Neutral citation number: [2023] UKFTT 765 (GRC)

Case Reference: EA/2023/0116

First-tier Tribunal
General Regulatory Chamber
Information Rights IC-172049-J4S5

Heard: on the papers

Heard on: 1 September 2023
Decision given on: 20 September 2023

Before

TRIBUNAL JUDGE CHRISTOPHER HUGHES
TRIBUNAL MEMBER NAOMI MATTHEWS
TRIBUNAL MEMBER AIMÉE GASSTON

Between

STOPWATCH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed

Substituted Decision Notice:

The Home Office disclose the requested information by 15 October 2023

Case

DH v IC and Lewis [2017] EWCA Civ 374
All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office [2013] UKUT 0560 (AAC)

REASONS

1. This case arises out of an information request for an Equality Impact Assessment (EIA) prepared by the Home Office in relation to s149 of the Equality Act 2010, which provides (most relevantly) -

Public sector equality duty
(1)A public authority must, in the exercise of its functions, have due regard to the need to –
(a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
…
(3)Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
(a)remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b)take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c)encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
…
(5)Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –
(a)tackle prejudice, and
(b)promote understanding.
…
(7)The relevant protected characteristics are –
age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

2. The EIA produced by the Home Office arose out of changes to the use of a police power contained in The Criminal Justice and Public Order Act 1994. This Act covers a wide range of issues, including provisions relating to young offenders, bail, evidence and procedure in criminal trials and Part IV (Police Powers) which consisted of six provisions relating to the taking of samples and (most relevantly) S60 which gave specific powers to the police *"to stop and search in anticipation of violence"*. The section contains detailed provisions as to the circumstances in which the power

may be authorised in writing including the seniority of the officer giving authorisation for the exercise of the power and the duration of the authorisation. The effect is to confer power on officers to stop and search without having grounds for suspicion:

(4)This section confers on any constable in uniform power –
(a) to stop any pedestrian and search him or anything carried by him for offensive weapons or dangerous instruments;
(b) to stop any vehicle and search the vehicle, its driver and any passenger for offensive weapons or dangerous instruments.
(5) A constable may, in the exercise of those powers, stop any person or vehicle and make any search he thinks fit whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind.
(6) If in the course of a search under this section a constable discovers a dangerous instrument or an article which he has reasonable grounds for suspecting to be an offensive weapon, he may seize it.

It creates a criminal offence:

(8) A person who fails to stop or (as the case may be) to stop the vehicle when required to do so by a constable in the exercise of his powers under this section shall be liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale or both.

It is in addition to other powers which may be exercised where there are grounds for suspicion:

(12) The powers conferred by this section are in addition to and not in derogation of, any power otherwise conferred.

3. There were subsequent amendments to the provisions (notably by the Knives Act 1997 and the Serious Crime Act 2007) and there was concern about the use of this power. On 30 April 2014 the then Home Secretary announced in Parliament a new framework "The Best Use of Stop and Search Scheme" (BUSSS) which had been developed and published in conjunction with the College of Policing and was a framework which individual police forces were encouraged to adopt. The objective was:

The principal aims of the Scheme are to achieve greater transparency, community involvement in the use of stop and search powers and to support a more intelligence-led approach, leading to better outcomes, for example, an increase in the stop and search to positive outcome ratio.

The objective was to reduce the use of section 60 "no suspicion" stop and search by

- *raising the level of authorisation to senior officer (above the rank of chief superintendent);*
- *ensuring that section 60 stop and search is only used where it is deemed necessary and making this clear to the public;*

• *in anticipation of serious violence, the authorising officer must reasonably believe that an incident involving serious violence will take place rather than may;*
• *limiting the duration of initial authorisations to no more than 15 hours (down from 24); and*
• *communicating to local communities when there is a section 60 authorisation in advance (where practicable) and afterwards, so that the public is kept informed of the purpose and success of the operation.*

4. The hope was that "*By adopting the Scheme, forces will use stop and search strategically, which will improve public confidence and trust.*" The document emphasised the importance of keeping records of the use of the power and to comply with all aspects of the scheme "*The Home Secretary reserves the right to withdraw membership of the Scheme where there is evidence that a force is not in compliance with its terms.*" The Scheme emphasised the importance of the public sector equality duty:

6. Race and Diversity Monitoring
6.1 To comply with the public sector equality duty in section 149 of the Equality Act 2010, whilst designing and implementing any new policies as part of the Best Use of Stop and Search Scheme, forces must consider the impact on all individuals. This duty requires that forces have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.
6.2 In addition, as an important element of the Scheme is to encourage a better relationship between the police and the public, participating forces need to ensure that they are actively monitoring their use of stop and search powers. Forces participating in the Scheme will ensure that the impact of the Best Use of Stop and Search Scheme is monitored, particularly as it relates to individuals from Black and Minority Ethnic groups and young people.

5. A Home Office study (published 2016 bundle 581-632) **Do initiatives involving substantial increases in stop and search reduce crime?** looked at the impact of Operation BLUNT 2. This was a Metropolitan Police initiative to reduce knife crime which dramatically increased the number of searches over a three year period from 2008- 2011 and concluded:

Despite its limitations, this study is able to shed some light on whether the large increase in stop and searches, which were a central part of Operation BLUNT 2, had a discernible effect on knife-crime volumes at the borough level. If an increase in the number of weapons searches is effective for reducing crime then a drop in knife-related offences would be expected in those areas where the number of stop and searches increased the most compared with areas that had smaller increases in stop and search activity. A conditional difference-in-difference regression analysis found no statistically significant crime-reduction effect across 11 offence types from the increase in weapons searches, when comparing boroughs with the biggest increases in stop and search activity with those that had much smaller increases. Perhaps the only exception to this general statement is around homicide, where the small numbers of offences make it difficult to come to a definitive view.

6. The scheme has also been subject to change. The then Home Secretary on 31 March 2019 announced (bundle page 98):-

"Home Secretary Sajid Javid is also making it simpler for police to use section 60 of the Criminal Justice and Public Order Act. This empowers officers to stop and search anyone in a designated area without needing reasonable grounds for suspicion if serious violence is anticipated.
The changes apply to seven police forces who collectively account for over 60% of total national knife crime and will result in at least 3,000 more officers being able to authorise section 60. The changes will run for up to a year, including a review after 6 months

The Home Secretary has lifted 2 conditions in the voluntary Best Use of Stop and Search Scheme by:
reducing the level of authorisation required for a Section 60 from senior officer to inspector
lowering the degree of certainty required by the authorising officer so they must reasonably believe an incident involving serious violence 'may', rather than 'will', occur"
…

The changes to section 60 will initially apply in areas particularly affected by violent crime - London, West Midlands, Merseyside, South Yorkshire, West Yorkshire, South Wales and Greater Manchester - for up to a year. Forces are also expected to engage with communities on its use, and nobody should be stopped on the basis of their race or ethnicity."

7. On 11 August 2019 a further announcement was made:

"Government lifts emergency stop and search restrictions

A stop and search pilot has today been rolled out to all 43 forces in England and Wales

Home Secretary Priti Patel today (11 August) empowered more than 8,000 police officers to authorise enhanced stop and search powers, as part of Government efforts to crack down on violent crime.
The Home Office is making it simpler for all forces in England and Wales to use Section 60 of the Criminal Justice and Public Order Act, which empowers officers to stop and search anyone in a designated area without needing reasonable grounds for suspicion if serious violence is anticipated.
The nationwide pilot has been extended from a smaller pilot within the seven forces worst affected by knife crime, following an urgent review commissioned by the Prime Minister."

8. EIAs of both the 2019 changes to the BUSSS arrangements were published. Home Office statistics published in November 2020 'Stop and search statistics data tables: police powers and procedures year ending 31 March 2020' show the use of s60 stop and search in England and Wales increased substantially from 622 stops in 2016/17 to 18,081 stops in 2019/2020.

9. On 26 February 2021 in the light of widespread concern arising out of the 2020 killing of George Floyd by police in America about "*the significant impact that police interaction can have on some people, particularly those from Black, Asian and Minority Ethnic communities*" Wendy Williams CBE Her Majesty's Inspector of Constabulary published a report entitled **Disproportionate use of police powers A spotlight on stop and search and the use of force**. She stated:

Over 35 years on from the introduction of stop and search legislation, no force fully understands the impact of the use of these powers. Disproportionality persists and no force can satisfactorily explain why. In 2019/20, Black, Asian and Minority Ethnic people were over four times more likely to be stopped and searched than White people; for Black people specifically, this was almost nine times more likely. In some forces, the likelihood was much higher. Black people were also 18 times more likely than White people to be searched under section 60 of the Criminal Justice and Public Order Act 1994. This gives officers time-limited powers to search any individuals in an area, without requiring reasonable grounds, in order to recover offensive weapons or dangerous instruments in anticipation of serious violence.

10. In July 2021 the UK Government produced the **Beating Crime Plan** (bundle 298-349 at 305), at the same time an EIA was prepared (it is dated July 2021) one of the objectives of this wide-ranging set of measures was:

    *"**Empowering the police to take more knives off the streets** and to prevent serious violence by permanently relaxing conditions on the use of section 60 stop and search powers."*

11. A judicial review of the plan with relation to top and search was launched by the Appellant. This was initially resisted by the Home Secretary however the Government Legal Department wrote to the solicitors for the Appellant (Liberty) on 19 November 2021:

    "Following a review of the background to the decision to which your challenge relates, it has come to light that at the time the decision was taken, the equality impact assessment put before the Home Secretary did not contain a full analysis of the available options.

    The Secretary of State has…decided to withdraw her decision and will reconsider the Government's position as soon as she is provided with a further set of advice, including an equality impact assessment which addresses all options that she is being asked to consider. This advice will also take into consideration any new relevant information and data which has become available since the July decision, or will become available very shortly. This will include the new stop and search statistics which will be published in the Police Powers and Procedures bulletin on 18 November."

12. On 22 November 2021 the Appellant sought:

    "The equality impact assessment

    Your client did not publish the equality impact assessment conducted prior to the decision in July 2021. Please kindly provide a copy of the same pursuant to your client's duty of candour alternatively, under the Freedom of Information Act 2000. If your client provides a copy of the EIA pursuant to her duty of candour, please confirm that it may be publicised.

    Advice to police forces

    You state that your client will advise police forces to revert to the position immediately preceding the decision subject to challenge, i.e. that the s60 BUSSS safeguards have not been

removed but are suspended pending the above-mentioned reconsideration. Please kindly provide confirmation that this has been done, including details of the means by which it was done."

13. On 6 January 2022 the Home Office refused the request relying on s35(1)(a) to withhold information (an exemption which relates specifically to the formulation or development of government policy) and stated that the public interest falls in favour of maintaining the exemption.

    We consider that the EIA requested continues to form part of briefings, advice and submissions intended for internal use and limited distribution to support the formulation of Government stop and search policy. The exemption at section 35(1)(a) is therefore engaged. The EIAs and research on relaxing conditions, their impact and supporting data relate to ongoing policy and decision and are therefore exempt from disclosure under section 35 (1) a.

14. The Home Office maintained that the EIA continued to be part of the consideration of the formulation of policy and the balance of public interest rested with non-disclosure to prevent misinterpretation and the diversion of resources away from consideration to deal with misinterpretations, arguing:

    Information, whether officially released or not, is already open to widespread interpretation and susceptible to selective assessment and reporting. This can curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making.
    …
    Disclosing information on ongoing policy development prematurely and which is not intended for public dissemination would undermine such efforts and fuel unhelpful and inaccurate conclusions on an already controversial issue.

15. Liberty replied on 15 February 2022 seeking an internal review, noting that another request for the EIA had been made on 28 July by the Criminal Justice Alliance and refused on the same basis, and asking that the two internal reviews be conducted together. Quoting the Home Office letter of 19 November 2021 it commented:

    First, it is clear from this that Home Secretary is reconsidering the implementation of the long-established s60 BUSSS safeguards. This does not constitute the 'formulation of Government policy'. Indeed, guidance published by the Information Commissioner's Office ('ICO') on s35 FOIA provides that: "the exemption will not cover information relating purely to the application or implementation of established policy."

    Second, it is plain that the EIA was deficient and will, or has been, replaced with a more recent EIA 'addressing all the options' the Home Secretary is being asked to consider, and that the (earlier) EIA will not form part of her considerations.

    Third, the EIA should in any event have been made publicly available (at least by publication on the Home Office website) once the Home Secretary announced her decision on 27 July 2021 to remove the s60 BUSS safeguards.

16. Liberty noted the ICO's guidance on the use of s35(1):-

"The ICO guidance states that such 'safe space' arguments may apply "as long as those discussions have not been opened up for general external comment."

17. On 26 April 2022 the Home Office responded maintaining its position. The Appellant complained to the Respondent ICO who on 2 February 2023 issued the decision notice upholding the Home Office position. The ICO found that s35(1)(a) applied as it was exempt information which related to the formulation or development of government policy. The ICO explained the approach adopted:

10. The Commissioner takes the view that the formulation of policy comprises the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

11. Development may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

12. The exemption covers information which relates to the formulation or development of government policy. The Commissioner considers the term relates to can be interpreted broadly.

13. In its internal review, the Home Office explained that the Government announced the permanent relaxations of the BUSSS conditions on the use of Section 60 in July 2021, as part of the Beating Crime Plan. It explained that since the announcement was made the Home Secretary has agreed to reconsider her decision. The Home Office acknowledges that this announcement has attracted scrutiny on the government's position on Section 60 policy. It explained that in addition to the wider ongoing policy development related to stop and search, the information requested forms part of the ongoing advice intended for the Home Secretary and her reconsideration on relaxing the Section 60 BUSSS conditions. The Home Office explained to the complainant that, at the time of the request, the Home Secretary has not yet re-taken her decision and as such, this remains a live Section 60 policy issue.

18. With respect to the arguments against disclosure the ICO accepted the Home Office's arguments:

24. The Home Office argued good government and policy making is in the public interest and that the deliberations and exchanges between officials and Ministers around Section 60 policy should not be inaccurately mis-interpreted. It explained that disclosure of the requested information may increase that risk and curtail the ability of officials to do their work effectively what is arguably a contentious policy area. It also explained that there may be a deterrence on official external experts or stakeholders who might be reluctant to provide advice if the information is disclosed. It stated that this can curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making.

25. The Home Office acknowledges the public interest in stop and search powers and the scrutiny they are under. However, it is in the public interest to ensure that policy making on a serious issue such as stop and search is afforded the safe space in which to be deliberated and developed freely to ensure the powers are lawful and proportionate.

19. The Appellant in its notice of appeal summarised the background to the request and explained the basis of the judicial review challenge it had launched which had argued that the Home Secretary had breached the Public Sector Equality Duty, had failed to take into account material considerations and had lacked an evidential basis for removal of the BUSSS safeguards. In the judicial review the Appellant had sought disclosure of the EIA. The reconsideration of the EIA had led to the Home Office withdrawing the decision with respect to BUSS. The Appellant argued that the final decision had now been made in May 2022 and the EIA for that decision had been published and there was no ongoing policy discussion about BUSS safeguards.

Consideration

20. The time at which the applicability of a FOIA exemption is to be examined and the public interest weighed is the time at which the request for information is considered and rejected – ie the 4 week period after the request of 22 November – the Home office replied slightly late on 6 January 2022.

21. It is therefore appropriate to consider the status of the policy formulation at that date, the role of the 2021 EIA in it and the consequences of its disclosure at that date on the formulation of policy.

22. In July 2021 the Home Secretary had announced the permanent removal of the BUSSS restrictions – effectively completing a process which had been in train for several years. She had disclosed much of the thinking and evidence behind the decision in the various statistical bulletins published by the Home Office, the policy intent and reasoning had been disclosed by the **Beating Crime Plan** published in July 2021.

23. It is clear that at the date of publication of the **Beating Crime Plan** in July 2021 a process of policy formulation had been concluded. A request made at that stage would have been a request for a finalised document which had been used in formulating a policy which had been announced and which (on the basis of the 2019 precedent) would have been routinely published.

24. Mr Justice Charles in the Upper Tribunal in *Lewis* (approved the Court of Appeal) stated:-

"Historically the candour argument was advanced in support of both class and contents claims for PII and LPP. The common law on these issues diverged with the result that LPP is based on a right and so a guarantee of non-disclosure, whereas no such right exists in the context of PII claims or duties of confidence. The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure). As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the

public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed. In general terms, this weakness in the candour argument was one that the courts found persuasive and it led many judges to the view that claims to PII based on it (i.e. in short that civil servants would be discouraged from expressing views fully, frankly and forcefully in discussions relating to the development of policy) were unconvincing."

25. This clearly identifies the general weakness of the arguments adopted by the ICO from the Home Office (paragraphs 17 and 18 above). There is an even greater weakness. The information in question is not from an early stage of policy making where a very wide range of unconsidered approaches might be identified but the considered conclusions of civil servants with every expectation that the EIA would be published. It is simply inconceivable (and demeaning of their integrity) that they and the others whose thinking contributes to such a document referred to as "official external experts or stakeholders" who in this context could be more informatively described as senior police officers, social scientists, lawyers etc would be inhibited in contributing to this extremely important work. While it is "arguably a contentious policy area" that derogatory euphemism for moral significance and complexity is precisely why both "official external stakeholders" and civil servants wish to contribute.

26. While the decision was, at the end of 2021/start of 2022, being remade it is exceptionally hard to see, on the Home Office's own account (that the EIA did not address all the options and new statistics were now available) that the EIA could be part of the next iteration of policy formulation.

27. A further point should be noted. Complex issues of importance are (or should be) always under consideration as new information is collected or further research published. An abbreviated account of part of the policy consideration of police searches of individuals in public spaces is set out above. The Police Powers Group in the Home Office is not a temporary phenomenon. Applying the logic adopted by the ICO more widely would suggest that the Minutes of the Monetary Policy Committee of the Bank of England should not be published as this area of policy would be in a state continuous evolution; whereas the regular publication of those Minutes is an important part of the assountability of the MPC in explaining its actions as it seeks to meet its inflation target.

28. The correct approach to considering the balance of public interest was set out in *APPGER* :

"… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits it disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

29. As explored above there are, on a proper analysis, no harms from disclosure. At the time of the request a decision to permanently loosen the extra-statutory restrictions on s60 had been made and promulgated to police forces. It had been in place for four months, this may have had some impact on police decision-making in the period – bolstering existing practices of using s60 more widely, in which case it would have had some real world effects based on what was acknowledged to be flawed decision-making. Even if those were small, the disclosure of the EIA would have had public value at the time of the refusal in explaining why that important decision had been taken.

30. The EIA as communicated to the tribunal is annex E in the "closed bundle" and listed as being from July 2021. In the closed bundle is also an EIA from November 2021 marked as published 31 May 2022; which would appear not to be in scope of the request (paragraph 12 above) for *"the equality impact assessment conducted prior to the decision in July 2021"* – the publication of the other EIA in 2022 would appear to be a reversion to normal practice. Other material in the closed bundle is marked as not being within the scope of the request some of which has been published.

31. The tribunal has some doubts as to whether on a proper analysis the exemption was engaged. However on the basis that the Home Office was correct in finding it engaged a dispassionate weighing of the competing interests finds that the public interest in favour of withholding the information was negligible, the interest in disclosure was of substance.

32. It is to be regretted that the ICO naively accepted the disingenuous arguments of the Home Office at face value.

Signed Hughes Date:18 September 2023