Neutral Citation Number: [2021] EWHC 2566 (Admin)

Case No: CO/2029/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th September 2021

Before :

THE HONOURABLE MR JUSTICE DOVE

- -

Between :

FF	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
- and -	
Prince Nasser Bin Hamad Al Khalifa of Bahrain	**Interested Party**

- -

- -

Tom Hickman QC and **Isabel Buchanan** (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Robin Tam QC and **Saara Idelbi** (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 29th June 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE DOVE

Mr Justice Dove :

The Facts

1. In February 2011 the claimant was a citizen of Bahrain who took part in a peaceful protest at the Pearl Roundabout in Manama. During the protest he was assaulted by the police and then arrested and held without charge. Whilst he was detained, he was physically abused and tortured. He was released and subsequently detained again and once more mistreated. Later, he was convicted by a military court for his involvement in this protest. Ultimately, on the basis that he was convinced that his life was in danger, the claimant left Bahrain and came to the UK where he claimed and was ultimately granted refugee status.

2. It was reported that the interested party was personally involved in the torture that detainees who were held after the protests in February 2011 were subjected to. Further reports and allegations of torture, along with widespread human rights abuses by the Bahraini authorities in response to the 2011 protests were contained in reports from Human Rights Watch. These observations included, again, identifying the involvement of the interested party in the direct infliction of torture. Reports of systematic torture and the involvement of the interested party in it were published by the Bahrain Centre for Human Rights in August 2011. In November 2011 the Bahrain Independent Commission of Inquiry published its report, having been commissioned to undertake an independent inquiry in relation to the events of February and March 2011. This report confirmed the Bahraini Government's use of systematic torture and other forms of abuse of detainees.

3. The claimant has for many years engaged in efforts to take action against the interested party in relation to his concern that the interested party was involved in human rights abuses. He has worked to take steps to hold the interested party accountable for his actions, in particular following the February 2011 protests. On 5th July 2012, the European Centre for Constitutional and Human Rights, a German organisation, provided the Director of Public Prosecutions ("the DPP") with a dossier of evidence implicating the interested party in the torture of detained prisoners in April 2011, and encouraging the instigation of a criminal investigation. That report was also passed to SO15. SO15 are the Counter Terrorism Command of the Metropolitan Police Service. Further, in the summer of 2012 the claimant's solicitors contacted the Director of Public Prosecutions seeking consent to issue an arrest warrant in relation to a private prosecution of the interested party. An issue was taken by the CPS in relation to the interested party having immunity from prosecution, but following the issuing of a judicial review in relation to that decision it was ultimately agreed that the interested party did not have any such immunity.

4. As part of the context for the present proceedings, correspondence ensued between the claimant's solicitors and SO15. In particular, on 12th November 2014, SO15 wrote to the claimant's solicitors indicating that they had no information to suggest the interested party was currently in the UK, and that they would not be conducting an investigation into him. The letter continued, "as detailed in the joint CPS/SO15 guidelines on the investigation of Genocide, Crimes against Humanity, War Crimes and Torture we will refer [the interested party] to the United Kingdom Border Force for potential immigration action."

5. On 20th March 2015, the claimant provided further evidence to SO15. On 27th May 2016, SO15 responded indicating that the view had been formed that there was insufficient evidence to provide a realistic prospect of a prosecution against the interested party. In July 2016, the claimant's solicitors wrote to SO15 asking whether or not the case had been passed to the defendant in accordance with the SO15 policy. On 10th August 2016, SO15 advised that "a copy of our report and findings will be passed to the Special Cases Department of the National Security Directorate of the Home Office for their consideration."

6. On 28th October 2016, the claimant wrote to the defendant, and on the basis of the information contained within the correspondence, which dealt with amongst other matters those which are set out above, requested that she exclude the interested party from the UK. On 22nd November 2016, the defendant responded to the claimant in the following terms:

> "It is the general policy of the Home Office not to discuss or comment on an individual's immigration matters with a third party. We have obligations under the Data Protection Act and in law generally to protect this information. I am therefore unable to comment on Prince Nasser.
>
> The Home Secretary has the personal power to exclude from the UK a foreign national whose presence would not be conductive to the public good. Exclusion powers are very serious and no decision to exclude is taken lightly. All exclusion decisions must be justified and based on sound evidence, and in all cases the Home Secretary must exercise her power in a way that is considered reasonable, proportionate and consistent. In making a decision, the Home Secretary would also take into account the views of relevant departments including the Foreign and Commonwealth Office and the Department of Communities and Local Government.
>
> The Government will continue to look at cases that are brought to its attention and act in accordance with the individual circumstances involved."

7. On 13th January 2017, the claimant sent a pre-action protocol letter which was responded to by the defendant on 10th February 2017. On 25th May 2017, a further letter before claim was sent by the claimant including a request for information under the Freedom of Information Act 2000 ("the FOIA request"). There was a lengthy period of delay in dealing with that request, but a response was finally sent on 26th February 2021. In the meantime, the claimant successfully judicially reviewed the refusal to grant him full representation funding for this claim, following which a further letter before claim was sent on 27th March 2020. This was responded to on 28th April 2020.

8. On behalf of the defendant, evidence has been filed by Ms Claire Earl, who is the Head of the Out of Country Casework Team in the Home Office's Special Cases Unit (the "SCU"). The SCU is the immigration arm of the Homeland Security Group. Its role is to manage some of the most significant, high-harm and high-profile immigration,

asylum and citizenship cases, including those involving suspected terrorists, extremists, war criminals and individuals involved in organised crime. In her evidence Ms Earl explains the context of the defendant's policy (set out below) entitled "Exclusion from the UK" which covers the use of the defendant's power to issue an exclusion direction.

9. Ms Earl also addresses in her evidence the claimant's request that the defendant gives an exclusion direction in relation to the interested party. It appears from her evidence that on 10th August 2016, SO15 told SCU by email that the claimant's solicitors had sent a dossier of material to the CPS who had referred the matter to the Metropolitan Police. The dossier contained material related to the allegations against the interested party set out above. SO15 asked SCU if they would like sight of the report that they had prepared in relation to the material, but SCU did not ask for the report and requested that their contact details not be given to the claimant's solicitor. Ms Earl explains that she understands that on 11th October 2016, SO15 explained to the claimant's solicitors they could not provide SCU contact details to them and they were referred to the Government's website for advice on how to bring the matter to the attention of the defendant. Although SO15 told the claimant's solicitors that they had sent SCU their report and findings, those were neither asked for nor received by SCU. On 28th October 2016, the claimant wrote to SCU requesting that the interested party be refused permission to enter the UK; there were no enclosures accompanying the letter. Whilst a number of enclosures were sent by the claimant with his letter before action dated the 13th January 2017, in the absence of any copy of the documents held by SO15, Ms Earl is unable to confirm if the documents sent in the letter before action were the same as the dossier referred to in the earlier correspondence by the claimant. On 22nd November 2016, SCU responded to the claimant as set out above.

10. In her evidence, Ms Earl goes on to explain that it is the defendant's standard practice to treat information about an individual's immigration affairs as confidential on the basis that every individual has a reasonable expectation of privacy relating to this personal information, and the defendant considers it would be a breach of data protection principles to reveal information about an individual's immigration affairs without their consent in this context. Thus if the defendant receives an enquiry from a member of the public in relation to another person's immigration status, or any application they may have made, that member of the public will not be informed about the other person's immigration matters, or whether any or if so what immigration action may be being taken in relation to them. Whilst in May 2009 the then Home Secretary published a list of individuals who were the subject of an exclusion direction, Ms Earl is unable to identify any reason for that disclosure other than a statement to the House of Commons concerning individuals encouraging violence or hatred in support of their ideology, and in respect of whom the then Home Secretary said she would in future consider whether it would be in the public interest to disclose that such an individual had been excluded. This is the only time that publication has been made of the identity of individuals who are the subject of exclusion directions.

11. Ms Earl explains in her evidence that the vast majority of exclusion cases originate from referrals from other Government departments and the police. She accepts that the defendant can and does consider information received from members of the public

concerning immigration matters, including for example that obtained via the defendant's immigration online and telephone reporting tools which enable members of the public to report immigration and border crime. Information received from the public in this way is the subject of initial assessment by officials to give consideration as to whether immediate action is required, and thereafter a report would be referred to Home Office officials to consider how, if at all, it should be taken forward. The individual making the report will not be told what has happened. Ms Earl expresses the concern that if a request for an exclusion direction were to trigger a requirement for a specific consideration by the defendant personally the process could become open to abuse, for instance by those seeking to use the process for national political point scoring or as a means of furthering private or family disputes.

12. In relation to the particular request made by the claimant FF, Ms Earl's witness statement records as follows:

> "25. Accordingly, even though FF made a request that the Secretary of State give an exclusion direction in relation to Prince Nasser, it would be contrary to this standard principle for the Home Office to tell FF what immigration action has been taken in relation to Prince Nasser, or what consideration has been given to FF's request. The Home Office takes the view that this must apply even though FF has issued legal proceedings concerning his request for an exclusion direction; the principles of privacy and confidentiality in relation to immigration affairs would be nearly meaningless if a third party could discover the outcome of their request simply by issuing proceedings.
>
> 26. Consequently, although I can confirm that officials looked at FF's request, I cannot say anything more about what view has been formed about the request or whether or not any immigration action has consequently been contemplated or taken in relation to Prince Nasser."

Policy

13. As alluded to above, the defendant has a policy entitled "Exclusion from the UK" ("the Exclusion Policy") which addresses the defendant's power to make a decision to make a direction to exclude a person from the UK on the ground that it is conducive to the public good to do so. The quotes set out below are taken from the most recent Exclusion Policy published on 31st December 2020; no material differences between this policy and any earlier policy were alluded to during the hearing. As set out above, exclusion of a person from the UK on conducive grounds is normally exercised in circumstances involving national security, criminality, international crimes (such as war crimes or crimes against humanity or genocide), corruption and other forms of unacceptable behaviour.

14. The policy contains material in relation to the consideration of a decision to exclude an individual from the UK. The policy of particular relevance to the issues in the present case provides as follows:

"Overview

A decision to exclude an individual from the UK is made by the Home Secretary (or Minister of State acting on behalf of the Home Secretary) following a recommendation. This must set out why exclusion is appropriate, either on the grounds that it is conducive to the public good or on the grounds of public policy, public security or public health.

Recommendations to exclude must be made on the facts of the particular case and must set out how the relevant test is met along with the evidence you have considered to support your conclusions. Where a recommendation to exclude is based on the public policy test, you must clearly set out how the decision is in line with Regulation 27 and the principles set out in Section 1 of the EEA Regulations 2016.

…

Assessing Cases

A recommendation to exclude an individual from the UK must be based on reliable evidence. This might include the use of criminal record checks, particularly where the recommendation is to exclude the person on the basis of criminality in the UK or overseas. In other cases, the evidence may not be so straightforward and a greater degree of scrutiny and assessment may be required.

You must consider all of the evidence available to you and give appropriate weight when deciding whether to recommend exclusion. For example, rumours or uncorroborated tip-offs by members of the public are likely to carry less weight than an assessment provided by a professional body or evidence supplied by another government department. However, where evidence has already been assessed by law enforcement agencies or similar organisations, it will usually be reasonable to rely on that assessment without undertaking your own consideration of the reliability of the underlying evidence.

…

An exclusion decision must be reasonable, consistent with decisions taken in similar circumstances, and proportionate. There must also be a rational connection between exclusion of the individual and the legitimate aim being pursued, for example safeguarding public security or tackling serious crime.

If, having consulted with any relevant stakeholders and senior caseworkers, you intend to submit to the Home Secretary or Minister of State with a recommendation on exclusion, you

> must make sure your submission clearly sets out the options, with the evidence to support your conclusions and recommendation."

15. Another policy which featured during the course of argument is the policy issued by the CPS entitled "War Crimes/Crimes Against Humanity Referral Guidelines". The relevant policy referred to is that which was updated on 30th September 2019. The introduction to the policy refers to SO15 as being responsible for the investigation of allegations of war crimes, crimes against humanity, genocide and torture and that the Counter Terrorism Division ("CTD") of the CPS has responsibility for prosecuting such crimes. The policy set outs the approach to be taken to investigating such allegations. In particular, in relation to the investigation to be undertaken by SO15 following referral by a private individual, lawyer or other organisation the policy provides as follows, at page 6:

> "3. If SO15 decides to take on the investigation in a case referred by a private individual, lawyer or organisation, the individual/organisation will be informed that SO15 are willing to take on the investigation. From that point all investigative decisions and the decision whether or not to arrest a suspect will be made by SO15 and any decision on prosecution will be made independently by CTD in accordance with the Code for Crown Prosecutors. A copy of the Code can be found on the CPS website www.cps.gov.uk
>
> 4. If such an investigation is not possible SO15 will inform the victim/s of the decision and the reasons for it as soon as reasonably practicable in accordance with the Victim's code. Any private individual, lawyer or individual who has submitted evidence on behalf of the victims will also be informed in writing.
>
> 5. If appropriate SO15 should refer the allegation to the Special Cases Department of the National Security Directorate of the Home Office for potential immigration action and inform them of the reasons why a safe and proportionate investigation is not feasible."

Ground 1: submissions and conclusions

16. It is worthwhile observing that the issue engaged under ground 1 has evolved during the course of these proceedings, in particular as a result of the exchange of pleadings. The claimant crystallises the legal issue arising in relation to ground 1 in paragraph 14 of his skeleton argument as follows: "Are the defendant's officials required to consider the material and representations that have been provided to the defendant by SO15 and by the claimant to assess whether the conditions for exclusion might be satisfied?" There was no demur from the defendant in relation to this formulation of the issue to be determined.

17. The claimant's submission is not that the defendant must personally consider every representation made, since that would go behind the policy of only involving the

defendant in making a personal decision following a recommendation made to her by one of her officials. However, the claimant contends that pursuant to the policy it is necessary for the defendant's officials to consider material submitted to her by an individual in order to determine whether or not a recommendation for exclusion should be made. The exclusion policy requires officials to consider evidence made available to them, and as a straightforward issue of public law the defendant's exclusion policy should be applied to the material which is placed before her. Such an approach is also reflected in the War Crimes/Crimes against Humanity Referral Guidelines which specifically refers to SO15 passing material to the defendant for consideration of immigration issues arising. The claimant contends that there is no basis for the contention that the claimant's approach would lead to the overburdening of officials, which in any event ignores the cardinal point, namely the need for the defendant to comply with her own policy.

18. In response to these submissions the defendant contends that there is no duty on the defendant to undertake a formal consideration of whether to make an exclusion direction on the petition of a member of the public. Following the clarification of the essence of ground 1, the defendant accepts that the Home Office could not simply discard information received from a third party concerning a possible direction for exclusion out of hand. The defendant seeks to place that acceptance into an analysis of the type of consideration that might take place. The defendant contemplates a three-stage process: at stage 1 consideration will be given to material provided by an individual in the sense that it would be acknowledged, read and triaged by officials, but would not generate any form of exclusion decision; at stage 2 there would be formal consideration by officials as to whether or not a recommendation should be made to the defendant; stage 3 is the personal consideration by the defendant of any recommendation as to whether or not to give an exclusion direction.

19. The defendant points out that, as set out in Ms Earl's evidence, stage 1 consideration has been given to the material passed to the defendant by the claimant. However, the policy does not specify the point at which it would be appropriate to consider recommending exclusion, and in truth the policy only applies at stage 2 as set out above, since it refers to a recommendation to exclude an individual being "based on reliable evidence". The defendant has a broad discretionary power and this should be recognised by any reading of the applicable policy. Furthermore, the defendant cannot be compelled by a third party to proceed to stage 2, since she owes no legal duty to a third party (on the basis that immigration action is a matter between the defendant and the individual whose immigration status is at stake). The defendant contends that if a duty to proceed to stage 2 consideration arose at the instance of a third party the policy would be unworkable: the defendant would be obliged to devote significant resources to addressing requests which were not credible or were vexatious.

20. Prior to engaging directly with these submissions, it is worthwhile making some observations in relation to the legal framework within which the defendant's power to make an exclusion decision resides. The Immigration Rules paragraph 9.2.1 record the defendant having the power to personally direct that an applicant be excluded from the UK. There was some discussion at the hearing as to whether or not the power to exclude was an exercise of the prerogative, or whether it derived from the Immigration Act 1971 and the immigration rules. On the one hand, the claimant draws attention to the case of *R (Munir) v SSHD* [2012] UKSC 32; [2012] 1 WLR

2192 in which Lord Dyson made clear at paragraph 26 of his judgment that the power to make the immigration rules derives from the 1971 Act itself and is not an exercise of the prerogative. Apart from an express saving contained within section 33(5) of the 1971 Act in relation to enemy aliens, all powers of immigration control fall to be exercised pursuant to the statute. On this basis it was contended that the power to make an exclusion decision was not a prerogative power, but one which existed under the rules as made pursuant to the 1971 Act.

21. By contrast the defendant places reliance upon *R (G1) v SSHD* [2012] EWCA Civ 867; [2013] QB 1008 in which at paragraph 11 of the judgment of Laws LJ (with whom the other members of the court agreed) he recorded that it was common ground that by virtue of the prerogative the Crown had power to exclude an alien from the UK unless such power had been abrogated or modified. Similarly, in *R (L1) v SSHD* [2015] EWCA Civ 1410 Laws LJ observed at paragraph 13 of the judgment that an order excluding a person from the UK was not made under statute but under the prerogative. Ultimately the question of whether or not the power to issue an exclusion direction is one exercisable under the prerogative or by virtue of the immigration rules does not fall to be decided in the present case, on the basis that it is accepted on all sides that questions in relation to the power to issue an exclusion direction are justiciable, and the answers to both grounds 1 and 2 in the present claim do not turn on whether or not the source of the power is the 1971 Act or the prerogative.

22. In my view, the starting point for the consideration of the issues raised under ground 1 is the legal effect of the fact that the defendant has a published policy in relation to the exercise of the power to issue an exclusion decision. The effect of a decision-maker having a policy in relation to decisions that are to be reached relating to subject matter covered by the policy was set out by Lord Wilson in *Mandalia v SSHD* [2015] UKSC 59 ; [2015] 1 WLR 4546 at paragraph 29 as follows:

> "The legal effect of the policy
>
> 29. In 2001, in *R v (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 356, para 7 Lord Phillips of Worth Matravers MR, giving judgment of the Court of Appeal, said: "The lawful exercise of [statutory] powers can also be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such a policy gives rise." Since 2001, however, there has been some departure from the ascription of the legal effect of policy to the doctrine of legitimate expectation. Invocation of the doctrine is strained in circumstances in which those who invoke it were, like Mr Mandalia, unaware of the policy until after the determination adverse to them was made: and also strained in circumstances in which reliance is placed on guidance issued by one public body to another, for example the Department of the Environment to local planning authorities: see *R (WL (Congo)) v Secretary of State for the Home Department* [2010] 1 WLR 2168, para 58. So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing,

> which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]:
>
> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.""

23. The question of interpretation of a policy adopted by a decision-maker is a question of law (see *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, at paragraphs 18 and 19, in the judgment of Lord Reed). Applying these principles to the circumstances in the present case the following emerges. Firstly, it is clear from the terms of the policy that the potential sources for the process of reaching an exclusion decision include even such material as "uncorroborated tip-offs by members of the public". In other words the policy contemplates giving consideration to material which has been referred to the defendant from individual members of the public, their representatives or other organisations. Whilst the policy does not directly facilitate such communication, nor does it explicitly encourage referral by members of the public, it does not suggest that where such referral occurs the material brought to the attention of the defendant will be disregarded unread. Thus, the defendant's approach in the skeleton argument whereby she accepted that it was not open to her to simply discard information obtained from a third party was a proper concession based upon her own policy.

24. Secondly, I can see no warrant for the three-stage process contemplated by the defendant in argument. There is nothing in the policy to suggest some form of preliminary triage of material, independent of consideration being given to the application of the policy. That said, as the claimant observes in paragraph 21 of his skeleton, no doubt requests lacking in credibility or which were vexatious would be quickly dismissed, along with others that had little or no connection with the substance of the policy or which clearly could not justify a recommendation for exclusion. Reaching decisions on these weak or tenuous cases nonetheless involves an application of the policy. The consideration of them may be short-lived and may lead to their early elimination as candidates for a potential recommendation for exclusion to be considered by the defendant personally. The consideration of them is, nonetheless, in accordance with the application of the defendant's policy in that connection.

25. I am unimpressed by the defendant's expressed concerns in relation to being inundated with requests from individuals and others for exclusion decisions. It is clear that the policy has been published for a significant period of time including within it the reference to consideration being given to tip-offs by members of the public. This has not led to any onerous administrative burden. As already observed, vexatious requests or those lacking any conspicuous merit will be speedily disposed of. It is also important to note that Ms Earl's evidence explains that the defendant depends upon

information and intelligence being passed to the Home Office through reports from the public of crimes or other breaches of immigration control using public reporting tools. The use of these means of receiving information has led to the receipt of over 53,000 reports a year. Nothing which has been set out above is inconsistent with what appears to be the general approach of the defendant to the discharge of her responsibilities.

26. Returning to the question posed by the claimant under ground 1, I am in no doubt that the answer should be provided in the affirmative. Considering the material and representations made by the claimant to the defendant in respect of the interested party (or if they had been provided by SO15, the materials provided by them) is a requirement created by the defendant's own policy in relation to the making of exclusion decisions for the reasons already rehearsed. When the claimant's solicitors provided the materials which they did to the defendant they were entitled to expect that, pursuant to the policy, consideration would be given to them. The acknowledgement of their receipt is sufficient to establish that they are to be considered in the light of the policy. That is, in fact, what has occurred according to Ms Earl's evidence. Certainly, no reason for departing from the policy has been indicated. In these circumstances the claimant has established his case in relation to ground 1.

Ground 2: submissions and conclusions

27. The claimant contends by means of ground 2 that he is entitled to be informed by the defendant of whether a decision has been reached in respect of whether or not to make an exclusion decision in the case of the interested party, and also the reasons for any such decision. The claimant's argument starts from the premise that he is the person who has furnished the material which would form the basis of any determination, and that he has a clear and obvious stake in understanding what the defendant has made of the material which he has provided.

28. The claimant seeks to found his submissions on the basis that there is a common law duty to provide reasons to the claimant in the present case in order to explain what action the defendant has taken. The claimant places reliance upon the decision of the Court of Appeal in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71; [2017] 1 WLR 3765. This case concerned the granting of planning permission for the erection of a football stadium on land designated as Green Belt by the defendant's planning committee contrary to the planning officer's recommendation for refusal of the application. In his judgment, Elias LJ explained the background in relation to the giving of reasons in respect of public law decisions as follows:

> "Reasons: the general position
>
> 26. There are powerful reasons why it is desirable for administrative bodies to give reasons for their decisions. They include improving the quality of decisions by focusing the mind of the decision-making body and thereby increasing the likelihood that the decision will be lawfully made; promoting public confidence in the decision-making process; providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, thereby

> facilitating the process of judicial review or the exercise of any right of appeal; and respecting the individual's interest in understanding – and perhaps thereby more readily accepting – why a decision has been made. This last consideration is reinforced where an interested third party has taken an active part in the decision-making process, for example by making representations in the course of consultations. Indeed, the process of consultation is arguably undermined if potential consultees are left in the dark as to what influence, if any, their representations had.
>
> 27. The disadvantage, accepted by Jay J in this case, is that having to provide reasons – particularly where they have to withstand careful scrutiny by lawyers – might involve an undue burden on the decision-maker. Exceptionally, there may be some powerful public interests, such as national security, which could justify withholding reasons, but there is no such competing public interest under consideration here.
>
> 28. Statute frequently, and in a wide range of circumstances, obliges an administrative body to give reasons, although the content of that duty, in the sense of the degree of specificity of the reasons required will vary from context to context. However, absent some statutory obligation, the question whether reasons are required depends upon the common law.
>
> 29. It is firmly established that there is no general obligation to give reasons at common law, as confirmed by Lord Mustill in *Ex p Doody* [1994] 1 AC 531. However, the tendency increasingly is to require them rather than not. Indeed, almost 20 years ago, when giving judgment in *Stefan v General Medical Council* [1999] 1 WLR 1293, 1301, Lord Clyde observed:
>
> "There is certainly a strong argument for the view that was once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions."
>
> 30. In view of this, it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."

29. Whilst Elias LJ was attracted towards a wider submission in relation to the creation in planning cases of a duty to give reasons, save where they were capable of being dispensed with because they were unnecessary, he decided it was unnecessary to determine the appeal upon such a broad basis. In the alternative he determined that there was a duty to give reasons in the circumstances of the case on the basis of a narrower argument, which he articulated as follows:

"58. An important objective of environmental policy is to protect and preserve special features of the landscape and certain important buildings. So special status is given, for example, to areas of outstanding natural beauty, the Green Belt, and listed buildings. They have this status because it is considered that in general their preservation enriches the quality of life. These features are not to be preserved at all cost, but strong reasons, and sometimes very exceptional reasons, will be required to justify interfering with them. For many citizens, a development which has an adverse impact on the countryside or which causes a change in the character of the landscape in their locality, particularly if the development brings in its wake a corresponding increase in noise, traffic and lighting pollution, will be perceived as lessening the quality of their everyday lives. For some third parties, a development of this nature may also have some economic impact if it affects the value of their property. There will obviously be situations where the benefits of a particular development outweigh the environmental disadvantages, and nobody can expect to live in a time capsule. But in my judgment the common law would be failing in its duty if it were to deny to parties who have such a close and substantial interest in the decision the right to know why that decision has been taken. This is partly, but by no means only, for the instrumental reason that it might enable them to be satisfied that the decision was lawfully made and to challenge it if they believe that it was not. It is also because as citizens they have a legitimate interest in knowing how important decisions affecting the quality of their lives have been reached. This is particularly so where they have made representations in the course of consultation. They cannot expect their detailed representations to be specifically and individually addressed, but as participants in the process, they can expect to be told in general terms what the committee perceived to be the advantages and disadvantages of a particular development, and why the former clearly outweighed the latter.

59. In a general sense this may be considered an aspect of the duty of fairness which in this context requires that decisions are transparent. The right for affected third parties to be treated fairly arises because of the strong and continuing interest they have in the character of the environment in which they live. Even if the decision to allow a development does not affect any property or financial interest, it may damage other non-pecuniary interests which affected parties may value equally highly. In my judgment, these are powerful reasons for imposing a duty to give reasons, at least if the reasoning process is not otherwise sufficiently transparent.

> 60. The decision in this case involved a development in the Green Belt and was also in breach of the development plan. Public policy requires strong countervailing benefits before such a development can be allowed, and affected members of the public should be told why the committee considers the development to be justified notwithstanding its adverse effect on the countryside. In my judgment these considerations demand that reasons should be given. Even if there are some planning decisions which do not attract the duty to give reasons, there is in my judgment an overwhelming case for imposing the duty here.
>
> 61. That conclusion is in my judgment reinforced where the committee departs from the officer's recommendation. The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required. As I have said, I would not impose the duty to give reasons on the ground that the committee's decision appears to be aberrant within the principle in *Ex p Cunningham* [1992] ICR 816, but the dictates of good administration and the need for transparency are potentially strong here, and they reinforce the justification for imposing the common law duty."

30. Sales LJ agreed with Elias LJ that a common law duty to give reasons arose in the circumstances of the case of *Oakley*, but he expressed his reasons separately bearing in mind his view that "the common law should only identify a duty to give reasons where there is a sufficient accumulation of reasons of particular force and weight in relation to the particular circumstances of an individual case" (see paragraph 76). Sales LJ expressed his conclusion that a duty to give reasons arose from the circumstances of the case in the following terms:

> "79. Where the public interest in ensuring that the relevant decision-maker has considered matters properly is especially pressing, as in cases of grant of planning permission as a departure from the development plan or in cases of grant of planning permission as a departure from the usual protective policy in respect of the Green Belt, that is a factor capable of generating an obligation to provide reasons. This is because requiring the giving of reasons is a way of ensuring that the decision-maker has given careful consideration to such a sensitive matter. Similarly, where a person's private interest is particularly directly affected by a decision, that may also provide a normative basis for imposition of a duty to give reasons, as exemplified in *Ex p Doody* [1994] 1 AC 531 and *Ex p Cunningham* [1992] ICR 816. In the planning context, I think that there is particular force in this point where the decision

> appears out of line with a natural and reasonable expectation on the part of the public that decisions will comply with the local development plan and with national policy to protect the Green Belt. Although it might be said that decisions to allow development in the Green Belt or contrary to the development plan are not aberrant as such, in that such decisions are not uncommon and cannot be assumed to be irrational, I think that they do give right to an important onus of justification on the part of the decision-maker which, taken with the parallel public interest considerations in such cases, grounds an obligation under the common law to give reasons in discharge of that onus.
>
> 80. In my judgment, the foundation for the identification of a duty to give reasons for the decision of the council in this case is the fact that the decision to grant planning permission appeared to contradict the local development plan and appeared to subvert the usual pressing policy concern that the Green Belt be protected (I think either of these factors alone would be sufficient), which engaged a particular onus of justification on the part of the council which could only be adequately discharged by the giving of a sufficient indication of its reasons for making the decision it did. The structured planning consideration required in this case was more complex than the simple issue of planning judgment which arose in *Ex p Chaplin* 76 P & CR 207. In my view, the fact that the council's decision was contrary to the reasoning and recommendation in the officer's report is not as such a matter which generates an obligation to give reasons; rather, it is something which means that the council cannot refer to the officer's report pursuant to the approach in *Ex p Fabre* 80 P & CR 500 to show that it has discharged the duty upon it, which arose for the reasons to which I have referred."

31. The claimant also relies upon the decision of the Divisional Court in *R v DPP Ex parte Manning* [2001] QB 330. This case was brought by sisters of a person who died of asphyxia whilst being restrained when he was remanded in prison custody awaiting trial. His death was investigated by the police, and at a coroner's inquest a verdict of unlawful killing was returned by the jury on the basis of the manner in which one of the prison officers had held the deceased's head during the incident. The CPS undertook a detailed examination of the available evidence, but it was concluded that whilst there was prima facie case against the officer, there was no realistic prospect of the prosecution being able to establish that excessive force had been used deliberately rather than as the result of an attempt to effect proper restraint which had been frustrated by the struggle with the deceased.

32. The CPS caseworker simply stated in advising the applicant of the decision that there was insufficient evidence to justify a prosecution. The question arose as to whether or not there was a requirement upon the DPP to provide reasons for not prosecuting in

the circumstances of the case. The conclusions of the court in relation to that issue were as follows:

> "33. It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined class of cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroners Act 1988, and if the death resulted from violence inflicted by agents of the state that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry: see *McCann v United Kingdom* [1996] 21 EHRR 97, 163–164, paras 159-164. Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to

> require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require."

33. The claimant further relies upon the case of *R v SSHD Ex parte The Kingdom of Belgium* CO/236/2000 a case concerning extradition of the former head of state of Chile, Senator Pinochet. The challenge in the case was to the defendant's proposed decision not to extradite Senator Pinochet to Spain for him to stand trial on the basis that he was unfit to do so. In particular, the challenge was based upon the entitlement of the Secretary of State to take such a decision without first providing the opportunity to Spain and other requesting states to have sight of the medical report upon which the defendant relied. The requesting states asked that the report be disclosed to them so that they could comment upon its conclusions. Simon Brown LJ, giving the judgment of the Divisional Court, concluded that fairness required that the medical report should be disclosed. He expressed his reasons as follows:

> "When deciding what fairness demands, it is necessary to have regard to the whole context in which the decision under section 12 is to be taken. In my view, fairness requires disclosure in this case for the following reasons. Firstly, the enormity of the alleged crimes. Were it not for that feature, it is clear that the Secretary of State would not have consulted the requesting states or the human rights organisations. Secondly, if the Secretary of State does not extradite Senator Pinochet to one of the requesting states, he will be returned to Chile, and it is likely that he will never be tried for these alleged crimes anywhere. In view of the gravity of the charges, that is a startling result of the exercise of ministerial discretion. It simply serves to underline the monumental importance of the decision that the Secretary of State is poised to make. No doubt that is why he would prefer to disclose the report. Thirdly, the scope of the disclosure now sought is very limited indeed. It is that there should be disclosure to the four requesting states alone, but only on terms that they agree to receive them on terms of confidentiality. The details of these terms would have to be worked out, since the requesting states would clearly need to be at liberty to disclose the report to independent doctors of the relevant disciplines. Fourthly, when one assesses the impact of the proposed limited disclosure, it should also be borne in mind that there has already been the widest possible dissemination of the basic conclusions of the medical report. The whole world already knows that the gist of the report is that Senator Pinochet is unfit to stand trial, because he would not be able to follow proceedings, give intelligible instructions to those representing him on trial, or give a coherent statement of his case. All of that emerges clearly enough from the answers given by the Secretary of State to questions in Parliament on 12 January 2000. The additional disclosure to a very limited class of persons needs, therefore, to be put into its true perspective. Finally, in my view, it is simply not possible

> to assess how likely it is that, following disclosure of the report, the requesting states would be able to make representations on the medical issue that they would not otherwise be able to make, representations which might influence the decision that the Secretary of State has to make.
>
> In my judgment, the cumulative effect of these considerations is that fairness requires disclosure of the report to the limited extent that I have indicated. In reaching this conclusion, I have not overlooked the fact that, as a matter of common law, there was a public interest in maintaining the duty of confidence owed to Senator Pinochet in respect of the contents of the report. But there was a competing public interest in disclosure to the extent that this was necessary to enable the Secretary of State to carry out the consultation exercise fairly, and thereby to discharge his functions under section 12 of the 1989 Act properly. It is for the court to decide how this balance should be struck. I have no doubt that, for the reasons already given, the balance comes down in favour of the limited disclosure that is requested by the applicants in this case."

34. The claimant also places reliance on the decision of the Court of Appeal in *R (Help Refugees Ltd) v SSHD* [2018] EWCA Civ 2098; [2018] 4 WLR 168 in particular at paragraphs 122 and following.

35. In response to these submissions the defendant contends that the claimant is not entitled to reasons in respect of any consideration by her of an exclusion decision in respect of the interested party. Firstly, it is submitted that there is no general or universal duty to give reasons for an administrative decision. Secondly, the defendant submits that the reliance upon the case of *Oakley* is misplaced. The claimant is a third party in relation to any exclusion decision in respect of the interested party, but fairness does not require that reasons are given to him. The factual context of the case of *Oakley* is materially different to that of the present case in that the planning application process gave specific opportunity for third parties to make representations in the decision-making process.

36. The defendant also contends that the present case is clearly distinguishable from the case of *Manning*, in which there was clear and apparently inexplicable inconsistency between two formal decisions, one from a court in the form of the inquest, and the other from the DPP.

37. The defendant submits that access to justice does not provide any basis for a requirement to give reasons, firstly, because if the defendant does not direct the interested party's exclusion there is no decision which could affect the claimant's rights being made and, secondly, because the claimant has no right or expectation under the policy to be able to demand the exclusion of another person such as the interested party. Moreover, the *ex parte Kingdom of Belgium* case also concerned very different and wholly exceptional circumstances. In the present case the interested party's immigration affairs are a matter between the defendant and the interested party, and not part of the public domain: the interested party is entitled to privacy and a reasonable expectation of privacy in respect of his immigration affairs. Thus it is

submitted on behalf of the defendant that this aspect of the claimant's ground 2 is misconceived.

38. The defendant submits that the immigration affairs of any individual, including the interested party, are matters which are confidential as between the defendant and that individual, and that a third party has no basis upon which to be informed of those immigration matters. This is the background to the approach taken explained in Ms Earl's evidence: the defendant does not provide any information on a person's immigration affairs on the enquiry of a third party.

39. Furthermore, the defendant contends that the disclosure of the existence of a decision in relation to the interested party, and the reasons for any such decision, would contravene data protection principles. In response to the claimant's FOIA request the defendant relied upon section 40(5B)(a)(i) of the Freedom of Information Act 2000. The relevant provisions of section 40 of the 2000 Act provide as follows:

> "Personal information
>
> (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
>
> (2) Any information to which a request for information relates is also exempt information if –
>
> (a) it constitutes personal data which does not fall within subsection (1) and
>
> (b) the first, second or third condition below is satisfied.
>
> (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –
>
> (a) would contravene any of the data protection principles, or
>
> (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
>
> (3B) The second condition is that the disclosure of the information to a member of public otherwise than under this Act would contravene Article 21 of the UK GDPR (general processing: right to object processing).
>
> (4A) The third condition is that –
>
> (a) on a request under Article 15(1) of the UK GDPR for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under Section 45(1)(b) of that Act, the information would be withheld in reliance on subsection (4) of that section.

(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies-

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section (1)(a) –

(i) would (apart from this Act) contravene any of the data protection principles or

(ii) would do so if the exemptions in Section 24(1) of the Data Protection Act 2018 were disregarded;

(b) giving a member of the public the confirmation or denial that would have to be given to comply with Section 1(1)(a) would (apart from this Act) Article 21 of the UK GDPR

(c) on request under Article 15(1) of the UK GDPR for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection 4A(a);

(d) on a request under section 45(1)(a) of the Data Protection Act 2018 the information would be withheld in reliance on subsection (4) of that section.

(7) In this section –

"the data protection principles" means the principles set out in –

(a) Article 5(1) of the UK GDPR and

(b) Section 34(1) of the Data Protection Act 2018;

"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

"personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

> "the UK GDPR" has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act)."

40. By virtue of section 3(2) of the Data Protection Act 2018, personal data "means any information relating to an identified or identifiable living individual". Thus, the defendant submits that any decision in relation to the information furnished with respect to the interested party concerning his exclusion from the UK, including a failure to take any decision, would relate to the interested party and amount to personal data about him. Disclosure of the defendant's position in respect of the interested party would contravene the first data protection principle, namely that the processing of any data should be lawful and fair, and if disclosure occurred it would be free from any duty of confidentiality and it would in reality amount to a disclosure to the world at large.

41. In response to these contentions the claimant submits as follows. Firstly, in relation to confidentiality, the claimant relies upon the case of *R (Lord Carlile of Berriew and others) v SSHD* [2014] UKSC 60; [2015] AC 945 in which a number of members of the House of Commons and the House of Lords challenged a decision by the defendant to exclude from the UK an Iranian dissident who was resident in France. The claimant had invited the Iranian dissident to come to London for discussion of human rights and other issues relating to Iran. The defendant, on the advice of the Foreign Secretary, maintained a decision to exclude her on the grounds that her presence in the UK would not be conducive to the public good. The claimant contends that this demonstrates the ability to disclose and litigate exclusion decisions in circumstances such as the present case.

42. Furthermore, in relation to the data protection issues, the claimant accepts that any decision in relation to the interested party's immigration affairs would be personal data (save that it is not conceded that a failure to make a decision would amount to personal data, as such would not amount to information relating to a living individual, but merely information that the defendant had not acted at all). Nevertheless, the claimant contends that processing of the personal data by way of providing it to the claimant would be lawful, on the basis that pursuant to article 6.1(c) of the UK GPDR the processing would be "necessary for compliance with a legal obligation" to which the controller is subject, if the claimant is correct that there is a duty to disclose that a decision has been taken in respect of the interested party and/or provide reasons in that connection. The claimant relies in particular on the case of *Cooper v National Crime Agency* [2019] EWCA Civ 16 where the Court of Appeal held that compliance with adopted policies in order to comply with a public law obligation amounted to "compliance with a legal obligation" for the purposes of data protection, as did compliance with a public law obligation under which a public body was acting.

43. In relation to the requirements of fairness, the claimant contends that processing of the data by provision of it to the claimant would be fair, on the basis of the nature of the public law obligation owed to the claimant and the need for the claimant to understand that the law has been complied with by the defendant. As set out above, the defendant has previously made known the identity of persons excluded from the UK, and the policy itself contemplates that exclusion can be based upon representations by third parties. There will be no negative consequences for the

interested party in the disclosure of the information and in any event the allegations against the interested party are a matter of public record.

44. Having reflected upon the submissions made in relation to ground 2, I am not persuaded that there is a public law duty on the defendant to notify the claimant when a decision has been taken in relation to whether or not to exclude the interested party from the UK, or to provide reasons to the claimant for any decision which may have been reached.

45. The starting point for this assessment is an examination of the defendant's policy. In my judgment there is nothing in the defendant's policy which would justify the claim that a person referring material to the defendant is entitled to know when a decision is reached in relation to that material, and what the reasons for any decision may have been. Whilst the policy acknowledges that reliance may be placed on material furnished by third parties, it provides no basis for the suggestion that those who provide that material will be notified of any outcome, or any reasons for any outcome. Indeed, the policy expressly provides for notification of exclusion decisions, and makes clear that it is only the person who has been excluded who is to be "notified in writing of the decision and given reasons for their exclusion from the UK". Thus, there is nothing in the policy which, in my judgment, provides any basis for the claimant's contentions under ground 2.

46. Beyond the policy, the claimant relies upon a duty to give reasons. In that connection it is important, in my view, to note that there is no universal obligation under the common law to provide reasons, albeit that a duty to provide reasons can arise in the particular circumstances of an individual case. The common law in relation to the duty to give reasons develops on a case-by-case basis, and proceeds from an examination of the requirements arising from the particular facts of the case under consideration.

47. In my view, the claimant can derive little assistance from the case of *Oakley* which was a decision arising in a very different statutory context, and against the background of particular factual circumstances. The statutory framework in which the decision in *Oakley* arose was one in which the decision came to be made in an open forum, in the context of a statutory framework which provides specific opportunities for third parties to make representations and to expect that those representations will be taken into account in the decision making process. Public participation is a key element of the planning process. Furthermore, the factual context of that case involved sensitive environmental policies and designations together with an unexplained departure from the recommendation to refuse planning permission which had been made by the defendant's professional planning officers. As Sales LJ observed at paragraph 80 of his judgment, the foundation for identifying a duty to give reasons in that case related to the fact that the decision apparently contradicted the development plan policy context, engaging an onus of justifying the decision which could only be discharged by the provision of reasons by the local planning authority. The present case has little in common with *Oakley*. Public consultation does not form a part of the process for making an exclusion decision and there is nothing about the facts of this particular case which would suggest that there is a requirement for the defendant to justify her position in respect of the interested party.

48. Similarly, the case of *Manning* is of little assistance to the claimant in the present case. That case was a decision which was apparently inconsistent with an earlier decision of a court arising in the context of the question of whether or not there had been an unlawful killing. Again, as the court in that case explained, the particular circumstances of the case demanded that reasons were provided to explain how the inconsistent decision had been reached. Nothing like these particular features are capable of being recognised in the present case. I also do not consider that the *Kingdom of Belgium* case is of assistance to the claimant. It is clear from the judgment of Simon Brown LJ that, again, the particular circumstances of that unusual case, identified by Simon Brown LJ in the context of the demands of fairness, justified the very limited disclosure of the relevant medical report in that case. It is of little, if any, assistance in understanding the scope and extent of the defendant's public law duties in the present case.

49. The present case differs significantly from the *Carlile* case in a number of material respects. It appears to have been a matter of public record that the Iranian dissident concerned was the subject of an exclusion decision and the focus of the challenge in that case related to the requirements of article 10 of the European Convention on Human Rights, and whether or not the decision that the defendant had reached was one which was proportionate. The question of whether or not the defendant was under a duty to furnish a third party with the existence and reasons for a decision in respect of the exclusion of an individual simply did not arise. The decision which was under challenge in that case was one issued after the original commencement of proceedings, and communicated to the claimants in the case, who included the Iranian dissident herself. The circumstances of that case do not in my judgment provide any assistance in relation to the arguments raised by the claimant in the present case.

50. The existence of a decision in relation to the interested party and whether or not he should be excluded from the UK, and the reasons for any such decision, are in my view personal data. I am unable to accept the contention made by the claimant that a failure to make a decision would not be personal data: as the defendant submits, that failure to take a decision would amount to information relating to the interested party, and thus whatever the defendant did in consequence of receiving the information from the claimant would amount to personal information in relation to him and the subject of data protection provisions. On the basis that I have concluded that there is no public law requirement or duty on the defendant to provide information about whether a decision has been reached, or the reason for such a decision, there is no basis upon which the processing of that data could be necessary for compliance with a public law obligation.

51. It follows that the defendant is, for the purposes of these proceedings, entitled to rely upon section 40(5B)(a)(i) and associated data protection legislation in refusing to provide the information sought by way of ground 2 in any event. Furthermore, even if there were a public law duty which could be deployed to justify the processing of the data by way of its provision to the claimant, it would be necessary for the claimant to establish that it was fair in all the circumstances for disclosure of the decision and its reasons to be made. Whilst in the circumstances it is unnecessary to resolve this issue, I should record that I have very serious doubts that it would be fair in the circumstances to disclose this data. As set out above, the policy provides no basis for any suggestion that the public are to be told whether or not an exclusion direction has

been made and the reasons for that decision. On the basis of the practice of the defendant that the identities of excluded persons are not placed in the public domain (subject to a single exception when disclosures were made upon which little reliance can be placed given it was an isolated occurrence some years ago for which the justification appears somewhat opaque) it would be reasonable for the interested party to assume that whether or not he was the subject of an exclusion order would not be made public knowledge. The interested party could expect from the practice of the defendant that his immigration affairs would be treated confidentially. The fact that he is identified in these proceedings and not entitled to anonymity in respect of them does not affect either of these points. As set out above, any disclosure of the defendant's position in relation to whether or not the interested party should be the subject of an exclusion direction and the reasons for that conclusion would, in effect be disclosure to the world at large. In my view, against the background of these considerations, the defendant is right to contend that disclosure of this information would be unfair to the interested party.

52. Drawing these threads together, there is nothing in the defendant's policy or her practice which would substantiate a requirement to give notice of any decision in respect of exclusion and its reasons in this case. The defendant is entitled to approach her dealings in relation to the immigration affairs of individuals as being sensitive and confidential to them, and not to make them available to third parties, even where those third parties have submitted evidence to her as a result of their interest in the individual under consideration. Neither the framework of the decision-making process, which apart from the opportunity to submit information provides for no role for third parties, nor the nature of the decision itself, which obviously directly impacts upon the individual under consideration for exclusion, requires a duty to give reasons to be imposed in the present case. An analysis of the authorities relied upon by the claimant does not justify a requirement to notify any exclusion decision and any reasons for it. These conclusions are reinforced by the position in relation to data protection, which is further support for the defendant's approach. It follows that I am not satisfied that the claimant has made out his case under ground 2, and this ground therefore falls to be dismissed.

Standing

53. The defendant has disputed the standing of the claimant to bring these proceedings. The question of standing was left over at the permission stage for determination at the substantive hearing. The defendant disputes that the claimant has standing on the basis that his complaint is not in relation to a decision made about him but rather about the interested party. In reality the claim was brought not because the claimant had a sufficient interest in being made privy to the defendant's decision but rather because, in reality, the claimant simply wants to know, or satisfy his curiosity, as to the outcome of any consideration of the material which he passed to the defendant.

54. In response to these submissions the claimant draws attention in particular to the conclusions of Murray J in his decision at [2020] EWHC 95 Admin dealing with the refusal of the claimant's application for legal aid to bring this claim. In that connection Murray J concluded at paragraphs 68-70 as follows:

> "68. This case, in my view, is an exceptional one. Having regard to the factors highlighted by Mr Hickman, which I have

> summarised at [62] above, it seems to me that FF has more than merely a "significant interest" in the case. His position, in my view, goes well beyond the position of the claimant in *Evans*.
>
> 69. None of the factors relied on by FF would, perhaps, in isolation, be sufficient to establish that FF would obtain a benefit within the meaning intended by Paragraph 19(3), but the Director needed to consider all of the factors and make a judgment on the whole. Taking the relevant factors together, it is clear to me that his decision in this case was, with respect, wrong, and that FF's proposed judicial review proceedings against the Home Secretary do have the potential to produce a direct, personal, and real benefit to FF, in accordance with the principles that I have outlined at [60] above, albeit not one that is likely to result in any financial or other material (as opposed to psychological or moral) benefit.
>
> 70. Mr Hickman submitted that there are other specific errors of law in the Director's reasoning in reaching the Decision that are sufficient to vitiate it as a matter of public law. In light of my conclusion above, it is not necessarily for me to comment on each of his arguments specifically, but broadly he submitted that (i) the Director applied too narrow a concept of "benefit" in reaching his decision and (ii) the Director defended his decision in his letter of 12 December 2018 on the basis that he was entitled to reach the Decision on the basis of the information that was available to him "and in accordance with the discretion afforded to him". In relation to the latter, Mr Hickman submitted that the Decision was not a matter of discretion, and it should be clear from my judgment above that I agree. I also agree with Mr Hickman that the Director appears to have applied too narrow a concept of "benefit" in reaching the Decision."

55. Whilst the defendant points out that this was the application of a different test, the claimant observes that it is in truth a stricter test, and in any event the factors which were relied upon by Murray J are all pertinent to the question of standing in the present case.

56. I share the view expressed by Murray J that this is an exceptional case. I reach this conclusion bearing in mind the factual background set out above which lies at the heart of the claimant's interest in these proceedings, reinforced by the other efforts which he has made to bring the interested party before the courts. I am satisfied that in the particular circumstances of this case the claimant is sufficiently interested in the subject matter of the claim to justify the grant of standing to him. This is not a case involving mere curiosity or simply a desire to be informed on the part of the claimant: his personal interest and engagement in this action is directly related to his involvement in the protests of 2011, the torture and ill treatment which he experienced, the wider allegations of torture by the Bahraini regime and the allegations of involvement in that activity by the interested party. In the particular

circumstances of the case, therefore, I am satisfied that the claimant has established a sufficient interest in order to demonstrate standing to bring this claim.

Relief

57. I am satisfied that in relation to the question posed by the claimant under ground 1 he is, for the reasons set out above, entitled for that question to be answered positively. For the reasons I have given I am not satisfied that the claimant has made out his case under ground 2. In the circumstances I propose to invite written submissions on the topic of relief and the form of an order to give effect to this judgment.