

IN THE UPPER TRIBUNAL

R (on the application of the Secretary of State for the Home Department) v First-tier Tribunal
(Immigration and Asylum Chamber) (Litigation Privilege; First-tier Tribunal) [2018] UKUT 243 (IAC)

**Field House
London
8, 9 February and 30 April 2018**

Before

**MR JUSTICE LANE, PRESIDENT OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE RINTOUL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicant

and

FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Respondent

WM

(ANONYMITY ORDER MADE)

Interested Party

Ms C Patry and Mr M Henderson instructed by the Government Legal Department, on behalf of the Applicant.

Ms S Harrison QC and Mr E Grieves, instructed by Birnberg Peirce solicitors on behalf of the Interested Party

The Respondent was not represented

- (1) *Whether or not to entertain an application for judicial review is a matter that falls within the Upper Tribunal's discretion, applying well-known principles that apply also in the High Court. Where there is an alternative remedy it would only be in the*

rarest of cases that the Upper Tribunal would consider exercising its jurisdiction to grant permission to bring judicial review proceedings.

- (2) *There is a high threshold to be overcome before the Upper Tribunal will entertain an application for judicial review in challenging an interlocutory decision of the FtT. Once the very high threshold is met it is not necessary for each of the grounds to reach that threshold.*
- (3) *Litigation privilege attaches to communications between a client and/or his lawyer and third parties for the purpose of litigation. It entitles the privileged party not to disclose information even if it is relevant to the issues to be determined in a court or tribunal. Proceedings in the First-tier Tribunal are sufficiently adversarial in nature to give rise to litigation privilege. The fact that human rights issues are in play does not mean litigation privilege has to be balanced against those issues*

JUDGMENT

Introduction

1. This case concerns the circumstances in which the Upper Tribunal should, when exercising its judicial review powers, entertain a challenge to an interlocutory decision made by the First-tier Tribunal in the course of a statutory appeal; and, whether litigation privilege applies in proceedings before the First-tier Tribunal.
2. During the hearing of the interested party's appeal against a decision of the applicant Secretary of State to deport him, the First-tier Tribunal ordered full disclosure to the interested party of a partially redacted email between two officials in the Foreign & Commonwealth Office ("FCO"). The applicant challenges that decision; the interested party seeks to support it. The First-tier Tribunal has taken no part in the proceedings.
3. The applicant asserts that the redacted parts of the document are protected by litigation privilege which has been properly claimed and that the FtT erred in law both in concluding that litigation privilege did not apply and in ordering disclosure. It is also argued that the reasons given for the decision are flawed.
4. The interested party submits first that the Upper Tribunal should not entertain the action as the applicant has an alternative remedy in pursuing an appeal to the Upper Tribunal against the final decision. He also submits that even if that is not an alternative remedy, the applicant has not met the very high threshold required before the Upper Tribunal would interfere with the decision.

5. The interested party argues that litigation privilege does not apply in the First-tier Tribunal; and, that if it does, it is not properly claimed here, either because it does not extend to communications between or within a third party, in this case the FCO, or because it has not been made out on the facts. It is also submitted that in any event, by producing the document, even in a redacted form, the applicant has waived privilege.
6. We turn first to how, why and in what context the email in issue was produced.

Chronology

7. In February 2008 the interested party, WM, was convicted of offences under the Terrorism Act 2000 and under the Criminal Law Act 1967 arising out of the failed 21 July 2005 bombings in London. He was sentenced to 17 years' imprisonment, reduced to 13 years on appeal. On 20 June 2013, the applicant made a deportation order against him, seeking to remove him to Somaliland. That decision was appealed to the First-tier Tribunal. There have been, we understand, numerous delays in the matter coming to trial and there has been a significant disclosure exercise undertaken.
8. The applicant relies in the proceedings before the First-tier Tribunal on the evidence of KR who works in the British Embassy in Ethiopia. In her supplementary statement of 3 March 2017, she explained that she had been made aware of an email between the FCO and the Home Office regarding a conversation between a British Embassy officer and the former Somaliland Minister of the Interior.
9. As part of the disclosure exercise, and in response to a request from the interested party's solicitors, the applicant disclosed a copy of the email, redacted on the grounds that litigation privilege attached to it. That is confirmed by a witness statement by Mr James Eke of the FCO in which it is said that the email was sent with the dominant purpose of gathering evidence for finalising a Safety on Return Assessment ("SOR") served on 10 June 2016. Mr Eke maintained in his statement that while part of the email might not attract litigation privilege, as it set out the reporting of the conversation, the remaining parts did attract litigation privilege and that privilege was not waived.
10. We note in passing that, as Ms Harrison submitted, the redacted email now provided in the bundle is not that served previously. Although the redactions are the same, the original one asserted that the redactions were "irrelevant material".
11. The interested party objected to the redactions and sought an order from the First-tier Tribunal that an unredacted copy be served. Following submissions by the parties, the First-tier Tribunal ordered on 14 November 2017, that unredacted copies be provided to the Tribunal by 4pm on 17 November 2017 and that it would then disclose them to the interested party unless they agreed that the redactions were justified.

12. The applicant then applied to the First-tier Tribunal for that order to be set aside. In response, the FtT agreed to hear further oral submissions on 4 December 2017. The FtT then, on that date, withdrew the order of 14 November 2017, and ordered disclosure of the email, it being open to the applicant to withdraw reliance on it in the appeal.
13. On 19 December 2017, the applicant commenced these proceedings, seeking the quashing of the order of 4 December 2017, expedition, and a stay on the FtT's order in the interim.
14. A limited stay until 22 December 2017 was ordered, and following submissions by the parties on that day, Upper Tribunal Judge Rintoul ordered a rolled-up hearing. The stay was not continued, the FtT having undertaken to maintain a stay on its order pending resolution of these proceedings.

The Decision of the FtT

15. The FtT's decision was given orally following submissions by Mr Grieves and Ms Patry, who appeared before the FtT as they did before us. The parties do not dispute the accuracy of the note of the decision drafted by the applicant's counsel.
16. So far as is relevant, the FtT held:

As far as litigation privilege is concerned, we observe that is no precedent for its application in this Tribunal. No authorities have been submitted and this has been confirmed today by counsel. We cannot definitively say why that may be but it may be because fundamental human rights obligations are at stake in this tribunal.

Even if this were a situation where litigation privilege could apply, we are of the view that Mr Eke's statement is incomplete and incorrect in material respects.

The statement contained inconsistent claims concerning the content of the email. On its face, the email stated "not relevant to this case" but elsewhere Mr Eke and counsel stated that it was the subject of litigation privilege. We find these two statements to be inconsistent.

Mr Eke also stated that he realised that part of the email was not covered by litigation privilege and that it could be disclosed. He stated that it is not the case of litigation privilege being waived. However, counsel claimed that litigation privilege was being waived in respect of the unredacted part of the email. Again, we are not satisfied that both statements could be correct.

For these reasons, even if litigation privilege applied in this tribunal, we would have found that Mr Eke's statement did not establish that it applied here. We do not accept that litigation privilege could override fundamental human rights considerations.

Finally, we took the view that if we were to permit the email redactions to stand, the impression may be created or there may be a perception that the tribunal could

have been misled on the evidence and we would wish to avoid our decision being tainted in that way

We therefore order disclosure of the email. We are not satisfied that we have been given any reason for not viewing the email ourselves or for it not to be disclosed to the appellant's representatives ("the nuclear option" according to Ms Patry). If the respondent wishes to withdraw the email that is a matter for her.)

The applicant's challenge

17. The applicant's case is that FtT erred in concluding that:
 - (i) litigation privilege did not apply to proceedings before the First-tier Tribunal
 - (ii) the witness statement relied upon to assert litigation privilege was not consistent
 - (iii) even if litigation privilege applied, "it could not override a fundamental human right".
 - (iv) there might be a perception that it might be misled by the evidence.
18. The interested party submits as a preliminary issue that the Upper Tribunal should not entertain the application as there is a suitable alternative remedy available by way of an application for permission to appeal against the final decision, that being the remedy laid down by Parliament; and, that the grounds do not in any event merit the exceptional course of intervention by way of judicial review of an interlocutory decision of a Tribunal.
19. It is also argued that even if these hurdles are overcome, and permission is granted, the application should be dismissed as:
 - (i) Litigation privilege does not apply in proceedings in the FtT as the proceedings are not adversarial proceedings;
 - (ii) Even if it did, it could not apply on the facts of this case as the email was between FCO officials;
 - (iii) Even if it did apply to the email, it cannot now be claimed as the applicant has waived litigation privilege through partial disclosure;
 - (iv) The challenge to the assessment of the witness statement and the other challenges to the FtT's summary reasons were not properly challengeable on "Wednesbury" grounds.

Legislative Framework

20. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides, so far as is relevant:
 - 11 Right to appeal to Upper Tribunal
 - (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8)

...

(5) For the purposes of subsection (1), an “excluded decision” is-

...

(f) any decision of the First-tier Tribunal that is of a description specified in an order made by the Lord Chancellor.

21. The Appeals (Excluded Decisions) Order 2009 provides, so far as it is relevant, that the following are excluded decisions for the purposes of (*inter alia*) section 11:

(m) any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981, section 82 of the Nationality, Immigration and Asylum Act 2002, or regulation 26 of the Immigration (European Economic Area) Regulations 2006.

22. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provide:

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

The Issue of a Suitable Remedy

23. As noted above, the interested party submits that the applicant’s challenge falls at the permission stage, on the basis that there is a suitable alternative remedy. It is submitted that judicial review proceedings are also premature, issues of disclosure being primarily a point for the court seized of the substantive appeal; and, that there are other options open to the applicant. And, further, it is submitted that if judicial review of interlocutory decisions is to be permitted, a very high threshold must be met, it being appropriate only in rare and exceptional cases.

24. Whether or not to entertain an application for judicial review is a matter that falls within the Upper Tribunal’s discretion, applying well-known principles that apply also in the High Court. We consider it uncontroversial to state that where there is an alternative remedy it would only be in the rarest of cases that the Upper Tribunal would consider exercising its jurisdiction to grant permission to bring judicial review proceedings.

25. The availability of an alternative remedy is not the only consideration as to whether jurisdiction should be exercised. As Ms Harrison submits, the statutory scheme, and the fact that this is an interference in the usual procedure are factors to be taken into account.

26. Whether a statutory appeal is a suitable remedy requires us to consider if litigation privilege applies and if so, a statutory appeal against the final decision of the FtT in the substantive appeal could be a remedy against an improper and unlawful order requiring disclosure.
27. We accept that, as Ms Harrison submits, Parliament's policy, as set out in the Excluded Decisions Order, is to limit appealable decisions in immigration appeals to final decisions of the FtT. That is in contrast with the position in the civil courts where interlocutory decisions do result in appeals up to the higher courts as with the cases to which we refer below reported as Three Rivers DC v Governors of the Bank of England (No.5) [2003] EWCA 474 and Three Rivers DC v Governors of the Bank of England (No 6) [2004] UKHL 48, commonly referred to as the Three Rivers litigation.
28. In that context, what was held in R (Sivasubramaniam) v Wandsworth [2002] EWCA Civ 1738 at [47] is relevant:

47. There is indeed an abundance of authority, which supports Mr Sales' submission. This can be demonstrated by reference to that which he cited to us:

Harley Development Inc v Comr of Inland Revenue [1996] 1 WLR 727, 736C per Lord Jauncey; *R v Inland Revenue Comrs, ex p. Preston* [1985] AC 835, 852D-F per Lord Scarman, and 862D and F per Lord Templeman; *R v Secretary of State for the Home Department, ex p. Swati* [1986] 1 WLR 477; *R v Birmingham CC, ex p. Ferrero Ltd* [1993] 1 All ER 530, 537c per Taylor LJ; *Allen v W. Yorkshire Probation Service* [2001] EWHC Admin 2.

What these authorities show is that judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused.

48. We believe that these general principles apply with particular force in the context of the applications before us. Under the 1999 Act, and the rules pursuant to it, a coherent statutory scheme has been set up governing appeals at all levels short of the House of Lords. One object of the scheme is to ensure that, where there is an arguable ground for challenging a decision of the lower court, an appeal will lie, but to prevent court resources being wasted by the pursuit of appeals which have no prospect of success. The other object of the scheme is to ensure that the level of Judge dealing with the application for permission to appeal, and the appeal if permission is given, is appropriate to the dispute. This is a sensible scheme which accords with the object of access to justice and the Woolf reforms. It has the merit of proportionality. To admit an applicant to by-pass the scheme by pursuing a claim for judicial review before a judge of the Administrative Court is to defeat the object of the exercise. We believe that this should not be permitted unless there are exceptional circumstances – and we find it hard to envisage what these could be.

Hooper J. was right to dismiss Mr Sivasubramaniam's application in relation to District Judge Dimmick's award on the ground that he had an alternative remedy. He should have dismissed Mr Sivasubramaniam's application in relation to the Wandsworth County Court for the same reason rather than entering into consideration of the merits.

29. There is, however, a distinction to be drawn. There is within the Tribunals structure no scheme of the sort described above and equally there is a focus on the availability of an appropriate remedy.
30. There is support for Ms Harrison's proposition from R (AM (Cameroon)) v Asylum and Immigration Tribunal [2007] EWCA Civ 131 at [104] - [105], relying on R (Wani) v SSHD [2005] EWHC 2815 (Admin), although it must be borne in mind that the procedure for appeals from the First-tier Tribunal is now different. While we accept the observations that cases where judicial review will lie in challenges to interlocutory decisions are rare, they are not expressly ruled out. These were characterised in AM (Cameroon) as being gross procedural unfairness. That is not, we consider, any different in substance from what was held by the Divisional Court in R (U & XC) v Upper Tribunal [2009] EWHC 3052 at [85]:

I think it important to emphasise the limited consequences (if my Lord agrees) of my holding that SIAC is subject to the judicial review jurisdiction. A final determination of an appeal by SIAC is by SIACA s.7 subject to appeal to the Court of Appeal. It is elementary that judicial review is a discretionary remedy of last resort. Accordingly it will not be deployed to assault SIAC's appealable determinations. Not of course for want of jurisdiction: but because the court's discretion should not be so exercised. Nor will it go to interlocutory decisions on the way to such a determination, at least without some gross and florid error. As for bail, the court will not allow judicial review to be used as a surrogate means of appeal where statute has not provided for any appeal at all. In a sensitive area where the tribunal is called on to make fine judgments on issues touching national security, I would anticipate that attempts to condemn the refusal (or grant) of bail as violating the *Wednesbury* principle will be doomed to failure. A sharp-edged error of law will have to be shown.

31. These cases do, we consider, indicate that there is, as Ms Harrison argues, a high threshold to be overcome before the Upper Tribunal will entertain an application for judicial review in challenging a decision of the FtT. But the examples given of when the High Court would intervene must be seen in the context of R (U & XC) - challenges to a court of record. That is not the case here. We bear in mind that whether or not the Upper Tribunal should intervene arises from discretion; not law and it must be recalled that when R (U & XC) reached the Supreme Court as Cart v The Upper Tribunal [2011] UKSC 28, the second appeals test was identified as being appropriate; that is to say, a test which requires there to be some important point of principle or practice or some other compelling reason to hear the appeal

32. We do not accept either that Pham v SSHD [2015] UKSC 19 is relevant to this case. We do not consider that, as Ms Harrison submits, it is an indication that issues of disclosure should primarily be dealt with by the court hearing the substantive issue. The passage cited at [62] suggesting that is made in the context of an appeal in SIAC where that Court would be in possession of open and closed material which is not the situation here. It is not just simply an issue of disclosure; this case touches first on whether litigation privilege is engaged.
33. We part company from Ms Harrison in her submission that the applicant must overcome the high threshold in respect of each ground advanced. We do not consider that the case law supports that proposition.
34. Given that the primary consideration is whether the Upper Tribunal should entertain a challenge at all, we consider that once the very high threshold is met, we accept Ms Patry's submission that, analogous with the second appeals test, it is not necessary for each of the grounds to reach that threshold. Further, and in any event, the grounds of challenge are simply ancillary to the core thrust which is that the order for disclosure was contrary to the applicant's fundamental right.
35. We do, however, consider that it is necessary to examine the substance of the challenge before reaching a conclusion on this issue.
36. The second, related preliminary matter is whether the right of appeal against a final decision of the First-tier Tribunal would be a suitable alternative remedy as the interested party submits. That is not an issue we can, however, decide without first considering whether litigation privilege applies. If it does, then it would not be an adequate remedy, as (for reasons which we develop below) it could not put the applicant back in the position she was before the email in question was disclosed and ceased to be confidential.

DISCUSSION

(a) The nature of litigation privilege

37. We now turn to litigation privilege. A number of issues arise in the context of this application
 - 1 What is the nature of litigation privilege?
 - 2 Does it apply to proceedings in the FtT?
 - 3 If so, can it apply to an email between officials within the FCO?
 - 4 If so, has it been properly claimed?
 - 5 If so, has it in fact been waived?
38. Litigation privilege attaches to communications between a client and/or his lawyer and third parties for the purpose of litigation. It entitles the privileged party not to disclose information even if, for example, it is relevant to the issues to be determined in a court or tribunal – in essence privileged communications

are immune from compulsory disclosure. It is to be distinguished from legal advice privilege - communications between lawyer and client for the purpose of giving or receiving legal advice. These two privileges form the two sub-categories of legal professional privilege - see Waugh v British Railways Board [1980] AC 521 and Three Rivers District Council v Governor and Company of the Bank of England (No6) [2005] 1 AC 610. There are, however, significant differences in the circumstances in which each of the types of privilege come into being.

39. Legal professional privilege is, as the case law makes clear, a fundamental right but it differs from other fundamental rights such as those protected by articles 2, 3 and 4 of the Human Rights Convention but where it does not differ is that there is no balancing exercise to be undertaken. That is not to say that there are not competing rights in play, as there clearly were in R v Derby Magistrates [1995] UKHL 18, where Lord Taylor CJ held at [58]:

58. The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

...

65. One can have much sympathy with McCowan L.J.'s approach, especially in relation to the unusual facts of this case. But it is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established.

40. Further, as Lord Lloyd observed at [67]:

67. The reason is rather that the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege, unless, of course, the privilege is waived.

It appears also from the case law that to be covered by LP, a communication must be confidential. We consider that the email in question must be in its nature confidential - not seriously submitted otherwise.

41. As noted at [38] above, litigation privilege, unlike legal advice privilege, attaches to documents and communications between a party and/or his lawyer, and a third party. But it does not apply to all such documents or communications. For litigation privilege to apply to a document or communication, it must meet three criteria:

- a. It must have come into being after litigation was reasonably contemplated or anticipated;
 - b. The litigation in question must be adversarial;
 - c. The document's dominant purpose must be to advance the contemplated litigation.
42. There is no doubt in this case that the document in question came into being once proceedings had commenced and was created to further the applicant's case. The issue is whether the proceedings in the FtT are adversarial.
43. The interested party's case is that litigation privilege cannot arise here as the proceedings are not adversarial. In Three Rivers (No6) Lord Rodger held at [51]-[52]:

51. It is common ground between the parties that legal advice privilege has to be distinguished from litigation privilege. As Lord Edmund-Davies noted in Waugh v British Railways Board [1980] AC 521, 541-542, in the past the need to make that distinction was sometimes overlooked:

"It is for the party refusing disclosure to establish his right to refuse. It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it) 'for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.'"

52. Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. In the words of Justice Jackson in *Hickman v Taylor* (1947) 329 US 495, 516, "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

44. Also of note are Lord Scott's comments at [29]:

29. In paragraph 39 of their judgment in *Three Rivers (No. 6)* the Court of Appeal commented that:

"The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged".

As to the justification for litigation privilege, I would respectfully agree that the need to afford privilege to the seeking or giving of legal advice for the purposes of actual or contemplated litigation is easy to understand. I do not, however, agree that that is so in relation to those documents or communications which although

having the requisite connection with litigation neither constitute nor disclose the seeking or giving of legal advice. Communications between litigant and third parties are the obvious example. This House in *in re L* [1997] AC 16 restricted litigation privilege to communications or documents with the requisite connection to *adversarial* proceedings. Civil litigation conducted pursuant to the current Civil Procedure Rules is in many respects no longer adversarial. The decision in *in re L* warrants, in my opinion, a new look at the justification for litigation privilege. But that is for another day. It does not arise on this appeal.

45. There is no disagreement between the parties that for litigation privilege to arise in respect of a communication, it must have been made in contemplation of adversarial litigation. It is evident from the cases to which we were taken that it does not arise in the context of an inquiry (as in *Three Rivers (No. 5)* and (No.6)), or in disputes as to child care and wardship – see Re L

46. What characterises that decision, and indeed Official Solicitor v K [1965] AC 201 on which it relies, is what is seen as the particular nature of proceedings in which the welfare of a child is in issue. It is, we consider, recognised in K that the nature of the dispute may vary according to what is in dispute, but equally it is useful to consider how Lord Scarman characterised wardship proceedings in E (SA) (a minor) (wardship: courts duty) [1984] 1 WLR 156 at p 158:

But a court exercising jurisdiction over its ward must never lose sight of a fundamental feature of the jurisdiction that it is exercising, namely, that it is exercising a wardship, not an adversarial, jurisdiction. Its duty is not limited to the dispute between the parties: on the contrary, its duty is to act in the way best suited in its judgment to serve the true interest and welfare of the ward. In exercising *159 wardship jurisdiction, the court is a true family court. Its paramount concern is the welfare of its ward. It will, therefore, sometimes be the duty of the court to look beyond the submissions of the parties in its endeavour to do what it judges to be necessary.

47. The nature of proceedings before the First-tier Tribunal is different from wardship or child care proceedings. There are two opposing sides; there are areas of factual and legal dispute between the parties; the issues in dispute are identified. Generally, the FtT cannot go behind concessions by either party.

48. Ms Harrison submitted that asylum and human rights appeals are not adversarial. That is a surprising submission, given the manner in which such appeals are contested on both sides, there being little room for compromise. While the Supreme Court in W (Algeria) v SSHD [2012] UKSC 8 did stress the need to ensure there is no breach of human rights, equally there is nothing to demonstrate that this cannot be achieved within the context of proceedings in which there is an identified dispute between the parties.

49. We do not accept that the fact that asylum appeals are administrative proceedings as opposed to civil is a relevant consideration. It is not doubted that litigation privilege applies to judicial review, or that it has been held to apply in other Tribunals. We do not accept that Karanakaran v SSHD [2000]

EWCA Civ 11 assists the view that the process is not adversarial. What is said at paragraphs [101] – [102] is that the usual civil rules of evidence need not necessarily apply as to what should be taken into account when assessing risk. It is in that limited manner, the usual paradigm of adversarial appeals as it applies to the admission of evidence is varied.

50. There is more support for Ms Harrison’s submission to be gained from the judgment of Sedley LJ at [18]:

The question whether an applicant for asylum is within the protection of 1951 Convention is not a head-to-head litigation issue. Testing a claim ordinarily involves no choice between two conflicting accounts but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant’s case. It is conducted initially by a departmental officer and then, if challenged, by one or more tribunals which, though empowered by statute and bound to observe the principles of justice, are not courts of law. Their role is best regarded as an extension of the initial decision-making process: see Simon Brown LJ in *Ravichandran* [1996] Imm AR 97,

51. This passage is, we consider, no longer representative of the law, even if were not obiter. We do not accept that the First-tier Tribunal is, in the light of the TCEA 2007, not a court of law, or that the nature of appeals under the Nationality, Immigration and Asylum Act 2002 which results in a binary outcome, are not head-to-head or adversarial litigation.

52. We accept that the case law establishes that, where issues of asylum and possible serious breaches of human rights arise, the position as at the date of hearing is what is in issue, and thus more recent material must be taken into account. But that does not render proceedings inquisitorial that otherwise bear the unmistakable characteristics of adversarial litigation – two parties, opposing views, pleadings and a clear dispute between the parties. It is fundamentally different from an inquiry where, for example, there may not have been an offence committed, or a coroner’s inquest where the issue is how the person died, or childcare proceedings, where the assessment of the child’s best interests may result in many different outcomes. In asylum or human rights appeals, the issue is whether the appellant’s removal from the UK would violate the Refugee Convention or the Human Rights Convention; either he succeeds in resisting that or he does not. The outcome is binary; an appeal is either dismissed or allowed. The First-tier Tribunal does not decide what form of leave, if any, flows from a decision in the appellant’s favour nor the terms of any such leave.

53. This is, we accept, a position different from that adopted by the Court of Appeal in R v SSHD ex p Besnik Gashi [1999] INLR 276 where Thorpe LJ (with whom Evans LJ agreed on this point) held:

Claims to litigation privilege in respect of experts’ reports invariably fuel suspicion that something damaging is being concealed... the point does not arise directly in this appeal. I would only observe that in a field of litigation that is not purely adversarial and in which the court has an overriding obligation to promote a

welfare consideration, litigation privilege does not allow a party to the litigation to refuse the production of any expert report that has been obtained for the purposes of the case: Re L (Police Investigation: Privilege) [1997] AC 16. It seems to me at the very least arguable that the principles that have curtailed the litigation privilege in that field would apply by extension into the asylum field.

54. The passage relied upon is obiter, as Thorpe LJ recognised. Furthermore, the passage concerned an expert report. That is not the case here, where we are concerned with material which went into the preparation of the applicant's Safety on Return assessment and into the evidence of KR. An expert owes an express duty to the court, which is different in kind from that of others who may testify before a court or tribunal. In any event, we observe in passing that in Lucas v Barking Havering and Redbridge Hospitals [2003] EWCA Civ 1102, the court held that mere mention of a privileged document in an expert's report does not necessarily waive privilege in that document if the contents of that document are not to be relied upon by the discloser. The position in respect of mention of a document in a witness statement is analogous – see CPR 31.14.
55. If and insofar as these obiter observations of the Court of Appeal imply the adoption of a balancing approach to determine the existence or scope of litigation privilege, such an approach has subsequently been disapproved by the Supreme Court in Three Rivers (No.6). The correct view is that litigation privilege simply does not arise – see Lord Jauncey in Re L at page 27. For these reasons, we consider that the observations in ex p Gashi are not to be followed.
56. The interested party placed particular reliance on R v Brown [2015] EWCA Crim 1328 and McE v Prison Service of Northern Ireland [2009] UKHL 15. We do not consider that these cases are authority for the proposition that litigation privilege does not have an absolute aspect but is a qualified right that necessarily has to be balanced against competing considerations.
57. In McE, the House of Lords held that certain surveillance operations could be carried out in prisons, even though the conversations that might be the subject of such operations were subject to legal professional privilege. In Brown, the imperative of protecting human life meant that legal advice privilege simply did not apply. In neither case was it suggested that the privilege was, as a result, qualified in nature. Furthermore, both cases concerned legal advice privilege, not litigation privilege.
58. Holyoake v Candy [2017] EWHC 52 lays to rest the fallacy of the suggestion that litigation privilege requires a balancing exercise to be undertaken, even where a competing human right is said to be in play. Having reviewed the authorities, Warby J (at [91]) rejected any submission that

...the court is duty bound to allow an incursion into LPP whenever the documents for which protection is sought may evidence a breach of any human right:

92. That, on analysis, has to be the logic of Ms Proops' position. However much she may emphasise the "fundamental" nature of the privacy rights at issue in this case she cannot submit that they fall into any special or separate category from other

fundamental human rights. If the argument is sound, it must apply to other human rights such as (for instance) the right to freedom of expression protected by Article 10, or the right to peaceful enjoyment of possessions protected by Article 1 of Protocol 1. It seems to me therefore that Mr Pitt-Payne is right to submit that this argument seeks a substantial expansion of the iniquity principle which would, on the face of it, significantly erode the right to LPP. I also see a great deal of force in Mr Pitt-Payne's submission that the argument for Mr Holyoake fails properly to recognise that the right to LPP is itself a fundamental human right. Authority establishes that LPP is an aspect of the rights protected by Article 8 ECHR (see *Campbell v United Kingdom* (1992) 15 EHRR 137). Those same rights are also protected by Article 7 of the Charter. Recognition of the need in the public interest to protect communications between client and lawyer is a common feature of European legal systems so that the protection of LPP is, to some extent at least, a principle of EU law: *A M & S Europe Ltd v Commission of the European Communities* (Case 155/79) [1983] QB 878 [21-22].

93. Bearing these points in mind it might be thought, and Ms Proops has argued in the alternative, that the court should adopt a balancing approach, weighing one competing right against another. Such an approach would limit the extent to which this human rights argument would involve an incursion into LPP. But it would create a new exception of uncertain ambit. It would also appear to be inconsistent with House of Lords authority. In *R v Derby Magistrates Court, ex parte B* [1996] 1 AC 487 the House rejected the notion that the availability of legal advice privilege might admit of exceptions, to be identified using a balancing approach. Lord Taylor CJ said at 508D-E that "if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits." The reference was to the decisions in *Berd v Lovelace* (1577) Cary 62 and *Dennis v Codrington* (1579) Cary 100 (see [1996] 1 AC 504B-D). Lords Keith, Mustill and Lloyd agreed. Lord Nicholls at 511G-512E adopted the same approach. This rejection of a balancing approach is one of the fundamentals referred to by Lord Hobhouse in *Morgan Grenfell*, but as already observed, his views were obiter.

59. Likewise, at [4] of *Belhaj and others v Director of Public Prosecutions and others* [2018] EWHC 513 (Admin), the claimants acknowledged that the privilege "is an absolute privilege: where it exists it is not subject to any balancing exercise and cannot be overturned by reference to the public interest". While this is not a decision put before us by the parties, it confirms the position taken in the cases cited to us, and thus we did not consider it necessary to receive additional submissions on it.
60. Thus, the interested party's stance on this issue must be rejected. Litigation privilege cannot be abrogated merely because the appeal proceedings concern the interested party's human rights. The FtT's decision to the contrary was, therefore, wrong in law.
61. We observe, in passing, that if Ms Harrison were right, then litigation privilege would not apply to appellants within the First-tier Tribunal (IAC) such that it would be open to the Secretary of State to seek, as a matter of routine, disclosure of correspondence between the appellant and third parties which touched on the appeal and, probably, to communications between them and

representatives who are not legally qualified which would not be covered by legal advice privilege.

(b) The duty of candour/ questioning the assertion of litigation privilege

62. The duty of candour imposed on SSHD and the FCO arises because, in part, as Laws LJ recognised in CM (Zimbabwe) v SSHD [2013] EWCA Civ 1303 there is no duty of disclosure imposed on the Secretary of State unlike in ordinary civil cases. The same applies in judicial review where orders for disclosure are rare and unusual.
63. In Belhaj the Divisional Court considered the duty of candour and held:

37 We add one point of some significance as a consequence of the argument in this case. HM Government has a duty of candour and a proper exercise of that duty is often of great importance. It is the critical safeguard to address the risk of "bad" but privileged legal advice.

38 The duty of candour is an important common law duty and, classically, includes the duty to approach the court with "its cards face up on the table": *R v Lancashire County Council ex p Huddleston* [1986] 2 All ER 941 at page 945. The duty applies not only to documents in the possession of the state but also to information known to it: In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 the Court was concerned with what appeared to it to be a reluctance on the part of the Defendant to give full sight of the reasons which motivated the decision being challenged. At paragraph [50] Laws LJ observed:

"... there is no duty of general disclosure in judicial review proceedings. However there is – of course – a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at. If the court has not been given a true and comprehensive account, but has had to tease the truth out of late discovery, it may be appropriate to draw inferences against the Secretary of State upon points which remain obscure: see *Padfield* [1968] AC 997, per Lord Upjohn at 1061G – 1062A."

39 Over and above the common law, it is evident from decided cases that the duty emanates also from Article 6 ECHR and the right of any party to receive a "fair" hearing: *McGinley & Egan v United Kingdom* (1999) EHRR 1. In *Roche v United Kingdom* [2006] 42 EHRR 30, the European Court of Human Rights held that Article 8 may also, in some circumstances, be engaged. In cases where fundamental rights are engaged, the duty may be especially onerous.

40 Those acting for the Government who properly exercise privilege must give thought to the basis of privileged advice and to the advice itself. If it is clear that the advice was given on an inadequate basis, or a basis clearly at odds with the evidence which will be before a court in the absence of the privileged material, then the duty of candour will require HM Government to correct any misapprehension. Any concern that a contested action was taken in reliance on privileged legal advice

obtained on a misleading basis, calls for careful consideration and, if the concern is well-founded and unless the point is immaterial, is likely to call for correction pursuant to the duty of candour

64. Neither this case, CM (Zimbabwe) nor R v SSHD ex p Kerrouche [1998] INLR 88 provides a basis for suggesting that the duty to disclose would include privileged documents including those protected by legal advice privilege, thus breaching a fundamental right of the Secretary of State. It is also difficult to discern how a distinction could in principle be drawn such that litigation privilege would not apply. In any event, the safeguards identified at [40] in Belhaj would apply to litigation privilege also. Further, it would in any particular case require the Secretary of State to make a positive claim of privilege. It would not be right for the Secretary of State simply not to disclose a document because it was privileged; that fact would in fairness, and in an analogy with the duty of disclosure in civil cases which require their existence to be identified, need to be disclosed. That is, in any event, not the position here; the document has been identified.
65. In the present case, the FtT was presented with an email. Pursuant to the applicant's duty of candour, she had disclosed part of that email to the interested party. The applicant claimed litigation privilege in respect of the redacted part of the email.
66. How should the FtT have proceeded? As we have seen at paragraph [16] above, the FtT based its decision to order disclosure of the unredacted email in part on the fact that it considered there was a discrepancy between Mr Eke's statement that the unredacted part of the email was not covered by litigation privilege and Ms Patry's submission to the FtT that litigation privilege was being waived in respect of the unredacted part.
67. The FtT's reasoning was, however, legally unsound. As [40] of Belhaj makes plain, there may well be instances where the duty of candour will require "careful consideration" by the public authority. That consideration may result in a decision to disclose certain information, which has its origins in communications that are subject to litigation privilege. It is for the public authority to decide how to present such information to the other party to the proceedings. Given the nature of litigation privilege, as set out above, the public authority must be afforded considerable latitude in this regard.
68. If the public authority decides that the most convenient course is to disclose an actual part of a privileged document, that is a matter for it. To anticipate what we say about waiver of privilege, it cannot be right that, merely by adopting this course, the public authority has waived privilege in the rest of the document.
69. The answer to the question posed in paragraph [63] is that it simply was irrelevant whether Mr Eke or Ms Patry was right. It was accordingly irrational for the FtT to base its disclosure decision in any way on the fact that both of them could not be right. This answer, however, needs some unpacking.

70. We accept that it is for the party claiming privilege to show it applies, and that close scrutiny will be exercised in examining that claim. But the need for close scrutiny and the form it takes, arise from the need to show that the document came into being with the dominant purpose of litigation which was then in reasonable contemplation. What was found to be insufficient in Starbev GP Ltd v Interbrew Central European Holdings BV [2013] EWHC 4038 and Astex Therapeutics Limited v Astra Zeneca AB [2016] EWHC 2759 were vague statements such as “documents which are by their nature privileged”. That did not explain why or how they satisfied the requirement to have a dominant purpose of litigation and to have been created once that was reasonably contemplated. That is significantly different from what was set out in the witness statement here.

71. Careful attention should be given to what Beatson J (as he then was) held in West London Pipeline [2008] EWHC 1729 at [53]:

Thus, affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect. On the need for specificity in such affidavits, see for example, Andrew Smith J in *Sumitomo Corp v Credit Lyonnais Rouse Ltd* [2001] 151 NLJ 272 at [39], referred to without criticism by the Court of Appeal [2002] 1 WLR 479 at [28], although the court did not (see [81]) consider the criticisms of the affidavit in that case were justified.

72. It is evident from Sumitomo Corp v Credit Lyonnais Rouse Ltd [2001] 151 NLJ 272 that the key issue was when the documents came into being, that is, at a time when litigation was in contemplation. There is no indication of an enquiry into the veracity or reliability of the witness statement or affidavit. The need for “anxious scrutiny”, that is, a close enquiry into what is prima facie established, arises because of the difficulty in going behind any statement without, we consider, evidence from the maker, subjected to cross-examination. That would not usually occur.

73. While the interested party seeks to rely on AXA Seguros De CV v Allianz Insurance PLC [2011] EWHC 1729 in support of the FtT’s approach we do not consider that, properly read, it assists him. The relevant passage is at [14]:

An affidavit which sets out a claim for privilege by stating the alleged purpose of the communication is not conclusive where it is appears from other evidence that the characterisation of the documentation is misconceived. The court must consider the issue in the light of all the evidence including, but not limited to any statement of purpose. Whether or not litigation is reasonably in prospect is an objective question, on which, again, the views of any deponent are not necessarily conclusive: see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027

74. This again relates to the issue of whether the threshold of litigation being reasonably contemplated such that one of the criteria necessary for litigation privilege to exist has been met. That was not the issue here.
75. The approach to be taken is, we consider, properly set out in West London Pipeline at [86]:

"(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority*.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montivedeo Gas Co*; *Birmingham and Midland Motor Omnibus Co v London and North West Railway Co*; *National Westminster Bank plc v Rabobank Nederland*.

76. Of particular importance in the context of the FtT's rejection of Mr Eke's witness statement and its approach to what it should then do is what is said at [86 (4)].

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: *Neilson v Laugharane*; *Lask v Gloucester Health Authority*.

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: *Birmingham and Midland Motor Omnibus Co Ltd v London and North West Railway Co*; *National Westminster Bank plc v Rabobank Nederland*.

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabo Bank Nederland* and *Atos Consulting Ltd v Avis plc* (No. 2). Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

(d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: (*House of Spring Gardens Ltd v Wait; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan (No. 2)*). However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: *Frankenstein's case; Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* and *Fayed v Lonrho*. In cases where the issue is whether the documents exist (as it was in *Frankenstein's case* and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue."

77. We accept that this was not properly put to the FtT and that they were not dealing with the formal process of disclosure under the CPR but the key question here is whether, as per rule 15(3) of the First-tier Tribunal Procedure Rules the applicant could in a court, be compelled to adduce the email. That should have been a key question for the FtT, and necessarily involved a proper analysis of both the CPR and the extensive case law on the subject. It is a complex area of law but proper analysis was required.
78. Applying the correct principles here, we consider that the FtT's approach to Mr Eke's statement was flawed. The FtT did not explain beyond identifying an inconsistency with other contemporaneous documents why they did not accept that litigation privilege was properly claimed. It was in consequence of the earlier issues that the statement of Mr Eke was obtained, but with respect, the FtT's conclusions do not comply with what Beatson J held in *West London Pipeline* at [86 (3)].
79. There is, contrary to what is permitted, an evaluation of Mr Eke's evidence. The issue must be whether the maker of the statement was incorrect as to the nature of the documents (see Chitty LJ in *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co* [1897] 2 QB as considered in *West London Pipeline* at [86 (3)(a)]). There is no proper consideration of this issue.
80. Further, we consider that it is not controversial or inconsistent to state that a document may be in part privileged, and in part not – see *The Sagheera* [1997] 1 Lloyd's Rep. 160 and *GE Capital* [1995] 1 WLR 172. The distinction between the latter and *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 is that in the latter, as a starting point, the whole document was said to be privileged and part was read out in court, that is that it was deployed in the litigation. That is different from what has occurred here. The latter case is, as was explained in *The Sagheera* and in *GE Capital*, primarily concerned with waiver – see Hoffman LJ:

In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is

privileged. There is no additional requirement that the part must deal with an entirely different subject matter from the rest.

The *Peruvian Guano* test must be applied to the *information* contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so. In *Jones v. Andrew*, 58 L.T. 601 an application to require a party to uncover parts of sentences of which the rest had been disclosed was, on the facts, unsuccessful: compare *Carew v. White* (1842) 5 Beav. 172.

The fact that the blanked-out part deals with the same subject matter as the part admitted to be relevant may mean that the former is also likely to be relevant. On the other hand it may not. The link between the two pieces of information which makes it appropriate to say that the subject matter is the same may be irrelevant to any issue in the action. Thus the memorandum from which I have quoted deals in one sense with the same subject matter, viz., G.E. deals which have gone wrong. But given the restrictions on the use of similar fact evidence, this is not enough to entail the relevance of the other transaction.

81. An analysis of the case law accordingly makes it plain that no adverse inferences can be taken from the reliance of a party on privilege. As a result, as we have said at paragraph 66 above, it was irrelevant whether Mr Eke was right about the unredacted part not being covered by litigation privilege. The fact that Ms Patry submitted that the unredacted part was privileged but that privilege had been waived, could not justify the approach taken by the FtT to Mr Eke's claim of privilege in respect of the redacted passages. If Ms Patry were right (and, in our view, she was), then there might be a question whether privilege in respect of the redacted passages had thereby been waived. The FtT did not, however, base its decision on any finding that there had been such waiver. Before us, Ms Harrison advanced this waiver argument in support of the submission that the FtT's decision, even if flawed, should nevertheless not be quashed. We shall have more to say later on the issue of waiver.
82. The interested party's stance before the FtT drew upon the duty of candour, to which we have already referred. The interested party's argument was that, having seen part of the email that had been disclosed in compliance with the applicant's duty of candour, he needed to be able to see the rest of it, in order to be sure the applicant was not holding something back, in breach of that duty. This, however, will not do. The interested party advanced no reason that might have given the FtT reasonable cause to think the applicant may not have complied with the duty of candour. Nor has any such reason been advanced before us. As a result, this aspect of the interested party's case is, in reality, a fishing expedition. The fact that the applicant had disclosed material in accordance with her duty of candour was being used opportunistically by the interested party.

83. In summary, neither the case law on inferences from reliance on litigation privilege nor the duty of candour provided the FtT with any rational basis for finding that, if it “were to permit the email redactions to stand, the impression may be created or there may be a perception that the tribunal could have been misled on the evidence and we would wish to avoid our decision being tainted in that way”.

(c) The position so far

84. It is necessary at this point to pause and take stock of the position we have reached. Proceedings in the First-tier Tribunal are sufficiently adversarial in nature to give rise to litigation privilege. Although there may be extreme instances where legal advice privilege and, possibly, litigation privilege have no bearing on the issue to be decided (e.g. to protect human life: Brown), the mere fact that human rights issues are in play does not mean litigation privilege has to be balanced against those issues. In the circumstances of this particular case, (subject to what is said below) the applicant was entitled to rely on litigation privilege. No adverse inference could be taken as a result of that claim. The fact that the applicant had disclosed certain information pursuant to her duty of candour -and that this information formed part of a document in respect of which litigation privilege was claimed – did not constitute a reason for thinking the applicant had not complied fully with that duty. The FtT’s reasoning on these issues was, therefore, legally defective.
85. Two matters featured in argument before this Tribunal, which find no expression in the reasons of the FtT but are relevant to the issue of relief. The first is the interested party’s submission that the communication in the email in respect of which litigation privilege is claimed was in law a communication between two third parties, rather than between the applicant and a third party. The second is that, even if there was claimable privilege, it had, on the facts of this case, been waived.

(d) Communication between third parties only?

86. Does litigation privilege apply to an email between two officials within FCO? The interested party submits that it does not.
87. It is not in dispute that the email in question was between two officials within the FCO, or, now, that it has been disclosed to KR, also working for the FCO. It is not submitted that, by Carltona principles, the relevant individuals are not acting as the Secretary of State for the FCO.
88. Is there then to be a distinction drawn between the two Secretaries of State such that they should be seen as two separate legal persons?
89. Despite the submissions we received as to Town Investments v Department of the Environment [1978] AC 359, we consider that the position is as analysed by the Upper Tribunal in Rota Bakhtiyar v SSHD [2015] UKUT 519 at [28]-[31]:

The truth of the matter is that:

“It is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments. ... [Acts of government are commonly attributed to ‘the Crown’, but some difficulties of comprehension could be] eliminated if instead of speaking of ‘the Crown’ we were to speak of ‘the government’ – a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by any of them are acts done by ‘the Crown’ in the fictional sense in which that expression is now used in English public law. ... The leases were executed under his official designation by the Minister of the Crown in charge of the government department to which, for administrative and accounting purposes, there is entrusted the responsibility for acquiring and managing accommodation for civil servants employed in other government departments as well as that of which the minister himself is the official head. In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown.”(at 380–381)

29 Thus, the distinction between different departments and their ministers was for these purposes irrelevant. The tenant was the government, and the business done in the premises was government business. The counter-inflation provisions applied.

30 In the course of his speech agreeing with Lord Diplock, Lord Simon of Glaisdale remarked at p.399 that “the mere fact of incorporation, which is only for administrative convenience, does not make a Secretary of State or a minister or a ministry an entity separate from the Crown”, and at p.400 drew attention to: “The fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible”. Interestingly, in his dissenting speech, Lord Morris of Borth-y-Gest noted at p.394 that certain provisions of the leases would have “no possible reason” if the tenant is to be regarded as the government as a whole, rather than some smaller unit. But the decision of the majority makes it clear that those considerations simply do not apply. It is a matter subject to the principles of constitutional and public law, not the choices of private law.

31 The present case is not about a lease, nor is it about counter-inflation provisions. It is, however, about government. Town Investments makes a number of things clear beyond argument for the purposes of the present application. First, the respondent, although nominally the Secretary of State for the Home Department is, in truth, the government, or ‘the Crown’. Secondly, the Government Legal Department, under the Treasury Solicitor, is part of the same “one and indivisible” entity. ...

90. The applicant’s submission is not that the Secretary of State for the FCO is a party to these proceedings, as Ms Harrison submits, merely that the different

Secretaries of State cannot be seen as separate entities for the purposes of applying the principles of litigation privilege.

91. Further, there is no merit in the submission that it is the Secretary of State for the Home Department in her capacity as a corporation sole who must be the respondent in an appeal. First, the relevant legislation refers only to the “Secretary of State” which, by operation of the Interpretation Act 1978 means any of Her Majesties Secretaries of State. Second, there is no basis for the submission that the Secretary of State for the Home Department (as opposed to other ministers) is a corporation sole. While the Ministers of the Crown Act 1975 enables Secretaries of State to be corporations sole, and that has been done in respect of SSFCO, there is no equivalent order in respect of SSHD.
92. In addition, section 2 of the 1975 Act provides:
 - (1) This section applies where any enactment (including an order under this Act) provides that a named Secretary of State and his successors shall be a corporation sole, and applies whether or not the office of corporation sole is for the time being vacant.
 - (2) Anything done by or in relation to any other Secretary of State for the named Secretary of State as a corporation sole shall have effects as if done by or in relation to the named Secretary of State
93. This appears, as was recorded in BAPIO v SSHD [2007] EWCA Civ 1139 at [53] “designed to secure continuity of property and contract rights and does not affect the prerogative character of the office itself.” We agree.
94. Accordingly, we are satisfied that as the SSHD and SSFCO are, in effect for the purposes of assessing whether litigation privilege applies, one and the same entity, albeit a corporate identity. While we accept that there would, as identified by the Court of Appeal in Three Rivers (No 5) be an issue as to whether legal advice privilege (this is not a communication to or from a lawyer or its agent) applied to the communication, it has not been submitted to us that such a limitation would apply here. In any event, there is no evidential basis put forward to suggest that either of the communicants was not authorised to give instructions to the applicant’s lawyers.

(e) Waiver

95. The interested party’s case is that there has been, in reality “cherry-picking” by the applicant. That was an issue considered, in similar circumstances, in Belhaj v DPP [2018] EWHC 514 handed down on the same day as Belhaj v DPP [2018] EWHC 513 (see above) which cited with approval the decision of Leggatt J in Mohammad v MOD [2013] EWHC 4478 where he held at [14]:

The term ‘waiver of privilege’ is an imprecise one, which is capable of referring to at least five legally distinct ways in which a right to assert privilege may be lost:

i) What might be called a 'true' waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances which imply consent to its use. Such a waiver may be either general or limited in scope.

ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter: see e.g. *Great Atlantic Insurance Co. v Home Insurance Co.* [1981] 1 WLR 529 . The underlying principle is one of fairness to prevent 'cherry picking': see e.g. *Brennan v Sunderland City Council* [2009] ICR 479 , 483–4 at [16].

iii) Similarly, a party who by suing its legal advisor puts their confidential relationship in issue cannot claim privilege in relation to information relevant to the determination of that issue. Again the governing principle is one of fairness: see e.g. *Paragon Finance v Freshfields* [1999] 1 WLR 1183 .

iv) Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed. Where a party does an act which has the effect of making information public, this has sometimes been described as a waiver of privilege (see e.g. *Goldstone v Williams* (1899) 1 Ch 47), but it is more accurate to say that privilege cannot be claimed because confidentiality has been lost.

v) Where a party comes into possession of privileged material by any means, and even if without the knowledge or consent of the other party, the receiving party is free to use such material subject to the equitable jurisdiction of the court to restrain a breach of confidence.

96. While this decision was not cited to us, we consider that the principles set out by Leggatt J are an uncontroversial summary of the relevant principles derived from the case law. Applying these principles, it cannot be said that it was open to the FtT to conclude that there had been waiver. The unredacted part of the email was disclosed pursuant to the applicant's duty of candour. This is far removed from the situation where a party seeks unprompted and of their own volition to use privileged material as part of their case, whilst attempting to rely on the same privilege to withhold other material of the same subject matter. As we have said, it is a matter for the applicant how to comply with the duty of candour.

Conclusions

97. As we said we would, we must now return to the question whether the high threshold for judicially reviewing the FtT's procedural/ancillary decision on disclosure has been met. We firmly conclude that it has. The FtT's reasons for ordering disclosure are fundamentally flawed. They cannot be saved by recourse to the argument that the communication was not made to the applicant (it was) or by recourse to the principle of waiver.

98. In these circumstances, to permit the FtT's disclosure direction to take effect and await correction, as part of the appeal process following the FtT's substantive decision, could not undo the fact that the applicant would have been compelled to disclose the privileged material. If, on the other hand, the applicant was to choose not to rely on the unredacted part of the email, the applicant would still have been materially disadvantaged by being forced to run her case in an unsatisfactory manner, in breach of her fundamental right.
99. For these reasons, we are satisfied that the Upper Tribunal should entertain the action. Accordingly, we grant permission, and for the reasons set out above, we grant judicial review. We quash the decision ordering disclosure of the email. It will now be for the FtT to make a fresh decision in the light of what we have set out above.
100. Permission to appeal is refused.

Postscript

At our request, we have seen the unredacted email. In the event, and as Ms Patry submitted would be the case, we find we have been able to reach our conclusions on all issues, without reference to the redacted passages.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Interested Party is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies to the applicant, to the respondent and to the Interested Party. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 19 June 2018

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul