

B E T W E E N :

THE QUEEN *on the application of*
(1) GINA MILLER
(2) DEIR TOZETTI DOS SANTOS

Claimants

-and-

THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Defendant

-and-

(1) AB AND A CHILD AND OTHERS
(2) GRAHAME PIGNEY AND OTHERS

Interested Parties

-and-

XXXXX AND OTHERS

Intervener

SECOND GROUP OF INTERESTED PARTIES'
APPLICATION TO CLARIFY OR VARY PARAGRAPH 13
OF THE 26 JULY 2016 ORDER

Page references (e.g. [APP/8]) are to the material appended to this application

1. At the case management hearing on 19 July 2016 the Divisional Court expressed its grave concern on receiving reports that parties and prospective parties to these proceedings, and their legal representatives, had been the subject of abusive conduct by a minority of members of the public, which may be criminal and/or in contempt of court. The Divisional Court also considered a remark by Counsel for the Defendant about the possibility of solicitors 'tweeting' the pre action correspondence if it was not kept confidential.
2. Paragraph 13 of the 26 July Order **[APP/10]** was made to deal with these matters. It reads:

"The Defendant's responses to the Letters Before Claim referred to in paragraph 1 above and any other documents produced by the Defendant shall be circulated, on a confidential basis, to solicitors acting for all parties to the actions joined by this Order and all parties who have permission to intervene in or be joined to those actions as Interested Parties. Their contents shall be kept strictly confidential by such parties and their solicitors. All such documents, and any other open correspondence and documents served in relation to the actions joined by this Order, are to be circulated by email to a common list

(the "Circulation List") comprising the relevant email addresses for service of the solicitors acting for the various parties."

3. As the appended correspondence shows [APP/13-19], a disagreement has arisen between the Secretary of State and the Second set of Interested Parties (i.e. Mr Pigney and others, 'the People's Challenge IPs') about the effect of paragraph 13 of the Order. This application has been made to resolve that disagreement.
4. The People's Challenge IPs wish to make public:
 - a. the Detailed Grounds of Resistance, on the basis that this document is in any event publicly accessible as a 'Statement of Case' within the meaning of CPR 2.3 and 5.4C(1) and there is an exceptional public interest in the Secretary of State's case being publicly known;
 - b. their own skeleton argument (which was filed and served yesterday) in an unredacted form;
 - c. their own individual witness statements, with addresses and other home location information redacted; and
 - d. the Secretary of State's skeleton argument, once it is served.
5. As they understand the Secretary of State's position, he: strongly objects to a. being published; would object to b. being published to the extent that the Interested Parties' unredacted skeleton makes reference to his position; takes no issue on c.; and would strongly object to d. being published.
6. The basis for the Secretary of State's objections has not been developed in correspondence. The reasons given so far are in the second paragraph of the Government Legal Department letter of 16 September 2016 [APP/15].
7. The People's Challenge IPs consider that the Order should be clarified, if necessary, to enable them to publish the material listed at a. to d. above, for the following reasons.

Limited purpose of order

8. First, given the concerns expressed at the case management conference, the confidentiality provisions in the Order were directed at:
 - a. protecting individual parties from abusive conduct; and
 - b. preserving the confidentiality of pre-action correspondence between the parties' solicitors.
9. Publication of the documents listed at paragraph 4 above would not create or increase any risk of abuse towards the parties, and withholding publication serves no protective end. Pleadings and skeleton arguments are not *inter partes* correspondence but documents filed

with the Court that will become public in any event (see below). The Order was therefore neither sought nor intended to impose confidentiality restrictions in respect of the documents referred to at paragraph 4 above.

Order not overriding CPR

10. Secondly, the terms of the 26 July Order were not intended to prohibit disclosure of documents that would normally be available to the public. The position under the Civil Procedure Rules is that a member of the public may obtain copies of a statement of case from the Court Office: CPR 5.4C(1)(a).¹ Other documents, such as skeleton arguments, normally become publicly available in any event once referred to in open Court: CPR 31.22(1)(a).
11. The Order states: *“Their contents shall be kept strictly confidential by such parties and their solicitors”* (emphasis added). It therefore does not dis-apply any right of access to court documents by the public, and was not intended to preclude the parties from disclosing such documents to the public. If that had been the intention (despite the fact that no such suggestion was made at the case management conference), paragraph 13 of the Order would not have referred to *“open correspondence and documents served”* between and on the parties respectively, or imposed confidentiality requirements on the parties alone: it would have stated that all such documents must not be disclosed in any circumstances.

Exceptional public interest

12. Thirdly, all parties agree that the issue at the heart of this case is of the utmost public interest. The Government has indicated publicly that it believes its position on the issue to be clear and is confident in the legal arguments that underpin it [APP/12]. Statements by ministers have already informed the public that the Government’s position is that Article 50 can be triggered through use of the royal prerogative without an Act of Parliament. Members of the public ought to be able to see how those arguments are set out, if they wish to do so.

Open justice principle

13. Fourthly, the general position, even in cases that do not attract such exceptional public interest, is in favour of open justice. In particular, documents which are referred to in open court, and which form part of the judge's decision-making process (as the pleadings and skeleton arguments inevitably will in this case), should be publicly available: see Lewison J in *ABC Ltd v Y (Practice Note)* [2012] EWHC 3176 (Ch), [2012] 1 WLR 532 [APP/20-35].
14. In light of the above, the Court is respectfully invited to clarify the meaning of the Order and, if necessary, to amend paragraph 13 by adding these words at the end:

“For the avoidance of doubt, the parties are not prohibited from publishing the Defendant’s or their own pleadings or skeleton arguments. If redactions are necessary to protect parties’ identities

¹ In *R (Corner House Research) v Director of the Serious Fraud Office* [2008] EWHC 246 (Admin) at [27] Collins J held that detailed grounds in judicial review proceedings constitute a “statement of case” for the purposes of CPR 2.3(1) and CPR 5.4C.

or addresses, then those documents should be published in a redacted form.”

HELEN MOUNTFIELD QC

GERRY FACENNA QC

TIM JOHNSTON

JACK R. WILLIAMS

JOHN HALFORD

Bindmans LLP

22 September 2016