Neutral Citation Number: [2022] EWHC 682 (Admin)

Case No: CO/3224/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

THE DUKE OF SUSSEX — **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

- -
- -

Shaheed Fatima QC, Gayatri Sarathy & Marlena Valles (instructed by **Schillings International LLP**) for the **Claimant**
Robert Palmer QC & Christopher Knight (instructed by **GLD**) for the **Defendant**

Hearing dates: 18 and 25 February 2022

- -

Approved Judgment

MR JUSTICE SWIFT:

A. Introduction

1. On 20 September 2021 the Duke of Sussex ("the Claimant") filed a claim for judicial review challenging the legality of decisions taken (in February 2020 and in early 2021) concerning the arrangements to be made for ensuring his security in the United Kingdom. The decisions were taken by a body known as the Executive Committee for the Protection of Royalty and Public Figures. This body is commonly referred to as "RAVEC", an acronym of its previous title, the Royalty and VIP Committee. RAVEC is the body responsible for deciding the security measures that are made in the United Kingdom for a range of public figures. The Defendant to this claim is the Home Secretary; she is legally responsible for RAVEC's decisions.

2. This judgment does not consider the merits of that claim. It concerns only the extent to which it is necessary for information relied on in support of the claim to remain confidential as between the parties to the proceedings and the Court. This matter is raised by the parties in an Application Notice filed on 16 February 2022. Put very briefly, some of the information relied on concerns security arrangements put in place either for the Claimant or for other public figures in the United Kingdom. For obvious reasons information on such matters usually remains confidential; if it became generally known the effectiveness of the security measures could be compromised. Set against that, the default position in litigation is that the courts work in public. In these proceedings a balance needs to be struck between legitimate requirements of confidentiality, and the ordinary requirements of open justice. The nature of the matters to be decided at this stage requires that some parts of my reasons can only be set out in the Confidential Annex to this judgment; setting out all my reasons in a public judgment would defeat the purpose of the application the parties have made. Subject to any further order by the court, the Confidential Annex shall be available only to the parties to the proceedings and their legal advisers, and to any judge dealing with any issue in the proceedings.

3. The claim is made under Part 54 of the Civil Procedure Rules ("the CPR"). Part 54 claims are commenced by filing a Claim Form at court, and the Claim Form must either contain a statement of the facts relied on and the legal grounds for the challenge, or that information must be set out in documents filed with the Claim Form: see Practice Direction 54A. Usually, this information is contained in a single document filed with the Claim Form and referred to as the Statement of Facts and Grounds.

4. In this case, the Claimant filed two documents with the Claim Form: (a) an Open Summary of the Statement of Facts and Grounds ("the Open Summary", a 3-page document); and (b) a Confidential Statement of Facts and Grounds the ("the Confidential Statement" running to 33 pages). When the claim was filed the Claimant also made an application for an order in the following terms, seeking to limit the extent to which documents filed at court might be made available to persons who are not parties to the litigation:

> "1. Upon the Judge being satisfied that it is strictly necessary:

> 1.1 No copies of the Confidential Material will be provided to any person other than the Defendant without further order of the Court;
>
> 1.2 Any person other than the Defendant seeking access to, or copies of, the Confidential Material must make an application to the Court, giving proper notice (of no less than 7 days) to the Claimant and the Defendant.
>
> 2. Any application made by any person other than the Defendant to obtain a copy of any other document from the Court file must be made on proper notice (of no less than 7 days) to the Claimant and the Defendant.
>
> 3. The Claimant and Defendant shall refer to the person whose name is set out in the Confidential Schedule by the letter "X" in any and all open hearings and any and all publicly accessible documents. Until further order, the publication of the name of "X", or any particulars or details which may lead to his identification in connection with these proceedings, is prohibited.
>
> 4. The parties (and their legal advisors) shall take all steps to preserve the confidentiality of the Confidential Material."

The "Confidential Material" referred to comprised the Confidential Statement, a witness statement made by the Claimant and the exhibits to that statement, a witness statement made by Tim Robinson OBE (a partner in the firm of solicitors instructed by the Claimant) and the exhibits to that statement, a witness statement by the person referred to as X and the exhibits to that statement, and submissions made in support of the application. The application explained that disclosure of the Confidential Material, which included information about security arrangements, would prejudice the rights of the Claimant, his family, and others under any/all of ECHR articles 2, 3 and 8.

5. The CPR makes general provision for public access to court documents. The general position for all proceedings, not just those governed by Part 54, is that once a defendant's Acknowledgement of Service or Defence has been filed, any person may ask for and obtain copies of the parties' statements of case: see CPR 5.4C(1) and (3). However, the rules also permit the court to vary that position. CPR 5.4C(4) states:

> "(4) The court may, on the application of a party or of any person identified in a statement of case –
>
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
>
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;

> (c) order that persons or classes of persons may only obtain a copy of statement of case if it is edited in accordance with the directions of the court; or
>
> (d) makes such other order as it thinks fit."

6. This power was the premise of the Claimant's application to the extent that he invited the court to order that any person not a party to the proceedings who applied under CPR 5.4C to obtain a copy of the Claimant's Statement of Case, should, in the first instance, be provided with a copy of the Open Summary and not a copy of the Confidential Statement. Any application to obtain a copy of the Confidential Statement would need to be made on notice to the parties to the claim. This was with a view to ensuring that the Claimant's challenge to the legality of the arrangements in place for his security could be determined without exposing information that might impair the security provided for him and for other significant public figures.

7. The court will, when good reason is shown, exercise its power under CPR 5.4C(4) to restrict access to documents held on the court file. However, the court must be satisfied that any restriction imposed represents the minimum necessary derogation from the default position. When called on to exercise the power under CPR 5.4C(4), the court must strike a balance between the public interest in open justice – that the court should do its business in public and members of the public should have access to basic information about claims brought to court – and any particular interests of the parties or others that might weigh in favour of more limited access to information.

8. Having considered the claim and the documents filed in support of the Application Notice, I asked the Claimant to file a schedule listing the specific parts of the Confidential Statement that he contended would give rise to prejudice, if made public. That schedule was filed on 27 October 2021. From that time the parties have liaised with a view to establishing a common approach to which information needs to be subject to some form of protection, and why. That process extended over a number of months.

9. The outcome was a new application, this time made by both parties, in an Application Notice dated 16 February 2022. This is the application now before me. The order the parties now seek is as follows:

> "1. The redactions in the Redacted Material (as defined in Section 10 below) are allowed.
>
> 2. No non-party shall obtain a copy of the Confidential Material (as defined in Section 10 below) from the court's records.
>
> 3. A non-party seeking access to documents from the Court's records shall only be permitted to obtain a copy of the Redacted Material.

> 4. The parties shall refer to the persons identified in the Confidential Schedule to the Order by the ciphers set out therein in any and all open hearings and any and all publicly accessible documents. Until further order, the publication of the names of the persons identified in the Confidential Schedule, or any particulars or details which may lead to their identification in connection with these proceedings, is prohibited.
>
> 5. Any application by any non-party to vary the terms of paragraphs 2 to 4 of this Order shall be made on no less than seven days' notice to the parties.
>
> 6. The Defendant shall file an Acknowledgement of Service, Summary Grounds of Resistance and any accompanying application for an equivalent Order in respect of those summary grounds by 4:30pm on 4 March 2022 …"

The material part of section 10 of the Application Notice further explains the situation as follows:

> "This application has been prepared by the Claimant but is filed on a joint basis, together with the Defendant as an applicant.
>
> On 20 September 2021 the Claimant filed a claim for judicial review challenging the arrangements for the provision of State security when he is in the UK. The parties are agreed that, in principle, it is necessary to restrict access to some confidential information in documents filed in support of the claim. By this application, confidentiality protections are sought in respect of the following documents of the claim: (a) the Confidential Statement of Facts and Grounds: (b) the First Confidential Witness Statement of The Duke of Sussex and exhibits; (c) the First Confidential Witness Statement of Tim Robinson OBE and exhibits; (d) the First Confidential Witness Statement of X and exhibits; (e) the Confidential Schedule to the Order; (f) the Claimant's Confidentiality Schedule; (g) the Defendant's Confidentiality Schedule; and (h) the parties' skeleton arguments and application bundle for the purpose of this hearing (together, the "Confidential Material").
>
> In relation to the (a) – (d): the confidentiality sought is limited to the redactions made to those documents and the ciphers that have been applied. The confidentiality protections are sought in respect of the following categories of information, which are indicated by colour-coded highlighting of the Confidential Material. The inclusion of a category in the list below does not connote acceptance of the category or the related redactions by the parties to this application …

> (i) the level of threat assessments and persons for whom they have been carried out …
>
> (ii) the protective security arrangements, movement, lifestyle or areas of vulnerability of the Claimant and his family …
>
> (iii) the protective security arrangements applicable to persons other than the Claimant, including those whose protected security is considered by RAVEC …
>
> (iv) names of serving protection officers, remembers and staff of RAVEC and other names and email addresses on data protection grounds …
>
> (v) specific protective security tactics …
>
> (vi) financial information relating to protective security … and
>
> (vii) private information of others which is, in any event, not relevant to the legal issues in the claim …"

B. Decision

(1) The application to edit the Confidential Statement of Facts and Grounds

10. The parties have, by reference to the above categories, considered the contents of the Confidential Statement and the witness statements and exhibits, and have identified the parts of these documents falling within those categories.

11. So far as concerns the Confidential Statement the parties' application is to the effect that I should exercise the power to edit at CPR 5.4C(4)(c) so that were any non-party to request the court to supply a copy of the Confidential Statement, that person would be provided with a copy of the edited version. If the person wished to obtain a copy of the unedited Confidential Statement she would have to make an application on notice to the parties, which would then be decided by the court on its merits.

12. I accept that the categories identified by the parties do identify matters that should, at least *prima facie*, be edited from any publicly available version of the Confidential Statement. I say *prima facie* because any person will still be able to make an application under CPR 5.4C to be provided with an unedited version of the Confidential Statement and on that application to contend that some or all of the passages that are for now edited, should be made publicly available.

13. The principle of open justice encapsulates important public interests. The courts should, to the full extent possible, work in public. This fosters public confidence in the integrity of judges and the judicial process. This objective is served by public access to court documents. Proper public scrutiny of the judicial process requires that the public has access to information about claims litigants bring to court. CPR 5.4C,

which provides for the possibility of public access to statements of case, is one means to this end. Both parties referred me to my judgment in *R(Yar) v Secretary of State for Defence* [2021] EWHC 3219 (Admin). In that case, taking account of the leading authorities (*R(Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] QB 618 and *Dring v Cape Intermediate Holdings Ltd* [2020] AC 629), I summarised the position as follows:

> "8. … when all other matters are equal, requests by non-parties for copies of documents that have been placed before a judge or referred to in proceedings in some material way in open court ought to be allowed. However, the specific circumstances of each application must be carefully considered to determine whether the default position should be reflected in the final order on the application. Toulson LJ's "default position" is just that, no less but no more.
>
> 9. As to which specific circumstances may be material, both *Guardian News and Media* and *Dring* are authority for the proposition that the reasons for the request could be relevant to whether the court's final decision on the application corresponds to the "default position". In *Dring* the court stated, "it is for the persons seeking access to explain why he seeks it and how granting him access will advance the open justice principle". Both courts also assumed that in this regard, journalists would be better placed than others: see *Guardian News and Media* per Toulson LJ at paragraph 85; and *Dring* per Baroness Hale at paragraph 45. Both judgments are binding on me. Nevertheless, some care is required. *First*, the premise of the open justice principle is that it is in the public interest for those who are not parties to proceedings to have access to documents used in court so as to better understand the proceedings. This purpose is pursued regardless of whether the person making the request is a journalist. *Second*, it seems optimistic (or possibly unrealistic) to assume that in every instance where the request is made by a journalist the objective of the open justice principle will be better or more affectively achieved through material that the journalist might publish, other than in the loosest sense. Although a court ordering provision of a document to a journalist (or any other person) might in principle impose conditions on the use that could be made of the information (for example, in exercise of the power at CPR5.4C(4)), in practice it would be invidious for any court to attempt to use that power to distinguish between journalistic purposes that further the open justice principle and those that might not, let alone to encourage how the former might be pursued.
>
> 10. … it seems to me that in most instances the primary relevance of the fact that the person requesting documents is a journalist seeking the material in pursuit of her work, will be as

> counter to any claim that the documents were sought for some purpose that would harm the legitimate interests of others, whether parties to the litigation or other non-parties.
>
> 11. Apart from this, the other matter that may affect the outcome otherwise produced by the default position will be the possibility of prejudice consequent on disclosure; either prejudice to one or both of the parties to the claim; or to other non-parties; or to some identifiable public interest."

14. The latter point was a reference to the judgment of Baroness Hale in *Dring*, at paragraph 46. In the present case, the parties' proposal to edit the Confidential Statement is appropriate. The derogation from the open justice principle consequent on the editing requested is marginal. The matter in issue between the parties is the legality of decisions on the arrangements to be made for the Claimant's security. The legality of those decisions (the in-principle decision taken in February 2020, and the decision in 2021 on the specific arrangements for the Claimant's security during a visit to the United Kingdom in June and July 2021) is challenged on four public law grounds: (1) that the relevant policy was applied too rigidly; (2) that regard was not had to relevant considerations; (3) that the decisions were unreasonable in the *Wednesbury* sense of the word; and (4) that the Claimant was prevented from making effective representations prior to each decision because he did not have enough information about RAVEC's criteria for provision of security and did not know who the decision-makers were. Removal from the Confidential Statement of the details the parties say should be edited, will not prevent any person understanding either the key matters that give rise to the litigation, or the issues that the court will be called on to decide.

15. Conversely, editing that information out will avoid the risk that putting information into the public domain concerning security arrangements made on past occasions, and the general approach to whether and if so what arrangements should be made, may impair the effectiveness of arrangements in place now, or which may be put in place in the future. In some instances, the risk arising is obvious from the description of the category of information. This is so for each of categories (i) to (v). Information about these matters would self-evidently be of interest to anyone wishing to harm a person within the scope of the security arrangements and would assist them to piece together previous practice with a view to anticipating present or future security provision. I explain this conclusion in more detail in the Confidential Annex to this judgment. All the matters the parties invite me to edit from the Confidential Statement fall within categories (i) – (v). The Confidential Statement does not include any information within categories (vi) or (vii).

(2) The application so far as it concerns the witness statements and exhibits

16. The parties have also identified passages in the witness statements and exhibits which comprise information within the categories listed in the Application Notice (see at paragraph 9 above). So far as concerns these documents, the draft order is to the effect that the passages identified should be redacted, and that any person requesting a

copy of any of these documents from the Court records should be provided only with the redacted version.

17. The CPR makes specific provision for statements of case: the specific power at 5.4C(4) pre-emptively to edit statements of case. But that power is not expressed to extend to any other document on the Court record. That may not rule out the possibility of applying an editing process to other documents (whether pursuant to other powers under the CPR or in exercise of the Court's inherent jurisdiction) as and when an application under CPR 5.4C(2) is made. But this is not a matter that needs to be resolved at this stage.

18. For now, other steps are sufficient to hold the ring. The CPR provides (a) that a non-party may obtain documents on the Court record other than statements of case, only with the court's permission (CPR 5.4C(2)), and (b) that an application must be made for that purpose (CPR 5.4D). For now, it is sufficient to require, in exercise of the power at CPR 5.4D(2), that any application for permission to obtain a copy of any of the witness statements or exhibits filed by the Claimant should be made on notice to the parties. This will ensure that neither the witness statements nor the exhibits will be provided to any non-party without full consideration of the merits of the position.

19. As a means of reinforcing this protection, and having regard to a provision that featured in the application made by the Claimant in September 2021, I suggested the parties agree an order to the effect that they would not, without permission of the court, provide to any non-party any copy of any witness statement or exhibit filed in these proceedings. The parties agreed to this and the order to be made consequent on this judgment will contain provision to that effect.

(3) The request for anonymity, Witness X

20. The Claimant requests anonymity for one person who has filed a witness statement in the proceedings. The Defendant does not oppose the application. By CPR 39.2(4) the court must anonymise a witness if it considers it necessary to secure the proper administration of justice and to protect the interests of the witness. I accept that that requirement arises for the witness concerned, who has been identified as Witness X. An order protecting his anonymity will be made. The reasons for this conclusion are set out in the Confidential Annex to this judgment.

(4) Irrelevant evidence

21. I asked the parties to make submissions on the relevance of certain parts of the evidence filed in support of the Claimant's claim: one paragraph in the Claimant's witness statement; four paragraphs in the witness statement filed by Mr Robinson; and passages in five documents exhibited to the Claimant's witness statement. My concern was that these matters were irrelevant or duplicative. Pursuant to CPR 32.1 the court has the power to give directions to control evidence in proceedings which includes the power to direct that a witness statement or exhibit be re-served omitting irrelevant or duplicative material.

22. The Claimant accepted that one document was duplicative, and that a further document was irrelevant. These documents need not form part of the evidence in this

case. The relevance of one of the five documents was satisfactorily explained and need not be further considered in this judgment.

23. What remained in dispute was (a) the relevance of passages in two documents already contained in the exhibit to the Claimant's statement; (b) whether the Claimant should have permission to add to the exhibit an additional document, produced during the private part of the hearing; (c) the relevance of paragraphs in the Claimant's witness statement and Mr Robinson's witness statement. The Claimant's submission was that since the litigation is at an early stage (time has not yet come for the Secretary of State to file her Acknowledgement of Service and Summary Grounds of Defence), I should be cautious before forming any view that evidence filed is irrelevant. Such a decision might be proved wrong as the litigation progressed. For example, information that appeared irrelevant might become relevant in light of the defence to the claim. The Claimant also submitted I should not attempt to draw fine distinctions between relevant and irrelevant matters within a single document. Rather than attempt such a task it is better (so the submission went) to leave all evidence in place and assess the matter in the round when the time comes for the final decision on the claim.

24. I accept that in principle a wait and see approach will be appropriate in many instances. However, much depends on the nature of the claim and the issues arising. It is important that this is a claim for judicial review. In these proceedings the court only assesses the legality of a decision by reference to the well-known public law principles. The court is not a finder of fact. Moreover, the primary focus is usually limited to matters such as what the decision-maker did, how the decision was taken, and the reasons for the decision. This makes it easier, even at an early stage in litigation, to take a realistic view on whether or not evidence is relevant.

25. There is much less to be said for the submission that evidence already filed may turn out to be relevant in light of the defence to the claim. In this case there has already been detailed pre-action correspondence. That has helped identify the nature of the defence to the claim. In any event, if the defence to a claim requires further response from the claimant, including additional evidence, the claimant has the right to apply to file evidence in reply. There is no need to file evidence when the claim is commenced only on the off-chance that later in the proceedings it might become relevant. It may just as likely never become relevant.

26. On consideration of the matters in dispute I have concluded that the evidence filed in support of the claim does include irrelevant evidence which for that reason is inadmissible and should be excluded from the proceedings. The detail of my reasons is in the Confidential Annex to this judgment.

27. After the draft of this judgment went to the parties for the usual purpose of checking for typographical or other minor errors, the Claimant volunteered further written submissions to the effect that reasons for my conclusion that irrelevant evidence had been filed should appear in this part of the judgment, not the Confidential Annex. I do not accept this submission. Submissions on the relevance issue were made in the part of the hearing that took place in private because any other course would have defeated the purpose of the exercise. The Claimant did not suggest otherwise. The course the Claimant now suggests would require the publicly available part of the judgment to include reference to the substance of the irrelevant information. That too would defeat the purpose of the exercise while serving no public interest.

28. Legal proceedings do not exist for the purpose of permitting parties to put irrelevant matters in the public domain, and the court must be astute to ensure that proceedings, legitimately pursued, do not become the occasion to publicise irrelevant material. The Claimant relies on the open justice principle. But no part of that principle requires irrelevant material be the subject of a reasoned public judgment simply for the purposes of explaining why it is irrelevant and ought not to have been part of the proceedings at all.

29. Next, the Claimant relies on the fact that the irrelevant material, having been excluded from the proceedings, would no longer fall within the provision to be included in the Order consequent on this judgment that the parties will not, without permission of the court, provide to any non-party any copy of any witness statement or exhibit filed in the proceedings. That submission is correct so far as it goes, but it says nothing to support the contention that irrelevant material need be the subject of detailed consideration in a public judgment, and for the avoidance of doubt, nothing in this judgment, and nothing that has occurred in these proceedings provides reason (for the Claimant or anyone else) to disclose the material now excluded from these proceedings.
