Neutral Citation Number: [2024] EWCA Civ 838

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mr Justice Chamberlain
[2024] EWHC 1220 (KB)
SITTING IN PRIVATE PURSUANT TO CPR 39.2

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2024

Before :
SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SINGH
and
LORD JUSTICE WARBY

Between :

MINISTRY OF DEFENCE	**Claimant/ Appellant**
- and –	
(1) GLOBAL MEDIA AND ENTERTAINMENT LIMITED	
(2) INDEPENDENT DIGITAL NEWS AND MEDIA LIMITED	
(3) TIMES MEDIA LIMITED	**Defendants/ Respondents**
(4) ASSOCIATED NEWSPAPERS LIMITED	

Sir James Eadie KC, Cathryn McGahey KC, Richard O'Brien KC and John Bethell (instructed by the **Treasury Solicitor**) for the **Appellants**

Jude Bunting KC (instructed by **Pia Sarma, Editorial Legal Director of the Third Respondent**) for **all Respondents**

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

Hearing dates: 25 and 26 June

This judgment was handed down remotely at 10.00am on 26 July 2024 by circulation to the parties or their representatives by e-mail.

SIR GEOFFREY VOS MR, SINGH LJ and WARBY LJ:

Introduction and summary

1. The issue on this appeal is whether the High Court was wrong to discharge an injunction which had been granted to guard against risks to life created by a government data breach.

2. The claim arises from the fact that someone working for the UK Government made an unauthorised disclosure of secret information of a kind that would put lives in jeopardy if it fell into the wrong hands. The Ministry of Defence ("MoD") later learned that the existence of such a data incident had become known to journalists and others and at least some of the information itself was in unauthorised hands. Fearing further disclosure, the MoD brought proceedings for an injunction. It applied in private for orders against the world at large. The judge who was dealing with urgent applications at that time in the King's Bench Division, Robin Knowles J, granted an interim injunction which prohibited any person from disclosing information about the incident. He also made an order for a "super-injunction", prohibiting disclosure of the fact that an injunction had been sought and granted.

3. The case was then allocated to Chamberlain J ("the Judge"). On several occasions he continued the initial orders, but on 21 May 2024 he decided that they should be discharged in their entirety. By this time four media organisations had been added as defendants to the claim; further evidence had been filed; the Judge had heard evidence and submissions in OPEN and CLOSED hearings; and the legal principles to be applied had been agreed. The Judge concluded that, applying those principles, the balance came down in favour of permitting disclosure of the information and the fact of its accidental release. That would inevitably require the discharge of the "super-injunction". The Judge said that he would have discharged that aspect of the order even if he had not lifted the other restrictions on disclosure.

4. The MoD now appeals with the permission of the Judge. It contends that the Judge erred in a number of ways that led him to strike the wrong balance and that all elements of the injunction remain justified.

5. On 25 and 26 June 2024 we heard submissions on behalf of the MoD and the media parties and from the Special Advocates. Part of the hearing was in OPEN but in private. Part was in CLOSED. The injunctions remained in place pending our decision. At the end of the hearing, we announced our decision to allow the appeal and restore the injunctions in full. We took this unusual step because we did not want the MoD and others to have to continue to do the extensive and sensitive work required in preparation for the lifting of the injunctions. We reserved our judgment.

6. We now provide our reasons for that decision. In summary, we have concluded that the balancing process undertaken by the Judge was vitiated by a failure properly to factor in the consequences of discharging the injunctions and thereby permitting unrestricted disclosure of the information at issue. We have therefore conducted the necessary balancing exercise for ourselves. Our conclusion is that the case for continued protection of the information clearly outweighs the competing considerations. We are also satisfied that the super-injunction element of the order remains necessary, to guard

against a real and substantial risk that a hostile actor could deduce the nature of the data breach with a consequent risk to life.

7. This is an OPEN judgment but the compelling need to protect the information which is the subject of the claim means that the judgment must be handed down in private and must remain private unless and until the need for the injunctions comes to an end or the court concludes for some other reason that a different order is required. Publication of this judgment would be a contempt of court as it would infringe the injunctions we are granting. It would also appear to us to be a contempt by reason of section 12(1)(c) of the Administration of Justice Act 1960.

8. We shall be providing the MoD and Special Advocates with a separate CLOSED judgment containing reference to material to which we have had regard but which cannot be disclosed to the media parties or made public for reasons of national security. That material reinforces the conclusions which we have reached in this OPEN judgment but does not affect the substance of what can be put in this OPEN but private judgment.

The facts

9. It is unnecessary and undesirable to add a lot of detail to the brief summary we have already given. It is enough to say the following, all of which is drawn from the uncontested evidence and the judgments below to which we shall refer.

10. The data incident occurred in the early part of 2022. It appears to have resulted from the release by someone working for the UK Government of a dataset. The dataset that was thus disclosed contained personal information relating to many thousands of individuals who had applied to come to the UK under the Afghanistan Relocations and Assistance Policy ("ARAP"). They had applied because of their past work for, or connection to, the UK before the Taliban returned to power in Afghanistan in 2021.

11. The data included identifying details [redacted] relating to tens of thousands of applicants under ARAP ("Affected People" or "Affected Persons"). Only a small proportion of these had been found to be eligible for assistance under ARAP. Most were located in Afghanistan. There were also smaller numbers located in Pakistan, Iran, Turkey and other countries. If their details were to fall into the hands of the Taliban who now control the whole of Afghanistan, the Affected People and their families would be at risk of being killed or subjected to torture or other serious harm. As the number of family members involved is several times the number of Affected People, the total numbers of people who would be exposed to a risk of death or serious harm if the Taliban obtained the data is between 80,000 and 100,000.

12. The MoD remained unaware of the incident until mid-August 2023. On 14 August 2023 it was notified by someone referred to by a cypher in the evidence as Person B that someone had that day posted messages anonymously on a social media platform which indicated that the user had access to the dataset. The anonymous messages identified only a very few of the Affected Persons. The messages were posted to a group with some 1,300 members with an active interest in ARAP. The ARAP Relocations team in Pakistan notified the ARAP community in that country. Five ARAP applicants in Afghanistan were notified by someone referred to by a cypher in the evidence as Person A. Two days later a Daily Mail journalist notified the MoD about the data breach, stating that they had learned of it from several different sources. The day after that, the

social media messages were taken down. On 22 August, a journalist from Global Media contacted the MoD to inform it of the incident.

13. These facts are essentially uncontroversial. The real issue in this case is what to make of them in the light of the other evidence, decision-making, and further developments to which we shall refer.

The High Court proceedings

14. The journalists who had contacted the MoD did not propose to publish anything about the matter at that stage. The Government concluded, however, that it was necessary to seek an injunction because other media organisations might obtain the material. If they did, the Government wanted to serve an injunction on them without delay to give itself the best chance of preventing disclosure.

15. On 25 August 2023, a decision was made by the Secretary of State personally to apply for an injunction. The two media organisations whose representatives had drawn attention to the breach were not made defendants to the claim but they were put on notice of the application. Documents relied on were supplied to them subject to essential redactions. The order sought was to restrain disclosure by any person of "any information pertaining to the data incident relating to the Ministry of Defence" which was described in a Confidential Schedule to the draft order. The MoD's case was summarised in the supporting witness statement:

> "The claimant makes this application because of a risk to life… if our adversaries, in particular the Taliban, were to become aware of this unauthorised data release … they will seek to find the data and will use it to persecute the individuals named in it, a significant number of whom remain in Afghanistan. There is a direct risk to the life of those who have applied for [ARAP]. Publication of information about the unauthorised data release increases the prospect of the Taliban becoming aware of the data and accessing it."

16. The application came before Robin Knowles J, sitting in private in the interim applications court on Friday, 1 September 2023. A representative of Global Media was present in court and contributed to the discussion. The judge concluded that an injunction to prohibit disclosure of information and the incident was justified. He further concluded that, although the MoD had not sought such an order, a super-injunction was in fact required. An order giving effect to these conclusions was made.

17. The judge gave a reasoned ruling on Saturday, 2 September 2023. He recognised that the order he had granted was exceptional, and had a material impact on freedom of expression, but held that it was justified in the particular and exceptional circumstances of the case. There was a risk to the lives of many individuals and their families. On the evidence, the confidentiality of the data had not yet been lost. The injunction might maintain a period within which the data compromise was not known or not widely known, and the Taliban would be less likely to succeed in obtaining the data. That period might come to an end for one of a number of reasons. In the meantime, the order would be kept under review.

18. The MoD considered how to protect Affected Persons who were not eligible under ARAP and their family members. No decision on the issue had been reached by 31

October 2023, when the case came before Chamberlain J for a decision on whether the order should be continued in its then form or discharged. He decided that it should continue for a further four weeks and set a further return date of 1 December 2023, with a timetable for further evidence and submissions.

The First Judgment of Chamberlain J

19. The Judge gave his reasons in a reserved judgment handed down on 23 November 2023 ("the First Judgment"). In [24]-[39] the Judge identified the legal principles he should apply. He first set out the general principles governing interim non-disclosure orders, drawing on the Practice Guidance issued by the Master of the Rolls in 2011 ("the Practice Guidance") [2012] 1 WLR 1003. At [24(d)] he identified the question at the heart of the case as "whether it is in the public interest" for the information which is the subject of the claim to be disclosed. At [24(g)] he noted the statement in [15] of the Practice Guidance that a super-injunction will only be justified in the rarest of cases where short-term secrecy is required in anti-tipping-off situations and only in truly exceptional circumstances will such an order be granted for a longer period.

20. At [35] the Judge noted that the parties disagreed about whether, given that the individuals who would be put at risk by disclosure were outside the UK's jurisdiction, Articles 2 and 3 of the Convention were engaged. He did not consider it necessary to resolve that debate as the principles to be applied in a case where a real and immediate risk to life was established were the same at common law:

> "(a) The predictive judgment of the executive about the extent of any risk is entitled to respect.
>
> (b) However, it is for the court not the executive to decide where the balance of public and private interests falls.
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> (c) It is not enough for the Government to show that the disclosure of information will give rise to a risk of life … the court also must also consider whether the grant of relief might endanger life, whether directly or indirectly. If so, it is for the court to consider and balance these consequences.
>
> (d) The court's decision on any interim order must take into account both this balance of private interests and the public interest in open justice and in the transparency of public decision-making."

21. The Judge considered these last two points to have a "special significance and weight" for three reasons, which he set out at [37]-[39]. First, as super-injunctions take place "under the radar", the grant of such an order to the Government is "likely to give rise to understandable suspicion that the court's processes are being used for the purposes of censorship" which is "corrosive of the public's trust in the Government." Second, the information which is the subject of the injunction was "highly relevant to a series of policy decisions currently being taken by the Government" but whilst in force the injunction would completely shut down "the ordinary mechanisms of accountability which operate in a democracy", including Parliamentary scrutiny and media reporting and comment. Third, the policy decisions in question could have implications for the lives and safety of many individuals but would be "taken in a scrutiny vacuum". The Judge observed that it is axiomatic that "decisions subject to public and Parliamentary

scrutiny are not only more legitimate but also likely to be better than ones taken in secret."

22. At [42], the Judge said that these considerations made the decision to continue the super-injunction a difficult one. Ultimately, however, he had decided to continue it for four weeks for "three principal reasons" which he set out at [43]-[45]. The first was as follows:

> "… the risk assessments I have seen are appropriately caveated. There are a number of imponderables. However, they nonetheless contain assessments that indicate a real risk that (i) the Taliban do not already know about the compromise of the dataset; (ii) disclosure of the fact of its compromise would cause them to take steps which lead to their obtaining it; and (iii) in that case many thousands whose details are contained in the dataset could be killed or injured and the UK government would have no realistic way of safeguarding them. The lives and safety of these individuals are of paramount importance."

23. The Judge's second and third reasons addressed considerations in favour of, and against, discharging the "super" aspect of the injunctions to allow public scrutiny. The Judge said that he had given careful consideration to this possibility but, although this would permit public disclosure of the fact that the Government had obtained injunctive relief, originally in the form of a super-injunction, to prevent disclosure of information and that the information was about a data breach and/or that the injunction was obtained on the basis of a risk to life, it would not permit public scrutiny of the key policy decisions "to any significant extent". That was because it would still be necessary to prohibit disclosure of any linkage between the data breach and ARAP.

24. Moreover, discharging the "super" element of the order "would give rise to a risk of unravelling the protection of the underlying information" and compromising its protection. On the basis of the information then before him the Judge considered that it was "quite possible that disclosure of the fact that a super-injunction has been granted would enable observers (which could include hostile states) to put two and two together".

25. The Judge was, however, mindful that interim injunctions, and especially super-injunctions sought by the Government, must not be allowed to continue indefinitely. For these reasons he gave the directions we have mentioned.

26. By the time the matter came back before the judge on 1 December 2023 the Domestic and Economic Affairs sub-committee of the Cabinet ("DEA") had (on 23 November) directed officials to prepare plans to relocate a targeted cohort of high-profile individuals and their dependants. The Judge concluded that the factual position had not materially altered but it was "nevertheless evolving very quickly". He therefore continued the injunctions until 18 December 2023, when he received further evidence and heard submissions from Leading Counsel for the MoD, a Special Advocate and two journalists. The Judge was told that the DEA would be meeting the following day and hence extended the order to a further, fifth return date of 1 February 2024, with directions for further evidence on all relevant matters.

27. The updating evidence before the Judge on 1 February 2024 told him that on 19 December 2023 the DEA had decided that relocation should be offered to a cohort of

some 200 high-profile individuals and their dependants; and that on 22 January 2024 the DEA had decided to consider how support could be delivered to a cohort of 2,800 high-profile individuals who were assessed to be at high risk, although at that time relocation was considered impractical. The latest figures were that nearly 5,000 people who were ARAP eligible, or family members of those who were, were still awaiting relocation to the UK, of which some 3,000 remained in Afghanistan. The evidence indicated that (unrelated to the incident) the MoD was proposing to re-take eligibility decisions about a further 2,000 ARAP applicants claiming to have been a member of Afghan specialist units, including the so-called 'Triples'. As a result of the incident, they were also considering a review of decisions relating to family members of Affected People that could result in over 9,000 Additional Family Members being found eligible on the basis of increased risk. The number requiring relocation might rise from about 3,000 to over 40,000. This would be "extremely challenging" to deliver. The DEA had received advice on a proposed methodology for alerting Affected People to the data breach and giving them an opportunity to take steps to protect themselves; but the Secretary of State had decided against this. There was some further evidence indicating that there was some knowledge of the data incident. However, it remained the MoD's assessment that "information pertaining to the loss of the dataset is not widely known" and that it had "no information to suggest that the Taliban presently have that knowledge".

28. Against this background the Judge decided to continue the injunctions again with directions for further evidence and submissions and a further hearing, at which he would hear oral evidence from a MoD corporate witness. He gave his reasons in a reserved judgment handed down on 15 February 2024 ("the Second Judgment").

The Second Judgment of Chamberlain J

29. The Judge continued to regard the decision whether to maintain the order as a difficult one. The reason was that, although he was unaware of any case in which "the potential damage which the injunction seeks to prevent is as serious as here … the damage that might be caused by continuation of the injunction also has the potential to be exceptionally grave". On the one hand there was a real possibility that the grant of the injunction (a) had protected the hundreds of ARAP eligible persons who had left Afghanistan since 1 September 2023 from extra-judicial killing or serious physical harm at the hands of the Taliban; and would save the lives of a little over 4,000 other ARAP eligible persons and their dependants who had been identified for relocation but had yet to be moved and were still in Afghanistan; and (b) would save the lives of the thousands of individuals whose eligibility for relocation was to be or might in due course be reconsidered. On the other hand, there was a much larger group (c) who, on the basis of current Government policy, would never be offered relocation to the UK. The injunction might delay the time at which the Taliban came to know of the breach but that day was "very likely to come in a matter of months in any event". In the meantime, there was "a risk that continuation of the order might positively endanger people in this cohort" by preventing them from being told about the breach or getting compensation, and thereby leave them "effectively unable to take action to avoid the risk".

30. In addition, said the Judge, the injunction meant that key decisions were being made without effective Parliamentary challenge or scrutiny and involved a serious interference with the rights of the media defendants and the public to impart and receive

information. The Judge considered it "possible that the decisions might be different if they were subject to media and Parliamentary scrutiny". Without an injunction the media and the public would have the opportunity to put pressure on the Government (for instance) to increase the number or speed of relocations or compensate Affected Persons more quickly.

31. However, the Judge concluded at [32] that:

> "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 sub-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 re-location 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)."

32. The Judge considered, nonetheless, that it was not satisfactory to continue to rely solely on the MoD's written evidence. This was not because he had any doubt that the evidence was full and candid. It was because the possibility that the injunction might be having an adverse effect on this sub-group was "of such critical importance to the overall balance" and its potential adverse effect "so catastrophic for the individuals involved"; because the logical consequence of the MoD's approach was that the injunction must continue indefinitely until the last person due to be relocated had been relocated; and because the contribution of the media defendants to date had shown that journalists with knowledge of conditions in Afghanistan could be very valuable in testing the MoD's assessments.

33. The Judge identified two broad topics on which the evidence required further exploration: (a) to what extent could the speed of relocations be increased if the political will was there; and (b) to what extent were Affected Persons in Afghanistan who were outside the cohorts 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? Directions were given for the media defendants and Special Advocates to submit lists of further topics.

34. Addressing the "super" element of the order, the judge recorded at [37] that he had given careful consideration to whether this should be discharged. He accepted that the use by the Government of the courts to prevent disclosure of a matter of such importance was an important issue but it was very difficult to see how any debate about that could be meaningful without revealing why the super-injunction was granted. For the reasons he had given at [45] of the First Judgment, discharge of the "super" element risked unravelling the protection granted to the underlying information.

Key evidence

35. The further hearing took place on 30 April and 1 May 2024. By that time the key evidence included the following:

(1) A paper submitted by the MoD for the meeting of the DEA on 25 March 2024 ("the DEA Paper"). This set out the Government's options to take protective action for the Affected Persons who were ineligible under the ARAP and their immediate and additional family members ("AFM") and the provision for the AFM of the ARAP eligible cohort. The DEA Paper was provided to the Judge and the Special Advocates in CLOSED and to the media parties in OPEN in redacted form.

(2) The annexes to the DEA Paper including, in particular, a Defence Intelligence ("DI") Threat Assessment dated 19 January 2024 ("the DI Assessment"). This was provided to the Judge and the Special Advocates in CLOSED but withheld from the media parties in its entirety on grounds of national security.

(3) Six witness statements from Mrs Moore of the MoD. The last three of these had been filed in response to the Judge's directions and the additional topics identified by the media parties. The sixth statement was made on 23 April 2024.

36. The OPEN version of the DEA Paper contains the following relevant passages:

> "INTRODUCTION AND BACKGROUND
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> 3. The key objective of protective action is to mitigate, so far as practicable, the risk that the data incident poses to individuals and to UK national security, taking account of all relevant considerations. Options have been weighted according to their likely effectiveness in meeting this objective, across the various affected cohorts, and the practicalities, risks and constraints of delivery ….
>
> 4. All options to take protective action take into account the risk of 'break glass' alongside their mitigating effect to the risk to individuals. The risk of a 'break glass' event remains high, irrespective of what protective action HMG might take.
> …
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> …
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> OPTIONS
>
> DO NOTHING FURTHER
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> …
>
> 10. A decision to do nothing further does not achieve the key objective to mitigate as far as practicable the risk to individuals – brought about as a result of HMG error – and may suggest HMG is indifferent to the incident and its effects. It carries reputational risk: ARAP has a broad and vocal stakeholder community who are likely to view negatively a decision by HMG to do nothing. It may attract criticism from allies and partners …
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> …
>
> PROTECTIVE SECURITY NOTIFICATION

> 15. This option would involve making contact with affected individuals to alert them to the data incident and its potential impact …. It carries risks of detection by a hostile actor (including the Taliban) and inadvertent disclosure by one of the many recipients. Either would have the affect of creating a 'break glass' event, increasing the immediacy of the threat to individuals….
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> 16. Contact with the full affected cohort is not recommended prior to a 'break glass' event, given the likelihood that this would alert the Taliban to the existence of the compromised dataset and its authenticity…. Notifying all affected individuals would present an unacceptable risk. Making contact with the highest risk individuals offered relocation also carries risk, but the numbers concerned are smaller and it is considered possible to manage the risk of 'break glass' for this group …
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> …
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> FINANCIAL PAYMENTS
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> 20. Officials have explored offering financial payments to affected individuals who would not be relocated to the UK. Its purpose would be to reduce risk by providing the means to allow affected individuals to take protective action as they best see fit … This option is dependent on identifying an enduring, safe and secure means of communicating with affected individuals and therefore carries many of the same risks (see para 16). It is therefore not recommended prior to 'break glass' as it would be highly complex to deliver (involving the use of a third party to make contact or transfer funds without explanation) and will likely arouse suspicion, both among affected individuals and hostile actors. It risks breaking glass …"

37. Our CLOSED judgment sets out additional material from the DEA Paper and some key passages from the DI Assessment.

38. Mrs Moore's witness statements set out in detail the measures taken to relocate Affected Persons and the constraints on doing so. She described "a high-risk situation of great complexity, where HMG's first concern has been not to make matters worse." She confirmed that the MoD's best assessment remained that notifying large numbers of Affected People of the data incident would lead to the Taliban becoming aware of the dataset and obtaining it. Notification would risk creating a "break glass" event "with the risk that it would make the position of those affected worse rather than better". Making payments would similarly be likely to alert the Taliban because it could not be done without making contact with Affected Persons in order to verify, identify and notify them of the payment, explain why it was being made and any appropriate action the Affected Persons might take. Neither option was, therefore, considered safe. These assessments were underpinned by considerable detail about the options that had been explored and how that had been done.

39. Mrs Moore reported in OPEN evidence that DI had said that referring to the fact of HMG having obtained an injunction, without referring to Afghanistan or the ARAP scheme, would not materially increase risk. She said, however, that "this judgment leaves open a 25-35% chance that such disclosure will lead to increased risk". At the further hearing Ms Moore was questioned about this in OPEN. She confirmed that the

percentages she had given were a mathematical expression of the term "unlikely". That assessment was not challenged.

The judgment under appeal

40. By his reserved judgment, handed down on 21 May 2024 ("the Third Judgment"), the Judge decided that the injunctions should be discharged.

41. The Judge noted that it was agreed that the principles to be applied were those he had identified in the First Judgment (see [19]-[21] above). He observed that the evidence now before him was fuller than at any stage previously. He was therefore better able to judge how much weight should be attached to assessments on particular issues. The Judge noted that the Government's position had developed materially over time. When the application for an injunction was first made, the evidence had been that it would take the MoD in the region of four months to put in place "all reasonable mitigations". At later hearings the expectation had remained that the justification for the injunction was likely to fall away within weeks or months because the Taliban were likely to find out about the data breach and then gain access to the dataset (an eventuality termed, as we have mentioned above, a "break glass" event). That had not occurred and the injunction had remained in place without public, media or Parliamentary scrutiny of the MoD's decision-making about relocation of Affected People, its cost, or the decision not to offer relocation to individuals outside the highest risk cohort.

42. The Judge said that he needed "to grasp the nettle now". Whilst he had previously adopted an incremental approach, the evidential picture had now become "relatively stable" and it was "important to take a realistic view of the logical end-point of the process if the injunction is maintained". That might be for "an unprecedented period" because, although it was not possible to say when a "break glass" event might occur, it was "quite possible that it might not occur for months or years".

43. The Judge then addressed the issues under a series of headings. Under the heading "The basis for the grant of relief to date" he summarised the history of the proceedings. In a section headed "The possible impacts of the injunction on the cohort being offered relocation" he noted the MoD's evidence that there was a significant possibility that the Taliban already had and was using the dataset. He reasoned that in that event the injunction was likely to be significantly increasing the risk faced by individuals in this cohort because they could be targeted without knowing it or being able to do anything about it. He did not accept the MoD's view that there was little that people in that cohort could do.

44. As for "The effect of the injunction on the non-relocation cohort" the Judge identified four categories of harm. These were the inability (a) to take evasive action if the Taliban already had access to the dataset; or (b) to take action to avoid the threat at "break glass"; (c) to benefit from public pressure on the Government to do more; and (d) to take the risk into account in planning their lives. Under the heading "The effect of the injunction on public debate" the Judge said that, even where lives are at stake, the restriction on public debate deserved some weight in its own right. He further observed that it was "fundamentally objectionable" for decisions affecting the lives and safety of thousands and involving the commitment of billions of pounds of public money to be taken in circumstances where they were completely insulated from public debate.

45. Under the heading "Decision" the Judge set out his key reasoning as follows:

> 48. The MOD's case for the maintenance of the injunction depends on a series of assessments: some about existing fact (e.g. whether the Taliban already have the dataset) and some in the nature of predictions about what may be done in the future in particular factual scenarios. On the evidence I have seen, OPEN and CLOSED, each assessment has been made in good faith. It is not uncommon for government policy to depend on assessments of this sort. But the use of these assessments in support of the maintenance of the super-injunction is, nonetheless, very unusual in at least three respects.
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> 49. First, the risk assessments are caveated and there are a number of imponderables. It is tempting to take each assessment as a building block upon which to make further assessments and use this process to generate an overall view as to what is likely to happen if the super-injunction is discharged. But there is a real danger that, in doing so, one builds an edifice with very unsure foundations, ignoring the consequences that may be ensuing or may yet ensue if some of the initial assessments are wrong.
>
> 50. Second, even on the MOD's assessments, there is a significant risk that the relief granted to date has in fact put lives at risk and is still doing so. This risk must be factored into the balance of risks and benefits.
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> 51. Third, the relief granted to date not only prevents public discussion of the full reasons for the Government's policy. It prevents the public from knowing of the very existence of the policy or the problem which it addresses; and it deprives decision-makers of information, public and Parliamentary scrutiny, all of which are liable to improve the quality of their decisions.
>
> 52. At this stage, it is important to return to the principles underlying the grant of interim non-disclosure orders: see Judgment no. 1, [24]. Interim non-disclosure orders of any kind require a "clear and cogent" evidential basis. That applies with even more force where the order is a super-injunction, which must be justified on the basis of strict necessity; and the maintenance of a super-injunction for any longer than a short period is "truly exceptional".
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> 53. In my judgment, the MOD has not shown that the maintenance of the injunction is now justified, given where the balance of risks now falls and the effect of the injunction in closing off public debate on an issue of profound moral and economic significance. In particular:
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> (a) Although on balance, the injunction is likely to be having a protective effect on the relocation cohort, there is a significant chance that it is in fact endangering some of this cohort.
>
> (b) The effect of the injunction on the much larger non-relocation cohort is likely to be adverse overall, whether or not the Taliban currently have access to the dataset. On the assumption that they do not, the injunction denies those in the non-relocation cohort the opportunity to take action to avoid the threat at the point (which is very likely to occur in the next months or few years) when the Taliban gain access to the database; denies them

the ability to benefit from public pressure on the Government to do more for them (whether by offering some of them the chance to apply for relocation or by providing financial redress or otherwise); and deprives them of the ability to take properly informed autonomous decisions on issues of fundamental importance to their lives.

(c) The sheer scale of the decision-making, in terms of the numbers of people affected and in financial terms, makes further secrecy unlikely to be sustainable for the very substantial period that would be necessary to relocate to the UK the cohort which have been offered the chance to apply for it. The effect of the decision-making on UK citizens (as well as on the Affected Persons) makes the enterprise of maintaining secrecy for that period objectionable as a matter of principle.

54. For these reasons, I propose to discharge the injunction with effect from 21 days after the handing down of this judgment. That period is designed to allow for protective notifications to be sent to Affected Persons in Afghanistan and third countries and to allow time for an appeal. ….

The appeal

46. The appeal is advanced on the single ground that the Judge erred by striking the wrong balance between the likely harms associated with maintaining and discharging the injunction.

47. The written grounds set out ten specific criticisms, asserting that the Judge (a) failed properly to recognise or give weight to the irreversible consequences for some if the injunction were discharged; (b) was wrong to conclude that discharging the injunction to enable public or Parliamentary scrutiny could lead to a different and better outcome for Affected Persons; (c) was wrong to conclude that inherent uncertainty in the MoD's assessments tended to undermine the Government's overall approach to risk and, accordingly, the Judge failed to give proper weight to the assessments of the Executive in this particularly sensitive area; (d) was wrong to find that the Government had sought to balance the moral obligation owed to the "non-relocation cohort" against "the costs of providing other assistance"; (e) was wrong to reject the MoD's assessment that anyone informed of the data incident could do very little to protect themselves even if they were informed in advance of the injunction being discharged; (f) was wrong to find that the injunction increased the risk to Affected People without taking into account that the discharge of the injunction would confirm the existence of the compromised dataset, putting thousands of lives at even greater risk; (g) was wrong to give weight to a "significant possibility" that the Taliban already had "the" dataset on the basis of reports that some Taliban-aligned individuals might be aware of a dataset; (h) was wrong to hold that the possibility of the Taliban having already obtained the dataset should be given weight even if it were "regarded as unlikely on balance"; (i) was wrong to regard the possible continuation of the injunction for years to come as a material consideration against maintaining it, while it continued to enable protective action to be taken for those at highest risk; (j) was wrong to find that the sheer scale of decision-making made further secrecy unlikely to be sustainable and/or to regard that as a reason to end its protective secrecy now.

48. At the hearing Sir James Eadie KC focused his argument for the MoD on sub-grounds (a), (b) and (e) to (h). He made three "key" submissions. First, he submitted that the discharge of the injunction would amount to a judicial "break glass" event giving rise to a high risk of death, torture, intimidation and harassment if the Taliban obtained the dataset; that could not possibly be justified on the basis that the Taliban might already have the list. Secondly, Sir James submitted that, although public and Parliamentary scrutiny is inherently valuable, it is impossible to justify the discharge of the injunction on the footing that such scrutiny could lead to better outcomes for some; on the contrary, the publicity required to achieve such scrutiny would come at the cost of bringing down "immediate risks on the heads of everyone in both cohorts in Afghanistan". Thirdly, he submitted that the Judge's reasoning ignored the MoD's careful and unchallenged assessments that protective notification or the provision of funds would come at the cost of "unacceptable" risks of breaking glass with all the very unfortunate consequences for Affected Persons still in Afghanistan, and the myriad reasons attested to in the evidence for doubting that self-help was a realistic or workable proposition for those individuals.

49. In support of these submissions the MoD relied on the undisputed evidence that had been before the Judge and in particular the DEA Paper and DI Assessment. The MoD also applied for permission to adduce fresh evidence in the form of witness statements dated 12 June 2024 from Ms Moore (her eighth) and Major General Daniel Blanchford (his first). These contained updates and explanations which the MoD said were likely to assist and be important for the appeal. The evidence was summarised in OPEN but the statements themselves were in CLOSED.

50. Mr Jude Bunting KC, who appeared for the media parties, supported the Judge's reasoning as to why the injunction should be discharged and submitted, further, that there was no proper basis for interfering with the evaluation made by the Judge on appeal. Mr Bunting resisted the MoD's application to adduce fresh evidence, contending that its admission would not be in accordance with the overriding objective or established principle, as most of it could have been adduced before the Judge and none of it was likely to have an important impact on the outcome of the appeal. So far as the discharge of the super-injunction is concerned, Mr Bunting invited us to uphold the Judge's decision in any event for five additional reasons identified in a Respondent's Notice, contending that (a) Mrs Moore had accepted that it was unlikely that lifting the "super" element of the injunction would increase risk; (b) she had also accepted that she could not demonstrate that the "super" element was necessary; (c) the MoD had not sought such an order in the first place, and for good reason; (d) Mrs Moore had rightly accepted that reporting the fact of the super-injunction was a matter of "significant public interest"; and (e) the discharge of the super-injunction would allow those affected by the data breach to seek clarification of their position from the MoD and thereby take steps to protect themselves.

51. By a further Respondent's Notice for which we gave permission at the hearing, the Special Advocates submitted that, if this Court concluded that the 21-day "grace period" allowed by the Judge's order was inadequate, the order should be maintained in modified form.

52. At the hearing, we ruled that we would consider the additional evidence on which the MoD wished to rely *de bene esse* (on a provisional basis) and give our ruling on the application to adduce it as part of our judgment on the appeal.

The approach required of this Court

53. The relevant principles which must be applied by this Court on an appeal such as this are well-established and are not in dispute.

54. CPR 52.21(1) provides that an appeal is usually limited to a "review" of the decision of the lower court and is not by way of a "re-hearing". CPR 52.21(3) provides, so far as relevant, that the appeal will be allowed where the decision of the lower court was "wrong". That is the position generally in relation to all appeals before this Court but it is also well-established in the authorities that, where the lower court has exercised a discretion or formed an evaluative judgment, it is not the role of this Court simply to substitute its own view for that of the lower court, in particular (but not only) where that court has heard oral evidence from witnesses, who could be cross-examined. We must bear all that in mind, as the Respondents rightly stressed before us. In particular, we must bear in mind that the Judge had the advantage of considering the entirety of the evidence, of hearing oral evidence from Mrs Moore for the MOD, who was cross-examined both in OPEN and in CLOSED, and of having been the Judge who had dealt with these proceedings for a lengthy period of time, and had given two judgments already before the judgments which are now under appeal.

55. The legal principles which should be applied by this Court were helpfully summarised, after citation of authority, including decisions of the Supreme Court, in *Re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031 (McCombe, Leggatt and Rose LJJ), at [76]:

> "… on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

56. Applying those principles to the present appeal, we have reached the conclusion that the Judge did fall into error both because there was a gap in logic and a lack of consistency in his reasoning. As will become apparent, we do not think that it is necessary to go beyond the four corners of his three judgments to identify those errors in his approach. This is not therefore a case in which anything turns on disputed evidence (whether oral or written) or on the Judge's assessment of the evidence.

The law

57. The principles identified in the First Judgment have remained common ground and we agree that they contain no misdirection. We would, however, highlight some points about the application to this case of the principles concerning interim non-disclosure orders and section 12(3) of the Human Rights Act 1998.

58. Section 12(3) prohibits the grant of a pre-trial remedy that would interfere with freedom of expression unless the court is satisfied that the claimant is "likely" to establish "that publication should not be allowed." Typically, this will require the court to forecast at a relatively early stage and on imperfect evidence what factual propositions will or will not be made out at a trial. This case is, however, by no means typical. It is a Part 7 claim

but, as we have noted, the essential facts are not in dispute. The core issue is the public interest question identified in the First Judgment at [24(d)]. Although the hearing on 30 April and 1 May 2024 was an interim hearing, the claim had been under way for some eight months. All parties had set out their cases and enjoyed the opportunity to file evidence. The MoD's evidence had been explored in cross-examination in order to test the Ministry's evaluative judgments. As the Judge said in his Third Judgment at [27(b)], "the Court's ability to test the assessments and balance the risks, is as good now as it is ever likely to be". The hearing could therefore be regarded as tantamount to the trial of the claim. In any event, the Judge's task was not the typical predictive one we have described. His decision had to turn on an assessment and comparison of the risk of harm from discharging the injunction and the risk of harm from continuing it. All of this was common ground on this appeal.

The principal errors in the judgment

59. In our judgment the Judge fell into two main errors, which undermine his conclusions.

60. The first error is that, in the Third Judgment, the Judge failed to compare what would happen if the injunction were discharged (as he concluded it should be) with what would happen if it were continued. He had in fact conducted that exercise on earlier occasions and had reached the conclusion that the injunction should be continued. That does not mean that he was not entitled to discharge the injunction on this occasion but, before he could properly do so, it was incumbent upon him to do that comparative exercise.

61. The Judge was clearly concerned that, on the undisputed evidence, there was a realistic prospect (even if it was unlikely) that the Taliban already had the relevant data. It was for this reason that the Judge expressed the concern that there was therefore a possibility that the injunction itself was causing harm to people. But what the Judge did not then go on to do was to confront what would happen if he discharged the injunction. On the undisputed evidence, the effect of discharge would be to turn what was a real possibility into a virtual certainty. In other words, the effect of discharging the injunction would be to cause the very harm which the Judge was seeking to avoid. In the Third Judgment, the Judge never confronted that reality.

62. The second error arises from the way in which the Judge addressed the interests of the cohort of people who were on the list but for whom there was at present no assistance to be given: for convenience we will call this "Cohort C". The Judge was clearly concerned that the continuation of the injunction was having the effect of preventing steps from being taken either by Cohort C to help themselves or by others who might wish to campaign or lobby on their behalf were they to become aware of the risk that they faced in the light of the data breach. This is why the Judge considered that there was a realistic possibility that the Government's decision not to assist Cohort C might change if there were Parliamentary pressure brought to bear, but the existence of the injunction was preventing the public and the media from bringing this issue to the attention of members of Parliament.

63. The Judge, however, failed to follow through the logical sequence of events which would have to occur if such public and Parliamentary pressure were to be brought to bear. First, the injunction would have to be discharged – indeed, that is one reason why the Judge concluded that it should be discharged. But in reality, the very act of

discharging the injunction would, on the undisputed evidence, immediately set in motion a chain of events leading to the dreadful (and potentially lethal) consequences which the Judge was seeking to avoid. The reality is that, very quickly after becoming aware of the data breach, the dangers and difficulties for people in Cohort C seeking to leave Afghanistan would be increased, even before the Taliban had obtained the dataset.

64. It is also important to note that all this would happen *after* the injunction was discharged. The Parliamentary pressure to which the Judge referred could not take place *before* discharge, for example during the grace period of 21 days which the Judge ordered. Although steps could be taken to help Cohort C in that grace period, for example to notify them of the data breach so that they could consider taking steps to help themselves, the wider publicity which the Judge contemplated would take place and which might lead to Parliamentary pressure on the Government could only take place after the end of the grace period.

65. If one stands back and considers the reality of what would happen in that scenario, it is obvious that there would be insufficient time for there to be the sort of Parliamentary pressure that the Judge had in mind. In other words, the discharge of the injunction would have precisely the opposite effect to the one intended by the Judge. We accept the submission made by Sir James Eadie KC on behalf of the MoD that the means chosen by the Judge had no rational connection with the aim he was trying to achieve; indeed, it would be self-defeating.

The "super-injunction"

The general approach

66. The Practice Guidance of 2011 was prompted by concerns that the court was too ready to grant interim injunctions restraining freedom of expression. The Practice Guidance highlights the fundamental principle of open justice and makes clear that derogations from open justice "can only be justified in exceptional circumstances when they are strictly necessary as measures to secure the proper administration of justice" and only to that extent: see [9] to [11]. The need for any derogation must be established by "clear and cogent evidence": see [13].

67. At [15] the Practice Guidance addresses the specific case of super-injunctions, meaning "an interim non-disclosure order containing a prohibition on reporting the fact of proceedings". The Practice Guidance states that "it will only be in the rarest cases" that such an order will be justified "on grounds of strict necessity". It identifies "anti-tipping-off situations where short term secrecy is required to ensure the applicant can notify the respondent that the order is made". It goes on to state that it is "only in truly exceptional circumstances that such an order should be granted for a longer period".

68. Nobody has sought in this case to cast any doubt on these general principles or their importance. But nor has anybody suggested that the "super" element of the injunction granted by Robin Knowles J and continued by Chamberlain J contravened these principles. There is no doubt nor any dispute that the circumstances of this case are of the rarest kind and truly exceptional. The super-injunction in this case is not an "anti-tipping-off" measure of the specific kind mentioned in the Practice Guidance but it has a comparable aim. It has not been argued nor do we consider that the Practice Guidance

purported to set out exhaustively the categories of exceptional circumstances that might justify a super-injunction.

The "super" element in this case

69. The exceptional nature of the order in this case has been recognised throughout. We have outlined the approach of Robin Knowles J. In the First Judgment, at [2], Chamberlain J noted the high threshold for granting a super-injunction and the exceptional nature of the jurisdiction, the need to keep it under constant review, and to discharge it, and inform the public about it, as soon as possible. He also noted at [14] that, so far as he was aware, this was the first *contra mundum* ("against the world") super-injunction ever granted and it imposed wide-ranging restrictions.

70. Both judges nevertheless decided that the case passed the stringent tests and that the grant and continuation of the "super" element of the order was justified. Chamberlain J's reasons were set out in the First Judgment. We have summarised them at [23]-[25] above. As we have noted, he adopted that reasoning in the Second Judgment at [37].

71. In his Third Judgment the Judge observed at [3] that the super-injunction had remained in force for 8 months and there was no reported example of a super-injunction continuing in force for so long. He returned to this point at [55] when he gave his reasons for concluding that the "super" element would have been discharged regardless of his decision on the maintenance of the main injunction:

> "Even though the discharge of the super-element would not enable public scrutiny of the underlying decision-making, it would enable public debate about the use by the courts of super-injunctions in proceedings brought by the Government. We have now reached a point where the continuation of the super-injunction for more than eight months represents a wholly novel use of the remedy, which is itself a matter of significant public interest. The assessed risk (falling short of a likelihood) that the discharge of the super-element would unravel the protection afforded to the fact of the data breach is no longer sufficient to justify the continued stifling of public debate on this issue. The fact that discharge of the super-element alone would leave the debate less than fully informed is not a sufficient reason to maintain in force a legal prohibition whose effect is to stifle it completely."

72. In our judgment there were two flaws in the Judge's approach to the question of whether the "super" element of the injunction should be continued or discharged.

73. The first error was that the Judge appears to have thought that the simple fact that the super-injunction had been in existence for an unprecedented amount of time was a reason to think that it was no longer necessary. We do not say that the duration of it was irrelevant. Clearly, as Mr Jude Bunting KC reminded us, the duration was a relevant consideration because the extent and degree of interference with the fundamental right to freedom of expression is relevant to the exercise of proportionality: the greater and longer the interference, the greater must be the weighty public interests to be weighed on the other side of the balance.

74. We note that the MoD had not initially applied for a super-injunction. That element was added by Robin Knowles J when he considered the application in September 2023. When the issue came to be fully considered by Chamberlain J, on two earlier occasions, he conducted the balancing exercise and concluded that the super-injunction was necessary so as to protect the very weighty interests on the other side of the balance, in particular the right to life. As a matter of principle, therefore, what the Judge was required to do in considering the issue in May 2024 was to ask whether there had been any material change in circumstances that would warrant discharging the super-injunction. The mere fact that it had gone on for a long time and on the evidence might have to continue for a long time in the future was not a good reason to discharge it if it remained necessary, in particular to protect the right to life.

75. The second error was that, on the undisputed evidence, there was a real and significant risk that, without the super-injunction, it would be possible, through a "mosaic" or "jigsaw" effect, to piece together different pieces of information (some of which may not at first sight appear to be important) and come to learn of the data breach. In other words, the super-injunction was necessary to maintain the efficacy of the underlying injunction. Indeed, that was the basis for the Judge's decision to continue the super-injunction on two earlier occasions.

76. On each of those occasions the Judge had applied the threshold test prescribed by section 12(3) of the Human Rights Act requiring the MoD to "convince me that it is more likely than not that publication will not be allowed at trial": see the First Judgment at [24(c)]. On each occasion the Judge was so convinced. Rightly so in our judgment. The issue at a trial would be how to balance the risks of disclosure and non-disclosure. So far as the super-injunction is concerned the question would be whether the evidence demonstrated that disclosing the fact of the proceedings would give rise to a real and immediate risk of serious physical harm and possible death such as to outweigh any countervailing risks and thereby justify a super-injunction. The Judge correctly found that the evidence showed a "real possibility" that disclosing the fact of the proceedings would lead to unravelling of the main protection afforded by the main injunction.

77. In our view, the continuing need to maintain the super-injunction, exceptional though it is, was not and is not undermined by the evidence (again undisputed) that the "mosaic" effect was unlikely to occur, in particular if there were no reference in public to ARAP or to Afghanistan. We accept, as Mrs Moore did on behalf of the MOD, that is unlikely but, where the right to life is at stake, a real and significant risk (calculated in this case to be in the region of 25-35%) cannot be brushed aside. This is particularly so in the present context, where it is well-established that, while the decision as to proportionality is one for the court itself to make, it must give due weight and respect to the assessment of the Executive. The Government has institutional expertise in this area which courts do not, including their access to intelligence.

78. We also bear in mind that, while the duration of the super-injunction in this case is unprecedented and will have to continue for even longer, the facts are also unprecedented. Each case must be considered on its own merits. The fact that a super-injunction is and continues to be justified in this case because it is necessary should not lead to any unfortunate precedent being created.

Other issues

79. The reasons we have given for allowing the appeal against the discharge of the main injunction broadly correspond to the MoD's sub-grounds (a), (b), (f) and (i). We do not consider it necessary to address the other sub-grounds. We have sufficiently explained why we are not persuaded by the points advanced in the media parties' Respondent's Notice ([49] above). The issue raised by the Special Advocates' Respondent's Notice does not arise in the light of the conclusions to which we have come. As our reasons do not rely on any of the MoD's "fresh" evidence we make no order on the MoD's application beyond granting their application for permission, pursuant to section 8 of the Justice and Security Act 2013, and CPR 82.13, not to disclose the sensitive material which was the subject of the application other than to the Court and to the Special Advocates.

Conclusions and next steps

80. The errors we have identified mean that the Judge's decision and order cannot stand. We conclude that there was no material change of circumstances sufficient to warrant a different approach from the one taken in the First and Second Judgments. For the reasons given on those earlier occasions the injunction should continue in the same terms as before and on the basis of the undertakings which the MoD has already given, to alert the court to any material change of circumstances.

81. In addition, the order should be subject to periodic review by the High Court. The detailed arrangements for such review should be a matter for the High Court but we would suggest it should be at least every three months. There is no reason not to remit the case to the same Judge for him to continue the exercise on which he had already embarked. The Judge will be free to take account of the MoD's fresh evidence and any other updating evidence that any party may submit to him. He will no doubt take account of the fact that, as was common ground at the hearing before us, the usefulness of the dataset to hostile actors is likely to reduce over time.