



**FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS**

Appeal Reference: EA/2019/0340

**Heard
On 1 October 2021**

Before

**UPPER TRIBUNAL JUDGE O'CONNOR
TRIBUNAL JUDGE GRIFFIN
MRS ANNE CHAFER**

Between

KHALFAN AL BADWAWI

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE FOREIGN AND COMMONWEALTH OFFICE**

Respondents

Appearances:

Appellant: Mr Khalfan Al-Badwawi, in person
Respondents: (1) Mr S Kosmin, Counsel
(2) Mr R Talalay, Counsel

1. This is an appeal against the Information Commissioner's decision notice which was issued on 5 August 2019 with reference number FS50810689.
2. The appeal is brought by Mr Al Badwawi pursuant to section 57 of the Freedom of Information Act 2000 ("FOIA") and concerns his request for a document which he

made to the Foreign and Commonwealth Office on 8 August 2018. That request sought a copy of a record from 1982 which was not held at that time by the National Archives, but at the time of his request was held by the Foreign and Commonwealth Office [FCO].

3. The request made by Mr Al-Badwawi stated “*Under the FOIA 2000, please provide a copy of the following document: Oman: anti-terrorism training and assistance by the Special Air Service (SAS).*” The reference number for the Foreign and Commonwealth Office is given, its date is given, and a formal reference number and its original department is also given together with a link to the National Archives.
4. In considering his appeal we have considered all of the documents submitted including the material that was withheld. We thank the parties for their submissions both written and oral which has been succinctly and clearly made. We give particular thanks to the appellant, Mr Al Badwawi who represents himself today, having been represented until yesterday. We have considered everything that he has said and also the written submission previously submitted on his behalf by his lawyers. The judgement of the Tribunal was announced at the hearing with a summary of the reasons. This is one of two decisions in this case, an open decision and a closed decision. These decisions have, in the usual way been reviewed in advance of promulgation by the respondent public authority and regulator.

The Grounds of Appeal

5. Mr Al Badwawi’s appeal is based on two grounds; the first ground is whether section 23 FOIA applies to the withheld material in whole or in part.
6. There are three central parts to consider on this first ground. Firstly, the Tribunal was invited to consider the withheld material and to consider whether it relates to any of the bodies specified in section 23(3) of FOIA, in particular the Special Forces and to disaggregate that which relates only to foreign military units or private military contractors to which, and there is no dispute about this, section 23(3) does not apply.
7. Secondly, whether falling outside the scope of FOIA, Article 10 applies such as to provide the appellant with the right to receive the information beyond the scope of section 23.
8. Third the appellant raised a point at the hearing that we should consider whether the withheld material refers to actions which may be illegal such that it will provide a reason to disclose the material to him.

9. The second ground of appeal concerns the decision not to transfer the withheld material to the National Archives. It is submitted on behalf of the appellant that this decision represents an interference with section 64(2) FOIA.
10. As to the second ground of appeal, in 2013 a decision was taken by the Foreign and Commonwealth Office not to transfer the withheld information to the National Archives. However, the material is included in the catalogue for the National archives and this states that it is retained by the Foreign and Commonwealth Office under section 3(4) of the Public Records Act.
11. That section reads as follows:

“(4) Public records selected for permanent preservation under this section shall be transferred not later than [20 years] after their creation either to the Public Record Office or to such other place of deposit appointed by the [Secretary of State] under this Act as the [Secretary of State] may direct:

Provided that any records may be retained after the set period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and where that person is not the [Secretary of State], the [Secretary of State] has been informed of the facts and given his approval.”
12. The appellant submits that he could not mount a public law challenge to that decision in 2013 and we acknowledge the reasons that Mr Al Badwawi gives for that. However, the question for us to determine is whether this Tribunal, not any other court, has the power to determine whether or not that affects our decision.
13. Turning then to consider the Tribunal’s jurisdiction. It is our conclusion that the Tribunal’s jurisdiction flows from that of the Commissioner. The Commissioner’s jurisdiction to entertain a complaint in respect of FOIA is derived from section 50 of that Act and is limited by section 50(1) to a decision *“whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements in Part 1”* of FOIA.
14. Pursuant to section 57 of FOIA the complainant, in this case Mr Al Badwawi, or the public authority concerned, may appeal to the Tribunal against the decision notice issued by the Commissioner having considered the complaint. That is what has happened in this case.
15. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

*(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

16. The question for us is to determine whether the decision to transfer the material to the National Archives lies outside the scope of section 50 and therefore outside the scope of our jurisdiction to deal with an appeal brought under section 57.
17. The appellant contends that the power to consider this aspect of the complaint may be found in s64(2) FOIA which provides "*In relation to any information falling within section 23(1) which is contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland, section 2(3) shall have effect with the omission of the reference to section 23.*"
18. However, although it is correct that this provision means that when a record is transferred to The National Archives, the section 23(1) exemption changes from being an absolute exemption to a qualified exemption and therefore subject to the public interest test, section 64 is concerned only with the legal consequences of when information in a historical record is transferred to The National Archives; it is silent about whether the record ought to be transferred.
19. The Appellant is further correct to state that the FCO *could* have transferred the file as a "closed" document to The National Archives, such that it would have become a historical record and any request under FOIA to receive the document would result in a response that would have included an assessment of the public interest test.
20. However, the FCO did not transfer the record to The National Archives, and instead exercised the power in s. 3(4) Public Records Act 1958 to retain it. Section 64(2) only speaks to the consequences of a transfer that has in fact occurred; not one that could have occurred.
21. Furthermore, when Parliament enacted FOIA, it could have repealed or amended s3(4) Public Records Act 1958 but it did not choose to do so and thus the provisions of FOIA should be read alongside section 3(4) Public Records Act 1958. The requirements of s64(2) FOIA are clear and require that records that have been transferred to the National Archives are subject to s23 as a qualified exemption; there is no criterion relating to the age of the records simply whether or not they have been transferred.

22. In this case the material has not been transferred and so s23 FOIA operates as an absolute exemption.
23. We have concluded that the Commissioner has no power to consider a complaint about whether the Foreign and Commonwealth Office was entitled to exercise the power given to them in section 3(4) of the Public Records Act 1958 to retain the file. There is nothing in s50 FOIA or elsewhere in that legislation that gives the Information Commissioner the power to consider a decision taken under s3(4) of the Public Records Act 1958.
24. Therefore, as the Commissioner lacks the power to consider such a decision, this Tribunal lacks jurisdiction to consider the appellant's complaint about it as part of the appeal against the decision notice that has been issued by the Information Commissioner.
25. That is not to say that a challenge could not be brought against the decision not to transfer the material, but this Tribunal cannot consider that challenge, and therefore we reject the appellant's second ground of appeal.
26. Turning to the first ground of appeal. The legal framework is not in dispute in this appeal.
27. The general right of access to information held by public authorities is set out in section 1 of FOIA:

"1(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

...".

28. Section 2 provides that the duties in section 1 are subject to the exemptions contained in Part II of FOIA:

"2 (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

...(b) section 23..."

29. Section 23, which creates an absolute exemption in this case, see above, relevantly provides as follows:

"23 (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.

(3) The bodies referred to in subsections (1) and (2) are –

(a) the Security Service,

(b) the Secret Intelligence Service,

(c) the Government Communications Headquarters,

(d) the special forces,

(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,

(g) the Tribunal established under section 5 of the Security Service Act 1989,

(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k) the National Criminal Intelligence Service,

(l) the Service Authority for the National Criminal Intelligence Service.

(m) the Serious Organised Crime Agency.

(n) the National Crime Agency.

(o) the Intelligence and Security Committee of Parliament."

30. It is not in dispute that section 23 FOIA does not apply to foreign forces nor to any private military contractors.
31. We take note of the fourteen principles set out in the Upper Tribunal decision of Commissioner of Police for the Metropolis v Information Commissioner & Martin Rosenbaum [2021] UKUT 5 (AAC), paragraph 35, and have concluded that they apply in this case. Neither the appellant at the hearing nor any representations previously made on his behalf has sought to argue otherwise.
32. We have considered the submissions made on behalf of the appellant about the application of Article 10, and whether that would be such as to provide Mr Al Badwawi with a right to receive the information beyond the scope of the FOIA. However, having considered the argument carefully we have concluded that we are bound by the Upper Tribunal decision in the case of Moss v Information Commissioner & the Cabinet Office [2020] UKUT 242 (AAC) from which it is clear that Article 10 does not provide the right contended for on behalf of Mr Al Badwawi. As set out by Upper Tribunal Judge Wright, in paragraphs 59 to 62 of that decision as follows;

59. The case Mr Moss seeks to advance is one that depends on his Article 10(1) right being engaged precisely because he says that right includes the right of access to public information. He is not arguing for a right to receive or impart information but to gain access to information in order to receive and then impart it. As demonstrated above, Magyar has expanded the understanding of Article 10(1) so that as matter ECtHR law it now covers, albeit in limited circumstances, a right of access to information. This was not disputed before me. However, the view of five members the Supreme Court in Kennedy, as well as the Court of Appeal in Kennedy and two if not three members of the Supreme Court in Sugar (No.2), in my judgment, is that domestic law does not consider Article 10(1) extends to include a right of access information, and I consider myself bound by the rules of precedent to follow this view.

60. The view that Article 10(1) does not include a right of access to information is explicit in Lord Brown's judgment in Sugar (No.2) at paragraph [97], a view with which Lord Mance agreed in that case (at para. [113]) and which he affirmed he had "expressly agreed" with at paragraph [62] of Kennedy. It is also the clear view of the Court of Appeal in Kennedy. It seems also to me to be the express view articulated by Lords Toulson and Sumption at paragraphs [145] and [154] respectively in Kennedy. It is also, in my judgment, the view of Lord Mance. This is not only because of his continuing to ally himself with Lord Brown's view in Sugar (No.2) but also through what he said in paragraphs [63] and [94] in Kennedy. In relation to the latter paragraph I accept Mr Pitt-Payne's argument that Lord Mance's concern about Article 10 becoming a European-

wide freedom of information law is inconsistent with him agreeing that Article 10(1) included a right of access to information.

61. *What Lord Mance said in paragraph [63] of Kennedy is also in my view to the same effect given the passages I have emphasised by Derek Moss v the Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC) underlining in that paragraph when they are taken with his continued agreement with Lords Brown in Sugar (No.2) and when they are read with his reference back to "the Grand Chamber statements" in paragraph [94].*

"63. Lord Brown identified four Strasbourg cases as establishing that, in the circumstances before the Strasbourg Court in each of such cases, article 10 involved no positive right of access to information, nor any obligation on the State to impart such information. The four cases were Leander v Sweden (1987) 9 EHRR 433, Gaskin v United Kingdom (1990) 12 EHRR 36, Guerra v Italy (1998) 26 EHRR 357 and Roche v United Kingdom (2006) 42 EHRR 30. In Leander Mr Leander sought information about national security concerns about him which had led to him being refused a permanent position in a naval museum. The claim was addressed primarily to article 8 (right to personal life), under which the withholding of information was held justified. Under article 10 the Court said simply:

"74. The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

I do not subscribe to the view taken by Lord Wilson (para 178) that this was the answer to "a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face". The Grand Chamber did not see the matter in such terms. It was giving a serious answer to an important question, which defines the role of the Convention in this area. The Convention establishes fundamental standards, but there are limits to the ideal systems upon which it insists, and the Grand Chamber was making clear that article 10 does not go so far as to impose a positive duty of disclosure on Member States at the European level."

62. *I therefore reject Mr Moss's argument that the Supreme Court in Kennedy left open the space for the limited right of access to information that Magyar then clarifies and provides."*

Conclusions

33. Section 23 of FOIA operates as an absolute exemption in this case if it is engaged. We accept the respondents' submissions relying on the Rosenbaum case that it would be wrong to add any qualification to the absolute nature of that exemption in these circumstances.
34. Moreover, for reasons which will be given in our closed decision, having looked carefully at the withheld material we have concluded that that withheld material relates solely to a body that is specified within the section 23(3) of FOIA. Thus, the information held by the public authority FCO is exempt information pursuant to s23(1).
35. We have considered carefully whether we could disaggregate any of the information within the withheld material and we conclude that it is not possible to do so in this case. In short, we concur with what is said in paragraph 6 of the letter of 9 July 2019 from the Foreign and Commonwealth Office Head of Archives that was placed before us in our bundle at page 67.
36. For all of these reasons the Tribunal dismisses the appeal.

Date 01 March 2022

Upper Tribunal Judge O'Connor