[2024] UKUT 48 (AAC)

IN THE UPPER TRIBUNAL **Appeals No. UA-2018-000662-GINS**
ADMINISTRATIVE APPEALS CHAMBER **UA-2018-000663-GINS**

(previously GINS/2919/2018 and GINS/2921/2018)

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Appellants: **Robert Fryers and Seamus Hogg**

Respondent: **The Secretary of State for Northern Ireland**

Before: **Madam Justice McBride, Mr Justice Lane, Judge Stockman**

NOTICE OF DECISION

These appeals are brought under section 28(4) of the Data Protection Act 1998 against national security certificates issued by the Secretary of State for Northern Ireland (the SOSNI). The issue before us on the appeals is whether, applying the principles applied by the court on an application for judicial review, the SOSNI did not have reasonable grounds for issuing the certificates.

For the reasons we give below, we dismiss the appeals.

REASONS

Background

Circumstances

1. The two appeals arise out of requests for personal information relating to the practice of administrative detention – generally known as internment – operating in Northern Ireland in the early to mid-1970's. Internment was implemented by three successive legislative schemes - namely the Civil Authorities (Special Powers) Acts 1922-1943 (the Special Powers Act), the Detention of Terrorists (Northern Ireland) Order 1972 (the 1972 Order) and the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act).

2. The first appellant, Mr Fryers, was detained under an interim custody order dated 17 July 1973, made under the 1972 Order. Following hearings before a Commissioner and a Detention Appeal Tribunal, he remained in detention until 29 October 1975.

3. The second appellant, Mr Hogg, was detained on 11 January 1972 under the Special Powers Act and was the subject of an internment order made on 14 February 1972. He was released on 8 August 1972, but was detained again under the 1972 Order on 22 December 1972. A Commissioner ordered his discharge from detention on 15 February 1973. However, on 23 May 1973 he was detained again under the 1972 Order and, following hearings before a Commissioner and a Detention Appeal Tribunal, he remained in detention until 31 December 1974.

4. On 10 July 2013, along with many others, the appellants requested access to the files relating to their detention, which are presently held by the Public Records Office of Northern Ireland (PRONI). They formally requested "any legal papers and documentation you may have in

relation to [our] detention and internment" by way of a subject access request under section 7 of the Data Protection Act 1998 (the DPA 1998).

5. PRONI provided each of the appellants with copies of relevant files. However, the copies of the files that they received were subject to substantial redactions. The redactions were said to be justified by statutory exemptions from disclosure on grounds of national security under section 28 of the DPA 1998, on grounds of prevention of crime under section 29 of the DPA 1998 and by the obligations under section 7(6) of the DPA 1998 to protect third party personal information. Additionally, on 22 October 2014 in the case of Mr Fryers and on 22 January 2015 in the case of Mr Hogg, the then SOSNI signed certificates certifying that exemption was required for the purpose of safeguarding national security (the original certificates). By law, such certificates amount to conclusive evidence of that fact.

6. The appellants lodged appeals against the original certificates (the original appeals). Subsequently, in the period following the repeal and replacement of the DPA 1998 with the Data Protection Act 2018 (DPA 2018), the original certificates were withdrawn. This resulted in the dismissal of the original appeals by a decision of the Upper Tribunal in *Fryers and Hogg v Secretary of State for Northern Ireland* [2019] UKUT 22 (AAC). However, the SOSNI issued further national security certificates on 8 October 2018 to the same effect as the original certificates. The appellants duly appealed against those certificates to the First-tier Tribunal (General Regulatory Chamber) (the FTGRC). Those appeals are the subject of the present proceedings.

Procedure

7. By a direction of 23 November 2018, the President of the FTGRC transferred the appellants' first instance appeals to the Upper Tribunal (Administrative Appeals Chamber) (the Upper Tribunal) under rule19 of the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (as amended). On 29 March 2021, an Upper Tribunal judge directed that the two appeals should be heard together.

8. An Upper Tribunal judge further directed in accordance with rule 14(10) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules) that there should be no disclosure of closed materials (i.e.the unredacted files) to the appellants or their representatives. He directed that an agreed joint open bundle of evidence and a closed bundle should be prepared. Under rule 37 he directed that a closed hearing should take place in private, with the exclusion of the appellants and their representatives from the closed part of the hearing.

9. The appellants requested that their interests should be represented in the closed hearing by a special advocate. A preliminary hearing was held on this issue on 9 March 2022. We decided against the appointment of a special advocate. We observed the principles set out in the decision of the Court of Appeal in England and Wales in *Browning v Information Commissioner and DBIS* [2014] EWCA Civ 1050, which approved the reasoning set out in Appendix 2 to the decision in *British Union for the Abolition of Vivisection v Information Commissioner and Newcastle University,* heard before the First-tier Tribunal under reference EA/2010/00064. We decided that we were appropriately placed to assess the application of the provisions of the DPA 1998 by testing the closed evidence of the SOSNI and could properly perform that role.

Relevant legislation

10. The DPA 2018 commenced on 25 May 2018, repealing the DPA 1998. The national security certificates which are the subject of these proceedings were issued by the SOSNI on 8 October 2018. However, by virtue of paragraph 2(1) of Schedule 20 to the DPA 2018, sections 7 to 9A of the DPA 1998 continue to have effect in a case in which a data controller received a request under section 7 of that Act before 25 May 2018.

11. Similarly, by paragraph 17(1) of Schedule 20, the repeal of section 28(2) to (12) of the DPA 1998 does not affect the application of those provisions after 25 May 2018 "with respect to the processing of personal data to which the 1998 Act (including as it has effect by virtue of this Schedule) applies". As the original requests for personal data were made on 10 July 2013, it is common case that section 7 and section 28 of the DPA 1998 continue to be the relevant provisions applying in the circumstances of these appeals.

12. The right of access to personal data is given by section 7 of the DPA 1998, which appears in Part II of the Act. This provides, so far as is relevant,

> **7 Right of access to personal data**
>
> (1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—
>
> > (a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,
> >
> > (b) if that is the case, to be given by the data controller a description of—
> >
> > > (i) the personal data of which that individual is the data subject,
> > >
> > > (ii) the purposes for which they are being or are to be processed, and
> > >
> > > (iii) the recipients or classes of recipients to whom they are or may be disclosed,
> >
> > (c) to have communicated to him in an intelligible form—
> >
> > > (i) the information constituting any personal data of which that individual is the data subject, and
> > >
> > > (ii) any information available to the data controller as to the source of those data, and
> >
> > (d) …

13. A relevant exemption from the requirement to disclose requested personal data appears at section 28 of the DPA 1998. This provides, insofar as relevant,

> **28 National security**
>
> (1) Personal data are exempt from any of the provisions of—
>
> > (a) the data protection principles,

(b) Parts II, III and V, and

(c) section 55,

if the exemption from that provision is required for the purpose of safeguarding national security.

(2) Subject to subsection (4), a certificate signed by a Minister of the Crown certifying that exemption from all or any of the provisions mentioned in subsection (1) is or at any time was required for the purpose there mentioned in respect of any personal data shall be conclusive evidence of that fact.

(3) A certificate under subsection (2) may identify the personal data to which it applies by means of a general description and may be expressed to have prospective effect.

(4) Any person directly affected by the issuing of a certificate under subsection (2) may appeal to the Tribunal against the certificate.

(5) If on an appeal under subsection (4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate.

(6) …

The impugned certificates

14. The SOSNI's certificate in each case is an open document, consisting of 28 paragraphs. It indicates that a request has been received from the PRONI for advice on whether any of the personal data held by it may be exempt from the 1998 Act on the ground that exemption may be required for the purpose of safeguarding national security. The SOSNI in turn indicates that advice had been requested and received from the Police Service of Northern Ireland (the PSNI) on this question.

15. The SOSNI refers to Bundle A, containing copies of documents in respect of which the PSNI advised that exemption was required for the purpose of safeguarding national security, with the relevant personal data highlighted. The SOSNI further refers to a "sensitive schedule", containing an explanation of the national security issues which arise and a justification table containing a detailed analysis of each item of personal data within the PRONI files. The SOSNI states that officials had provided further information regarding evidence of previous disclosure of the personal data in question and offered advice. On this basis, she had made the certificate in each case. The SOSNI then offers her reasons for doing so.

16. The SOSNI notes that she had considered the potentially serious adverse repercussions for the national security of the UK if the redacted personal data were to be disclosed. She agreed with advice that the proposed redactions were required for the purpose of safeguarding national security. She took into account that the files were created and related to events in the 1970s and took into account whether and to what extent some of the personal data had been made available either orally or in written form in the course of internment proceedings. She took into account the implications for national security if the data was made available to the data subjects and was subsequently to enter the public domain. She noted that she had been advised that in the absence of evidence that the data subject still held previously disclosed

documents, or whether it was previously provided either orally or in writing, national security sensitive information should not be disclosed.

17. The SOSNI indicated that the personal data referred to included information (where reference to the PSNI includes references to its predecessor the Royal Ulster Constabulary (the RUC)):

    a) relating to methods, techniques or equipment of intelligence gathering, disclosure of which would reduce the value of the method, technique, or equipment in future operations;
    b) relating to persons providing information or assistance in confidence to the PSNI, which would endanger those persons or others, or impair or risk impairing their willingness to continue providing information or assistance or ability to obtain information or assistance from the person concerned or others;
    c) relating to operations of the PSNI, disclosure of which would reduce or risk the effectiveness of those operations or other operations current or future;
    d) likely to be of use to those of interest to the PSNI, including terrorists and other criminals, disclosure of which would impair PSNI performance of their functions.

18. The SOSNI reasoned in particular that it was essential to national security that those who supply information to the police do so in confidence and that any departure from that would be likely to be damaging to the security capabilities and operations of the United Kingdom now and in the future. Disclosure might assist in the identification of individuals who supply information and give a risk of serious harm to that person, their family, and associates. While acknowledging that the majority of terrorist organisations in Northern Ireland are now observing ceasefires, she observed that the threat of violence remains. She reasoned in the particular context of Northern Ireland that disclosure would damage the capabilities for countering terrorism and preventing loss of life.

Hearing

19. We held an oral hearing of the appeals. The appellants were represented by Mr O'Donoghue KC and Mr Devine BL, instructed by Ó Muirigh Solicitors. The respondent was represented by Mr McLaughlin KC and Mr Reid BL, instructed by the Crown Solicitor. We are grateful to the representatives for their clear and helpful submissions.

20. The hearing was adjourned, part-heard, on 25 May 2022, when it transpired that a witness for the respondent was not available. The hearing continued on 14, 15 and 16 November 2022. The appeals involved open evidence and open submissions from both of the parties and also involved closed evidence and closed submissions from the respondent. The closed hearing was conducted on the afternoon of 14 November, all day on 15 November and on the morning of 16 November.

Evidence

In Open

21. The respondent relied upon the open evidence of Ms Sloan, an official in the Northern Ireland Office (NIO), further to her open witness statement. Ms Sloan had not had direct involvement in the preparation of the SOSNI certificates, but based her evidence on discussions with other officials, documents, and records.

22. Ms Sloan related that the historical files relating to internment between 1971 and 1975 had been deposited by the NIO with PRONI in the late 1980's. The files were deposited on the basis that they would remain closed to the public for a period of 75 years until 2062. At that time, PRONI exercised its functions under the charge and superintendence of the Minister for Culture, Arts and Leisure (MCAL).

23. In June 2013, PRONI had received requests for access to internment files from ten individuals. It asked NIO for assistance in relation to those and further anticipated requests from a group of up to 150 individuals represented by Ó Muirigh Solicitors. An NIO reviewer recommended that the files remained closed until the data subject's 100th birthday, but that the files could be released subject to specified redactions. A batch of files, including those of Mr Clarke and Mr McDonnell, were then released. No consultation with the PSNI was undertaken at this time. Another set of files was released to a former internee on the same basis following the request of an elected representative.

24. In the context of a wider disagreement between PSNI and the MCAL, the Chief Constable of the PSNI had sought an interlocutory injunction to restrain further release of legacy files by PRONI. Following discussions, a new process for reviewing files in response to DPA subject access requests was developed. This involved PSNI reviewing each file and advising on the national security implications of disclosure.

25. When the next ten DPA subject access requests were received, the NIO consulted the PSNI on disclosure. PSNI advised that the files contained information for which exemption from the DPA 1998 was required for the purpose of safeguarding national security. It was considered that the files contained information of one or more of the following types:

    a) Information relating to methods, techniques or equipment of intelligence gathering, disclosure of which would reduce its value in future operations;
    b) Information relating to a person providing information or assistance in confidence to the PSNI, disclosure of which would endanger or risk endangering that person or others, or would impair or risk impairing their ability or willingness to continue providing information or assistance, or their ability to obtain information and assistance from the person involved or other persons;
    c) Information relating to PSNI operations, disclosure of which would reduce or risk the effectiveness of those operations or of other operations either current or future;
    d) Other information likely to be of use to those of interest to the PSNI, including terrorists and other criminals, disclosure of which would impair PSNI performance of their functions.

26. In light of the history of previous disclosure by MCAL, notwithstanding the advice of NIO and PSNI that national security redactions should be applied, Ms Sloan indicated that it was considered appropriate by the NIO to issue Ministerial Certificates.

27. Following the request of Mr Fryers, PSNI provided NIO with a detailed sensitive schedule, setting out the specific information that they advised should be redacted for national security reasons. Ms Sloan observed that materials suggested that Mr Fryers was present during detention hearings but indicated that PSNI advised that a precautionary approach should be followed, on the assumption that he had no memory or record of the evidence given. She related that a draft sensitive schedule, a draft appendix setting out specific reasons for each redaction and a draft certificate were provided to the SOSNI for consideration. She referred to a copy of the original certificate.

28. Following the request of Mr Hogg, Ms Sloan stated that the same procedure was followed. She observed that Mr Hogg was present during two detention hearings. She observed that the Commissioner at hearing had commented on his interest in identifying sources of information. Again, she related that a draft sensitive schedule, a draft appendix setting out specific reasons for each redaction and a draft certificate were provided to the SOSNI for consideration. She again referred to a copy of the original certificate.

29. Ms Sloan related how, following the original appeals, a process of review was undertaken. It was decided that unless there was evidence that the appellants retained the documents considered to be "national security sensitive", any such material should be redacted. As it was known that Mr Fryers and Mr Hogg each retained copies of the original notices of particulars served in advance of the Commissioner's hearing, that material was not redacted.

30. Following the review process, two new certificates were drafted for the consideration of the SOSNI. Ms Sloan indicated that the draft certificates were accompanied by a more detailed sensitive schedule, setting out the risks and damage that may be caused by releasing the redacted information and the specific justification for each redaction. She referred to the submission provided to the SOSNI. She related that the SOSNI reviewed the papers and signed the new certificates in these cases on 8 October 2018.

31. Under cross-examination, Ms Sloan confirmed that she had not authored her own statement, but that it was drafted by lawyers. She also confirmed that it was not based on her personal knowledge, but upon what she had been told by others and from documentary sources.

32. She indicated that she had not spoken with the SOSNI directly to discuss the circumstances or seen any advisory materials that may have been placed before her by officials. She had not seen any "working papers" generated within the SOSNI's private office.

33. Ms Sloan indicated that she had not been a member of the case review team in the NIO in June 2013 and did not know their training, qualifications or the instructions given to them prior to making any redaction. She had no knowledge of whether PRONI had consulted with PSNI at that time.

34. Ms Sloan indicated that she did not know if the NIO had undertaken steps to clarify working practices around the disclosure of material in the course of hearings in the 1970's, such as seeking to contact the individuals involved in detention hearings or to locate any guidance that may have been issued those involved in hearings. She was unaware of any search having been conducted in NIO archives for additional relevant materials.

In Closed

35. We then heard evidence in closed session. As observed above, the tribunal had directed, pursuant to rule 37 of the UT Rules, that there should be no disclosure to the appellants of the closed schedule of material; that the part of the hearing in which these materials were considered should be in private; and that the appellants and their representatives should be excluded from that part of the hearing.

36. Mr McLaughlin KC, at the direction of the tribunal, prepared a summary of the closed proceedings for the purpose of informing the appellants what had transpired in closed session to the extent that this could be done consistently with the tribunal's direction. The following

paragraphs are derived from that summary, as approved by the tribunal. They were provided to Mr O'Donoghue KC on day 3, prior to hearing final submissions from counsel:

> *In the course of the closed hearing, the tribunal heard oral evidence from a Detective Superintendent and a Detective Inspector of the PSNI. It heard oral evidence relating to the risk assessment process which was undertaken by the PSNI prior to providing advice to the SOSNI concerning the requirements of national security which may arise from the disclosure of the information contained in the sensitive schedules in the appeals.*
>
> *The tribunal has also undertaken a line-by-line analysis of all the documents which are contained in the sensitive schedules in both appeals. In doing so it considered the entirely of these documents in unredacted form. It received evidence and submissions concerning the rationale supporting each redaction and it had a full opportunity to ask questions to both PSNI witnesses concerning any issue which it considered to be necessary for the determination of the case and which is in the interests of the appellants.*
>
> *Specific queries which were raised by the tribunal with the PSNI witnesses have included:*
>
> *(i) The nature and extent of the risks in light of the period of time that has elapsed since the underlying events and since the documents were created;*
>
> *(ii) The extent to which PSNI is aware of any risks which have materialised as a result of the disclosure which was made in the McDonnell and Clarke cases and the disclosure to date in the present appeals;*
>
> *(iii) Any inconsistencies or errors which may have occurred in the application of redactions to the documents contained in the sensitive schedules in these appeals.*
>
> *In accordance with requests made expressly by the appellants in open session, the tribunal's enquiries in closed session included the following additional matters:*
>
> *(i) careful scrutiny of the materials contained in the sensitive schedules to ascertain whether the national security grounds for the redactions continue to retain validity and justification now in light of the passage of time;*
>
> *(ii) consideration of whether any redacted materials could be disclosed to the relevant appellant without revealing the identity of any human source.*

37. Additional to the above open summary of the proceedings in closed session, a closed decision has been prepared by the tribunal. This addresses the evidence and submissions given in closed hearing and our related findings. **Under rule 14(11) of the UT Rules, so as not to undermine the effect of the order previously made under rule 14(10), we direct that there shall be no disclosure of the closed decision to any person but the SOSNI and his representatives.**

Submissions of the parties

38. The original grounds of appeal advanced by the appellants were refined into four submissions set out in skeleton argument and developed at hearing. Prior to the hearing, the appellants had expressly ceased to rely on an original ground relating to their rights under the European Convention on Human Rights and Fundamental Freedoms.

39. Firstly, the appellants relied on mistake of fact on the part of the SOSNI relating to the information placed before her when issuing the impugned national security certificates. They submitted that the SOSNI had been misinformed on the question of whether there had been prior disclosure of the requested material to them.

40. Secondly, the appellants relied on the ground that the SOSNI had failed to take into account a material consideration, namely that there had been prior disclosure of the requested information. It was submitted that certain of the redacted documents had been served on the appellants personally in the course of detention-related proceedings in the 1970's. In addition, it was submitted that they had been present at hearings when the same information was given to them orally.

41. Thirdly, the appellants relied on irrationality in the context that the much of the information now withheld on national security grounds was previously disclosed. They submitted that, as there had been no reliance on national security grounds in the 1970's at the height of the "Troubles", these could not be advanced rationally in the present day. They submitted that it was irrational of the SOSNI to decide that national security certificates were required to deny the release of information that the appellants were already aware of.

42. Fourthly, they submitted that the SOSNI had failed to take into account a further material consideration, namely the prior release of files to other former internees. They referred to the cases of Mr Clarke and Mr McDonnell who had requested personal data of the same nature as them (see paragraph 23 above). Unlike the appellants, those applicants had been provided with unredacted materials by PRONI. It was submitted that the release of these papers demonstrated that the redaction of the same information and documents relating to the appellants could not be required for national security purposes.

43. The respondent made general submissions regarding the scope of an appeal on judicial review grounds in cases such as the present one and the weight that should be given to the SOSNI's conclusions. The appellants' specific submissions were then addressed.

44. The respondent submitted that the appellants' first ground appeared to be addressed to the original certificates but could not apply to the present certificates due to differences in their wording. It was submitted that the SOSNI was fully aware of any previous disclosure of the requested personal data to the appellants and that no mistake of fact was evident.

45. The respondent replied to the appellants' second ground by submitting that although previous disclosure was relevant, it was not decisive. It was submitted that the SOSNI was entitled to adopt a precautionary approach to safeguarding national security. It was submitted that the SOSNI was entitled to have regard to the possible damage that would result from the release of orally disclosed material in documentary form and to any renewed risk to persons that might arise. It was submitted that the SOSNI was entitled to have regard to the policy of neither-confirm-nor-deny (NCND) in making this assessment.

46. The respondent replied to the appellants' third submission by submitting that the SOSNI was required to make an assessment of the requirements of national security at the time of

considering the subject access requests. It was submitted that the respondent was not bound by any view taken in the 1970's about the requirements of national security at that time. Again, it was submitted that the SOSNI was entitled to adopt a precautionary approach to safeguarding national security.

47. The respondent replied to the appellants' fourth submission by submitting that inconsistency was not a ground of judicial review. In any event, it was submitted, the files in Mr Clarke and Mr McDonnell's cases were released in the context of a materially different consultation procedure.

Assessment

48. As noted above, these are first instance appeals against the national security certificates issued by the SOSNI on 8 October 2018. By section 28(5) of DPA 1998, we may allow the appeal and quash the certificate only if, applying the principles applied by the court on an application for judicial review, we decide that the SOSNI did not have reasonable grounds for issuing the certificate.

49. Initially, under the Special Powers Act, internment was a devolved power of the Parliament of Northern Ireland, exercised by the Prime Minister. Subsequently, under Direct Rule from Westminster after 28 March 1972, the power of internment was exercised by the predecessors of the current SOSNI. In the period from 7 November 1972 to 7 August 1973, the 1972 Order made provision for an interim custody order to be made for a period no longer than 28 days, followed by reference to a Commissioner empowered to make a detention order of indefinite duration. Such an order could in turn be appealed to a Detention Appeal Tribunal. From 8 August 1973 these provisions were essentially replicated in Schedule 1 to the 1973 Act.

50. The relevant procedural rules first appeared in the Schedule to the 1972 Order. In relation to Commissioner proceedings, these provided that, not less than three days before the hearing, the detainee had to be served with a statement in writing as to the terrorist activities that were the subject of the enquiry (para.11). The rules required that hearings were to be held in private and permitted the detainee to be present (para.12), subject to a proviso for disorderly conduct. The detainee could give and adduce evidence, make representations in writing, and was entitled to be represented by counsel or a solicitor (para.13). A Commissioner was empowered to receive oral, documentary or other evidence, notwithstanding that it would not be admissible in a court of law (para.14). Where, in relation to any part of the proceedings, it appeared to the Commissioner that it would be contrary to the interests of public security or might endanger the safety of any person for that part of the proceedings to take place in the presence of the detainee, he and his representatives could be excluded (para.15). In such a case, the Commissioner was required to inform the detainee of the substance of matters dealt with in his absence (para.16). The proceedings before the Detention Appeal Tribunal under the 1972 Order followed similar provisions.

51. From 8 August 1972, the relevant procedural rules appeared in Schedule 1 to the 1973 Act. These appear almost identical to those under the 1972 Order.

52. It can be seen that the detainee was entitled to receive certain documents, including a statement in writing of the case against him - which is also referred to as a notice of particulars - and a record of the Commissioner proceedings. He was entitled to be present at the hearings of the Commissioner and Detention Appeal Tribunal, subject to exclusionary rules. From the open documents, it can be seen that the appellants in the present cases were served with the

notice of particulars and were likely to have been present when oral evidence was given against them.

53. The records of proceedings in the present case indicate that para.15, permitting the exclusion of the detainee from the hearing on public security and safety grounds, was employed, at least in the case of Mr Hogg. This can be gleaned from indications in open proceedings that his representative was given a gist of what occurred in the closed session (page 16 of the Commissioner hearing of 22 October 1973). However, no record of any closed session appears to have been preserved in either of the cases. Therefore, these appeals are concerned solely with the records of the open proceedings and other general documents, and we are not concerned with materials that would have been closed to the appellants in the 1970s.

54. In the case of Mr Fryers, the appeal involves a challenge to the redactions that were made to four documents prior to them being given to him. The documents in question were:

    a) a submission/advice dated 17 July 1973 relating to an interim custody order;
    b) a formal application dated 16 July 1973 to the SOSNI for an interim custody order;
    c) notes taken by a Commissioner of a hearing before him on 9 January 1974;
    d) a record of a decision by a Detention Appeal Tribunal dated 20 March 1974.

55. In the case of Mr Hogg, the appeal involves a challenge to the redactions that were made to eleven documents prior to them being given to him. The documents in question were:

    a) notes taken by a Commissioner of a hearing before him on 22 October 1973;
    b) the Commissioner's decision of the same date;
    c) notes taken by a Commissioner of a hearing before him on 16 February 1973;
    d) Detention Appeal Tribunal decision of 3 December 1973;
    e) correspondence regarding parole dated 29 February 1974;
    f) a formal application dated 22 May 1973 to the SOSNI for an interim custody order;
    g) correspondence from RUC to SOSNI dated 15 October 1973;
    h) a submission/advice dated 22 December 1972 relating to an interim custody order;
    i) a formal application dated 21 December 1972 to the SOSNI for an interim custody order;
    j) a recommendation to the RUC Chief Constable for internment dated 28 January 1972;
    k) a recommendation from the RUC Chief Constable to the SOSNI for internment dated 2 February 1972.

56. In the case of Mr Fryers, we are satisfied that the redacted documents referred to as a) and b) in paragraph 54 above were not previously disclosed to him. They are internal procedural documents of the Royal Ulster Constabulary (the RUC) recommending his detention. However, it appears clear, and it was not disputed, that he was present at the Commissioner hearing recorded by redacted document c). It also appears clear to us that he was more likely than not to have attended the Detention Appeal Tribunal hearing recorded by redacted document d) and that his legal representative certainly attended that hearing.

57. In the case of Mr Hogg, we are satisfied that the redacted documents referred to as e), f), g), h), i), j) and k) in paragraph 55 above were not previously disclosed to him. In Mr Hogg's case, it also appears clear to us, and it was not disputed, that he was present at the Commissioner hearings and Detention Appeal Tribunal hearing recorded by redacted documents a), b), c) and d).

Mistake of fact

58. The appellants firstly submitted that the national security certificates were issued by the SOSNI under a mistake of fact. This submission focused on wording in the original certificates that referred to advice given to the SOSNI that there is "no conclusive evidence available that the redacted information… has already been disclosed to the data subject during the internment process or at any time since the issue of prior disclosure of the redacted material to the appellants in the course of proceedings leading to their detention".

59. The appellants distinguished between the documents and the information contained within them. On the basis that the appellants were each present at their detention hearings and had heard the evidence against them disclosed orally, it was submitted that it followed that they had heard the information that was recorded in the redacted documents. They submitted that the SOSNI relied upon erroneous assumptions of fact in accepting that there was no conclusive evidence that the requested information had already been disclosed.

60. As indicated above, it appears to us that the appellants were likely to have been present at hearings where the now redacted material was discussed openly. However, we consider that the argument based on mistake of fact is misconceived in the present appeals. This is because it appears to us that the appellants continue to refer to the original certificates issued by the SOSNI when making this submission. The particular wording upon which this submission of mistake of fact is based appears at paragraph 9 of the original certificate of 22 October 2014 in the case of Mr Fryers and at paragraph 8 of the original certificate of 22 January 2015 in the case of Mr Hogg. The full wording of the relevant paragraph in the case of Mr Fryers is:

> "I have been advised that there is no conclusive evidence available that the redacted information mentioned in Bundle A has already been disclosed to the data subject during the internment process or at any time since. It has not been possible to conduct an exhaustive search in relation to this question in the time available. Should I become aware of other information which might have a bearing on my assessment of the risk to national security presented by disclosure of the redacted information to the data subject, I acknowledge that this Certificate may need to be reviewed".

61. The same paragraph is formulated in a slightly different way in the case of Mr Hogg. After the word "disclosed" in the relevant paragraph in his case, the words "in writing" appear. Therefore, there is a qualification in the particular circumstances of his case that differs from the equivalent text in the case of Mr Fryers.

62. Nevertheless, regardless of the wording in the original certificates, the subject matter of the present appeals is the certificates of 8 October 2018. These were only issued after the original certificates were withdrawn. It is our understanding that the wording relied upon to ground the argument of mistake of fact, which we refer to above, does not appear in the present certificates. That element of the certificates of 8 October 2018 which appears closest to the wording in the earlier certificates instead reads, at paragraph 10:

> "My officials have also provided me with further information regarding any evidence of previous disclosure of the personal data in question. My officials have requested that I review all of the above mentioned materials and requested that I decide whether an exemption is required in relation to any of the identified personal data, for the purpose of safeguarding national security. My officials have also provided me with advice prior to doing so".

63. There may have been force in the submission of mistake of fact when addressed to the original certificates. However, those certificates are not under appeal before us. The wording of the original certificates differs from the certificates that are the subject of the present appeals. Specifically, the statement that there is "no conclusive evidence that the redacted information had already been disclosed", whether it refers to disclosure in writing or otherwise, no longer appears.

64. For this reason, we consider that the submission that the present certificates involved the making of a mistake of fact is not well founded. Therefore, we must dismiss the appeal on this ground.

Irrationality arising from failure to take account of previous disclosure

65. Before addressing this next submission, it may be helpful to set out some general principles that have application to this ground and the grounds immediately following it. Each of these grounds alleges irrationality on the part of the SOSNI.

66. Whereas this is a first instance statutory appeal, it is not an appeal on the merits. We may allow the appeal and quash the certificate only if, applying the principles applied by the court on an application for judicial review, we find that the SOSNI did not have reasonable grounds for issuing the certificate. Therefore, our jurisdiction does not permit us to address the merits of the assessment by the SOSNI of the potential damage to national security from disclosure, but is confined to the lawfulness of that assessment.

67. It appears to us that relevant principles relating to the approach that should be adopted were identified in the decision of the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47. *Rehman* concerned a decision of the Home Secretary to refuse indefinite leave to remain in the UK to a Pakistani national in circumstances where the security services provided confidential information alleging that he was a threat to national security. He appealed to the Special Immigration Appeals Commission (the Commission). Whereas the proceedings involved a closed procedure, the appeal to the Commission was essentially on the merits. Nevertheless, in *Rehman* the House of Lords found that:

> "even though the Commission has powers of review both of fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review" (per Lord Slynn at para.26).

68. Lord Hoffmann explained, at paragraph 50, that:

> "What is meant by "national security" is a question of construction and therefore a question of law within the jurisdiction of the Commission, subject to appeal. But there is no difficulty about what "national security" means. It is the security of the United Kingdom and its people. On the other hand, the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries,

> decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive".

69. From paragraph 54 of *Rehman,* it can be seen that the House of Lords analysis was that the Commission had three functions. These were, firstly, to review the evidence giving the factual basis for the assessment that there was a risk to national security; secondly, to determine whether the decision was one that no reasonable Minister could in the circumstances reasonably have held; and thirdly, to address other issues, such as Convention rights, that did not lie within the exclusive province of the executive. This has similarities to our own jurisdiction in the present case, albeit that no Convention right is raised.

70. While similar, we observe that our own statutory jurisdiction is not the same as that of the Commission in *Rehman*. Nevertheless, we accept that an implication of *Rehman* for the present case is that, in addressing the question of whether there were reasonable grounds for issuing the certificate for the purpose of safeguarding national security, we should give due weight to the assessment and conclusions of the SOSNI. This is because whether something is necessary for safeguarding national security is not a question of law but a matter of judgement and policy. It was submitted, and we accept, that these principles were confirmed by the UK Supreme Court in more recent cases, including *R(Carlisle) v Secretary of State for the Home Department* [2014] 3 WLR 1404 and *R(Begum) v Special Immigration Appeals Commission* [2021] 2 WLR 556. Therefore, we consider that we must afford the SOSNI a wide margin in a rationality challenge to her national security assessments.

71. It was submitted by the respondent in open hearing that detentions of the appellants were based on the suspicion that they had been engaged in terrorist activities. It was submitted that a detention order could only be made by a Commissioner or Detention Appeal Tribunal after findings that the person in question had been concerned in the commission or instigation of terrorist activities. On this basis, it was further submitted that the subject matter of the detention records was therefore likely to be security related and to contain sensitive information about intelligence gathering and possible sources. We accept that this is self-evident from the open materials.

72. The open evidence submitted on behalf of the SOSNI had confirmed in each certificate that the redacted information was:

    (i) Information relating to intelligence gathering methods, techniques, or equipment;
    (ii) Information relating to persons providing information or assistance to police in confidence, disclosure of which would endanger that person and would impair their willingness to continue providing information or assistance, or that of other persons;
    (iii) Information relating to police operations;
    (iv) Other information likely to be of use to those of interest to police, including terrorists and other criminals.

73. Having considered the redacted material in closed hearing, we accept that those general descriptions are broadly accurate.

74. Returning now to the grounds advanced by the appellants, their second contention was that the making of the certificates was irrational for the reason that the SOSNI failed to take into account the fact that much of the redacted material had previously been disclosed to them.

75. As indicated above, we accept that the appellants were present at hearings before the Commissioner and the Detention Appeal Tribunal, when oral evidence against them was presented openly. We observe that specific allegations of involvement in terrorist activities were made in related procedural documents, such as the notice of particulars, and accept that these were served on the appellants. We also observe that, when an appeal was made to the Detention Appeal Tribunal, the detainee would have been entitled to receive the record of proceedings from the hearing before the Commissioner under Article 6(4) of the 1972 Order and, later, paragraph 27(3) of Schedule 1 to the EPA. However, in the absence of evidence, we cannot determine whether the appellants received these particular documents personally.

76. Mr O'Donoghue KC, for the appellants, submitted that the SOSNI was required to investigate whether or not these documents were previously given to the appellants before making any redactions. He established in evidence that the NIO had not conducted a general trawl of all files relating to internment prior to the SOSNI making the impugned certificates. For his part, Mr McLaughlin KC submitted that the subject access requests were confined to files immediately concerning the appellants, and not all files generally relating to internment. He submitted that, for their part, the appellants had offered no evidence of receiving the redacted documents.

77. The appellants relied upon the case of *Al Sweady v Secretary of State for Defence* [2009] ECHC 1687 (Admin). In that case a Public Interest Immunity certificate signed by the Minister had proved to be partly false, as a significant volume of material withheld on national security grounds was already in the public domain through its disclosure in an unrelated court martial. That material related to the permissible limits of the techniques of the tactical questioning of captured individuals by British Armed Forces interrogators. Officials were rightly criticised for misleading the court. However, we do not find *Al Sweady* to be of particular assistance in the factual circumstances that are before us. It dealt with the situation where a certificate purported to withhold documentary material that was fully and recently placed in the public domain. That is not the case before us.

78. In the absence of evidence, we cannot say whether the appellants were served with copies of the records of proceedings in their hearings before the Commissioner. Nevertheless, we are satisfied that Mr Fryers was present at the hearings which were recorded in the two documents referred to above as c) and d), and that Mr Hogg was present at the hearings which were recorded in the four documents referred to above as a), b), c) and d). Each would have heard oral evidence given which appears in records of proceedings that are now withheld from them.

79. However, that oral evidence was given almost 50 years ago. In addition, if they had been given a documentary record of proceedings, that was an equally long time ago. There is no evidence to indicate what information the appellants may have retained in memory, but we consider that it is highly improbable that the appellants would accurately recall all of the information sought. The SOSNI in the certificates had followed advice that, in the absence of evidence that the appellants still held the documents requested (paragraph 16 of the certificates), national security sensitive information should not be disclosed. Her focus was on whether the material was held by the appellants in the present, as opposed to having been disclosed in the past. This was a rational approach in the circumstances.

80. We heard evidence in closed session from, as indicated above, a Detective Superintendent and a Detective Inspector of the PSNI. That evidence cannot be disclosed in the present open decision. However, it was addressed to the rationale of the SOSNI for withholding the

requested information. We have carefully probed that evidence and have heard justification advanced for each of the redactions in the appellants' files. Having heard that evidence, we cannot hold that it was irrational of the SOSNI to issue the national security certificates on the basis that she failed to take into account that some of the redacted material was disclosed in hearings held almost 50 years previously. In particular, we accept that the SOSNI in 2018 was not bound by decisions about disclosure of evidence made by those administering the detention hearings from 1972-75 but was obliged to address the circumstances obtaining at the date of her certificates.

81. On the basis of the evidence that we have heard in closed session, and affording her an appropriately wide margin of appreciation, we cannot hold that the SOSNI acted irrationally by failing to take account of previous disclosure.

Irrationality arising from lack of consequences from prior disclosure

82. The appellants more generally submitted that, since disclosure had been made in the course of detention proceedings in the 1970's, during the worst years of the "Troubles", a very clear explanation would be required for a refusal to release the same material in 2022. This submission engaged with the apparent lack of any negative consequences from previous disclosure and the question of whether the level of the risks arising from disclosure had changed in the intervening period. The appellants also pointed to the release of the Clarke and McDonnell files (see para.33 above) in unredacted form. They submitted that no negative consequences had arisen as a result.

83. There is plainly some force in the submission that the risks to national security arising from disclosure of files from the 1970's may have diminished over time. For example, technological advances in the past 50 years mean that surveillance methodologies may have changed considerably. Individuals named in the files who may be at risk of reprisal may be deceased and the risk to others may have diminished. However, the respondent submitted that in matters of national security the SOSNI was entitled to adopt a precautionary approach, namely that actual harm did not have to be shown where it was reasonably anticipated.

84. The respondent further relied on the decision of the Upper Tribunal in *Keane v Information Commissioner & the Home Office* [2016] UKUT 461. That case was addressed to a request of an Irish historian, made for academic purposes, for "details of paid informants referred to in Metropolitan Police records and involved in Irish secret societies in the period from 1890 to 1910". That case was not, as here, a first instance appeal, but rather an appeal on a point of law from the First-tier Tribunal, which had decided by a majority that the names of informants should not be disclosed. The case involved an application under the Freedom of Information Act 2000 (FOIA) and addressed qualified statutory exemptions on national security (section 24, FOIA) and health and safety (section 38 FOIA) grounds. Unlike the present case, there was no national security certificate.

85. In *Keane*, the parties had accepted that any adverse impact on the ability to recruit and retain informants posed a threat to national security. In that context the appellant had accepted the tribunal's finding that section 24(1) of FOIA was engaged. The sole question was the balance of public interest between disclosure and non-disclosure. The Upper Tribunal accepted that the First-tier Tribunal had reached a sustainable conclusion that the public interest in maintaining the section 24(1) exemption outweighed the public interest in disclosure. Although bearing some similarities to the subject matter of the present cases, it is not an authority which

greatly assists us, due to the different statutory regime involved and the existence of national security certificates in the present appeals.

86. In the course of the closed hearing, we have heard justification advanced for the maintenance of redactions in the appellants' cases. We have probed the nature and extent of current risks in light of the period of time that has elapsed since the underlying events and since the documents were created. We have probed the issue of whether PSNI was aware of any risks which have materialised as a result of the disclosure which was made in other internment cases. We have carried out a careful scrutiny of the materials contained in the sensitive schedules to ascertain whether the national security grounds for the redactions continue to retain validity and justification now in light of the passage of time.

87. We consider that the SOSNI was entitled to consider possible risks that might result from disclosure – whether or not actual harm had resulted from previous disclosure - when addressing herself to the national security considerations of the present day. We accept that the SOSNI was entitled to address herself to any risks and consequences in 2018 of the disclosure of material from 1972-75. On the basis of the evidence that we have heard in closed session, and affording her a wide margin of appreciation, we cannot hold that the SOSNI acted irrationally by issuing the certificate in a situation where information was previously disclosed in the 1970's.

Irrationality arising from release of the Clarke and McDonnell files

88. The appellants submitted that the SOSNI had failed to take into account the inconsistent release of unredacted files to Mr Clarke and Mr McDonnell. It was submitted that the release of those files, while the appellants were refused information on an equivalent basis, demonstrated irrationality on the part of the SOSNI.

89. We heard and accept the open evidence of Ms Sloan that, in 2013, subject access requests were made to PRONI for disclosure of internment records by a number of individuals other than the appellants. PRONI sought advice from the MCAL at that time, who permitted the release of substantially unredacted records of the same nature as those requested by Mr Fryers and Mr Hogg. These included the records released to Mr Clarke and Mr McDonnell. The appellants provided evidence of the contents of the released files in the Clarke and McDonnell cases, and we accept that they were released substantially, if not entirely, without redaction.

90. We also heard evidence that a disagreement around the procedure for releasing such files arose between PSNI and MCAL, leading to legal proceedings and an interlocutory injunction in and around 2013. Afterwards, the system for releasing files was changed and directly involved the PSNI in a role of reviewing files for national security sensitive content. Whereas the files of Mr Clarke and Mr McDonnell were released without any consultation with PSNI, the files of the present appellants were reviewed by PSNI.

91. We observe that the two impugned certificates do not refer to the release of the Clarke and McDonnell files. Rather they are directed to the processes and consequences relating to the release of the files of the respective appellant. They refer to the original certificates and indicate that a process of further review was undertaken by PSNI in each case and that further advice was given before the present certificates were issued.

92. The respondent submitted that inconsistency is not a ground for judicial review, referring to *R (Gallagher Group) v The Competition and Markets Authority* [2018] UKSC 25, at paragraph 25. That submission is, we accept, correct, but perhaps mischaracterises the appellants' ground, which is more focused on the question of the matters that the SOSNI has had regard to.

93. In any event, we consider that the present case does not involve any inconsistency of approach by the SOSNI. The decision maker in relation to the Clarke and McDonnell files was PRONI, under the oversight of MCAL, whereas the SOSNI is the decision maker in the present case. The decision maker in Clarke and McDonnell did not have any advice from PSNI. However, PSNI have advised initially in relation to the appellants' original certificates and have advised the SOSNI further before the present certificates were issued. Therefore, the Clarke and McDonnell papers were released by a different body and the present certificates were issued after consideration of a different range of advice.

94. On the question of whether the SOSNI failed to have regard to the simple fact of the release of the Clarke and McDonnell papers, it is clear that the focus of the SOSNI was on the present appellants. However, the issue of any consequences stemming from the release of unredacted files in Clarke and McDonnell was addressed by us in closed session. We probed the extent to which PSNI is aware of any risks which have materialised as a result of the disclosure which was made in the McDonnell and Clarke files. We heard closed evidence and closed submissions on the issue.

95. In the light of the submissions were have heard and accepted, we find that the prior release of the papers in the cases of Clarke and McDonnell is not a factor that undermines the rationality of the SOSNI's certificate.

Conclusion

96. On the basis of the evidence that we have heard in open and in closed session and affording her decision a wide margin of appreciation in accordance with the relevant authorities, we cannot hold that the SOSNI did not have reasonable grounds for issuing the impugned national security certificates.

97. Therefore, we must dismiss the appeals.

Madam Justice McBride

Mr Justice Lane

Judge Stockman

Signed on original on 30th January 2024