IN THE UPPER TRIBUNAL **Appeal No. GIA/651/2020**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

EDWARD WILLIAMS

Appellant

- v –

(1) THE INFORMATION COMMISSIONER
(2) THE CHIEF CONSTABLE OF KENT POLICE

Respondents

Before: Upper Tribunal Judge Jones

Hearing date: 7 June 2021

Representation:

Appellant:	Appeared in person
First Respondent:	Did not appear nor participate
Second Respondent:	Mr Dijen Basu QC, instructed by the Chief Constable for Kent Police Legal Services Department

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 5 March 2020 under number EA/2018/0244 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **The case is remitted to a freshly constituted panel of the First-tier Tribunal (FTT) for reconsideration.**

2. **The First and Second Respondents may rely on exemptions from disclosure under FOIA not previously relied upon before the FTT when it made the original decision on 5 March 2020.**

3. **The parties may rely on evidence that was not before the FTT when it made the original decision on 5 March 2020.**

4. **Other consequential directions, including whether an oral hearing is required and the form of any hearing, are to be made by the FTT.**

These Directions may be supplemented by later directions by a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. The Appellant appeals the decision of the First-tier Tribunal (General Regulatory Chamber) – Information Rights - ("the FTT") dated 5 March 2020.

2. The primary issue in this appeal is whether information relating to the detention and questioning of a person at a port stop performed under Schedule 7 to the Terrorism Act 2000 ('Schedule 7' to 'TACT') is exempt from disclosure under section 30(1)(a)(i) of the Freedom of Information Act 2000 ('FOIA) because it is material held for the purposes of '(a) an investigation which the public authority has a duty to conduct with a view to it being ascertained—(i) whether a person should be charged with an offence'.

3. The FTT had dismissed an appeal the decision of the Information Commissioner (the 'First Respondent' or 'Commissioner') dated 31 October 2018 refusing to require the Chief Constable of Kent (the 'Second Respondent' or 'public authority') to provide information that the Appellant had requested. The request concerned material arising from the stop and questioning of Ms Lauren Southern by the Second Respondent on 12 March 2018 pursuant to Schedule 7 to TACT.

4. Both the Respondents and the FTT decided that the information should not be disclosed and relied on the exemption from disclosure under section 30(1)(a)(i) of FOIA.

5. The Appellant's ground of appeal is that the FTT erred because the exemption did not apply to the material requested. He submits that information relating to the stop and questioning of Ms Southern under Schedule 7 has not at any time been held by a public authority (the Second Respondent) for the purposes of any investigation which that that public authority has a duty to conduct to ascertain whether a person should be charged with an offence.

6. On 2 June 2020 I granted the Appellant permission to appeal the decision of the FTT. I further directed that the parties address me on the Appellant's ground of appeal but also upon:

   a. Whether the exemption under section 30(1)(b) FOIA might apply to the information requested ('any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct');

   b. Whether the exemption under section 40(2) FOIA (personal information) might apply;

   c. Whether the exemption under section 24(2) FOIA (national security) might apply;

d. Whether the exemption under section 31 FOIA (law enforcement) might apply; and

e. Whether, if the FTT erred, the matter should be remitted to the FTT (and if so whether it be a fresh panel) or the decision re-made by the Upper Tribunal.

7. The Second Respondent submits that the FTT did not err in relying upon section 30(1)(a)(i) FOIA but even if it did, the decision should be re-made and the information requested be exempt from disclosure under any of the further exemptions listed above. In particular, it is submitted that the national security exemption under section 24 of FOIA applies to the material.

The hearing

8. On 7 June 2021, I held an oral hearing of the Appellant 's application using the online video platform, CVP. The parties had consented to this form of hearing and I was satisfied that it was in accordance with the overriding objective, just and fair, to proceed in this manner. The parties were able to participate fully in the hearing and make oral submissions in addition to the written arguments they had previously lodged.

9. The Second Respondent, the Chief Constable of Kent Police, was represented by Mr Basu QC. The First Respondent, the Commissioner, did not participate in the hearing but had not been required to do so. She adopted the submissions of the Second Respondent opposing the appeal.

10. In addition to the open hearing, there was a short closed session from which the Appellant was excluded but in which counsel and solicitor for the Second Respondent participated. I provided a gist to the Appellant of that session so that he could make further submissions in the open part of the hearing. The gist included the following. In the closed session the same closed material that was before the FTT was examined. The material was in the same category as that requested by the Appellant under parts1 & 2 of his request (as addressed below). I was not asked to make specific findings about that closed material by the Second Respondent.

11. I provide short closed reasons for this decision which address that closed material. The essential reasoning for this decision is contained entirely in these open reasons but the closed reasons supplement this decision.

Factual background to the appeal

12. I adopt the following background from the FTT's decisions.

13. The appeal arises out of an incident in Calais on 12 March 2018 when Ms Lauren Southern was stopped and questioned and refused leave to enter the UK on the grounds that her presence in the UK was not conducive to the public good.

The Appellant's Request for Information

14. This appeal concerns parts 1, 2 and 6 of the request made on 14 March 2018 by the Appellant for the following information made in the following terms:

'According to this video on Youtube:- https://youtu.be/odGiYJdFtE0 Ms Lauren Cherie Southern, a Canadian citizen, was stopped at Calais, France, on or about 12 March 2018 and prevented from entering the UK by British authorities. She has named Kent Police as the relevant police force.

1. Provide all records held regarding the decision to invoke Schedule 7 Terrorism Act 2000 ('The Act') or other legislation/powers and to stop/detain Ms Southern.

2. Provide the custody record or similar record.

3. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a UK port (including Calais) pursuant to the powers under the Act.

4. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when sopped or detailed at a UK port (including Calais) pursuant to the powers under the Act when the relevant person refuses to provide information orally (i.e. answer questions) or refuses to unlock any electronic device such as a telephone, computer etc.

5. Provide leaflet given to those detained.

6. Provide all material held which was (allegedly) distributed by Ms Southern on or about 24 February 2018 in Luton, UK.'

Information placed in the public domain

15. The information placed by the government in the public domain about this incident is contained in the response to a written question in the House of Lords on 21 March 2018 and a statement from a Home Office Spokesperson in March 2018. The written question (HL6552) and answer are recorded in Hansard as follows:

'Q. Asked by Lord Pearson of Rannoch Asked on: 21 March 2018

Home Office

Lauren Southern

To ask Her Majesty's Government why Lauren Southern was detained under the Terrorism Act 2000 in Calais in March; and why she has been denied entry to the UK.

A. Answered by: Baroness Williams of Trafford Answered on: 28 March 2018

It is longstanding policy not to disclose details of records which may be held in relation to individuals' arrival in the United Kingdom, as to do so would not be in the interests of national security.

Schedule 7 helps maintain public safety by allowing an examining officer to stop and question and, when necessary, detain and search individuals travelling through ports, airports, international rail stations or the border area to determine whether an individual appears to be someone who is or has been involved in the commission, preparation or instigation of acts of terrorism.

The decision to examine an individual using Schedule 7 is an operational one, undertaken independently by the police. You will understand that the Home Office cannot comment or provide any more specific information about why Ms Southern was stopped and examined.'

16. The press statement issued by the Home Office reads:

'A Home Office Spokesperson said:

"Border Force has the power to refuse entry to an individual if it is considered that his or her presence in the UK is not conducive to the public good"

Background:

• Lauren Southern was refused Leave to Enter the UK by Border Force in Coquelles (Monday 12 March).

• She was refused on policy grounds that her presence in the UK was not conducive to the public good.'

The Response to the request

17. The Second Respondent responded to the Appellant's request on 5 April 2018. It refused to confirm or deny that it held the requested information citing s.30(3) of FOIA

(investigations and proceedings) and s.40(5) (personal information) but provided links to Schedule 7 of the Terrorism Act 2000 and guidance issued by the College of Policing on that schedule.

18. On 10 May 2018 the Second Respondent conducted an internal review. It concluded that only parts 1, 2 and 6 of the request fell within the scope of ss. 30(3) and 40(5) of FOIA and further relied on s. 24(2) of FOIA (national security). In relation to those parts of the request, it upheld the decision. In relation to parts 3, 4 and 5, the Second Respondent confirmed that the information was held. Some was available in the public domain and links were provided. In relation to additional material held within the scope of parts 3 and 4 but not already in the public domain, the Second Respondent relied on ss. 24(1) and 31(1)(a)(b) (law enforcement).

19. In the course of the Commissioner's investigation the Second Respondent disclosed further information within the scope of parts 3 and 4, redacted in accordance with s. 40(2) of FOIA. In relation to the remaining withheld material within the scope of parts 3 and 4, the Second Respondent relied on ss. 21(1), 24(1) and 31(1)(a)(b).

20. The Appellant confirmed by letter to the Commissioner dated 10 May 2018 that he wished the Commissioner, the First Respondent, to consider parts1, 2 and 6 of the request.

The law – schedule 7 of the Terrorism Act and section 30 of FOIA

21. Schedule 7 of the Terrorism Act 2000 ("TACT") (given the force of law by s.53(1) TACT) entitles a police constable, immigration or customs officers (examining officers) to stop, question and detain a person at a port or border area in order to determine whether the person appears to be a person falling within s.40(1)(b) TACT – in other words, whether they appear to be or have been concerned in the commission, preparation or instigation of acts of terrorism ("concerned in CPI"). There are separate powers of arrest pursuant to s.41 TACT.

22. Paragraphs 2, 5, 6, 8, 11A and 18 of Schedule 7, as it applied in 2018 and in so far as relevant, provide:

> 'Power to stop, question and detain
>
> 2(1) An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).
>
> (2) This paragraph applies to a person if—
>
> (a)he is at a port or in the border area, and
>
> (b)the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland [or his travelling by air within Great Britain or within Northern Ireland].
>
> ……..
>
> (3) An examining officer may exercise his powers under this paragraph whether or not he has grounds for suspecting that a person falls within section 40(1)(b).'
>
> ……
>
> 5 A person who is questioned under paragraph 2 or 3 must—
>
> (a)give the examining officer any information in his possession which the officer requests;

(b)give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity;

(c)declare whether he has with him documents of a kind specified by the examining officer;

(d)give the examining officer on request any document which he has with him and which is of a kind specified by the officer.

6.-(1) For the purposes of exercising a power under paragraph 2 or 3 an examining officer may-

(a) stop a person or vehicle;

(b) detain a person.

... ...

(3) Where a person is detained under this paragraph the provisions of Part I of Schedule 8 (treatment) shall apply.

(4) A person detained under this paragraph shall (unless detained under any other power) be released not later than the end of the period of nine hours beginning with the time when his examination begins.

... ...

8.(1) An examining officer who questions a person under paragraph 2 may, for the purpose of determining whether he falls within section 40(1)(b)-

(a) search the person;

(b) search anything which he has with him, or which belongs to him, and which is on a ship or aircraft;

(c) search anything which he has with him, or which belongs to him, and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft;

(d) search a ship or aircraft for anything falling within paragraph (b).

... ...

(3) A search of a person under this paragraph must be carried out by someone of the same sex.

... ...

11A(1)This paragraph applies where the examining officer is a constable.

(2)The examining officer may copy anything which—

(a)is given to the examining officer in accordance with paragraph 5,

(b)is searched or found on a search under paragraph 8, or

(c)is examined under paragraph 9.

(3)The copy may be retained—

(a)for so long as is necessary for the purpose of determining whether a person falls within section 40(1)(b),

(b)while the examining officer believes that it may be needed for use as evidence in criminal proceedings, or

(c)while the examining officer believes that it may be needed in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971.

Offences

18.-(1) A person commits an offence if he-

(a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule,

(b) wilfully contravenes a prohibition imposed under or by virtue of this Schedule, or

(c) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of this Schedule.

(2) A person guilty of an offence under this paragraph shall be liable on summary conviction to-

(a) imprisonment for a term not exceeding three months,

(b) a fine not exceeding level 4 on the standard scale, or

(c) both."

23. A subsequent amendment under the Counter-Terrorism and Border Security Act 2019 inserted paragraph 5A into Schedule 7 as from 13 August 2020:

> '5A (1)An answer or information given orally by a person in response to a question asked under paragraph 2 or 3 may not be used in evidence against the person in criminal proceedings.
>
> (2)Sub-paragraph (1) does not apply—
>
> (a)in the case of proceedings for an offence under paragraph 18 of this Schedule,
>
> (b)on a prosecution for perjury, or
>
> (c)on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the answer or information mentioned in sub-paragraph (1).'
>
> ……

24. "Terrorism" is defined necessarily broadly in s.1 TACT and applies to a use or a threat of action anywhere in the world and a terrorist is a person who has committed an offence under ss. 11, 12, 15 – 18, 54 and 56 – 63 or a person who may have committed no offence at all, but is or has been concerned in CPI (see s.40).

25. The use of Schedule 7 to stop, question, detain and search a person is distinct from an arrest pursuant to s.41 of a person reasonably suspected by a constable to be a terrorist. The officer needs no grounds whatsoever for even suspecting that the person is or has been concerned in CPI in order to exercise the powers under Schedule 7. The Officer may have no grounds, some grounds or very strong grounds for so suspecting.

26. The person being questioned pursuant to Schedule 7 must give the officer any information or documents in his possession that the officer requests. They have no right to remain silent and commit an offence if they do not cooperate. The answers given during a Schedule 7 examination cannot be used in any prosecution (except in the limited circumstances now set out in paragraph 5A).

27. Pursuant to Schedule 8 a person detained under Schedule 7 acquires rights which they did not have prior to detention (for example, to have a named person informed, and to consult a solicitor) but also obligations (for example, to give fingerprints, non-intimate and intimate DNA samples).

Section 30 FOIA (investigations and proceedings conducted by public authorities)

28. Section 30 FOIA was the provision ultimately relied upon by the FTT for exempting the information requested from disclosure. It provides as follows:-

"(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

(2) Information held by a public authority is exempt information if—

(a) it was obtained or recorded by the authority for the purposes of its functions relating to—

(i) investigations falling within subsection (1)(a) or (b),

(ii) criminal proceedings which the authority has power to conduct,

(iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2)."

The decision of the Information Commissioner

26. In a decision notice dated 31 October 2018 the Commissioner decided that the Second Respondent was entitled to neither confirm nor deny whether it held any information within the scope of parts 1, 2 and 6 of the request relying on s. 30(3) of FOIA. The decision notice did not deal with parts 3, 4 or 5 of the request.

27. The Commissioner held that any information, if held, would be held in relation to investigation(s) into the individual named and would fall within s 30(1)(a)(i) because it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption was therefore engaged.

28. The Commissioner held that the purpose of s.30 is to preserve the ability of the police to carry out effective investigations and that the public interest in maintaining the exemption outweighed the public interest in issuing a confirmation or denial.

29. In the light of her findings on s.30 the Commissioner did not go on to consider the other exemptions.

The interim decision of the FTT

30. The FTT issued an interim decision dated 14 August 2019 published as *Williams v Information Commissioner (Allowed)* [2019] UKFTT 2019_0244 (GRC) (03 October 2019). In its interim decision the FTT concluded that s.30(3) of FOIA was engaged because the request was for information which is, or if it were held by Kent Police would be, by its nature exempt information by virtue of section 30(1) or (2).

31. However, the FTT concluded that the public interest in maintaining the exclusion of the duty to confirm or deny did not outweigh the public interest in confirming or denying that the information was held by the Second Respondent. At [54] of its decision it stated:

'54. We conclude that the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the public interest in confirming or denying that the information is held. We deal firstly with parts 1 and 2 of the request. At the date of the internal review (the date at which the public interest balance must be determined), the fact that Lauren Southern had been stopped and examined under Schedule 7 had been confirmed in a written answer to a parliamentary question. We accept that Kent Police are in a better position to assess any harm that might flow from revealing that Lauren Southern was or was not questioned or detained under Schedule 7 , but we find that any such harm flows from the response to the parliamentary question. By the time of the internal review, this harm would already have occurred as a result of this fact being in the public domain. There is therefore no public interest in excluding the duty to confirm or deny. In the circumstances the public interest in maintaining the exclusion of the duty to confirm or deny does not outweigh the general public interest in transparency in confirming or denying that the information is held.'

32. On 17 September 2019 the Second Respondent confirmed that it held information within the scope of parts 1 and 2 of the request but not part 6.

The substantive decision of the FTT

33. The FTT decided the substantive appeal on 7 February 2020 without a hearing and made its decision on 5 March 2020. A closed bundle of material was provided to the FTT. It is clear from the FTT's decision at [55] and [57] that it examined the closed material. However, there was no open nor closed hearing before the FTT nor closed reasons provided for its decision.

34. I have examined the same closed material on the appeal to the Upper Tribunal and address this briefly in my closed reasons which accompany this decision.

35. Before the FTT, the Second Respondent relied on exemptions under section 30(1)(a) (criminal investigation) and section 40(2)(a) of FOIA (personal information) to refuse to disclose any information requested. It no longer relied on the exemption under section 24(1) of FOIA (national security) – see [3] and [17] of the FTT's decision.

36. The FTT stated the following at [39]-[40] of its decision:

> '39. The 'scope of the appeal is limited to parts 1, 2 and 6 of the request. Kent Police have confirmed that they do not hold information under part 6. In relation to parts 1 and 2 they rely on s30(1)(a) and s40.
>
> *Section 30(1*)
>
> 40. The issues under 30(1)(a) are:
>
> 40.1 Is the request for information which is, or if it were held by the public authority would be, except information by virtue of subsection (1) or (2)?

> 40.2 If so, in all the circumstances of the case, does the public interest in maintaining the exclusion of the duty to confirm or deny outweigh the public interest in disclosing whether the public authority holds the information.'

37. At [42]-[43] the FTT found:

'42…that the request is for information which is, or if were held by the public authority would be, by its nature, exempt information by virtue of subsection 30(1)(a).

43. We accept Kent Police's submission that the requested information is information that has been held by the authority for the purpose of an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.'

38. The FTT gave its reasons at [45]-[48] of the decision:

'45. The powers under Schedule 7 to stop, question and detain can only be exercised for the purpose of determining whether a person appears to be a person falling within section 40(1)(b). They can only therefore be exercised for the purpose of determining whether a person appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Although Kent Police have not specified a particular offence, the tribunal is satisfied from the statutory definition of terrorism that a number of offences could be relevant.

46. On this basis the Tribunal finds that the use of powers under Schedule 7 amount to an investigation within s 30(1)(a) which is conducted with a view to it being ascertained whether a person should be charged with an offence and that information obtained through questioning or the use of other powers by Kent Police under Schedule 7 would be held for the purpose of the investigation. We do not accept that an 'investigation' for the purpose of that s30(a)(a) should be restrictively interpreted to include only the part after the officer has formed a suspicion and PACE begins to apply. There is no requirement under s30(1)(a) that the police must have reach the stage where they have a suspicion that person has committed an offence.

47. The appellant's argument is based in part on the decisions of the Supreme Court and the ECtHR in the case of *Beghal*. We repeat our reasoning from the interim decision in relation to the Appellant's reliance on the case of *Beghal*, which concerns the question of the application of article 6 of the European Convention on Human Rights. The decision that schedule 7 questioning did not, in *Beghal*, amount to a criminal investigation under article 6 is based on case law on the scope of article 6:

> The Court has repeatedly held that the protections afforded by Article 6(1) apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.

48. In our view, the question of whether or not schedule 7 questioning falls within article 6 is not relevant to the question under s 30(1)(a), ie. whether or not it amounts to an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.'

39. Thereafter the FTT went on to consider the public interest balancing exercise at [52]-[62] of its decision, most relevantly:

'[55] The bar of the exercise of the schedule 7 powers has been set by Parliament at quite a low level, and there is no evidence in the closed material to suggest that the police had not been satisfied that the condition had been met before they proceeded. We do not accept the Appellant's submissions that the use of schedule 7 cannot be justified, nor that there is any evidence, including in the closed bundle, that it was not for the statutory purpose. We do not accept that disclosure will reveal any unlawful action by the police. Nor do we accept that there is any evidence to support the submission that Kent Police chose to use schedule 7 in an abusive manner to humiliate Ms Southern and gain access to her data which is journalistic material and protected as excluded material under PACE.

……

[57] In conclusion having reviewed the closed material we do not accept the Appellant's argument that disclosure is in the public interest because the use of schedule 7 was unjustified or unlawful. Nor is there anything in the closed material which suggests any wrongdoing on the part of the police. Whilst there is general public interest in the transparency to enable public scrutiny of the use of police power, and in particular in the use of schedule 7 powers, we find that this would be served only to a limited extent by the disclosure of this information.

…….

[61] In assessing the public interest in this case, we take account of the fact that this investigation relates to potential terrorism offences. We find that there is a very strong public interest in ensuring the effective investigation of terrorism offences. Placing the level of detailed information requested into the public domain would detail to potential terrorists the police's methods and tactics and give detailed information about the content and conduct of the schedule 7 investigation. We accept that placing detailed information about a potential terrorist investigation into the public domain would be harmful to the efficacy of the schedule 7 stops.

[62] Our conclusion is that this strong public interest in maintaining the exemption outweighs the more limited public interest in disclosure. The appeal is dismissed. Our decision is unanimous.'

40. In light of its conclusions the FTT did not go on to consider the further exemption relied upon by the Second Respondent, exempting the requested material from disclosure under section 40 of FOIA as containing personal information.

The Appellant's submissions

41. The Appellant's grounds of appeal were enclosed with an application for permission to appeal and Notice of Appeal dated 20 March 2020 (form UT13).

42. In summary, he submitted:

> '3. The FTT made an error of law when it decided that s30(1)(a) FOIA could (and should be applied) ……..
> 4. Para 45 of the FTT Decision refers to offences but, as the case law quoted above in para 1 [*Beghal v UK*, ECtHR Application No 4755/16, 28/5/19 and *Beghal v DPP* [2015] UKSC49] makes clear, a port stop is 'suspicionless'.
> 5. A port stop is not an investigation, much less a criminal investigation. It is an examination to allow a constable, immigration officer or customs officer to determine if a person appears to be a terrorist. The whole of sch[edule] 7 [to the Terrorism Act 2000] is concerned with immigration controls. The title heading to sch 7 is Port and Border Controls. Controls are not criminal investigations……..
> 6. Section 32 TACT [Terrorism Act 2000], not sch 7, covers investigations…….'

The Second Respondents' submissions in reply on section 30 of FOIA

43. Mr Basu made submissions on behalf of the Second Respondent as to why the FTT did not err in relying on the exemption under s.30(1) of FOIA.

44. He submitted that, if, and to the extent that, any records exist and are held by the Second Respondent in relation to "the decision to invoke Schedule 7 Terrorism Act 2000 … or other legislation/powers and to stop/detain Ms Southern", custody or similar records connected with the use of Schedule 7 and material distributed by Ms. Southern on or about 24th February 2018 in Luton, they would fall into the s.30(1) qualified exemption because the police are under a duty to conduct investigations with a view to it being ascertained (whether by the CPS, the police or otherwise) whether a person (that is, of course, any person – and not

simply Ms. Southern) should be charged (by the CPS) with an offence or whether a person charged with an offence is guilty of it.

45. Mr Basu conceded that a Schedule 7 stop need not itself be an investigation which falls within s.30(1)(a). However, the subsection is not confined to information held by the public authority which has *been obtained* in an investigation which the authority has a duty to conduct. No extant criminal investigation is required for this exemption to apply.

46. He referred to paragraph 17 of the reasons given for granting permission to appeal the FTT's decision which referred to s.32 TACT, which defines 'terrorist investigations'. However he submitted that terrorist investigations are not necessarily criminal investigations because (perhaps counterintuitively), not all terrorism is a criminal offence at all. They are so defined in order to provide for a regime of cordons, terrorist financing investigations (including disclosure), criminalisation of disclosing or failing to disclose certain material, the provision of search warrants, etc. See also, for example, §17 Schedule 5 TACT, which provides that, for the purposes of s.21 and 22 PACE "(seized material: access, copying and retention) (a) a terrorist investigation shall be treated as an investigation of or in connection with an offence". That is because not all terrorism constitutes an offence.

47. Mr Basu submitted that stopping someone to determine whether they appear to be, or to have been, concerned in commission, preparation of instigation of acts of terrorism ('CPI') is sufficiently broad to encompass, for instance, a person who is innocently concerned in the commission, preparation or instigation of criminal acts of terrorism being organised by others or being non-criminally concerned in CPI which is part of a larger criminal terrorist enterprise.

48. He submitted that this exemption does not require the police to show any prejudice to the investigations, proceedings etc. concerned.

Discussion and decision – section 30(1)(a)(i) FOIA

49. I am satisfied that the FTT erred in law in finding that parts 1 and 2 of the request were exempt from disclosure pursuant to section 30(1)(a)(i) of FOIA.

50. The relevant subsection of FOIA provides:

"30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained—

(i) whether a person should be charged with an offence"

51. As Mr Basu concedes, a port stop conducted under Schedule 7 to the Terrorism Act 2000, need not, of itself, form part of an investigation with a view to ascertaining whether any person (including the person stopped) should be charged with an offence (a criminal investigation). Likewise, I am satisfied that the information resulting from a port stop, such as the record of any questioning or interview or records relating to detention, need not be held for the purposes of a criminal investigation.

52. Paragraphs 2 and 6 of Schedule 7 to the Terrorism Act 2000 provide the power for an officer to stop a person at a port and question them. Paragraph 2(1) provides that the powers are to be used for the purposes of determining whether a person falls within section 40(1)(b) rather than investigating or determining whether a person has committed any specified criminal offence, such as a specific terrorism offence under TACT.

53. Further, the powers do not require the officer to hold grounds for suspecting a person falls within section 40(1)(b) of the Act (concerned in the commission, preparation or instigation of acts of terrorism). The powers are 'suspicionless'. They are exercised independently of arrest powers under section 41 of TACT.

54. It is not in dispute between the parties that the port stop powers exercised under Schedule 7 are not necessarily powers exercised to investigate criminal offences. This approach is supported by authority – see for example the judgments of the Supreme Court in *Beghal v Director of Public Prosecutions* [2015] UKSC 49 and European Court of Human Rights ('ECtHR') in *Beghal v United Kingdom* Application No 4755/16, (2019) ECHR 181, 28 February 2019. The ECtHR stated at [121] of its judgment:

> 121. None of those events occurred in the present case. The applicant was neither arrested nor charged with any (terrorism-related) criminal offence. Although she was questioned for the purpose of determining whether she appeared to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism, this cannot, of itself, engage Article 6 of the Convention. First of all, the Schedule 7 power did not require police officers to have "reasonable suspicion" that she was concerned in the commission, preparation or instigation of acts of terrorism. As such, the mere fact of her selection for examination could not be understood as an indication that she herself was suspected of involvement in any criminal offence. On the contrary, the applicant was explicitly told by police officers that she was not under arrest and that the police did not suspect her of being a terrorist (see paragraph 8 above). Moreover, the questions put to her were general in nature and did not relate to her involvement in any criminal offence (see paragraph 11 above). The Court has already noted that the Schedule 7 power is a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counter-terrorism inquiries of any person entering or leaving the country (see paragraph 97 above). While it would not exclude the possibility that it could be exercised in such a way as to engage Article 6 of the Convention, there is no evidence to suggest that it was so exercised in the present case.

55. The exercise of the powers to stop, detain question, search and retain copies under Paragraphs 2-11A of Schedule 7 does not require any police, immigration or customs officer therefore to be conducting '(a) an investigation which the public authority has a duty to conduct with a view to it being ascertained—(i)whether a person should be charged with an offence' for the purposes of section 30(1)(a) FOIA. As the Strasbourg court stated at para 121 of its judgment in *Beghal*, 'the Schedule 7 power is a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counter-terrorism inquiries of any person entering or leaving the country'.

56. Copies of information obtained from a Schedule 7 Port Stop may be used a) to determine whether a person is involved in is involved in the commission, preparation or instigation of acts of terrorism (s.40(1)(b)); b) for criminal proceedings; or c) in immigration deportation proceedings (see 11A(3)(a)-(c)).

57. The powers to detain under Schedule 8 and question under paragraph 2(1) of Schedule 7 are not expressly connected to determining (or even investigating) whether an offence under the Terrorism Act has been committed but only expressly for determining whether a person falls within section 40(1)(b) ('is a terrorist who is or has been concerned in the commission, preparation or instigation of acts of terrorism').

58. The scheme under Schedule 7 is therefore designed for a number of purposes when determining whether a person falls within section 40(1)(b), including immigration control, public protection and disrupting terrorism as much as investigating the possibility of criminal offences being committed. The scheme is independent of, and not even necessarily a

potential precursor to, a criminal investigation for the purpose of determining whether a person has committed a specific criminal offence of terrorism. The port stop and information obtained thereunder may or may not result in a criminal investigation being initiated thereafter. Alternatively, the Schedule 7 power may be used after a criminal investigation has been started, whether into the person stopped or any other person.

59. Most importantly, the public authority, Commissioner, and FTT are required to undertake a fact specific analysis in every case in which they seek to rely on the exemption under section 30(1)(a)(i) of FOIA in order to decide whether information requested relating to a port stop is of itself information held at any time for the purposes of a criminal investigation (ascertaining whether a person should be charged with a criminal offence).

60. Mr Basu submitted that material does not have to have been *obtained* in the course of a criminal investigation for s.30(1)(a)(i) to apply so long as it is *held* at any time – ie. thereafter, for such purpose. I accept that this is the correct interpretation of the subsection. So long as the information is held at any time for the purposes of a criminal investigation, it is irrelevant whether it was obtained at the time as part of a criminal investigation. As set out above, material generated by a Schedule 7 port stop may form part of a subsequent criminal investigation or indeed, there may be a pre-existing criminal investigation of which the Schedule 7 port stop forms part.

61. I also agree with Mr Basu that the Second Respondent is not required to prove that the criminal investigation is being conducted into the same person who is the subject of the schedule 7 port stop (in this case Ms Southern) so long as it is being conducted in relation to any other person.

62. However, I part company with Mr Basu when he submits that section 30(1)(a)(i) exempts from disclosure information requested that may be the subject of future or potential criminal investigation ie. all material held by the Second Respondent as part of its law enforcement functions. He submits that any information held by the Second Respondent concerning a Schedule 7 port stop would be held as part of its law enforcement functions whether or not there was a past or current or criminal investigation ongoing. Such information would be retained because it may form a building block in such a future criminal investigation.

63. Mr Basu recognised that such an interpretation of the exemption from disclosure would be wide but he submitted it would be subject to safeguards because it would be limited by a) the requirement to conduct a public interest balancing test under FOIA; b) the fact that it would only apply to information held in respect of or derived from the law enforcement functions of the Second Respondent (as opposed to say its functions in conducting Human Resources, employment or civil proceedings).

64. I am unable to accept such a broad interpretation of s. 30(1)(a)(i).

65. The wording of the provision is to exempt information if 'it has at any time been held' by the authority for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence. The natural reading of section 30(1)(a)(i) is that information is only exempt under this subsection if it is or has been held for the purposes of a criminal investigation into a person at the time when it is requested from the public authority (and thereafter, the time at which the Commissioner conducts any internal review and decides whether or not the information should be disclosed). This necessitates there to be a past or current criminal investigation in respect of which the requested material has been or is being held in order for it to be exempt from disclosure.

66. The use of the past tense in the words '*if it has at any time been held* for the purposes of any investigation' does not imply the potential for the material to be held with the prospect of some future criminal investigation. Likewise, inclusion of the phrase 'which the authority has a duty to conduct' rather than 'which the authority has conducted or is conducting' does not imply such a broad scope to include all material that might be later used in any criminal investigation into a person not yet identified. That is not to say that some other provision of FOIA may apply to exempt information held in such circumstances – for example, the law enforcement exemption under section 31.

67. The FTT erred in finding that Ms Southern had been the subject of a criminal investigation and the material requested was held for such purposes merely because she had been the subject of a Schedule 7 port stop. I am satisfied that the FTT erred at [45]-[46] of its decision because it did not perform any fact specific analysis but incorrectly decided that material relating to a port stop under Schedule 7 would automatically be information held for the purposes of a criminal investigation (ascertaining whether a person should be charged with a criminal offence).

68. The FTT failed to identify whether there was any evidence or material in open or closed which established whether Ms Southern or any person had been or was currently (at the time of the Commissioner's review decision) the subject of any criminal investigation and whether the information requested under parts 1 or 2 of the request had been held at any time for such a purpose.

69. For all these reasons the Appellant's ground of appeal succeeds. The FTT erred in law in making its decision. The error of law was material because the FTT only relied on the exemption under section 30(1)(a)(i) in dismissing the Appellant's appeal. The FTT's decision should be set aside for material error of law.

Remitting or re-making the decision

70. The Appellant submitted that the case should be remitted to the FTT for reconsideration and a fresh determination of whether any other exemption applies.

71. The Second Respondent submitted that the decision should be re-made refusing disclosure of the requested information because it is exempt from disclosure under other provisions of FOIA, namely sections 30(1)(b) & (2), 40, 24 and 31. In short, Mr Basu submitted that the other potential exemptions raised in my grant of permission apply to the request and the FTT arrived at the correct conclusion even if it relied on the wrong provision of FOIA.

72. I set out Mr Basu's submissions on each of the applicable exemptions below.

Second Respondent's submissions on other applicable exemptions

Section 30(1)(b)

73. Mr Basu submitted that s.30(1)(b) of FOIA applied to exempt the information from disclosure. He accepted that the Second Respondent has no power to institute and conduct prosecutions for most TACT offences because they require the consent of the DPP. However, he submitted that the provision is sufficiently broad to apply, for example, to a prosecution under paragraph 18 of Schedule 7 to TACT for offences of failing to comply with duties under that Schedule, contravening prohibitions or obstructing a search or examination. Section 117 TACT exempts that paragraph from requiring the consent of the DPP for a prosecution to be instituted.

74. He further submitted that any records emanating from a port stop under Schedule 7 would also be recorded or obtained by the police for the purposes of their functions relating to such investigations and may relate to the obtaining of information from confidential sources, so as to fall within s.30(2) of FOIA.

Section 40 FOIA (personal information)

75. Mr Basu began by accepting that the absolute exemption under section 40 of FOIA was not considered by the First Respondent and was not relied on by the FTT in making its decision. However, the Second Respondent relied on it before the Upper Tribunal.

76. Mr Basu submitted that s.40 FOIA was amended by paragraph 58 of Schedule 19 Data Protection Act 2018 ("DPA") (given the force of law by s.211 DPA) with effect from 25th May 2018 (see Reg 2(1)(g) of the Data Protection Act 2018 (Commencement No. 1 and Transitional and Saving Provisions) Regulations 2018 (SI 2018/625)).

77. Paragraph 52 of Schedule 20 DPA (given the force of law by s.213 DPA) defines the 'relevant time' as the time when the amendments to ss. 2 and 40 FOIA in Schedule 19 DPA come into force (i.e. 25th May 2018). Paragraph 52 of Schedule 20 DPA provides that, where a request for information was made to a public authority under FOIA before the 'relevant time' – i.e. 25th May 2018 – as here – the amendments to ss.2 and 40 do not have effect for the purposes of determining whether the public authority dealt with the request in accordance with Part 1 FOIA but the powers of the First Respondent and the Tribunal do not include power to require the authority to take steps which it would not be required to take in order to comply with Part 1 FOIA as amended by Schedule 19.

78. He submitted that the Second Respondent dealt with the request (including determining the internal review) before 25 May 2018 and the upshot of the above provisions is that: (1) that decision is to be judged by the original form of s.40 FOIA but that, (2) if that decision was wrong, the Second Respondent cannot be required to take steps which it would not be required to take on a present-day request under the present-day form of s.40 FOIA.

79. Mr Basu submitted that therefore the Upper Tribunal must therefore consider both forms of s.40. The original form of s.40 FOIA provided:-

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
(2) Any information to which a request for information relates is also exempt information if—
(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.
(3) The first condition is—
(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
(5) The duty to confirm or deny—
(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
(b) does not arise in relation to other information if or to the extent that either—
(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section

10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).
(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.
(7) In this section—
"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act." [emphasis added]

80. Mr Basu submitted that it is beyond doubt that any information under paragraphs 1 and 2 of the request held by the Second Respondent falls within the definition of data contained within s.1(1) DPA 1998.

81. He submitted that in relation to the first condition set out above, the first data protection principle set out in Schedule 1 DPA 1998 (given the force of law by s.4 DPA 1998) is that personal data be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 DPA 1998 is met – and, in relation to sensitive personal data (as the target data would be here, if it existed) Schedule 3. The processing involved is not necessary for any of the purposes set out in Schedules 2 or 3 to DPA 1998 and there is no valid consent (explicit or otherwise) to the processing.

82. He submitted that in relation to the second condition, the s.28 DPA 1998 national security and crime exemptions apply for the reasons set out below. The national security exemption applies where exemption is required for the purpose of safeguarding national security. The crime exemption applies to the extent that compliance would be likely to prejudice the prevention or detection of crime or the apprehension or prosecution of offenders.

83. Mr Basu further submitted that s.40(5)(b)(ii) of FOIA is activated by the national security and crime provisions of Part IV DPA 1998 referred to above and, in fact, disapplies the duty to confirm or deny, conferring absolute exemption.

84. He submitted that if the Tribunal were against the Second Respondent to any extent, then it is necessary, as explained above, to consider the amended form of s.40 FOIA, which provides as follows:-

"(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
(2) Any information to which a request for information relates is also exempt information if—
(a) it constitutes personal data which does not fall within subsection (1), and
(b) the first, second or third condition below is satisfied.
(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—
(a) would contravene any of the data protection principles, or
(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).
(4A) The third condition is that—
(a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.
(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—
(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a)—
(i) would (apart from this Act) contravene any of the data protection principles, or
(ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;
(b) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the GDPR (general processing: right to object to processing);
(c) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);
(d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.
(7) In this section—
"the data protection principles" means the principles set out in—
(a) Article 5(1) of the GDPR, and
(b) section 34(1) of the Data Protection Act 2018;
"data subject" has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);
"the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4), (10), (11) and (14) of that Act).
(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted." [emphasis added]

81. Mr Basu submitted that the information requested constitutes personal data of which the Appellant is not the data subject. It therefore falls within s.40(2)(a) of FOIA.

85. He further submitted that s.40(2)(b) FOIA is satisfied by both the first and the third conditions. The first condition is either met or is not, but the third condition requires proof that, having regard to the fundamental rights and legitimate interests of Ms. Southern, it would be a necessary and proportionate measure to withhold the information following a request for it from her for the s.45(4)(a) – (e) DPA purposes (see below).

86. Mr Basu submitted that the first condition is satisfied because disclosure of the information sought (certainly under paragraphs 1 and 2 of the request) would contravene the first data protection principle – that the processing of personal data for any of the law enforcement purposes must be lawful and fair (see s.35(1) DPA). For the first data protection principle to be met, the data subject must give consent to the processing for one of the law enforcement purposes or the processing must be necessary for the performance of a task carried out for that purpose by the Second Respondent. Neither condition is satisfied.

87. He submitted that the third condition is, in any event, satisfied in relation to the information sought at paragraphs 1 and 2 of the request because, on a request under s.45(1)(b) DPA for any such information, it would be withheld in reliance on s.45(4) DPA, which provides:-

"(4) The controller may restrict, wholly or partly, the rights conferred by subsection (1) to the extent that and for so long as the restriction is, having regard to the fundamental rights and legitimate interests of the data subject, a necessary and proportionate measure to—
(a) avoid obstructing an official or legal inquiry, investigation or procedure;
(b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
(c) protect public security;
(d) protect national security;
(e) protect the rights and freedoms of others."

88. Mr Basu submitted that s.45(4) DPA is self-evidently made out and the s.40 exemption applies. Indeed, s.40(5B)(d) FOIA also disapplies the duty to confirm or deny, conferring absolute exemption.

Section 24 FOIA (national security)

89. Mr Basu primarily relied on the national security exemption under section 24 FOIA which provides:-

"(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.
(4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect."

90. He also submitted that, for the avoidance of doubt, any information falling within s.23(1) – information held by the Second Respondent which was supplied to it by, or related to, one of the intelligence services – would also be exempt. He submitted that this absolute exemption requires no explanation.

91. Mr Basu submitted that the s.24(1) FOIA qualified exemption applies because exemption from s.1(1)(b) is required for the purpose of safeguarding national security, having regard to the wide security and counter-terrorism purposes of Schedule 7 TACT.

92. He submitted that communicating information about the decision to stop one person pursuant to Schedule 7, and any custody records, but not another, would allow terrorists to use the FOIA to their advantage in order better to understand what the authorities knew about them. As a result, Mr Basu submitted that the Second Respondent cannot communicate this information concerning Ms. Southern because it risks either confirming that she is concerned in CPI or confirming that she is not concerned in CPI and because it risks (in the former case) revealing how much or how little is known about the acts of terrorism in question. In effect this submission was one of high principle because it would apply to information relating to the subject of any port stop – that all material generated by Schedule 7 stops is exempt from disclosure under s. 24 of FOIA. This does not require a specific factual analysis of Ms Southern's port stop nor any information produced or held as a result.

93. Mr Basu accepted that the national security exemption had originally been relied upon by the Second Respondent but later abandoned before the FTT. Nonetheless he placed primary reliance upon it before the Upper Tribunal.

Section 31 FOIA (law enforcement)

94. Mr Basu also relied on the exemption under section 31 FOIA which provides, so far as is relevant:-

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders,
…
(e) the operation of the immigration controls,
…
(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

95. Insofar as the s.30 exemption does not apply, Mr Basu submitted that, having regard to the purposes and use of Schedule 7 TACT, disclosure of the information sought would (be likely to) prejudice the matters set out at s.31(1)(a), (b) and (e). To the extent that the distribution of any leaflets by Ms. Southern on a previous visit to Luton amounted to an offence, their disclosure would fall within s.31(1)(a). The Second Respondent has already explained that it does not hold any such information and so this point is moot.

The Public Interest Test

96. Mr Basu submitted that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to provide the information requested, in relation to ss. 24, 30 and 31 (the s.40 exemption, of course, being absolute) outweighs the public interest in the Second Respondent disclosing it. The Second Respondent has summarised above the potential reasons and purposes for the use of Schedule 7 in relation to anyone passing through a port or border area for the purposes of travel into or out of the UK.

97. The consistent refusal to comment on such matters as are referred to above is known in Government as the Neither Confirm Nor Deny ("NCND") principle. The rationale for the principle is applicable here, despite the bare confirmation by the Second Respondent that it holds information falling within paragraphs 1 and 2 of the request (and the denial in relation to paragraph 6). That confirmation goes no further than Ms. Southern has gone herself and tells the world (including her) nothing more.

98. He submitted that a stark illustration of the application of the NCND principle as it relates to potential covert human intelligence sources is to be found in the judgment of the Court of Appeal of Northern Ireland *in In The Matter of an Application by Freddie Scappaticci for Judicial Review* [2003] NIQB 56.

99. In that case Mr. Scappaticci claimed that his life was in danger because of media speculation that he had been an undercover agent working within the IRA as an informer in Ulster for the security forces. A number of newspaper articles claimed that he was an agent codenamed 'Stakeknife'. His solicitors asked a Northern Ireland Office minister to confirm that he was not an agent but the minister would neither confirm nor deny this. Mr. Scappaticci sought judicial review of this decision and, while the Court accepted that there was "a real and present danger" to his life; notwithstanding this, it refused to overturn the minister's decision.

100. Lord Carswell LCJ, stated:-

"To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person who may be under suspicion from terrorists. Most significant, once the government confirms in the case of one person that he

is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger. ... If the government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy about the risk to themselves being increased through the effect of government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced. There is in my judgment substantial force in these propositions and they form powerful reasons for maintaining the strict NCND policy."

101. Mr Basu submitted that the utility of the NCND principle depends on its consistent application. Departures from it – even perfectly innocently sought and even if sought in relation to someone perfectly innocent and noble – would weaken crime fighting and counter terrorism because of the 'jigsaw puzzle' effect of releasing little pieces of information.

102. The relevant and damaging pieces of information include what is or was known or discovered (if anything) about person subjected to a Schedule 7 stop, and why and for what purpose or purposes (if any) they were stopped. In this highly sensitive sphere of operation, disclosure by the police showing that they hold a small amount of information in a given category could be every bit as damaging as disclosure by them of a great deal of information in such a category. This applies, even if the information is redacted. How much information they hold may also reveal their interest, or otherwise, in a person or activity, and their degree of 'coverage' – or otherwise – of that person and/or or their activities.

103. Mr Basu submitted that the Second Respondent cannot reveal how much or how little information exists in relation to Ms. Southern because of the vital need not to diminish in any way the effectiveness of the use of the Schedule 7 power at ports and borders. Disclosing any information in relation to the use of that power would, of course, reveal how much or how little information was so held. Revealing anything about her custody records (or similar) would again tend to reveal how much or how little was known about her as well as other details which cannot be permitted to enter the public domain. Some of that information will be private and relate to a time when she was acting under compulsion. All police detention etc. records will contain a great deal of private information about their subject.

104. The confirmation that information is held under paragraphs 1 and 2 of the request tells one nothing at all about the contents or quantity of any such information.

105. Mr Basu submitted that the Second Respondent did not violate Ms. Southern's Article 8 (or 10) rights in making the Schedule 7 stop. In any event, such a claim was for her to make against the Chief Constable within the 1-year time limit for bringing human rights claims and these proceedings cannot be used as a proxy for such a claim. Even if there was somehow a breach of her Article 8 or 10 rights in March 2018, that does not perceptibly alter the balance of the public interest test set out above because the qualified exemptions relied on are not person-specific. They would apply to any person from anywhere in the world presenting at any UK port or border who was stopped, detained and questioned pursuant to Schedule 7 TACT.

Decision on remittal or re-making

106. Despite Mr Basu's valiant efforts, I have come to the conclusion that I should not attempt to re-make the decision of the FTT and rely upon any of the exemptions that the Second Respondent now invites me to apply.

107. The exemptions now relied upon by the Second Respondent were, for the most part, not argued before the FTT and the FTT did not consider nor apply any of them. The FTT did not consider any evidence that may be relevant to their application nor make any relevant factual findings in relation to them.

108. Section 40 of FOIA (personal information) was relied upon by the Second Respondent but not the FTT in making its decision. Reliance on section 24 of FOIA (national security) was abandoned by the Second Respondent in the circumstances set out above. None of the other exemptions (sections 30(1)(b), 30(2) and 31) were even raised in correspondence.

109. Many of the submissions now raised, are not simply peculiar to the facts of this case but are made at a high level of generality and on principle without reference to the specific material requested (particularly because there was a decision by the Second Respondent not to confirm in any event the nature of the material held, only to confirm that some information held by the Second Respondent falls with parts 1 and 2 of the request).

110. I am satisfied that the Appellant is entitled to sufficient notice and particularity of all the exemptions which are to be relied upon by each of the Respondents in defending the appeal in order for him to present any evidence and arguments in reply. This is particularly the case when such exemptions have not previously been relied on by the First or Second Respondents or FTT. The Appellant may wish to serve or rely upon fresh evidence for any remitted determination, whether at an oral hearing or if the matter is to be re-decided on the papers.

111. I am also reluctant to make any fresh findings of fact when the Upper Tribunal is primarily an appellate tribunal established to decide matters of law on appeal from the FTT. The FTT is a specialist fact finding tribunal, with the benefit of experienced and expert members who can consider all that evidence afresh. Further, my remaking the decision would result in reduced rights of appeal for the parties, thereafter only to the Court of Appeal, compared to the appeal avenues available from decisions of the FTT.

112. Any delay caused by remitting the matter to the FTT for a fresh determination will not prejudice the Second Respondent, because in the mean-time the requested information will not be disclosed.

Conclusion

113. For the reasons set out above and in my closed reasons I allow the Appellant's appeal and set aside the decision of the FTT for error of law. I remit the matter to a newly constituted FTT for a fresh determination as to whether any relevant provision of FOIA may apply to exempt the requested information from disclosure. I do not limit the material nor evidence nor the exemption provisions of FOIA that may be relied on by the parties at such a hearing. Further consequential directions, including whether an oral hearing is necessary and the form of that hearing, are for the FTT to make. I make directions in the terms set out above.

Rupert Jones
Judge of the Upper Tribunal
Signed on the original on 21 June 2021