Neutral citation number: [2024] UKFTT 3 (GRC)

Case References: EA-2022-0355

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers

Heard on: 17 November 2023
Decision given on: 16 January 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER KATE GRIMLEY EVANS
TRIBUNAL MEMBER SUSAN WOLF

Between

EDWARD WILLIAMS

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE HOME OFFICE

Respondents

Decision: The appeal is allowed in part.

Substituted Decision Notice:

Organisation: The Home Office

Complainant: Mr Edward Williams

The Substitute Decision – IC-152077-K0T2

1. For the reasons set out below the Home Office failed to comply with section 1(1) of the Freedom of Information Act 2000 (FOIA) because it failed to inform the complainant in writing whether it held information of the description specified in the request.
2. The Home Office was entitled to withhold the requested information under section 31(1)(a) and (e) and section 42 FOIA.
3. The Home Office is not required to take any steps.

REASONS

Introduction

1. The parties consented to a hearing on the papers, and the tribunal considered that it was in the interests of justice for the matter to be heard on the papers.

2. This is an appeal by Mr. Williams against the Commissioner's decision notice IC-152077-K0T2 of 7 November 2022 which held that the Home Office was entitled to rely on section 31(1) (law enforcement), section 42(1) (legal professional privilege) and section 43(2) (commercial interests) to withhold the requested information. The Commissioner found that the Home Office had breached section 17(1) FOIA by providing its refusal notice outside 20 working days. The Commissioner did not require the Home Office to take any steps.

Factual background

3. The tribunal made the following findings on the balance of probabilities on the basis of the evidence before it. These paragraphs are largely taken from the witness statement of Stephen Whitton, Head of Border Force Maritime Command, which the tribunal accepted.

4. Border Force is a law enforcement command within the Home Office, with primary responsibility for border security. Border Force Maritime Command (BFMC) is part of Border Force and operates the UK's only national maritime law enforcement capability with the skills, experience and ability to operate effectively and safely at sea in support of the overall mission and priorities of Border Force. All vessels carry out both reactive and proactive, intelligence led maritime LE operations including: surveillance, security and maritime interceptions (including the boarding of vessels at sea), both within UK and adjacent international waters.

5. Historically, the focus of BFMC has been counter-narcotics and other smuggled goods bound for the UK where they are responsible for delivering the maritime enforcement capability and in so doing, prevent and disrupt organised crime from exploiting the UK's territorial waters for illegal

purposes including drug trafficking, illegal immigration and modern slavery. More recently since 2018 BFMC has been increasingly deployed to respond to the threat posed by small boats used as Migrant Vessels ("MV") crossing the English Channel and the significant threat to life that this dangerous activity poses.

6. One specific tactic which was the subject of consideration and trials in the period from March 2020 onwards was the use of turnaround tactics to prevent MVs from progressing through UK waters. The development of turnaround tactics resulted in the approval of the Standard Operating Procedure ("the SOP") and tactical plan, under the name of Operation Sommen.

7. The strategic aim of Operation Sommen was to deliver an operational plan which would reduce the number of MVs seeking to cross the English Channel by deterring migrants from attempting the journey, restore public confidence in the UK's control of its borders and protect life. In terms of the specific operational aspect, the purpose was to deliver an operational plan and tactics to safely and dynamically turn-around a positively identified MV, once inside UK territorial waters, in order to prevent it from reaching UK shores and induce it to leave UK Territorial waters and return to France. The strategic intention was that these operational tactics would deter migrants from using small boats or other high-risk means to reach the UK and ensure that the route becomes unviable for organised criminals to profit from and exploit. It was therefore aimed at being a deterrent to both individual migrants and organised criminal gangs.

8. Although the turnaround tactics, as part of Operation Sommen, were approved for use and the operation deployed in the Dover Strait on 10 separate occasions between 3 November 2021 and 15 March 2022, they were never employed against a small boat. This was because no small boat was identified and assessed as suitable for the tactic to be safely and lawfully used and in accordance with the detailed criteria set out in the SOP.

9. From 14 April 2022 the Home Secretary made the decision that the policy and procedures which underpin the delivery of turnaround tactics was withdrawn. From this date, therefore, Operation Sommen to deliver the turnaround tactics was no longer a "live operation".

10. The Home Office holds a standard operating procedure headed "Combined SOP for preventing small boats progressing through UK Territorial Waters" authored by Border Force Maritime Command ("the SOP") at CB/372. The SOP consists of instructional material used to train Border Force officers and then brief them prior to operational deployments in relation to when and how to deploy turnaround tactics and so is also the basis for the operational plan for any "live" deployments.

11. The Home Office also holds a training PowerPoint entitled "Vessel Recognition Training" at CB/399.

The request

12. Mr. Williams made the request on 9 September 2021 in the following terms:

> "BACKGROUND
> https://www.theguardian.com/uk-news/2021...
>
> Priti Patel to send boats carrying migrants to UK back across Channel. Border Force is being trained on 'turn-around' tactics but France warns plan could endanger lives.
>
> 1. Please provide legal advice received regarding the legality of UK authorities (Border Force etc.) stopping migrant boats at sea entering UK part of the English Channel and/or turning them back to France?
>
> 2. Provide name of the author of the legal advice and the fee note.
>
> 3. Provide training material regarding how to execute push back at sea."

13. The Home Office replied on 21 December 2021 withholding the information under the following sections of FOIA:
    13.1. parts (1) and (3) under section 31(1)(a) and (e) (law enforcement – prevention or detection of crime and operation of immigration controls)
    13.2. parts (1) and (2) under section 42 (legal professional privilege)
    13.3. the legal fee note under section 43(2) (commercial interests)
    13.4. part 2 under section 40(2) (personal data).

14. The Home Office upheld its decision on internal review on 26 January 2022.

15. Mr. Williams referred the matter to the Commissioner on 26 January 2022.

Decision notice

16. In a decision notice dated 7 November 2022 the Commissioner decided that sections 31(1), 42(1) and 43(2) were engaged and that the public interest balance lay in favour of withholding the information. The Commissioner concluded that the Home Office breached section 17(1) FOIA because it did not issue its refusal notice within 20 working days of receiving the request.

Grounds of appeal

17. The Grounds of Appeal are as follows. The tribunal has adopted the numbering suggested in the Commissioner's response:

Ground 1

17.1. The Home Office did not confirm or deny that the information was held and the response was not in accordance with section 1(1). The decision notice is therefore not in accordance with the law.

Ground 2

17.2. The Commissioner was wrong to conclude that section 31(1) was engaged. The Home Office asserted that disclosure would assist those engaged in criminal activity as the UK's borders. The migrant crossings and the push back taken place in the Atlantic Ocean not at the UK border. Crossing the sea to reach a UK border and claim asylum is not a criminal offence (**Bani v the Crown**) [2021] EWCA Crim 1958). Push back at sea is a breach of international law. Crossing the sea to claim asylum does not fall under the category of immigration controls, asylum is not a form of 'immigration'. Asylum seekers are not immigrants.

Ground 3

17.3. The Commissioner was wrong in his assessment of the public interest balance under section 31(1).

Ground 4

17.4. The Commissioner was wrong in his assessment of the public interest balance under section 42.

Ground 5

17.5. [No longer in issue]

18. Ground 5 related to the lawyer's fee notes and the application of section 43(2) (commercial interests). The Second Respondent has now disclosed redacted versions of the fee notes and section 43(2) is no longer in issue before the tribunal.

The Commissioner's response

Ground 1 – failure to confirm or deny

19. Mr Williams' appeal is against the decision of the Commissioner in his DN and not against the public authority's response to the request. It was clear in the Home Office's response dated 21 December 2021 that the information was

held but not disclosed as an exemption was engaged. The Commissioner correctly concluded that the Home Office had dealt with Mr Williams' request in accordance with the requirements of Part I in reaching the conclusion, in accordance with s.2(2) FOIA, that the requested information was exempt.

Ground 2 – whether section 31 is engaged

20. Illegal immigration and the trafficking of migrants is not lawful. The withheld information falling within the scope of parts 1 and 3 of the request relates to a policy adopted by the UK Government to try and prevent such illegal immigration and trafficking. As such, this information clearly relates to the applicable interest protected by the exemption under s.31(1)(a).

21. Immigration is the action of coming to live permanently in a foreign country (for whatever reason, asylum or otherwise). The UK Border Force is responsible for immigration controls for the UK. The withheld information clearly relates to the operation of immigration controls.

22. As the policy is most likely to apply to migrants travelling through the Dover Strait, it is most likely that the policy was intended to be applied in UK waters for which the UK Border Force is responsible for securing.

23. It is clear that the withheld information relates to a policy adopted by the UK Government, via the UK Border Force to control immigration. As such, the withheld information in this case clearly relates to the operation of immigration controls which the exemption is designed to protect.

Ground 3 – public interest under section 31(1)

24. If the tribunal accepts that disclosure of the withheld information would be likely to affect the function of the Home Office to maintain an immigration control and prevent crime, the Commissioner submits that there is a very strong public interest in withholding such information which, on the facts of this particular case, outweighs any public interest there may be in disclosure. There is a very strong public interest in protecting the ability of public authorities to enforce the law and in protecting society.

Ground 4 – public interest under section 42

25. The Commissioner maintains his position in the decision notice.

Reply by Mr. Williams

26. Mr. Williams requests an order that the Commissioner and the Home Office state which UK offences are committed when a dinghy, possibly containing asylum seekers, is rescued at sea.

27. There is no explanation in the Commissioner's response as to how providing the information would cause prejudice to the operation of immigration controls. The relevant authority states that a breach of immigration law does not occur when a boat enters UK coastal waters. A breach of immigration law would occur on disembarkation otherwise than at a port with an approved area where the migrants could remain until given leave to enter, detained or bailed.

Response of the Home Office

Ground 1 – failure to confirm or deny

28. In its response to the Request dated 21 December 2021 and the internal review dated 26 January 2022, the Second Respondent specifically identified in respect of each part of the Request that it was withholding information by reference to identified exemptions. Those responses, when read as a whole, clearly confirmed that legal advice, associated fee notes and relevant training materials as described in each of the three parts of the Request were held by the Second Respondent and detailed arguments were given as to why this information was being withheld. Accordingly, it was clear from the responses provided by the Second Respondent on 21 December 2021 and 26 January 2022 that information described in each of the three parts of the Request was held by the Second Respondent.

29. The Second Respondent submits that in substance it has complied with the obligation in section 1(1)(a).

Ground 2 – whether section 31 is engaged

30. The crossing of the English Channel by migrants in boats in order to claim asylum in the UK potentially involves the commission of the following criminal offences on the part of the migrant(s) and/or the facilitators of such a crossing:
    30.1. Entry in breach of a deportation order and knowingly entering the UK without leave (see section 24(1)(a) of the Immigration Act 1971 ('the Immigration Act').
    30.2. Assisting unlawful immigration to a member State or the United Kingdom under section 25 of the Immigration Act.
    30.3. Helping an asylum-seeker to enter the United Kingdom under section 25A of the Immigration Act.

31. Neither **R v Kakaei** [2021] EWCA Crim 503 ('**Kakaei**') nor **R v Bani and others** [2021] EWCA Crim 1958 ('**Bani**') is authority for the proposition that the crossing of the English Channel by persons without leave to enter the UK is not capable of constituting a criminal offence either on the part of the relevant migrant or the facilitator. **Bani** expressly left open the possibility that a facilitation offence could take place if a migrant intended to be intercepted and to claim asylum and if they intended to land on a beach but were not intercepted (see paragraphs 104 – 105).

32. The Nationality and Borders Act 2022 made a number of amendments to the offences in the Immigration Act and added new arrival-based offences (with effect from June 2022. Amendments were also made to sections 25 and 25A to expand the scope of these offences.

33. The Second Respondent submits that disclosure of the operational tactics which were authorised for use by Border Force and training received by Border Force or immigration officers in respect of migrant boats seeking entry to the UK would prejudice the prevention and detection of the relevant criminal offences on the basis that individuals and groups facilitating these crossings could use this information to identify the nature of the tactics being deployed, the circumstances in which particular tactics may or may not be used, the strengths and weakness in those tactics and operational priorities in order to evade or undermine the measures put in place to seek to deter and prevent crime.

34. The Tribunal has previously accepted that section 31(1)(a) would be engaged in respect of information about planned police or Border Agency operations or tactics: see **Armitt v IC and Home Office** (EA/2012/0041) 1 at paragraph 27, where the Tribunal noted it is "self-evident" that disclosure of a current operational policy revealing detection or enforcement processes would assist the commission of such crime because if published, it is clear that individuals would adjust their behaviour so as not to fall within the selection criteria.

35. As to section 31(1)(e), the Second Respondent submits that disclosure of information relating to the operational tactics used by Border Force in respect of migrant boats crossing the English Channel, would (or, alternatively, would be likely to) prejudice the operation of the immigration controls. Disclosure of the operational tactics used by Border Force and training received by Border Force or immigration officers in respect of migrant boats seeking entry to the UK would enable those individuals and groups facilitating these crossings to identify the nature of the tactics being deployed, the circumstances in which particular tactics may or may not be used, the strengths and weakness in those tactics and operational priorities in order to evade or undermine immigration controls including the policing of UK borders and the prevention of boats landing in the UK.

36. Unless an asylum seeker has a form of leave to remain whilst their asylum claim is considered, asylum seekers are persons subject to immigration control (as defined in section 13(2) of the Asylum and Immigration Act 1996) and do not have permission to stay in the United Kingdom.

37. Turn-around tactics would have been deployed within territorial waters with the intention of preventing a landing in the UK and therefore are a form of immigration control. Section 31(1)(e) makes no reference to borders, and the application of this exemption is not dependant on action taken specifically at a border.

Ground 3 – public interest balance under section 31

38. The Second Respondent submits that the Commissioner was correct to find that the public interest balancing exercise in respect of operational tactics and training materials regarding turn-around tactics held pursuant to parts 1 and 3 of the Request lies firmly in favour of maintaining the exemption:
    38.1. There is a compelling public interest in maintaining the exemption in section 31(1) in circumstances where disclosure of the Requested Information would prejudice the ability to prevent and detect criminal offences and compromise the integrity of immigration controls. Disclosure of operational tactics would enable criminal groups to build a picture of the work of Border Force and identify any strengths or weaknesses, and circumvent the controls by building up a picture of operational priorities, activities and areas of highest risk. There is a strong public interest in ensuring the integrity of the borders and ensuring the efficacy of the activities of Border Force to prevent and detect criminal offending.
    38.2. The Second Respondent accepts that there is a public interest in transparency in relation to immigration enforcement and border control activities. However, it is noted that at the time of the Request the policy concerning turn-around tactics was already in the public domain. The information in the public domain included that the policy would entail the deployment of turn-around tactics at sea by Border Force when safe to do so in order to re-direct migrant boats away from the UK back into French waters. Therefore, to a significant extent the public interest in transparency in relation to the nature of the operational tactics which had been authorised for use was satisfied by the material which had already been published. There is limited public interest in disclosure of the specific details of how the policy may be implemented on an operational level or the training materials used by Border Force.

Ground 4 – public interest balance under section 42

39. It has repeatedly been recognised by the Court that there is a strong public interest in non-disclosure built into legal professional privilege.

40. The Second Respondent submits that in this specific context, there are strong public interest considerations in favour of maintaining the exemption:

    40.1. Confidentiality of communications between a client and their lawyer is in the public interest in that it enables a public authority to put all relevant facts before its legal advisers and receive advice based on them without fear that either the facts or the advice will be disclosed to others without consent.

    40.2. The protection of the confidentiality of legal advice sought and received by Government encourages the taking of decisions fully informed by the legal context including relevant legal principles and extent to which a proposed course of action is compliant with those principles.

    40.3. If disclosed, there is a risk that clients and lawyers will avoid making a permanent record of the advice that is sought or given, or make only a partial record, if legal advice were to be routinely disclosed. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision-making is described accurately and fully; the legal advice must be part of that record.

    40.4. Disclosure of legal advice would have a significant prejudicial impact on the ability of Government to defend its legal position and expose its position to challenge.

    40.5. These considerations are particularly acute in the context of the Request, where the legal advice related to operational tactics which had been authorised for use in appropriate circumstances at the time of the Request, and the operational tactics were the subject of debate and potential legal challenge. A specific threat of litigation in respect of the policy of seeking to stop and turn around small migrant boats in the English Channel was received from solicitors in mid-December, shortly before the Second Respondent provided a substantive response to the Request.

41. It is submitted that there is no compelling justification for disclosure of the legal advice falling within Part 1 of the Request which would outweigh the strong interest in protecting confidential lawyer/client communications, in particular in circumstances where the legal advice was "live" at the time of the Request.

Reply by Mr. Williams dated 5 April 2023

42. The tribunal understands this email to be primarily a response to the Commissioner's application to strike out the appeal, but it is relevant to the substantive appeal and so is included here.

43. In essence Mr. Williams argues that the public interest balance test speaks for itself because pushback is dangerous and illegal under international law, relying on a number of newspaper articles.

Further submissions by the Second Respondent

44. In response to questions raised by Mr. Williams the Second Respondent made some further written submissions by letter dated 5 July 2023, primarily to avoid the need for an oral hearing.

45. In that letter the Second Respondent provided the following clarification in relation to paragraph 6 of the witness statement of Mr. Whitton:

> "The meaning of the term 'threat' used in paragraph 6 of Mr Whitton's witness statement is clear from reading his witness statement as a whole. It can cover the threat to life as a result of undertaking such dangerous journeys (which is referred to in paragraphs 6-7, and 10 of his witness statement), the threat to vulnerable people being exploited by Organised Criminal Gangs (which is referred to in paragraphs 6, 13, 15, 57 and 60 of his witness statement), to Border Force personnel (for example, see paragraph 57 of his witness statement) through to the threat of committing criminal offences (for example, see paragraph 7 of his witness statement).
>
> Reasonable suspicion is a term that is frequently used across law enforcement and provides the legal basis for the exercise of certain law enforcement powers. It has an objective and a subjective element to it, which means that the officer's subjective suspicion must be based on reasonable grounds. We would refer the Appellant to the explanation set out in Blackstones Criminal Practice for an explanation of this concept, and although it relates specifically to the police in the context of this text, we consider that it is of relevance in relation to the maritime law enforcement powers."

Legal Framework

46. Sections 1 and 17 of FOIA provide 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) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
(3) Where a public authority—
(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,
the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
(4) The information—
(a)in respect of which the applicant is to be informed under subsection (1)(a), or
(b) which is to be communicated under subsection (1)(b),
is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"

2 Effect of the exemptions in Part II.
(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
(a) the provision confers absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
section 1(1)(a) does not apply.

17 Refusal of request.
(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
(a) states that fact,

(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—
(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

Section 31 – law enforcement

47. Section 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

> (1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt

information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention and detection of crime,
…
(e) the operation of the immigration controls,
…

48. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

Section 42 – Legal Professional Privilege.

49. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. Legal professional privilege covers both legal advice privilege and litigation privilege. Legal advice privilege covers confidential communications between lawyer and client for the purpose of giving or receiving legal advice or related legal assistance.

50. S 42 is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant 'in-built' interest in the maintenance of legal professional privilege (**DBERR v O'Brien and Information Commissioner** [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that "although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption" (**DCLG v IC and WR** [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.

51. We adopt the approach set out in **DBERR** at para 53:

> ...the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non- disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

The public interest balance

52. In **APPGER v ICO and FCO** [2013] UKUT 0560 (AAC) the Upper Tribunal gives helpful guidance on how the balancing exercise required by section 2(2)(b) of FOIA is carried out:

> "… 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 its 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." (para 75)

Relevant other statutes

53. Section 3(1)(a) of the Immigration Act provides:

> **3.— General provisions for regulation and control.**
> (1) Except as otherwise provided by or under this Act, where a person is not a British citizen
> (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;

54. Section 11(1) provides, in part that an immigrant shall:-

> "be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do"

55. Section 25 of the Immigration Act 1971 provided at the relevant time:

> *25. Assisting unlawful immigration to member State*
>
> (1) A person commits an offence if he—
>
> (a) does an act which facilitates the commission of a breach or attempted breach of immigration law by an individual who is not a citizen of the European Union,

(b) knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of immigration law by the individual, and

(c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

56. It is necessary for the prosecution to prove that a person charged under section 25 did acts which facilitated the "entry" without leave into the United Kingdom of a non-EU citizen (**Kakaei** [2021] EWCA Crim 503).

57. The effect of this is explained in **R v Bani** at para 5:

> "This means that a person who disembarks at a port and remains within its "approved area" does not "enter" the United Kingdom. They will only do that when they leave the approved area. This will generally only happen if they are given leave to enter, or are conveyed into detention or granted immigration bail. In those circumstances no breach of immigration law occurs because a person is deemed not to enter the United Kingdom in those circumstances."

58. The Judge observed as follows at para 95 of **Bani:**

> "In each of these cases a boat which is not capable of being accurately navigated was intercepted in the Channel having left France and travelled in the direction of England. Each vessel contained a number of migrants who claimed asylum when they arrived in England. In the absence of any evidence to the contrary, the jury would be entitled to infer that the migrants intended to land wherever they could, if they were not picked up on their way. The jury would also be entitled to infer that this was the intention of the helmsman who was the person attempting to give effect to this intention. That is why what a defendant says in interview or in the witness box is important. To make that obvious point is not at all the same as saying that there is any sort of burden on a defendant."

59. It is not an offence for an asylum seeker to attempt to arrive at the frontiers of the United Kingdom in order to make a claim:

> 'as the law presently stands an asylum seeker who merely attempts to arrive at the frontiers of the United Kingdom in order to make a claim is not entering or attempting to enter the country unlawfully. Even though an asylum seeker has no valid passport or identity document or prior permission to enter the United Kingdom this does not make his arrival at the port a breach of an immigration law. Parliament

altered the position in 2004 for those whose facilitated the entry of asylum seekers for gain." **R v Bani** (para 71).

60. Section 25A, at the relevant time, made it an offence to facilitate the arrival or attempted arrival of asylum seekers for gain:

> "25A Helping asylum-seeker to enter United Kingdom
> (1) A person commits an offence if—
> (a) he knowingly and for gain facilitates the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom of an individual, and
> (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.
> (2) In this section "*asylum-seeker*" means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under—
> (a) the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (interpretation)), or
> (b) the Human Rights Convention (within the meaning given by that section).
> (3) Subsection (1) does not apply to anything done by a person acting on behalf of an organisation which—
> (a) aims to assist asylum-seekers, and
> (b) does not charge for its services.
> (4) subsections (4) and (6) of section 25 apply for the purpose of the offence in subsection (1) of this section as they apply for the purpose of the offence in subsection (1) of that section."

The role of the Tribunal

61. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

List of issues

62. The issues for the tribunal to determine are:

62.1. Whether disclosure would or would be likely to prejudice the prevention or detection of crime.
62.2. Whether disclosure would or would be likely to prejudice the operation of the immigration controls.

62.3. If either exemption under section 31 is engaged, whether the public interest favours disclosure under that exemption.
62.4. Whether the public interest favours disclosure under section 42.

Evidence

63. We read an open and a closed bundle. We read an open and a closed version of a witness statement from Stephen Whitton, Head of Border Force Maritime Command.

64. Mr. Williams has been provided with an open version of the index to the closed bundle. The tribunal is satisfied that it is necessary to withhold the closed bundle from Mr. Williams on the basis that to do otherwise would defeat the purpose of the appeal.

Discussion and conclusions

65. The tribunal is not assisted by the decisions of previous first-tier tribunals cited by the parties.

Has the Home Office breached section 1 FOIA in failing to confirm or deny that it held the information?

66. Under section 1(1)(a) FOIA any person making a request for information to a public authority is entitled to be informed in writing whether it holds information of the description specified in the request. The duty of a public authority to comply with section 1(1)(a) is referred to in the act as "the duty to confirm or deny".

67. Under section 1(5), a public authority is to be taken to have complied with the duty to confirm or deny in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

68. Specific provisions state that the duty to confirm or deny does not arise in certain circumstances, but otherwise, a public authority is under that duty.

69. If a public authority is relying on a provision that states the duty to confirm or deny does not arise, then the public authority must give the requestor a notice that states that fact (s 17(1)).

70. In the light of that statutory framework, we do not accept that a public authority that relies on an exemption can be taken to have complied with the duty to confirm or deny. That would be, in effect, implying a similar provision to section 1(5) to the effect that a public authority is to be taken to have complied with the duty to confirm or deny in relation to any

information if it has relied on any exemptions. Parliament could have included such a provision but did not.

71. The Home Office did not confirm or deny that it held the requested information, nor did it indicate in its refusal notice that it relied on a provision that stated that the duty to confirm or deny did not arise. For those reasons we find that it failed to comply with section 1 of FOIA.

72. It is clear, however, that the Home Office does hold information within the scope of all parts of the request and nothing is to be gained from requiring the Home Office to issue the appropriate response at this stage in the proceedings. We have therefore required the Home Office to take no steps.

73. It has not been necessary for us to consider the arguments raised in the witness statement about the application of section 35(3) in relation to any legal advice that might have been provided by the Attorney General. The Home Office was simply required by section 1(1)(a) to confirm or deny whether it held information of the description specified within the request. They have subsequently confirmed that they do without any need to breach the Law Officers' Convention.

Section 31 – Would disclosure or would it be likely to prejudice the prevention or detection of crime or the operation of the immigration controls.

*The cases of **Bani** and **Kakaei***

74. The cases of **Kakaei** and **Bani** do not establish that no criminal offences can be committed until a small boat lands. Paragraph 105 of **Bani** is useful to illustrate this (emphasis added):

> "The words "or attempted breach" in section 25(1) of the 1971 Act mean that it is an offence to facilitate a breach of immigration law at any stage in the plan which may result in such a breach. It does not matter whether the plan results in a breach of immigration law or not. It is an offence to facilitate any step in the journey which is more than merely preparatory to the breach. In these small boat cases the facilitator at the time of the act must be proved to have known or had reasonable cause to believe that the migrant who s/he was facilitating would enter the United Kingdom without leave if no other means of entry became possible. **If those on a vessel set off intending to be intercepted, but also intend that if they are not intercepted then they will land on a beach, then the journey prior to interception will be an attempted breach of immigration law by them**. If they are intercepted then the entry which actually happens will be lawful, but by then the offence has already been completed. **If landing on a beach if necessary was within the plan of (one or more of) the migrants, then it would be open to the jury to conclude that the helmsman assisted an unlawful entry even if**

the boat was ultimately intercepted. In this situation the facilitator would have assisted an attempted breach of immigration law. If, on the other hand, the facilitator knows that the only way in which the migrant intends to enter the United Kingdom is by being brought ashore by the UK Border Force, then he will not be committing the offence, unless he has reasonable cause to believe that this will not be possible."

75. Paragraph 105 makes clear that if the landing on a beach was within the plan of one of more of the migrants, then it would be open to a jury to conclude that the helmsman knew or had reasonable cause to believe this and had assisted an unlawful entry even if the boat was ultimately intercepted. It is an offence to facilitate a breach of immigration law at any stage in the plan which may result in a breach. Thus, the fact that the push back takes place in the ocean, does not mean that at that stage no immigration offence could have been committed.

76. Further, these cases concern section 25, which requires 'entry' in breach of immigration law to have been the intention of the passengers. Under section 25A there was, at the relevant time, an offence of facilitating for gain the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom of an individual that the facilitator knows or has reasonable cause to believe is an asylum-seeker.[1]

77. Although an asylum seeker who merely attempts to arrive at the frontiers of the United Kingdom in order to make a claim is not entering or attempting to enter the country unlawfully, those that facilitate their arrival for gain are committing a criminal offence.

The prejudice relied on by the Home Office

78. Having read the closed material, and the closed sections of Stephen Whitton's witness statement, we accept that the SOP sets out information in relation to the circumstances in which turnaround tactics can be used. It sets out the specific criteria which need to be met before they are authorised for use by the Tactical Commander. This includes the circumstances (or tactical parameters) in which turnaround tactics must not be used (or once commenced must be ceased), the nature of those tactics and how they should be implemented at sea.

79. Having read the detail of the circumstances in which the tactics can be used, the specific criteria that need to be met and the circumstances in which they cannot be used, we accept that that information could be used by individuals and groups facilitating crossings by small boats to evade or undermine the use of turnaround tactics.

[1] The requirement that the facilitation be 'for gain' has since been removed.

80. As stated, under section 25A there was, at the relevant time, an offence of facilitating for gain the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom of an individual that the facilitator knows or has reasonable cause to believe is an asylum-seeker. Facilitation of an attempted arrival is an offence, so can be committed even if arrival is only attempted.

81. Further, if a helmsman knows or has reasonable cause to believe that landing on a beach was within the plan of one of more of the migrants on a boat, then they will have committed an offence by the time they would be intercepted by a boat attempting to carry out turnaround tactics.

82. The turnaround tactics were intended to have a deterrent effect. If less small boats attempt the crossing, less of the offences described above will have been committed by facilitators. We accept that this deterrent effect would be likely to have been reduced if facilitators had detailed information on the circumstances in which the tactics would or would not be used. We accept that there is a causative link between the release of the information and prejudice to the prevention of crime in this sense.

83. Further, if turnaround tactics were successfully used and a boat was prevented from landing, it is likely that certain facilitation offences would have been prevented. In support of this we note that turnaround tactics were only authorised to be used in relation to boats where an immigration officer had reasonable grounds to suspect that a relevant offence was being committed.[2] If the boat contained asylum seekers, and their passage had been facilitated for gain, the offence of facilitating their arrival or entry into the UK would have been prevented. We accept that there is a causative link between the release of the information and prejudice to the prevention of crime in this sense.

84. For those reasons, we also conclude that that the claimed prejudice is real and of substance, and there is a real and significant risk of prejudice and that the harm relates to the interests protected by the exemption. The exemption under section 31(1)(a) is therefore engaged.

85. For the same reasons we accept that release of the information would be likely to cause prejudice to the operation of immigration controls. The turnaround tactics were intended, in part, to deter individuals from attempting immigration offences and to prevent immigration offences that would have been committed when the boats landed in the UK. Both those are part of the operation of immigration controls. In our view, information that enables the turnaround tactics to be evaded causes a real and significant risk

[2] This was because the chosen legal basis for the turnaround tactics was the power to 'stop' a boat under paragraph 2(2) of Schedule 4A of the Immigration Act 1971, on the basis that it was 'arguable' that the power to stop could be interpreted to mean stopping the progress of a vessel.

of prejudice that is real and of substance to the operation of immigration controls. Section 31(1)(e) is engaged.

86. On that basis, we accept that there is a causal link between release of the information and prejudice to the prevention of crime and the operation of immigration controls, in summary because the information would have been of use to individuals or groups facilitating crossings by small boats, who were likely to include those that would be potentially committing the facilitation offences set out above.

Public interest balance

87. We have considered the public interest balance in relation to section 31(1)(a) and (e) together because we think that the public interest in maintaining those exemptions overlaps to a great extent. Although we are permitted (and arguably required - **DBI v ICO and Montague** [2023] EWCA Civ 1378) to aggregate the public interest it does not arise in this appeal because we consider that the public interest in favour of maintaining either exemption outweighs the public interest in disclosure.

88. We accept that there is a strong inherent public interest in avoiding the prevention of crime and in avoiding the undermining of immigration controls. There is, in our view, a strong public interest in not reducing the deterrent effect of these tactics, because these journeys are dangerous. A decrease in deterrent effect risks more vulnerable migrants undertaking these dangerous journeys.

89. It is not our role to consider whether it was right to introduce these tactics. However, having introduced these tactics, we accept that publicising the circumstances in which these tactics will, and more importantly will not, be used carries a clear risk that vulnerable migrants will be encouraged to undertake journeys in even riskier conditions, in order to evade the use of the turnaround tactics. It is well known that these journeys already carry a risk of loss of life. In our view this increased risk of serious harm weighs heavily in the public interest balance against disclosure.

90. We accept that there is some additional public interest in withholding the information because it would reveal information about Border Force capabilities and operational tactics more generally which could be used by individuals or criminal grounds in building up a picture of strengths and weaknesses, operational priorities and activities and areas of highest risk.

91. Taken together, we conclude that there is an extremely strong public interest in withholding the information.

92. We accept that there is a very clear public interest in transparency in relation to these particular controversial tactics and in relation to government policy and measures in relation to channel crossings by small boats. We accept that at the relevant time that there was significant public debate about these measures, and we accept that the disclosure of this information would have assisted in informing that debate.

93. The public interest in disclosure is reduced to some extent because there was already a significant amount of information already in the public domain, as highlighted by the contemporaneous news reporting some of which is linked to or provided in the bundle. Further, this information relates specifically to training materials at the operational level. It can therefore only inform public debate in relation to the way in which the tactics were intended to be implemented and not in any broader way. Even taking into account these factors in our view the public interest in disclosure remains very strong.

94. Overall, for the reasons set out above, we find that the extremely strong public interest in withholding the information outweighs the very strong public interest in disclosure.

Section 42

95. It is not in dispute that section 42 is engaged. In any event we find that the withheld information is clearly covered by legal advice privilege and the exemption is engaged.

96. There is always a strong inherent public interest in not disclosing legal advice. In addition, in this particular case, there was a live prospect of litigation at the relevant time. The Home Office had received a specific threat of litigation in respect of the turnaround policy in mid-December 2021, just before it responded to the request. This was the judicial review that was issued in December 2021. This creates an extremely strong public interest in not disclosing legal advice at the relevant time.

97. There is a very strong public interest in transparency for the many of the reasons set out under section 31 above and because there is a particular public interest in the legal advice received by the government, given that the legality of the policy had been questioned in public debate.

98. We find that the extremely strong public interest in withholding the information outweighs the very strong public interest in disclosure.

Signed Sophie Buckley Date: 15 December 2023

Judge of the First-tier Tribunal