IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

GIA/2481/2018

BETWEEN:-

THE HOME OFFICE

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

ANTHONY WEBBER

Second Respondent

SECOND RESPONDENT'S SKELETON ARGUMENT

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1. This skeleton argument is submitted on behalf of the Second Respondent, Mr Anthony Webber.

History of the case

2. This case arises from Mr Webber's request to the Home Office of 23 August 2016 for copies of any correspondence between the governments of Guernsey, Jersey and Isle of Man and the UK government in connection with the Syrian Vulnerable Persons Resettlement Scheme.

3. That request was refused by the Home Office under section 36(2) of the Freedom of Information Act ('FOIA') on 8 November 2016. Following internal review, the Home Office confirmed the refusal on 25 January 2017.

4. Mr Webber complained to the Information Commissioner ('IC') about the refusal on 3 February 2017. The IC's decision notice FS50666313 of 30 October 2017 held that the Home Office had been entitled to find that the exemption in section 36(2), and particularly that in section 36(2)(c) (effective conduct of public affairs) had been engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

5. Mr Webber appealed against the decision notice to the First-tier Tribunal ('FTT'), which, in decision EA/2017/0281 issued on 1 August 2018, upheld his appeal.

6. The Home Office was refused permission to appeal to the Upper Tribunal by the FTT judge on 6 September 2018. It now seeks permission from the Upper Tribunal. The Attorneys General of Guernsey, Jersey and the Isle of Man support the Home Office's application and seek to be added as interested parties if permission is granted. Mr Webber opposes the Home Office's application.

7. The points below address the Home Office's grounds of appeal in the order in which they appear in its application for permission to appeal of 10 October 2018. It does not address Ground 4 (which seeks to allow a joint letter from officials of the three Crown Dependencies to be considered) as this appears to have been overtaken by the permission given to the Attorneys General to take part in the present proceedings.

Ground 1: failure to give any or any appropriate weight to the reasonable opinion of the Qualified Person when assessing the balancing of the public interest

8. The Home Office maintains at paragraph 14 of its application that although the FTT accepted that the Qualified Person ('QP') had provided a 'reasonable opinion' establishing that the section 36(2) exemption was engaged it gave *'little or no weight'* to that opinion when assessing the public interest.

9. The weight that should be given to the QP's opinion was set out in the Court of Appeal's decision in *Department for Work and Pensions v The Information Commissioner & Zola* [2016] EWCA Civ 758. At paragraph 55 Lloyd Jones LJ said:

> 'It is clearly important that *appropriate consideration should be given to the opinion of the qualified person* at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the *Tribunal's own assessment of the matters to which the opinion relates.'* (emphasis added)

10. The Upper Tribunal, in its decision in *Information Commissioner and Edward Malnick and ACOBA* [2018] UKUT 72 (AAC) observed that:

> 'although the opinion of the QP is not conclusive as to prejudice…it is to be afforded a measure of respect.' (paragraph 29)

11. Neither the Court of Appeal in *DWP* nor the Upper Tribunal in *Malnick* held that the QP's opinion must be given 'substantial' weight, merely that it receive 'appropriate' consideration, based on the tribunal's own assessment of the position (*DWP*) or 'a measure of respect' *(Malnick).* Mr Webber submits that this is what the FTT did.

12. The Home Office's suggestion that the FTT gave *'little or no weight'* to the QP's opinion conflates two unrelated situations. The first is a failure to give *any weight at all* to the opinion – in effect to disregard it as a relevant factor. This may be an error of law. The second is to give it *little weight*. There is no reason to assert that this would be an error of law. The FTT is only required to give the opinion '*appropriate'* weight and '*little'* weight may be the appropriate weight in the circumstances.

13. The FTT set out at paragraphs 12 to 14 of its decision two contrasting approaches to the weight to be attached to the QP's opinion when considering the public interest test.

14. It referred to the Information Tribunal's decision in *Guardian Newspapers and Brooke v Information Commissioner and BBC* EA/2006/0011 and EA 2006/0013 which held that the Commissioner:

> 'must *give weight to that opinion as an important piece of evidence* in his assessment of the balance of public interest. However…the Commissioner is

> entitled, and will need, to *form his own view on the severity, extent and frequency* with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.' (emphasis added)

15. It also referred to the Tribunal's decision in *Evans v Information Commissioner and Ministry of Defence* EA/2006/0064 which stated:

> *'Nor do we attach much weight to the Minister's opinion in itself as a factor in the balancing exercise*. It is a necessary threshold to show that the exemption is engaged, and without it there would be no balancing exercise to conduct. For this reason we do not see the logic of then placing the Minister's opinion in the scales as a factor to be weighed in favour of maintaining an exemption whose engagement has been triggered by that very opinion. This seems to us like double counting the opinion which is a necessary safeguard to prevent inhibition being claimed without due cause. In the scheme of the Act, we regard the opinion as a threshold condition, required to engage section 36, rather than a major piece of evidence in its own right.'

16. The FTT's decision stated:

> 14. In our view we do not need to decide between these two approaches in this case. *Even if we give the qualified person's some weight as advised in Brooke, it will not amount to very much*, given the concerns of the Commissioner about the quality of submissions the qualified person received, and the fact that he has not viewed the material (whereas the Tribunal has done).

17. The FTT is clearly stating it has tested its assessment against the criterion in *Brooke* and is satisfied that it meets it.

18. The Home Office appears to suggest that having accepted the QP's opinion as reasonable, the tribunal was required to give it substantial if not decisive weight in assessing the public interest. That would deny the tribunal a proper role in assessing the public interest and transform section 36(2) from a qualified exemption into something approaching an absolute exemption.

19. The Home Office suggests at paragraph 14(a) that the tribunal should have recognised that:

> 'The Qualified Person's opinion represented one of the best sources of evidence on the issues before the FTT, particularly as the opinion was given by a Minister with expertise in the relevant area, well-placed to assess the prejudice resulting from disclosure'

20. This account is not easily reconcilable with the IC's view of the poor quality of the submission (paragraphs 7-10 of the FTT decision) which the FTT shared or the minister's apparently cursory involvement in the exercise (paragraph 11).

21. There is also no indication that the minister was aware that the substance of the disputed information was in the public domain already (paragraphs 15-17). If so, that would have justified the FTT placing even less weight on the minister's opinion when it came to the balancing exercise.

22. The passages reproduced at paragraph 16 of the FTT decision are verbatim extracts from a statement made by Jersey's Chief Minister to the States Assembly on 1 December 2015 and recorded in the Hansard official report of that date.[1] The statement is also available on the States of Jersey's official website.[2] Extracts from it can be found in contemporaneous media reports, still available online, published by ITV News,[3] the Jersey Evening Post[4] and Bailiwick Express.[5] The Chief Minister's statement and the reports of it were published almost 9 months before Mr Webber's request was made on 23 August 2016.

23. The tribunal compared the withheld information with those public statements and found that the disputed material contained:

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[1] https://statesassembly.gov.je/Pages/Hansard.aspx?docid=DAEA67FF-5383-4AFA-9618-023CE854F8AF#_Toc437009386
[2] https://www.gov.je/News/2015/pages/SyrianRefugeesUpdate.aspx
[3] https://www.itv.com/news/channel/2015-12-01/syrian-refugee-deal-would-set-risky-precedent-for-future/
[4] https://jerseyeveningpost.com/news/2015/12/01/jersey-will-not-be-taking-in-refugees-says-chief-minister/
[5] https://www.bailiwickexpress.com/jsy/news/refugees-ruled-out-jersey-over-fears-legal-backdoor/#.XEv8Py2cYhs

> ‘nothing that goes beyond the stated public position of the Crown Dependencies that there were specific reasons why it was not appropriate for them to take part in the scheme at the present time.’ (paragraph 15)

24. Neither the Home Office nor the Attorneys General challenge this finding.

25. There is nothing contradictory in the FTT accepting that the QP’s opinion is reasonable, giving it *some* weight in assessing the public interest but nevertheless finding that in all the circumstances the public interest favours disclosure. That is entirely consistent with the approach set out in *DWP* and *Malnick* and does not indicate any error of law.

Ground 2: the FTT erred in law by focusing solely or largely on whether the content of the Withheld Material was ‘controversial’ rather than on the wider prejudice of disclosing such communications

26. It is difficult to see on what basis the Home Office maintains that the FTT limited its consideration of the public interest ‘solely or largely’ to the question of whether the disputed material was ‘controversial’.

27. The tribunal’s decision makes a single reference to the word ‘controversial’ at paragraph 15:

> ‘15. We take into account that there really is nothing *controversial* in the closed material, and nothing that goes beyond the stated public position of the Crown Dependencies that there were specific reasons why it was not appropriate for them to take part in the scheme at the present time.’ (emphasis added)

28. The reference to ‘*controversial’* is immediately followed by the observation that the disputed material contained *‘nothing that goes beyond the stated public position of the Crown Dependencies’.* That suggests that by ‘controversial’ the FTT meant that the release of information which had already been placed in the public domain by the bodies concerned and reported in the press was unlikely to attract significant public comment if disclosed under FOIA since it revealed nothing that was not already known.

29. Nothing in the decision supports the view that the tribunal has treated the presence or absence of 'controversial' material as the 'overwhelming focus' (paragraphs 23 and 25) of its consideration of the public interest.

30. At paragraph 25 the Home Office suggests that the tribunal's alleged preoccupation with 'controversy' was at the expense of the consideration it should have given to a possible 'chilling effect'. The opposite is likely to be the case. To the extent that 'controversy' was considered it is likely to have been as an indicator of whether anything in the material was likely to provoke an unwelcome reaction, liable to discourage the authors from expressing themselves in similar terms in future. That would of course be a 'chilling effect'.

31. These passages from the FTT's decision unmistakeably refer to a 'chilling effect':

> '15. We take into account that there really is nothing controversial in the closed material, and nothing that goes beyond the stated public position of the Crown Dependencies…
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> '17. As the withheld material contains general discussions of these very issues, we cannot see how it can be said that a request for information in August 2016 which, upon inspection, turns out to have to have been accurately reflected in a public statement some eight months previously, *could lead, if disclosed, to the reluctance of Crown Dependencies or other authorities to co-operate with the UK Government'*

32. It is clear that the FTT did focus on the possibility of a 'chilling effect' and its likely impact on the Crown Dependencies. It did not limit Its consideration to local authorities but considered the impact on '*Crown Dependencies or other authorities.'*

33. The Second Respondent submits that the alleged error of law did not occur.

Ground 3: the FTT reached irrational conclusions when balancing public interest

34. The Home Office maintains that having concluded that the withheld information had already been made public, it was irrational for the tribunal to find that there was 'considerable public interest' in its disclosure.

35. The public is well aware that there are often significant discrepancies between what government says in public and what it says in private. Indeed, in 1994 the former Foreign Secretary Lord Howe told the Scott Inquiry into the export of arms to Iraq that:

> 'there is nothing necessarily open to criticism in incompatibility between policy and presentation of policy. It [government] is not necessarily to be criticised for a difference between policy and presentation of policy'[6]

36. There is a significant public interest in establishing whether a public authority's public statements reflect what it says and does in private. That is often the reason why FOI requests are made. When public and private positions are found to coincide, the public's confidence in its politicians and authorities is likely to be enhanced.

37. The Home Office maintains at paragraph 29 that it was irrational for the FTT to hold that the public interest balance favoured disclosure after finding that the withheld material had already been made public. That would, perversely, imply that there is a public interest in showing that authorities have suppressed or misrepresented information but not in demonstrating that they have been open and honest.

Local authorities

38. At paragraph 32a the Home Office maintains that the tribunal:

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[6] Oral evidence of Lord Howe, 12 January 1994, to the Inquiry into Exports of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions chaired by Lord Scott, London 1996.

> 'erroneously equates the Crown Dependencies to local authorities (with reference to "other local authorities" and by drawing a direct comparison to how local authorities dealt with requests)'

39. For the avoidance of doubt, the FTT does not at any point describe the Crown Dependencies as 'local authorities'. It is perfectly well aware of the distinction, referring at paragraph 19 to communications to the UK government from *'Crown Dependencies and local authorities'.*

40. Insofar as the FTT refers to the possible impact of disclosure in this case on *local authorities*, it is merely echoing the way in which the Home Office itself expressed its concerns.

41. The Syrian Vulnerable Persons Resettlement Scheme (VPRS) is a *domestic* policy directed at the settlement of refugees from the Syrian conflict in the United Kingdom. Resettlement is undertaken by local authorities working with NGO partners and by the devolved administrations liaising with their own local authorities and partners. Over 235 local authorities were involved as of July 2017.[7]

42. The Home Office's concerns about the effect of disclosure on the local authorities it relied on to deliver the programme is referred to in the IC's decision notice:

> '36. In correspondence with the Commissioner, the Home Office explained that it considered that *disclosure in this case would be likely to discourage other authorities from participating in the resettlement scheme*.
>
> 37. In support of its view, the Home Office told the Commissioner that the development of the Syrian VPR is ongoing *and the cooperation of local authorities is crucial to this development.' (emphasis added)*

43. A few paragraphs later the decision notice states:

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[7] Written Statement by the Home Secretary, 3 July 2017, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-07-03/HCWS23/

> ’50. In correspondence with the Commissioner, the Home Office explained that participation in the VPR scheme is voluntary for local authorities. It told her that it *relies on close relationships with local authorities and that if they believed that the Home Office might disclose details of their discussion with them* about the issues surrounding their participation in the scheme:
>
> > “*...there is a very real possibility that they would no longer wish to participate a*nd this would jeopardise the UK Government’s ability to deliver on its promise to resettle 20,000 Syrian refugees by 2020”.’ (emphasis added)

44. The Home Office was not initially a party to the FTT proceedings. After it was joined, following the Registrar’s Case Management Directions dated 21st March 2018, it issued an (undated) Response to Mr Webber’s appeal.

45. The Response indicated that it used the term:

    a. ‘*authorities’* to refer to ‘Local Authorities’[8], and

    b. ‘*the Crown Dependencies’* to refer to the ‘The Jersey, Guernsey and the Isle of Man authorities’[9]

46. At paragraph 29, referring to local authorities, it said:

> ‘It was plainly reasonable for the QP to conclude that the disclosure of candid communications, opinions and detailed reasons for Crown Dependencies choosing not to (at this time) participate in the VPRS would likely prejudice the scheme’s future administration and the relevant relationships, *with authorities being less likely to engage in dialogue on the issue.’* (emphasis added)

47. At paragraph 36, again referring to local authorities, it said:

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[8] Paragraph 9 of the Home Office Response begins: ‘The VPRS is operated by the HO but depends on the cooperation of Local Authorities (‘the authorities’), within whose areas refugees would be resettled in accommodation provided by the authorities.’

[9] Paragraph 11 begins: ‘The Jersey, Guernsey and the Isle of Man authorities (‘the Crown Dependencies’) made public their decisions not to participate in the VPRS at that time’

> 'The disclosure of the Disputed Information may well cause *other authorities* considering participation in the VPRS *to not come forward* or withdraw from planned participation, affecting VPRS' ability to resettle refugees. Alternatively, the disclosure of communications may well *lead to authorities' reluctance to approach the Home Office* concerning potential challenges/issues in relation to participation in the VPRS and impede inter-governmental communications generally.' (emphasis added)

48. Later it said:

> '47. If the Tribunal does not uphold the HO's reliance on s. 36 (2) (c), it will rely on the remaining two limbs of s. 36 (2): inhibition of free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
>
> 48. In respect of… *[section 36(2)(c)]* communications to and from *authorities* may include provision of frank advice about suitability of local arrangements/resources for participation in the VPRS. If such material becomes public, it would undermine the inter-governmental communication generally and in respect of the VPRS specifically.'[10]

49. These passages show that the *Home Office's* focus was to large extent on the impact of disclosure on the *local authorities* on whom the VPRS depended. The references by the FTT to local authorities reflect the Home Office's own focus on these bodies.

50. The passage in the FTT decision which the Home Office claims shows that the tribunal '*erroneously equates the Crown Dependencies to local authorities'* in particular by referring to *'other local authorities'* appears in paragraph 17 of the tribunal's decision:

> 'We accept, as set out in paras 52-53 of the Decision Notice, that the VPR is a voluntary scheme dependant on the *goodwill of local authorities* and devolved administrations, but we do not think that there is much of a risk at

[10] From the context the reference to 'inter-governmental communication' appears to refer to communications between different UK public authorities.

> all that disclosure of this correspondence about the feasibility and applicability of the scheme to Crown Dependencies, will put that goodwill in jeopardy, and disclosure is very *unlikely to deter other authorities* co-operating in relation to the scheme, or that the scheme will be disrupted. As the Appellant has shown with the papers in the bundle, *other local authorities have been willing to disclose a lot of information about they have dealt with the VPR scheme.'* (emphasis added)

51. The FTT has here variously referred to '*local authorities and devolved administrations'*, *'other authorities'* and *'other local authorities'*. In doing so, it is mirroring the Home Office's concerns. Although the final reference to '*other local authorities'* might have been more carefully worded, it appears to reflect the way in which Mr Webber's submissions were argued. Neither this passage nor any other indicates that the FTT considered the Crown Dependencies as effectively indistinguishable from local authorities.

Section 27 of FOIA

52. Having suggested that the FTT made no proper distinction between the Crown Dependencies and local authorities, the Home Office points out that the Crown Dependencies are *'considered to be foreign states'* under FOIA (paragraph 32a). It adds:

> 'The distinction between communications with local authorities and with foreign states is recognised by FOIA, including the 'international relations' exemption in section 27, which covers confidential information received from a foreign state. This reflects the recognition of an overarching interest in the confidentiality of such communications and the prejudice stemming from their disclosure' paragraph 32b)

53. The Attorneys' submission observes at paragraph 16:

> 'In this context, the guidance issued by the Information Commissioner's Office ("ICO") about the exemption in FOIA section 27 is significant: see Annex 6. Section 27(1) provides that information is exempt from disclosure under FOIA if its disclosure would, or would be likely to prejudice (among

other matters) relations between the UK and any other state. At page 3, the Guidance refers to the definition in section 27(5) of the term "state". Section 27(5) provides that:

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

The ICO's Guidance recognises that, on the basis of this definition, the Crown Dependencies would constitute a "state" for the purposes of section 27. Hence, information the disclosure of which would prejudice relations between the UK and the Crown Dependencies would fall within section 27(1).'

54. These passages indicate that in the view of both the Home Office and the Attorneys, section 27(1) of FOIA is available and could be used in relation to requests whose disclosure would prejudice the UK's relations with a Crown Dependency. It would follow that section 27(2) could also be used to withhold confidential information obtained from a Crown Dependency.

55. The IC appears to have issued at least one decision notice upholding the use of section 27 in relation to a Crown Dependency. This is decision FS50587518 of 11 November 2015 which refers to a request to the Ministry of Justice for information about advice relating to proposed legislation dealing with electricity provision on Sark, which is a Crown Dependency. However, it does not appear that this or any other decision relating to the use of section 27 in connection with a Crown Dependency has been tested before the First-tier Tribunal or above.

56. The Second Respondent questions whether the Crown Dependencies have the status of independent States capable of triggering sections 27(1) and (2). He notes that the Crown Dependencies are not responsible for their own international relations, which are dealt with by the UK government. The UK government is also responsible for ensuring good governance by the Crown

Dependencies. The following extracts from a 2010 government response to a Justice Committee report[11] by the Ministry of Justice illustrate this:

> 'The UK government is responsible for the Crown Dependences' international relations and ultimate good governance and has the commensurate power to ensure these obligations are met' (Ministerial Foreword)'
>
> 'As they are not sovereign States, the Crown Dependencies cannot bind themselves internationally.' (Ministerial Foreword)
>
> 'The Government notes the Committee's concerns that the United Kingdom is influencing Island legislation at the policy level which 'may be motivated by wider political concerns, even though it is not legitimate on constitutional grounds' (paragraph 60). In completing the scrutiny process, the Ministry of Justice does not generally check for congruence with UK policy unless divergence would demonstrate risk of breaches of the ECHR or breaches of EU or international law, and we would not accept that we carry out scrutiny beyond what is constitutionally legitimate. *Although we do not generally seek to do so, in addition to strict questions of lawfulness, in limited occasions we may consider it appropriate to intervene in policy matters where there may be the potential for a direct and adverse impact on UK interests (for example in relation to changes to drug or immigration law in the Islands). Equally, if an Island Law sought to do something fundamentally contrary to current UK principle, or which may be fundamentally damaging to UK interests, we would not consider it constitutionally illegitimate to refuse to recommend the Law for Royal Assent.'* (page 11) (emphasis added)

57. The fact that both the Home Office and the Attorneys maintain that section 27 is applicable to the Crown Dependencies raises the question of why the present application has been made at all. Section 27 was not cited at any stage in relation to Mr Webber's request. **If** the Home Office and Crown Dependencies are right in what they say, section 27 could have been used, in addition to section 36, to ensure that any international relations concern was dealt at the FTT stage.

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[11] Government Response to the Justice Select Committee's report: Crown Dependencies, November 2010, Cm 7965

As section 27 is a qualified exemption, public interest arguments relating to international relations could also have been raised under section 27.

58. No explanation for the failure to cite section 27 in this case is offered. Instead the FTT is reproached for its supposed failings in not properly considering international relations issues:

> '*If the FTT had properly directed itself* as to the nature of the relationship between the UK Government and the Crown Dependencies, then this would have had considerable significance for the FTT's approach when assessing the public interest. *It is well settled that in matters of international relations the Courts will pay considerable deference to governmental views'* (emphasis added) (Attorneys' submission, paragraph 36)

59. Both the Home Office and the Attorneys General now ask the Upper Tribunal to give permission for an appeal, arguably in order to compensate for the Home Office's failure to cite sections 27(1) and/or (2) at any of the opportunities it had to do so, which included the initial response, internal review, IC investigation stage and the FTT proceedings themselves. It is well established that new exemptions may be introduced at any of these stages.[12] The Home Office's failure to invoke section 27 raises a serious question as to the justification for this application.

Mr Webber has made numerous requests to the authorities of respectively Guernsey, Jersey and the Isle of Man under their own FOI laws or Access to Information procedures, seeking information about their approach to the Syrian refugee emergency. In the course of these he has referred to his FOI request to the Home Office and asked them about their position in relation to any potential disclosure by the Home Office of their own discussions with it about assistance for Syrian refugees. He suggests that it is extremely likely that his inquiries will have led to contact between the respective Crown Dependencies and the Home Office to discuss the latter's response to him. He is extremely sceptical about the suggestion that none of the three Crown Dependencies were aware of the FTT proceedings in time to make their views known to it. He suspects that the Home Office may have been so confident that the IC's

[12] Birkett v The Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606

decision in his case would be upheld by the FTT that it did not see any need to suggest that such representations might be of assistance. Understandably, he is not in a position to demonstrate that this was the case. However, if it were it would go to the heart of the present application, which is based on the suggestion that the Crown Dependencies had no knowledge of these proceedings until the FTT's decision was published.

60. The Second Respondent has a number of objections to the present application

(1) There is no error of law in the FTT's decision

(2) Permitting a further appeal would reward the Home Office for its own failings

61. This refers to the Home Office's failure to cite section 27 at an appropriate stage, despite its view that the exemption is applicable to requests such as this. It also refers to its failure (if that was the case) to advise the Crown Dependencies that it could include with its own submissions to the FTT any representations that they might wish to make. The delay in providing disclosure that has so far resulted from this application, together with any additional delay were permission to appeal be granted, would be extremely unfair to Mr Webber.

(3) The existence of section 27 further undermines the case that the FTT's decision will lead to a 'chilling effect'

62. Neither the Home Office nor the Attorneys have expressed any concern about the *direct* effects of disclosing the disputed information, which they do not suggest would be harmful in itself. The sole concern expressed is that it may discourage the Crown Dependencies from communicating frankly with the UK government *in future*, on this or other matters.

63. To achieve this, they seek a rehearing of the section 36(2) public interest issue, allowing them to bring international relations concerns to bear. However, if section 27 can be brought to bear on future requests involving communications with the Crown Dependencies that provides a further answer to any fears of a 'chilling effect'. No rehearing is needed to achieve that nor is any Upper Tribunal

precedent required for the future, given that no defect in the protections provided by the Act's exemptions has been claimed.

(4) The 'international relations' perspective will make little difference in the present case.

64. The simple invocation of 'international relations' does not automatically transform every exchange into a highly sensitive secret – and could not do so where the information has already been published. Though they do not suggest it is comparable, the Attorneys refer to the case of *Savic v Information Commissioner and others* [2016] UKUT 535. That involved the UK's decision to launch military action in the form of the aerial bombing of Kosovo and Serbia in 1999. The request was for the minutes of Cabinet and Cabinet committees, exchanges between the Foreign and Commonwealth Office and the Ministry of Defence and *all* other records relating to the decision including discussions with the United States, the United Nations, NATO, other UK allies and highly classified intelligence shared between the UK and the USA.

65. The case is cited to illustrate *'the considerable deference'* paid to government views on matters of international relations (Attorneys' submission, paragraph 36). But such deference is not uniform, absolute or guaranteed. It flows from the reluctance of the courts to contemplate overruling experienced officials' assessments of the consequences of disclosing highly sensitive or classified material of the kind that featured in *Savic.* Nothing remotely comparable is involved here.

66. The Attorneys' submission suggests (paragraph 35) that although the FTT has considered the position of local authorities and devolved administrations (paragraph 35) it has not given proper weight to the constitutional position of the Crown Dependencies. It suggests this requires further detailed analysis, presumably to be provided at any future hearing. Given the facts of the present case, particularly the previous publication of the withheld information, this is unnecessary. There is no need to quantify precisely what degree of constitutional deference is due to the Crown Dependencies (or each of them individually) as opposed to, say, the devolved institutions, (or each of those individually). Nor should it be assumed that, in terms of the UK's own interests (international or

other), there is necessarily less of a need to maintain positive working relationships with the devolved administrations than with the Crown Dependencies. The opposite may well be the case.

(5). The proposed use of section 36(2)(c) would be contrary to Parliament's intention

67. The proposed rehearing would reopen the public interest balancing exercise under section 36(2). Unhelpfully, neither submission specifies which limb(s) of that section would be cited, but it seems likely to be section 36(2)(c), the 'effective conduct of public affairs'.

68. There is a history to this provision which makes it unsuitable for use as an emergency back-stop for authorities which fail to cite an appropriate exemption at the relevant time.

69. During the FOI Bill's House of Lords Report Stage the 'catch-all' nature of what is now section 36(2)(c) (but at the time was found in clause 35 of the bill) attracted considerable concern and pressure for its removal. Lord Falconer, the minister responsible, told the House that the provision was necessary because:

> 'situations may arise which one cannot quite envisage **and cannot quite cover by a specific exemption,** but in relation to which one would assume, if one was a reasonable person, that some sort of exemption should be given. It seems sensible in that regard that there should be some test which provides protection. That is the purpose of Clause 35.'[13] (emphasis added)

70. The IC subsequently adopted that approach to section 36(2)(c). The Information Tribunal's decision in *McIntyre & Information Commissioner & Ministry of Defence*, EA/2007/0068 endorsed the approach stating at paragraph 25:

> 'We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but **which are not covered by another specific exemption,** and where the disclosure would

[13] Official Report, House of Lords (Deb), 14 November 2000, col. 240

prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure' (emphasis added)

71. The IC's current guidance on section 36 cites this passage from *McIntyre* and the IC's decision notices on section 36 regularly reproduce it.

72. The remedy sought in this case appears designed to allow section 36(2)(c) to stand in as a proxy for section 27, allowing the Home Office another opportunity to make a case for withholding the information, by asserting that the UK's international relations are in play.

73. The use of section 36(2)(c) as a substitute for section 27 would be contrary to Parliament's intention in enacting section 36(2)(c). It would set a precedent that could undermine the Act's structure by allowing specific FOI exemptions to be by-passed by use of a catch-all more favourable to the withholding of information.

74. Instead of having to show that prejudice to a specified interest was *likely*, the minister could simply assert it under section 36(2)(c). The assertion would be challengeable only if it could be shown to be 'irrational or absurd'.[14] This would fundamentally reshape the Act's balance in favour of the public authority and at the expense of the requester.

75. There could hardly be a less compelling case for causing such disruption to the FOI regime. There is no suggestion that disclosing the withheld information would cause direct harm to any interest. There is no suggestion that any gap in the statutory regime has been identified. The circumstances of this case make any chilling effect implausible. Any remaining concerns on this score could – if the Home Office is right about section 27 and the Crown Dependencies – be doubly safeguarded against by its appropriate use, without any need for a rehearing.

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[14] The IC's guidance on section 36 states: 'If the [Qualified Person's] opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.' Prejudice to the effective conduct of public affairs (section 36) 20150319, Version: 3

Conclusion

76. For these reasons the Second Respondent asks the Upper Tribunal to refuse permission to appeal.

MAURICE FRANKEL
Campaign for Freedom of Information
31 January 2019