Freedom of Information and Closed Proceedings: The Unavoidable Irony

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> "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. . . .
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> 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 even more offensive to fundamental principle than a private hearing."

1. This restatement of what many see as two of the most fundamental principles of the rule of law comes at the outset of the Supreme Court majority's judgment in *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38 [2013] 3 WLR 179,[1] handed down in June last year. Yet June 2013 may also be remembered as the month in which Parliament abandoned those principles through the introduction of closed material proceedings in all civil trials via the Justice and Security Act 2013 ("the Act"). Ironically, that Act came into effect just six days after the judgment in *Bank Mellat*.

2. For many years, closed material proceedings, whereby one party is excluded from seeing certain evidence or submissions, as well as from attending part of a hearing, have, however, been used across a number of jurisdictions, particularly those regularly considering issues of national security. Indeed, in mid-2011, while denying the existence of a general power to conduct such proceedings in general civil claims in *Al-Rawi v Security Service* [2011] UKSC 34 [2012] 1 AC 531, the Supreme Court, in *Tariq v Home Office* [2011] UKSC 35 [2012] 1 AC 452, accepted that such proceedings did not, in and of themselves, breach Art. 6 ECHR rights where specifically permitted by statute.

3. One jurisdiction in which closed material proceedings are quite literally unavoidable is information rights, and in particular freedom of information (and to some extent, data protection) proceedings under the Freedom of Information Act 2000 ("FOIA") (and the related Environmental Information Regulations 2004 (SI 2004/3391)). The words "literally unavoidable" are used because any proceedings will have to consider the information that is in dispute (the "disputed information"). If the person seeking the disputed information were to be provided with that information as part of the proceedings, and/or attend the parts of the hearing where the information was discussed directly, there would be no need for a hearing at all.

4. This is in contrast to the majority, if not all, of the other examples where closed material proceedings are now permitted. Disclosure in such jurisdictions would not obviate the need for the proceedings; indeed, disclosure in these cases is arguably necessary for the proceedings. Instead, disclosure, it is argued, cannot be made because it would endanger national security, or some other higher principle. In effect, a value judgment has

[1] At paras 2, 3, per Lord Neuberger (with whom Lady Hale, Lord Clarke, Lord Sumption and Lord Carnwath agreed).

seen made in these jurisdictions as to which is the greater good: protection of the principles of open and natural justice or avoiding cases being rendered "untriable" because certain information cannot be shared with all parties. The recent, and indeed first, judgment in respect of the Act has highlighted a number of the difficulties inherent in the making of such a judgment.[2]

5. That value judgment is not, however, absent in the FOIA jurisdiction. Although the disputed information clearly cannot be disclosed, there is also commonly a second category of (non-)disclosure, namely some of the supporting evidence and submissions. The circumstances in which that material is to be considered in a closed hearing are ultimately subject to the same value judgment identified above.

6. Two recent judgments from the Administrative Appeals Chamber of the Upper Tribunal (UT) have considered aspects of the procedure appropriate to closed material proceedings in FOIA cases, although in one case, only in respect of a very specific part of that procedure, and in the other case, only by way of observations made *obiter*. These are, however, the first cases outside the First-tier Tribunal (FTT) to consider such issues in any substantive manner, and both involved experienced panels, led by Chamber President, Mr Justice Charles, sitting with a second High Court Justice and a senior UT judge. They are therefore worthy of consideration not just in respect of the FOIA jurisdiction, but all jurisdictions where closed material proceedings can be used.

7. It is also perhaps a salutary warning to those considering the potential application of the Act that it has taken almost nine years from the beginning of the operation of the FOIA for such judicial guidance to be given.

Disclosure to an excluded party's representatives

8. The first case, *Browning v Information Commissioner* [2013] UKUT 0236 (AAC)[3] concerned a request by Mr Browning to the Department for Business, Innovation and Skills (DBIS) for the names of the companies that applied for export licences for Iran during a specified period. The Information Commissioner (IC) originally ordered the disclosure of the information, but during DBIS's appeal to the FTT changed his position in light of evidence produced by DBIS in the form of responses from applicants for the export licences in question as to their views on disclosure. There were 92 responses, 52 objecting to disclosure and 40 consenting to conditional or unconditional disclosure. Two such applicants also provided oral evidence.

9. Prior to the hearing Mr Browning was provided with "four or five" of the responses, anonymised, retyped and redacted to avoid disclosure of any of the requested information. At the hearing, Mr Browning made an application for his legal representatives to be permitted to see all of the closed evidence and attend the closed hearing, subject to relevant undertakings. That application was refused and formed part of Mr Browning's appeal to the UT.

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[2] *CF v The Security Service* [2013] EWHC 3402 (QB) [2014] 2 All ER 378.
[3] Mr Justice Charles, Mr Justice Mitting and UT Judge Andrew Bartlett QC.

10. The UT was clearly concerned, and perhaps even confused, by Mr Browning's failure (and reluctance) to request disclosure of "many, if not all" of the other responses received by DBIS in a similar format to the limited number that were disclosed, as well as the witness statements from the witnesses that appeared before the tribunal. It appeared to be the UT's view that this could have been done and would have effectively obviated the need for the application through the disclosure of almost all relevant information other than the disputed information. However, the UT still went on to consider the principles relevant to when an excluded party's representatives should be permitted to attend the entirety of the hearing.

11. In this respect, Mr Browning had sought to rely upon the principles of open and natural justice that were effectively summarised by the majority in *Bank Mellat* as set out above (although the appeal preceded that judgment). However, the UT considered that "the relevant background and landscape of rights, interests and duties [in the FOIA jurisdiction] is materially different from that which obtains in criminal and civil litigation in the courts".

12. In essence, the UT found that the FOIA jurisdiction of the FTT was effectively investigatory rather than adversarial, and that, as noted above, such proceedings *must* involve some form of closed material proceedings so as to avoid disclosure of the disputed information. As a result, the application of the open and natural justice principles in normal civil litigation was "not an appropriate benchmark or analogy for the exercise of the discretion of a First-tier Tribunal in respect of its consideration of closed material and its conduct of a closed hearing".

13. The UT also highlighted the difficulties in which representatives can find themselves, in circumstances where they are privy to information that they cannot disclose to their client, which difficulties have been recognised in previous case law when similar applications have been made (and generally refused).

14. The UT therefore accepted the approach proposed by the First-tier Tribunal in *BUAV v IC* EA/2010/0064, 11 November 2011, 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:
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> > '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 interests involved.'"

The UT acknowledged that this would mean that such an order would only be made in "exceptional and so rare cases", suggesting that the panel was unable even to envisage circumstances in which it would consider such an order appropriate.

15. Alongside its detailed consideration of this specific issue, the UT also considered whether it should provide more general guidance on what information should be included in closed evidence, whether there should be a closed hearing and what information about such closed evidence/hearing should be provided to the requester.

16. The UT concluded that it should not provide guidance, not having received submissions on the issue, but still went on to suggest that FTTs should:

(a) take the Practice Note on "Closed Material in Information Rights Cases" ("Closed Material Practice Note") into account and, if they do not apply it, explain why; and
(b) give "appropriately detailed directions and reasons:

(i) setting out the nature and subject matter of any closed material and hearing;
(ii) why they have accepted that they should consider evidence advanced by a public authority (or anyone else) and argument on a closed basis; and
(iii) why further information relating to their content has not been provided."

The conduct of closed material proceedings

17. A differently constituted UT expanded further on these principles in the case of *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner* [2013] UKUT0560 (AAC).[4] The procedural history of this case is relatively complex, but provides useful background to the UT's findings.

18. The case concerned a number of requests made by the All Party Parliamentary Group on Extraordinary Rendition (APPGER) to the Foreign and Commonwealth Office (FCO) concerning the UK's involvement in extraordinary rendition. One of the significant issues in the appeal concerned the application of the public interest test in respect of information covered by the FOIA, s. 27 exemption for information the disclosure of which would, or would be likely to, prejudice international relations.

19. A significant proportion of the FTT hearing was conducted in closed,[5] although ultimately the FTT decided not to issue a closed judgment (with the exception of the redaction of a few paragraphs from a schedule attached to the open judgment). In addressing the public interest test, the draft judgment circulated by the FTT to the parties referred to "what is known as the 'control principle' whereby material provided, on security or diplomatic channels, is not released without the specific consent of the provider". The FTT considered that the maintenance of the "control principle", as defined, gave rise to "very strong public interest", which ultimately outweighed the "very strong public interest" in disclosure of information regarding the UK's role in extraordinary rendition.

20. The FCO had been given the opportunity to review the draft judgment before the APPGER to ensure that it did not contain closed material. In its "points of clarification" the FCO acknowledged that the "term 'control principle' has only formally been used in connection with sharing of information on intelligence and security liaison channels". The FCO therefore essentially suggested that the FTT used "control principle" as a defined term for the "understanding" described above, while acknowledging that this went beyond the previous use of the term.

21. The draft judgment and the FCO's "points of clarification" were subsequently provided to the APPGER. Despite recognising "the extraordinary nature of the request", the APPGER applied for the hearing to be reopened on the basis that the FCO's

[4] Mr Justice Charles, Mr Justice Burnett and IT Judge Nicholas Wikeley. The author acted as solicitor to APPGER in respect of these proceedings.
[5] The closed session of a hearing is commonly referred to by practitioners as being concluded "in closed" (as opposed to "in open").

response to the draft judgment went beyond a "point of clarification", and effectively "undermined [the FTT's] whole approach to the [public interest] balancing exercise". The FCO maintained that its proposal was "nothing more" than a "clarification regarding terminology". The FTT did not respond to this correspondence, making only a different amendment to define the "control principle" as "an understanding that secret intelligence material provided on security or diplomatic channels, is not released without the consent of the provider". Unfortunately this amendment was inconsistent with other references to the "control principle" throughout the judgment, as well as remaining inconsistent with historical usage of the term.

22. Throughout the four-day appeal hearing, the UT repeatedly pressed the FCO for clarification of what its position was as to the risk of disclosure of the information in question. During the third day, the FCO provided a statement confirming that "disclosures as a result of the Binyam Mohamed litigation caused actual damage. It caused a reduction in the flow of intelligence". This evidence had been presented to the FTT in closed session. Then, on the final afternoon, shortly before closing statements, the FCO provided a further statement confirming that:

> "The FCO's principal case before the FTT was that the public disclosure of any of the documents in respect of which section 27 had been claimed would further undermine US confidence in its exchanges with the UK, including in the field of intelligence sharing. The release of such documents would complicate the intelligence-sharing relationship and give rise to a real risk of a further reduction in the flow of intelligence."

23. As the UT recognised, the arguments relating to the "control principle" in the Binyam Mohamed litigation and elsewhere had generally been made on the basis that disclosure of a certain type of information (secret intelligence) would affect the future sharing of that particular type of information. What the FCO was now arguing was that disclosure of one type of information (diplomatic) could affect the future sharing of a different type of information (secret intelligence). This required an additional (and new) leap of logic and therefore also additional evidence. The UT accepted that throughout the six days of the FTT hearing and the first three-and-half days of the UT hearing, none of the FTT, the FCO or the IC had properly communicated that this was the FCO's position to APPGER.

24. The UT concluded that the "failure of the parties and the FTT to make this clear to APPGER resulted in avoidable substantive and procedural unfairness". The UT considered this unfairness to be so significant that the failure of the FTT to reopen the hearing at APPGER's request, which could have remedied the unfairness, constituted an error of law. The UT further found that the FTT's approach to the "control principle" constituted a second error of law.

25. Although acknowledging that the FTT proceedings were conducted in accordance with common practice at the time and that the FTT brought "care and diligence" to its task, the UT found that the unfairness of the proceedings was caused at least in part by the approach to the closed proceedings. In these circumstances, it is perhaps unsurprising that the UT considered it appropriate to make "general observations" regarding the conduct of those proceedings.

26. The UT began from the position that "a proportionate approach must be taken and what is or is not fair in a given case will depend on the circumstances of the case".

However, there are fundamentals, not least that the FTT should not have proceeded without a recording of the closed proceedings.

27. With respect to assessing the public interest balance, the UT likened its preferred approach to that taken in respect of public interest immunity (PII) claims, namely that there should be:

> "appropriately detailed identification, proof, explanation and examination of both:
> (a) the harm or prejudice; and
> (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

28. The UT suggests that an exchange of witness statements is not the best way to identify such issues, proposing some form of agreed document, identifying the matters in dispute as an alternative. This is potentially related to the UT's questioning of whether oral evidence and cross-examination are really necessary at all in the information rights jurisdiction.

29. As to the conduct of closed proceedings, the UT adds to the observations in *Browning*, suggesting that after any closed session, the FTT and the parties involved in that closed session:

> "should consider:
> (a) whether amendments or additions should be made to an open document identifying the actual risks of harm being asserted; and/or
> (b) whether such an open document should be prepared; and/or
> (c) whether the excluded party should be told in specific or general terms of closed evidence, reasoning or argument."

30. According to the UT:

> "That consideration is directed to ensuring that so far as possible the excluded party is informed of the case he has to meet. Also, it is directed to ensuring that the tribunal and the other parties keep under review the validity of the reasons why evidence and argument and/or the gist of them should be withheld from the excluded party."

A possible approach to FOIA proceedings

31. It is interesting that, in *APPGER*, the UT does not refer to the Closed Material Practice Note, which had been raised in *Browning*, nor did it consider how the UT's proposed approach in *APPGER* fits with the terms of that Practice Note. In respect of closed hearings, the UT's observations at paras 29 and 30 above are largely consistent with the terms of the Practice Note. However, the Practice Note also refers to the need for any party to rely on closed material to make a written application with appropriate reasons, which application should be considered in advance of the substantive hearing.

32. Where such an application sits in relation to the UT's proposed "issues document" is unclear. However, it would seem that an issues document may provide significant assistance to an FTT judge considering an application in respect of closed material. It would also clearly be of benefit to the requester for the FTT to engage in respect of the closed material and what material should rightly be transferred to open as early as possible. Although there is no dispute that the closed material should be kept under review, and it is inevitable that some new information will arise during the

proceedings, early disclosure is clearly preferable to disclosure near the conclusion of the hearing when the requester has little time to take it into account.

33. These matters also give rise to interesting questions regarding conventional procedure. Assuming that the requester is the appellant, it is generally expected that the requester will provide evidence first, both in writing and orally. However, in these circumstances, the appellant effectively knows only the position of the IC and the position of the public authority at the time of the internal review, which may have been articulated some years previously. Although technically the appeal is against the position of the IC, the reality is that the defence will generally be led by the public authority, whose position will often be different from, or at least more detailed than, the IC's Decision Notice and/or its own position in the internal review response.

34. In these circumstances, the appellant must either risk targeting in evidence matters that may not be relevant or adopting a scattergun approach in the hope of hitting an as yet undefined target. Neither is it in the interests of the efficient operation of justice. This situation could potentially be avoided through use of an issues document. But it also perhaps suggests that the normal "batting" order should be reversed, and the public authority, which inevitably holds all the cards, should provide evidence first.

35. If all of the above is accepted, this would suggest a procedure along the following lines in appropriate circumstances when the requester is the appellant, and assuming both the IC and the public authority are respondents:

    (a) Following the requester's reply,[6] the public authority should produce an "issues document" identifying its position in respect of the matters relevant to the grounds of appeal (for example, the nature and extent of the risk of disclosure in respect of a public interest balancing exercise).
    (b) The requester and the IC should be given the opportunity to identify where there is disagreement with the public authority's position in respect of the relevant matters, or where a relevant matter has been omitted.
    (c) The parties should seek to agree a version of the "issues document" that accurately records the issues in dispute, together with draft directions as to how the proceedings should continue.
    (d) If appropriate, the public authority should submit evidence in respect of the issues in dispute. If the public authority wishes to keep any of that evidence closed, it should make an application in accordance with the Closed Material Practice Note. That application should be considered before any further steps are taken and any further disclosure ordered by the FTT should be made as soon as possible.
    (e) The requester (and the IC) should submit evidence in response.
    (f) The parties should reconsider the issues document and adjust it as appropriate in light of the evidence.
    (g) The requester should submit its skeleton argument.
    (h) The public authority (and the IC) should submit its skeleton argument. Where the public authority intends to rely on a closed skeleton argument and/or seek a closed hearing, it should make an application in accordance with the Closed Material Practice Note. That application should be considered as soon as possible

[6] In accordance with r. 24 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976).

and certainly in advance of the substantive hearing, again so that further disclosure can be made to the requester where appropriate.

The procedure could clearly be adapted when the public authority is the appellant or, at the other end of the spectrum, chooses not to be involved in the proceedings.

36. This process may appear to involve significantly more work for the FTT in advance of the substantive hearing; however, if properly case managed, such work should be kept to a minimum. It should also reduce the length of substantive hearings by narrowing the issues (both procedural and substantive) in dispute in advance, while also according greater fairness to the requester.

37. Difficult situations will, however, always remain. One particular example involves cross-examination if this is allowed to proceed despite the UT's warnings in *APPGER*. It is not uncommon for a public authority witness to refuse to answer a question on the basis that it needs to be addressed in closed. This question will therefore usually be parked until a subsequent closed session. Even if the answer is subsequently disclosed after the closed session, by then the witness has been excused and it is not possible to ask follow-up questions.

38. This should be kept to a minimum by clear definition of the issues to be addressed in closed throughout the procedure described above. It may also be worth considering the order of the proceedings themselves. Where a closed hearing is inevitable, there may be merit in the FTT going immediately into closed session following opening statements. The public authority and the IC can make their closed submissions and the public authority's witnesses can be questioned on their closed evidence. The FTT and the parties can then consider, in accordance with the UT's guidance, whether there is additional information that should be made open.

39. Once any additional information has been given to the requester, the requester can proceed to cross-examine the public authority's witness. Assuming that the witness has been properly cross-examined in closed, if a witness refuses to answer, the FTT should already understand why and be in a position to direct the witness to answer or uphold the refusal.

40. Some of these proposals risk giving rise to satellite litigation – most likely where the FTT orders disclosure of information that the public authority does not wish to disclose. However, this is surely to be preferred to conducting entire proceedings without disclosing to the requester information that should have been disclosed. In these circumstances, there will almost inevitably be a re-hearing in any event because of the unfairness resulting from non-disclosure, as was the case in *APPGER*. Any increase in such satellite litigation should also be short-lived as judicial guidance will be developed more quickly in these circumstances, which guidance will no doubt be heeded by all parties involved.

Conclusion

41. The lessons to be learned from these cases are perhaps already largely understood by civil courts and practitioners who are used to dealing with complicated issues of

disclosure and PII certificates. However, it is submitted that they do highlight the significant practical difficulties to which closed material proceedings can give rise, not just with respect to determining what is to be considered in closed, but even matters as simple as when such applications are to be considered (and reconsidered), as well as the order of the proceedings themselves.

42. It has taken nine years for this debate to reach beyond the FTT in the FOIA jurisdiction and it is possible, if not likely, that many of the cases over the previous eight years have fallen short of the guidelines now given by the UT to ensure an appropriate level of fairness. Clearly, such lessons must be learned far sooner in relation to proceedings under the Act if serious miscarriages of justice are to be avoided.