Neutral citation number: [2022] UKFTT 525 (GRC)

Case Reference: EA/2022/0210

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing

On: 05 September 2023
Decision given on: 15 September 2023

Before

TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER EMMA YATES

Between

EDWARD WILLIAMS

Appellant

and

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

Respondents

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 2 August 2022 (IC-83982-H9H3, the "Decision Notice"). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information about the possibility of the United Kingdom establishing an asylum processing centre on Ascension Island or St Helena, requested from the Foreign, Commonwealth and Development Office (the "FCDO").

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 29 September 2020, the Appellant wrote to FCDO and requested the following information (the "Request"):

BACKGROUND

https://www.ft.com/content/ff1dc189-5531...

"Priti Patel asked officials to explore the construction of an asylum processing centre on Ascension Island, a British overseas territory more than 4,000 miles from the UK in the south Atlantic, for migrants coming to Britain.

The home secretary's officials also looked at the possibility of building an asylum centre on St Helena, part of the same island group.

But the idea of transferring asylum seekers to remote volcanic outcrops appears to have been dropped by Ms Patel. The Foreign Office was consulted on the plan and provided an assessment of the practicality of shipping asylum seekers to the remote locations."

REQUEST

Provide the assessment or similar information referred to above.

4. FCDO responded on 27 October 2020 and confirmed that it held information falling within the scope of the Request. FCDO withheld the information relying upon, following an internal review, the exemptions in FOIA sections 27(1)(a) (international relations) and 35(1)(a) (formulation and development of government policy).

5. The Appellant complained to the Commissioner, who decided that FCDO was entitled to withhold the requested information under both of the exemptions relied on. In both cases, the exemption was engaged. Although there is significant public interest in openness and transparency about policy making regarding immigration issues, in both cases this was outweighed by the public interest in maintaining the exemption.

The Appeal and Responses

6. The Appellant appealed on 1 August 2022. His grounds of appeal are:

a. He does not admit that the exemptions considered by the Commissioner are applicable.

b. The public interest balancing test was wrongly decided.

7. The Commissioner's response maintains that the Decision Notice was correct.

a. ***Section 27(1)(a).*** Disclosure of the withheld information would be likely to prejudice the UK's relations with its overseas territories, accepting the representations from the FCDO. There is a causal link between disclosure of the information and prejudice to the UK's relations with its overseas territories given that the proposals would be relevant to the immigration law and arrangements of those territories. The risk of prejudice is more than hypothetical. By a narrow margin, the public interest in

maintaining the exemption outweighs the public interest in disclosure, taking into account the likely impact disclosure would have on the UK's relations with its overseas territories.

b. ***Section 35(1)(a).*** The Commissioner maintains that he clearly stated why he decided that section 35(1)(a) is engaged as he accepted that the withheld information related to both the formulation and development of government policy. He was correct to conclude that the exemption is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

8. The Commissioner applied to strike out the appeal. The Appellant opposed the strike out application, and applied to strike out the reliance on section 27 because Ascension Island is subject to the UK government and so is not a "State". FCDO was joined as a party to the proceedings. Both strike out applications were considered and rejected.

9. FCDO's response states the following in relation to section 27(1)(a):

a. It has a unique and well-recognised expertise regarding relations between the United Kingdom and other states. Each overseas territory has its own government, constitution and local laws. On Ascension, local government has a range of responsibilities including immigration and other matters that would be affected by the policy proposals.

b. Disclosure would affect relations between the UK and an overseas territory. It would also affect relations with other states, including the US which has a military presence on Ascension and would be affected by the policy proposal. The documents also consider the immigration function of other sovereign states.

c. The Appellant has not articulated any specific case for public interest in disclosure. FCDO's acknowledged expertise in matters concerning the relations between states should attract very considerable weight in striking the balance, and it would be for the Appellant to identify concerns of the highest importance to outweigh the FCDO's expertise. He has not identified any such concerns, or indeed anything other than general curiosity.

10. FCDO's response states the following in relation to section 35(1)(a):

a. There is ongoing policy work concerning asylum processing.

b. Schedule 4 of the Nationality and Borders Act 2022 enables asylum seekers to be removed to a safe third country pending the processing of their asylum claim. It came into force on 28 June 2022, and is the subject of ongoing political and legal evaluation and challenge.

c. There is a high level of political and legal controversy around the issue of offshore asylum processing. It is likely that government policy will continue to evolve in light of that controversy. Accordingly, it would be wrong in principle to allow the appeal.

Applicable law

11. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

(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.

……

2 Effect of the exemptions in Part II.

…….

(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.

……..

27 International relations.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State…

…….

(5) In this section—

……

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

……..

35 Formulation of government policy, etc.

(1) Information held by a government department…is exempt information if it relates to —

(a) the formulation or development of government policy…

…….

58 Determination of appeals

(1) 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.

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

12. The approach to assessing prejudice for the purposes of relevant exemptions, including section 27(1), is as set out in the First Tier Tribunal decision of ***Hogan v Information Commissioner*** [2011] 1 Info LR 588, as approved by the Court of Appeal in ***Department for Work and Pensions v Information Commissioner*** [2017] 1 WLR 1:

a. Firstly the applicable interests within the relevant exemption must be identified.

b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "real, actual or of substance".
c. Thirdly, the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "real and significant risk" of prejudice, or there "may very well" be prejudice, even if this falls short of being more probable than not.

13. The exemption in section 35(1)(a) is provided to ensure a safe space for development of government policy. Engagement of section 35(1)(a) is not dependant on whether a policy was still being formulated at the time of the request (***Cabinet Office v Information Commissioner and another*** [2018] UKUT 67 (AAC). However, this is relevant to the public interest balance. The public interest in preserving a safe space for discussion is strongest when the formulation and development of the relevant policy is still live. There can be a public interest in withholding information after completion of the policy formulation or development process, but the public authority must show evidence that this might adversely affect current or future discussions (***Cabinet Office v Information Commissioner and Webber*** [2018] UKUT 410 (AAC)).

Issues and evidence

14. The issues are:
a. Is section 27(1)(a) engaged by the requested information and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?
b. Is section 35(1)(a) engaged by the requested information and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:
a. An agreed bundle of open documents.
b. A partially redacted witness statement from Adam Pile of the FCDO, Deputy Director responsible for the UK's inhabited overseas territories.
c. A closed bundle of documents containing an unredacted version of the submissions from FCDO to the Commissioner during his investigation, an unredacted version of Mr Pile's witness statement, and the withheld information.

Discussion and Conclusions

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues. In doing so, we address both of the points of appeal raised by Mr Williams – whether the exemptions are applicable, and whether the public interest balance has been decided correctly.

15. ***Is section 27(1)(a) engaged by the requested information?*** We start with considering whether Ascension Island and/or the other overseas territories are a "state" for the purposes of this exemption. The Commissioner's detailed guidance on this exemption says, "*The term "state" covers the government of any state. This will include states with a government structure, the*

overseas territories of the UK, the overseas territories of other countries and Crown Dependencies such as the Channel Islands…the term "state" also includes "any territory", outside the UK which includes territories which are not recognised as states in international law but which may be the subject of international law or international agreements. For example, Antarctica."

16. We note the information in Mr Pile's statement about the UK's relationship with the overseas territories, and the fact they each have their own constitution, government and local laws. Powers are devolved to the maximum extent possible. We also note the definition of "State" in section 27(5), which covers "any territory" outside the UK. We agree with the position taken in the Commissioner's guidance that the UK's overseas territories fall within the definition of a "state" for the purposes of FOIA. In any event, other states that are not overseas territories are referred to in the withheld information. These include the United States in relation to Ascension Island (as set out in FCDO's response), and other countries whose immigration functions are discussed.

17. The interests within the section 27(1)(a) exemption are in preserving good international relations between the UK and other states, and damage to these relations is the reason relied on by FCDO for withholding the information. We have considered whether there is a causal relationship between the potential disclosure and the prejudice, and whether the prejudice is "real, actual or of substance". We are satisfied that this test is met. Having seen the withheld information, there is a clear causal link between the potential disclosure and the prejudice. The information discusses in some detail options for immigration processing by overseas territories. Immigration is an area that is devolved to these territories. As stated by FDCO in its response to the Commissioner, release of the documents would undermine trust in the UK government and its wider partnership with all of the overseas territories. The closed information provides more detail on why this would be the case, and although we cannot explain the reasoning in detail in this decision, we confirm that we accept the accuracy of that information in light of FCDO's expertise regarding relations between the United Kingdom and other states.

18. We therefore find that disclosure of the withheld information would be likely to prejudice relations between the UK and other states, including but not limited to Ascension Island and St Helena. On the information we have seen from FCDO (including the closed information), this is a real and significant risk, which could well happen.

19. ***If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** We find that it does.

20. The Appellant's appeal does not put forward any specific case for public interest in disclosure. However, we accept that immigration policy is an issue of very significant public interest. It is a controversial issue, both politically and legally. As well as the general public interest in openness about formation of government policy, openness and transparency about early policy discussions on this particular immigration topic would inform public debate on the issue of illegal migration.

21. Nevertheless, we find that this is outweighed by the public interest in maintaining the exemption. We have found that disclosure would be likely to damage the UK's relations with Ascension Island and St Helena, as well as its other overseas territories and some other states. This is clearly not in the public interest. It is very important that the UK is able to maintain trust and a good relationship with its overseas territories, as well as with other major states. As stated in FCDO's response to the Commissioner, the UK has a goal of strengthening engagement and interaction with the overseas territories. Disclosure of this information would be likely to do the

opposite. The information relates to a possible immigration policy that was simply under discussion, which means the public interest in disclosure is somewhat more limited than if this was a policy that had been implemented. On balance, we therefore find that the exemption applies.

22. ***Is section 35(1)(a) engaged by the requested information?*** We find that it is. The withheld information consists of feasibility studies and assessment of an immigration policy relating to the UK's overseas territories, as part of wider discussions about deterring illegal and clandestine migration to the UK. The information clearly relates to the formulation of government policy.

23. ***If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** We find that it does.

24. The public interests in disclosure are as discussed in paragraph 20 above. The public interest in maintaining the exemption, as put forward by FCDO in their response to the Commissioner, is the need for officials to be able to offer impartial advice without the threat of policy discussions being released before any decisions are taken.

25. In assessing the strength of the public interest in maintaining the exemption, we have considered whether formulation of the policy under discussion was still "live" at the time of the Request. The public interest in preserving a safe space for discussion is strongest while the formulation and development of policy is still taking place. There is significant public interest in ensuring that public officials are able to provide open and candid advice on government policy without being inhibited by the risk that this information is released before a final decision has been taken. This provides a safe space to debate ideas without external interference and distraction. It also avoids the risk that civil servants are deterred from expressing candid views – although this "chilling effect" lessens after the relevant policy has been finalised.

26. Having seen the withheld information, we are satisfied that various policies in relation to offshore processing of migrants were still being formulated at the time of the Request. As stated in FCDO's response to the appeal, there is a high level of political and legal controversy around the issue of offshore asylum processing. Legislation enabling asylum seekers to be removed to a safe third country pending the processing of their asylum claim only came into force in June 2022 (after the date of the Request), and this remains the subject of ongoing political and legal challenge. The withheld information forms part of policy formulation and development in this area, which was ongoing at the time of the Request (and in a wider sense is still ongoing now).

27. The important and controversial nature of this topic enhances the public interest in disclosure. However, it also enhances the public interest in ensuring that government policy can be formulated and developed on the basis of the best possible open and impartial advice from officials. The public interest in maintaining the exemption is particularly strong for this reason. Disclosure of the information while policy formulation was still live would be likely to attract considerable interest and comment, and so affect the safe space for debate and discussion. As noted by the Commissioner in his decision, the withheld information is a candid assessment of issues concerning the policy proposal, and it is plausible that disclosure would cause officials to reconsider how to draft similar documents in the future. We agree with the Commissioner that both the safe space and the chilling effect arguments have significant weight in this case. On balance, we therefore find that the exemption applies.

28. We find that both of the exemptions relied on by FCDO apply to the withheld information and they were entitled to withhold it for this reason. We dismiss the appeal.

Signed Judge Hazel Oliver Date: 13 September 2023