Neutral Citation Number: [2025] EWHC 1669 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 02/07/2025

Before:

THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE KING'S BENCH DIVISION
MR JUSTICE CHAMBERLAIN

- -

Case No: QB-2022-000174

Between:

HM ATTORNEY GENERAL FOR ENGLAND AND WALES — **Claimant**

- and -

BRITISH BROADCASTING CORPORATION — **Defendant**

Case No: AC-2024-LON-02952

And Between:

THE KING
on the application of

'BETH' — **Claimant**

- and -

THE INVESTIGATORY POWERS TRIBUNAL — **Defendant**

- and -

THE SECURITY SERVICE — **Interested Party**

- -

Sir James Eadie KC, Neil Sheldon KC, Jennifer Thelen and Emmanuel Sheppard (instructed by the **Treasury Solicitor**) for **HM Attorney General for England and Wales**

Jude Bunting KC (instructed by the **BBC Litigation Department**) for the **British Broadcasting Corporation**

Charlotte Kilroy KC, Jesse Nicholls and Isabel Buchanan (instructed by the **Centre for Women's Justice**) for **Beth**

Sarah Hannett KC and Paul Skinner (instructed by the **Government Legal Department**) for the **Investigatory Powers Tribunal**

Zubair Ahmad KC and Dominic Lewis (instructed by the **Special Advocates' Support Office**) as **Special Advocates**

Hearing date: 3 June 2025

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Approved Judgment

Baroness Carr of Walton-on-the-Hill (Lady Chief Justice of England and Wales), Dame Victoria Sharp (President of the King's Bench Division) and Mr Justice Chamberlain:

Introduction and summary

1. This judgment addresses serious issues which have arisen in two sets of High Court proceedings. Both proceedings relate to the activities of a man, "X", who—it can now be confirmed—was a covert human intelligence source (a "CHIS" or "agent") for the Security Service ("MI5").

2. In late 2021, following an investigation led by the journalist Daniel De Simone, the BBC proposed to broadcast a programme which included the allegations that X was a dangerous extremist and misogynist who physically and psychologically abused two female partners; that he was also an MI5 CHIS; that he had told one of these women ("Beth") that he worked for MI5 in order to terrorise and control her; and that MI5 should have known about X's behaviour and realised that it was inappropriate to use him as a CHIS. The BBC intended to name X.

3. In early 2022, the then Attorney General (the Rt Hon. Suella Braverman MP) filed a claim in what was then the Queen's Bench Division of the High Court seeking an injunction to prevent the BBC from broadcasting or publishing a story about X. The case was managed and heard by Chamberlain J. Special advocates were appointed to represent the BBC's interests. After an interlocutory hearing on 16 February 2022, a declaration under s. 6 of the Justice and Security Act 2013 ("the 2013 Act") was made and directions given for a public hearing: [2022] EWHC 380 (QB). After a hearing on 1 and 2 March 2022, an interim injunction was granted preventing the BBC from identifying X but allowing it to report on other aspects of the story, including the fact that X abused his CHIS status and that MI5 was at fault for using him as a CHIS: [2022] EWHC 826 (QB), [2022] 4 WLR 74.

4. In a further judgment on 18 May 2022, outstanding issues as to what could and what could not be broadcast were resolved: [2022] EWHC 1189 (QB). Shortly after that, between 19 and 22 May 2022, the BBC broadcast programmes and published stories on its website about X, without naming or identifying him. On 30 September 2022, the court made a consent order granting a final injunction in the same terms as the interim order made on 7 April 2022, but giving the parties permission to apply to vary it if there was a material change of circumstances.

5. In support of the claim for an injunction in January 2022, evidence was given by a senior MI5 officer ("Witness A") that, throughout its dealings with Mr De Simone, MI5 had adopted its usual "neither confirm nor deny" ("NCND") stance as to whether X was a CHIS. MI5 affirmed this evidence, and added further detail, in response to enquiries from the special advocates. This had important implications for the way in which the proceedings were conducted. Each of Chamberlain J's public judgments and orders was drafted so as not to reveal whether X was, in fact, a CHIS.

6. The Attorney General (now, the Rt Hon. Lord Hermer KC) admits that Witness A's evidence was false and that the court and the special advocates were misled. In fact, another individual ("Officer 2"), who at the material time was head of communications at MI5, had been authorised to tell Mr De Simone that X was a CHIS and had done so

in a series of conversations in June 2020. This came to the court's attention only because Mr De Simone later produced notes and recordings of the relevant conversations. By that time, however, Witness A's false evidence had also been relied upon by MI5 in proceedings brought by Beth in the Investigatory Powers Tribunal ("IPT") and in a judicial review claim in the High Court challenging an interlocutory ruling by the IPT in June 2024: [2024] UKIPTrib 3. So, Witness A's false evidence misled both the High Court (in two separate sets of proceedings) and the IPT.

7. In January 2025, the Attorney General and MI5 accepted that false evidence had been given, apologised to the court and set out the steps being taken to investigate how this had occurred. In February 2025, the injunction was varied by consent to allow the BBC to report on the fact that, and the circumstances in which, false evidence had been given. At the same time, directions were given for the parties to file evidence and submissions and a hearing was fixed before this divisional court to consider two issues:

   (a) How did the Attorney General and MI5 come to deploy false evidence before the court and what further steps (if any) should now be taken by the court? (Issue 1)

   (b) Should the Attorney General be permitted to maintain NCND on the question whether X was a CHIS? (Issue 2)

8. Very shortly before the hearing before us, the Attorney General indicated in a written submission that, in the exceptional circumstances of this case, he no longer seeks to maintain NCND as to X's CHIS status. The use of NCND in these proceedings, and its maintenance until the very last minute, raises wider concerns and in any event forms an essential part of the backdrop to issue 1. We therefore invited the parties to file submissions and refer us to the relevant authorities.

9. Issue 1 remains live, because giving false evidence in a witness statement can in some circumstances amount to a contempt of court. Where the court considers that a contempt "may have been committed", CPR 81.6 requires the court to consider of its own initiative (i.e. even where no party has made an application) whether to proceed against the person concerned in contempt proceedings.

10. MI5 has apologised to the court in statements from Witness A and Witness B, its Director General Strategy. It has also commissioned two investigations into the circumstances. One is an internal investigation which has involved many hours of interviews and which has reported to an internal panel, which may decide to take disciplinary action against individuals. The second is an external investigation by Sir Jonathan Jones KC (hon). We have seen the OPEN and CLOSED versions of Sir Jonathan's investigation and the documents from the internal investigation. The essential conclusion reached is that false evidence was given because of a series of mistakes, some systemic and some personal, but that there was no deliberate attempt by any MI5 staff member to mislead the court.

11. The apologies were repeated in submissions made on the Attorney General's behalf by Sir James Eadie KC, who also made clear that if the court considered further action necessary, such action would be taken and that if the court required further information, that would be provided.

12. Our conclusions may be summarised as follows:

    (a) The evidence that has been put before the court indicates that the special advocates, the High Court, the IPT and the Investigatory Powers Commissioner were all misled on the key question whether MI5 had departed from NCND in relation to X's CHIS status. The proper operation of each of these safeguards is dependent upon high standards of candour on the part of the agencies. Any evidence of a departure from these standards must be promptly and effectively investigated.

    (b) NCND was maintained until shortly before the hearing before us on 3 June 2025, long after MI5 had filed evidence making clear that Witness A's evidence was incorrect and any justification for its maintenance had disappeared. Thought should have been given at a much earlier stage to the question whether it was realistic to maintain NCND in the circumstances, particularly given that the effect of doing so was to cast formal doubt on the veracity of Mr De Simone's evidence.

    (c) It is regrettable that MI5's explanations to this court were given in a piecemeal and unsatisfactory way—and only following the repeated intervention of the court.

    (d) The investigations carried out by MI5 to date suffer from serious procedural deficiencies. Their conclusions cannot presently be relied on.

    (e) In those circumstances, we consider that it would be premature to reach any conclusions on whether to initiate contempt proceedings against any individual. We accordingly adjourn consideration of that question pending the outcome of a further investigation which we anticipate will not suffer from the defects that we have identified. We consider that this further investigation should be carried out under the auspices of the Investigatory Powers Commissioner, who has oversight of MI5's surveillance activities.

    (f) Separately, we give more general guidance about the way in which evidence from an agency such as MI5 should be presented and received in future. Parties should take care to ensure that evidence is given either by the person with most direct knowledge of the matter in question or, if given in a "corporate" witness statement, that the deponent makes clear from which other (named) persons the evidence derives, and precisely what, if any, independent scrutiny they have given to the evidence being proffered. The requirements of the Civil Procedure Rules ("CPR") must be observed.

Legal context

The national security context

13. Whilst acknowledging the seriousness of what happened, Sir James submitted that the false evidence given in this case was not determinative of or directly relevant to the question whether the injunction should be granted or continued. This is correct, as far as it goes. The BBC does not suggest that the injunction preventing disclosure of X's identity should be discharged. Sir James's submission, however, overlooks three interlocking aspects of the legal context of the proceedings brought by the Attorney

General, which, taken together, make the provision of false information by MI5 in this case particularly serious.

14. First, in all legal proceedings the general rule is that hearings take place in public: see CPR 39.2(1). Any derogation from this general rule must be strictly justified for one or more of the reasons set out in CPR 39.2(3). If there were ever a case in which the open justice principle had heightened importance, it was this one, where the Attorney General was applying, in what she considered to be the public interest, for an order to prevent a publicly-funded broadcaster from disclosing information the publication of which was considered to be in the public interest. This point was made by Chamberlain J in the first judgment in these proceedings: [2022] EWHC 380 (QB), at [18].

15. The question whether MI5 had adopted a NCND stance in relation to X's CHIS status was critical to the decision about which parts of the hearing could be held in public.

16. Secondly, the 2013 Act provides for a "closed material procedure". This enables the court to consider evidence and submissions in CLOSED, i.e. not only in the absence of the public but also in the absence of one or more of the parties. This derogates both from the open justice principle and, even more significantly, from the principle that every party is entitled to see everything that the court sees and to be present for the whole of the hearing (a fundamental element of natural justice). In the 2013 Act, Parliament allowed departures from these principles in strictly limited circumstances, namely, where it can be shown that there is sensitive material, the open disclosure of which would damage national security. Where a declaration under s. 6 of the 2013 Act is sought, special advocates are appointed to represent the interests of the excluded party. Their presence attenuates, but does not remove, the unfairness inherent in closed material proceedings.

17. The 2013 Act and the procedural rules which accompany it in CPR Part 82 make clear that declarations under s. 6 are not to be made automatically. Where such an application is made, the court must scrutinise the evidence supporting it with care and keep the declaration under review as the proceedings progress. The same is true of applications to withhold sensitive evidence under s. 8 of the 2013 Act.

18. The question whether MI5 had adopted a NCND stance in relation to X's CHIS status was central to the question whether to make a s. 6 declaration and central to the decision about which parts of the evidence could be deployed only in CLOSED.

19. Thirdly, courts accord special status and respect to national security assessments by the executive branch of government: see e.g. *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765, [70] (Lord Reed); *U3 v Secretary of State for the Home Department* [2025] UKHL 19, [66] (Lord Reed). The implications and limits of this special status and respect were considered by Chamberlain J in his main judgment in these proceedings: [2022] EWHC 826 (QB), [2022] 4 WLR 74, [28]-[33]. For present purposes, however, the key point is that national security assessments often originate from the security and intelligence agencies. The justification for the respect owed to such assessments is in significant part based on institutional matters including the expertise and experience of the personnel involved and the wide range of sources of information available to them. However, this respect is warranted only if, and to the

extent that, the courts can have confidence without reservation in the processes by which such assessments are prepared and presented.

The importance of NCND

20. Section 2(2) of the Security Service Act 1989 imposes an obligation on the Director General of MI5 to ensure that there are "arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings".

21. The policy in relation to CHIS is now set out in the Home Office's *Covert Human Intelligence Sources revised code of practice*, published on 13 December 2022, at paragraph 9.26:

> "People who take on the role of a CHIS may place themselves at considerable risk, while their continued co-operation is of great importance to the effectiveness of investigation and law enforcement work. All organisations have a responsibility to protect the identity of individuals working as CHIS, and others who may be affected by the disclosure of the CHIS's identity. Organisations using CHIS should attempt to protect the identities of CHIS by all reasonable and lawful means possible and where appropriate by neither confirming nor denying the existence or identity of a CHIS."

22. In general, the courts have accepted that there is powerful justification for the NCND policy. In *In re Scappaticci's Application* [2003] NIQB 56, Carswell LCJ (sitting in the Queen's Bench Division of the Northern Ireland High Court) explained the justification in this way at [15]:

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger… If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy."

23. In some quarters, however, a perception seems to have emerged that "the NCND principle" confers some kind of special immunity or exception to the ordinary obligations which apply in legal proceedings. This perception is erroneous. In *Secretary of State for the Home Department v Mohamed* [2014] EWCA Civ 559, [2014] 1 WLR

4240, at [20], Maurice Kay LJ (with whom Sullivan and Briggs LJJ agreed) said this at [20]:

> "Lurking just below the surface of a case such as this is the governmental policy of 'neither confirm nor deny' ('NCND'), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from legal norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so."

24. *Scappaticci, Mohamed* and other authorities on the use of NCND were reviewed by Bean J in *DIL v Commissioner of Police for the Metropolis* [2014] EWHC 2184 (QB), at [25]-[38]. At [39], he derived from this review the following material propositions that:

> "(1) There is a very strong public interest in protecting the anonymity of informers, and similarly of undercover officers (UCOs), and thus of permitting them and their superiors neither to confirm nor deny their status; but it is for the court to balance the public interest in the NCND policy against other competing public interests which may be applicable…
>
> …
>
> (3) Even where an individual informant or UCO has self-disclosed, the police (or the Secretary of State) may nevertheless be permitted to rely on NCND in respect of allegations in the case where to admit or deny them might endanger other people, hamper investigations, assist criminals, or reveal police operational methods." (Emphasis added)

25. In a statutory closed material procedure, such as is available under the 2013 Act, the statute supplies the framework under which the court has to consider whether to allow a party to adopt a NCND stance. Even here, however, it is for the government party to establish that the disclosure of a particular individual's CHIS status would damage national security. Sometimes, this may be relatively easy to do, but all will depend on the circumstances. In this case, the key question was whether it would damage national security to disclose openly that X was a CHIS *without identifying X*.

26. In that regard, it was obviously highly material to understand whether MI5 had already departed from NCND by confirming X's CHIS status to the BBC and, if so, in what terms and subject to what conditions. More generally, as the IPT (Burton J and Sir Richard Gaskell) recognised in *Frank-Steiner v Data Controller of the Secret Intelligence Service* (IPT/06/81/CH, 26 February 2008), at [45] (endorsing the submissions of Jonathan Crow QC, counsel for SIS):

> "…for an NCND policy to be effective in ensuring that information is not revealed about individual cases, the NCND response must be provided invariably. This is not a novel point: it lies at the heart of the NCND policy

> as it is, and always has been, applied by the security and intelligence agencies."

27. In the light of these principles, it is important that a party seeking to adopt a NCND stance in relation to a fact relevant to legal proceedings ensures that the court is candidly informed (if necessary in CLOSED pursuant to a public interest immunity application or a closed material procedure) about:

    (a) the existence and terms of any relevant policy or practice relating to the use of NCND and/or to the circumstances in which it may be departed from; and

    (b) the circumstances of any departure from NCND in the particular case or other related cases and the precise terms of the departure (including whether the departure was authorised, whether the information was conveyed in confidence and the precise terms of any departure).

28. If it is unclear whether there has been such a departure, any material which evidences or suggests that there has been must always be candidly disclosed to the court (if necessary in CLOSED pursuant to a public interest immunity application or closed material procedure). This is an incident of the duty owed by any party engaged in court proceedings to ensure that the court is able to carry out its functions on a properly informed basis. It applied with particular force to the Attorney General in this case for the reasons set out in [14]-[19] above.

What happened in this case

<u>What MI5 told the court and special advocates in 2022</u>

29. The Attorney General's application for an injunction was supported by a witness statement from Witness A, signed on 26 January 2022. Witness A was a Deputy Director, who at that time had worked at MI5 for 18 years. The witness statement set out the discussions between MI5 and Mr De Simone in June 2020 and said this about them:

> "11… During those discussions in June 2020, MI5 neither confirmed nor denied whether or not this individual was a CHIS, role-player or otherwise. However, MI5 did explain that running aspects of the story relating to this individual would cause damage to national security. MI5 asked that those aspects be removed, and Mr de Simone agreed to remove them…"

30. Mr De Simone responded to this in a witness statement dated 1 February 2022. At paragraph 31 of that statement, he said:

> "On 8 June 2020, I received a call from a representative of MI5 and went on to have several conversations with him. I have read the account provided by 'Witness A' of these conversations. It does not correspond with my recollection in various respects."

31. The proceedings were heard on a highly expedited timetable. On 13 February 2022 (before the hearing at which the s. 6 declaration was made), the special advocates

appointed to represent the interests of the BBC in any CLOSED hearing (Zubair Ahmad KC and Dominic Lewis) asked for any notes recording the exchanges between MI5 and the BBC in June 2020. They explained as follows:

> "The relevance of the detail of the exchange is hopefully clear. The engagement between MI5 and the BBC in June 2020 was effective in neutralising the risk that had been presented. If during that engagement MI5 did indeed [GIST: depart from NCND], then the justification for withholding that information from the Defendant in connection with the present proceedings in [sic] significantly weakened (and arguably falls away altogether)."

32. The Attorney General responded in writing on 15 February 2022 saying that there were no contemporaneous notes of the discussion which took place between MI5 and the BBC. It was acknowledged that there were "internal discussions" about whether to depart from NCND on an exceptional basis to an extremely limited number of trusted contacts at the BBC, in confidence. It continued:

> "In the event, that option was not pursued – and NCND was maintained in the discussions which then took place, as detailed in Witness A's confidential witness statement… Whilst there is no contemporaneous note of the discussions in June 2020 between MI5 and the BBC, it is evident that NCND was maintained because:
>
> 1) Had there been a departure from NCND… that departure would have been recorded.
>
> 2) The BBC have not stated that [GIST: there was a departure from NCND]."

33. At this stage, two points are worthy of note. First, MI5 took the absence of a written record of any departure from NCND as a basis for asserting positively, and without qualification, that there had been no such departure. The fact that there had been conversations of which no written record had been taken should have decreased, not increased, the confidence with which MI5 responded to the enquiry. Secondly, great reliance seems to have been placed on the fact that Mr De Simone had not said that there had been a departure from NCND. He had, however, said that Witness A's description of the conversations (the key element of which was that there had been no departure from NCND) did not accord with his recollection. The fact that he had said nothing since was hardly surprising, because the enquiries being made by the special advocates were being made entirely in CLOSED. Mr De Simone had no knowledge of them, or of the answers to them.

34. The special advocates responded in writing on 16 February 2022, stating that they were surprised by the Attorney General's answer and asking further questions:

> "(i) Were any notes (or other record) ever made by MI5?
>
> (ii) If notes (or other record) were made, why do they not now exist?

(iii) If notes (or other record) cannot be found, what searches have been carried out?

(iv) Would it not be expected/good practice that notes of such calls would be made, as in December 2021, particularly given the possibility, which had been contemplated, that MI5 would need to [GIST: depart from NCND]?

(v) Is there any other contemporaneous (or near contemporaneous) record of the detail of the engagement in June 2020?... If so could we be provided with any such record?

(vi) In the absence of contemporaneous notes, how / on what basis is Witness A able to state that *'during the course of those discussions in June 2020, MI5 neither confirmed nor denied whether or not this individual was a CHIS, role-player or otherwise?'*

(vii) If not relying on his own knowledge, on what records did Witness A draw to make that apparently categorical statement?

(viii) With what degree of confidence can Witness A make that statement?

(ix) Was Witness A the person from MI5 who spoke to Daniel De Simone in June 2020?

(x) If the answer to (ix) is 'yes', why does Witness A not say so in terms in either his OPEN or CLOSED statements?...

(xi) If the answer to (ix) is 'no', or if others within MI5 spoke to Mr De Simone, in addition to Witness A, could all those who did speak to Mr De Simone make witness statement(s) setting out their recollection of the conversations?"

35. This request from the special advocates was sent on the same day (16 February 2022) as the interlocutory hearing to which we have already referred. The special advocates sensibly took the view that they could not pursue these requests before the court until they had received answers, and so they reserved their position.

36. The purpose of the hearing was to consider two matters. The first was whether there should be a declaration under s. 6 of the 2013 Act. As we have explained, the question whether MI5 could properly adopt a NCND stance in relation to X's CHIS status was highly relevant to that issue.

37. The second matter considered at the hearing on 16 February was how the parts of the main hearing which took place in the presence of the BBC and its legal representatives would be conducted. As can be seen from [7]-[8] of Chamberlain J's judgment of 24 February 2022, the Attorney General was submitting that these parts should take place entirely in private, i.e. in the absence of the press and public, pursuant to CPR 39.2(3)(a), (b) and (c). That submission was rejected, for various reasons, but the fact that MI5 had confirmed that X was a CHIS would have been highly material.

38. The Attorney General's response to the special advocates' request came in writing on 24 February 2022. The responses were as follows (we have interpolated our comments in italics after each one):

> "a. Paragraph 3(i) and (ii) – no notes or other records were made by MI5 in respect of the June 2020 meeting.
>
> b. Paragraph 3(iii) – no specific searches have been completed in respect of the June 2020 exchanges because the individual at MI5 who spoke to the BBC in June 2020 has confirmed that no notes or other records were made."
>
> *The question was whether any notes or other record had "ever" been made. The evidence now available shows that the answer was almost certainly false. Officer 2 told the internal investigation that he "almost certainly" did make notes at the time but no longer had them. The reference to the "June 2020 meeting" was also misleading, because it suggests just one conversation between MI5 and the BBC when in fact there were many.*
>
> "c. Paragraph 3(iv) – there is no MI5 policy or practice to make notes of all calls with journalistic contacts. The immediate focus of the conversation in June 2020 was to mitigate the risk of [GIST: damage to national security]. The result of that conversation was that that risk had been mitigated… There was therefore no enduring impact arising from this conversation which may have warranted a note to be drafted…"
>
> *This can now be seen also to have been false. In fact, as Sir Jonathan Jones's investigation has revealed, there was such a policy: the Media Engagement Policy, which said that MI5 must "write up all contacts with the media (dates, venues, topics of questions and replies, and hospitality received or given), file the write-up to the corporate record and copy it where appropriate to senior management".*
>
> "d. Paragraph (v) – there are not other contemporaneous or near-contemporaneous records of the detail of the engagement in June 2020. [GIST: The outcome of the meeting was reporting verbally.]
>
> e. Paragraph (vi), (vii) and (viii) - Witness A spoke to the MI5 officer who had contact with the BBC in June 2020. The MI5 officer confirmed that it was his recollection that MI5 neither confirmed nor denied that X was a CHIS, roleplayer or otherwise. This also reflects Witness A's recollection of what the MI5 officer confirmed verbally to Witness A at the time of the meeting. Witness A has a high degree of confidence that his position is accurate based on (i) the recent conversations he has had with the MI5 officer who had contact with the BBC at the time; and (ii) conversations in which he was personally involved in regarding the matter back in June 2020."
>
> *On one reading (and, it may be said, the most obvious one) this paragraph suggests that Witness A spoke to Officer 2 in June 2020. Later material suggests this was not so. Sir James urged us to read "at the time of the meeting" as a reference to a meeting held a few days previously with a view*

> *to answering the special advocates' requests. We reach no concluded view at this stage, but it is highly unsatisfactory that a response that was (at best) ambiguous was given.*
>
> "f. Paragraphs (ix) and (x) – no. Witness A was not the individual who spoke to Daniel De Simone.
>
> g. Paragraph (xi) – no, we do not consider that obtaining further witness evidence in respect of the June 2020 meeting is either necessary or proportionate in accordance with the Claimant's duty of candour. The meeting is already dealt with by the statement of Witness A, and what Witness A sets out in respect of the June 2020 meeting isn't inconsistent with anything set out by the BBC. In any event, NCND was maintained in the June 2020 discussions: any departure would have been recorded … Furthermore, the BBC have not stated that [GIST: there was a NCND departure]."

39. In the light of what is now known, we consider this answer to be particularly troubling, for three reasons.

40. First, unlike the original evidence in paragraph 11 of Witness A's statement, this response was given to a series of direct and precise questions posed by the special advocates, on a point whose relevance to the proceedings had been fully explained. The response to these questions contained at least two apparently false statements.

41. Secondly, the Attorney General appears to have placed considerable reliance on the fact that "what Witness A sets out in respect of the June 2020 meeting isn't inconsistent with anything set out by the BBC". But Mr De Simone had said that Witness A's account of the conversations between him and MI5 did not accord with his recollection. As the Attorney General's lawyers would have known, the special advocates would have had the opportunity to meet Mr De Simone before they received the CLOSED material, but could not communicate with him about any CLOSED material after receiving it, save pursuant to a security-cleared communication request. He would therefore have had no opportunity to verify or comment on the Attorney General's response to the special advocates' enquiries, which were all given in CLOSED. Indeed, he would not have seen any of the exchange between the special advocates and those representing the Attorney General until it was brought partially into OPEN on 17 March 2025.

42. Thirdly, as we have mentioned, these proceedings were heard on a highly expedited timetable. The special advocates' initial enquiries were sent shortly before the hearing at which the declaration under s. 6 of the 2013 Act was made. The response came afterwards, on 24 February 2022. The main hearing was due to start on 1 March 2022. It was very unlikely that there would be time to raise disclosure questions of this kind even if it had been considered worthwhile doing so in the light of MI5's unequivocal response. This must have been obvious to those involved.

Why it mattered whether MI5 had confirmed X's CHIS status

43. Whether MI5 had confirmed X's CHIS status mattered for four reasons.

44. First, it was relevant to the substance of the claim for an injunction. The cause of action relied upon was breach of confidence. It was relevant to the establishment of that cause of action if the information which the BBC wished to broadcast had been communicated to it by MI5. If that had been stated, the court might have wished to consider whether the terms in which the confirmation was given undermined any obligation of confidence. As we have said, the BBC has not asked for the injunction preventing the disclosure of X's identity to be discharged. But that is known only with the benefit of hindsight.

45. Secondly, it was relevant to the application for a declaration under s. 6 of the 2013 Act. The notes of the CLOSED argument show that Chamberlain J regarded it as such. He was persuaded to make a s. 6 declaration on the strength, amongst other things, of MI5's evidence that X's CHIS status had been maintained throughout and it was vital to maintain that stance. Decisions about what material should be withheld from the BBC and their legal representatives were also made on the basis that X's CHIS status had not been confirmed to them. The recent flurry of disclosure of previously CLOSED material into OPEN, following the concession that MI5 can no longer maintain NCND, demonstrates how much the point mattered to the location of the OPEN/CLOSED divide.

46. Thirdly, it was also relevant to the Attorney General's application that even those parts of the hearing that were being held in the presence of the BBC and its legal representatives should be held in private. As noted above, the application was rejected for other reasons. But from the perspective of MI5 at the relevant time, if there had been a departure from NCND in this case, particularly an authorised one, that made it materially less likely that the court would accede to the application for a private hearing.

47. Fourthly, the question whether MI5 had departed from NCND in this case was relevant more broadly to the stance generally adopted by it and the other security and intelligence agencies (among others) in legal proceedings. As shown by the excerpt cited above from the IPT decision in *Frank-Steiner*, the "invariable" application of the NCND stance is said to be central to its effectiveness. Disclosure of an authorised departure from NCND—particularly one as extensive as it is now known took place in this case—would be relevant to the ability of MI5 and others to adopt such a stance in proceedings in the future.

How the false evidence came to light

48. In May 2022, Beth issued a human rights claim in the IPT in respect of her ill-treatment by X. On 21 June 2024, after an interlocutory hearing, the IPT (Lieven J and Judge Rupert Jones) held that MI5 should be permitted to adopt a NCND stance on the question whether X was a CHIS. The issue was an important one because Beth's evidence was that X had used his CHIS status to facilitate his abuse of her. The IPT held at [37]:

> "We are satisfied that there is cogent evidence before us to support the Respondent's assessment as to the harm to national security of waiving NCND, in addition to that of identifying X. We also do not accept that the Respondent has come close to waiving NCND in its approach or conduct in reply to Beth's allegations. Rather, the respondent has gone to extensive

lengths throughout these and the BBC proceedings to uphold the NCND policy."

49. On 18 November 2024, Mr de Simone wrote to MI5 saying that the BBC planned to report that, contrary to what MI5 had said, MI5 had positively volunteered to him that X was a CHIS and that the MI5 representative to whom Mr De Simone spoke said that he was authorised to say so. The letter said that the BBC's legal department was separately writing to inform the Attorney General of an intended application to vary the injunction to allow this point to be reported.

50. This prompted a robust response from the Government Legal Department on 25 November 2024, noting that the intended purpose of the proposed story was to assert that MI5 had given "a materially inaccurate account of the extent to which it has previously confirmed or denied X's CHIS status". The letter said that MI5 "stands by the entirety of the account given to the High Court in Witness A's witness statement". It invited Mr De Simone to provide evidence.

51. On 2 December 2024, the BBC invited members of MI5's legal team to attend Broadcasting House to inspect and listen to the contemporaneous evidence, including an audio recording of some of the relevant conversations. They did so on 13 December 2024. In the light of that meeting, the Government Legal Department wrote to Chamberlain J on 18 December 2024 to say that they had recently been provided with information which led them to consider that "a particular aspect of the evidence relied upon in the course of the injunction proceedings that were before the court on a number of occasions during the period February-May 2022 may be materially incorrect".

52. On 24 December 2024, the BBC applied to vary the injunction to enable them to report that false evidence had been given. The application was supported by a third witness statement from Mr De Simone. In it, he gave details of telephone conversations on 8 and 9 June 2020 and referred to later conversations without giving details of these. An audio recording of the conversation on 9 June 2020 was exhibited.

MI5's explanations and investigations

53. On 10 January 2025, the Attorney General filed a further witness statement from Witness A, indicating that there was no objection to the variation of the injunction, as sought by the BBC. The statement also contained a "correction". At paragraph 7, Witness A said that paragraph 11 of his statement of January 2022 "reflected my understanding of the position regarding the discussions in June 2020, based on the information available to me and I genuinely and honestly believed it to be true". At paragraph 9, Witness A said that he had "no reason to doubt the accuracy of the account set out in paragraph 11 of my witness statement until I was recently made aware of Mr De Simone's Third Witness Statement and the exhibits thereto". At paragraph 10, he said that it was "now apparent to me that MI5 did, in fact, depart from NCND during the discussions". At paragraph 14, Witness A apologised to the court for giving inaccurate information, which resulted in inaccurate responses being provided to the special advocates and the court. At paragraph 16, he said that the circumstances leading to his being given false information were currently subject to investigation and review and that MI5 was commissioning an external review to identify improvements to

systems and processes to ensure that in the future correct information is always given to the court.

54. The application to vary the injunction was listed for hearing before Chamberlain J on 12 February 2025. In written submissions prepared for that hearing, the Attorney General indicated that the Home Secretary and the Director General of MI5 had agreed to appoint an independent external reviewer "to establish the facts of how incorrect information came to be included in paragraph 11 of Witness A's January 2022 statement (and subsequently relied upon) with the further objective of identifying lessons and making recommendations to avoid any repetition". The submissions explained that Sir Jonathan Jones had been appointed to undertake this external review and that he had already begun work. The "prescribed scope" of the review "requires consideration of the period 2020 to 2024 in order to establish the facts of what happened". Sir Jonathan was to report his findings to the Home Secretary and the Director General of MI5. In parallel, MI5 was conducting an internal investigation in accordance with its disciplinary casework procedures.

55. Following the hearing on 12 February 2025, Chamberlain J made an order varying the injunction and gave directions for submissions on the maintenance of NCND and for the Attorney General to update the court on the outcome of Sir Jonathan's investigation. There was to be a hearing to deal with any outstanding matters of dispute.

56. The update required by this order was provided in a witness statement from Witness B, MI5's Director General Strategy, dated 26 April 2025. He explained that the external review was now complete and Sir Jonathan had produced CLOSED and OPEN reports. The OPEN report was an "unclassified version of the CLOSED Report" and was, in both Sir Jonathan's view and Witness B's, "a fair and accurate account of his findings and recommendations" (paragraph 53). Witness B summarised Sir Jonathan's conclusions in this way (paragraph 56):

> "The OPEN Report concludes that there was no deliberate attempt on the part of MI5 to mislead, or lie, about what transpired in the course of the Officer 2 Conversations. The inaccuracy in Witness A's evidence (and the subsequent responses to the Special Advocates) arose from the fact that no contemporaneous record was made of telephone discussions which resulted in Officer 2 having to do their best to remember, many months later, what was said based on an imperfect recollection and inference from the surrounding circumstances."

57. The OPEN report concludes:

- "As explained, all the evidence shows that the misleading evidence flows ultimately from Officer 2's recollection of their conversations with the BBC, which they now accept to have been wrong.

- In the absence of a written record (deeply regrettable though that is), it is understandable that those responsible for producing MI5's evidence, including Witness A, relied on Officer 2's personal account. There was nothing else for them to go on. By the time the evidence was produced, that account was clear and unqualified.

- In the absence of evidence that NCND had been waived (which would have been a significant and exceptional step) it was not unreasonable for those producing the evidence to accept Officer 2's assurance that it had not been waived.

- Once MI5 had given its evidence, DDS did not, up until November 2024, contradict or query MI5's continued assertion of NCND, so MI5 was not on notice of any dispute about that issue.

- It is impossible to see what advantage anyone in MI5 would have gained from lying about Officer 2's conversations. An operational decision had been taken authorising waiver of NCND, unusual step though that may have been. This had been shared with Officer 2. If Officer 2 had correctly remembered waiving NCND, this would have amounted to no more than giving effect to that decision.

- All the evidence I have seen and heard reflects the seriousness which was attached within MI5 to ensuring the accuracy and honesty of evidence given to the court.

- In any case, MI5 will obviously have realised that the other party to the Officer 2 conversations (i.e. DDS) knew what was said during those conversations, may well have kept his own notes or recordings of them, and thus would be in a position to refute any misstatement by MI5 about what was said."

58. Sir Jonathan went on to make recommendations covering review of policy and guidance on NCND, production of corporate witness statements and media engagement.

59. Separately, the internal investigation concluded that there was no evidence that any officer had deliberately misled MI5 and no evidence of any conspiracy to provide false information. However, Officers 2 and 3 had failed to act with reasonable care and competence. In Officer 2's case, this was by failing to ensure that there was a formal record of his conversations with Mr De Simone.

60. At paragraph 71, Witness B said that he agreed with the findings and conclusions in Sir Jonathan's report. At paragraph 72, he added: "Like Sir Jonathan, I am unable to identify any advantage that would have accrued to MI5 by giving incorrect evidence concerning the Officer 2 Conversations. On the contrary, the events leading up to the conversations, including the authorisation to depart from NCND if necessary, only served to emphasise the seriousness with which MI5 was treating this issue and the extent of the risk we had identified should X be identified as a CHIS."

61. After receiving Witness B's witness statement, the special advocates sought disclosure, to them, of Sir Jonathan's CLOSED report. The Attorney General filed detailed written submissions opposing disclosure. These relied on the assurances of Sir Jonathan and Witness B that the OPEN version of the report was "a fair and accurate account of the material in the CLOSED report".

62. There was a hearing on 2 May 2025, at which Chamberlain J made clear his provisional view that the CLOSED report should be disclosed. In the light of this indication, MI5

agreed to disclose it. Chamberlain J set a further hearing to consider any further requests for disclosure.

63. At that hearing, on 12 May 2025, Chamberlain J, having read the CLOSED report, reached the provisional view that it contained significant material that was not in the OPEN version and that the latter could not, therefore, be said to be a full and accurate account of the former. He ordered disclosure of further documents and expressed the hope that the Attorney General and the special advocates would seek to agree any further CLOSED material which could be made OPEN.

64. On 14 May 2025, Mr De Simone filed and served a fourth witness statement in response to that of Witness B. He stated that Sir Jonathan had not contacted him as part of the investigation and that he had further significant evidence which undermined Sir Jonathan's conclusions. This concerned the extent of the communications between him and Officer 2. It can now be seen that there were nine calls between Mr De Simone and Officer 2 and that one of the calls involved another MI5 officer. Some of these calls were long (for example, 40 minutes on 9 June, 20 minutes on 10 June, 12 minutes for the first call on 11 June, 45 minutes for the second call on 11 June). There were also text messages between Mr De Simone and Officer 2. It is not necessary to set out excerpts here. Mr De Simone accurately summarises what these calls show at paragraph 11 of his fourth witness statement as follows:

> "The multiple calls that took place between me and Person B were a sustained departure from NCND. Person B departed from NCND in every substantial telephone conversation we had, some of which lasted as long as 40-45 minutes. The departure from NCND was not a small detail in a limited conversation during which Person B quickly achieved his aim of persuading me not to refer to X in my reporting; on the contrary it was a series of lengthy conversations in which a significant amount of detailed information about X was discussed and shared. [Officer 2] called me specifically to depart from NCND: telling me that X was a CHIS was the method that [Officer 2] used to try to convince me not to include X in the upcoming broadcast."

65. As we have said, the calls also involved another MI5 officer, at Officer 2's suggestion. What this other officer said led Mr De Simone to conclude that the other officer was aware of the content of the earlier conversations. In the calls, Officer 2 refers to the fact that he had been authorised to tell Mr De Simone that X was a CHIS and that there were points he would have to discuss with others at MI5, including X's case handler (mentioned in calls on 8 and 9 June 2022), lawyers and "the team" (mentioned on 10 June). Perhaps most strikingly of all, there were departures from NCND in relation to five other individuals whom Mr De Simone was investigating at the time. There were also texts between Mr De Simone and Officer 2, in October 2021, concerning later reporting by the BBC, which Mr De Simone considered made it clear that—at that later stage—Officer 2 had a clear recollection of the previous conversations.

66. In a fifth witness statement filed on 20 May 2025, Mr De Simone produced further records of interactions with Officer 2 in June 2020 and October 2021.

67. As noted above, neither those conducting the internal disciplinary investigation nor Sir Jonathan had ever asked Mr De Simone for his account of his conversations with

Officer 2, or for the records of these conversations. The result was that the conclusions reported by Witness B in his witness statement on 26 April 2025 (that there was no evidence of any deliberate attempt to mislead) were reached without the benefit of the contents of Mr De Simone's fourth and fifth witness statements, or the notes and recordings exhibited to them. Once these became available, they were considered and the results of that consideration put before the court in the form of a supplementary witness statement from Witness B on 27 May 2025.

68. In this supplementary statement, Witness B explained that both the internal investigation and Sir Jonathan had proceeded on the basis that "if the BBC held any further relevant information concerning this issue it would have been dealt with in [Mr De Simone's third witness statement]. With the benefit of hindsight, it would have been preferable had steps been taken to request from the BBC any further information in their possession before completing the Internal Investigation and External Review". Nonetheless, the internal investigators conducted further witness interviews, including with Officer 2, as a result of which they maintained their conclusion that Officer 2 gave credible evidence and had not deliberately sought to mislead.

69. In a third witness statement on 29 May 2025, Witness B exhibited Sir Jonathan's supplemental report. At paragraph 12 of that supplemental report, he said this:

> "I have considered whether the new BBC material suggests an additional motivation for Officer 2 to lie or obfuscate about his calls with the BBC – because they provide evidence of wider disclosures. My terms of reference state that it is not for me 'to make findings about why specific individuals did or did not do certain things'. Serious though Officer 2's failings no doubt were, I note the finding of the internal investigation that he has been open and honest with them throughout the process. In any event, even if (contrary to the findings of the internal investigation) Officer 2 had deliberately lied about the content of his calls with DDS when it came to the production of evidence for the High Court, as mentioned above there is no evidence that others within MI5 connived in any such lie or set out deliberately to mislead the court."

Further OPEN disclosure

70. Following the hearing on 12 May, the Attorney General has disclosed further documents into OPEN, which make clear that, in the course of a document review in August 2022, inspectors from the Investigatory Powers Commissioner's Office ("IPCO") identified a documentary record of the authorisation given to Officer 2 to depart from NCND in relation to X's CHIS status, if he considered it necessary to do so. Following an investigation, IPCO produced a draft report in February 2023 containing a finding that there had been a departure from NCND in accordance with the authorisation. The Investigatory Powers Commissioner himself expressed the view that there had been a departure from NCND as late as December 2023. However, MI5 responded to IPCO denying any such departure. IPCO was persuaded to alter its conclusions and, in its final report in March 2024, accepted MI5's assurance that no departure had taken place.

Findings and conclusions

(a) Who was misled?

71. It is apparent from the material that we have seen that the High Court, the special advocates, the IPT and the Investigatory Powers Commissioner were all misled on the key question whether MI5 had departed from NCND in relation to X's CHIS status.

72. The evidence that we have seen makes clear that both the special advocates and the Investigatory Powers Commissioner (and his investigators) considered, on the basis of the contemporaneous documents, that it was likely that NCND had been waived. But both were met with clear denials. In the face of those denials, neither could take the matter any further.

73. This shows that each of the independent mechanisms designed to scrutinise the activities of MI5 is dependent on high standards of candour by MI5 itself. Any evidence of a departure from these standards must be promptly and effectively investigated.

(b) The unrealistic maintenance of NCND

74. Even after MI5 had filed evidence making clear that Witness A's evidence was incorrect, it took no steps of its own motion to consider whether to maintain NCND. Whether it could properly do so was raised as an issue by Chamberlain J at the hearing on 12 February 2025. MI5's response was to file detailed submissions on 5 March 2025, maintaining NCND.

75. This meant that the Attorney General's position was that:

    (a) Witness A's January 2022 evidence that NCND had been maintained was incorrect;

    (b) Witness A had realised this after reviewing the notes and transcript provided by Mr De Simone (which showed very clearly that Officer 2 had repeatedly departed from NCND);

    but

    (c) MI5 still maintained NCND as to whether X was a CHIS.

76. At the hearing on 2 May 2025, counsel for the Attorney General was asked whether the authenticity of the notes and transcript were in dispute. She said that there was "no real dispute" about this, but that NCND was nonetheless maintained. This meant that there was still no formal acceptance that Mr De Simone was telling the truth.

77. In our judgment, by continuing to maintain NCND in these circumstances, MI5 was adopting a patently unrealistic position while at the same time casting formal doubt on the veracity of Mr De Simone's evidence. The maintenance of that position until 23 May 2025 will have done nothing to bolster the confidence of any CHIS in MI5's policy. The quid pro quo for the respect which must be accorded to MI5's national

security assessments is that MI5 must take care not to maintain such assessments when it is unrealistic to do so.

(c) The manner in which the court was informed about MI5's investigations

78. The manner in which MI5's explanation for the false evidence to the court has been provided has been unsatisfactory.

79. The Attorney General's original plan was to inform the court about the investigations that had been undertaken, and their outcome, entirely in OPEN. This course was taken in Witness B's witness statement of 26 April 2025. That document contained Witness B's personal assurance (reflecting Sir Jonathan's own view) that the OPEN version of Sir Jonathan's report was a "fair and accurate version" of the CLOSED report. When an application was made for disclosure of the latter to the special advocates, it was opposed. MI5 agreed to disclose it to the special advocates only after Chamberlain J made clear that he was likely to order its disclosure.

80. We have now read the CLOSED report and the material referred to in it. Much of this has now been disclosed in OPEN. We do not consider that the OPEN document was a "fair and accurate" version of the CLOSED report. The OPEN report omitted several critical matters, including the fact that the question whether MI5 had departed from NCND in relation to X had been investigated by IPCO and that, at one stage in the course of his investigation, the Investigatory Powers Commissioner concluded that MI5 had departed from NCND (though he was subsequently persuaded to change his view).

81. We are also concerned about the following matters. MI5 never took any active step to bring the existence of IPCO's investigation to the attention of the court during the period when IPCO had expressed and not yet changed its view that MI5 had departed from NCND. MI5 thought that it had given a proper explanation of the circumstances in which false evidence came to be given without mentioning the fact of IPCO's investigation. The CLOSED version of the report also provided considerable detail about the knowledge of the relevant circumstances on the part of MI5 officers other than Officer 2.

82. We do not consider that it could properly be said that the OPEN version was a fair or accurate account when it omitted this information. It may also be noted that, even once the CLOSED report had been disclosed, an order was required for the Attorney General to disclose the CLOSED documents referred to in that report. The result has been that documents have been provided in a piecemeal fashion. The impression has been created that the true circumstances in which false evidence came to be given have had to be extracted from, not volunteered by, MI5.

(d) The adequacy of the investigations

83. Jude Bunting KC for the BBC made a series of powerful points about the adequacy of the investigations undertaken by MI5. We have also considered submissions in CLOSED by the special advocates and oral and written submissions in response by Sir James on behalf of the Attorney General.

84. We are mindful that it is not our function to reach findings of fact. It would not be fair for us to do so without hearing from the individuals concerned. At this stage, we focus on the question whether we are satisfied with the investigations conducted to date and their conclusions. We are not. As we see it, those investigations suffered from three major deficiencies. Taken together, these deficiencies mean that we are unable to have the requisite degree of confidence in the conclusions reached.

85. First, an essential purpose of the investigations was to discover the circumstances in which false evidence had been given to the court. One possibility was that someone at MI5 had given deliberately false information. That possibility had to be properly investigated. The starting point for any inquiry was what had been said in the conversations between Mr De Simone and Officer 2. Since MI5 had no written or other record of those conversations, and Officer 2 said that he did not recall, the obvious starting point was to ask the other participant, Mr De Simone, whether *he* recalled what had been said and whether he had any relevant records in addition to those that had already been provided. Mr Bunting said in terms on 2 May 2025 that he expected that MI5 would wish to contact Mr De Simone to ask him to assist them in this regard. In fact, the internal investigators never contacted Mr De Simone. The consequence was that they reached what they intended to be their final conclusions without an accurate understanding of what had actually been said to Mr De Simone.

86. We have considered carefully the evidence now available of what passed between Officer 2 and Mr De Simone in the light of what the internal investigators discovered. The content of those conversations was aptly described by Mr De Simone in the passages of his fourth witness statement which we have summarised and set out in [64]-[65] above. This paints a significantly different picture from that which the investigators had available to them when they reached their initial conclusions, as presented to the court in April 2025.

87. Secondly, there was in our view a fundamental incoherence in Sir Jonathan's terms of reference. He was asked to "establish the facts of what happened in relation to journalistic and legal disclosure in the X/Beth case" but subject to the important caveat that he was not to "make findings about why specific individuals did or did not do certain things". We find it difficult to see how Sir Jonathan could "establish the facts of what happened" without making findings about "why specific individuals did or did not do certain things". Even if the purpose of Sir Jonathan's investigation was to make recommendations for systems changes, the recommendations that would flow from a finding of deliberate dishonesty would presumably be different from those which would flow from a finding that the false evidence was attributable to errors in record keeping. Be that as it may, Sir Jonathan did make findings in his report of 22 April 2025 to the effect that there was no deliberate attempt by anyone (including Officer 2) to mislead the court. He did so (initially at least) without himself ever having spoken to Officer 2 and without considering Mr De Simone's extensive additional evidence about what Officer 2 had actually said to Mr De Simone.

88. Thirdly, we accept that both the internal investigators and Sir Jonathan later considered Mr De Simone's new material and that they did so in good faith. But the fact remains that investigators who had already reached final conclusions that there had been no deliberate attempt to mislead the court would inevitably find it difficult to reappraise those conclusions fairly in the light of evidence which fundamentally affects the basis

on which their earlier conclusions were reached. The passage which we have quoted at [69] above from Sir Jonathan's supplemental report seems, in any event, to present a substantially less confident conclusion than appears in his initial report. That passage indicates that, on the critical question whether anyone at MI5 gave deliberately false evidence, his conclusion was dependent on the view reached by the internal investigators—who had already spent many hours with the relevant witnesses before receiving Mr De Simone's material and reached firm conclusions that they were all telling the truth. Charlotte Kilroy KC for Beth also noted that the internal investigators appeared to be very close to the witnesses. For example, the investigator thanked those interviewed for their "time and honesty" in answering questions.

89. The three matters we have set out above are sufficient to enable us to say that the investigations were procedurally deficient and we cannot rely on their conclusions. There are other criticisms made by Mr Bunting in his written and oral submissions, which we also consider had force. To take one example, neither the internal investigation nor Sir Jonathan appear to have enquired into the discrepancies between the disclosure to the special advocates in February 2022 and the accounts given by Witness A and Officer 2.

(e) Contempt of court

90. CPR 32.14 provides that proceedings for contempt of court may be brought against a person who "makes or causes to be made" a false statement in a document verified by a statement of truth.

91. It is not necessary at this stage to examine in detail the state of mind which is necessary for a finding of contempt. For present purposes we consider it at least arguable that a person who provides information knowing or intending that it will be used in a witness statement, knowing that the information is false or without an honest belief in its truth, is guilty of contempt of court: see e.g. *R (Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [26].

92. We have already made reference to CPR 81.6. It provides as follows:

> "If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court of its own initiative shall consider whether to proceed against the defendant in contempt proceedings."

93. The application of CPR 81.6 involves a two-stage process. At the first stage, the court considers whether a contempt may have been committed. Once that threshold is met, the court must then reach an evaluative judgment whether contempt proceedings should be initiated: *Ayinde,* [28].

94. In view of the serious procedural deficiencies of the investigations, it is premature at this stage to form any view as to whether or not contempt proceedings are appropriate.

95. We note that, at paragraph 94 of his submissions, the Attorney General says this:

> "If there is further action that the Court considers to be necessary, or further information that needs to be provided, then that will be done."

96. We consider that further action is necessary. There should be a further, robust and independent investigation. It seems to us that the most appropriate forum for such an investigation would be IPCO. The Investigatory Powers Commissioner may, if he sees fit, nominate one or more of his judicial commissioners to carry out the task. The results of this investigation should then be provided to the court. We consider that all the materials that were made available to us should be provided to the individual or individuals conducting this new investigation.

(f) Corporate witness statements

97. The document in which Witness A gave false evidence was what is known as a "corporate witness statement", i.e. a statement conveying the collective evidence of a company or other body. Evidence given on behalf of a government department or agency is often given in the form of a corporate witness statement. This can be a convenient way to present an "institutional view", but it has dangers—as this case illustrates.

98. The court has already commented on these dangers previously in this litigation. Just as the injunction application was being filed, and at a time when the (then) Attorney General was seeking to persuade the court to hold the main hearing of the injunction application entirely in private, an article appeared in The Daily Telegraph which appeared to have emanated from a Government source. The material contents of the article were set out in Chamberlain J's first judgment in this case: [2022] EWHC 380 (QB), [24]. The claimant was ordered to file evidence about the media coverage of the case. A witness statement was filed by a lawyer at the Government Legal Department (Ms Wallace), which contained evidence about the state of knowledge of various government departments.

99. Chamberlain J said this:

> "28… CPR 32 PD para. 18.2 provides that a witness statement must indicate (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief and (2) the source for any matters of information or belief.
>
> 29. In *Punjab National Bank (International) Ltd v Techtrek India Ltd* [2020] EWHC 539 (Ch), at [20], in a passage cited in the White Book at para. 32.8.2, Chief Master Marsh said this:
>
> > 'In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements of paragraph 18 of Practice Direction 32 to provide the source of the evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of the evidence is a person, as opposed to being from documents, the person or persons must be identified and named. A corporate entity cannot experience

> events and can only operate through the medium of real persons. A failure to identify the source in a manner that complies with paragraph 18.2 will mean that the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue.'
>
> 30. I would respectfully endorse that interpretation of CPR 32 PD para 18.2 as correct. It applies with at least as much force to government departments as it does to corporate entities. When the issue being addressed is whether a particular press statement was made with authority, it will be important to identify in respect of any relevant department (i) which (named) individuals have authority to authorise such statements to be made (ii) which (named) individuals have said what about whether such authority has been given.
>
> 31. Without this information, phrases like 'The Home Office is not aware…', 'As far as No. 10 is aware' and 'My clients have confirmed' (all of which appear in Ms Wallace's statement) are of very limited probative value…"

100. These observations were made in the context of evidence about an inquiry into a possible press briefing. They apply with equal force to the false statement made by Witness A in the witness statement of 26 January 2022 that "MI5 neither confirmed nor denied" X's CHIS status.

101. Indeed, in our judgment, they apply generally to government departments and agencies, both on questions of fact and when conveying institutional views or assessments (including on matters of national security). Evidence of this kind is not exempt from the requirements of the CPR and practice directions.

102. Returning to this case, there were two options in respect of the evidence of Officer 2: to file a witness statement from him personally, or to serve a corporate witness statement dealing with his evidence. In our judgment, serious consideration should have been given to the first option, given Officer 2's critical involvement in the material exchanges with Mr De Simone and his disposal of his contemporaneous records of those exchanges.

103. The Attorney General chose the second option. In those circumstances, Witness A's statement should have complied with CPR Practice Direction 32 para 18.2.

104. Had it done so, the following information would have been revealed: there were no records of the relevant conversations; the evidence about what MI5 had done came only from the recollection of the officers concerned (whose identity should have been given, in CLOSED if necessary) with the date being given on which those persons were asked to and gave their recollections.

105. Further, since this critical information was second hand, the witness statement should have set out the degree of confidence those officers had expressed in their recollection. In addition, the officers should have been asked to read the passage of the witness statement which purported to record or summarise their recollections, and to confirm that the relevant part of the witness statement was correct. The witness statement should then have recorded that confirmation. Finally, Witness A should have stated whether

the officers' recollections had been the subject of any independent scrutiny or testing, including by Witness A.

106. This level of rigour will add to the burdens of those preparing evidence for government litigation, but it will deliver three important and related benefits. It will concentrate the minds of the persons providing the information on the accuracy of any statements they make. It will enable to the court to assess for itself how much weight should be accorded to the institutional evidence. In a case where the evidence given is deliberately or recklessly false, it will make clear who is responsible.

Conclusions and direction

107. Our conclusions are summarised in the opening section of this judgment, which we do not repeat. Whilst we accept the genuineness of the apologies proffered on behalf of MI5, the fact remains that this case has raised serious issues. MI5 gave false evidence to three courts. This was compounded by inadequate attempts to explain the circumstances. MI5 chose to maintain NCND long after it was unrealistic to do so.

108. The special advocates are to be commended for the central role that they have played in bringing these matters to light, as are Mr De Simone and the BBC (and its legal team). It is to be hoped that events such as these will never be repeated.

109. We direct that a copy of this judgment be sent to the Secretary of State for the Home Department, who has Ministerial responsibility for MI5, and to the Investigatory Powers Commissioner.