



Neutral Citation Number: [2024] EWHC 312 (KB)

Case No: KB-2023-003361

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Handed down in private: 15/02/2024

Handed down in public: 15/07/2025

Before :

MR JUSTICE CHAMBERLAIN

Between:

MINISTRY OF DEFENCE

Claimant

-and-

(1) GLOBAL MEDIA AND ENTERTAINMENT LIMITED
(2) INDEPENDENT DIGITAL NEWS AND MEDIA LIMITED
(3) TIMES MEDIA LIMITED
(4) ASSOCIATED NEWSPAPERS LIMITED

Defendants

Cathryn McGahey KC and John Bethell and Richard O'Brien (instructed by **Government Legal Department**) for the **Ministry of Defence**

Lewis Goodall (Journalist) and **Vicky Etchells** (Producer) on behalf of the First Defendant

Holly Bancroft (Journalist) on behalf of the Second Defendant

Sam Greenhill (Journalist, Daily Mail) on behalf of the Fourth Defendant

Mariyam Kamil (Counsel) and **Larisa Brown** (Journalist) on behalf on the Third Defendant

Tom Forster KC and Paul Mertens (instructed by the Special Advocate Support Office) as
Special Advocates

Hearing date: 1 February 2024

Approved Judgment

Mr Justice Chamberlain:

Introduction

1. This judgment should be read with my previous judgment, handed down in private on 23 November 2023 (neutral citation [2023] EWHC 2999 (KB)). There, I explained the circumstances in which, on 1 September 2023, a super-injunction *contra mundum* was granted by Robin Knowles J on the application of the Ministry of Defence (“MOD”) and why, after a hearing on 31 October and 1 November 2023, I decided to continue that injunction.

Procedure since 23 November 2023

2. At the third return date on 1 December 2023, the evidence suggested that the factual position described in my first judgment had not materially altered, but the factual situation was nonetheless evolving very quickly. I therefore continued the super-injunction until a fourth return date on 18 December 2023, at which I heard submissions from Cathryn McGahey KC for the MOD and Tom Forster KC as Advocate to the Court. I also heard submissions from two journalists: Lewis Goodall, on behalf of Global Media and Entertainment Ltd (“Global”), and Holly Bancroft, on behalf of Independent Digital News and Media Ltd (“The Independent”).
3. At that stage, there were no parties to the proceedings other than the MOD as claimant. This had certain procedural consequences. In particular, a closed material procedure under the Justice and Security Act 2013 would be difficult or impossible to operate: see [18]-[23] of my first judgment. Nonetheless, Ms McGahey and Mr Forster agreed, and I concluded, that it was possible under the inherent jurisdiction to replicate in substance the protections of the statutory closed material procedure.
4. At the hearing on 18 December 2023, Ms McGahey explained that the Domestic and Economic Affairs sub-committee of the Cabinet would be meeting on the following day to take decisions in relation to the relocation of persons whose personal information was included in the data breach. Global and The Independent indicated that they would wish to consider, in the light of the decisions made by this committee, whether to apply to be joined as parties pursuant to CPR Part 19.
5. I therefore extended the super-injunction, with a fifth return date of 1 February 2024, with directions for further evidence on all matters relevant to the continuation of the injunction, including in particular:
 - a) what decisions have been made by the Claimant and HM Government on relocation of Affected People [i.e. those whose personal information was included in the dataset];
 - b) what steps have been, or will be, taken to carry out that relocation and how long those steps will take to complete;
 - c) to what extent the existence of the data breach has become known publicly, whether indicated from Afghanistan, in the course of public law claims concerning the ARAP scheme in England, or otherwise;

- d) what steps have been taken to draw to the attention of Members of Parliament or Peers the existence of the data breach, whether by briefing Members of HM Opposition on Privy Council terms, informing any parliamentary Committee, or otherwise.
6. I also set a timetable by which Global and The Independent could apply to be joined as parties. I directed a preliminary hearing on 22 January 2024 to ensure that, if Global or The Independent applied to be joined, all steps necessary to convert the proceedings into a closed material procedure could be complete before the hearing on 1 February 2024.
7. By the time of the preliminary hearing on 22 January 2024, Global and The Independent had both indicated their intention to apply to be joined as parties. I granted their applications. I also indicated that I would make a declaration under s. 6 of the 2013 Act, invited the Attorney General to appoint the Advocates to the Court as Special Advocates and set a timetable for an application by the MOD to withhold sensitive material pursuant to s. 8 of the 2013 Act. I made the declaration under s. 6 of the 2013 Act by separate order on 30 January 2024.
8. The application to withhold sensitive material was made. With exemplary efficiency, the Special Advocates produced a schedule of material which they submitted could be made OPEN. With equal efficiency, the MOD's legal team reached agreement on all outstanding issues except one, which I subsequently resolved in the MOD's favour.
9. Shortly before the hearing, the injunction was served on another journalist, Larisa Brown, who is Defence Editor of *The Times*. On 30 January 2024, the court received an email indicating that Times Media Ltd ("The Times") was considering applying to be joined and wished to see the "in private" materials. I directed that those materials should be sent to them. On 31 January 2024, by an email from its Editorial Legal Director, Pia Sarma, The Times applied to be joined as a party. I gave them permission to attend the OPEN "in private" part of the hearing.
10. At the hearing on 1 February 2024, The Times was represented by counsel, Mariyam Kamil. She made an oral application for joinder of The Times. I dispensed with the need to file an Application Notice and made the order. During the hearing, Sam Greenhill, Chief Reporter of The Daily Mail, indicated that Associated Newspapers Ltd ("Associated") also wished to be joined as a party. I made an order to that effect. Both The Times and Associated indicated that they wanted the Special Advocates to be appointed to act in their interests, as well as those of Global and The Independent. I indicated that I considered this appropriate, though this would be a matter for the Attorney General.

The key OPEN evidence

11. At this stage, the key OPEN evidence is contained in three witness statements by Natalie Moore, dated 28 November 2023, 13 December 2023 and 24 January 2024.

Decision-making about Affected People

12. The decision-making in relation to Affected People may be summarised as follows:

- a) The dataset contains the personal information of 18,766 principal ARAP applicants. A substantial majority of these are currently in Afghanistan. Only a small proportion have been found to be ARAP eligible. There are also smaller numbers in Pakistan, Iran, Turkey and other countries.
- b) The DEA met on 19 December 2023 and agreed that access to a new relocation scheme should be offered to a “targeted cohort” of around 200 high profile individuals and their dependants who hold existing and confirmed links to the UK [i.e. links other than that their lives have been endangered by the loss of the dataset]. The intention is to offer a package equivalent to that offered under the ARAP scheme to this targeted cohort and their dependants (i.e. including relocation to the UK). The relevant decision of the DEA meeting says this:

“THE COMMITTEE agreed that access to a new route should be offered to a targeted cohort of c.200 high profile individuals and their dependents who hold existing and confirmed links to the UK Government. As set out in the paper provided by the Secretary of State for Defence, hotels would not be required to accommodate this cohort.”

One inference that might be drawn from this last sentence is that the need to avoid the use of hotels (which the Government has committed to phase out) played a part in the decision about the size of the cohort to whom relocation would be offered.

- c) At the meeting on 19 December 2023, the DEA also asked officials to consider whether it was possible to distinguish between and prioritise the claims of a further c.2,800 Affected People assessed to be at highest risk from the data incident. That work was done. It concluded that it was not possible to differentiate between the members of this cohort on the basis of risk. All were at high risk as a result of the data incident.
- d) At a further meeting on 22 January 2024, the DEA said this:

“Of the cohort of 2,800 identified in the MINISTRY OF DEFENCE’S paper, THE COMMITTEE agreed in principle to consider how we could deliver support to this group. Noting the long timeframes set out if this group were to be re-located to the UK under the existing relocation model, THE COMMITTEE did not currently consider that this represented a viable approach and commissioned work on the full range of options for providing assistance for this group. Accordingly, the MINISTRY OF DEFENCE should work with other Government Departments to work up a full range of viable, costed options for consideration by the 13th February.”
- e) As of 18 January 2024, there were 4,958 ARAP eligible persons and family members who still have to be relocated to the UK, of whom 3,091 were in Afghanistan and 1,867 in third countries. Of those in Afghanistan, 275 are awaiting ministerial approval for eligibility under category 4 of ARAP.

- f) For reasons separate from the data incident, the MOD has identified inconsistencies in the decision-making process for ARAP Category 4 applications. This includes members of the “Triples” (Afghan Special Forces units within the chain of command of the Afghan Ministry of the Interior). As a result, c.2,000 eligibility decisions for applicants claiming a connection with UK Armed Forces will be retaken. These include members of the Triples. An announcement was made in Parliament to this effect on 1 February 2024. Around half of these are Affected People. The work is estimated to take 12 weeks. Affected People will be prioritised.
- g) Separately, consideration is being given to whether to look again at about 9,000 additional family members of Affected People found to be ARAP ineligible on the basis of risk. No decision was made on what to do about this cohort.

Relocations

- 13. If the number invited to relocate under the new scheme is added to the number who could now be found eligible for ARAP (including dependants, additional family members and those who may be found eligible under the Triples review), the total number of individuals requiring relocation (now 3,091) would increase by 37,100 to just over 40,000.
- 14. Relocations of this scale would be “extremely challenging to deliver” using what is described as “our existing model”. Ms Moore adds: “Additionally, the size of this cohort far exceeds the UK accommodation provision.”
- 15. The evidence about the mechanism of relocation is almost entirely in CLOSED.

Support for and notification of Affected People

- 16. The DEA decided on 18 December 2023 that officials could explore with foreign partners diplomatic options to relocate Affected Persons to other countries.
- 17. Separately, the DEA received advice on a proposed methodology for alerting Affected People of the data breach, sharing protective messaging and affording them the opportunity to protect themselves. However, the Secretary of State decided not to contact Affected People with news of the breach and protective messaging. There is some further detail about this decision in CLOSED.

Related litigation

- 18. The fact of the data incident has been made known to the Administrative Court and Court of Appeal in judicial review proceedings in a large number of cases, but to date only in CLOSED proceedings under the 2013 Act.

Knowledge of the data incident

- 19. The MOD assessment remains that “information pertaining to the loss of the dataset is not widely known”.
- 20. Ms Bancroft brought two matters to the MOD’s attention: a phishing email sent to an ARAP applicant and the possible infiltration of a Facebook group. Both may indicate, as is already known, that there is some knowledge about the incident. However, the

MOD continues to assess that it has no information to suggest that the Taliban presently have that knowledge.

21. There have been two Parliamentary Questions relating to data breaches. The first, on 13 December 2023, was by John Healey MP, the Shadow Defence Secretary, who has been informed about the data breach.

Submissions

22. The hearing on 1 February 2024 had two parts, the first OPEN, but in private, and the second CLOSED.
23. At the OPEN hearing, I heard submissions from Ms McGahey for the MOD and very brief submissions from Mr Forster, which tracked the agreed OPEN version of his CLOSED skeleton argument. I heard briefly from Ms Kamil for The Times, but only on the question of joinder. Because she and her client had only very recently seen the papers, she reserved her position to apply to make further substantive submissions at a later date if the injunction were continued. I also heard oral submissions from Mr Goodall and Ms Bancroft (elaborating on their written submissions on behalf of Global and The Independent), Vicky Etchells (Head of News and Factual Podcasts at Global), Larisa Brown (whom I permitted to address me directly even though The Times was represented) and Sam Greenhill for Associated.
24. At the CLOSED hearing, I heard submissions from Ms McGahey and Mr Forster.
25. Ms McGahey accepted that the injunction was having the effect of preventing public scrutiny of decision-making on an issue of critical importance. She accepted that it was wholly exceptional for relief having that effect to be granted at all, let alone maintained for five months and more. However, she submitted that this case was exceptional because there was a real prospect that discharge of the super-injunction would lead directly to the deaths of hundreds or thousands of people who are currently awaiting relocation but are still in Afghanistan. The super-injunction could not be maintained forever, because it was likely that news of the data incident would come to the Taliban in the next few months. Maintaining the super-injunction for the time being might enable some hundreds or thousands to be relocated, who would otherwise be targeted. The “super” element should not be discharged for the reasons given in the first judgment.
26. Mr Goodall for Global submitted that the position could be summarised as follows. The Government has lost the data of thousands of people. It has decided not to help the vast majority of these. It is entirely possible that public scrutiny of the decision-making on this subject would lead to the Government taking different decisions about the numbers to be relocated and about the resources to commit to the process. Moreover, if the Government’s submissions are accepted, there is no foreseeable end-point to the super-injunction. Even if the court continues to review its appropriateness, the process will be “rinse and repeat”. The time has come when the court should say that the super-injunction can no longer be maintained.
27. Ms Bancroft for The Independent said that she was aware from her own research that there had been widespread errors in the processing of the Triples’ applications. Ministers had been forced into making a statement about this only because the Labour

Party had tabled an urgent Parliamentary question. In any event, this cohort is already in hiding. The Taliban know who these people are and are hunting them down, one by one. The decisions now being taken, not only about relocation but also about compensation, were of the utmost importance. Compensation was important because without money many Affected People cannot flee. Yet the lack of public scrutiny is holding up compensation payments – and this could be actively endangering people. Matters have now got to the stage where a very large number of people know about the data incident.

28. Ms Brown for The Times said that she had been covering this issue for many years, in her current role and previously for the Daily Mail. As to the Triples, she endorsed Ms Bancroft's submission that the Taliban already know who these people are. More generally, the whole matter is hugely embarrassing for the Government, and could become an election issue. It is objectionable that the court's order prevents public scrutiny of decision-making on these important topics.
29. All the journalists who addressed me submitted that, if I decided to maintain in place the injunction, I should nonetheless discharge the "super" element, because the fact that the government can obtain a super-injunction which prevents public scrutiny of an important issue of this kind is itself a matter of legitimate public debate.

Discussion

30. The circumstances of this case are unprecedented. The public and Parliamentary disquiet which led to the issue of the Master of the Rolls' Guidance in 2011 stemmed from the use of super-injunctions to prevent disclosure of information about the private lives of celebrities. In this case, the underlying information is of a wholly different character. I am aware of no reported case where the potential damage which the injunction seeks to prevent is as serious as here. However, as I said in my first judgment, the decision whether to maintain the super-injunction is nonetheless a difficult one, because the damage that might be caused by continuation of the injunction also has the potential to be exceptionally grave.
31. The key elements of the factual picture against which this application falls to be assessed, as they appear from the MOD's written evidence, are as follows:
 - a) There is a real possibility that, had the injunction not been granted, hundreds of ARAP eligible persons who have left Afghanistan since 1 September 2023 would not have been able to do so and would instead have been targeted by the Taliban for extra-judicial killing or serious physical harm. There is a further group which the Government has already decided to relocate to the UK. These are the existing ARAP eligible persons and dependants currently in Afghanistan, together with the very small additional cohort of about 200 high profile individuals and their dependents, who have been identified for relocation in light of the data incident. This group comprises a little more than 4,000 people. There is a real possibility that continuation of the injunction will save the lives of these people.
 - b) There is a further group, some of whom may be offered relocation to the UK. This group comprises the c.2,000 Triples and others whose ARAP eligibility is to be reconsidered and the 9,000 additional family members whose eligibility may in due course be reconsidered. There is a real possibility that the continuance of the injunction

will allow some of this group to leave Afghanistan when they would otherwise be unable to do so. If it does, it may save their lives.

- c) However, there is a group that is much larger than either of the previous two who, on the basis of current Government policy, will never be offered relocation to the UK. Continuation of the injunction may delay the date at which the Taliban will target individuals in this group, but, on the MOD's own case, that day is very likely to come in a matter of months in any event. There is also a risk that continuation of the injunction might positively endanger people in this cohort because it prevents them from being told about the risk they face and/or because it delays the point at which the MOD can compensate them for the data loss. As Ms Bancroft submitted, this may leave them effectively unable to take action to avoid the risk.
 - d) At the same time, decisions are being taken at a very high level (by the DEA) about how to respond to the data incident. These decisions will determine the number of people (beyond existing ARAP eligible persons) to whom offers of relocation will be made and the other arrangements to be made in response to the data incident (including as to the resourcing of relocation arrangements and compensation). It is at present unclear whether the relevant decisions are being taken purely on the basis of what is judged to be feasible within a reasonable timeframe or by reference to other considerations, such as the perceived need to avoid the use of hotels for those relocated to the UK (in line with the Government's public commitment to eliminate or substantially reduce such use).
 - e) What is clear is that the Government has decided to offer help to only a very small proportion of those whose lives have been endangered by the data incident; and that the decisions in this regard are being taken without any opportunity for scrutiny through the media or in Parliament: see my first judgment at [38]. The Parliamentary Question posed by Mr Healey (who has been briefed about the data incident) and the deliberately vague answer to it show that Parliamentary mechanisms (which the super-injunction does not directly affect) have not to date enabled any public discussion of the issues.
 - f) The continuation of the super-injunction involves a serious interference with the right of the media defendants to freedom of expression and the correlative right of the public to be informed about these vitally important decisions. Moreover, and more pertinently, it is possible that the decisions might be different if they were subject to media and Parliamentary scrutiny. In particular, the media and public would have the opportunity to put pressure on the Government to increase the number of people to whom relocation would be offered and/or increase the speed of relocations and/or compensate Affected People more quickly and/or to make other arrangements with a view to safeguarding them. I bear in mind that remedial action honestly considered infeasible at a particular point in time may come to be regarded as possible days or weeks later if, in the intervening period, a media campaign which identifies a moral obligation to act has caught the public's imagination. There are obvious recent examples which illustrate this general point.
32. At this stage, and on the basis of all the OPEN and CLOSED written evidence I have seen, the balance falls in favour of maintaining the injunction, because of the real possibility that it is serving to protect those in the groups identified in sub-paragraphs (a) and (b) above. On the basis of the MOD's written evidence as it stands, there is nothing to substantiate the disadvantages to the much larger cohort identified at sub-

paragraph (c) above, because of the MOD's assessment that there would be very little members of this cohort could do to protect themselves if the dataset were to come into the hands of the Taliban. Moreover, the evidence at present suggests that, even if the Government had made or were to make different decisions about how many people to relocate, it could not effect such relocation quickly, so there would be no immediate or even medium-term advantage to those who might benefit from a more generous relocation policy. I have to proceed on the evidence I have; and it does not suggest that the discharge of the injunction would have a protective effect on those identified in sub-paragraph (c).

33. But the possibility that the injunction might be having an adverse effect on those identified in sub-paragraph (c) is of such critical importance to the overall balance of advantages and disadvantages, and the potential adverse effect so catastrophic for the individuals involved, that it is not satisfactory to continue to rely solely on the MOD's written evidence as the sole basis for continuing the injunction. As Mr Goodall cogently pointed out, the logical consequence of the MOD's approach is that the injunction must continue indefinitely until the last person due to be relocated from Afghanistan has been relocated. The super-injunction has already been in place for five months and, if the MOD's approach is accepted, may yet end up in force for many more.
34. Moreover, although I have no doubt that the assessments contained in the MOD's written evidence are full and candid, they are based on the corporate knowledge of the Government. The contribution of the media defendants to the hearing on 1 and 2 February 2024 seems to me to show that journalists with knowledge of conditions in Afghanistan can be very valuable in testing the robustness of the assessments and assumptions in the MOD's evidence. I have therefore concluded that, at the next return date, the MOD should be invited to tender a corporate witness for cross-examination in OPEN by a representative or representatives of the media defendants and in CLOSED by the Special Advocates. As I explained to the media defendants, they are entitled to communicate with the Special Advocates if they consider that there are particular matters which should be probed in CLOSED, though under CPR Part 82, the Special Advocates will not be able to respond without the permission of the court.
35. For my part, I identified two broad topics on which the existing evidence requires further exploration and which I invite the MOD's witness to address:
 - a) To what extent could the speed of relocations be increased if the political will to do so were there?
 - b) To what extent are Affected Persons in Afghanistan who are outside the cohorts identified for relocation endangered by (i) the inability to inform them of the loss of the dataset and/or (ii) the absence of compensation payments, which may prevent them taking action to protect themselves?
36. I have given directions for the media defendants to submit a list of additional OPEN topics and the Special Advocates to submit a list of additional CLOSED topics to be explored in oral evidence. Both lists are to be approved by me. The evidence will be heard in OPEN and CLOSED on 27 and 28 March 2024.
37. I have given careful consideration to the question whether the "super" element of the injunction should be discharged. I accept the journalists' submissions that the use by

the Government of the courts to prevent disclosure of a matter of such importance is an issue about which, other things being equal, the public should be informed. However, it is very difficult to see how that debate could be meaningful without revealing why the super-injunction was granted. And, for the reasons explained at [45] of my first judgment, the discharge of the “super” element of the injunction risks unravelling the protection granted to the underlying information.

Decision

38. The Order will continue in force in its current form until further order, subject to a possible minor modification to paragraph (7), on which I will consider written submissions. However, there will be another hearing on 27 and 28 March 2024, at which I will hear oral evidence from a MOD corporate witness, who will be questioned in OPEN by a representative or representatives of the media defendants and in CLOSED by the Special Advocates.
39. Although this judgment is based on both OPEN and CLOSED material, it has been possible to set out my conclusions entirely in OPEN, so no CLOSED judgment has been produced.