IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2011/0081

BETWEEN:-

DAVID MOSS

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

APPLICATION FOR PERMISSION TO APPEAL
21 MAY 2012

Abstract

The Appellant applies for permission to appeal against the majority Decision of the First-tier Tribunal (Information Rights) in EA/2011/0081 principally on the grounds that it is perverse.

The Appellant alleges that the Home Office's defective decisions are patently iniquitous. The Tribunal gives no reason for dismissing that allegation and has misdirected itself further by failing even to mention in its Decision the Appellant's other allegation, that the Home Office have been misleading the public for years about the reliability of biometrics.

The Tribunal has not been even-handed. It has consistently ignored the arguments made by the Appellant and what it calls the "counterproductive" evidence adduced by him and by world authorities including but not restricted to Professor Ross Anderson of the University of Cambridge Computer Laboratory while declaring itself consistently "impressed" by the Home Office's arguments and evidence, and IBM's. The Home Office have been unable to adduce any expert testimony.

Some of the Tribunal's findings of fact are contested and some missing findings are identified – without complete and accurate findings, any Decision is bound to be perverse.

The Home Office have failed to make their case for exemption from disclosure under FOIA §§31, 41 and 43. The objective of the Appellant remains therefore to convince the Tribunal that it should order disclosure of the IBM report which is the subject of this case, using its power under FOIA to render that disclosure immune from actions for breach of confidence, however unlikely it is that those actions would be brought let alone succeed, the public interest immunity arising by established convention from the manifest iniquity identified, the public being misled and public concern about crime prevention and detection, terrorism, border security, the safety of the 2012 Olympics, the efficiency with which public services are delivered and the assurance that the benefits of those public services are only enjoyed by those entitled to them.

References to clauses, n, of the Freedom of Information Act 2000 ("FOIA") are in the form FOIA:n – the Act is available at
http://www.legislation.gov.uk/ukpga/2000/36/contents

References to clauses, n, on pages, m, of Information Rights – Law and Practice (Third Edition) *edited by Philip Coppel QC, are in the form Coppel:m:n*

Links to the documents below are recorded at
http://dematerialisedid.com/bcsl/foi.html

References to paragraphs, n, in the Tribunal's 24 April 2012 Decision are in the form IRTDec1:n

References to paragraphs, n, in IBM's 20 February 2012 Witness Statement (on behalf of the Home Office?) are in the form WSIBM2:n

References to paragraphs, n, in the Second Respondent's 20 February 2012 Response are in the form HOResp4:n

References to paragraphs, n, in the Commissioner's 20 February 2012 Response are in the form ICOResp3:n

References to paragraphs, n, in the Appellant's 16 February 2012 Response are in the form DMResp5:n

References to paragraphs, n, in the Judge's Directions dated 12 December 2011 are in the form JDir3:n

References to paragraphs, n, in the Second Respondent's 28 November 2011 Response are in the form HOResp3:n

References to paragraphs, n, in the Appellant's 20 September 2011 Response are in the form DMResp4:n

References to paragraphs, n, in the Second Respondent's 24 August 2011 Response are in the form HOResp2:n

References to paragraphs, n, in the Commissioner's 24 August 2011 Response are in the form ICOResp2:n

References to pages, n, in the Open Bundle, second index received on 28 July 2011, are in the form OB2:n

References to paragraphs, n, on pages, m, in the Open Bundle, second index received on 28 July 2011, are in the form OB2:m:n

References to paragraphs, n, in the Appellant's 25 July 2011 Response are in the form DMResp3:n

References to paragraphs, n, in IBM's 19 July 2011 Witness Statement on behalf of the Home Office are in the form WSIBM1:n

References to pages, n, in IBM's 19 July 2011 Exhibits, m, on behalf of the Home Office are in the form WSIBM1:Exhm:n

References to paragraphs, n, in the Home Office's 20 July 2011 Witness Statement are in the form WSHO1:n

References to pages, n, in the Home Office's single 20 July 2011 Exhibit on behalf of the respondents are in the form WSHO:Exh1:n

References to paragraphs, n, in Professor Anderson's 18 July 2011 Witness Statement on behalf of the Appellant are in the form WSCantab1:n

References to paragraphs, n, in the Appellant's 31 May 2011 Response are in the form DMResp2:n

References to paragraphs, n, in the Second Respondent's 20 May 2011 Response are in the form HOResp1:n

References to paragraphs, n, in the Appellant's 10 May 2011 Response are in the form DMResp1:n

References to paragraphs, n, in the Commissioner's 27 April 2011 Response are in the form ICOResp1:n

References to paragraphs, n, in the Appellant's 29 March 2011 Appeal are in the form DMApp1:n

References to paragraphs, n, in the Commissioner's 28 February 2011 Decision Notice FS50320566 are in the form ICODecNot:n

Table of contents

Background

1 Well over two years ago on 6 January 2010, the Appellant submitted a Freedom of Information request[1] ("the Request") asking the Home Office to publish their report on a technology trial conducted for them by IBM (*OB2:107-9*).

2 IBM were testing the reliability of biometrics, a technology supposedly to be pressed into service for government ID cards, passports, residence permits and visas.

3 The Home Office's idea was to use biometrics to help with crime detection and prevention and counter-terrorism. In time, it was hoped, biometrics would help to make the delivery of public services more efficient. It was hoped also that biometrics would help to ensure that state benefits could only be claimed by people who are entitled to them.

4 The Home Office's own published evidence – particularly their report on the UKPS biometrics enrolment trial – demonstrates that the technology is not reliable enough[2, 3] to do the jobs required of it. Anyone would think that that would be the end of the matter, biometrics would be abandoned and the Home Office would look for some other way to achieve the unimpeachable objectives above.

5 Far from it, the Home Office continue to spend public money on initiatives which depend for their success, wholly or partly, on biometrics being reliable. Judging by the published evidence, they are misusing public money. The Home Office are ignoring scientific evidence. Their own scientific evidence. Their choice to proceed with biometrics is not logical. And not businesslike. It is irresponsible. And undignified. It is recognisably an iniquity. It is not in the public interest. Altogether, it lays the Home Office open to a charge of misfeasance in public office (*DMResp2:15, DMResp3:54*).

6 As a result of their technology trial, in April 2009 IBM won the so-called "NBIS" contract from the Home Office – National Biometric Identity Service – and CSC won a separate Home Office contract to work on ePassports, which incorporate face recognition biometrics. The IBM contract was worth £265 million and the CSC contract £385 million[4] (*OB2:31-2, DMResp3:6*).

7 IBM were not experts in biometrics at the time. The biometrics technology required for these contracts had to be supplied by someone else. Based on their technology trial, they awarded a sub-contract to Sagem Sécurité[5], a subsidiary of the French Safran Group (*OB2:20,33*).

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[1] http://dematerialisedid.com/bcsl/13728%20Sagem.html

[2] http://dematerialisedid.com/PDFs/UKPSBiometrics_Enrolment_Trial_Report.pdf

[3] http://dematerialisedid.com/Register/regBiometrics.pdf

[4] http://www.whitehallpages.net/news/archive/185894

[5] http://www.safran-group.com/site-safran-en/press-media/press-releases/2009-447/article/sagem-securite-chosen-by-ibm-to?10071

8 Sagem Sécurité has subsequently changed its name to "Morpho"[6].

9 Whereas the Identity & Passport Service (IPS) was in the driving seat at the time of the award of the NBIS contract, the baton has subsequently been passed to the UK Border Agency (UKBA). IPS and UKBA are both executive agencies of the Home Office.

10 After being renamed "NIAS" for some time, NBIS is now known as "IABS", the Immigration and Asylum Biometric System. IABS is the new system being deployed by UKBA at Heathrow airport[7] and elsewhere to protect the UK border and to make the Olympics safe.

11 But do the biometrics components of IABS work? Can they protect the border and make the Olympics safe? We don't know. The Home Office have published no evidence of the reliability of biometrics since their 2005 report on the UKPS biometrics enrolment trial. And that report demonstrated that the Home Office's chosen biometrics don't work.

12 The only evidence that might justify the Home Office's investment of public money in this dubious technology is in the IBM report.

13 Disclosure of the unpublished IBM report would reveal either that the technology has improved enough to be useful or that the Home Office are iniquitously wasting public money.

14 They don't want to publish the IBM report.

15 The Home Office refused[8] the Request (*OB2:117-21*). A subsequent internal investigation upheld[9, 10] that decision (*OB2:127-32*). The Information Commissioner's Office (ICO) also upheld[11] the Home Office's decision (*OB2:1-11*). And now the Tribunal has upheld[12] the ICO's decision.

16 The Appellant remains convinced, and contends that any reasonable Tribunal would remain convinced, that the public interest is better served by disclosure of the IBM report than by non-disclosure, and applies therefore for permission to appeal against the Tribunal's 24 April 2012 Decision ("the Decision"), *IRTDec1*.

17 The Appellant is guided by what Coppel says under the heading *FOURTH STAGE: APPEAL FROM FIRST-TIER TRIBUNAL TO UPPER TRIBUNAL* (*Coppel:874:28-030*):

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[6] http://dematerialisedid.com/BCSL/Garlic.html

[7] http://www.dmossesq.com/2012/05/chaos-at-heathrow-border-security-in.html

[8] http://dematerialisedid.com/bcsl/13728%20response.html

[9] http://dematerialisedid.com/PDFs/20100617_13728_Letter.html

[10] http://dematerialisedid.com/PDFs/20100617_13728_Report.pdf

[11] http://www.ico.gov.uk/~/media/documents/decisionnotices/2011/fs_50320566.ashx

[12] http://www.informationtribunal.gov.uk/DBFiles/Decision/i736/20120424%20Decision%20EA20110081.pdf

> An appeal on a 'point of law' would be on the grounds (a) that the Tribunal misdirected itself in law or misunderstood or misapplied the law; (b) that there was no evidence to support a particular conclusion or finding of fact made by the Tribunal; or (c) that the decision was perverse in that it was one which the Tribunal, directing itself properly on the law, could not have reached or one which was obviously wrong.

18 This application for permission to appeal ("the Application") makes it clear that two members of the Panel ("the Majority") have obviously wrongly come to the perverse decision to suppress the IBM report and that the third member ("the Minority") – who seems, judging by the Decision, to disagree with nearly every conclusion his colleagues reach in this matter – is right to favour disclosure.

19 The purpose of FOIA is to remedy the mischief or vice of excessive secrecy (*Coppel:10-1:1-012*), which is held to lead to arrogance in the Executive and defective decision-making by them and to harm the political health of any modern state (*Coppel:12-4:1-013-4*). The Tribunal – or at least the Majority – is misdirecting itself when it supports non-disclosure in this case, it misunderstands or misapplies the law and it is thereby depriving not only the public but also the Executive of the benefits of the Act by obstructing the achievement of its purpose, *viz.* to improve decision-making by public authorities.

20 In his book *The Socialist Case* Douglas Jay wrote:

> Housewives as a whole cannot be trusted to buy all the right things, where nutrition and health are concerned. This is really no more than an extension of the principle according to which the housewife herself would not trust a child of four to select the week's purchases. For in the case of nutrition and health just as in education, the gentlemen of Whitehall really do know better what is good for the people than the people know themselves.

21 That was in 1937, 75 years ago, and things have changed since then – no civilised man today believes that women are inferior and no four year-old can still subscribe to Lord Jay's Doctrine of the Infallibility of Whitehall.

22 Certainly HM Courts & Tribunals Service (HMCTS) to whom this Application is addressed can be under no illusions about Whitehall's incompetence.

23 When the National Audit Office (NAO) came to audit the Service's 2010-11 accounts they drew attention to defects in Libra, HMCTS's case management system which has cost £447 million so far.

24 The lead contractor on Libra is Fujitsu (*née* ICL). The Libra project is the responsibility of Sir Suma Chakrabarti, Permanent Secretary for the time being at the Ministry of Justice, and Mr Andy Nelson, Chief Information Officer not only for the Department but for HMG as a whole.

25 The accounting records maintained by Libra are so poor that the NAO couldn't even qualify its opinion on them, it had to take the unprecedented step of *disclaiming*[13] an opinion.

26 And as to the collection of fines and penalties and the execution of confiscation orders, the NAO found that £1.4 billion is at risk of not being collected.

27 In 1952 Professor GW Keeton published his book *The Passing of Parliament*. Keeton was Dean of the Faculty of Laws at University College, London. He debunks *The Socialist Case* and points to the danger of the Executive moving beyond the reach of either the Common Law or Parliament (p.114):

> ... Very far from the Common Law replacing administrative tribunals, more and more are being created outside the Common Law year by year, and some of the cases discussed earlier in this book will show how, in spite of obvious willingness, the courts have failed to hold back the onward rush of administrative lawlessness.

28 That was 60 years ago. Keeton's question then was, in summary, what was the point of going through all the suffering of the Civil War to establish the supremacy of Parliament in the 1689 Bill of Rights if we end up with an Executive behaving for all the world like a latter-day monarch exercising his or her prerogatives?

29 The question continues to be asked. Repeatedly.

30 Here is the Home Affairs Committee writing in its 19 January 2012 report on its *Inquiry into the provision of UK Border Controls*[14]:

> 2. The precise facts of the case are disputed and the Home Office has denied us access to original documents that would have helped us to clarify the sequence of events ...
>
> 9. The Home Office has refused to provide us with a copy of the HOWI Guidance, a document we believe to be of importance as it has been discussed extensively in oral evidence to this Committee, as well as in the House itself ...
>
> 18. ... We have requested a copy of the slide presentation from the Home Office, which again has been refused. Without access to the slide, we are unable to comment on ...
>
> 27. Despite agreeing to make both the Home Office Warnings Index Guidelines and the periodic updates available to us when she came before us on 8 November, the Home Secretary has since refused to provide us with these documents ... notwithstanding any internal departmental investigations, these documents would have assisted our inquiry in confirming witness accounts and we would normally

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[13] http://www.nao.org.uk/publications/1012/courts_service_trust_statement.aspx

[14] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1647/164703.htm

> expect a Government of any party to acquiesce to such a request from a Select Committee. We recommend that the Home Secretary deposit copies of all the documents that have been made available to the three internal investigations in the Library of this House. This will allow this Committee to reach an informed conclusion of our own and would be consistent with the Government's commitment to transparency and accountability ...

31 Parliament was still having trouble asserting its supremacy over the Executive two months later, as recorded in the Committee's 27 March 2012 report on *Work of the UK Border Agency (August–December 2011)*[15]:

> 79 When Mr Whiteman [Chief Executive of UKBA] first appeared before this Committee on 15 November 2011, he told us that
>
> > Rob Whiteman: I think this Committee has an important role in holding me to account and also in my being transparent about the good things and the bad things that happen ... I very much want to work on the basis of trust with this Committee.
>
> It is therefore deeply disappointing that on two occasions since our last report, the Committee has been denied access to information. The "Agency" refused to provide us with the outcome of cases of people who arrived at St Pancras via the 'Lille loophole'. The "Agency" also refused to provide us with data regarding inspections of Tier 4 sponsors on the basis that it was 'not fit for wider dissemination'.

32 It's not just the Home Affairs Committee. The Home Office also thumb their nose at the House of Commons Science and Technology Committee, evidence of which has been adduced a number of times[16] during the case by the Appellant, without being remarked on by the Tribunal in their Decision.

33 And it's not just Parliament. With their consistently arrogant refusal to give us any confidence that our money is not being wasted on a defective decision to invest in biometrics, the Home Office also thumb their nose at the public.

34 Coppel assures us in the *Preface* to his book without saying so in so many words that now, Keeton's "onward rush of administrative lawlessness" can be checked:

> The most significant procedural change since the last edition has been the creation of a comprehensive administrative tribunal system in the United Kingdom: the First-tier Tribunal and the Upper Tribunal. In terms of administrative law, their creation – underscored by the stature of their members – stands to be the most important

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[15] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1722/1722.pdf

[16] From http://dematerialisedid.com/PDFs/FS_Appeal.pdf (para.53) to http://dematerialisedid.com/bcsl/EA20110081%20Appellant%20Submission%2016%20February%202012.pdf para.35

> administrative law development in a lifetime. Time will tell whether the opportunity it presents for a general right of independent, merit-review of administrative decisions relating to an individual will be realised. However, so far as appeals against information rights decisions are concerned, that day arrived with the Freedom of Information Act 2000 itself.

35 Is Coppel right to be optimistic? The outcome of this Application will be one straw in the wind.

Information rights and the public

36 This case was accepted by the Tribunal on 28 March 2011 and a Decision was Promulgated on 24 April 2012. The uninitiated may imagine that the intervening year was taken up with a lively debate advocating our right to know what the Executive is doing on the public's behalf.

37 The Appellant made some attempt (*DMResp1:11-21, DMResp2:82-90*) but the majority of the time and a mass of well-trained and acrobatic intellectual energy has been spent trying to establish the rights of the Home Office, IBM, Morpho and five other, unnamed biometrics suppliers not to tell us anything.

38 In the event, you may rest assured that the Home Office has no interest whatever in the public's information rights in this case and neither it seems does the Information Commissioner.

Biometrics

39 This case revolves around the reliability of biometrics. The uninitiated may imagine that the year was taken up with a lively debate about biometrics, the different technologies available, the best way to assess their reliability and the costs and benefits to the public of their use.

40 While the Appellant has pursued these matters in his evidence and in his arguments – an approach described by the Tribunal as "counterproductive" (*IRTDec1:23*) – the Home Office have spent the year wringing their hands, worrying about the duty of confidence they owe to IBM and the duty of confidence IBM owes to Morpho and the other biometrics suppliers, and so has the Information Commissioner.

41 The Majority (of the Tribunal) finds that the Home Office and the Information Commissioner are right to argue that *FOIA:41(1)* makes them exempt in this case from disclosing the IBM report:

> Information is exempt information if ... the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

42 Biometrics doesn't come into it. Not for the Respondents. Nor for the Tribunal.

Commercial confidentiality

43 The only game in town, the Appellant joined in with the argument about duties of confidence (*DMResp2:33-132*).

44 The Tribunal says in its Decision (*IRTDec1:99*):

> 99. In his Reply the Appellant expressly doubts whether there was a "confidentiality agreement" between the Home Office and IBM. In particular he claims that the word or expression "Restricted" on the document does not without more create the necessary degree of confidentiality. There is and has to be he says an express nondisclosure agreement. The Tribunal's finding of fact is that there was such an express agreement. The Appellant may have misdirected his initial arguments because the relevant agreement was not produced until well into the proceedings.

45 The Appellant notes that the word "Restricted" appeared at the top of every page of his 31 May 2011 Submission (*DMResp2*) and that nevertheless no-one seems to be treating that document as confidential.

46 He notes also – what will not be clear to anyone reading the Tribunal's Decision – that it is he, the Appellant, who "well into the proceedings" found "an express nondisclosure agreement", *viz.* the NBIS contract itself, and brought it promptly to the Tribunal's attention (*DMResp2:125-8*).

47 If anyone is doing any misdirecting here it isn't the Appellant but the Home Office, who failed to bring this document with its explicit confidentiality clauses (and its explicit acknowledgement of FOIA) to the Information Commissioner's attention or to the Treasury Solicitors' attention or to the Tribunal's attention, thereby wasting months of everyone's time.

48 Or are they? Are the Home Office, that is, misdirecting everyone?

49 Maybe they're not. In his 19 July 2011 witness statement Mr Nicholas Swain, IBM's Commercial Director responsible for NBIS/NIAS/IABS, says the very opposite of the Tribunal (*WSIBM1:22*):

> ... IBM, therefore, did not enter into a specific NDA with the Home Office for the Demonstration.

50 They're talking about the Demonstration of the reliability of biometrics that IBM organised for the Home Office. That Demonstration presumably pre-dated the signing of the NBIS contract and so the contract can't be the agreement needed for our purposes here.

51 The Tribunal say that there *was* an explicit non-disclosure agreement and IBM say that there *wasn't*. So does the Home Office. So does the Information Commissioner. It seems that what the Tribunal thinks has been established as a fact may not be.

52 Without specifying which "express agreement" the Tribunal intend, without specifying which agreement "was not produced until well into the proceedings", this finding of fact of theirs which contradicts the Respondents' own testimony depends on an unnamed *deus ex machina* and remains mysterious and unsatisfactory.

53 Let us suppose nevertheless that there are duties of confidence owed between the Home Office, IBM and the six biometrics companies. Let us suppose further that disclosure of the IBM trial report would be a breach of those confidences. Let us suppose also that IBM and/or the biometrics companies would actually bring actions and, even more unlikely, that those actions would be successful.

54 Even then, with all those points notionally conceded, would the IBM report be exempt from disclosure?

55 No.

56 Not necessarily.

57 There is still the public interest to consider and according to Coppell (*Coppell:763:25-024*):

> ... The circumstances in which a public interest defence to a claim for breach of confidence may enjoy success can conveniently be considered under three headings, which may, of course, overlap:
> – first, the public interest in the disclosure of iniquity;
> – secondly, the public interest in the public not being misled;
> – thirdly, the public interest in the disclosure of matters of public concern.

58 Remembering *FOIA:41(1)*, the Tribunal has it in its power to order disclosure of the report and grant immunity from action under the Act. The Tribunal has not exercised that power. Why not?

59 All Parties concede that Coppell's third condition is satisfied, there is public concern about crime, border security, Olympics safety and the efficiency of public services and entitlement to them – all of them objectives whose achievement is meant to be facilitated by NBIS/NIAS/IABS. The Respondents acknowledge that concern momentarily and then, at enormous length, try to argue that the public interest is still nevertheless better served by non-disclosure. The Majority agree with the Respondents on that matter and favour non-disclosure.

60 As to Coppell's first condition, the Appellant has argued consistently for two years and more that there is an obviously apparent iniquity here, the Home Office appear to be behaving arrogantly, illogically, unscientifically, irresponsibly, in an unbusinesslike way, and in an undignified way. The public authority is accused with good reason of making a defective decision by investing public money in biometrics which the public authority knows from its own trials to be too unreliable to achieve the public goods promised.

61 The Respondents deny that charge without giving any reason. And so do the Majority. Their Decision is perverse.

62 As to Coppell's second condition – misleading the public – the Appellant has submitted evidence demonstrating that the Home Office, first under Sir David Normington and now under Dame Helen Ghosh, his successor as Permanent Secretary, have been doing precisely that for years with respect to the reliability of biometrics. The response of the Tribunal is simply to ignore the evidence – it isn't mentioned in the Decision. Their Decision is perverse.

Iniquity

63 The Tribunal says in its Decision (*IRTDec1:115-6*):

> 115. Finally, it is often said that a showing or a well-founded allegation of iniquity or impropriety might undermine reliance on the type of public interest which has just been defined. As indicated above, no such showing is made out in the present case.
>
> 116. The Appellant not unnaturally points to the amount of public money that has been expended in relation in particular to the NIS and other schemes. The Tribunal by a majority does not find the isolation of that factor in itself or in any way material. Its significance is if anything outweighed by the public interest highlighted in the detailed evidence provided in this case by and on behalf of the public authority.

64 The NIS mentioned by the Tribunal, the National Identity Scheme, allegedly cost £292 million[17] (*DMResp2:R2.A2*) and failed. There is nothing to show for the money. £292 million of public money. What with that and the IBM (£265 million) and CSC (£385 million) contracts already mentioned it is clear that we are talking about a lot of public money here. At least £942 million. More given that there are other contractors involved. More still, to cover the Home Office's own costs. All or some of that money is being wasted if biometrics don't work.

65 And that, according to the Majority, is not "in itself or in any way material".

66 A "well-founded allegation of iniquity or impropriety" has been shown and yet the Majority somehow believe that "no such showing is made out in the present case".

67 The Majority may find this waste of money immaterial. Others, like the Minority, may disagree. They may find it patently iniquitous. They may find it definitive – if this isn't an iniquity, then there is no such thing as an iniquity. The tribunal's Decision is perverse.

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[17] http://www.publicservice.co.uk/news_story.asp?id=14065

Procurement 1

68 The Tribunal asserts that the Appellant has failed to adduce any evidence demonstrating that the Home Office's letting of the NBIS contract breaks "UK and EU procurement law and practice" (*IRTDec1:107*).

69 Guilty as charged.

70 But then the Appellant does not allege that these rules have been broken.

71 The same argument is advanced by the Home Office (*HOResp2:61*). In each case, the argument is perverse. Wasting public money is iniquitous even if a procurement complies with UK and EU rules.

Procurement 2

72 Jackie Keane is a senior civil servant at UKBA and is the Programme Director of IABS. According to her testimony (*WSHO1*) she says:

> 11. As part of [the NBIS] tender process IBM proposed to IPS [the Identity & Passport Service], in support of their bid, to undertake an evaluation of biometric specialist suppliers so they could effectively evaluate whom they wished to partner with in their overall bid and prove to IPS that they could meet the facial and fingerprint matching requirements prescribed by the NIS.
>
> 12. The method of testing undertaking by IBM was not imposed or required by IPS ...
>
> 22. As set-out above, IPS was aware that IBM were undertaking the testing exercise described in paragraph 11 above in order, first, to determine who they would select as a preferred biometric sub-contractor if they themselves were successful in their bid; and second, to provide data to IPS demonstrate that IBM could meet the requirements including the service levels stipulated.
>
> 23. It was an exercise undertaken by IBM and wholly developed, run and owned by IBM. IPS did not have engagement with the 3rd party suppliers and it was known by IPS that the data within the report remained the property of IBM.

73 It seems from what she says that when IBM had to answer the question, can any of these biometrics suppliers meet IPS's requirements, yes or no, there was a £265 million incentive to answer yes even if the truth was no.

74 In that situation, it is essential that the Home Office perform its own checks or retain an independent organisation with the appropriate expertise to perform checks that the trial has been properly carried out and that the results are as reported. But Ms Keane is intent on emphasising that IBM did everything and that IPS/UKBA/the Home Office did nothing.

75 She may believe that this stance helps to prove that the trial report belongs to IBM. But the upshot is that, the way Ms Keane depicts it, IBM were in a position to write their own cheque on the taxpayers' account.

76 This matter has been raised with the Tribunal before (*DMResp5:37*). There is no mention of it in the Decision.

77 There may be questions yet whether this procurement exercise meets "UK and EU procurement law and practice". As things stand, it looks as though there is another potential iniquity for the Tribunal reluctantly to consider.

Procurement 3

78 Professor Keeton has been dead for some time now. We may be grateful on his behalf that he didn't live to see this next paragraph in Ms Keeton's testimony:

> 27. If IBM had felt unable to disclose the IBM Report to IPS for fear of disclosure of its contents under FOIA that would, in my view, have limited the ability of IPS properly to assess the capabilities of IBM (and other bidders) and would have made it less certain whether they could have met the terms of the Service Level agreements.

79 Is Ms Keane seriously suggesting that there is a chance that the Home Office would have accepted IBM's bid for NBIS without seeing the biometrics report?

80 The Home Office's case here simply doesn't make sense.

81 Who is procuring what?

82 On the one hand Ms Keane argues that the assessment of biometrics capability was an internal IBM exercise performed for its own benefit, nothing to do with the Home Office. On the other hand, the service levels required were specified by the Home Office and the test data was supplied by the Home Office with a view to awarding a Home Office contract worth £265 million of public money. Which is it?

83 In the hopeless attempt to reconcile the two, Ms Keane and IBM and the Tribunal have been lured into talking about IBM "sharing" their report with the Home Office.

84 This is the language of the encounter group – "thank you for sharing that with us, Nicholas [or whatever]".

85 This language is utterly inappropriate to the world of public administration where a competent public authority is supposed to be in charge of the procurement process. Ms Keane's craven testimony suggests that what we have here instead is a Department beholden to a contractor, it's the wrong way round and once again it looks as though there may be an iniquity here.

The ability of the Home office to do its job

86 The Home Office assert that they could not do their job if the IBM report were disclosed. This is simply begging the question. Only if the Home Office publish the report can the public see if they are doing their job. On the evidence available otherwise, they clearly aren't – they're spending the public's money on a technology they have already proved to be useless.

87 To accept the Home Office's line of argument – as the Information Commissioner's Office and the Majority appear to – is to accept that FOIA can't achieve its objectives. That surely can't be the position the Commissioner and the tribunal want to be in.

Misleading ministers, Parliament, the media and the public

88 The Appellant submitted evidence demonstrating that the Home Office have for years misled people about the reliability of biometrics.

89 The findings of the House of Commons Science and Technology Committee have been referred to several times over the year of this case. The Committee pointed out that the Home Office had no good reason for their claimed confidence in the reliability of their chosen biometrics particularly in light of the results of the UKPS biometrics enrolment trial.

90 There was the Appellant's 4 February 2009 letter to Sir David Normington[18] (*OB2:179-87*). Sir David was at the time permanent secretary at the Home Office. The letter points out that there is no basis for the claims made in a misleading Home Office press release about the reliability of biometrics. Sir David did not answer the letter.

91 There was the Appellant's correspondence with Sir David[19] (*OB2:188-91*), Lin Homer[20, 21] (then chief executive of UKBA, *OB2:207-16, 217-22*) and Brodie Clark (head of the UK Border Force at the time, *DMResp4:5.8, DMResp5:11*).

92 This correspondence concerned the deployment of so-called "smart gates" at UK airports – the Home Office claimed that this deployment was justified by the successful trial at Manchester airport whereas John Vine, the independent chief inspector of UKBA at the time, could find no evidence of a trial having been undertaken (*DMResp4:5.8*).

93 Does the Tribunal agree that the Home Office have been misleading everyone about the reliability of biometrics?

94 We don't know, because this evidence of the Appellant's is not mentioned in the Decision. As a result of this perverse omission, the Tribunal is able to remain silent on the question whether the Home Office has been misleading ministers and Parliament, the media and the public, for years, on the reliability of biometrics and avoids deciding whether immunity from breach of confidence actions could be granted if disclosure of the IBM report is ordered.

The Appellant's evidence

95 The Tribunal reprove the Appellant for his verbosity (*IRTDec1:23*):

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[18] http://dematerialisedid.com/BCSL/Normington.html

[19] http://dematerialisedid.com/BCSL/Normington2.html

[20] http://dematerialisedid.com/BCSL/eBorders.html

[21] http://dematerialisedid.com/BCSL/UKBA20100203.html

> The Tribunal as a whole pauses here to note in the majority view, it has not been greatly assisted by the length and density of the materials submitted in the appeal by the Appellant. On the one hand, it is of course right that a litigant in person without legal training should be afforded some latitude in the manner in which submissions are made to the Tribunal. However there must be a corresponding responsibility to impose a degree of self-discipline with regard to the length of submissions and supporting evidence. Submitting everything that may or may not be thought to be relevant may well in the end be counterproductive.

96 On the one hand, the Tribunal is wrong – if the Appellant had submitted everything that might or might not be relevant, then the Open Bundle would be even thicker.

97 On the other hand, the tribunal is right, it's not the first time that this charge has been levelled against the Appellant and the failure of the Tribunal to consider the evidence that the Home Office have been misleading everyone for years about biometrics is a painful demonstration that his chronic verbosity can indeed be counter-productive.

98 And on the other hand, the Tribunal has had over a year to consider the case and there are three people on the Panel, this is a serious case, it demands a lot of evidence and there has been plenty of time to read it and consider it, that is the Panel's job.

99 The Appellant respectfully rejects the suggestion that it is "counterproductive" to try to support his case in front of the Tribunal by submitting evidence and hopes that this evidence can now be considered, late in the day, as part of the Application.

Professor Anderson's witness statement

100 There is no such excuse for the tribunal ignoring Professor Anderson's witness statement[22] in their Decision (*OB2:307-10*).

101 The Professor informs the Tribunal that banks do not use face recognition biometrics or flat print fingerprints and the reason is that the technology is not reliable enough.

102 It follows that the Home Office investment in this technology is an iniquitous waste of public money and that the Home Office have been misleading the rest of us for years by pretending that the technology works.

103 It is perverse of the Tribunal to ignore this evidence and the Appellant hopes that it will now be considered as part of the Application.

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[22] http://dematerialisedid.com/bcsl/anderson-statement-moss-vs-ico.pdf

The Home Office's witness statements – omissions

104 It is noteworthy that the Home Office were unable to submit any independent, third party, academic, expert testimony in favour of their chosen biometrics. Noteworthy to the Appellant, but not to the Tribunal, who perversely make no comment on this omission from their Decision.

105 Why didn't the Home Office or IBM or Morpho submit any open, technological evidence to the Tribunal? The opportunity was there for them to give the public some confidence that our money is not being wasted. Forever arrogant, the opportunity was not taken. That omission also is worthy of comment by the Tribunal in their Decision but perversely there is none.

106 The Home Office have in the past used Tony Mansfield, Jim Wayman, John Daugman and Marek Rejman-Greene for external expert advice on biometrics.

107 Mr Rejman-Greene[23] (*OB2:165-78,270-81*) is now employed by the Home Office Scientific Development Branch. He cannot be regarded as independent but he is the Home Office's internal expert on biometrics and it is noteworthy that no testimony from him was submitted although once again it is not noted by the Tribunal in their Decision.

108 Professor Daugman[24] is the father of biometrics based on the iris and warns that there is too little randomness in faces and fingerprints to identify people uniquely in large populations – the attempt to do so will drown, he says, in a sea of false positives even if the equipment used is hugely more accurate than today's devices (*OB2:270-81*). Face recognition and flat print fingerprints are the Home Office's chosen biometrics. Professor Daugman's testimony would clearly not be welcome.

109 Messrs Wayman and Mansfield, together with Mr Antonio Possolo of the US National Institute of Standards and Technology (NIST), have written a paper[25] brought to the attention of the Tribunal several times concluding that the technology of biometrics is out of "statistical control" (*DMResp2:61-7, DMResp4:3.3-3.5, OB2:282-306*). Among other things, this implies that IBM's technology trial report cannot justify the Home Office's investment of public money in their chosen biometrics.

110 Like the Appellant's evidence of the Home Office misleading the public and like Professor Anderson's evidence, the evidence of the three world authorities Messrs Daugman, Wayman, Possolo and Mansfield submitted to the Tribunal for consideration is ignored in their Decision. The Appellant requests that this failure of the Tribunal's to say why they were not persuaded by so much of the evidence adduced by the Appellant be taken into account in this Application.

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[23] http://dematerialisedid.com/Register/regBiometrics.pdf

[24] http://dematerialisedid.com/Register/regBiometrics.pdf

[25] http://biometrics.nist.gov/cs_links/ibpc2010/pdfs/FundamentalIssues_Final.pdf

111 It is likely that the Home Office did not approach any of the external authorities above for a witness statement in support of their case – it is unlikely that it would have been provided or, if it had been, that it would have been supportive. But is there *anyone* authoritative who would have given the Home Office's choice of biometrics technology a good reference? Anyone *anywhere* in the world?

112 If not, what does that say for the Home Office's choice?

113 It says that the Home Office's conduct is iniquitous, their decision to invest in their chosen biometrics is defective and their refusal even to attempt to justify their continued waste of public money is arrogant.

The biometrics evidence required

114 Following the Wayman, Possolo and Mansfield paper, the point was made by the Appellant in his 31 May 2011 submission (*DMResp2:75*) that the reliability of any given biometric technology can only be measured and meaningfully quoted for a given set of test data. Messrs Wayman, Possolo and Mansfield say that this has been well known since the USA PATRIOT Act 2001 which requires NIST to certificate biometrics used by the US government. In 2004 it was reported that their certificates say:

> For purpose of NIST PATRIOT Act certification this test certifies the accuracy of the participating systems on the datasets used in the test. This evaluation does not certify that any of the systems tested meet the requirements of any specific government application. This would require that factors not included in this test such as image quality, dataset size, cost, and required response time be included.

115 The point was repeated by the Appellant at the Oral Hearing on 24 February 2012. And yet the Tribunal persist in accepting in their Decision the contention of the Home Office and IBM that the public can satisfy themselves as to the reliability of their chosen biometrics and the wisdom of the Home Office's investment of public money in respect of NBIS/NIAS/IABS by looking at any of the papers stored on the NIST website or at one particular paper published by UIDAI (the Unique Identification Authority of India), *viz. Role of Biometric Technology in Aadhaar Enrollment*[26].

116 What the public needs, the Appellant said at the Oral Hearing, is specific assurance that the biometrics tested in the IBM trial on the specific data provided by the Home Office met the specific requirements drafted by the Home Office.

117 This point, like a lot of others we now begin to see, has been simply ignored by the Home Office and IBM and even by the Tribunal. That is perverse.

118 Only the IBM report will provide the public with the necessary assurance.

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[26] http://uidai.gov.in/images/FrontPageUpdates/role_of_biometric_technology_in_aadhaar_jan21_2012.pdf

119 The Home Office and IBM have argued repeatedly that because the IBM trial had only a “narrow and specific purpose”, a “limited scope”, it was “highly contextual” and had a “targeted purpose”, there were “very specific factors” in a “tightly constrained” and “specific context”, the public would learn nothing from seeing the report.

120 This is the wrong way round.

121 The public precisely needs to know that biometrics will help to achieve a number of specific objectives. Are the Home Office and IBM saying that the report will not prove that?

122 At the very least they are admitting that the report will not justify the use of biometrics for purposes not foreseen at the time of the IBM technology trial and not tested.

123 And they are admitting that they have no other evidence to justify their investment of our money in biometrics used for any other purposes.

124 The Home Office would rather agree with the Appellant that they are guilty of misfeasance in public office than disclose the IBM report.

125 It’s extraordinary. Even more extraordinary, the Tribunal perversely accept it.

The importance of biometrics

126 The Appellant has the highest regard for IBM. The company has survived 100 years in business, it is highly profitable, it can’t be stupid and it doesn’t waste time on hopeless projects.

127 What then does Mr Swain’s testimony imply?

128 Mr Swain, remember, recommends that the public should browse the NIST website or UIDAI’s for assurance that biometrics will do the job (*WSIBM2:17-22*).

129 The NIST website includes several scrupulously fair academic papers which undermine the reliability of biometrics, not least the paper already referred to by Messrs Wayman, Possolo and Mansfield. Other NIST papers and the travails of biometrics are discussed in the Appellant’s article submitted a year ago as evidence (*OB2:270-81*).

130 The Aadhaar enrolment paper recommended by Mr Swain does not pass muster. If the authors of this paper applied for a job with IBM, such is the quality of their work that HR would reject them out of hand, no interview, no need to bother the line managers.

131 Mr Swain will not thank whoever sloppily suggested to him that he recommend that paper. Not least because it may cause people to go on to read its sister paper, *India boldly takes biometrics where no country has gone before*[27].

132 That's the paper that predicts that any large-scale identity management system that doesn't use iris scanning is doomed to "catastrophic failure". I.e. large-scale identity management systems like IABS:

> In this author's opinion [Raj Mashruwala], the iris decision alone turned the UID system into a roaring biometrics success and averted a potentially catastrophic failure.

133 The Appellant has written about these two UIDAI papers but has not burdened the Tribunal before with the article[28].

134 Given that IBM do not make you the Commercial Director of a nine-figure contract with the UK government if you're stupid, the implication is that biometrics is irrelevant to NBIS/NIAS/IABS, it doesn't matter to Mr Swain, biometrics is nothing more than an optional decorative frieze on the contract. There are the important structural components of NBIS/NIAS/IABS on the one hand on which he concentrates and, on the other hand, there are the ornamental biometrics components which are trivial and not worthy of serious consideration and which can be quite properly dismissed unthinkingly with careless and airy references to papers by NIST and UIDAI.

135 Which confirms again that the Home Office are misleading the public, which once again goes without being noted by the Tribunal in their Decision.

136 Which may be a partial explanation why, when the Appellant came back into the Court after a closed session of the Oral Hearing, the Judge was thanking Mr Swain for attending and describing his attendance as "sensitive".

137 Which may be a partial explanation why this case which surely raises no novel matters of principle in the world of information rights has required five Hearings on the papers and one Oral Hearing and taken over a year to reach an obviously perverse Decision 47 pages and 135 paragraphs long.

138 Which may be a partial explanation why the three-man Panel who seemed not in the least perverse at the Oral Hearing have two of them at least delivered such a perverse Decision.

139 And which suggests that Mr Swain and others at IBM may be despairing at the moment, seeing the chaos the Home Office are creating at Heathrow airport and elsewhere as they try with their traditional aplomb to deploy IABS.

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[27] http://www.planetbiometrics.com/creo_files/upload/article-files/India_boldly_takes_biometrics_where_no_country_has_gone_before.pdf

[28] http://www.dmossesq.com/2012/02/uidai-and-textbook-case-study-of-how.html

Findings of fact, questions of law and procedure

140 Mr Swain says in his first witness statement that (*WSIBM1:18*):

> 18. All of the suppliers involved in the Demonstration made significant investment in time and provided IBM with more details about their products performance than is generally available. The information provided included business-critical intellectual property of the suppliers, representing the results of major investment in software research and development ...

141 The business-critical intellectual property concerned was provided under cover of NDAs. IBM submitted a copy of one of these NDAs as evidence (*WSIBM1:Exh3*). It specifies that IBM should not disclose the information provided. IBM did disclose it – to the Home Office. Are IBM therefore already in breach of these agreements? Or is there another agreement which we haven't seen that provides for the Home Office to see the information? No finding of fact has been made by the Tribunal.

142 IBM may well be in receipt of valuable intellectual property from the biometrics companies, but is any of it in the disputed report? If not, then disclosing the report may not be actionable. The Appellant hasn't seen it, *ex hypothesi*, and is reliant on the Tribunal when he asks that question, which he has done twice (*DMResp2:95, DMResp4:4.8-9*). There has been no response, no finding of fact has been made by the Tribunal.

143 The Home Office in particular make lurid claims as to the unlimited damages they and IBM could be sued for. Is there any substance to these claims? Are they a subterfuge, nothing more than an excuse not to disclose the IBM report? Are they a sign of ignorance on the part of the Home Office, itself a monopoly, unaware of the commercial reality of competition?

144 The Appellant points out that bringing actions against the Home office and IBM for breach of confidence would highlight the failure of five of the biometrics suppliers to win the IBM sub-contract (*DMResp1:50*). That would be bad publicity. They might be expected to prefer to keep quiet. IBM themselves say that anyone can see comparative assessments of biometrics products on the NIST website – the companies don't sue NIST. The Appellant has argued that they would no more sue IBM or the Home Office. In the circumstances, would the biometrics suppliers be likely to bring actions against IBM? No finding of fact has been made by the Tribunal.

145 The Home Office and IBM assert that their commercial interests and the commercial interests of the biometrics companies which participated in the IBM trial would be adversely affected by disclosure of the disputed report. As a counter-example, the Appellant notes that Identix, Inc.'s, biometrics products failed completely when they were tested in the UKPS biometrics enrolment trial. Identix was subsequently incorporated into L-1 Identity Solutions Inc. and went on to win millions of dollars-worth of contracts in the US. So successful were they that Morpho paid $1.6 billion to buy them. Their published failure can hardly be said to have harmed their commercial interests. How reliable is this

shroud-waving argument of the Home Office's and IBM's? We need a finding of fact from the Tribunal. None has been made.

146 The Appellant points out that bringing actions against IBM for breach of confidence would highlight the fact that all six biometrics suppliers handed over their intellectual property to IBM. There was no need to do that – the Home Office need to know *that* the biometrics products work, not *how* they work. The directors of the biometrics companies are potentially in breach of their fiduciary duties (*DMResp4:4.9*) and accordingly risk being sued by their shareholders. In the circumstances, would the biometrics suppliers be likely to bring actions against IBM? No finding of fact has been made by the Tribunal.

147 IBM argue that disclosing the disputed report would make it harder for them to enlist participants in similar trials. That is a good thing in the view of the Appellant (*DMResp4:4.9*). It was commercially inept of the biometrics companies to reveal their intellectual property to IBM, it was against the interests of their shareholders, and it should be discouraged. There is no reason to believe that companies would refuse to take part in trials just because they weren't giving away their intellectual property. How else would they win the lucrative contracts offered by the likes of the Home Office? Does the Tribunal agree? No finding of fact has been made by the Tribunal.

148 If actions were brought against IBM and/or the Home Office for breach of confidence, how likely is it that they would be successful? No finding of fact has been made by the Tribunal.

149 The NDAs and the NBIS contract all recognise that the parties are subject to FOIA. Mr Swain says in his first witness statement that although IBM and the biometrics suppliers acknowledge that FOIA is there, no-one thought that it would be invoked (*WSIBM1:6,35*):

> IBM would view any release by the Home Office as a grave breach of the confidentiality IBM had every right to expect in a normal, productive commercial relationship with the Home Office, notwithstanding the fact that a public body is subject to the FOIA ...
>
> In summary, IBM would suggest that the FOIA cannot properly, in circumstances such as these, be used to release information that is the commercial property of IBM and, particularly, where that release would damage IBM's legitimate commercial interests.

150 If a Respondent says "I know about the _____ Act and I even signed an agreement acknowledging that I was bound by it but I didn't really mean it and I didn't think it would apply so it doesn't", is that a defence in English law? The Tribunal might be expected to pronounce on the matter but no ruling has been forthcoming.

151 The Home Office (*WSHO1:11*) and IBM (*WSIBM1:10*) both claim that the biometrics trial assessed the reliability of both face recognition and flat print fingerprints. The Home Office volunteered the information that they had provided five million pairs of fingerprints as a test database for the trial

(*OB2:224-8*). The IBM paper delivered at the 2-4 March 2010 NIST conference (*WSIBM1:Exh2*) presents results for fingerprints only, not faces. The Appellant hasn't seen it, *ex hypothesi*, and is reliant on the Tribunal when he asks whether the IBM report includes face recognition, or only flat print fingerprints. No finding of fact has been made by the Tribunal.

152 The Home Office made four submissions during the course of the case – 20 May 2011, 24 August 2011, 28 November 2011, 20 February 2012. Three of them are signed by Mr Gerry Facenna of Monckton Chambers. At the Oral Hearing on 24 February 2012, there was Mr Facenna, supposedly Counsel to the Home Office – supposed as such by the Appellant, at least. It transpired some hours into the proceedings that Mr Facenna was actually representing not the Home Office on this occasion but Mr Swain of IBM. Given which, how can the Tribunal write in its Decision (*IRTDec1:9*):

> 9. The practical result has been that although initially the parties and the Tribunal originally were of the collective view that the matter could be disposed of on the papers, the Tribunal not only had to consider on several occasions the issues but also in the process after a number of panel discussions and interim directions thought it appropriate to convene a half day's oral hearing at which all the parties were represented and additional evidence and submissions stemming from the Tribunal's earlier directions and deliberations were canvassed.

153 It is not the case that "all the parties were represented". And, incidentally, it is not the case that the Tribunal and the Parties were of the collective view that the matter could be decided on the papers – the Appellant, as a litigant in person, pointed out that he wasn't qualified to judge.

154 How can the Tribunal make such a mistaken finding of fact? Far from being represented, the Home Office didn't turn up at all. At their own case.

155 And is it procedurally correct for IBM to have been represented at the Oral Hearing? IBM aren't even a Party to the case.

Government secrets

156 The Tribunal twice raises the issue of government secrets in its Decision, (*IRTDec1:76-7,113*):

> 77. In any event enough has been said already in this judgment to make it clear that the present appeal is not at all concerned with information that could be remotely be characterised as a Government secret ...
>
> 113. For the sake of completeness, the Tribunal again by a majority also finds that the present case does not constitute a case of "Government secrets" in any sense or meaning of that phrase ...

To be clear about attribution, neither the ICO, nor the Home Office nor the Appellant started this hare running. It was entirely the Tribunal's work, first raising the issue in one of its Directions and then dismissing it as irrelevant.