Neutral Citation Number: [2014] EWCA Civ 1050

Case No: C3/2013/2239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (AAC)
(CHARLES J, THE PRESIDENT OF THE
ADMINISTRATIVE APPEALS CHAMBER OF THE
UPPER TRIBUNAL, MITTING J AND UPPER TRIBUNAL JUDGE
ANDREW BARTLETT QC)
[2013] UKUT 236 AC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2014

Before:

LORD JUSTICE MAURICE KAY
LORD JUSTICE PATTEN
and
LORD JUSTICE MCCOMBE

- -

Between:

Jonathan Browning	**Appellant**
- and -	
The Information Commissioner	**1st Respondent**
The Department for Business, Innovation and Skills	**2nd Respondent**

Philip Coppel QC and Anthony Hudson (instructed by **Howard Kennedy**) for the **Appellant**
Ben Hooper (instructed by **The Information Commissioner)** for the **1st Respondent**
Gerry Facenna and **Julianne Stevenson (**instructed by **Treasury Solicitors)** for the **2nd Respondent**

Hearing dates: 18-19 June 2014

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Approved Judgment

Lord Justice Maurice Kay:

1. This appeal raises an important procedural issue in relation to the Freedom of Information Act 2000. When the First-tier Tribunal (FTT) is hearing an appeal against a decision of the Information Commissioner (IC), in what circumstances (if any) can it lawfully adopt a closed material procedure (CMP) in which a party and his legal representatives are excluded from the hearing or part of it? Neither the Tribunals, Courts and Enforcement Act 2007 (TCEA) nor the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (the FTT Rules) provides expressly for a CMP or for the appointment of a special advocate (SA) to protect the interest of an excluded party. The procedural history of this case illustrates the problem. Before detailing that history, it is appropriate to set it in the context of the underlying dispute.

2. Jonathan Browning is a respected journalist who works for Bloomberg News. On 11 September 2008 he emailed a Freedom of Information Act (FOIA) request to the Department of Business Information and Skills (DBIS) seeking information as to, inter alia, ñwhich companies applied to the Export Control Organisation for export licences to Iran in the first and second quarters of this yearò.

3. As is well known, the licensing system in relation to exports to Iran results from certain resolutions of the United Nations Security Council and corresponding European Union measures. Licences are required for certain (but not all) categories of exports. In this country the licensing system is administered by the Export Control Organisation (ECO) under the aegis of DBIS. The governing domestic legislation is to be found in the Export Control Act 2002 and the Export Control Order 2008.

4. On 17 November 2009, DBIS replied to Mr Browningôs application, stating that the requested information was exempt from disclosure pursuant to sections 41(1) and 43(2) of FOIA and that the public interest lay in maintaining the exemption. That decision was maintained following an internal review.

5. On 5 March 2010, Mr Browning filed a complaint with the IC. On 17 January 2011 the IC served a Decision Notice in which he concluded that the reliance on sections 41(1) and 43(2) was misplaced. He required DBIS to release the requested information.

6. DBIS appealed to the Information Tribunal (whose functions have now been absorbed within the FTT) and Mr Browning, upon his application, was joined as a party to the appeal. Prior to the hearing before the FTT, the IC changed his position. Having seen some material disclosed to him (but not to Mr Browning) by DBIS, he now supported DBISôs case on sections 41(1) and 43(2).

7. The hearing of DBISôs appeal took place before the FTT on 4-5 August 2011. Mr Browning was represented by Mr Philip Coppel QC. DBIS was represented by Mr Gerry Facenna and the IC by Mr Ben Hooper. The IC made common cause with DBIS. In open session, DBIS relied on the evidence of Tom Smith of the ECO and Martin Johnson, Director-General of the British-Iranian Chamber of Commerce. They gave evidence in general terms of detriment and prejudice to applicant companies which would result from the release of their identities into the public domain. Such companies included those which required and were granted licences, those which required but were refused licences and those which applied out of an abundance of

caution but were considered not to require licences. Following the open session, the FTT held a closed hearing from which Mr Browning and Mr Coppel were excluded. It is no secret that, during it, the FTT heard two witnesses from applicant companies who gave evidence about detriment and prejudice.

The decision of the FTT

8. The FTT refused an application on behalf of Mr Browning that Mr Coppel (but not Mr Browning himself) be permitted to attend and participate in the closed hearing pursuant to an undertaking as to confidentiality. The FTT accepted that Mr Coppel would comply with such an undertaking but refused the application by reference to its established practice exemplified by British Union for the Abolition of Vivisection v ICO and Newcastle University EA 2010/0064 (to which I shall refer as the BUAV case) and other decisions.

9. It proceeded to allow DBISôs appeal. Its reasoning embraced acceptance of the evidence of the witnesses who had been heard in the closed session. No issues of national security arose or arise in relation to that evidence and, notwithstanding the adoption of the CMP, the essence of it was disclosed during the open hearing and is referred to in the judgment of the FTT. The judgment includes the following passages.

10. On the issue of the closed session, the FTT said:

> ñ33. There was nothing exceptional about the closed session evidence in this case. It was quite straightforward and came from two businessmen who exported to Iran. é the evidence, when heard in closed session, reinforced that conviction. As we indicated before the session began, we were ready to review the position if our preliminary impression, for any reason, changed. It did not.
>
> 34. We concluded that this was far from an exceptional case and refused the applicationò.

11. Under the heading ñthe closed session evidenceò, the FTT then stated:

> ñ35. The asserted need for confidentiality relates only to the names of the witnesses and their businesses and the nature of those businesses, from which the names might be deduced. The effect of their evidence was straightforward and can be shortly summarised in the publicly available decision.
>
> 36. Both had direct experience of lawfully exporting to Iran over a substantial periodé Both had experienced critical problems in the withdrawal of banking facilities by major UK banks because of their trade with Iran. The bankôs letter withdrawing facilities was exhibited to the statement of one of the witnesses. Both suffered repeated rebuffs from other banks, which they approached to provide facilities. One ultimately overcame the problem by ñdisguisingò the source of payment through routing via a foreign bank. The ñdisguiseò, apparently,

> was required by the bank that eventually provided facilities so that there was no evidence that it knew that funds came from Iran ï surely a deplorable state of affairs. Similar problems were confronted when attempts were made to transfer funds, lawfully held in Iraq, to a UK account. European banks refused to act. Eventually a bank within the EU agreed to make transfers but at a very high rate of commission.
>
> 37. Both witness stated that these problems had done immense damage to their businesses, indeed that they had faced closure. Both spoke of competitors facing these difficulties.
>
> 38. Their evidence confirmed that the risk of withdrawal or refusal of banking services extended to European and, plainly, to US institutions.
>
> 39. It was made clear to them that this aversion to Iranian transactions was the result of the perceived risk of withdrawal of the US correspondent banking licences without which a bank cannot trade in US dollars. Major European banks have, of course, a considerable presence in the USA for more general business purposes.
>
> 40. Evidence was also given of the potential loss of business from US companies, if this trade were publicised. On the other hand, major suppliers refused to do any business with a company trading with Iran, even for the purposes of exporting to a quite distinct end user.
>
> 41. More generally, both companies feared scrutiny by the US authorities and their inclusion on a black list which cut off all trade contacts with the USA and perhaps more widely. We were referred to the websites of the Office of Foreign Assets Controlé , an organ of the US Treasury, which enforces economic sanctions worldwide and blacklists companies and individuals with which US entities are prohibited from trading.
>
> 42. All these measures are liable to be taken against companies engaging in trade which is perfectly lawful according to EU law and the domestic law of the country in which they are registered and controlled.
>
> 43. One of the witnesses emphasised his expectation of confidentiality in making a licence application, having regard to the consequences of disclosure which he described.ò

I have set out those paragraphs at length so as to demonstrate the extent to which the product of the closed session was disclosed openly. It was disclosed to Mr Browning and Mr Coppel at the time so as to enable Mr Coppel to make submissions about it.

12. Later in the decision, the FTT addressed the relevant exemptions. It concluded that the information was clearly confidential (paragraphs 55-57) and that detriment was clearly established. As to detriment, it stated:

> ñ60é we were strongly impressed by the strength of the evidence on detriment which we heard in the closed session and which we tested with some care. We readily accept that these witnesses ï and doubtless others ï were treated by large banks in the manner which they describe and suffered the other trading difficulties summarised above. On the evidence adduced before us we are satisfied that a climate of fear as to US Treasury reaction frequently inhibits not just US institutions but many European ones from dealing with those who trade quite lawfully with Iran.
>
> 61. Taken as a whole, we found the evidence as to detriment resulting from disclosure entirely compelling. ò

13. Turning to the public interest test which applies to the exemption provided by section 43 (2), the FTT stated:

> ñ69. We bear well in mind that information must be disclosed if the balance of public interests is inconclusive. Given the doubt as to whether the information now sought would achieve what is claimed, the very high likelihood of real harm to a large number of companies resulting from disclosure of their identities and the ancillary point as to deterrence from candour in the licensing process, we conclude that the public interest firmly favours the withholding of this information.ò

The decision of the FTT was unanimous.

The decision of the UT

14. The decision of the UT contained a much fuller consideration of the CMP issue. It considered the nature of proceedings under the FOIA and concluded:

> ñ60é in our view, to characterise the First-tier Tribunalôs function, within the statutory scheme established by FOIA, as or equating to ordinary civil and therefore adversarial litigation because it is deciding a dispute between the parties before it, or deciding whether to vindicate a right claimed by the applicant, is an inadequate and inaccurate description; rather, its function is investigatory and is to see if FOIA is properly applied to the circumstances. This involves consideration, in the manner provided by FOIA, of the right which is given by section 1 (1) in pursuance of the interests that were served by the release of information, together with the assessment of countervailing public and private interest in accordance with the terms of the exemptions.ò

It later referred to the procedure as ñan investigatory appeal process to a tribunal comprising persons with relevant expertiseò (paragraph 65).

15. The UT then considered the question of disclosure to a legal representative in circumstances in which that representative cannot disclose the material to his client. It referred to circumstances in which such limited disclosure has been considered inappropriate in different contexts: see R v Davis [1993] 1 WLR 613; R v Preston [1994] 2 AC 130; R v G [2004] 1 WLR 2392 and Somerville v Scottish Ministers [2007] 1 WLR 2734. Having considered these authorities and the position which arises in FOIA cases, the UT concluded:

> ñ78. The points madeé all point to the conclusion that it will only be in exceptional and so rare cases that it would be appropriate to exercise a discretion in favour of directing disclosure of closed material to a representative of a person who is not to be provided with it.ò

Basing itself on the approach which had been taken in the BUAV case, the UT stated:

> ñé we have concluded that a First-tier Tribunal should not direct that a representative of an excluded party should see closed material or attend a closed hearing unless it has concluded that, if it does not do so:
>
> *it cannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interest involved.*ò

The italicised quotation was taken from the BUAV case. Applying this test, the UT dismissed Mr Browningôs appeal on this and other grounds.

The statutory framework

The right to information under the FOIA

16. The duty of a public authority to disclose requested information is established by section 1 (1) of FOIA. Exemptions are first referred to in section 2 (2):

> ñIn respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that ï
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.ò

The two categories of exemption considered in the present case are those provided for in section 41(1) and section 43 (2). The former is an absolute exemption within the meaning of section 2 (2) (a). The latter is a qualified exemption giving rise to the balancing exercise required by section 2 (2) (b).

17. Section 41 (1) relates to confidential information. It provides:

> ñInformation is exempt information if ï
>
> (a) it was obtained by a public authority from any other person (including another public authority), and
>
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.ò

18. Section 43 (2) provides:

> ñInformation is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).ò

The role of the IC and the FTT

19. Section 50 empowers the IC to make decisions upon disputed requests for information. Appeals to the FTT are governed by sections 57 and 58. Section 58 provides:

> ñ(1) If on an appeal under section 57 the Tribunal consider ï
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.ò

The FTT Rules

20. The FTT Rules were promulgated pursuant to powers conferred by the TCEA. Central to this appeal is the issue of whether or not the Rules permit the procedure adopted by the FTT in the present case, and whether or not the Rules are intra vires the TCEA. The FTT Rules and the TCEA will therefore be considered in more detail below. For now, it is sufficient to note that the TCEA provides that the FTT Rules

may make provision for a hearing to be held in private, and for the non-disclosure of information received during the course of the proceedings.

21. In the instant case, it is common ground that the FTT could and did properly exclude Mr Browning from the closed session pursuant to the FTT Rules. The dispute is confined to the exclusion of Mr Coppel. The notion of a legal representative being entrusted with information which is denied to his client is not wholly alien to the FTT Rules. Thus rule 14 (5) permits a partyôs legal representative to see closed material on terms (an undertaking) that he will not disclose it to his client without the consent of the Tribunal.

The development of CMP in the FTT

22. At the time of the hearing of the present case in the FTT, the FTT had issued a Practice Note headed Protection of Confidential Information in Information Rights Appeals Before the First-tier Tribunal on or after 18 January 2010. It may be that the significance of that date is that it coincided with the decision of the FTT in People for the Ethical Treatment of Animals Europe EA/2009/0076 in which a CMP was adopted and disclosure on a ñcounsel onlyò basis was rejected in accordance with earlier decisions. The Practice Note was not a Practice Direction within the meaning of section 23 of TCEA. It was a less formal document essentially advising tribunal users of the approach which the FTT had developed at that time. It referred to ñarrangementsò for protecting confidential information (paragraph 1) and stated that ñthe nature of appealsé under [FOIA] is such that the Tribunal will often require to see information which must be kept confidential from one or more of the partiesé ò (paragraph 3). Paragraph 13 stated:

> ñé at times the judge may have to make directions during the hearing to hold part of it in private. This means that those who cannot see what is claimed to be confidential information, or hear evidence presented that needs to refer directly to its contents will be asked to leave the room for the minimum length of time necessary to examine such evidence. For the avoidance of doubt those excluded will be those from whom the information needs to be kept confidential, which normally will mean everyone other than those parties from whom the documents are requested and any related parties and those representing the Information Commissioner.ò
>
> (Underlining added).

Thus, ñnormallyò the legal representative of an excluded party would be excluded.

23. The next milestone was the BUAV case which was to form the basis of the decision of the FTT in the present case. The BUAV case, decided on 11 November 2011, contained a thorough explanation by the FTT, chaired by Mr Andrew Bartlett QC, of the approach, taking into account the most recent authorities on the open justice principle such as Al-Rawi v Security Service [2011] UKSC 34 and Tariq v Home Office [2011] UKSC 35.

24. As it contains the most comprehensive reasoning behind the approach of the FTT it is necessary to refer to some of its content in detail. The reasoning is set out in Appendix 2 to the decision. Paragraph 14 includes the following:

> ñ(g) The Commissioner, though a party to the appeal, does not have the specific objective of trying either to procure or to prevent the release of the particular information. His concern, like the Tribunalôs, is to see that the Act is properly applied and to take proper account of the relevant private and public rights and interests. He argues for disclosure or non-disclosure according to his view of the application of the Act to the particular circumstances. Because his commitment is to the Act rather than to a pre-selected result, it is not unusual for his arguments to alter during the course of the hearing as evidence unfoldsé
>
> (h) In appeals which involve consideration of the requested information in closed session, the role of the Commissionerôs counsel is of particular importance. Counsel is able to assist the Tribunal in testing the evidence and arguments put forward by the public authority.
>
> (i) However, irrespective of the assistance of the Commissioner, the Tribunal, as a specialist tribunal, can be expected to be able, at least in some cases, to assess for itself the application of the provisions of FOIA to the closed materialé the extent to which the tribunal will be in a position to do this will depend upon the particular circumstances.
>
> (j) Until the Tribunal has decided whether the information is to be disclosed under FOIA section 1, it must proceed on the basis that it may decide against such disclosure. The Tribunal must therefore be careful not to do anything which might prejudice that outcome.
>
> (k) Disclosure to the appellantôs counsel on restricted terms would not itself amount to disclosure to the public under FOIA section 1. But it would be attended by risks of prejudicing the outcome. There could be a slip of the tongue. Information could be given away by facial expression or body language, or by the way questions were asked or answered or submissions made, or by inference from advice given. A change in the approach of counsel after seeing the material could make apparent the content of the information, or some of it. Such risks are relevant to the exercise of discretion under the Tribunalôs procedural powers.
>
> (l) Further risks may arise, beyond the individual appeal, because there are many individuals and organisations who are regular users of the right to freedom of information in pursuance of a particular interest. BUAV is one example out of

> many. If it became a regular practice to disclose requested information to counsel for the appellant, such counsel would over time build up a bank of knowledge concerning the topic of interest, derived from information which the public has no right to see. This could affect the personôs or organisationôs strategy in the use of the Act. I have observed above that, unlike a special advocate, an ordinary legal representative, authorised to see the closed material on confidential terms, would continue to communicate with the appellant after seeing it, and would take into account the confidential information when advising the appellant and taking decisions on the conduct of the case. By making the information available to counsel, in cases where there is no right to it, the appellant would over time derive illegitimate benefits.
>
> (m) Difficulties would also arise in relation to how appellants should be treated, who are not legally represented. An appellant may be wholly trustworthy and may offer an undertaking not to disclose the information unless the Tribunal so orders. If the information can be made available to counsel, why not to a trustworthy appellant? Yet to give it to the appellant before the Tribunal has decided whether it is disclosable, would be to override the Act and undermine the Tribunalôs function. Giving it to a lawyer acting as the appellantôs representative is not far different from giving it to the appellant in person.ò

These observations led to the Tribunal expressing its approach as follows (at paragraph 15):

> ñThese considerations lead me to the conclusion that the type of order now sought should not be made, save in exceptional cases where, as a minimum, the Tribunal take the view that it cannot carry out its functions effectively without the assistance of the appellantôs legal representative in relation to the closed material. Whether there will be any such cases remains to be seen. The approach must depend upon the particular circumstances. In some cases the Tribunal will be able to deal with the matter without external assistance. In many cases all necessary assistance will be provided by counsel for the Commissioner. In a few cases it may be necessary to appoint a special advocate, despite the extra expense likely to be occasioned.ò

This is the passage that was adopted by the UT in the present case (see paragraph 15 above). Since the present case was decided by the FTT, a further Practice Note has been issued in May 2012. It provides for additional procedural protection by a requirement of an application in writing for the withholding of material. Where a party and, by inference, his legal representative are excluded from part of a hearing it states (paragraph 12) that ñthe judge will explain to the excluded party, usually the citizen, what is likely to happen during the closed part of the hearing. The judge may ask if there are any particular questions or points which he would like put to the other parties

while he is absentò. It further provides for the Tribunal to discuss with the remaining parties, prior to the end of the closed hearing, what summary of the closed hearing can be given to the excluded party and whether, in the course of the closed session, any new material has emerged which it is not necessary to withhold and which therefore should be disclosed.

Identifying the issue on this appeal

25. It is important to identify what is and what is not in issue on this appeal. As I have already stated, it is common ground that the decision of the FTT to exclude Mr Browning from the closed session was permissible under the Rules (although Mr Coppel is critical of the way in which the decision was taken). The real issue relates to the exclusion of Mr Coppel. As his submission to this Court developed it seemed that the essence of his argument is that the Rules do not, and, as a matter of vires, cannot permit the exclusion of a legal representative who is willing to give an undertaking as to confidentiality. If that argument is to be rejected, and the Rules do permit the exclusion of both a party and his legal representative, Mr Coppel does not submit that the decision to exclude him was legally flawed in a Wednesbury sense. When Mr Browningôs case came before the UT, there was also a part of the proceedings from which he and Mr Coppel were excluded. Again, Mr Coppel is critical of that but it seems to me that, unless he can make good his challenge to the exclusion decision of the FTT, nothing turns on it.

The point of principle

26. The FTT is a creature of statute. It is therefore necessary to identify the statutory source of any power to exclude a legal representative. The general rule-making power in relation to tribunal procedure is contained in section 22 of TCEA. By section 22(4), the rule-making power must be exercised with a view to securing that, inter alia:

> ñ(4) (a).é justice is done,
> (b).é the tribunal system is accessible and fair.ò

By Schedule 5, paragraph 7 (b), the Rules may

> ñmake provision as respects allowing or requiring a hearing to be in private or as respects allowing or requiring a hearing to be in public.ò

Paragraph 11 (1) permits rules to make provision for the disclosure or non-disclosure of information received during the course of proceedings before the FTT. Paragraph 16 provides that rules may confer on the FTT such ancillary powers as are necessary for the proper discharge of its functions.

27. Section 22 and Schedule 5 of TCEA gave rise to the FTT Rules. Their most important provision for present purposes is rule 35, which includes the following:

> ñ(1) Subject to the following paragraphs, all hearings must be held in public.

> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.
>
> (3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
>
> (4) The tribunal may give a direction excluding from any hearing, or part of it ï
>
> > (c) any person who the Tribunal considers should be excluded in order to give effect to the requirement at rule 14 (10) (prevention of disclosure or publication of documents, and information); or
> >
> > (d) any person where the purpose of the hearing would be defeated by the attendance of that person.ò

Rule 5 confers general powers of case management including the power for the FTT to regulate its own procedure. Rule 14 is headed ñPrevention of disclosure or publication of documents and informationò. Its provisions include:

> ñ(1) The Tribunal may make an order prohibiting the disclosure or publication of ï
>
> > (a) specified documents or information relating to the proceedings; or
> >
> > (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
>
> (2) The tribunal may give a direction prohibiting the disclosure of a document or information to a person if ï
>
> > (a) The Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
> >
> > (b) The Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
>
> é
>
> (4) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that ï
>
> > (a) Disclosure to the representative would be in the interests of the party; and
> > (b) The representative will act in accordance with paragraph (5)

> (5) Documents or information disclosed to a representative in accordance with a direction under paragraph (4) must not ne disclosed either directly or indirectly to any other person without the Tribunalôs consent.
>
> (6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons.
>
> é
>
> (10) The Tribunal must conduct proceedings and record its decision and reasons approximately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (6)é ò

These provisions were not tailored to the specific context of appeals under FOIA. They apply across the broad range of the jurisdictions inherited by or conferred on the FTT pursuant to TCEA including, for example, appeals and applications arising under the Mental Health Act 1983.

28. It seems to me that the FTT Procedure Rules, in particular rules 5 (3) (g) and 35, fall within the vires conferred by section 22 and Schedule 5, paragraphs 7 (g), 11 (1) and 16 of TCEA and that, on the face of it, they permit the procedure that was adopted by the FTT in the present case. Mr Coppelôs submission is that, even if such an interpretation is a tenable one, it should be resisted because the fundamental principles of open justice and natural justice demand a more restrictive interpretation.

29. There is more common ground on this issue than Mr Coppel is prepared to acknowledge. He was determined to take us through a hundred years of authorities on open justice and natural justice but the basic principles are incontrovertible. Their most recent exposition is that by Lord Neuberger (with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed) in Bank Mellat v Her Majestyôs Treasury (No 2) [2013] 3 WLR 179:

> ñ2. The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimumé
>
> 3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know

> the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the Court can look at evidence or hear argument on behalf of one party without the other party ...knowing, or being able to test, the contents of that evidence and those arguments,é or even being able to see all the reasons why the Court reached its conclusions.ò

The present case is concerned with a hearing that, in part, was not only private but closed. It is not disputed that the FTT Procedure Rules permissibly provide for private hearings, nor is it disputed that the FTT was entitled to exclude Mr Browning from the closed session. If it had not done so, he would have obtained the very thing which the hearing was designed to decide whether he should obtain, namely information pointing to the identity of the applicant companies. As I have said, the issue is confined to the exclusion of Mr Coppel. For its part, the FTT acknowledged that there may be circumstances in which it is appropriate to exclude a party but to permit the presence of his legal representative in a closed session: see the BUAV case, Appendix 2, paragraph 15, quoted above at paragraph 24. All this serves to emphasise the fact-sensitive nature of the dispute. However, Mr Coppelôs submission is that the Rules do not and cannot have been intended to permit the exclusion of a party and his legal representative because such a substantial derogation from the fundamental principles is intolerable absent a much clearer articulation of legislative intent. His submission is akin to one based on the principle of legality as explained in R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131, per Lord Hoffmann.

30. I do not accept this submission or Mr Coppelôs various reformulations of it.

31. Our Courts have shown an aversion to permitting counsel to see or hear evidence which he is not at liberty to disclose to his client. In the context of criminal litigation, this is illustrated by R v Davis [1993] 1 WLR 613, 616 to 617, per Lord Taylor of Gosforth CJ; R v Preston [1994] 2 AC 130 at 152-153, per Lord Mustill; and R v G [2004] 1 WLR 2932, at paragraph 13, per Rose LJ. However, such an approach is not confined to criminal litigation. Somerville v Scottish Ministers [2007] 1 WLR 2734 was concerned with an application for judicial review. As in the criminal cases, the issue concerned public interest immunity. An arrangement had been devised whereby documents were to be made available to counsel on condition of strict confidentiality which prevented him from disclosing them or their contents to his client. Lord Rodger said (at paragraphs 152-153):

> ñAlthough devised with the best of intentions, this procedure was, in my view, wrong in principle. As a result, it not only gave rise to very real practical difficulties but led the Court to adopt a mistaken approach to the inspection of the documents by the Lord Ordinary.
>
> é counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with,

> his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of Your Lordships, I am satisfied that no such procedure should be followed in the future.ò

Drawing on the criminal cases to which I have just referred, Lord Mance said (at paragraph 203):

> ñIt puts counsel in an invidious and unsustainable position in relation to his or her clienté as in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the Court about public interest immunity.ò

32. I readily acknowledge that the present case is not concerned with public interest immunity. Nor is it concerned with an interlocutory determination of what may or may not form part of a trial. The closed session with which we are concerned was part of the substantive hearing. Nevertheless, in my judgment the FTT and the UT were correct in their analysis of the circumstances and were entitled to derive support from the jurisprudence to which I have referred, acknowledging (as the UT did at paragraph 72) that the context of this case is different. In spite of the difference, I consider that the features most comprehensively spelt out by the FTT in the BUAV case (above paragraph 24) fully justify the approach taken there and subsequently in the present case.

33. The crucial task is to devise an approach, in the context of a specific case, which best reconciles the divergent interests of the various parties. In my judgment, the approach adopted in this case and originating in the BUAV case does precisely that, having regard to the unique features of appeals under FOIA where issues of third party confidentiality and damage to third party interests loom large. The features to which reference was made in the BUAV case ï the expertise of the Tribunal, the role of the IC as guardian of FOIA etc ï make it permissible to exclude both an appellant and his legal representative except in circumstances where the FTT

> ñcannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interests involved. ò

In associating myself with this formulation I am accepting that there are features surrounding a case such as this which merit the description of the procedure as being at least in part investigatory as opposed to adversarial.

34. In the BUAV case, the FTT opined that this approach might be departed from but only ñin exceptional casesò. It seems to me that it was there using the word ñexceptionalò in a predictive sense rather than as positing a substantive test of exceptionality. What is important is that each case should be considered in its particular factual context.

35. What is also important is that when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision. Having been taken by counsel to the contemporaneous notes written during the proceedings, I am satisfied that this was achieved in the present case. Parenthetically, I should add that Mr Coppelôs complaints about having been bounced out of the Upper Tribunal hearing peremptorily and unfairly seem to me, on proper investigation, to be unfounded.

36. It follows from what I have said that, in my judgment, the Tribunal Procedure Rules, properly construed, do permit the course that was taken by the FTT and upheld by the UT in the present case. There are sound reasons why their natural meaning should be maintained so that justice can be achieved to the fullest extent possible, having regard to the conflicting interests which arise in a unique statutory context.

Permission to Appeal

37. Finally, I turn to the three grounds of appeal in respect of which we refused permission on the first morning of the hearing. I now provide reasons for refusal.

(1) Ground 3: the construction of section 41 (1)

38. It will be recalled that the exemption for confidential information provided by section 41 applies to information which ñwas obtained by the public authority from any other person (including another public authority)ò: section 41 (1) (a). ñInformationò means ñinformation recorded in any formò: section 84. The submission on behalf of Mr Browning was expressed in his skeleton argument as follows:

> ñ[Section 41 (1) (a)] will cover recorded information that a public authority has obtained from another person. This will cover recorded information that a public authority has obtained from another person and which finds its way ï without any material modification to its content ï into a document created by the public authority (i.e. where the public authority merely copies recorded information into another document). It will also cover the situation where the requested public authority puts into a different format confidential information which it has obtained from another person. But section 41 does not exempt a document or record which the public authority has itself created by processing information which it has obtained from another person. In this situation, the document or other record prepared by the public authority (i.e. the recorded information) will not have been obtained from another person.ò

The FTT and the UT rejected this construction. The FTT described it as ñan impossible propositionò (paragraph 54). I agree.

39. The FOIA is concerned with ñinformationò, not the form in which it is communicated or held. It is plain from section 41 (1) (a) and section 84 that the exemption relates to information recorded in any form provided that it was obtained from another person in circumstances where its disclosure would constitute an actionable breach of confidence. Here, the disputed information concerns the identity of the applicant companies. That information was obtained from them through the medium of their applications. It is fanciful to suggest that their confidentiality rights could be put in jeopardy by the way in which the public authority chose, for internal purposes, to process the information.

(2) Ground 4: prejudice

40. The qualified exemption provided by section 43 (2) arises where disclosure ñwould, or would be likely to, prejudice the commercial interest of any personòé This proposed ground of appeal is essentially a perversity challenge which seeks to take issue with the findings of the fact by the FTT. It asserts that the UT wrongly endorsed the FTTôs conclusion that detriment would result from the disclosure of the requested information, despite the fact that the evidence on which that conclusion was based had ñshortcomingsò and that the conclusion was otherwise ñbased on conjectureò. I consider this ground of appeal to be utterly unarguable. It comes nowhere near to satisfying the second-appeals test. The findings were justified on the totality of the evidence from the open and closed sessions.

(3) Ground 5: severance

41. One of the findings of the FTT was that:

> ñDisclosure endangers the frankness and caution with which intending exporters currently appear to approach the question of export controlò (paragraph 68).

In other words, potential exporters currently adopt a prudent and precautionary approach which embraces the making of applications for licences in borderline cases. If they thought that their applications might become matters of public knowledge, they might be less candid. The UT considered this to be an impermissible conclusion because the FTT had failed to take into account ñthe crucial and obvious factor that exporting without a licence (when one is needed) is a criminal offenceò (paragraph 108).

42. The complaint is that it was a legal error for the UT to discount and sever the identified error and that it should have led inexorably to Mr Browningôs appeal being allowed. I reject this proposed ground of appeal. The UT was entitled to find immateriality. Indeed, the FTT itself had described the point as ñancillaryò (paragraph 69). I have dealt with this proposed ground of appeal at its highest. As both respondents submit in their skeleton arguments, it is not totally clear that the FTT deployed this point as part of its dispositive reasoning in any event.