

**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**

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**RESPONSE BY THE APPELLANT  
16 FEBRUARY 2012**

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*References to clauses, n, on pages, m, of Information Rights – Law and Practice (Third Edition) by Philip Coppel, are in the form Coppel:m: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 Commissioner's 24 August 2011 Response are in the form ICOResp2: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 Appellant's 20 September 2011 Response are in the form DMResp4: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 Judge's Directions dated 12 December 2011 are in the form JDir3:n*

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- 1 The arguments presented here are supplementary to the arguments advanced in the Appellant's earlier Appeal (29 March 2011) and Responses (10 May 2011, 31 May 2011, 25 July 2011 and 20 September 2011).

- 2 In accordance with the Judge's Directions, this Submission addresses the Home Office's Response dated 28 November 2011 (*HOResp3*).
- 3 The Appellant looks forward to expanding on this Response at the Hearing kindly, if reluctantly, arranged by the Judge (*JDir3:2*).

### **The competence of the Tribunal**

- 4 Under the guidance of the Tribunal and the Commissioner, we have reached the point in this case where we know that we have to test the claim that it is against the public interest to withhold the IBM report. The report may justifiably be more or less redacted first, before publication, but the claim is that one way or the other it should be disclosed.
- 5 The Home Office are lagging somewhere behind on this issue, and assert in their 28 November 2011 Response that the Tribunal doesn't know how to do its job (*HOResp3:4-5*).
- 6 Coppel reminds us that a public interest defence can be mounted and that if it is successful, then the breach of confidence resulting from disclosure would not be actionable (*Coppel:744:25-001, 749:25-007*). He lists three headings under which the defence could be successful, *viz.* the disclosure of iniquity, stopping the public from being misled and responding to public concern (*Coppel:763:25-024*).
- 7 There is no call for the Home Office to be Judge as well as Respondent in this case.

### **The nothing-to-see-here gambit before 29.11.11**

- 8 The Home Office pretend that the Appellant is trying to promote nothing more than an academic debate about the reliability of mass consumer biometrics, a debate which would be remote from the public interest and which could not justify any breach of confidence (*HOResp3:1-3, 8-10*). They're not stupid. This is a subterfuge or gambit. The Home Office know perfectly well that this is a tendentious description of the Appellant's case.
- 9 So why would the Home Office attempt this gambit?
- 10 The Appellant can only conclude that it is an attempt to distract the Tribunal's attention from the situation in which the Home Office found itself on 28 November 2011, a situation which precisely makes the Appellant's case for disclosure.
- 11 Remember please in what follows the point made at *DMResp4:5.9*, more than six weeks before the Brodie Clark affair: "In the opinion of the Appellant, the public can't tolerate this situation. Good people like Lin Homer and Brodie Clark are being suborned".
- 12 *HOResp3* is other-worldly. The Home Office write as though nothing relevant had happened since their 24 August 2011 Response, *HOResp2*. In fact, here in the real world:

- On Wednesday 2 November 2011, Brodie Clark was suspended as Head of the UK Border Force. The allegations against him and which he disputes were listed by the Home Secretary in a statement to the House<sup>1</sup> on 7 November 2011 and centre on biometric fingerprint-checking at the border.
- In the same Statement, the Home Secretary announced that three internal Home Office enquiries had been launched into the affair<sup>2</sup>.
- The outrage expressed by the media and the opposition over the intervening weekend were deemed sufficient to threaten the Home Secretary's job. Were the borders safe? Would the 2012 Olympics be safe? Had the government lost control of the UK Border Agency? Did the government know what was going on at the borders? Against this background, the Home Secretary gave evidence<sup>3</sup> to the Home Affairs Committee on Tuesday 8 November 2011.
- That was the first evidence session in an enquiry<sup>4</sup> launched by the Home Affairs Committee in addition to the three Home Office enquiries.
- Brodie Clark resigned and initiated a case for constructive dismissal, so that now there will also be an employment tribunal looking into the matter in addition to the four enquiries above.
- On 15 November 2011, Brodie Clark gave evidence<sup>5</sup> to the Home Affairs Committee and asserted that biometric fingerprint checks are the ninth and bottom priority for the Border Force when making identity/security checks, they are the least reliable check and the check which it is most sensible to drop when health and safety concerns supervene.
- On the same day, it was announced that Dame Helen Ghosh, Permanent Secretary at the Home Office, who had been expected to be appointed Head of the home civil service, would now be overlooked<sup>6</sup> in light of the Brodie Clark affair.

13 This is mayhem but, if HOREsp3 is to be taken at face value, then the Home Office's case is presumably that the security of the border and the safety of the 2012 Olympics are matters of no more than ivory tower interest, it is in the public interest for their Permanent Secretary to have her career curtailed rather than disclose the IBM report, Brodie Clark's assertion that the Home Office's chosen biometrics are unreliable is irrelevant, the Home Affairs Committee is wasting its time, the "common welfare" (*Coppel:489-90:15-004*) is promoted by having the Home Secretary – and, as it happens, the Shadow Home Secretary – make a fool of herself in public by assuming that the biometrics chosen by her officials are reliable, and that the public concern expressed by politicians and the media is not a public concern that need detain the Home Office.

#### **The nothing-to-see-here gambit after 28.11.11**

14 Remember please in what follows that Jackie Keane, the senior civil servant, has submitted evidence to the Tribunal (*OB2:311-16*) about IABS, the Immigration and Asylum Biometric System built on the basis of the NBIS/NIAS contract awarded on the basis of, among other things, the disputed IBM report.

- 15 Remember also, please, that John Vine is the Independent Chief Inspector of the UK Border Agency who revealed that there is no evidence that the Home Office made any attempt to assess the reliability of the smart gates being tested at Manchester Airport (*DMResp4:5.8*). Meanwhile, the Home Office say that they are deploying smart gates at other airports on the basis that they proved reliable at Manchester Airport. This confusion needs to be resolved.
- 16 There have been developments in the real world since 28 November 2011:
- Jackie Keane's IABS, which was meant to be deployed by the end of December 2011<sup>7</sup> has now been delayed, according to *UK Border Agency News*<sup>8</sup> until February 2012 for the UK border security components and March 2012 for the Olympics safety components.
  - One of the Home Office internal enquiries announced by the Home Secretary on 7 November 2011 is being conducted by John Vine. He was due to report by 31 January 2012. In the event, he needs more time and submission of his report has been delayed<sup>9</sup>.
  - The *Financial Times* tell us that the deployment of smart gates at UK airports will now be delayed<sup>10</sup>.
  - The *Sunday Times* tell us that UKBA have stopped bothering to fingerprint so-called "clandestines" at Calais<sup>11</sup> because, as Damian Green MP, the Immigration Minister, puts it, his staff have got better things to do. In the case of Calais clandestines at least, Brodie Clark was suspended for doing something that is now Home Office policy.
  - The Home Affairs Committee report *hasn't* been delayed. In fact it has been published<sup>12</sup>. The Committee complain that information that should be made available to them has been withheld by the Home Office, even when that information was promised by the Home Secretary in her testimony before the Committee. As a result, the Committee has been unable to reach reasoned conclusions in its enquiry.
  - The *Manchester Evening News* tell us that the IRIS system, which uses iris scans to verify the identity of frequent flyers, has been discontinued at Manchester Airport and reminds us that new registrations on IRIS were halted last year. The newspaper claim to have seen secret Home Office documents which confirm that IRIS will be terminated nationwide, not just at Manchester Airport.
- 17 The Appellant recognises the predicament the Home Affairs Committee find themselves in, with the Home Office in their other-worldly way wrongly refusing to disclose relevant information.
- 18 What do the delays and termination in para.16 above betoken? Perhaps nothing more than delays and termination. But perhaps something is going on. Perhaps the Home Secretary and the Permanent Secretary have set about rectifying the shambles left behind for them by Sir David Normington and his several Home Secretaries. That is conjecture. One thing is certain. The Home Office cannot come to the Hearing on 24 February 2012 maintaining this pretence that there is "nothing to see here". Not if they have any dignity left.

**UKBA's lights under a bushel of biometrics**

- 19 Coppel reminds us that the “mischief or vice” that the Freedom of Information Act 2000 is meant to remedy is the “unnecessary secrecy in government [which] leads to arrogance in government and defective decision-making. The perception of excessive secrecy has become a corrosive influence in the decline of public confidence in government” (*Coppel:12:1-013*) and the “unnecessary secrecy in Government and public services [that] has long been held to undermine good governance and public administration” (*Coppel:13:1-014*).
- 20 Unnecessary secrecy in this case doesn't just undermine confidence in the UK Border Agency. It hides from view the successes that UKBA enjoys. Under different circumstances, UKBA could currently be bathed in public approval of the achievements of Lin Homer and Brodie Clark who, with the assistance of Interpol, have at last implemented checks at the border for lost and stolen passports<sup>13</sup>. Instead, the public and the media are furious with UKBA's more famous incompetence with biometrics.

**The bag no longer contains the cat**

- 21 Hard for the Tribunal to believe, perhaps, but even in this short Response there is more to add so that they and the Respondents are on notice what to expect at the Hearing.
- 22 The Unique Identification Authority of India (UIDAI) came under existential threat. The Standing Committee on Finance in the Indian Parliament published a damning report on UIDAI's Aadhaar scheme<sup>14</sup>, which is meant to use biometrics to identify everyone in India, all 1.2 billion of them, and allocate them a corresponding unique number. Somewhere behind the scenes, the Home Ministry, UIDAI's rivals, were sniping at them, defending their rival identity management system, the NPR<sup>15</sup>. Would UIDAI's funding be renewed? Would they be authorised to register the next 200 million Indians, having registered the first 200 million by 31 March 2012? The answer is yes.
- 23 How did UIDAI achieve that?
- 24 Partly, by publishing the performance figures of their system<sup>16</sup>. Using Morpho biometrics, just like the Home Office, UIDAI claim to have achieved a biometric failure to enrol rate of 0.14%, a false positive identification rate of 0.057% and a corresponding false negative identification rate of 0.035%. These figures are outstanding. So outstanding that they are barely credible and, indeed, it is recommended that everyone wait for an independent audit before believing them.
- 25 We mustn't guess. We are in uncharted territory here because, unlike UKBA, UIDAI are using multi-modal biometrics – flat print fingerprinting + iris scanning, the two combined, making one composite biometric. Not only that, but instead of using just one biometrics matching algorithm, they use three competing ones.
- 26 Two points to note:

- These performance figures are of the order of 100 times better than anything seen even in biometrics technology tests.
  - And they are the first performance figures to be seen at all, for years.
- 27 Ever since the *débâcle* of the UKPS biometrics enrolment trials, technology suppliers and public authorities the world over have eschewed mentioning any performance figures at all. The Home Office are not alone in looking seedy in this way, refusing to tell people whether their investment in biometrics is justified.
- 28 UIDAI have broken what looks like an unwritten rule by publishing their figures. They have also described the likely fate of any identity management scheme which fails to use multi-modal biometrics and, particularly, to use iris scanning, as “catastrophic failure”<sup>17</sup>. The Home Office’s IABS is one such.
- 29 So now the bag no longer contains the cat. The way is open for the public to ask, in the UK and elsewhere, is our scheme as good as India’s? It’s one thing to tell the Appellant to take a running jump. But can the Home Office withstand the pressure that will come from the media to answer the question what have we got for our money, does the technology work?
- 30 We don’t know the answer but that doesn’t matter because what we do know is that any organisation like the Home Office, intent on survival, is not going to wait to find out if it can withstand the pressure – it will, if it has any sense, take matters into its own hands and release the information, apparently voluntarily, taking great credit for openness, while it still has some control over the news management<sup>18</sup>.
- 31 Far from appealing, if the Tribunal’s Decision goes against them (*HOResp3:12*), the Appellant fully expects the Home Office very soon to embrace disclosure. It should be respectfully noted that if the Tribunal’s Decision goes against the Appellant, he likewise will consider appealing (*Coppel:874:28-030 et seq.*). The case could go on for years. But the Home Office haven’t *got* years, have they. The Olympics start in July.

### **Stewardship of the public purse**

- 32 The Home Office have a new-found desire to save time and public money (*HOResp3:11-15*). For that reason, they say, they would like to delay consideration of the §§31 and 43 exemptions to a later phase of the case if their §41 argument fails.
- 33 “Neither the Appellant nor IC”, they say, “has objected to the proposal to deal with section 41 first and separately” (*HOResp3:12*). Wrong. Six months before *HOResp3*, the Appellant made his case against the application of §§31 and 43 (*OB2:162-186*). He made it then explicitly to avoid unnecessary delay later. And what’s more, the Home Office made their detailed response in August 2011 (*HOResp2:73-89*).
- 34 It will certainly save time and public money if the Home Office will please quickly desist in their efforts to draw an analogy between their situation vis-à-vis their

contractors/sub-contractors and the lawyer-client relationship (*HOResp3:6-7*). The analogy is so inept that it looks like contempt to bother to try it on – it doesn't fit.

### **The untroubled conscience of the contemptuous**

- 35 Contempt in this case is a mistake. The Home Office's contempt for the Judge (para.5) and the Home Affairs Committee (para.17) are referred to above and their contempt for the House of Commons Science and Technology Committee has been referred to in previous submissions (*DMResp4:5.6*). As has their contempt for scientific method, when they ignored the results of the UKPS biometrics enrolment trial and pressed ahead, wasting public money, with mass consumer biometrics which they knew to be too unreliable to do the job in hand (*DMResp4:4.6*).
- 36 But the contempt displayed and the mistake made by submitting Jackie Keane's and Nicholas Swain's evidence (*OB2:307-420*) is transcendent. How could they think it would help their case?
- 37 What the evidence says is that IBM at their own expense evaluated the performance of the products of six biometrics technology suppliers and then bid for the Home Office's NBIS contract. When they compared their results with the Home Office's requirements, IBM had a choice. They could say yes, there is a product which will meet the Home Office's requirements. Or no, there isn't. To say no would cost them £265 million, the value at the time of NBIS. They said yes.
- 38 Were she a recipient of that evidence, perhaps the Home Secretary's or the Permanent Secretary's "conscience would be troubled to be replaced by a structured enquiry" (*Coppel:765:25-027*). That *modus operandi* of the Home Office's, whereby they have given IBM the wrong incentive, leaving the public whom they hold in contempt to pay the bill, is clearly a matter of public concern, which is what Coppel is talking about in the passage quoted. The evidence was submitted in confidence. But is this a case where a confidence should be broken in the public interest?
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<sup>1</sup> “First, biometric checks on EEA nationals and Warnings Index checks on EEA national children were abandoned on a regular basis, without ministerial approval.

“Biometric checks on non-EEA nationals were also thought to have been abandoned on occasions, without ministerial approval.

“Second, adults were not checked against the Warnings Index at Calais, without ministerial approval.

“Third, the verification of the fingerprints of non-EEA nationals from countries that require a visa was stopped, without ministerial approval.”

<http://www.homeoffice.gov.uk/media-centre/speeches/border-force-suspensions>

<sup>2</sup> “Dave Wood, head of the UKBA Enforcement and Crime Group and a former Metropolitan Police Officer, will carry out an investigation into exactly how, when and where the suspension of checks might have taken place.

“Mike Anderson, Director General of Immigration, is looking at the actions of the wider team working for Brodie Clark.

“And John Vine will conduct a thorough review to find out exactly what happened across UKBA in terms of the checks, how the chain of command in Border Force operates and whether the system needs to be changed in future. And, for the sake of clarity, I am very happy for Mr Vine to look at what decisions were made and when by ministers.

“That investigation will begin immediately and will report by the end of January.”

<http://www.homeoffice.gov.uk/media-centre/speeches/border-force-suspensions>

<sup>3</sup> <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/uc1631-i/uc163101.htm>

<sup>4</sup> [http://en.wikipedia.org/wiki/Brodie\\_Clark#Home\\_Affairs\\_Committee](http://en.wikipedia.org/wiki/Brodie_Clark#Home_Affairs_Committee) – please note that much of this Wikipedia entry is written by the Appellant

<sup>5</sup> <http://www.dmossesq.com/2012/01/theresa-may-keith-vaz-john-vine-and.html#es> – the relevant part of Mr Clark’s testimony is between 12:18 and 12:24.

<sup>6</sup> *The Times*, ‘Borders row blocks first woman from top Civil Service job’,  
<http://www.thetimes.co.uk/tto/news/politics/article3226830.ece>

<sup>7</sup> *UK Border Agency News*, Issue 7 – May 2011 (p.5):

“At the end of 2011 the Immigration and Asylum Biometric System (IABS) will replace the agency’s current fingerprint system and will also support biometric capture at the Olympic and Paralympic Games ...

“The programme is working closely with its suppliers IBM, Morpho, Home Office IT, Fujitsu and Atos to successfully deliver the latest biometric matching technology for the agency ...”

[http://www.ukdirectgov.com/homeoffice/ukba/sitecontent/documents/aboutus/workingwithus/ukba-news1/issue-7\\_178d2d3.pdf](http://www.ukdirectgov.com/homeoffice/ukba/sitecontent/documents/aboutus/workingwithus/ukba-news1/issue-7_178d2d3.pdf)

<sup>8</sup> *UK Border Agency News*, Issue 10 – November 2011 (p.5):

“In February 2012 the Immigration & Asylum Biometric System (IABS) will replace the agency’s current fingerprint system. It will also enable biometric capture at the border for Olympic and Paralympic Games Family Members which include ...

“IABS will go live in February 2012, and the equipment used for biometric capture at the border for the Olympic and Paralympic Games will go live at the end of March 2012 ...”

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[http://www.ukdirectgov.com/homeoffice/ukba/sitecontent/documents/aboutus/workingwithus/ukba-news1/issue-10\\_178d2d3.pdf](http://www.ukdirectgov.com/homeoffice/ukba/sitecontent/documents/aboutus/workingwithus/ukba-news1/issue-10_178d2d3.pdf)

<sup>9</sup> <http://www.dmossesq.com/2012/02/john-vine-report-delayed.html>

<sup>10</sup> <http://www.ft.com/cms/s/0/f5c44c0e-4e87-11e1-ada2-00144feabdc0.html>

<sup>11</sup> <http://www.dmossesq.com/2012/01/theresa-may-damian-green-keith-vaz.html>

<sup>12</sup> *Inquiry into the provision of UK Border Controls:*

“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 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 ...”

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1647/164703.htm>

<sup>13</sup> *Lin Homer, Brodie Clark and Ron Noble:*

“Britain is the only EU country to systematically check passports against those registered as missing worldwide. Last year more than 11,000 people were caught trying to enter the UK using lost or stolen passports. Britain carries out more checks against the database than the rest of Europe combined – 140 million last year. France carried out the second highest number, at 10 million.

“The UK Border Agency acknowledged the importance of the Interpol system, saying its high usage of the database was ‘indicative of the seriousness and priority we place on border security’.”

<http://www.dmossesq.com/2012/01/lin-homer-brodie-clark-and-interpol.html>

<sup>14</sup> *India's ID card scheme – drowning in a sea of false positives,*  
<http://dematerialisedid.com/BCSL/Drown.html>

<sup>15</sup> *Some ground covered, PM Manmohan Singh to fix UIDAI mandate tomorrow,*  
[http://articles.economictimes.indiatimes.com/2012-01-26/news/30666813\\_1\\_home-ministry-uidai-chairman-nandan-nilekani-unique-identity-authority](http://articles.economictimes.indiatimes.com/2012-01-26/news/30666813_1_home-ministry-uidai-chairman-nandan-nilekani-unique-identity-authority)

<sup>16</sup> *Role of Biometric Technology in Aadhaar Enrollment,*  
[http://uidai.gov.in/images/FrontPageUpdates/role\\_of\\_biometric\\_technology\\_in\\_aadhaar\\_jan21\\_2012.pdf](http://uidai.gov.in/images/FrontPageUpdates/role_of_biometric_technology_in_aadhaar_jan21_2012.pdf)

<sup>17</sup> *India boldly takes biometrics where no country has gone before:*

“In this author's opinion, the iris decision alone turned the UID system into a roaring biometrics success and averted a potentially catastrophic failure.”

[http://www.planetbiometrics.com/creo\\_files/upload/article-files/India\\_boldly\\_takes\\_biometrics\\_where\\_no\\_country\\_has\\_gone\\_before.pdf](http://www.planetbiometrics.com/creo_files/upload/article-files/India_boldly_takes_biometrics_where_no_country_has_gone_before.pdf)

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<sup>18</sup> As first suggested to Rt Hon John Reid MP, Home Secretary at the time, On 28 January 2007, <http://dematerialisedid.com/Open.html>