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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

ROSALEEN McCORLEY

(Plaintiff) Respondent

and

NORTHERN IRELAND OFFICE
and
GOVERNOR OF HMP MAGHABERRY

(Defendants) Appellants

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CARSWELL LCJ

This appeal is brought by way of case stated under Article 61 of the County Courts (Northern Ireland) Order 1980 against a ruling given by the Recorder of Belfast His Honour Judge Hart QC on 8 June 1999 at Belfast Recorder's Court in the course of hearing an action brought by the respondent against the appellants for damages for "assault, batteries and trespasses to her person". By that ruling the judge rejected in part a claim put forward by the appellants for public interest immunity in respect of certain documents relating to the events out of which the respondent's claim arose.

The Course of the Proceedings

Those events took place on 2 March 1992, when Governor Gibson ordered a full

search of a number of prisoners in Mourne House, the female wing of Maghaberry Prison. He had received information which led him to believe that a gun might have been smuggled into Mourne House, and regarded this as a serious threat to the safety of persons within the prison and the public at large and to good order and discipline within the prison. He decided that a full-scale search of Mourne House and a full body search of all prisoners would have to be carried out. This was a very substantial and difficult operation, as it was strenuously resisted by a number of Republican prisoners, who barricaded themselves into their cells and did their utmost to prevent the searches from being carried out or to obstruct the process. Teams of officers carried out the search of the prisoners, including the respondent, but no gun was found.

Seventeen prisoners commenced proceedings in the county court against the appellants for damages, of which the respondent's was the first to come on for hearing. The basis of her claim is set out in her reply to the appellants' notice for particulars:

"16/18 **PARTICULARS OF ASSAULT, BATTERY AND TRESPASS TO THE PERSON**

(i) Using unnecessary and unreasonable force upon the Plaintiff.

(ii) Touching the Plaintiff against her will and without her consent.

(iii) Forcing the Plaintiff to the ground.

(iv) Forcibly removing the Plaintiff's clothing.

(v) Strip searching the Plaintiff.

(vi) Conducting a strip search upon the Plaintiff in an inhumane and degrading manner.

(vii) Strip searching the Plaintiff in the presence of male persons.

(viii) Using unlawful and unnecessary force upon the Plaintiff."

The hearing commenced on 4 March 1999 and continued on a number of days thereafter with the calling of witnesses on each side.

Discovery of documents was made in accordance with an order dated 16 February 1999, but in the course of cross-examination of one of the defence witnesses on 25 May 1999 it became evident that a report made by Governor Hall had not been discovered. It was accepted by counsel for the appellants that it should have been included in discovery, but he raised the possibility of a claim of public interest immunity, and the proceedings were adjourned to enable consideration to be given to this. On 4 June 1999 a list of documents which included the missing report was furnished, verified by affidavit, in which it was stated that the appellants objected to production of the item described as "Governor Hall's Report", amongst other documents, except as sealed or covered up, on the ground that –

> "their production except as sealed or covered up would in respect of the parts sealed or covered up be injurious to the public interest in that it would be prejudicial to the safeguarding of national security and the protection of public safety or public order."

The list of documents was accompanied by a certificate signed by the Right Honourable Paul Murphy MP, then Minister of State in the Northern Ireland Office, in which he stated in paragraphs 4 to 8:

> "4. The documents referred to at items 3 and 4 of Part 3 of Schedule 1 contain material which would assist in identifying the source or sources of intelligence that led to the search being carried out on the plaintiff and on other prisoners on 2 March 1992 and how that intelligence came to light and the consideration of the intelligence. Disclosure of such material would put the security of the sources at risk and would make it less likely that any further intelligence of a similar nature would be given to the authorities in prisons throughout Northern Ireland.
>
> 5. I have considered the potential harm to the public interest as a result of disclosure of the information identified in paragraph 4. If the documents are disclosed without the material referred to in paragraph 4 being

redacted then real harm to the public interest would in my opinion be sustained.

6. I have considered any possible impairment of the court's ability to administer justice in these proceedings if the information referred to in paragraph 4 is not disclosed. I have reflected particularly on the question whether non-disclosure of the said information to the Plaintiff might diminish her prospects of succeeding in her legal claim. In balancing the aforementioned interests and considering the said question, I have sought and obtained the advice of Counsel to which I have had regard. Having carefully weighed the foregoing matters, I have formed the view that non-disclosure of the information in question should not impair the court's ability to administer justice in this case. I have concluded that there is a clear balance of public interest in favour of the non-disclosure of the redacted material.

7. In forming the view that the public interest immunity should be asserted in relation to the material which has been redacted, I have taken into account the statements made on 18 December 1996 by the Lord Chancellor and the Attorney General to the House of Lords and House of Commons respectively and the paper placed in the library of each House on that date. These announcements were made following a period of consultation by government on the future use of public interest immunity certificates and the Government has applied the same policy to Ministerial claims in Northern Ireland. I understand that copies of the said statements and papers will be made available to the court. In July 1997 the Attorney General informed the House of Commons that the approach of the previous administration would continue to be applied rigorously. In forming the above mentioned opinions and conclusions I have had particular regard to the principle that relevant information should be disclosed to the maximum extent commensurate with the protection of the important public interest identified in this certificate. I have concluded that real damage to the public interest would ensue if I did not assert this claim.

8. In making this claim I accept that the court has final responsibility for determining questions of disclosure and, in particular, for deciding whether the interests of justice outweigh the public interest that I have asserted. I also accept that the court is in a better position than I am to

> assess the relevance and importance of the information to the determination of the issues in the proceedings."

The document in question was more fully described by counsel on the direction of the judge as containing several portions, the report itself and five annexures:

1. Governor Hall's report;

2. PO Kerr's half sheet (the term used in the Prison Service for a statement made by an officer to his superiors);

3. Report containing intelligence and preliminary assessment by a governor;

4 to 6. Material relevant to the evaluation of the risk.

Several portions of item 1 were obliterated and items 2 to 6 were withheld altogether. The appellants furnished edited copies of the documents to the respondent's solicitors without making any objection to production of the documents.

In his certificate Mr Murphy referred to certificates made by the Secretary of State on 24 February and 19 April 1999 in this action, in which she advanced a claim to withhold on public interest grounds the names of the members of the control and restraint teams who took part in the search of the prisoners. In the certificates she described the background of the respondent and the state of security in Northern Ireland at the time. She set out facts tending to show that threats have been made to members of the prison staff and that if the prisoners knew the identities of the members of the control and restraint teams they and their families could be put at risk.

The Issues

Mr Treacy submitted on behalf of the respondent that the issues which arose in the action were the lawfulness of the search and the extent of the force used in the course of the search. The latter issue speaks for itself, as it must be established that the force used was reasonably necessary in the circumstances of each case, and we need not discuss it further. The lawfulness of the search was one of the issues considered in *Re Baker's Application* (1994, unreported), an application for judicial review brought by

eleven of the prisoners searched who were charged with offences against the Prison Rules (Northern Ireland) 1982 in refusing to comply with a lawful order to submit to a search. The Court of Appeal held on appeal from the Queen's Bench Division that on the proper construction of Rule 9(1) the governor of the prison has a right to order a search at any time, subject to the direction of the Secretary of State, and is not required to give any reason for the search. Nicholson J, who gave the judgment of the court, added the sentence "The only limitation on that right is that it must be exercised bona fide." The respondent's counsel in the present case submitted that this sentence meant that there was an obligation on the prison authorities as part of their proofs to prove affirmatively the presence of good faith on the part of the governor in ordering the search. Basing themselves on this premise, they argued that the documents or parts thereof withheld or covered up were relevant because they might contain material which would be of assistance in challenging the good faith of the governor in ordering that a full search be carried out. They suggested that the prison authorities might have decided to use the receipt of intelligence about the importation of a weapon as an excuse for a severe search in order to subdue and exercise control over the female prisoners. If the weapon was of such a size or nature that it could not possibly be concealed on the persons of the prisoners, that would, they submitted, tend to show that the body search was not instituted for bona fide reasons.

On this issue the judge appears to have accepted the proposition that there is an onus on the appellants affirmatively to prove the governor's good faith in ordering the search, but we do not consider that this is correct or that Nicholson J intended to convey it in the sentence which we have quoted. It is not incumbent upon him, any more than it is on a person making any other administrative decision whose lawfulness is subsequently challenged, to establish affirmatively by evidence as part of his proofs that his action was taken in good faith. It is only if something appeared in the course of the evidence which cast doubt upon the governor's bona fides in ordering the body

search, which would clearly affect the lawfulness of his order, that his good faith would become a matter in issue. We accordingly approach on this basis the possible relevance of the documents which are the subject of the claim for public interest immunity.

The Judge's Ruling

The judge started his consideration of the issues by asking whether production of the documents was necessary for disposing fairly of the action. He concluded that because counsel for the appellants had conceded that they should have been included in the list of discovered documents the question was *ipso facto* answered in the respondent's favour. As we shall show, to put matters in this way incorrectly conflates two distinct parts of the discovery process. Such a "relaxed practice" may be permissible where there is no claim of immunity, but not where a reasoned objection to production is put forward: *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 444, per Lord Scarman. The judge then cited the principles set out by Ackner LJ in *Campbell v Tameside Metropolitan Borough Council* [1982] 2 All ER 791 at 796-7 and concluded from them that the burden of proof rests upon the party seeking to withhold documents on public interest immunity grounds to justify doing so and that the burden is a heavy one. He held that the established category of public interest immunity under which the identity of informants may be protected did not extend to employees of the Prison Service. He went on then to carry out a balancing process, on the basis that he may not have been correct in his conclusion that employees of the Prison Service do not come within the category under which the identity of informants is protected. He concluded:

> "I consider that in the particular circumstances of this case the defendants have failed to discharge the heavy onus upon them of establishing that relevant documents should not be disclosed and I therefore refuse the application for public interest immunity for the documents listed as 2, 3, 4, 5 and 6, save that any references to X by name shall be redacted."

He granted the appellants' application in respect of certain other parts of the report which had been obliterated, stating that no submissions had been addressed to the court in respect of these:

> "(a) the passages immediately following paragraphs 1.2 and 1.7,
>
> (b) paragraph 2.5,
>
> (c) paragraphs 1, 2 and 3 of the `Conclusions',
>
> (d) paragraphs (a) and (h) of the `Recommendations',
>
> (e) the names of search teams,
>
> (f) the names at paragraph 11, 12 and 13 of The `Contents'."

Mr Treacy stated before us that the immunity of the latter passages was not conceded and reserved his position about them, so we shall take them into consideration when determining the appeal.

Mr Weatherup QC in opening the appeal on behalf of the appellants criticised the judge for revealing that X, from whom certain information had been received, was a member of the prison staff. The appellants had been careful not to state from which source any information had come, to minimise the risk that prisoners might be able to deduce the identity of any source. It is difficult to see, however, how the judge could have decided the issue on which he reached his conclusion about the ambit of the protection afforded by the material category of public interest immunity without adverting to the fact that X was a member of the staff. We would only say that it is incumbent upon judges in determining applications for public interest immunity meticulously to avoid saying anything which might have the effect of revealing by a side-wind what the party withholding the documents wishes to avoid disclosing, bearing in mind that an appellate court may take a different view of the extent of the immunity. We would urge them to take every possible precaution to ensure that they

do not by inadvertence let slip information which ought properly to be protected.

Categories of Public Interest Immunity

Before we consider the question of how to approach the assessment of the documents we must determine whether the claim advanced by the appellants falls within any of the recognised categories of public interest immunity. Those categories are not closed (see *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 230, per Lord Hailsham of St Marylebone) but, as Lord Woolf stated in *R v Chief Constable of the West Midlands, ex parte Wiley* [1995] 1 AC 274 at 305, "the recognition of a new class-based public interest immunity requires clear and compelling evidence that it is necessary"; cf Murphy on Evidence, 6th ed, p 362, n 30. We should observe also that the division into class and contents claims for immunity is, if not obsolete, at least of much less significance since the announcements made to Parliament on 18 December 1996 by the Lord Chancellor and the Attorney-General, in the course of which they said:

> " Under this new approach, Ministers will focus directly on the damage that disclosure would cause. The former division into class and contents claims will no longer be applied. Ministers will only claim public interest immunity when it is believed that disclosure of a document would cause real damage or harm to the public interest. This new approach constitutes a change in the practice to be adopted by Ministers but fully respects existing legal principles, as developed by the courts, and is subject to the supervision of the courts. It also accords with the view expressed by the present Lord Chief Justice that,
>
> > `public interest immunity should only be claimed for the bare minimum of documents for which the claim of serious harm can be seen to be clearly justified'.
>
> The Government intend that this test shall be rigorously applied before any public interest immunity claim is made for any government documents.
>
> It is impossible in advance to describe such damage exhaustively. It may relate to the safety of an individual

> such as an informant, or to a regulatory process; or it may be damage to international relations caused by the disclosure of confidential diplomatic communications. Normally it will be in the form of direct and immediate harm to, for example, the nation's economic interests or our relations with a foreign state; in some cases it may be indirect or longer-term damage, to which the disclosure of the material would contribute, as in the case of damage to a regulatory process. In any event, the nature of the harm will be clearly explained.
>
> This new, restrictive approach will require, so far as possible, the way in which disclosure could cause real damage to the public interest to be clearly identified. Public interest immunity certificates will in future set out in greater detail than before both what the document is and what damage its disclosure would be likely to do, unless to do so would itself cause the damage which the certificate aims to prevent. This will allow even closer scrutiny of claims by the court, which is always the final arbiter."

This was supplemented by the Attorney-General's paper *Public Policy Immunity*, in which he stated that as a matter of practice the government will no longer claim immunity solely upon a document's membership of a given class. Moreover, whereas the classic view in assessing class claims (even after the conclusiveness of a minister's assertion of a claim was rejected in *Conway v Rimmer* [1968] AC 910) was that the minister was likely to be able to make the best judgment about the importance of the public interest, Mr Murphy in his certificate accepts that the final responsibility lies with the court to assess the relevance and importance of the information to determining the issues in the proceedings.

The rule whereby the identity of informers in criminal prosecutions is not to be disclosed is well established: it was articulated in *Marks v Beyfus* (1880) 25 QBD 494, but is of much older origin. It is but one example of the application of a wider rule, as Bridge LJ stated in the Court of Appeal in *Burmah Oil Co Ltd v Bank of England* [1979] 2 All ER 461 at 473-4:

> "The underlying principle by reference to which the validity of this claim must be tested may be stated in the

> following general terms: whenever information is given in confidence, whether voluntarily or pursuant to a statutory obligation, of a kind which is necessary to enable the recipient of the information to perform an important public function with maximum efficiency and which would not be so readily forthcoming if the informant could not be sure that the confidence would be absolutely respected, then there is added to confidentiality a public interest in its protection which is sufficient to ensure that the confidential information will be withheld from production in legal proceedings. The classic example of the application of this general principle is, of course, the protection which is extended to the identity of police informers and of the information which they have given: see *Marks v Beyfus*. Other examples can be given from decided cases since *Conway v Rimmer*. This protection has been extended to the following: information supplied in confidence by police officers to the Gaming Board about a person applying for certificates of consent under the Gaming Act 1968 (*R v Lewes Justices, ex parte Secretary of State for the Home Department*) information supplied in confidence by traders to the Commissioners of Customs and Excise pursuant to s 24(6) of the Purchase Tax Act 1963 (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)*) information supplied in confidence to the Monopolies Commission to assist them in the performance of their statutory functions, *F Hoffman La Roche & Co AG v Department of Trade and Industry*; the identity of an informant who had made, under a pledge of confidentiality, a complaint to the NSPCC about ill-treatment of a child, (*D v National Society for the Prevention of Cruelty to Children*)."

As in all such cases, the operation of the principle in any particular case must be tested against the necessity in the public interest for the protection of the names. It was submitted in the present case that the public service could suffer if the identity of the persons concerned was revealed and their safety put at risk. As in the case of police informers and persons giving information to the NSPCC, it is likely that the flow of information necessary for the proper carrying out of their public functions would dry up or be restricted. It was objected on behalf of the appellant that the prison officers were under a statutory duty by virtue of Rule 87(3) of the Prison Rules (Northern

Ireland) 1982 to inform the governor of breaches of the rules, and that it must be supposed that they would continue to perform their duty irrespective of threats to their safety. We observe, however, that in some of the decided cases, such as *Alfred Crompton Amusement Machines Ltd v Comissioners of Customs and Excise (No 2)* [1974] AC 405 it was not an obstacle to the claim for public interest immunity in respect of information supplied by customers that it was so supplied under a statutory obligation. It may be a factor to bear in mind, but we do not regard it by any means as conclusive. Moreover, there is in our view a legitimate public interest in not putting at risk the safety of prison officers, since if they are not given reasonable protection their morale and efficiency may decline. They may have to leave their employment, and it may well become more difficult to engage suitable prison staff with the qualities which the Prison Service seeks.

The judge stated in the course of his ruling:

> "It is well established that the source of information must be someone other than a person employed by the defendants. To extend the scope of this exception to someone in X's position would, in my opinion, be an unjustified extension of the principle, as X was an employee of the prison service in a responsible position."

We have been quite unable to find any authority for the proposition accepted by the judge that the immunity does not extend to cases where the information has come from an employee of the party seeking to withhold documents, nor were counsel able to cite any to us. Indeed, it seems to us to have no foundation in principle or support from such authority as bears upon the point – some of the documents for which immunity was successfully claimed by the Commissioners of Customs and Excise in the *Alfred Crompton* case came from members of their staff. In principle we consider that, just as Lord Simon of Glaisdale held in *D v NSPCC* [1978] AC 171 at 241 that there is no distinction between information received by the police or local authorities and that received by the NSPCC, so there is none between information coming from third

parties and that furnished by the employees of the Prison Service. We accordingly must conclude that the judge was in error in holding that such a distinction exists.

Inspection and Production of the Documents

Given then that the appellants have advanced a claim for public interest immunity in respect of parts of these documents which may be sustainable in law, the court has to undertake the process of applying the correct principles to see whether the documents should be given immunity. It is in some cases important to keep distinct the several stages of this process, although less directly material in the present proceedings. The first is to determine whether the documents possess sufficient possible relevance to the issues in the action, by the application of the test set out by Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 62-3, to require to be included in a list of documents. That is not in dispute, as counsel for the appellants correctly conceded in the court below. The next stage is concerned with production of the documents, for it does not follow that the court will require all documents to be produced for the inspection of the other party, even if they possess some actual or possible relevance. By Order 15, rule 2(6) of the County Court Rules (Northern Ireland), which echoes RSC (NI) Order 24, rule 15(1) –

> " … the judge shall not make an order for inspection of such documents if and in so far as he is of opinion that it is not necessary either for disposing fairly of the proceedings or for saving costs."

Only if that test is satisfied does the question of balancing the public interests arise. The test of necessity was discussed by Lord Salmon in *Science Research Council v Nassé* [1980] AC 1028 at 1071 in the following terms:

> "It, of course, includes the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a very slim chance of success without inspection of documents but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed

> of, were he to be denied inspection."

In such cases as *Campbell v Tameside Metropolitan Borough Council* [1982] QB 1065 the court held that there was a real risk of the plaintiff being the victim of a denial of justice if the documents in question were not disclosed. It therefore held that the balance in weighing the interests came down in favour of disclosure, it being clear as part of its reasoning that the documents were necessary for disposing fairly of the action. We do not say that a party seeking disclosure would be required to go through such a narrow gate in every case, but it is certainly a more difficult criterion to satisfy than the very broad and general one specified by Brett LJ in the *Peruvian Guano* case when dealing with the issue whether documents relate to any matter in question in the action. We think that perhaps the most apposite formulation of the test is that propounded by Bingham J and approved in the speech of Lord Scarman in the House of Lords in *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 445:

> "In my judgment documents are necessary for fairly disposing of a cause or for the due adminstration of justice if they give substantial assistance to the court in determining the facts on which the decision in the cause will depend."

As we have indicated, this issue is of less direct importance in the present case, for the appellants have impliedly accepted that the test is satisfied by producing the documents, seeking only to withhold parts which have been obliterated in the copies furnished.

Similarly, the question whether we should inspect the documents is less difficult to decide in this case than in many others. It was made clear in *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 that the issue of production is itself determined by the application of a two-stage test: the party seeking production must first show that the documents are sufficiently likely to contain material which would support his case to induce the court to inspect, then the court after having inspected the documents must be satisfied that they are in fact necessary for fairly disposing of the proceeedings:

cf Murphy, *op cit*, p 369. It may be that the court should be somewhat more ready to inspect than in previous years, in the light of the change in government practice, as is suggested by Murphy, *op cit*, p 372, and this would appear to be supported by the attitude of the court in *Wallace Smith Trust Co Ltd v Deloitte Haskins and Sells* [1996] 4 All ER 403. We do not find it necessary to pursue this point, however, as we consider that there were good grounds in the circumstances of the present case to inspect the documents, since they were not described with the usual precision in the minister's certificate lest that defeat the purpose of claiming immunity for them. We have accordingly inspected the documents in their unexpurgated form.

The Balancing Exercise

When the judge has determined that production of the documents is necessary for the fair disposal of the action, then he must carry out the balancing exercise, weighing in one scale the public interest in the proper adminstration of justice, which requires that parties should not be unnecessarily hindered in obtaining material which would assist them to present their case, against the public interest in withholding from disclosure documents whose release could be harmful to the nation or the public service under one of the heads recognised by the law. In reaching conclusions on the balancing issue the onus of proof may be material, if the scales are found to be evenly balanced. The judge in the present case applied a test which he took from the judgment of Ackner LJ in *Campbell v Tameside MBC* [1982] QB 1065 at 1075, and held that the appellants had to undertake a "heavy onus" of establishing that relevant documents should not be disclosed. In saying this Ackner LJ based himself on a remark of Lord Reid in *Rogers v Secretary of State for the Home Department* [1973] AC 388 at 400, in which he cited the earlier decision of the House of Lords in *Conway v Rimmer* [1968] AC 910. It is apparent from Lord Reid's words, however, that he was referring to class claims, which he considered had to be very carefully considered before they were admitted, since by its nature a class claim will encompass documents which may

be entirely innocuous as far as the public interest is concerned and which may be capable of making a critical difference to the other party's chance of success in the litigation: see Lord Reid's speech in *Conway v Rimmer* at page 943 cf also Lord Woolf in *R v Chief Constable of the West Midlands, ex parte Wiley* [1995] 1 AC 247 at 291.

The matter is put beyond doubt by the observations of the members of the House of Lords in their speeches in the *Air Canada* case. At page 435 Lord Fraser of Tullybelton stated that before the court should even inspect the documents the party seeking disclosure --

> "ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case …"

Lord Edmund-Davies formulated the test at page 442:

> "Suffice it to say that, provided that certain conditions have been satisfied, the stage may be reached when the court will be obliged to conduct a `balancing' exercise, consisting in weighing (a) the public interest in the due administration of justice against (b) the public interest established by the claim for immunity. And it is for the party seeking discovery to establish clearly that the scale falls decisively in favour of (a) if he is to succeed in his quest. If he fails, even material clearly `necessary ... for disposing fairly of the cause of matter' must be withheld."

Conclusions

Our conclusions therefore are as follows:

(a) Public interest immunity extends to withholding documents in order to avoid disclosing the identity of an informant who is employed by the party seeking to withhold the documents.

(b) The judge did carry out a balancing exercise, which he did in case he was wrong on the extent of public interest imunity. He was not correct, however, in holding that there was a "heavy onus" on the appellants to establish that the documents should not

be disclosed.

The questions contained in the appellants' requisition, which were adopted by the judge in the case stated, do not appear to us to deal with the issues of law on which the matter turns. Mr Weatherup submitted to us a revised set of draft questions, but we have decided to reframe them yet again, as follows:

> " **1.** Whether I was correct in law in holding that public interest immunity did not extend to documents containing information from a person in X's position as an employee of the first appellant.
>
> **2.** Whether I was correct in law in holding that there was an onus on the appellants to satisfy the court carrying out a balancing exercise that the documents should not be disclosed."

We answer both questions in the negative.

We accordingly consider that the judge's decision cannot stand, but we do not consider it necessary to remit the matter to him for further determination. We have read the withheld portions of the documents with minute care in order to see whether they could conceivably assist the respondent in making the case that the search was unlawful or carried out with excessive force. We can find nothing in them which would give her any assistance whatsoever in advancing her case in either respect. On the other side of the scales, we consider that the reasons advanced by the minister in his certificate have substantial weight. We are of opinion that if the correct principles are applied when the balancing test is carried out, any court must inescapably rule in favour of immunity.

We therefore allow the appeal and order that the appellants are entitled to immunity from disclosure in respect of the documents forming part of Governor Hall's report described as follows:

> "**2.** PO Kerr's half sheet.
> **3.** Report containing intelligence and preliminary assessment by a governor.

4. Material relevant to the evaluation of the risk.

5. Material relevant to the evaluation of the risk.

6. Material relevant to the evaluation of the risk".

For the avoidance of doubt we also order that the immunity attaches to the following portions of documents, in respect of which the case for immunity is at least as strong as that in relation to those which we have just set out:

(a) The words obliterated in paragraph 2(a) of Governor Gibson's report of 13 March 1992.

(b) The portions obliterated in the Contents table of Governor Hall's report, being items 2 to 6 and names in items 11 to 13.

(c) The following parts of Governor Hall's report:

(i) paragraphs 1.3 to 1.6 inclusive;

(ii) paragraphs 1.8 and 1.9;

(iii) the name obliterated in paragraph 2.5;

(iv) the obliterated portion of Conclusion 1 and the whole of Conclusions 2 and 3;

(v) recommendation (a) and the obliterated portion of recommendation (k).

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