilateral and multilateral relations. It could also adversely affect the UK Border Agency's efforts to tackle organised immigration crime. An internal review upheld the Home Office's original refusal.

32. The Home Office initially relied on both sections 27 and 31 of FOIA. The legal background as to section 27 will be dealt with below. Section 27(1)(a) addresses whether in the context of international relations, disclosure would or would be likely to prejudice relations between the UK and any other State. On any view, and this appears not to be disputed in the present appeals, it focuses on the effect of disclosure rather than upon the nature and content of the disclosure itself.

33. In his Decision Notice, the Commissioner stated that international relations involving the UK covered a wide range of issues, eg UK policy and strategic positioning in relation to other States, diplomatic matters between the States, international trade partnerships and consular matters in relation to UK citizens abroad or visitors to the UK. Invocation of the exemption required a need to show prejudice. According to the Commissioner, prejudice, which as will be explained below, must be prejudice which is of a real or substantial nature, is made out if it renders international relations more difficult.

34. As to prejudice, first the Commissioner accepted that the relevant applicable interests were in relation to the countries which appeared on the list or lists which was or were sought. Second, the Commissioner came to the view that the effect of disclosure would be, as he put it, detrimental or damaging to relations with some of the countries that were listed. He therefore did not find that the exemption was engaged in relation to all the countries listed. This is how the terms "non-detriment" and "detriment" came to arise. He therefore described those countries as "non-detriment countries" where no prejudice could be shown. With regard to "detriment" countries however, he accepted that disclosure would be likely to have a prejudicial effect.

35. The final stage of his analysis was therefore with regard to what he called the "detriment" countries, ie those with regard to which he accepted that disclosure would be likely to have a prejudicial effect. With regard to such countries, he therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest militating in favour of disclosure.

36. On balance, the Commissioner accepted that despite a disclosure being regarded as desirable in the light of greater public scrutiny, as he put in paragraph 26 of his Decision Notice:

> "… effective conduct of the UK's bilateral relations and international engagement in the sensitive issues surrounding migration and border security would be compromised if the requested information about the "detriment countries" were made known."

37. The Home Office had also relied on section 31 which deals with law enforcement. The potential risk with regard to organised immigration crime has already been briefly referred to. Since no substantive argument about reliance on this exemption was made in relation to these appeals, the Home Office having abandoned the point before the hearings in these appeals, nothing further will be said on the application of that exemption.

38. Appeal 266 relates to the complaint made by Mr O. His request addressed the Equality Authorisation. He wrote to the Border Agency on 22 February 2011 with regard to the Ministerial statement made on 15 February 2011 by Mr Green MP. His request was framed in the following terms, namely:

> "What is the current list of nationalities covered by the authorisation?"

39. As in the case of appeal 265, the Home Office, again acting by the UK Border Agency refused to disclose the requested information relying again, as in the case of the previous appeal, on sections 27(1)(a) and section 31(1)(e) of FOIA.

40. In his Decision Notice (Reference No. FS503290172) and in relation to the applicability of section 27, the Commissioner reached the same decision as he had reached in relation to the Decision Notice in appeal 265, ie he found that the same distinction drawn in the other Decision Notice as between non-detriment and detriment countries applied equally with regard to Mr O's request.

41. One additional feature in the present Decision Notice in relation to appeal 266 needs to be noted. In setting out the factors which had been put before the Commissioner as to why the requested information should be disclosed, the Commissioner drew attention to the letter already referred to briefly above, namely the letter from the Immigration Law Practitioners' Association to the Immigration Minister in which reference had been made to the fact that because every immigration refusal carried with it a right of appeal on the grounds of racial discrimination, in order to facilitate such appeals, the Border Agency, ie the Home Office would have to indicate that it

was relying on the authorisation and "the list will be revealed piecemeal, if it is not revealed earlier".

42. The Commissioner determined that section 27 was engaged and, as is clear from this judgment so far, eventually ruled against the Home Office with regard to its reliance on section 31 of FOIA.

43. Appeal 280 also relates to the same Decision Notice which underlies appeal 266, namely Decision Notice Ref FS50390172.

44. The Home Office appealed in relation to both Decision Notices, and those appeals are as indicated appeals nos. 265 and 266. The first relates to the Northern Ireland Authorisation. In its Notice of Appeal, the Home Office refers to the specific provisions of the Northern Ireland Order as well as to the relevant authorisation.

45. With regard to section 27, the Notice of Appeal at paragraph 4.1 stated that the Home Office's treatment of foreign nationals wishing to enter or transfer to the UK, and where appropriate its prioritisation of their removal were matters of "acute sensitivity" when it came to the UK's bilateral relations with countries of origin. It went on to say that notwithstanding that the less favourable treatment provided for under the Equality Authorisation is "of a carefully limited and controlled kind", disclosure of the fact that the Home Office had thereby authorised "discrimination" against foreign nationals from a particular State on the basis that they are more likely to breach or attempt to breach immigration controls, is "particularly likely to prejudice such relations". At paragraph 4.2 the Notice of Appeal stated as follows:

> "Rightly or wrongly, many such States are inevitably likely to consider their inclusion on either list, particularly where contrasted with the non-inclusion of other States as: "demeaning and disrespectful; a slight, affront, or insult to their national dignity and pride; an instance of unfair discrimination and victimisation; and an indication of a lack of co-operation, goodwill and respect on the part of the United Kingdom.""

46. It then went on to deal with non-detriment countries and took issue with the decision of the Commissioner on the basis that should disclosure be made as to those countries only, they too might be affronted in the same way, or at least object, even if the same States might not object if either list were itself published in full with their details included as part of a larger group. The importance of the distinction between detriment and non-detriment countries has now become academic.

47. The same Notice of Appeal then dealt with the question of prejudice. The Home Office claimed that the entirety of the disputed information, ie the lists and the

evidence base, was exempt under section 27(1)(a). The point was specifically stressed that disclosure would or would be likely to prejudice relations between the UK and other States including those referred to in the lists and evidence base and their allies and partners (emphasis in original).

48. The type of prejudice required was one which is well known to the Tribunal, namely that it must be prejudice which is "real, actual or of substance". This formulation was first adopted in *Hogan & Oxford CC v IC* (EA/2005/0026 & 0030), especially at paragraph 30. Particular attention was drawn to the more recent case of *Campaign Against the Arms Trade v IC* (EA/2006/0040), especially at paragraphs 80 & 81, repeated in more or less identical terms in *Gilby v IC* (EA/2007/007, 0071 & 0079), especially at paragraphs 22-23.

49. As to the required degree of likelihood, the Home Office admitted that "the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk" (reference was made to another well known decision of this Tribunal, namely *John Connor Press Associates Ltd v IC* (EA/2005/0005), especially at paragraph 15). See also *R (Lord) v SSHD* [2003] EWHC 2073 (Admin), per Munby J at para 106, where the learned Judge stated as follows, namely:

> "I accept that "likely" [as in Data Protection Act, section 29(1)] does not mean more probable than not. But on the other hand, it must connote a significantly greater degree of probability than merely "more than fanciful". A "real risk" is not enough … In my judgment, "likely" connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interest. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not."

50. The Notice of Appeal then turned to the competing public interests. It accepted that there was a public interest in the disclosure of information held by public authorities referring to another well known decision, namely *OGC v IC* [2010] QB 98, especially at paragraph 69. It was claimed that disclosure would promote transparency and accountability and thereby improve the quality of decision making. The Home Office also accepted that there was a particular public interest in transparency with regard to a measure such as the Equality Authorisation which permitted a degree of less favourable treatment on the grounds of national origin which would otherwise be unlawful under the 2010 Act, section 29(6).

51. However, at paragraph 4.11 of the Grounds, the following was stated, namely:

> "Having said this, the public interest in disclosure is to a great extent served by publication in the Northern Ireland Authorisation of the conditions and criteria which must be satisfied in order for any country to be included in the lists and evidence base. Furthermore, the type of less favourable treatment authorised thereunder may entail additional administration and inconvenience but it will not prevent an individual from obtaining a benefit or achieving an outcome to which he or she is legally entitled. Moreover, the available mechanisms for challenging the lawfulness of related [Home Office] decision making mean that the rights of those individuals likely to be affected are properly protected. Most importantly, the avoidance of damage to the nationally vital public interest protected by FOIA [section 27(1)(a)] is of much greater importance than the transparency interests at play in this context."

It is self-evident in the Tribunal's judgment that the above paragraph again refers to the ability of an affected individual who might otherwise be aggrieved by a decision emerging from the Home Office in this connection to seek independent redress or otherwise challenge the lawfulness of any decision made against him or her.

52. The Notice of Appeal with regard to appeal 266 deals with the Equality Authorisation and sets out grounds which are, in effect, those advanced in relation to appeal 265. In appeal 280, Mr O seeks disclosure of both lists. In his grounds of appeal, Mr O takes issue with the Commissioner's findings in relation to the detriment countries claiming that it was "erroneous and unlawful" for the Commissioner to reach his decision. In particular he claims that the Commissioner should have provided reasons setting out "the logic behind the distinction and the factors taken into account during the decision making process" as well as reasons "as to why any relations with any "detriment" country would be more prejudiced than a "non-detriment" country" (*emphasis in original*). In particular, Mr O claims that the Commissioner was mistaken and/or misdirected himself in law in failing to disclose a "correct direction" on the meaning of "prejudice". Mr O claims that when the Commissioner had referred to "the effective conduct of the UK's bilateral relations and international engagement in sensitive areas surrounding migration and border security" as a reason for his decision, such a reason related to what would be prejudiced in the Commissioner's opinion, not " why or how they would be prejudiced "(*emphasis set out in original*). Mr O therefore claimed that the Commissioner had erred in law adding insufficient weight to the discriminatory nature of the requested information. Finally, Mr O contended that "very significant section 27 "prejudice"" was needed to outweigh the strong public interest favouring disclosure. He provided three reasons as to why this was the position, namely, first that the undisclosed information related to State discrimination on the grounds of race/nationality/ethnicity; secondly, that non-disclosure actively frustrated and interfered with Parliament's intention that discriminated migrants

should be able to appeal to the relevant asylum chamber in the First-Tier Tribunal and a failure to disclose the list of countries, in practice, would deny such migrants the right to appeal, and thirdly, that prejudice, in practice, related more to migrant nationals of the State than to the actual "State". This was because, Mr O contended, the Authorisation in question related to decisions relating to "Entry Clearance", "Examination of Passenger [sic] at the United Kingdom border" and "Removal Directions".

53. The Tribunal pauses here to say that it will address the question of prejudice in due course. As will be shown, it is entirely satisfied that a sufficient degree of prejudice falling within the judicial criteria specifying the type of prejudice required has been demonstrated. Moreover, as will be seen, the evidence provided to the Tribunal entitles it in its judgment to reject any contention that the lists in some way relate to State discrimination. Furthermore, enough has been said already to show that any aggrieved individual who might otherwise be affected by a decision made pursuant to the authorisations has an independent right to challenge the determination made, should such a determination be adverse to the applicant's intentions to seek clearance. Nonetheless, it is hoped that the reasons more fully set out in this judgment will in any event cover the bases of Mr O's Grounds of Appeal in full.

The responses

54. With due respect to the Home Office's formal responses to all three appeals, and as will be seen below, in effect the content of those responses has been largely overtaken by the far more extensive and detailed amount of evidence and submissions put before this Tribunal than was presented to the Commissioner.

55. The Home Office however does take issue with two particular submissions which have been made by Mr O. They have been mentioned above. The first is to the effect that non-disclosure would "frustrate" Parliament's intention that would-be immigrants would be able to appeal to the Immigration Chamber in the First-Tier Tribunal. The second submission was to the effect that prejudice related in practice more to migrant nationals than to the actual States concerned. As to the first, the Home Office points out that an unsuccessful migrant will be provided with a written explanation for refusal which could then be appealed in the normal way. As to the second, the Home Office stressed that the only material prejudice related to State relations between the UK and other States. The Tribunal will add nothing further on these issues save to say that in his reply to the Home Office's response, Mr O in effect put the Home Office "to proof" that international relations would be adversely affected in the way alleged. By way of further alternative, Mr O claimed that if the predicted prejudice to international relations were to occur, the latter would not be the consequence of disclosure but would be the consequences of the Home Office

making and implementing the Equality Authorisation. The Tribunal pauses here to note that it totally rejects this argument. The clear intent of section 27 is to focus on the prejudice that will result to international relations. The evidence which has been presented to the Tribunal on this appeal, if nothing else, clearly goes to demonstrate that it is that specific type of prejudice which is here in issue.

The evidence and the principal factual issues in the appeals

56. Two critical observations need to be re-emphasised at this stage. Both have been referred to above. First, as already indicated, the Home Office has abandoned any reliance on section 31 for the purposes of the present appeal. Second, the Tribunal has heard and considered a far more extensive range of evidence than was considered by the Commissioner prior to and including the dates of the relevant Decision Notices. Indeed, the extended time gap which has elapsed between the dates on which the two oral hearings have been heard persuaded the Commissioner that his former reliance on the detriment/non-detriment distinction should be abandoned and that section 27 can properly be relied on and that in the circumstances the Decision Notices should be amended accordingly.

57. In addition, before turning to the principal submissions advanced by the parties, it is important to set out a number of relevant factual matters which need to be taken into account in relation to the arguments on the appeal.

58. Reference has already been made to the evidence provided by Kristian Armstrong. Mr Armstrong produced two statements. He was cross-examined on the first statement at the first hearing. Mr Armstrong is a Senior Civil Servant and is currently employed as Head of Asylum Criminality Enforcement Policy within the Home Office. His grade is SCS(1), Grade 5. His written statement explains the role of the Border Agency. He also explains how immigration law and policy involves treating some people differently to others. He goes on to state and claim that the Equality Act 2010 does not, and did not, "override" provisions and other primary legislation or requirements imposed at Ministerial level by virtue of enactments which discriminate on the grounds of nationality. In this respect, he refers to the terms of paragraph 17 of Schedule 3, to the Equality Act, which provides as did the former section 19D of the Race Relations Act 1976, as indicated earlier, that in exercising immigration functions, direct discrimination on grounds of nationality or ethnic or national origins is allowed if required by immigration legislation specified in the Act or by a suitable authorisation. Again, as indicated above, he admits that direct discrimination which is not authorised in one of those ways is unlawful.

59. Apart from the basic requirements imposed by the 1971 Act and by the Immigration Rules, he claims that along with the Border Force, the Border Agency has a

legitimate need to prioritise its resources on the basis of nationality in the way in which immigration applications for nationals of certain countries are processed. He maintains, however, that nationals of certain countries pose and present a "greater risk" to UK immigration controls than others.

60. At paragraph 4.1 of his first witness statement, he states that authorisations are subject to review by the Independent Chief Inspector of Borders and Immigration (the Chief Inspector). This is a statutory appointment, independent of the Home Office, one of the roles of which is to consider and make recommendations about the compliance on the part of the Border Agency and the Border Force with regard to discrimination and equality law. The functions of the Chief Inspector are to consider and make recommendations about the efficiency of various aspects of the Border Agency and the Border Force and their work.

61. According to Mr Armstrong, the Chief Inspector gave his view in a November 2010 report (which dealt with Abu Dhabi and Islamabad) that nationality-based differentiation in the evidential requirements which apply to entry clearance applications, did not comply with the equality legislation. This recommendation led to the formation of a working group to consider what was required in terms of specific exemptions from the Equality Act; the authorisations were made in February 2011. These, he says, replaced and extended the preceding authorisation from 2004 which applied only to border control and removals. These later authorisations made some changes to the terms of the former authorisation.

62. Mr Armstrong explains that there are three principal functions and operational areas which the authorisations are intended to facilitate. These have regard to entry clearance which deals with applications to travel to the UK for whatever reason and which are given scrutiny by Home Office officials working overseas, secondly, border checks in the UK or in certain specified locations, such as Calais, and thirdly, removals from the UK of those who have no right to be in the UK on the grounds of unlawful entry. It is the first two categories which are in play in the present appeals.

63. Mr Armstrong explained that the authorisations permit lawful differentiation on the basis of nationality when scrutinising applications for entry clearance and transit visas, as well as applications for leave to enter at the border, as well as with regard to the prioritisation of removals. Without the authorisations, differentiation of this sort would be prohibited under the provisions of the 2010 Act, a point already made on more than one occasion in this judgment. He stresses, as has already been also stressed in this judgment, that the authorisations do not affect the position that all immigration applications are determined against the background of the same basic substantive rules and qualifying criteria. The authorisations relate only to the process of prioritising cases, permitting more rigorous scrutiny of some nationals provided

they are on a list, or in the case of this appeal, the lists which are personally approved by the Minister.

64. He explains how the process works. On the basis that certain nationality groups present greater risks than others that factor will yield the need to ask the applicants to produce additional evidence or to ask them to submit to interview. In most cases, it will simply be the need for additional questions, or requesting the production of additional documentary evidence. A typical example of additional information would be evidence of employment and academic qualifications. In other cases, interviews may be required.

65. Mr Armstrong stressed that in principle, all arriving passengers are subject to the same security and identity checks, regardless of nationality but beyond this, officers will determine the extent to which further examination is required to verify a passenger's intentions and *bona fides* through questioning and the need to produce documents.

66. He confirmed that there are two separate lists, the one being for entry clearance referred to briefly as the ECL, and the second for border control and removals, referred to as the BCRL. The need for two lists is because the patterns of immigration abuse will not be identical between nationalities and because some nationalities pose a greater degree of risk at the border since they are not subject to visa requirements to visit the UK. As has been pointed out with regard to the terms of the Equality Authorisation, the listed nationalities are assessed on the basis of statistics and/or intelligence. The lists are drawn up and forwarded to the Immigration Minister for approval and reissue on a quarterly basis. It is the Chief Inspector who subjects the list to scrutiny since he receives a copy of the latest lists each quarter, together with the supporting intelligence assessment. He claimed, and there is no reason to doubt this, that the Home Office continues to keep the authorisations under review.

67. Mr Armstrong then specified the criteria used by the Border Agency's Strategy and Intelligence Directorate to assess the original decisions and the relevant breaches of the immigration laws and rules which then find themselves reflected statistically in the lists. He listed ten matters which in particular are analysed, namely forged documents presented on arrival, arrivals without travel documents, refusals of entry on the basis of asylum, refusals of entry on the basis of non-asylum, refusals of extension of leave or settlement, refusals of refugee status, the service of illegal entry papers, workers in breach or overstaying their working permission period, absconders and visas refused, but only with regard to the ECL, not with regard to the BCRL.

68. He reiterated the thresholds which are articulated in the authorisations themselves. There is first the numerical threshold of identified abuse and there is secondly the need to ensure that the volume of abuse identified is proportionately significant when compared to the number of persons of that nationality admitted to the UK. He also pointed to the additional condition attached to the authorisations, namely that countries were included where there was specific intelligence suggesting a significant number of persons had breached, or would attempt to breach, the immigration controls and/or the Immigration Rules. The final condition was based on the statistical thresholds being met within a timeframe shorter than a single month.

69. Much of what Mr Armstrong said is confirmed by the terms of the authorisations themselves. Paragraphs 7 and 8 of the Equality Authorisation state that the lists must be approved personally by the Minister in order to ensure political oversight and accountability at the highest possible level. At paragraph 10.1 of his first witness statement, Mr Armstrong stressed that in considering whether the list should be disclosed, it was relevant to address the question of whether it would be possible for an individual to use publicly available data to obtain an idea of the nationalities contained on the list. He confirmed that the Home Office did publish a range of immigration statistics, much of those statistics being broken down by country as well as by category and some of the statistical data used in compiling the list would therefore enter the public domain in due course. That data would include figures for refusals of extension of leave and settlement, refusals of refugee status and visas refused. However, he denied that it would be possible to "reverse engineer" the lists using the authorisations and publicly available information. Even if it were, the exercise could only be taken some time after a set of lists had ceased to be current.

70. In the interval between the two oral hearings, Mr Armstrong served and filed a second witness statement. In it, he revisits the underlying legislative background. He describes the period from 1999 to 2010 as one of "considerable legislative activity in the field of equality law", both domestically and at the European level. He said that the key event which resulted in the extension of domestic UK legislation prohibiting unlawful race discrimination was the murder of Stephen Lawrence in 1993. The Race Relations Act 1976 was therefore extended in respect of the exercise of all public functions. There was therefore what he called a default prohibition on all discrimination that was disapplied in certain contexts. That was to be contrasted with the approach taken in other countries whereby discrimination is prohibited on a more targeted context-specific basis. There needed to be safeguards in the legislation to avoid misalignment between the extended Race Relations Act 1976 and the effective operation of the UK system of immigration control. The relevant Bill, being the Race Relations (Amendment) Bill, therefore made provision for the system of Ministerial authorisation, allowing immigration staff to discriminate on the grounds of nationality

or ethnic or national origin. This was followed by the Race Relations (Amendment) Act 2000 which introduced amongst other things sections 19B and 19D into the 1976 Act with effect from April 2001 when the first authorisations were made. The new provisions, as had been seen, were then subsequently replicated in the 2010 Act which consolidated all mainland UK equality legislation.

71. The second witness statement was clearly prompted by the questions put to Mr Armstrong in cross-examination during the first oral hearing. He accepted in his second witness statement that the approach eventually adopted by the UK Government was neither mandated, nor required as a matter of European Union law and therefore was not adopted by many, if any, fellow members of and within the European Union. He did however point to two Council Directives which have implemented the principle of equal treatment between persons, irrespective of racial or ethnic origin and which in other cases have established a general framework for equal treatment in employment and occupation. The UK Government has taken action to transpose these particular directives into domestic UK law and the net result was, in the event, the Equality Act 2010. He stressed however that the Directives did not apply, and do not apply, to the exercise of immigration or border control functions. He also accepted that the UK legislation has therefore gone further than required by European Union law in prohibiting discrimination in the widest range of fields including law enforcement. As he says at the end of his second witness statement:

> "It is because the UK's controls in this area are so comprehensive that certain limited exceptions are required for some public functions such as immigration control where the achievement of equality is not always the overriding policy or practical consideration."

72. The next relevant factual matter relates to the number of countries on the list or lists which have been the subject of the requests. In its letter to the Commissioner's office of 4 August 2011, the Home Office confirmed that at the time of the request made in relation to appeal 265, ie May 2011, there were 39 countries on the list which permitted greater scrutiny of applications for entry clearance, ie the ECL, 37 on the list which permitted greater scrutiny of entrants at borders, ie the BCRL. It was then confirmed that 44 countries were on either or both lists.

73. This particular issue has been addressed in far greater detail in the evidence of the other witness who gave evidence on behalf of the Home Office, namely Ms Susannah Simon. She has in the result provided two witness statements, both of which have been redacted in part and both of which also exhibited redacted material. She was cross-examined at both oral hearings. Inevitably, she gave part of her evidence in closed session.

74. Ms Simon is not a Civil Servant within the Home Office. She is currently employed as Director Migration within the Foreign Office. As such, her grade is SMS2 which denotes membership of her department's Senior Management Structure. It is equivalent to a Grade 3 level post within the Senior Civil Service. She was appointed to this grade in January 2009 and appointed as Director Migration in April 2011. The Tribunal unhesitatingly is of the view that it found her to be an impressive witness, able to deal clearly and concisely with questions put to her in cross-examination both by the Counsel for the Commissioner and by Leading Counsel on behalf of Mr O. The Tribunal is extremely grateful for the time, effort and energy which she and her colleagues have devoted into preparing the evidence which was presented to the Tribunal over the two sets of oral hearings. It is fair to say as pointed out above that her first witness statement in effect responds to a position no longer adopted by the Commissioner, taking issue with the decisions formerly made by the Commissioner that there was a viable distinction between detriment and non-detriment countries. Overall, she refuted that distinction and said that there should be no disclosure whatsoever. Her first witness statement therefore pointed out that prior to the Decision Notices, the Home Office (and for this purpose reference will be made to the Home Office even though Ms Simon works for the Foreign Office) had not foreseen the possibility of partial disclosure and therefore had not addressed that issue in its dealings with the Commissioner. She produced a document which was inspected by the Tribunal in closed session and which was described as a Country Specific Analysis. This was called the CSA. Reference will be made to this document in the closed Annex marked "B" appended to this judgment. The CSA was in fact an expanded version of a table previously provided to the Commissioner. It was collated by Ms Simon's Directorate in consultation with the relevant desk officers within the Foreign Office. She confirmed that each desk had approved the final version of the relevant sections and that she had approved the final version as a whole. She claimed that the CSA reflected a consultation by her staff and herself on the UK's bilateral relations with each listed State, bearing in mind the interests of the UK abroad and the promotion and protection of those interests abroad. The CSA reflects the position that obtained as at the date of her witness statement. She admitted that matters could have changed since Spring 2011 when the request fell to be answered but she claimed that the position had not materially changed between the date of the CSA and the date of the original request in the previous year. The period in question was about 18 months. The date of her witness statement is 29 August 2012.

75. She added that this was not surprising given that the UK's bilateral relations with other States are long term and tend not to undergo radical change on a yearly basis. Any changes were recorded in the CSA itself. She did however appreciate that prejudice was a dynamic concept and that different levels of prejudice might occur at different times according to varying circumstances.

76. The thrust of her witness statement, and of her evidence, was that full disclosure of the list would have caused material prejudice to the UK's relations with the countries featuring in that list or those lists in 2011 and that disclosure, as at the date of her witness statement, namely August 2012, would have the same effect. The Tribunal infers from her evidence at the second hearing that the position has not changed in any material respect between the date of the original hearing in September 2012 and the adjourned hearing in March 2013.

77. She therefore approached the issues and matters laid out in her witness statement in effect in an eight-part manner. The first part dealt with an overview of prejudice to international relations. The second dealt with the principle of grouping countries together. The third addressed the reduced effectiveness of the UK's wider diplomatic efforts. The fourth dealt with the risk of reciprocal action. The fifth dealt with damage to cooperation on return of individuals who did not have the right to remain in the UK. The sixth dealt with damage to trade and investment interests. The seventh dealt with partial disclosure and is now of academic interest. The final section dealt with the public interest generally.

78. As to prejudice generally, she emphasised the fact stressed by Mr Armstrong that the authorisations operated at three key stages, namely with regard to entrance clearance, border control and, finally, removals. There were 39 countries on the ECL with regard to the three month period ending December 2010 and there were 37 countries with regard to the same time period on the BCRL. Her closed evidence contained the relevant statistical analyses reflecting the methodologies set out in the authorisations and justifying in the course of the criteria specified in the authorisations the final numbers of countries appearing in both lists.

79. At paragraph 2.7 of her first witness statement, she, as well as Mr Armstrong, characterised the discrimination that could otherwise be said to have been conducted by immigration authorities as being "administrative or procedural in nature". She stressed a matter hopefully already made clear earlier in this judgment, namely that the discrimination here in question took the form of additional scrutiny and not the denial of entry or leave to enter where criteria for entry or leave were otherwise met. She admitted that anything that could be labelled or perceived as "racial discrimination" against particular individuals was and is "inevitably a matter of acute sensitivity from a diplomatic perspective". She therefore strongly endorsed the summary set out in the Grounds of Appeal which have been referred to and are set out in paragraphs 4.1 to 4.3 of the Grounds of Appeal, the essence of which is in the Tribunal's view reflected in the extract from paragraph 4.2 quoted above. In any event, her evidence as a whole also reflects the contents of those paragraphs.

80. She claimed that in terms of prejudice to international relations the impacts of full disclosure were likely to fall into four categories, such as to reflect the third, fourth, fifth and sixth elements of her eight-fold characterisation of the issues in her witness statement. They can be referred to shortly. As for the principle of grouping countries, she pointed out it was sometimes "sensible" to take a common policy approach to groups of countries that had similar or aligned interests or issues in a specific area. These can follow geographical, economic, or political similarities. The examples that she gave were the Association of Southeast Asian Nations known as ASEAN, and the Latin America and Caribbean Group, namely GRULAC. This meant that the release of information might well impact upon a group of countries, and not just the country whose identity alone might have been identified. That in turn would reduce the effectiveness and efficiency of the UK's diplomatic effort. To paraphrase her words, she said that the lists were an example of where it was sensible for the Government to take a common policy approach to a group of countries where the UK had interests in a specific area "but where confidentiality is also vital".

81. As for the reduced effectiveness of the UK's diplomatic efforts, she claimed that although many countries would be aware of the security concerns posed by their nationals, "some would be highly offended if the UK raised these concerns publicly". Many countries, she claimed, used visa and migration policy as a foreign policy tool. They would expect the UK to do the same. Some countries would perceive the lists as evidence of the UK treating certain nationalities unfavourably which would in turn damage bilateral relations and might at least cause an adverse reaction, even in the case of countries who accepted that the UK had to take a risk-based approach.

82. She stressed that in many cases the UK had no direct control over other regions or institutions. That meant that for there to be an effective UK foreign policy, reliance had to be placed on the UK's ability to influence other countries to act in alignment with the UK's own interests. It was therefore harder she claimed to influence a country if that country believed that the UK was not treating it as an equal.

83. She then reverted to the question of bilateral relationships working together in a multi-lateral setting, eg the UN or NATO. Sometimes, she claimed, the UK would have a relationship with a group of countries, for example, a regional trading block, as well as bilateral relationships. In her words, in paragraph 4.3 of her first witness statement:

> "If countries think we are treating them or their principal allies or partners unfavourably or not valuing them, they are much less likely to be willing to co-operate with us or support positions in the UK national interest".

She then turned to the risk of reciprocal action. She claimed that there would not only be a diplomatic slight should disclosure occur, but also possible retaliation, eg by the

application of similar measures to UK nationals applying for visas. She gave examples which were related in closed session. As indicated above, the Tribunal has no hesitation in saying that it in no way takes issue with Ms Simon on this given her experience and seniority within the Foreign Office and her direct knowledge of such matters.

84. She also pointed out that with regard to retaliatory diplomatic countermeasures, disclosure of the lists would also impair relations with the listed countries "in a subtler but nevertheless significant way". She characterised this as the possible likelihood of inclusion on the list as becoming "a bone of contention". This in turn would result in possible lobbying by the country affected for that country's removal from the list or lists, "possibly in return for co-operation or movement on some other issue". She added that many of the listed countries regularly raised the UK's visa service with Ministers and senior officials and disclosure could "create an additional distracting agenda item for them to raise and a new rationale for raising visas."

85. She then turned to the damage to cooperation on the return of individuals who did not have a right to remain in the UK.

86. This, she claimed, was an "important area of UK Government policy". Many of the countries on the lists she said were also priority countries for returns, and successful returns were, and are in turn, heavily reliant on the cooperation of the receiving State. The presence of a country on a published list could affect what she called returns cooperation. That in turn would be likely to affect the UK's security and law enforcement as returns would increase what she called the "pull factor" for people to arrive illegally or to overstay once their visa had expired. There would also be an undermining of the public's confidence in the immigration system as well as an increase in costs to the tax payer as greater numbers of returnees might then be held in detention centres for longer periods.

87. As for the damage to trade and investment interests, she claimed that they were "increasingly dominating the UK's bilateral relationships" in the world as a whole. These relationships she claimed went beyond traditional geo-political relationships. Some of the countries on the lists were examples of countries which held considerable commercial opportunities for UK companies. Those countries would be sensitive to how they were perceived in an international setting and any disclosure might well demonstrate unfavourable treatment and could be perceived as the UK valuing certain relationships more, or treating countries as unequal partners. She claimed that there would be an adverse effect on tourism in addition to trade and investment interests. Again, examples were given in closed session. She pointed to what she called permanent or temporary high value migrants and visitors who made

"a significant contribution to economic growth" by investing in business and bringing skills for the benefit of the UK generally.

88. Much of what Ms Simon said with regard to the risks of partial disclosure, if only as a matter of logic, bears upon the arguments she maintains in favour of non-disclosure for all the countries on the lists. Partial disclosure, she said, would also be detrimental to bilateral relations and similar reactions would occur in the case of partial disclosure as would happen were there to be full disclosure.

89. Finally, she turned to the public interest issue. She claimed that the public interest in maintaining the exemption for the disputed information in section 27(1) "strongly outweighs the public interest in its disclosure". This issue will be revisited below when considering the amended stance taken by the Commissioner. To be fair, Ms Simon did recognise that the interests of effective diplomacy and good international relations were one facet of the overall public interest and that the exemption in section 27(1) was not absolute. She took into account accountability, transparency and public engagement; she also attached weight to the importance of equality and diversity. She also took into account, as she put it: "the fact that the authorisations allow for a targeted derogation from important anti-discrimination norms". She was prepared to admit, however, that publication of the lists could be seen as prompting some countries to work with the UK to mitigate immigration risk; however, she said that even though that would be beneficial, it was on balance in her view "a remote prospect" and "the much likelier outcome is that the countries on the list would respond in a negative and not a constructive fashion".

90. Mr Armstrong was cross-examined on his first witness statement. The Tribunal did not find that any of the answers he gave in any way detracted from the basis of his evidence which was largely descriptive of the overall process, and more importantly, set out matters which were confirmed from other sources. In the Tribunal's view, it is difficult to see in what way Mr Armstrong's evidence could be said to be contentious. On the other hand, Ms Simon was subject to cross-examination by Leading Counsel on behalf of Mr O, as well as (initially at the first hearing) by the Commissioner. In her answers given in cross-examination at the first oral hearing she stressed that countries did not look at the matters which were under consideration in any form of rational or objective way: sometimes it was the persons whom she called the élite who might dictate a particular response. Nor was there, she claimed, any particular relevance attached to issues raised in relation to persons seeking asylum in the UK. Indeed, she added that very often the countries from whom asylum seekers came might well not be too concerned about their treatment by the UK. She gave examples of how what could be called blacklisting adversely affected countries other than the UK. As indicated above, this prompted the provision of a second witness statement

which will be studied in further detail below. As will be seen, the Tribunal does not attach much weight to the situations applying in other related countries, although the open evidence will be set out. The same reaction was also expressed by the Commissioner in his final written submissions. However, Ms Simon did actually articulate in her second witness statement examples of situations which demonstrated the sensitivity attaching to the substantive issues that underlie these appeals. In particular, Ms Simon rejected in cross-examination in her first session any suggestion that visa waiver lists were in any way relevant. Such lists were not relevant to the CSA exercise she and her colleagues had carried out. With regard to visa régimes, and visa waiver schemes, the Tribunal entirely accepts that on the evidence it has seen and heard the imposition of related requirements and of perceived unfairness can and could be said to have an adverse impact on international relations. However, again, on the basis of what it has heard, the Tribunal is equally satisfied that the relevant practices and procedures with regard to visa regimes and waiver schemes are more uniformly adopted and represent something which other countries are more used to. The criteria are of a quite different nature to those which apply in the present appeals.

91. Overall, the Tribunal did not find that any of the answers provided in open cross-examination in both appeal hearings in any way detracted from the thrust of her first witness statement, nor from the force and effect of the contentions that the countries featuring in the two lists would react in an adverse fashion were there to be disclosure. Fuller reasons appear in the closed judgment attached hereto as Annex B.

92. In her second witness statement, Ms Simon refers to the fact that at the first hearing, namely in late September 2012, the Home Office submitted on 28 September of that year, a note entitled “Home Office Note on Relevance of Practice in Other Jurisdictions” (the HO Note). She confirmed that she had contributed to the discussions that led to the production of the Note, and the Note overall reflected her views and the position of both the Foreign Office and of the Home Office. The said Note is annexed to her second witness statement. The Note reflected queries raised by the Tribunal at the end of the first day of the oral hearing, namely whether other jurisdictions differentiated on grounds of nationality. It also raised the issue if such other jurisdictions did so, whether such countries also maintained lists of nationalities liable to differential treatment. If there were such lists, the question was raised as to whether the lists were kept confidential and, finally, if the latter was not the position, had the absence of confidentiality caused prejudice to those countries’ relationships with other countries. The countries in question were Australia, Canada, Denmark, France and the USA.

93. The Note also pointed out that the UK had particular attractions as an intermediate and final destination by reason of its geographical location, relative wealth, relatively accessible language, relative tolerance to such matters as diversity and the multicultural makeup of the population. Much was to do with the UK's imperial and colonial history. This meant that as a result, the UK had particularly high levels of movement at and across its borders and it faced particular challenges in terms of immigration and asylum. Out of a hundred million passengers or more arriving per annum, there were at least twenty million who were subject to immigration controls. The Note therefore pointed out that factors of that type meant that there were countries who might be more affected by, or concerned about, and who might therefore react differently to inclusion on the type of lists here in question as opposed to any one or more of the five countries enumerated.

94. In Australia, the relevant department in charge of immigration matters is called the Department for Immigration and Citizenship in Australia, otherwise known as DIAC and the equivalent United States department is the Department for Homeland Security abbreviated as DHS.

95. In effect, those countries and their relevant departments were sent questions which reflected the contents of the Note and the questions which have been summarised above. Formal exchanges were made between the relevant departments in those countries, although sometimes the information was passed through conversations between staff in the respective countries themselves.

96. In her second witness statement, Ms Simon accepted that none of the countries involved "has an immigration system directly equivalent to the UK". She claimed that on the basis of the research done, all five countries embraced "the principle that immigration law should not discriminate between people on the grounds of nationality without good reason". Some countries, she claimed, based their assessment of visa applicants on asylum and immigration abuse statistics, such as Australia and Denmark. That practice was not carried out by the Home Office. She claimed that to publish such statistics would also be detrimental to the UK's international relations.

97. By default however she claimed that the UK did apply fundamental principles of non-discrimination to the exercise of its immigration functions and that the same were, as explained previously in the evidence, partially disapplied through the imposition of exemptions. The use of the Ministerial authorisation was again unique to the UK. She stated that in Australia there was no relevant legislation in the immigration context that prohibited discrimination based on a person being a national of a particular country alone.

98. In Canada anti-discrimination laws were applicable to immigration. In Denmark anti-discrimination laws applied to public officials in the immigration context, but differential treatment of different nationalities did occur in practice and was lawful provided it was objectively justified on risk grounds and prescribed by law or administrative guidance.

99. In France there was specific anti-discrimination legislation but the same did not apply in the field of immigration. The powers in France relating to border control visas had a constitutional basis and had to be in accordance with the transfer of powers under the so-called Schengen agreement as authorised by treaty and ratified in accordance with the French Constitution. In the United States, the Immigration Nationality Act stated in terms that there had to be no preference or priority afforded to any person and no discrimination against such a person with regard to the issuance of an immigrant visa on account of the person's nationality. There were, she claimed, no equivalent statutory prohibitions in other immigration contexts.

100. The countries in the research which was carried out did however provide examples of where they did make distinctions between nationalities as part of their decision-making process. This meant that, for example, in Australia with regard to Student Programs, different nationalities had to provide different levels of evidence to support a student visa application. The DIAC published the assessment level required for each country on its website. The DIAC however had not said whether publication of the student safe list was prejudicial to its international relations. The UK safe list is published as it is intended to be a beneficiary measure for certain applicants. However, according to Ms Simon, foreign Governments had raised objections that they were not on the student safe list to the UK Government. Australia also had a Visitor Program, the same was compiled by nationality and the data was published quarterly on DIAC's website. The Australian response was that no negative comment had been received from foreign Governments in relation to that data.

101. However, Ms Simon said that out of the examples provided by Australia, the Australian Visitor Program would appear to bear the closest resemblance to the UK's nationality list. It was however only possible to make very limited comparisons. The compilation of data produced by the DIAC with regard to the Visitor Program was referred to as the Modified Non-Return Rate, ie the MNRR. Ms Simon admitted that the MNRR data are a much simpler risk assessment than the data used to compile the lists which are in issue in these appeals.

102. In Canada, the Canadian Parliament had passed legislation allowing the Government to designate certain countries as "safe". This was for the purposes of asylum. According to Ms Simon, it appears likely that when the list is finalised, it will be made public. She claimed however that it was difficult to compare the impact of producing

"asylum safe country" lists on international relations with the impact of disclosing lists relating to visas and border checks.

103. With regard to Denmark, there was a system called the High Risk Asylum Group. In a visa memo published on 15 November 2011, visa applicants from different countries are subdivided into different categories by reference to various criteria. There were, she said, two main groups of high risk applications, namely high risk asylum applications and high risk immigration applications. The criteria for placing a country into the high risk group of asylum claims were, amongst other things, a higher occurrence of asylum seekers from that country and difficulties in returning nationals to that country. The high risk group comprised 15 countries and the visa processing procedures applied to applications from those countries were very strict. With regard to the high risk immigration group, there were 27 countries involved. The criterion for the inclusion of those countries was evidence that their nationals sought extensions to their visit visas.

104. With reference to the Schengen Visa Code, Member States such as Denmark and France are allowed to subject certain nationalities to a higher degree of scrutiny than others when considering Schengen visa applications. The EC Commission is not obliged to make the list of third countries public, only to inform all Member States. The Commission, however, does publish the overall list of all third countries where a Member State requires that central authorities are consulted during consideration of a visa application.

105. Reverting to the United States, there were numerical limits placed on the issuance of immigrant visas. There was, in addition, a Transport Security Administration screening list of 14 countries of interest where passengers travelling from those countries were subject to enhanced screenings. Ms Simon listed the countries in her second witness statement.

106. From the open portion of her second witness statement and as indicated above, the Tribunal accepts that the degree of light, or additional light, it throws on the issues before the Tribunal is limited. A number of conclusions however can be drawn from the description of Ms Simon's open evidence in her second witness statement and from the unredacted portion of her evidence in that respect. These conclusions reflect the most recent submissions made by the Home Office which the Tribunal is content to accept. First, UK approval to the relevant legislation and in particular to the authorisations arises out of a particular political and/or geo-political context. There is no evidence that it is either mandated or required by EU law. EU law does not extend anti-discrimination requirements into immigration controls. Second, enough has been said to note that none of the five countries which were here analysed in the Note has taken the same approach as has the UK. This is why the

Tribunal also accepts the Commissioner's contention that no other country surveyed has a directly comparable list or set of lists to the ones presently under consideration. Third, the fact that such countries do not have directly comparable lists does not mean that such countries do not exercise or practice differentiation on the grounds of nationality in the context of immigration control. Enough has been said to demonstrate that insofar as such differentiation is practised by any of the other countries, such country or countries reconcile doing so with those countries' more general anti-discrimination norms and rules by other means. Fourth, it is clear again, even on the basis of what is said in this open judgment, that nationality "lists" are in some way used by the five countries whose rules and practices were examined. Some such lists are published, whilst others are not. Fifth and finally, what is central to the Home Office's evidence in this case in the context of the authorisations is the special, if not unique, effect on other countries' reactions to UK policies by virtue of the UK's own particular blend of characteristics reflecting in turn its historic past, and the present mix of such elements as location, language, diversity, coupled with all relevant attendant economic, diplomatic and cultural factors.

107. The Tribunal entirely accepts the observation made by the Commissioner in his final written submissions that comparative law examples must always be handled with caution. However, even from the limited description set out in this open judgment (as distinct from the survey of her evidence given by way of redacted evidence in her second witness statement and covered in Annex B to this judgment), the Tribunal is entirely satisfied that, on the whole, it is clear that other countries do sometimes permit differential treatment of entrants from different countries for the purposes of immigration control. Equally, however, it is clear that no other country has enacted a statutory exception taking the form of authorised derogations from that country's anti-discrimination legislation in order to permit public officials to discriminate on the grounds of national origin for the purposes of immigration control. The Tribunal would accept that overall this shows that there is some force in attributing a degree of public interest reflecting the desirability of prohibiting discrimination under international law and in seeking to entertain, as much as possible, efforts to prevent discrimination. The issue of the competing public balance will however be addressed in further detail below.

John O

108. John O has also submitted a witness statement. He was not cross-examined. With all due respect to Mr O, his statement is in effect an explanation of the evolution of the relevant legislation which culminated in the authorisations which underlie these appeals. One of his principal contentions is that the effect of the authorisations, at least with regard to the one applicable in Great Britain, is that a person who has otherwise paid for his application, had that application examined and arrived in the UK "can then have that permission revoked simply based on their nationality". The existence of the lists sought to be disclosed means that permission can be cancelled at any time. In his words: "… this whole process is an affront to the rule of law": paragraph 11. Further exception is taken to paragraph 5(2) of the current Equality Authorisation. He then sets out a lengthy list of previous authorisations, commenting that the Home Office had not pointed to a "jot of actual evidence" that showed that international relations were damaged when any of the earlier authorisations came into force.

109. As indicated above, the Tribunal is faced with the general contention made by Mr O that both the authorisations and the lists purport to render lawful that which would otherwise be unlawful, ie that they represent, separately or together, an improper form of "authorised discrimination".

110. Quite apart from the fact indicated earlier that the content of such a submission is in effect an indirect claim that the authorisations and/or the lists should be the subject matter of some form of judicial view and thus beyond the remit of this Tribunal, the Tribunal nonetheless is grateful to adopt the following submissions put forward by the Home Office. First, as already indicated in this judgment, the authorisations relate only to what can be called matters of process such as examination, scrutiny, the gathering of information and prioritisation. They have no impact on issues of substantive entitlement or outcome. Second, it cannot be said that the authorisations create or confer any public law functions: they operate alongside and in connection with what the Home Office quite rightly describes as the exercise of certain freestanding functions. In short, they address and in the process, disapply section 29 of the Equality Act with regard to the exercise of those functions in accordance with the terms of the authorisations themselves. Third, following on from this last consideration, although it can be said that the authorisations prevent the application of section 29 of the 2010 Act in certain respects, they do not prejudice, let alone remove, a pre-existing right not to be discriminated against. They merely set out the limitations of that right. Fourth, and again by way of reflecting the second and third contentions just set out, the authorisations mean that certain acts will not be rendered unlawful as a consequence of or by virtue of section 29. This is not the

same thing as saying that every act carried out by virtue of the authorisations is thereby necessarily lawful, or may not be unlawful on other grounds, eg as a result of general public law principles.

111. As will be seen in a final section towards the end of this judgment, some of these principles were revisited at the conclusion of the second appeal hearing by Leading Counsel on behalf of Mr O and will be readdressed accordingly.

112. Overall, the Tribunal agrees with the Home Office in its initial written submissions. Much, if not all, of what Mr O states in his witness statement is highly contentious. In the Tribunal's judgment, the issues he raises are not material either to the engagement of section 27, or arguably even to the public interest balancing test that needs to be conducted.

113. As noted above, Mr O contends in his Notice of Appeal that the Commissioner erred in making the distinction between detriment and non-detriment countries. He also claimed that the Commissioner failed to issue or make a proper "direction" on the meaning of "prejudice". As indicated above, a specific basis for Mr O's appeal is that the undisclosed information relates to state discrimination on the grounds of race and that non-disclosure "actively frustrates" Parliament's intention that a discriminated migrant should be able to appeal to the relevant Immigration Tribunal and that the prejudice in question relates more to migrant nationals of the State than to the actual States themselves.

114. For the sake of argument, the Tribunal is prepared to accept that these contentions made by Mr O in his written statement go to one or more of the specific bases outlined in the preceding paragraph. However, the Tribunal is entirely satisfied that such contentions are, as put forward by Mr O, totally answered in the following manner by the Home Office.

115. First, Mr O takes issue with the apparent right of appeal against the refusal of visas by virtue of an order made under the Equality Act 2010. He quotes a passage from a debate in the House of Lords in support of his contention that there was a removal of such a right and such a removal was inadvertent. The Home Office points out that some appeals can still be brought before the appropriate Immigration Chamber in the First-Tier Tribunal. It points out that primary legislation will be required and as at the Autumn of 2012, the intended vehicle for the relevant correction to amend the position was the Crime and Courts Bill. This reflects a refutation of any suggestion of a Parliamentary or Governmental conspiracy in the way alluded to by Mr O. In any event, the Tribunal sees no relevance between what at most would be the basis for some form of judicial review on the one hand, and on the other, the only exercise with which this Tribunal is concerned, namely the engagement of the operation of section

27 and the relevant public interest balancing test. As Mr Armstrong points out in his second witness statement, the relevant authorisations have been properly implemented.

116. Next, Mr O contends that the authorisations provide for arbitrary cancellation of the leave to enter. The Home Office repeats matters already set out in this judgment. The power under paragraph 4 of the Equality Authorisation can only be exercised first before the individual arrives in the UK in accordance with immigration rules and, importantly, as a prelude to a request for information and documents under the relevant order, namely the Immigration (Leave to Enter and Remain) Order 2000. The Home Office points out that whether leave to enter is then given will depend on the consideration of the information and documents available and the immigration rules, not on the authorisations or on the lists. This too has been mentioned above. In addition, as can be seen from the authorisation quoted in this judgment, paragraph 5 does not allow for arbitrary removal or detention on grounds of "race": the only criterion is that of nationality. Moreover, it only applies where an individual is liable to be examined under the Immigration Act 1971, Schedule 2, paragraphs 2 and 2A. Removal will only then be possible if the individual has also been refused leave to enter under the 1971 Act, Schedule 2, paragraph 6. Even then, detention will only be possible pending an examination and then only if there are also grounds to believe that the individual is at a high risk of absconding or may not comply with the terms of temporary admission.

117. Mr O sets out a list of previous authorisations. The Home Office claims these are, or were, qualitatively different to the Equality Authorisation and the Northern Ireland Authorisation. None has caused damage to international relations. The Home Office contends that the concern of most of these authorisations as listed by Mr O is, or was, with asylum applications. Enough has been said in this judgment to show that asylum applicants fall into a different category from those travelling for business, studies, visits or other non-asylum purposes. The authorisations quoted by Mr O are also to do with the verification of the origins of the asylum applicants through tests or other analyses. A number of the authorisations listed by him are no more than re-issues of previous authorisations, some being concerned with ethnic or national origins, and not nationality, and some being benevolent or permissive in their effects. The Home Office claims, and the Tribunal duly accepts, that there is no comparison between the authorisations listed by Mr O on the one hand and the two authorisations in question in this appeal, on the other. It follows that the issues raised in the CSA put forward by Ms Simon are simply not engaged. In the period prior to the resumed oral hearing of the appeal, and according to the Home Office, two further authorisations have been made under the Equality Act. They deal first with the issue of more favourable treatment of certain Syrian nationals applying for leave to remain,

and secondly, with language testing to assist in determining the national origin or nationality of certain asylum claimants. The Tribunal would accept the Home Office's characterisation of these two authorisations as being, as in the case of the others cited by Mr O, "qualitatively" distinguishable from the authorisations related to the instant appeals.

118. Finally, Mr O refers to reports of the Chief Inspector. He claims that in some way the Chief Inspector's reports confirm that discrimination is being carried out in practice. In particular, he says that there was a global review of entry clearance decision-making held between December 2010 and June 2011. That review conducted by the Inspectorate found that in 50% of cases from certain specified areas in the Middle East and the Indian sub-continent, there were errors in the way evidence was assessed when deciding whether or not to grant entry clearance permission. These, Mr O claimed, were not errors, but examples of active discrimination based on the Equality Authorisation. The net claim made by Mr O is that immigration officers have thereby been abusing their powers in discriminating against individuals "for no good reason". He claims that this "lack of transparency alone makes the system wrong". He claims that the Inspector's Reports show "nationals of particular countries are often refused on illogical or unfair grounds".

119. The Home Office contends that the said reports, most of which pre-date the authorisations and the lists here in question contain "almost no finding of discrimination". Furthermore, Mr O's "fear" that references to administrative errors were "examples of active discrimination based on the current authorisation" is claimed by the Home Office to be "groundless". The Tribunal is not minded to revisit this area in any detail. The Home Office points to errors of description made by Mr O in his witness statement with regard to certain reports that he specifically mentions. In particular, a report that is mentioned at paragraph 22 was based on a file sampling covering entry clearances made between 1 July 2009 and August 2010. At paragraph 21 of the report by the Inspector, according to the Home Office, the only finding of discrimination led in fact to the issue of the authorisations and the lists in their current form. The Home Office also points to certain passages which are misquoted from the same report, the misquoting being done by Mr O. The Tribunal is not minded to accept any of the contentions put forward by Mr O in this particular regard even if they were regarded as relevant. The Tribunal is not concerned with alleged errors in the Inspector's Report: it is concerned simply with the proper operation of section 27 on the facts of this particular case.

<u>The issues</u>

120. Prior to the formal indication made by the Commissioner prior to the second oral hearing that he would no longer resist the Home Office's appeals, the real issues

have narrowed somewhat. However, they can still be enumerated and used as a template for this judgment, even in the light of the Commissioner's amended stance.

121. The first question is whether full disclosure would, or would be, likely to prejudice international relations. The second issue is that if it would, or more accurately would have, as at the time of the request, does it follow that section 27 is fully engaged in connection with the lists in their entirety?

122. The third issue stems from any finding that full disclosure would not cause prejudice and is put as follows, namely would there be any part of the lists where disclosure would, or would be likely to prejudice international relations?

123. The fourth issue goes to the public interest balancing test required under FOIA, particularly that required by section 2(2)(b) of the Act. The fourth issue again addresses full disclosure and raises the question whether, if full disclosure would, or would be likely to prejudice international relations (partial disclosure no longer being possible), does the public interest in maintaining the exemption under section 27 outweigh the public interest militating in favour of full disclosure?

124. There were two other issues which were argued, at least on paper, and raised initially based on the possibility of partial disclosure. These questions have been overtaken by events in the form of the amended stance adopted by the Commissioner. Nevertheless, the Tribunal has considered separately whether it is appropriate in the light of all the evidence to disclose the identity of any one country or more than one country in the lists and therefore that has been considered, but for obvious reasons, the basis for the stance eventually adopted by the Tribunal in upholding the Home Office's appeals can only be dealt with in the closed judgment which is annexed to this judgment.

Prejudice

125. It has been noted above that the required degree of prejudice is to the effect that it should be real, actual or of substance: see *Hogan v IC supra*, especially at paragraph 30. There must also be a causal relationship between disclosure and the prejudice. The burden is on the decision-maker to demonstrate that such cause or relationship exists between the potential disclosure and the prejudice. The Tribunal is in no doubt that this relationship has been amply established in this case by the Home Office and in particular in the form of the evidence given by Ms Simon.

126. In *CAAT v IC* supra in particular at para 21, it was held by this Tribunal that prejudice can be real and of substance if it makes international relations more difficult or calls for a particular diplomatic response to contain or limit damage which would not

otherwise have been necessary. There need not be demonstrated any actual harm. The risk of an adverse reaction by another State is enough, even if the precise reaction of that State would itself not be predicted or predictable. As it was put in that case: "The prejudice would lie in the exposure and vulnerability to that risk". That finding was reflected in the argument made in the present appeal based on Ms Simon's evidence that the disclosure here would constitute a bone of contention with other countries and would use up oxygen, to use the phrase that was employed: this referred to the difficulties which would arise and which would need to be worked through and displace attention that might otherwise be devoted to other more important diplomatic and related issues.

127. The expression "likely to prejudice" entails something more than a ypothetical or remote possibility: it must be a real and significant risk: see *John Connor v IC supra* especially at 15: see also *APPGER v IC & FCO* (EA/2011/0049-51).

128. Throughout the appeal, the Home Office has contended that the Tribunal should only consider the question of whether section 27 is engaged or not with full disclosure in mind.

129. The all or nothing approach has remained for a while challenged by the Commissioner. The Commissioner has however changed his position. Given the Tribunal's findings that in the result the lists should not be disclosed, it is not necessary further to explore this issue and the Tribunal proposes to say nothing further on this point.

130. In the light of the evidence of Ms Simon and Mr Armstrong, even on the basis of those portions of their evidence summarised in this open judgment, the Tribunal is entirely satisfied that the requisite degree of prejudice is made out. More particularly, the disclosure of the lists not only would be likely to, but would in fact, prejudice relations between the UK and other States within the meaning and ambit of section 27(1)(a) of FOIA. More specific reasons are set out in the closed Annex to this judgment. The Tribunal entirely rejects any arguments such as that put forward by Mr O that the evidence given by Ms Simon constitutes or reflects conjecture as distinct from evidence clearly demonstrating the type of prejudice arising under section 27. It follows that the Tribunal answers the first question set out above by determining that full disclosure would result in the prejudice said to arise by the Home Office. Second, the Tribunal unhesitatingly finds that section 27 is fully engaged, if the same is not already clear in this judgment.

The balance of the public interests

131. The Tribunal is mindful of six principal factors which apply in relation to the exercise involving the balancing of competing public interests, at least in this case.

132. First, there is a clear public interest in the disclosure of information held by a public authority: see especially what could be regarded as a leading case in this area in the High Court, namely *OGC v IC* supra, particularly at paragraph 65 and following.

133. Second, there is no presumption of disclosure: see again, *OGC v IC supra*, especially at paragraph 79, approved in turn in *HMT v IC* [2010] QB 563 at 38.

134. Third, the relevant time at which the balancing exercise should occur is at the time when the requests were made, ie in Spring 2011. The Tribunal is not persuaded and has not been given any evidence to suggest that the evidence that it has considered, even over the time period which has elapsed between the two oral hearings, has done anything other than focus on that period.

135. Fourth, regard should be had to any and all public interest factors reflected in or set out in the particular exemption in question.

136. Fifth, the request should be judged objectively.

137. Sixth, so-called standard or generic-type public interest arguments, eg transparency, must be fairly considered even if there is a danger of their being viewed or discussed in some form of formulaic manner.

138. The Tribunal in these appeals takes into particular consideration the following factors in assessing those elements of the public interest which can be said to militate in favour of non-disclosure. First, it is clear from the evidence of both witnesses that the authorisations themselves provide ample information about the criteria which are employed with regard to the computation of the lists. The Tribunal attaches particular weight to the fact that by such means the public can see the precise mechanism by which the lists are compiled. In the Tribunal's view, this factor goes a long way towards informing the public about how the "list" system operates without trespassing upon matters of greater impact, namely the sensibilities of those countries or other entities that might be offended in the way suggested by the Home Office as voiced by the evidence of Ms Simon.

139. Second, and coupled with the above factor, the public is provided with what Mr Armstrong in his first witness statement calls a public explanation of the lists. At paragraph 11 in his first witness statement, he confirms that the release of the authorisations in February 2011 was made by ministerial announcement in the House

of Commons and in the House of Lords. Letters were also sent to the Chief Inspector and to the Chairman of the Equality and Human Rights Commission, as well as to the Immigration Law Practitioners' Association. The response by this last named association has already been referred to.

140. Third, the Tribunal is particularly impressed by the effect of an issue, again already referred to above in this open judgment, namely the precise nature and ambit of the form of "discrimination" which is in reality in play. As Mr Armstrong puts it in his first witness statement, the form of discrimination reflected in the authorisations is of a limited and "procedural" nature. Substantive rights remain unaffected. Comments have already been made about this in this open judgment.

141. Fourth and related to this third fact, the fact remains that oversight and scrutiny of what can be called the authorisation process is in the hands of the Chief Inspector and in due course, if necessary, by use of an appeal before the judicial tribunal or tribunals.

142. The Tribunal would conclude this analysis by stating that any reliance on article 8 of the European Convention of Human Rights is more than adequately addressed and dealt with by either of the above factors, in particular, the third and fourth factors which have just been set out.

143. The Tribunal now turns to those factors which could be said to militate in favour of disclosure.

144. Both the Home Office and Mr O stress the need for transparency and accountability, coupled with the desire to induce public participation and the improvement of the quality of decision-making. There is, it is claimed, a particular need to know as much as possible about the authorisations so as to allow a greater consideration of why and how less favourable treatment is afforded on the grounds of national origin which, it is claimed, might otherwise be unlawful or possibly unlawful under the 2010 Act.

145. In addition, it can be said that the interests of effective diplomacy and good international relations are important factors, particularly in the relationship between those desired aims and the immigration policies. Reliance can also be placed on the importance of equality and diversity, again, in the particular context of the fact that the authorisations and their effect cause there to be a departure from the normal rules and procedures which govern diplomacy and international relations.

146. The Tribunal pays due and careful attention to the fact that in his final written submissions put in prior to the second oral hearing, the Commissioner stated that he did not doubt that the public interest in the issues raised by these appeals is

"considerable". He pointed out that discrimination on the grounds of national origin is, as has been noted in general terms already, contrary to international law drawing particular attention to Article 2 of the Universal Declaration of Human Rights as well as the specific provisions under UK law, already outlined in this judgment. Moreover, he points to the self-evident fact inferable from Ms Simon's own evidence, namely what the Commissioner calls an antipathy to any form of official discrimination. Such antipathy, the Commissioner claims, is certainly not confined to the UK. Virtually every country, including those on the lists, would or would be likely to take exception to evidence that the UK practices discriminatory activity in some shape or form.

147. The Tribunal pauses here to note related observations made by the Commissioner with regard to the HO Note discussed at length above in relation to Ms Simon's second witness statement as well as his remarks with regard to the Home Office's researches on the relevant laws in the five countries forming part of the research carried out by Ms Simon and her colleagues, namely Australia, Canada, Denmark, France and the US. The comments made by the Commissioner very much reflect the Tribunal's own views which have also been expressed above, namely that comparative law examples should, as a matter of principle, always be handled with care.

148. The Commissioner points out that while other countries do sometimes permit differential treatment of entrants from different countries for immigration control purposes, no other country has enacted what the Commissioner calls a statutory exception to its own anti-discrimination legislation in order to permit public officers to discriminate on the grounds of national origin for immigration control purposes.

149. The Tribunal notes that characterisation but is not minded to place quite the degree of emphasis on it as a factor militating in any material way in favour of disclosure if that is what the Commissioner seeks to do. The fact remains that the Commissioner has quite clearly altered his stance in the way already indicated in this judgment. Enough has been said to show that the criteria which govern the manner in which the lists are compiled are publicly available. Moreover, the lists *per se* in no way intrude upon any other avenue, eg by way of appeal or review, otherwise available to a person whose rights are otherwise prejudiced by virtue of the processes reflected in the authorisation. The Tribunal is of the firm view that it is simply not appropriate to say that those avenues are in some way barred or in any way otherwise adversely hampered by virtue of the fact that the State of origin appears on a particular list. It follows that the Tribunal finds that no part of the lists can be published without there arising the type of prejudice contended for by the Home Office. As with the fourth issue, the Tribunal finds that the public interest militates in favour of total non-disclosure.

Mr O's final submissions: the rule of law

150. At the conclusion of the adjourned hearing, Counsel for Mr O revisited an argument that could perhaps be said to have been behind or inherently reflected in some of the submissions made by Mr O in his witness statement and already addressed in this judgment. Alternatively, if such an argument were not be so regarded, it certainly could be viewed as an important component of the Mr O's overall contention that the public interest balance reflected in section 27 militates firmly, if not decisively, in favour of disclosure.

151. Given the importance of this issue, the Tribunal invited the parties to file further written submissions. It is grateful to the parties for their efforts in that regard.

152. As it is put in Mr O's final Note, the lists, either by themselves, or in conjunction with the authorisations, constitute an instrument or instruments which defined the incidence of legal or equitable rights, duties or obligations such as to make them properly amenable to the rule of law, in particular the requirements of ascertainability and certainty. Put shortly, maintenance of the secrecy of the list or lists is, as it is put in the Note, "irreconcilable with the rule of law".

153. The Tribunal has no hesitation in dismissing this argument on the assumption that it was relevant to the issues on the appeal. As has been indicated already in this open judgment, it is not part of the Tribunal's function to entertain public law arguments of a type which are properly the subject matter of decision in the civil courts or in other tribunals. However, there are other more cogent reasons in the Tribunal's judgment for dismissing this contention even on the assumption that it could be said to intrude on the appropriate public interest balancing exercise.

154. First, it is clear from Mr O's contention as described above that it depends on showing that the lists and/or the authorisations are instruments which affect the types and range of rights which are referred to above. Mr O refers to a number of authorities which purport to show that those instruments which are in issue in these appeals, in particular the lists, necessarily entail and impinge on obligations reflected in or which arise as a consequence of the relevant authorisations.

155. The Home Office, rightly in the Tribunal's judgment, points out that some documents which affect or define legal or equitable rights, liabilities, duties or obligations are published whilst others are not, eg wills, certain policies and military rules of engagement, etc. Indeed, Mr O himself in his Note recognises that documents which set out policies and guidance are often not published. At paragraph 2 of his Note, Mr O appears to accept that what he calls a statement of policy, or sets of instructions and guidances need not be published.

156. The Equality Act has been referred to above with regard to Schedule 3 , in particular paragraph 17(4)(a) where the expression "a relevant authorisation" is defined and described as being:

> "… a requirement imposed or express authorisation given by a Minister of the Crown acting personally and with regard to a particular case or class of case."

There is no mention of any need to publish such a requirement on the basis of the statutory language. It follows that an authorisation could be communicated orally and/or urgently "with respect to a particular case …"

157. The Tribunal would agree with the Home Office that it is impossible to regard such language as necessarily prescribing that an authorisation be formally published, eg by way of a statutory instrument.

158. In addition, there is nothing in the Equality Act which suggests that individuals seeking either entry clearance or leave to enter should necessarily know in advance whether they may be subject to less favourable treatment on the grounds of nationality or ethnic or national origin. There appears to be nothing which prevents the Minister from acting, in effect, on a case-by-case basis and in this respect the Tribunal again refers to the terms of paragraph 17(4)(a) and to the express reference to "a particular case".

159. As can be seen from the way in which Mr O's argument is formulated, it is critical to consider whether the authorisations and/or the lists are instruments of the kind which Mr O contends for.

160. Again, as has been pointed out in this open judgment and reflected in the evidence of both witnesses, the authorisations are concerned only with issues of process and procedure. They are not of themselves matters which determine whether entry clearance or leave to enter should be granted or not. As the Home Office, again, rightly in the Tribunal's judgment, points out, the authorisations provide only that certain less favourable treatment will not constitute discrimination for the purposes of section 29 if such treatment is exercised or undertaken on the grounds of nationality or ethnic or national origin.

161. On the assumption that the only "right" in play is a legal right not to be discriminated against contrary to section 29, the authorisations "affect" such a right only to the extent that they prescribe or delimit the true scope of any such right.

162. The Tribunal has indicated in this section of the present judgment that it will assume that Mr O's present argument can be said to relate to the public interest balancing

test. However, in the Tribunal's judgment, there are grave, if not insuperable difficulties, even with regard to the making of that assumption.

163. Non-publication is said to be contrary to the rule of law. However, in the Tribunal's judgment, such an argument would only be relevant in relation to the public interest balancing test in the case of a qualified exemption such as section 27 if the disputed information disclosed, or arguably were likely to disclose, some illegality or unlawfulness. Here, it is self-evident even on the basis of this open judgment, that the disputed information which is sought in this case does nothing of the kind.

164. In addition, and reflecting the principles already referred to that the Tribunal cannot carry out some form of judicial review, Mr O's contention necessarily invites the Tribunal to find or declare that non-publication of the lists is, in essence, unlawful. Such a course would contravene the well known constitutional principles referred to in such cases as *Hoffmann-LaRoche v Secretary of State for Trade and Industry* [1975] AC 295, in particular per Lord Diplock at page 366A-C.

165. Furthermore, it is clear from the preceding paragraph that Mr O is also inviting the Tribunal to fashion an appropriate remedy to accompany the invitation he makes for the Tribunal to determine that such lists are unlawful by means of an order for publication. Such an order would in effect be a remedy not unlike an order for mandamus.

166. On a related note, reference has already been made in this judgment to the inability on the part of Mr O to rely on article 8 of the European Convention on Human Rights. He claims that a removal order would infringe the right to a private and family life. The Tribunal finds this argument difficult, if not impossible, to follow. The authorisations of themselves have nothing to do with any order for removal. Enough has been said to show that they address only the need to consider such matters as additional examination or further scrutiny.

167. Article 8 in its terms and effect necessitates the taking of a step which constitutes a *prima facie* interference with an individual's article 8 rights, in particular, whether the resultant impact could be said to attain the necessary "level of seriousness". Article 8 also entails the need to show that such interference is not in accordance with the law or that such interference is unjustified and/or disproportionate in the interests of national security, public safety or the other major eventualities listed in article 8(2).

168. The Tribunal finds it impossible to see how the application of the authorisations would or could entail an interference with an article 8 right in the light of the facts and matters set out in this judgment. Moreover, though he may be the cross-appellant in these appeals, Mr O is not a victim of an alleged unlawful act and would appear on

the basis of the evidence put before the Tribunal not to be a person capable of presenting a claim for interference under section 7(1) of the Human Rights Act 1998.

Conclusion

169. For all the above reasons the Tribunal allows the Home Office's appeals, dismisses Mr O's appeal and makes the decision reflected in the paragraph at the beginning of this judgment, in effect concluding that there be total non-disclosure with regard to all the information that is the subject of the relevant requests in both Decision Notices.

[Signed on the original]

David Marks QC
Tribunal Judge

10 April 2013

Corrections made to Decision on 18 April 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

JOHN O v HOME OFFICE

ANNEX A: Open judgment

1. As indicated in the main judgment in these appeals, Mr O by Leading Counsel, contended at the outset of the entire appeal hearing that the Home Office could only introduce into evidence a closed bundle consisting principally of the disputed material if Leading Counsel for Mr O on giving certain undertakings to the Tribunal and to the other parties was also given access to the closed bundle, and secondly, that the Home Office as the relevant public authority could in addition to providing evidence by its witness or witnesses provide evidence in a closed sessions again only if Leading Counsel for Mr O once again on the giving of certain undertakings was also entitled to fully participate in any such closed hearing.

2. General reliance is placed on the overall principle that judicial hearings must be considered and conducted on an open and fair basis with all parties concerned involved. In particular, reliance is placed on the statutory provisions which apply to the Tribunal, in particular, the Tribunals, Courts and Enforcement Act 2007. It is claimed that nothing in the 2007 Act expressly enables this Tribunal to receive closed evidence. The particular provisions which confer power to make rules restricting access to information are present but do not expressly mandate the making of a rule or rules that specifically permit closed evidence without the participation of other parties.

3. The full title of the Rules is the Tribunal Procedure (First-Tier Tribunal) (GRC) Rules 2009.

4. The Rules by rule 14(2) empower a Tribunal to prohibit the disclosure of particular documents or information to a party but not where the Tribunal is satisfied that disclosure could be likely to cause that party or some other person serious harm: see in particular rule 14(3). Rule 14(6) to 14(7) enable a party to apply for and obtain a direction that the Tribunal may disclose “certain documents or information” to the Tribunal on the basis that the Tribunal must not disclose those documents or information to other parties. It is conceded that the Tribunal has in the past interpreted those Rules overall to permit the adducing of closed evidence. However, it is claimed that nothing in the Rules can be said to permit closed hearings.

5. It is however also conceded that rule 35(4) which enables a Tribunal to give a direction excluding from any hearing any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely, has been interpreted by the Tribunal in particular decisions to

permit closed hearings: see e.g. *British Union for the Abolition of Vivisection v IC* (EA/2010/0064) (November 2011), especially at appendix 2, *DEFRA v IC* (EA/2009/0076) (May 2010), especially at paragraphs 14 and 27.

6. Mr O goes on to contend that on the assumption that the Tribunal does enjoy the power to permit the adducing of closed evidence, as well as the power to conduct a closed hearing, the Tribunal still enjoys the discretion as to whether or not it is satisfied that the circumstances in question justify departure from the requirement of an open hearing. By analogy with the practice in other albeit unrelated areas, Mr O contends that the consideration of closed evidence in closed session should be done only where the case is "compelling" or "strictly necessary": see e.g. *In re A (Forced Marriage: Special Advocates)* [2010] EWHC 2438 (Fam); [2012] (Fam) 102, especially at paragraph 62.

7. This approach, says Mr O, leads in turn to a consideration of what in the context of the present case can be viewed as appropriate mitigation necessary to address what he calls a consequential deficit to the principle of open justice.

8. As indicated above, the answer it is suggested, lies in allowing the Mr O's Leading Counsel, as distinct from Mr O himself, to participate in the closed session: see and compare in the Competition Tribunal: *Claymore Dairies Ltd v Office of Fair Trading* [2003] CAT 12; and in the High Court *National Grid Electricity v AEB Ltd* [2011] EWHC 1717.

9. Reference is also made to the fact that in relation to other appeals, this Tribunal, whilst accepting that it does have the power to allow a requester's legal representative access to closed evidence and to participate in the closed session, has nonetheless consistently refused to allow this practice. It is claimed however that the reasons given in the past for refusal do not bear analysis. Six propositions are advanced by Mr O in that regard.

10. First, it is claimed that attendance by or on the part of a requester is "unnecessary" because of the presence of the Commissioner. Mr O claims that although the Commissioner has generally been content to assume the role, he has nonetheless been known to decline it. It is first contended that in truth, the Commissioner does not actually represent the requester. He is not briefed by the requester; he may often have been hampered by the lack of any special knowledge and thus the effectiveness of his representations may in turn be hampered accordingly.

11. It follows, it is claimed, that the less the extent to which the Commissioner shares the points taken, or that might be taken by the requester, the more difficult it becomes for his participation in the closed session to begin to make good any shortcomings which

might relate to the closed evidence and any closed session. Indeed, the Commissioner may positively adopt or endorse the stance of the public authority in question.

12. Second, although it has been claimed that the Tribunal has something of an inquisitorial role, this does not detract from the proper and due entitlement to representation on the part of the requester.

13. Third, to state that the release of the requested information is the main question at issue provides no basis for not disclosing or revealing the information to the requester's Counsel on the giving of proper undertakings. In particular, Mr O notes that unless Counsel breaches the undertakings he gives in the way suggested, disclosure to him no more risks the subject matter of the proceedings being infringed or being otherwise prejudiced than disclosure to Counsel for the public authority, or indeed to Counsel to the Commissioner himself.

14. Fourth, and with regard to the view that the Tribunal is something of a specialist body with a special ability to assess the evidence, it would follow that the Home Office should not be permitted to make statements in closed session. In other words, all the examination, and all the relevant analysis of the closed material should be conducted by the Tribunal alone.

15. Fifth, and with regard to the risk of inadvertent disclosure, the said risk is also shared with and between the other parties' representatives. There is therefore no good reason for any disparity in treatment.

16. Sixth and finally, and with regard to the contention that there would be problems with unrepresented requesters, such would not be the case in the present instance.

17. Before turning to these contentions, it is appropriate to set out the Commissioner's contentions and those of the Home Office. The former are helpfully set out in short written form and were supported in oral argument. The Home Office presented its arguments orally on account of the fact that Mr O's written submissions were put in only a short time before the first dates on which the appeal was heard.

18. First, the Commissioner points to the Tribunal's earlier decision in the *Vivisection* decision. There, the Tribunal twice refused the BUAV's application for an order that its Counsel be allowed to see all the information within the scope of the request and to participate fully in a closed session on the same terms as those propounded and proposed by Mr O in this case.

19. The Tribunal in that case accepted that it had power to request the appointment of a special advocate in an exceptional case: see e.g. *CAAT v IC and MOD*

(EA/2006/0041). However, it saw no reason to depart from what it saw as its established practice of conducting hearings by employing a special advocate. At paragraph 21, the Tribunal stated that the role of the Tribunal was "essentially inquisitorial"; it was, it was said an independent body and thus well able in the majority of cases to conduct an investigation of the closed material on its own account.

20. The same Tribunal pointed to the fact that if it was, or was to become, a regular practice to disclose information to Counsel for a requester, such Counsel would over time build up a state or body of knowledge concerning topics of interest as well as decisions and information which the public otherwise had no right to see. This might lead in time, and over time, to an appellant or appellants deriving what the Tribunal in that case characterised as "illegitimate benefits".

21. The Commissioner also took issue with the contention that an analogy could be drawn with the use of special advocates. The Appellant in this case has pointed to the UK's Supreme Court's decision in *Al Rawi and others v Security Services* [2011] UKSC 34. There, the use of closed proceedings was held contrary to the common law right to a fair trial but nonetheless was upheld as being said to be "for special reasons in the interests of justice". The Commissioner therefore pointed out that there did exist certain classes of case where a departure from the normal rule might be justified for special reasons: see e.g. paragraph 63 of the *Al Rawi* decision. Lord Dyson in the passage referred to pointed to wardship cases and to cases where the whole object of the proceeding was to protect a commercial interest and where full disclosure might not be possible in circumstances where disclosure might otherwise render the entire proceedings futile.

22. The Commissioner also stresses the inevitable risk that disclosure to an excluded party's legal representative would cause: see e.g. *Roberts v Parole Board [*2005] UKHL 45, especially as per Lord Rodger at para 108. Unlike the case of special advocates, in excluding the party in proceedings before the present Tribunal, that party's representative would have no entitlement to receive information concerning the closed material sufficient to enable him to give effective instructions to his representative who might otherwise be representing him, albeit on the undertaking suggested in closed session.

23. The Home Office pointed to the distinction and difference that existed in relation to the Data Protection Act 1998, in particular by virtue of sections 7 and 15(2) where a statutory right of limited disclosure is specifically provided for subject to restrictions on disclosure to applicants in related litigation pending judicial determination of any underlying right of access. Reference was also made to certain specific provisions in the Civil Procedure Rules, e.g. CPR Rule 31.19.

24. The Tribunal has no hesitation in rejecting the contentions advanced on the part of Mr O. It has carefully considered Appendix 2 to the earlier Tribunal case referred to involving the *British Union for the Abolition of Vivisection* (EA/2010/0064). In this Tribunal's view, this supplies convincing counterarguments to the six principal submissions advanced by Mr O.

25. First, as paragraph 14 of that Appendix, in particular at subparagraphs (f) and (g) point out, the Commissioner and the Tribunal stand in a special position. Not only is there no impediment to their receipt and consideration of sensitive information (see e.g. section 58 of the Data Protection Act), but both have to ensure that FOIA is properly applied so as to ensure in turn that proper account is taken of the relevant particular public interests and rights which are in play. Subparagraph (h) makes the additional point that the role of the Commissioner's Counsel is of paramount and particular importance.

26. The present Tribunal would also make the following observation in the present case. There can be said to be no parity of interest as between the Commissioner and the Home Office, at least as at the inception of this appeal. The position has, as the main judgment in this case notes, changed in the intervening period between the first appeal hearing dates and the conclusion of the appeal, but the point being made remains the same. The Home Office initially sought withholding of all requested information, while the Commissioner, at least in the period leading up to hearing of the appeal, determined that there should be partial disclosure. As is often the case with regard to developments that are likely to occur between the issue of a disputed Decision Notice and appeal in the Tribunal, a very wide range of evidence was placed before the Tribunal. Given what was in effect the tension that existed at the inception of this appeal, there would seem no basis for suggesting that all the relevant rights and interests would not have been otherwise protected. In any event, the Tribunal takes the view that there will of necessity be a strong imperative weighing on the Commissioner to ensure that the Act is properly applied.

27. Second, as subparagraph (g) at paragraph 14 in the *BUAV* Appendix makes clear, the role of the Tribunal is somewhat different to the role of a civil court in a typical adversarial civil litigation setting. With this Tribunal, there has to be a consideration not only of the rights of the requester, insofar as they differ from more general public interests, but also of the rights of the public authority and indeed, insofar as they may be different, the general public interest at large.

28. Sometimes private interests are involved such as when confidential information or personal details are in play. The operative procedures only reflect the need to safeguard the interplay between all these varying interests and rights.

29. The Tribunal would accept with the Tribunal of the *BUAV* case that its role is wide enough to permit it to make the type of order which Mr O, by his Leading Counsel, seeks in the present case. However, it is equally entirely satisfied that in the present case that course is simply not justified.

30. The Tribunal is also of the view that to focus upon what has been called the inquisitorial role of the Tribunal is to distort the real issue. In the present type of case, the simple question is whether the information sought should be released to persons besides the Commissioner and the public authority. The question in every case is whether the Tribunal has taken sufficient and proper steps to determine that issue in the light of the specific circumstances that come before it.

31. The basic principles articulated in the preceding paragraph go towards addressing the third contention made by Mr O. There can perhaps be cases where limited or controlled disclosure to a requestor, whether by his Counsel or otherwise, might be appropriate, but only in the Tribunal's clear view where the normal safeguards might otherwise be regarded as an inadequate means of determining whether disclosure should be ordered at all. It cannot be remotely contended in the Tribunal's view that the Commissioner is in any way motivated either to push for or to prevent the release of particular information. He has a distinct statutory obligation, the Tribunal being also charged with a distinct statutory responsibility. Both must see that the Act is properly applied and must therefore take account of the relevant public and private interests which are in play. As the *BUAV* decision at paragraph 14 of Appendix 2 to that judgment puts it, the Commissioner agrees to disclosure or non-disclosure according to his view of the application of FOIA to the particular circumstances. As the present case illustrates, the Commissioner, being committed to an impartial role under and by virtue of the terms of the Act and not to any preselected result, is likely to alter or shift his arguments as the evidence unfolds, this case being a good example, as it has unfolded during the appeal, of that practice. His view will change therefore as to whether or not depending on the circumstances before him and the Tribunal, a particular exemption should or should not be relied on.

32. With regard to Mr O's fourth contention, the Tribunal would equate the description afforded to it of being a specialist Tribunal with the reality of its proper function under the Act. This Tribunal would reject any suggestion of the kind made by Mr O that it would benefit from some kind of particular expertise in a case such as the present case where, admittedly on the face of matters before it, there is a degree of close consideration of immigration law and practice. This is not to say however that the Tribunal is incapable of making a decision by virtue of its particular position, role and function under FOIA. The Tribunal, consisting as it does, of two lay members and a legal chair is charged with assessing how to apply the provisions of the Act to the

disputed information. This Tribunal takes the view that the exercise conducted by the Tribunal involving its lay membership involves largely a consideration of the facts. Even though immigration law is present in this case, that approach still applies in the present appeal. That in turn reflects the value of the lay membership. More significantly, the exercise goes further since the Tribunal, as should the Commissioner, must then determine the appropriate public interest balancing act. The whole exercise is one which is quite capable of being exercised by the type of Tribunal envisaged and created under FOIA. That is why it is only in the most exceptional cases, and even then in this Tribunal's view, only rarely, that there would have to be any need to allow the requester, whether by his Counsel or otherwise, to render any assistance in relation to the Tribunal's overall function. If necessary, and if the case arises, the Tribunal would in such a case it is respectfully suggested, elect to seek if anything independent outside expert assistance, rather than take any form of route of the type suggested by Mr O in this case.

33. With regard to the risk of inadvertent disclosure, enough has been indicated already about the attendant risks which arise. This Tribunal is firmly of the view that only in the most exceptional case should the type of course proposed by Mr O be permitted. Despite the best assurances and any undertakings which might otherwise be proffered, in this Tribunal's view, there must always remain a risk of inadvertent disclosure should those representing a requester be allowed freely to participate in a closed session in which closed material is being scrutinised.

34. Finally, the Tribunal remains troubled by the apparent absence of consistent principle arising out of Mr O's submissions. It is to say the least odd that allowance should be made for participation albeit on the terms by the requester's Counsel, coupled with the apparent acceptance that non-legally represented appellants should in general not be allowed to participate. As the *BUAV* judgment puts it, if the information can be made available to Counsel, why should it not be made available to the requester himself?

35. The Tribunal would conclude what is already perhaps too lengthy a ruling on this issue by observing that it is somewhat surprising that such a robust application was made in the present case. As Mr O sought to argue it, there is no clear precedent for such course in the Tribunal's case law. As long ago as 12 May 2006 in the well known *Sugar* litigation, there was a ruling in *Sugar v IC and BBC* (EA/2005/0023) by the single Tribunal Judge dealing with a submission made by Mr Sugar that he be provided with disclosure of all the requested information partly in reliance on the provisions of Article 6 of the European Convention of Human Rights. In a lengthy and detailed ruling, the Tribunal then emphasised the need for confidentiality and ruled

against Mr Sugar very much on the same lines and grounds as those set out in the *BUAV* judgment in the relevant appendix and in the present Ruling.

36. This Ruling can end on a general note. In civil cases, disclosure, albeit under restrictions which might affect a particular party, can be properly regarded as part of the necessary cost of vindicating that person's private or public law right. The position with regard to FOIA is fundamentally different. The provisions of FOIA need to be taken into account both in relation to the requested information and as well as with regard to any and all connected information which may have been relevant or which may bear upon the key issues arising as to whether or not, and if so to what extent, the requested information should be disclosed. To the present Tribunal, there appears to be no justification for giving a particular individual privileged access to certain material which may not be the subject of the request, but which may be protected by FOIA simply because he is the Appellant seeking certain information under FOIA. Put another way, this amounts to saying that in the course of an appeal, he is not entitled to see the information requested because he has asked for its disclosure, but he is nonetheless entitled to see the connected information because he has not specifically asked for it. The present Tribunal sees no justification, at least in law, for such an argument.

[Signed on the original]

David Marks QC
Tribunal Judge

10 April 2013

Corrections made to Annex A on 18 April 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009