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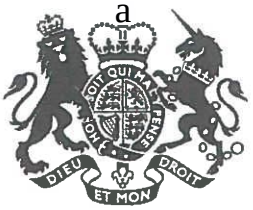

Neutral Citation Number: [2025] UKIPTrib 8

Case No: **IPT/22/10/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 30 July 2025

Before :

LORD JUSTICE SINGH (PRESIDENT)
LORD BOYD OF DUNCANSBY (VICE-PRESIDENT)
MRS JUSTICE LIEVEN

- -

Between :

BETH	**Claimant**
- and -	
SECURITY SERVICE	**Respondent**

- -
- -

Charlotte Kilroy KC (instructed by the **Centre for Women's Justice)** appeared on behalf of the **Claimant**
Neil Sheldon KC and Jennifer Thelen (instructed by the **Treasury Solicitor)** appeared on behalf of the **Respondent**
Sarah Hannett KC and Paul Skinner appeared as **Counsel to the Tribunal**

Hearing date: 10 July 2025

- -

OPEN JUDGMENT

Lord Justice Singh:

Introduction

1. This is the unanimous judgment of the Investigatory Powers Tribunal ("the Tribunal" or "the IPT").

2. The Tribunal convened a hearing of its own motion, with the President, the Vice-President and another senior member of the Tribunal sitting because of the importance of the issues raised, not only in the context of this particular case but more generally for the work of the Tribunal. The Tribunal is an independent court, which is capable in principle of providing an effective remedy for breaches of individuals' rights, including their fundamental human rights, in the context of covert surveillance and other conduct of public authorities such as the intelligence services of the United Kingdom ("UK"). But the effectiveness of the Tribunal depends on the quality of the evidence that is placed before it, in particular by those public authorities. To this end it is essential that the Tribunal should be able to rely with complete confidence on that evidence, particularly since (for good reasons in the public interest) it will often not be possible to disclose that evidence to claimants or their representatives. What happened in this case gives rise to real cause for concern and must never happen again.

3. For present purposes we were able to conduct an entirely OPEN hearing on 10 July 2025. We heard submissions from Neil Sheldon KC, who appeared with Jennifer Thelen for the Respondent; Charlotte Kilroy KC, who appeared for the Claimant; and Sarah Hannett KC, who appeared with Paul Skinner as Counsel to the Tribunal ("CTT").

Background

4. For present purposes the background can be gleaned from the OPEN judgment of the Tribunal (Lieven J and Judge Rupert Jones) dated 21 June 2024: [2024] UKIPTrib 3, at paras 1-9. The case concerns a claim by "Beth" that her human rights have been breached by the Security Service (or MI5), the Respondent, by reason of its failure to protect her. Beth was in a relationship with X for a number of years and claims that he was seriously abusive to her. Beth says that X was a Covert Human Intelligence Source ("CHIS"), who was working for MI5. The Tribunal has not yet considered or determined the substantive merits of the claim.

5. The main issue which arose for determination in May/June 2024 was whether the Respondent should be allowed to rely on the policy of Neither Confirm Nor Deny ("NCND") in respect of whether X was or was not a CHIS. The Tribunal held that it should: see para 60 of its judgment. The Tribunal made an order to reflect its decision: see para 1 of the order dated 21 June 2024.

6. The Claimant then brought judicial review proceedings to challenge that decision of the Tribunal, with the Security Service being the Interested Party to the proceedings in the Administrative Court. In formal terms that case now stands adjourned by the Divisional Court, which recently considered that claim for judicial review together with injunction proceedings brought by the Attorney General against the British Broadcasting Corporation ("BBC"). The Divisional Court held a hearing on 3 June 2025 and gave judgment on 2 July 2025: [2025] EWHC 1669 (KB). On the same date the Court made an order, adjourning the judicial review proceedings. It is common ground, however, that in practice this Tribunal does not need to wait for a formal order of the Divisional Court to quash its decision of 21 June 2024; indeed the parties to the judicial review proceedings clearly contemplated that this Tribunal would revisit the issue of NCND at the hearing before us listed for 10 July 2025: see the preamble to the order of Chamberlain J dated 8 May 2025.

The judgment of the Divisional Court

7. The Divisional Court comprised Lady Carr of Walton-on-the-Hill CJ, Dame Victoria Sharp PKBD and Chamberlain J.

8. The background was set out in the introduction and summary at paras 1-11 of the Divisional Court's judgment. For present purposes it will suffice to note that the Attorney General had obtained an injunction in 2022, which prevented the BBC from identifying X but allowed it to report on other aspects of the story, including the allegation that X abused his CHIS status and that MI5 was at fault for using him as a CHIS. An interim injunction was granted by Chamberlain J on 7 April 2022 and this was made final by him on 30 September 2022.

9. In support of the claim for an injunction in January 2022, evidence had been given by a senior MI5 officer ("Witness A") that, throughout its dealings with a BBC journalist called Mr Daniel De Simone, MI5 had adopted its usual NCND stance as to whether X was a CHIS.

10. Before the Divisional Court the Attorney General accepted that Witness A's evidence was false and that the Court and the Special Advocates had been misled. The true position was that 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, in late 2024, Mr De Simone 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 IPT and in the subsequent claim for judicial review challenging the interlocutory ruling by the IPT.

11. The Divisional Court summarised its conclusions as follows, at para 12:

"(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."

12. The Court set out its findings and conclusions in more detail from para 71 of its judgment.

13. At paras 90-96, the Court considered the possibility of proceedings for contempt of court under CPR 32.14. It said that it is 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 para 91.

14. In view of the serious procedural deficiencies in the investigations which had been conducted by or on behalf of MI5 to date, the Court considered that it was premature to form any view as to whether contempt proceedings were appropriate. At para 96, the Court said that there should be "a further, robust and independent investigation" and that the most appropriate forum for such an investigation would be the Investigatory Powers Commissioner's Office ("IPCO"). The results of that investigation are then to be provided to the Divisional Court. The formal order of the Court provides, at para 3, that the Claimant is to update the Court in writing on the status of the further investigation by 3 October 2025.

Issues for this Tribunal

15. The hearing before this Tribunal was originally listed to consider two issues:

    (1) Whether the Respondent could continue to rely on NCND in light of the fact that it was now acknowledged that there had been departures from NCND with the BBC; and

    (2) How the IPT came to be given false evidence to the effect that the Respondent had maintained NCND in respect of X's CHIS status when in fact there had been repeated confirmation of his CHIS status to the BBC in 2020.

16. As things have developed, however, it has become clear that the Respondent no longer seeks to maintain NCND and has acknowledged publicly that X was in fact a CHIS. In a letter dated 30 May 2025 sent by the Government Legal Department to the Centre for Women's Justice (the Claimant's solicitors) it was confirmed that the Respondent "does not seek to maintain a position of NCND in respect of X's status" in these proceedings. Accordingly, the first issue has fallen away, save to the extent that, formally, the Tribunal's previous order remains in place and needs to be set aside.

17. At the hearing before us it became clear that the issues that now arise are the following:-

    (1) What, if anything, the Tribunal should do about its earlier judgment about NCND of 21 June 2024, given that the Respondent no longer wishes to assert NCND in this case?

(2) Whether the Tribunal should follow the course taken by the Divisional Court and invite IPCO to include in its investigation the question of how the Tribunal also came to be given misleading evidence; or whether the Tribunal should conduct such an investigation itself.

(3) Whether the Tribunal should give guidance about the form of evidence to be given in other cases in the future, including the use of corporate witness statements, and any other guidance.

(4) What directions the Tribunal should make to progress the substantive claim to a final hearing.

The history of the proceedings in the Tribunal in more detail

The proceedings

18. The Claimant lodged her claim and complaint (using forms T1 and T2) on 11 May 2022. Initially, at the Claimant's request, the claim was stayed. The Claimant's statement of grounds, which was a detailed document settled by counsel, was dated 12 May 2023. On 23 November 2023, the Claimant's statement of grounds was amended.

19. The claim was allocated by the President to a panel to be chaired by Lieven J. CTT was instructed (at that time Ms Hannett, who has more recently been joined by Mr Skinner) and the claim proceeded in the usual way, with consideration being given to what material had to be considered in CLOSED and what could be opened up even if it had to be considered in private: in other words in the presence of the Claimant and her representatives but to the exclusion of the public more generally.

20. OPEN detailed grounds of resistance were filed by the Respondent, dated 22 December 2023.

Correspondence between IPCO and MI5

21. On the same date (22 December 2023) the Respondent's solicitor wrote to the Tribunal to say that the Respondent held material, obtained from the BBC during the course of the Attorney General's injunction application against the BBC, which the Respondent considered fell for disclosure pursuant to its duty of candour. In due course this material was disclosed to the Tribunal and CTT, in CLOSED at that stage. This CLOSED material referred to correspondence which had taken place and was still taking place at that time between IPCO and MI5.

22. In February 2023 IPCO had sent MI5 a draft report, which suggested that there had been a departure from the NCND principle in this case. This was contested by MI5 and eventually IPCO was persuaded to revise its report. The final report was sent to MI5 in March 2024 and no longer suggested that there had been a departure from NCND in this case.

23. In those circumstances, CTT (Ms Hannett), who had seen this material in CLOSED at that time, took the view that she could not go behind the conclusion of IPCO and so the matter was not pursued at that stage. It is important to note that the Claimant's representatives had not seen this material, because it was in CLOSED.

The hearing before the Tribunal in May 2024

24. As we have mentioned, there was a hearing on 9-10 May 2024 before Lieven J and Judge Rupert Jones, to consider the issue of NCND. The Tribunal then gave its judgment on that issue, both in OPEN and in CLOSED, on 21 June 2024.

25. We have seen a transcript of the OPEN hearing before the Tribunal on 9 May 2024. At that hearing Ms Kilroy submitted on behalf of the Claimant that she should be permitted to know (in private) whether there had been a departure from NCND, although it was accepted that this could not be made OPEN more generally to the public. The Respondent resisted that suggestion, e.g. at page 1IF of the transcript, where Mr Sheldon told the Tribunal:

> "If the Security Service were to do what the Claimant is inviting the Tribunal to require it to do then that would amount to a clear and unequivocal breach of the fundamental guarantee given to all CFUSs on which the relationship between them and the Security Service is based, namely that the Security Service will never reveal your status to third parties. That is regardless of whether X is or is not a CHIS, which I neither confirm nor deny, and that is because the way in which the Security Service protects CHIS status is by the consistent maintenance ofNCND."

26. Reliance was placed at that hearing by the Respondent on the statement of Witness A in the High Court injunction proceedings. The submission was made by Mr Sheldon (at page 19A) that that evidence had been accepted by Chamberlain J in the High Court. At page 25D, Mr Sheldon submitted that what flowed was that the Tribunal should conclude, at this stage, that requiring the Respondent to confirm to the Claimant whether X is or is not a CHIS "would be prejudicial to national security whether it was done in private or in public."

The judgment of the Tribunal of 21 June 2024

27. In its judgment of 21 June 2024, the Tribunal in essence accepted those submissions made on behalf of the Respondent at that time. At para 30, the Tribunal said:

> "In relation to the self-disclosure argument, the fact that a third party, here Beth, believes that they know that an individual is a CHIS is largely immaterial as to whether it is appropriate to maintain NCND. The NCND principle fundamentally relies upon the absolute consistency of its application. A CHIS is effectively given a guarantee that their status will not be acknowledged. It would undermine that guarantee if it had to be caveated to the effect that the [Security Service] would undertake a balancing exercise in determining whether to maintain NCND. …"

28. At para 34, the Tribunal placed reliance on the assessment made, and judgment given, by Chamberlain J in the High Court proceedings.

29. At para 37, the Tribunal said:

> "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 came 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."

30. In its CLOSED judgment of 21 June 2024, which has been partially opened up for present purposes, the Tribunal said, at para 16, that:

> "… on none of these occasions has it been alleged that the Respondent breached NCND to Beth or anyone else, either by expressly identifying X as a CHIS or by implication, in identifying themselves as officers of the Respondent."

31. The Tribunal had regard to CLOSED evidence before it, which it concluded, at para 22, was "additional evidence in support of the damage to national security that would be caused by the Respondent confirming X's status to Beth in these proceedings (even if only done in private and with the identity of X anonymised)."

<u>Evidence for the Respondent before the Tribunal</u>

32. The original evidence of Witness A was filed in the High Court injunction proceedings and was signed on 26 January 2022. The crucial passage appeared at para 11, where Witness A said:

> "… 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 …"

33. Mr De Simone responded to this in a witness statement dated 1 February 2022. At para 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."

34. The evidence for the Respondent in the Tribunal consisted of a corporate witness statement made by Witness A, a Deputy Director within MI5, dated 20 December 2023. That witness statement was CLOSED. A later OPEN gist was entirely generic, given that the Respondent was, at that stage, relying on NCND in respect of X's CHIS status. We have now seen a further OPEN gist of that witness statement, which was provided for the hearing on 10 July 2025. In the CLOSED statement Witness A provided a chronological account of MI5's relationship with X and described the nature and extent of its knowledge of his past and his activities.

35. The witness statement referred to various policies on CHIS. Notably, however, it did not refer to or exhibit any policies on the circumstances in which NCND may in fact be departed from by MI5. As we shall mention later, we now know that there were at least two, and possibly three, such policies.

36. At paras 26-28, the witness statement referred to events in June 2020. In the gist it is stated that a member of the handling team conducted a risk assessment relating to an email that X had received from a BBC journalist. The BBC said it intended to expose X as a "dangerous Nazi". The handling team continued to liaise with X regarding the BBC reporting and its potential consequences for X. No reference was made to the fact that a BBC journalist had in fact been told that X was indeed a CHIS.

37. Witness A had no direct knowledge of what had happened in June 2020 but his witness statement did not explain to the Tribunal the limitations on his ability to give evidence about what had happened then, for example that he had seen no written records from that time. If his witness statement had mentioned this, CTT would have been in a position to query whether there were, or should have been, contemporaneous written records and, if there were not, whether that carried any significance as to the weight to be given to the evidence by the Tribunal.

38. At para 32 of the gist, Witness A stated that he had given evidence in the High Court proceedings to the same effect as given in the Tribunal - that the fear of being revealed as a CHIS might discourage individuals from acting as CHIS and this would damage national security. He said that his assessment in those proceedings had been accepted as "cogently reasoned and plausible": see *Attorney General v BBC* [2022] 4 WLR 74, at para 71 (Chamberlain J). Witness A said: "I maintain this assessment."

39. At para 29, the gist stated that:

> "IPCO provided MI5 with a draft Inspection Report: MI5 CHIS X ('the Draft IPCO Report'). This followed a records-only review of CHIS records relating to X. The Draft IPCO Report describes the review as being focused on MI5's compliance obligations to assess if X had been authorised and managed in accordance with RIPA and the CHIS Code of Practice. IPCO informed us on 23 March 2023 that they had intended to carry out a further inspection and so described the report as 'preliminary'. IPCO subsequently informed MI5 that they did not intend to carry out a further inspection and that they would be unlikely to alter their conclusions without new evidence. However, the report has been left in its preliminary form and no final report has been provided to MI5. MI5 is currently in correspondence with IPCO on a number of aspects of the Draft IPCO Report. MI5 has some concerns about the aspects of the IPCO methodology and some of the draft conclusions reached."

40. The witness statement also exhibited relevant documents referred to there.

41. At the hearing before us Mr Sheldon accepted that para 29 fell below the standards of candour and co-operation with this Tribunal which should have been complied with. He was right to do so but further, in our view, there remain unanswered questions about how the evidence of Witness A came to be placed before the Tribunal in the form that it did. Our concerns are not confined only to the possibility of contempt of court but relate to the wider question of whether the duty of candour and co-operation (to which we turn in more detail below) was fully complied with and, if not, whether it is possible to identify individuals who were responsible for that failure. That would, in principle, include lawyers who were acting for the Respondent who assisted with the drafting of the witness statement and who later prepared and presented the submissions for the Respondent at the hearing on 9-10 May 2024.

42. We have seen an OPEN confidential version of the draft inspection report by IPCO. As the header to that document explains, the disclosed version of that draft report carries the date 28 November 2023 but that was the date on which the document was printed. The draft report was in fact provided on 6 February 2023. In that draft report, IPCO clearly formed the view that MI5 had decided to depart from the principle of NCND. The concluding paragraph of the relevant section stated:

> "The MI5 decision to disclose X's status as CHIS to a BBC journalist was extraordinary and handled as such."

The draft report was "concerned at the lack of records showing the full consideration of this exceptional measure and consideration of the alternatives. Such critical considerations must form part of the CHIS record."

43. In a letter dated 13 October 2023, MI5 responded to IPCO by saying that they would like "to make clear that we did not in fact take any such decision. X's CHIS status was not disclosed to the BBC either at that time or subsequently."

44. In a letter dated 5 December 2023, Sir Brian Leveson (the IPC) said that, having consulted his inspectors, it remained IPCO's view, based on the records made available, that:

> "There is evidence upon which IPCO is entitled to conclude as a justifiable inference, on the balance of probabilities, that MI5 disclosed X's role as a CHIS (either directly or indirectly) to a contact at the BBC …"[99]

45. In a detailed response, dated 13 December 2023, MI5 firmly maintained its stance that there had been no disclosure of X's CHIS status to the BBC.

46. In a letter dated 7 March 2024, enclosing the final inspection report, Sir Brian Leveson accepted, in view of what had been said by MI5, that X's identity as a CHIS had not been disclosed to the BBC.

47. In late 2024 it became clear that that was wrong. The chronology of events is described as follows by the Divisional Court, at paras 49-52 of its judgment:

> "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 was 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."

48. At paras 64-65, the Divisional Court summarised the still more recent evidence from Mr De Simone as follows:

"64. … 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[sic]), 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."

49. The correspondence which had taken place with IPCO in late 2023-March 2024 was eventually corrected by MI5 in March 2025. In a letter dated 6 March 2025, at para 3, MI5 finally acknowledged to IPCO that: "MI5 did disclose X's CHIS status to the BBC in June 2020."

50. As we have mentioned, in the proceedings before the Tribunal, Witness A had filed a witness statement dated 20 December 2023. In addition MI5 relied on the statement of Witness A of January 2022. As Sir Jonathan Jones KC (Hon), who had been appointed by the Respondent to identify lessons and make recommendations in relation to journalistic and legal disclosure in X's case, noted at para 47 of his report 'Incorrect Evidence in High Court and IPT Proceedings: External Review':

> "No additional steps were taken within MI5 at that stage to verify that evidence further."

Ms Kilroy makes the observation that this was despite the passage of almost two years in the meantime. She submits that, even if the quality of the January 2022 witness statement might be explained by reference to the urgency at that time to obtain an interim injunction, it certainly would not have justified the failure to take additional due diligence steps before the witness statement of December 2023 was filed with this Tribunal.

51. At paras 60-77 of his report Sir Jonathan Jones took into account applicable policies, including an MI5 document entitled 'The NCND Principle and its Application (Official Guidance)', which he called "the Agency Guidance" and the MI5 Media Engagement Policy. He also mentioned the 'Guidance note on NCND principle' produced by the Cabinet Office National Security Secretariat, dated October 2017 ("the Cabinet Office Guidance"), although he observed that there is a question about the status of that guidance in the light of the more recent Agency Guidance: see paras 64-68 of his report.

52. What is of significance for present purposes is the fact that there existed guidance in the form of policies within MI5 which clearly contemplated that there could be cases in which the NCND principle could be departed from. In particular, Ms Kilroy draws our attention to para 73 of the report, where it is said:

> "On NCND, the Media Engagement Policy notes that the NCND principle is a long-standing and important principle. However, it goes on to say that MI5 may depart from it where a contact is proposing to run a story that will cause damage to national security. In those circumstances, the Policy says that MI5 may make clear to a contact that the story will cause damage, if there is judged to be a realistic prospect that this will result in a story being dropped entirely or edited to remove the sensitive details. It adds that MI5 will depart from NCND only after carefill consultation with investigative/operational colleagues and legal advisers and on the express authority of the DG or one of the DDGs. The Policy requires the making of a full written record of what is

disclosed, to whom, for what purpose and whose authority. The Policy states:

> 'There may be very exceptional cases where the public interest in preserving NCND is outweighed by the public interest in making a statement. Save in cases of urgency, NCND will be preserved unless and until a departure has been agreed between officials and cleared with Ministers.'"

53. It is clear from that passage that (i) legal advisers should be involved; (ii) written records should be kept; and (iii) Ministerial approval may be required. These are matters that should have been properly investigated when the witness statements of Witness A were being prepared, drafted and filed with the Tribunal. If, for example, proper enquiries had been made and it was discovered that the policies had not been complied with, perhaps because no written records were kept, this should have been drawn to the Tribunal's attention. Instead, the Tribunal was left with the impression that there were no deficiencies in the quality of the evidence relating to what had happened in June 2020.

54. But the point is more basic than that. In our view, it is both surprising and disappointing that even the existence of these policies was not drawn to the Tribunal's attention at any time before or at the hearing in May 2024. Quite apart from any question of contempt of court in relation to para 11 of Witness A's January 2022 statement, which concerns the specific facts of this particular case, the applicability of those policies is of a much broader application and they must have been known to a much larger class of persons within MI5.

55. Furthermore, as Ms Kilroy points out, those policies indicate that MI5 itself draws a distinction between public departure from the NCND principle and private disclosure, including potentially to the media. It was that distinction between public disclosure and private acknowledgement within the Tribunal proceedings which the Claimant's representatives were seeking to advance at the hearing in May 2024. They were met with the apparently absolute objection that there could be no departure from the NCND principle even in private proceedings.

Issue 1: setting aside the judgment and order of 21 June 2024

56. It is common ground before us that this Tribunal has the power to set aside the judgment and order it made on 21 June 2024 and need not wait for the Divisional Court to quash them or declare them to be invalid. The test which the Tribunal has laid down in earlier cases is that the Tribunal may set aside an earlier judgment of its own if (i) that judgment was based upon materially inaccurate evidence, (ii) fresh evidence is now

available and (iii) there is a probability or likelihood that the outcome would have been different but for that inaccuracy: *see Privacy International* v *Secretary of State for Foreign, Commonwealth and Development Affairs and Others* [2024] UKIPTrib 1, at paras 5-19 (Singh LJ (President) and Lieven J).

57. In the present circumstances, and especially given that the Respondent no longer seeks to maintain NCND in this case, it follows that that test is necessarily satisfied. Accordingly, we will set aside para 1 of the Order made by the Tribunal on 21 June 2024 and the judgment of that date relating to NCND.

Issue (2): requesting the assistance of IPCO

58. Section 68 of the Regulation of Investigatory Powers Act 2000 ("RIPA") provides, so far as material:

> "(1) Subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings, complaint or reference brought before or made to them.
>
> (2) The Tribunal shall have power -
>
> (a) in connection with the investigation of any matter, or
>
> (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter,
>
> to require *a relevant Commissioner appearing to the Tribunal to have functions in relation to the matter in question* to provide the Tribunal with all such assistance … as the Tribunal thinks fit." (Emphasis added)

59. At the hearing before us, Mr Sheldon and Ms Hannett suggested, at least lightly, that the words we have italicised in that provision may mean that the sort of investigation that the Tribunal would require in this case may not fall within the meaning of "functions" of the IPC, which are to be found not in RIPA but elsewhere. The "main oversight functions" of the IPC are set out in section 229 of the Investigatory Powers Act 2016 ("IPA"). It is not immediately apparent to us that that is an exhaustive list.

60. In any event, our current view is that this Tribunal can require a Judicial Commissioner (including the IPC) to provide it with assistance under section 232(1) of the IPA, which provides:

> "A Judicial Commissioner must give the Investigatory Powers Tribunal all such documents, information and other assistance … as the Tribunal may require -
>
> (a) in connection with the investigation by any matter by the Tribunal, or
>
> (b) otherwise for the purposes of the Tribunal's consideration or determination of any matter."

61. Before us Mr Sheldon suggested that there may be doubt about whether strictly speaking the Tribunal has the power to direct the IPC to conduct an investigation on its behalf in the present circumstances. As we have mentioned, our current view is that the Tribunal does have power to make such a direction under section 232 of the IPA. We do not need, however, to decide that point in the present case because, as Mr Sheldon himself suggested, in any event, the Prime Minister could make an additional direction to the IPC under section 230 of the IPA. He told us that discussions are taking place, to which the Respondent is not party, with a view to obtaining such a direction from the Prime Minister. In the circumstances, we are content to request (via the IPC) that that direction should include an investigation into events in the Tribunal proceedings as well as those in the High Court.

62. Before we set out what we propose to request IPCO to investigate on behalf of the Tribunal we should set out the important principles relating to the duty of candour and co-operation, because they are relevant to the terms of that request.

The duty of candour and co-operation

63. The duty of candour and co-operation in the context of judicial review proceedings is well-known and has roots going back at least to 1986. The duty was summarised by the Court of Appeal in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812; [2018] 4 WLR 123, which cited the earlier judgment of the Divisional Court (Singh LJ and Carr J) in J?*(Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), at paras 8-24, which were in effect incorporated into the judgment of the Court of Appeal.

64. At para 106 of *Citizens UK,* Singh LJ outlined some of the salient points as follows:

> "…
>
> (2) One of the reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court. This is a 'self-policing duty'. A particular obligation falls upon both solicitors

and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

(3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para 20:

> 'It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.'

(4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for 'spin'.

(5) The duty of candour is a duty to disclose all material facts known to a party injudicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact."

65. Those principles apply in this Tribunal too. If anything, they apply with even greater force because much of the work of this Tribunal must (in the public interest) be conducted in CLOSED. Claimants and their lawyers will not see the CLOSED material and therefore have no opportunity to challenge it.

66. The express terms of section 68(6) of RIPA reinforce the duty of candour and co-operation in the context of this Tribunal in so far as that provision imposes a duty on relevant persons "to disclose or provide to the Tribunal all such documents and information as the Tribunal may require for the purpose of enabling them - (a) to exercise the jurisdiction conferred on them by or under section 65; or (b) otherwise to exercise or perform any power or duty conferred or imposed on them by or under this Act or the Investigatory Powers Act 2016."

67. Although the role of CTT is not identical to that of Special Advocates and their important role does mitigate what would otherwise be an unfair process, the fundamental fact remains that the Claimant and their OPEN representatives will be excluded from CLOSED hearings and will not see some of the evidence in the case. This makes it all the more important that respondents fully comply with the duty of

candour and co-operation and that, in particular, their in-house and external lawyers have their obligations at the forefront of their minds. This applies both when evidence is being prepared, for example when a witness statement is drafted, and when submissions are made to the Tribunal. Both counsel appearing before the Tribunal and those instructing counsel should ensure that the Tribunal is not misled, either by positive submissions or by omission of something material which may have significance for the Tribunal's understanding of a case. Ultimately, these obligations which fall upon lawyers can be enforced by their relevant regulatory body.

68. As we have noted above, when quoting from para 106(2) of *Citizens UK*, a "particular obligation" falls upon both solicitors and barristers acting for public authorities to assist the court or tribunal in ensuring that the high duties of candour and co-operation are fulfilled.

69. As CTT have pointed out to us, three aspects of this "particular obligation" have been identified in the case law:

    (1) Lawyers have a responsibility "to ensure that all those involved in the authority are aware of the duty of candour and comply with it": see *R (KI)* v *Brent LBC* [2018] EWHC 1068 (Admin), at para 15 (David Elvin KC, sitting as a deputy High Court judge).

    (2) A solicitor is required "to take steps to ensure that their client knows what documents have to be disclosed": see the judgment of the Divisional Court in *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 2, at para 42 (Scott Baker LJ).

    (3) Solicitors "owe a duty to the court, as officers of the court, to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their client's [list]": see *Woods v Martins Bank* [1959] QB 55, at 60 (Salmon J), cited in *Al-Sweady*, at para 42.

70. The *Al-Sweady* case led to the promulgation of guidance given by the Treasury Solicitor on 'Discharging Duty of Candour and Disclosure in Judicial Review Proceedings' in 2010, which remains in effect. Various aspects of that guidance have been endorsed or assumed to reflect accurately the requirements of the duty in a number of decisions by the courts. In *R (HM)* v *Secretary of State for the Home Department* [2022] EWHC 2729 (Admin), at para 16, the Divisional Court (Edis LJ) said that the guidance "contains a great deal of sound advice".

71. Detailed guidance is given in that document, at para 2.1, in respect of the role of the case-handler at the Government Legal Department. This includes that:

> "The case-handler decides which documents are relevant and disclosable. They owe a duty to the court to ensure the exercise is properly conducted and to make sure so far as is possible that no relevant documents have been omitted."

72. Similarly, at para 2.3, the guidance sets out detailed guidance as to the role of counsel.

73. The role of a respondent's legal team is, as has been noted by the authors of a textbook on this area of law, of particular importance in CLOSED proceedings, because, unlike the position in "ordinary" litigation, the other party (i) will never see the bulk, if any, of the CLOSED material; and (ii) may not have much insight as to the type of material that the respondent may hold about them. "Thus neither they nor, necessarily, the special advocate [or, by analogy, CTT] will be able to readily identify any exculpatory material that may be missing from that which is disclosed": see Ward and Blundell, National Security: Law, Procedure and Practice (2nd ed., 2024), at para 6.92.

Questions to be suggested to IPCO

74. At the end of the hearing before us we gave the parties and CTT permission to file a short document setting out suggested questions which they would invite the Tribunal to ask IPCO to investigate. We have had suggestions from the Claimant's representatives and from CTT, which we have taken into account.

75. In our view, it is important not to be too prescriptive in the request that we make of IPCO. We consider that the proposal by CTT will suffice for this purpose. They state that:

> "We consider that (at least) the following issues arise for further consideration:
>
> a. In responding to Beth's claim, and in responding to the queries from IPCO, to what extent, and by whom specifically, was consideration given to whether Witness A's witness statement dated 26 January 2022 served in the BBC injunction proceedings ("the statement") remained accurate?
>
> b. If no such consideration was given to whether the statement remained accurate, did anyone (and if so who) turn their mind to whether such consideration needed to be given? If not, why not?
>
> c. Was the duty of candour and/or the duty of cooperation to the Tribunal contained in section 68(6) of the Regulation of Investigatory Powers Act 2000 ("the 2000 Act") ever explained to Witness A and/or those on whose knowledge he relied (such as Officer 2 or Officer 3)? If so, when and by whom? If not, why not?
>
> d. In respect of the CLOSED witness statement of Witness A dated 20 December 2023, what was the decision-making process behind: (i)

the account given of the IPCO inspection process, and (ii) the failure to draw the Tribunal's attention to the fact that X had consented to his CHIS status being disclosed to a BBC journalist?

e. What was the decision-making process behind the decision not to disclose relevant policies in relation to NCND (including the 3 policies referred to in Sir Jonathan Jones KC's report) both in responding to Beth's claim and in preparation for the hearing on 9 May 2024? Without prejudice to the generality of the above:

i. Did lawyers ask the Respondent for any relevant policies?

ii. If so, were they provided?

iii. If so, why were they not disclosed?"

76. CTT do not consider that the CLOSED material in this case gives rise to additional or further issues for the IPCO investigation to consider beyond those identified in OPEN above. That said, in addressing those issues they consider that the investigation will need to have regard to all of the relevant material, including that which remains in CLOSED.

Issue (3): guidance on corporate witness statements and other matters

77. The Divisional Court gave guidance on the giving of evidence by way of corporate witness statements at paras 97-106 of its judgment. Although to some extent what the Divisional Court said was influenced by the provisions of CPR 32 PD, para 18.2, which provides that a witness statement must indicate (i) which statements are made from the witness's own knowledge and which are matters of information or belief and (ii) the source for any matters for any information or belief, the basic principles underlying the guidance given by the Divisional Court are, in our view, also applicable to the context of this Tribunal, although it is not bound by the Civil Procedure Rules. Those rules only apply to civil proceedings in England and Wales, whereas this Tribunal has a UK-wide jurisdiction and, in any event, this Tribunal is given a broad discretion as to matters of procedure by the provisions of RIPA (section 68(1)) and may receive evidence that would not be admissible in a court of law (rule 13(1) of the Investigatory Powers Tribunal Rules 2018 (SI 2018 No 1334) ("the Tribunal Rules"). Nevertheless, as we have indicated, we consider that in future the basic principles set out by the Divisional Court should also be followed in this Tribunal.

78. As the Divisional Court said at para 101, the observations which had been made by Chamberlain J in the injunction proceedings at [2022] EWHC 380 (QB), at paras 24

and 28-31, which cited with approval what had been said by Chief Master Marsh in *Punjab National Bank (International) Ltd* v *Techtrek India Ltd* [2020] EWHC 539 (Ch), at para 20, "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)."

79. As the Court observed at paras 102-104, the Attorney General had had two options in the injunction proceedings. The first was to file a witness statement from Officer 2 personally but the Attorney General had chosen the second option: to serve a corporate witness statement instead. Although that was permissible in principle, Witness A's statement therefore should have complied with the requirements of CPR Practice Direction 32, para 18.2, which would have had the consequence that 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." (para 104)

80. Further, as the Court observed at para 105, since this critical information was second-hand:

> "the witness statement should have set out the degree of confidence those officers had expressed in their recollections. 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."

81. The Court acknowledged, at para 106, that:

> "The level of rigour will add to the burdens of those preparing evidence for government litigation, but it will defiver 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 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."

82. We consider that those salutary words are also applicable in the context of this Tribunal.

83. We recognise that there will continue to be cases in which a corporate witness statement can have a valuable role to play. Indeed it will often be required before this Tribunal because it provides the opportunity to draw the threads together which otherwise might not be immediately apparent from disparate sources of evidence, for example documents and emails which have taken place over many months or even years. It is an important aspect of the duty of candour and co-operation with the Tribunal that this should be done. It would not be acceptable, for example, if a respondent simply disclosed a vast amount of documentary material to the Tribunal (even with the assistance of CTT), without setting out in narrative form what is significant and drawing the evidence together in a coherent and comprehensible form.

84. We would emphasise that the cases in which CTT are instructed are relatively rare. Very often the Tribunal has to consider material that is filed by a respondent in compliance with its duty under section 68(6) of RIPA, without the assistance of CTT. It is particularly important in such cases that a full, candid and fair narrative is given to the Tribunal so that it can understand the material that is disclosed to it.

85. On the other hand, however, as the present case has demonstrated, there will be instances where what is needed is not so much the "institutional view" but specific evidence from a particular witness or witnesses about what may be a disputed question of fact. In those cases the Tribunal is likely to require a witness statement from the individual concerned, not least because then there will be someone who can properly be cross-examined about it, if necessary in CLOSED session. If that witness is no longer available, that will need to be explained in a witness statement, with a narrative given of what steps have been taken to verify what will therefore be hearsay evidence.

The possibility of unannounced inspections

86. In the course of its consideration of *Privacy International and Others v Secretary of State for Foreign and Commonwealth Affairs and Others* the Tribunal gave a judgment on the "IPCO issue", dated 21 October 2021: [2021] UKIPTrib IPT_17_86_CH(|Singh LJ (President), Lord Boyd of Duncansby (Vice-President) and Sir Richard McLaughlin).

87. As the Tribunal noted in that judgment, at para 11, the power to require a relevant Commissioner to provide assistance under section 68(2) of RIPA may be exercised by a single member of the Tribunal: see rule 6(b) of the Tribunal Rules. As a matter of convention, in practice the request to the IPC is made by the President on behalf of the Tribunal.

88. At paras 34-37, the Tribunal observed that "it is of vital importance that the Tribunal should be free to make such a request as it thinks fit, for example where it asks the IPC

to make an unannounced inspection of a respondent." The Tribunal illustrated this by reference to an example which is in the public domain, which was referred to in the IPC's Annual Report for 2019 (published in December 2020), at para 2.19(d), where reference was made to the fact that the IPT had sought assistance in verifying the assertion by a police force that, following searches carried out by it, it did not hold any relevant information. IPCO inspectors attended the police force's offices, interviewed staff and reviewed the force's records before providing a report to the IPT on their findings. As the Tribunal went on to state, at para 36:

> "The possibility that a respondent may be the subject of an unannounced inspection by the IPC at the request of the Tribunal is an important safeguard both to prevent the risk of 'tipping off, with the consequences which may follow (for example the destruction of relevant documents or deletion of records from a computer); and to maintain public confidence in the effectiveness of the system to supervise what public authorities do, particularly in the present context, where they are entrusted by the law with surveillance powers which frequently have to be exercised in secret for obvious reasons."

Further, at para 37, the Tribunal said:

> "It is precisely because every respondent authority knows that it may be subject to an unannounced inspection by the IPC on the request of the Tribunal that the integrity of the system overall can be secured. The public can therefore have confidence that the system of supervision by this Tribunal is effective."

89. We envisage that, in future cases such as the present, the Tribunal will wish to give careful consideration to whether it should make use of its power to require IPCO to conduct an inspection on its behalf to verify what has been said in evidence and, in suitable circumstances, to require that investigation to be on an unannounced basis.

Testing of evidence

90. In any event, if the Tribunal is faced in the future with evidence such as that contained in para 11 of the original witness statement of Witness A of 26 January 2022 or para 29 of his witness statement of 20 December 2023, both CTT and the Tribunal should subject that evidence to close scrutiny and raise questions to test its reliability, for example whether there are any contemporaneous records to support what is said and whether there are any documents or other evidence that point away from the conclusion which a respondent invites the Tribunal to draw.

Conclusion

91. We can summarise our response to the four issues identified above as follows:-

(1) What, if anything, the Tribunal should do about its earlier judgment about NCND of 21 June 2024, given that the Respondent no longer wishes to assert NCND in this case? Para 1 of the order made on 21 June 2024 and the judgment of that date relating to NCND are set aside.

(2) Whether the Tribunal should follow the course taken by the Divisional Court and invite the IPC to include in his investigation the question of how the Tribunal also came to be given misleading evidence or whether the Tribunal should conduct such an investigation itself. The President will write to the IPC to ask him to investigate what happened in this Tribunal as part of his investigation, in the terms set out above.

(3) Whether the Tribunal should give guidance about the form of evidence to be given in other cases in the future, including the use of corporate witness statements, and on other matters. The Tribunal has given guidance above. This should help to ensure that respondents at all times comply with their obligations to the Tribunal. This suite of safeguards is essential to maintain public confidence in the ability of the Tribunal to provide effective scrutiny of respondents, including the intelligence services of the UK, in this sensitive area.

(4) What directions the Tribunal should make to progress the substantive claim to a final hearing. The Tribunal will make directions with the assistance of CTT, who are asked to liaise with the parties about this.

92. We envisage that the substantive hearing will take place before a panel chaired by Lieven J. In the meantime, after the investigation by IPCO has taken place, we envisage that a panel chaired by the President will be convened to consider what steps, if any, should be taken in the light of a report by IPCO. This may include proceedings for contempt of court.