IN THE UPPER TRIBUNAL **Case No. GIA/2887/2013**
ADMINISTRATIVE APPEALS CHAMBER **GIA/2888/2013**

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Appellant:	**Mr Jeffrey Dudgeon**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Chief Constable, Police Service of Northern Ireland**
First-tier Tribunal Case No.	**EA/2012/0113**
First-tier Tribunal Decision Date	**3 May 2013**

DECISION

1. This appeal is brought on two grounds by the information requester (the appellant) against the decision of the First-tier Tribunal (the FTT) made on 3 May 2013. The FTT on 15 July 2013 granted leave to appeal on the first of those grounds. Following a stay of proceedings, on 2 December 2015, I granted leave to appeal on a second ground.

2. For the reasons I give below, I dismiss the appeal on the first ground and on the second ground.

Reasons

Background

3. On 29 November 2010, the appellant requested the Police Service of Northern Ireland (the second respondent) to provide "copies of the internal papers relating to the decision to appoint Baroness O'Loan and Richard Harvey to oversee an investigation into murders and other serious crimes committed by the UVF in North Belfast, the terms of reference for these two people or panel and their powers, and any public statements by the second respondent at the time of the appointment of the panel". The appellant further indicated that "I asked by e-mail for a copy of such statement and received no reply and would also like to see any records relating to this request".

4. "UVF" is an acronym for Ulster Volunteer Force – a loyalist paramilitary group which is an organisation proscribed under Schedule 2 of the Terrorism Act 2000. The particular criminal investigation had been given the code name "Operation Stafford" by the second respondent.

5. The second respondent answered the requests on 26 January 2011 with a refusal notice. While providing the appellant with a copy of the press statement issued at the time of the appointments, it refused to disclose the remainder on the basis that it was exempt from doing so under sections 30, 31, 38, 40 and 41 of the Freedom of Information Act 2000 (the FOIA). The second respondent further relied on sections 23(5) and 24(2) of the FOIA to

refuse to confirm or deny whether it held any further relevant information. The appellant complained to the Information Commissioner (the first respondent).

6. By a decision of 15 May 2012, the first respondent held that the second respondent was entitled to rely on section 30 of the FOIA to refuse to disclose the relevant information and on sections 23(5) and 24(2) to refuse to confirm or deny whether it held any other relevant information. Section 30, broadly speaking, applies to information held for the purpose of criminal investigations. Sections 23 and 24 apply to information supplied by the security services and to exemption for national security purposes. The appellant appealed to the FTT.

7. On 9 July 2012, the FTT issued directions, inter alia adding the second respondent as a party to the proceedings and directing the second respondent to prepare a closed bundle of documents containing the disputed information and any other related information which needed to be treated in confidence.

8. The appeal was heard before the FTT on 14 December 2012. In the course of the appeal, counsel for the appellant had submitted that it was unlawful for the FTT to conduct part of the hearing in a closed session. Nevertheless, the FTT considered witness statements and documents and heard oral evidence and submissions, including some in the course of a closed session from which the appellant and his counsel were excluded. The FTT further considered some documentary material which has not been seen by the appellant or his counsel.

The FTT's decision

9. On the basis of the evidence before it, the FTT decided that the reliance of the second respondent on section 30 of the FOIA – exemption for information held for the purposes of an investigation - was justified. Part of the open evidence consisted of the Association of Chief Police Officers' (ACPO) "Murder Investigation Manual", wherein it was recognised that effective family liaison is central to the success of homicide investigations (Part 16). The open evidence equated the use of the "Operation Stafford" panel to the use of Interveners or an Independent Advisory Group as provided for in the "Murder Investigation Manual".

10. The FTT found that the panel played no part in carrying out investigations. Nevertheless, it found that it was an integral part of the investigation for the purpose of assuring the public, and that the disclosure of the requested information could have seriously damaged the working relationship between the second respondent and the victims' families. On this basis, the FTT accepted that section 30(1) of the FOIA was engaged on the basis that the requested information concerning the appointment of the panel was held for the purpose of the criminal investigation. It found that significant public interest in protecting live investigations outweighed the public interest in disclosing the requested information.

11. The FTT further considered the exemptions claimed under section 23 and 24 of the FOIA – information provided by or relating to security bodies and national security. The appellant submitted that the information relating to the appointment of the panel was distinct from and severable from the information gleaned in the course of the investigation. The FTT held that there was a very great public interest in safeguarding national security and found no weighty arguments in favour of disclosure. It concluded that public interest in maintaining exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the second respondent held further relevant information.

12. By an open decision promulgated on 15 April 2013, and later amended on 3 May 2013, the appeal was dismissed. On 29 May 2013 the appellant sought permission from the FTT to appeal to the Upper Tribunal on four grounds. The FTT granted leave to appeal on 15 July 2013 on the ground that the FTT arguably erred in law by its failure to modify its procedure in relation to the closed session, for example by permitting the attendance of counsel for the appellant at the closed session. It refused leave on three grounds.

13. I granted leave to appeal on 2 December 2015 on the further ground of whether the FTT had erred in law by giving an excessively broad application to national security exemptions under sections 23 and 24 of the FOIA. I refused leave to appeal on two grounds. Having held a hearing of the application for leave to appeal, I was minded not to hold an oral hearing of the appeal and no party submitted that I should hold an oral hearing.

Relevant legislation

14. The right to information under the FOIA derives from section 1(1). This provides as follows:

> **1 General right of access to information held by public authorities**.
>
> (1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.

15. An important qualification of the right under section 1 arises from section 2 which provides:

> **2 Effect of the exemptions in Part II.**
>
> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
> (a) the provision confers absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
> section 1(1)(a) does not apply.
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
> (a) …,
> (b) section 23,
> (c) …

16. Part II of FOIA provides for a number of categories of information which are exempt. The relevant categories in the present case are set out below.

17. Section 23 of FOIA provides as follows:

> **23 Information supplied by, or relating to, bodies dealing with security matters.**
>
> (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).
>
> (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.
>
> (3) The bodies referred to in subsections (1) and (2) are—
> a. the Security Service,
> b. the Secret Intelligence Service,
> c. the Government Communications Headquarters,
> d. the special forces,
> e. the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
> f. the Tribunal established under section 7 of the Interception of Communications Act 1985,
> g. the Tribunal established under section 5 of the Security Service Act 1989,
> h. the Tribunal established under section 9 of the Intelligence Services Act 1994,
> i. the Security Vetting Appeals Panel,
> j. the Security Commission,
> k. the National Criminal Intelligence Service,. . .
> l. the Service Authority for the National Criminal Intelligence Service.
> m. the Serious Organised Crime Agency.
>
> (4) In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.
>
> (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

18. Section 24 of FOIA provides as follows:

> **24 National security**.
>
> (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
>
> (3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the

purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.

Appeal grounds

The first ground of appeal

19. The FTT granted leave to appeal to the appellant on a single ground concerning the closed materials procedure of the FTT. Specifically, it was submitted that the appellant was prejudiced by the decision of the FTT to hear evidence in a closed session, to exclude the appellant's representative from the closed session and to admit closed materials in evidence. Among other authorities, the appellant relied upon *Al Rawi v Security Service* [2011] UKSC 34, which concerned the applicability of a closed materials procedure in a civil claim for damages.

20. I stayed the proceedings at the leave stage in order to await the decision of the Court of Appeal in England and Wales in *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2014] EWCA Civ 1050. I asked for further submissions in the light of the decision in *Browning*.

21. The appellant submitted that *Browning* did not resolve the question in issue, as it concerned the right of the complainant's representative to attend a hearing and did not consider the appointment of a "special advocate"; it did not consider the Justice and Security Act 2013, and was a decision on its own facts, lacking a *ratio decidendi*.

22. In response, the first respondent submitted that Browning confirmed that the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the FTT rules") permitted the use of a closed procedure and were *intra vires* of the Tribunals Courts and Enforcement Act 2007. The first respondent submitted that *Browning* was determinative that the exclusion of the appellant himself was not unlawful and that the exclusion of his counsel was not unlawful, provided the FTT could carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision "on a sufficiently informed basis… ".

23. The second respondent similarly submitted that *Browning* was determinative of the issue before me. It was submitted that *Browning* addressed the issue of holding a closed session as a matter of principle, holding that the FTT rules permit the use of a closed procedure, that rules 35(4)(d) of the FTT rules permitted the exclusion of the appellant from a closed session and that the FTT rules can also, in appropriate circumstances, permit the exclusion of counsel from the closed session.

Assessment of the first ground of appeal

24. In *Browning*, Maurice Kay LJ posed the question:

> "When the First-tier Tribunal (FTT) is hearing an appeal against a decision of the Information Commissioner (IC), in what circumstances (if any) can it lawfully adopt a closed material procedure (CMP) in which a party and his legal representatives are excluded from the hearing or part of it? Neither the Tribunals, Courts and Enforcement Act 2007 (TCEA) nor the First-tier Tribunal (General Regulatory

> Chamber) Rules 2009 (the FTT Rules) provides expressly for a CMP or for the appointment of a special advocate (SA) to protect the interest of an excluded party"...

25. Maurice Kay LJ held that, properly construed, the FTT rules permit the course adopted by the FTT in *Browning* of holding a closed session from which Mr Browning and his counsel were excluded. He stated that "the crucial task is to devise an approach, in the context of a specific case, which best reconciles the divergent interests of the various parties". He continued:

> 34. "In my judgment, the approach adopted in this case and originating in the BUAV case does precisely that, having regard to the unique features of appeals under FOIA where issues of third party confidentiality and damage to third party interests loom large. The features to which reference was made in the BUAV case – the expertise of the Tribunal, the role of the IC as guardian of FOIA etc – make it permissible to exclude both an appellant and his legal representative except in circumstances where the FTT
>
> > "cannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interests involved. ""

26. The appellant submits that *Browning* was decided on its particular facts. I do not accept that submission. The EWCA in *Browning* expressly approved the principles adopted by the Upper Tribunal and derived from the practice of the FTT as followed in *British Union for the Abolition of Vivisection v ICO and Newcastle University* (EA/2010/0064) and other cases. While allowing for an exception in cases where the FTT could not otherwise carry out its statutory function on a sufficiently informed basis, the EWCA in general held that the exclusion of an appellant and his representative was lawful.

27. The appellant argues that *Browning* does not deal with his submission that a "special advocate" type procedure should be adopted. He argues that, in particular, the submission in *Browning* was that the representative, but not the information requester, should be permitted to attend the closed hearing. However, it appears to me that, since the EWCA ruled that a closed hearing in the absence of the appellant and his representative – and, therefore, by implication, in the absence of a special advocate - was lawful, there is not much traction in this argument. The EWCA has effectively ruled that there is no requirement to mitigate any unfairness resulting from the absence of the information requester and his representative.

28. In particular, the EWCA makes express reference at paragraph 33 of that part of the *British Union for the Abolition of Vivisection v ICO and Newcastle University*, approving the approach which originated in that case. Notably, as observed by the EWCA at paragraph 23, it was decided after, and took into account, *Al Rawi v Security Service,* which is relied upon by the appellant. The FTT (at Appendix 2, paragraph 14(g)) expressly observed that the Information Commissioner,

> "… though a party to the appeal, does not have the specific objective of trying either to procure or to prevent the release of the particular information. His concern, like the Tribunal's, is to see that the Act is properly applied and to take proper account of the relevant private and public rights and interests. He argues for disclosure or non-disclosure according to his view of the application of the Act to the particular circumstances.

> Because his commitment is to the Act rather than to a pre-selected result, it is not unusual for his arguments to alter during the course of the hearing as evidence unfolds…
>
> (h) In appeals which involve consideration of the requested information in closed session, the role of the Commissioner's counsel is of particular importance. Counsel is able to assist the Tribunal in testing the evidence and arguments put forward by the public authority.
>
> (i) However, irrespective of the assistance of the Commissioner, the Tribunal, as a specialist tribunal, can be expected to be able, at least in some cases, to assess for itself the application of the provisions of FOIA to the closed material…the extent to which the tribunal will be in a position to do this will depend upon the particular circumstances".

29. Thus the EWCA expressly acknowledged that features such as the expertise of the FTT and the role of the Information Commissioner as "guardian of FOIA" made it permissible to exclude both an appellant and his legal representative, except in the narrow circumstances where the FTT could not otherwise have carried out its functions on a sufficiently informed basis. Essentially, it found that the Information Commissioner should fulfil the role of a special advocate.

30. I do not accept that the FTT has erred in law by excluding the appellant and his counsel from the closed part of the hearing, nor by failing to appoint a special advocate to represent the interests of the appellant in the closed session. I do not accept that the subsequent enactment of the Justice and Security Act 2013 on 23 June 2013 can be relevant to the lawfulness of the FTT decision of 3 May 2013. I dismiss the appeal on this ground.

The second ground of appeal

31. The appellant submitted that the FTT had erred in law in its approach to the exemptions from disclosure granted by sections 23 and 24 of FOIA. He submitted that it was not entitled to apply a "broad brush" refusal to disclose any information from "Operation Stafford" on national security grounds. In essence, the appellant submitted that the documents relating to the appointment and the terms of reference of the panel were entirely distinct from any information which would form part of the evidence in the investigation and could have no likely connection to a section 23 body.

32. The first respondent submitted that the FTT found that the information requested could not be separated from information concerning the Operation Stafford investigation and that the general material acquired and held by Operation Stafford could fall into section 23(5) and 24(2) FOIA – entitling the public authority to make a "neither confirm nor deny" response to the request for information. This was justified on principles set out by the FTT in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner* (EA/2011/0049-51) in order to mask the involvement or non-involvement of a body designated under section 23.

33. Upon the grant of leave to appeal on this ground, the first and second respondent each applied to make closed submissions and in the case of the second respondent to advance closed evidence. I accepted the applications to make closed submissions and directed that these should be disclosed to the Upper Tribunal on the basis that these should be withheld from the appellant and his representative. I prohibited the publication or disclosure of those

submissions and evidence under rules 14 and 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The principles of law that I applied in admitting this material are as set out in my leave determination of 2 December 2015 under the heading "Open and closed bundles".

34. The first respondent referred to the evidence of DCI Campbell in the closed session (redacted in the open version) and the findings of the tribunal which were based upon it. The second respondent referred to a note of the evidence given by DCI Campbell in the closed session. In their closed submissions the first and second respondents maintained that the FTT was correct in law to hold that the second respondent was entitled to neither confirm nor deny whether further information was held, pursuant to sections 23(5) and 24(2) of the FOIA. Each respondent based submissions upon the evidence heard in closed session.

Assessment of the second ground of appeal

35. Section 23 of the FOIA provides an absolute exemption. Section 23(1) creates an exemption from the duty to communicate information and section 23(5) creates an exemption from the duty to confirm or deny. Section 23(5) will be engaged where "compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".

36. Section 24 provides a qualified exemption. In relation to the duty to communicate information, section 24(1) provides a mutually exclusive alternative to section 23(1). In relation to the duty to confirm or deny, section 24(2) provides a potential basis for exemption additional to section 23(5).

37. At the heart of this appeal is the FTT's approach to the duty to confirm or deny and the meaning of "any information (whether or not already recorded) which … relates to, any of the bodies specified in subsection (3)". The FTT correctly decided that if a public authority holds information which relates to a security body, then it is clearly entitled not to disclose it and clearly entitled neither to confirm nor deny that it holds it.

38. However, a further principle is commonly relied upon in national security cases which has a basis in case law, but which at first glance appears somewhat surreal. The submission is made that, if a decision is made to the effect that the public authority is not entitled to confirm or deny, the fact that the body does not hold information which was directly or indirectly supplied by, or which relates to, a security body is revealed. This in itself is information which relates to a security body.

39. Thus, in *Baker v Information Commissioner and the Cabinet Office* (EA/2006/0045), an MP requested information about the policy of interception of MPs' telephone calls. Specifically, he asked whether there had been a change in policy since the "Wilson doctrine" whereby the then Prime Minister Harold Wilson had told the House of Commons in 1966 that there would be no tapping of MPs' phone calls. At present, telephone interception under the Regulation of Investigatory Powers Act 2000 could, but might not necessarily, involve a section 23 security body. It was argued that, if a denial of interception was made at a time when there was not any relevant interception or change of policy, but that six months later a refusal to confirm or deny response was made to the same question, it would be revealed that a change of policy had been made and the involvement of a section 23 body could be deduced. It was accepted that the only way to protect the information concerning the involvement of a section 23 body was to maintain a consistent refusal to confirm or deny throughout.

40. In *Dowling v Information Commissioner and the Police Service for Northern Ireland* (EA/2011/0118) the FTT held at paragraphs 19 and 20:

> "19. Information describing a s.23(3) body or its activities is clearly covered but "relates to" plainly extends beyond that. If that were the limit of its ambit, words such as "identifies or in any way describes" would have sufficed.
>
> 20. We consider that any significant connection between such a body and such information is caught by s.23(1). In *Metropolitan Police Commissioner v. Information Commissioner*, EA/2010/0008 the Tribunal observed at §15:
>
> > *".... s.23 provides absolute protection to information coming from or through the specified security bodies or which, 'relates to' any of those bodies. Significantly for this appeal, that very broad class of information plainly embraces, not just the content of information handled by a specified body but the fact that it handled it."*

41. The latter case began with a public statement by the former President of the United States, George W Bush, to the effect that questioning terrorist suspects in secret detention facilities had prevented planned attacks on Heathrow Airport and Canary Wharf. The Investigations Editor of the "Times" newspaper duly asked the Metropolitan Police Commissioner for information as to how these plots were foiled by such questioning. The FTT on an appeal by the Metropolitan Police Service (MPS) concluded:

> "22. Armed with the literature and media coverage of these matters available today, we have no real doubt that many readers and viewers would appreciate that, if MPS held the information to which President Bush referred, so did the Security Service and that it was through that agency that it had been supplied to MPS. Equally, a denial would, by parity of reasoning, indicate that the information had probably not reached either body, since it is hard for the layman to suppose that intelligence as to a planned attack on two of London`s most obvious targets would not be passed to the police force responsible for their safety, if it reached the Security Service or any other s.23 body.
>
> 23. If that is so, confirmation that MPS held the information would not involve the disclosure of information which was directly or indirectly supplied to MPS by a s.23 body but the fact that this information had been passed by such a body to MPS would be information "relating to" that body.
>
> 24. By the same token, as a result of the deduction referred to in paragraph 22, a denial would amount to a statement that the Security Service (or other s.23 body) did not hold information; that is equally information "relating to" that body".

42. In *All Party Parliamentary Group on Extraordinary Rendition v ICO and Foreign and Commonwealth Office* [2016] AACR 5 (APPGER), a three judge panel of the Upper Tribunal (Charles J, Mitting J and Judge Wikeley) addressed the proper construction of section 23. At paragraph 25, it was held that words "relates to" should be understood as used in a wide sense, approving the "steer" given in earlier UT cases such as *Home Office and Information Commissioner v Cobain* [2015] UKUT 27 (AAC) and the FTT in APPGER. The FTT had said at paragraph 70:

> "To sum up we consider that the Tribunal should adopt a broad, although purposive approach to the interpretation of s.23(1). However this should be subject to a remoteness test so that we must ask ourselves whether the disputed information is so remote from the security bodies that s.23(1) does not apply."

43. I observe that while the decisions of the FTT that I have referred to are not binding, they have been approved in the Upper Tribunal.

44. My understanding of the principles arising from the above cases is that a public authority is entitled to refuse to confirm or deny whether it holds information in circumstances where the information was supplied directly or indirectly by a section 23 body or which relates to such a body. However, information which relates to a section 23 body can include the fact that it did not provide any information directly or indirectly. Following on from this, it is obvious that all sorts of mundane information which have no connection to a section 23 body might also fall into the category of information which was not provided by a section 23 body. Therefore, a test of remoteness must be applied. A public authority can properly confirm that it holds or does not hold information which is so remote from the security bodies that sub-section 23(1) does not apply. Where there is a connection which is not remote, sub-section 23(5) will apply.

45. The FTT in the open information in the present case records that the second respondent submitted that "Operation Stafford" contains some discussion of the role of Special Branch in handling informers. It had submitted that the nature of the work of Special Branch involves working closely with security bodies and the sharing of information and intelligence. In this context, it was submitted that the second respondent and its predecessor, the Royal Ulster Constabulary, had responsibility for national security in Northern Ireland until MI5 took over that area in 2007. The FTT accepted that there was potential for information which might be held by the second respondent to relate to one of the designated security bodies, thus bringing such information within section 23 and also section 24. On this basis, the FTT further found that section 24(2) was engaged. It then considered that, as the exemption was required to safeguard national security, there was a very great public interest in safeguarding national security, and that maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing "whether the second respondent holds any further relevant information".

46. The FTT has identified the gist of the findings it has derived from the closed material. It can be seen that it has placed weight on the aspect that disclosure might enable terrorists to identify whether their activities had been detected and therefore jeopardise national security. It has further placed weight on the fact that information about the acquisition of information and intelligence in the course of an investigation by the second respondent might relate to a section 23(3) body. It is abundantly clear that the general material acquired and held by the "Operation Stafford" investigation could fall into such categories.

47. I acknowledge that there is force in the appellant's argument that the information he requests about the appointment of the panel is quite distinct from information obtained by the second respondent in the course of the investigation. Nevertheless it is equally obvious that there is potential for a connection between the appointment of a panel to "Operation Stafford" and a section 23 body. For example, general information about the investigation's methods, and specific information about the evidence held by the investigation has the potential to relate to a section 23 body. This information may come to be shared with the panel. The only question which then arises is whether the process of the appointment of the panel is so remote from the security bodies that s.23(1) does not apply.

48. It seems to me, having considered the closed submissions of the first and second respondent, that it is not so remote. On the evidence before it, I consider that the FTT was entitled to find that the second respondent was justified in maintaining the exclusion of the duty to confirm or deny in all the circumstances of this case.

49. It follows that I must disallow the appeal.

Further issue: the precedent effect of *Browning* in Northern Ireland

50. I gave a direction on 17 February 2014 in the context of staying the proceedings pending *Browning*. In the direction I indicated that [as a judge of the Upper Tribunal sitting in Northern Ireland] "while I would not be, strictly speaking, bound by a decision of the Court of Appeal in England and Wales, I consider that such a decision – where it is addressed to a statutory scheme applying equally to England, Wales and Northern Ireland – would be of highly persuasive authority and should normally be followed by me".

51. Subsequently, the first respondent made a submission inviting me to hold that the Upper Tribunal, when considering cases in the context of the access to information regime, is bound equally by judgments of the Court of Appeal in England and Wales and the Court of Appeal in Northern Ireland. It was submitted that this was not a case where two appellate courts have parallel but separate regimes, but a situation where they have equal and coextensive jurisdiction in a single jointly administered regime.

52. I consider that, in the light of my decision above, I need not state a concluded view on this matter. However, it appears to me that the submissions of the first respondent cannot be correct. By sub-sections 13(11) and 13(12) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act):

> (11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
>
> (12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate—
>
> > (a) the Court of Appeal in England and Wales;
> >
> > (b) the Court of Session;
> >
> > (c) the Court of Appeal in Northern Ireland.

53. The 2007 Act therefore provides for appellate courts in three separate jurisdictions to determine appeals from the Upper Tribunal.

54. In *Clarke v Frank Staddon Ltd* [2004] EWCA Civ 422, the Court of Appeal in England and Wales was considering a case in which an Employment Appeal Tribunal (EAT) sitting in England had not followed a decision of the Court of Session. The matter in issue involved the interpretation of regulations made under Directive 93/104/EC (the Working Time Directive) which applied across the United Kingdom. The EAT was a body constituted across Great Britain with a single jurisdiction for England, Wales and Scotland. Laws LJ said at paragraph 32:

> "… The rules of precedent or *stare decisis* cognisable here are given by the common law. Part of their substance, though not its whole, is that decisions of the Court of Appeal bind the Court of Appeal itself and all lower courts. They include refinements which teach where the edge of precedent is to be found, so that often the earlier decision can be distinguished. I need not go into those. The essence is that precedent confines the very power of the courts subject to it. It is not a rule of discretion or comity or anything of the kind. It is therefore of necessity a doctrine whose reach is limited to the jurisdiction in which the courts in question operate."…

55. It seems to me that, had it been intended that the 2007 Act should have established a single appellate jurisdiction to bind the Upper Tribunal, it could have been done. Instead, the 2007 Act provided for three separate appellate jurisdictions in England and Wales, Scotland and Northern Ireland. It seems to me inescapable that the precedent effect of the decisions of the appellate courts is limited to the jurisdictions in which they operate.

56. A different view would have implications not only for the FTT and the Upper Tribunal but also for the appellate courts themselves, namely that the Court of Appeal in England and Wales might be bound by a decision of the Court of Appeal in Northern Ireland on appeal from the Upper Tribunal. This is certainly not the case at present. Nevertheless, principles of comity may bring about the same effect. For example, in *Secretary of State for Work and Pensions v Deane* [2010] EWCA Civ 699, an appeal from the Administrative Appeals Chamber of the Upper Tribunal, Ward LJ said that the Court of Appeal in England and Wales was,

> "… not obliged to follow decisions of the Northern Ireland Court of Appeal, but we must accord them the greatest respect. Where the decision relates to a statutory requirement which applies or which is the same as that which applies in England and Wales, then we ought to follow that Court in order to prevent the wholly undesirable situation arising of identically worded legislation on the other side of the Irish Sea (or the other side of the Tweed) being applied in inconsistent ways".

57. I have not heard argument on this issue and it may be a matter which comes for decision in the future in a case in which it is material to the outcome. I do not need to decide it now.

(Signed on the original)

Odhrán Stockman

Judge of the Upper Tribunal

Dated **19 September 2016**