First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2017/0219

Heard at:
Laganside Courts on 30 April, 1 May 2018
and Field House , London on 5 & 6 December 2018

Before

JUDGE HOLMES

TRIBUNAL MEMBER(S)

PAUL TAYLOR
ANNE CHAFER

Between

THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Second Respondent

Appearances (1 May 2018):

For the Appellant : Mark Bassett BL, Counsel

For the ICO : Christopher Knight, Counsel

For the second respondent : Philip Aldworth QC

5 & 6 December 2018: Written representations.

DECISION AND REASONS

DECISION

It is the Decision of the Tribunal that the Decision Notice dated 30 August 2017 that the PSNI was entitled to rely upon s.23(1) of the FOIA to refuse the Appellant's request for disclosure of the Walker Report produced for the then Royal Ulster Constabulary in 1980 is upheld.

REASONS

1. By a Decision Notice dated 30 August 2017 the Information Commissioner ("the IC") determined that the Police Service of Northern Ireland ("the PSNI") was entitled to rely upon s.23(1) of FOIA to refuse a request made by the Appellant on 18 January 2016 to the PSNI for disclosure of the Walker Report commissioned by its predecessor the RUC to consider and review the work of the RUC Special Branch.

2. By a Notice of Appeal dated 26 September 2017 the Appellant appealed against this Decision Notice. The IC responded by a response dated 3 November 2017. By Directions made on 24 November 2017 The PSNI was added as Second Respondent to the appeal. Its response was filed on 16 January 2018. The Appellant filed a Reply to the response of the Second Respondent on 6 February 2018.

3. The appeal was to be considered at a hearing, before a full panel. It was listed for hearing on 1 and 2 May 2018 at the Laganside Courts, 45, Oxford Street , Belfast . On 30 April 2018 the Tribunal convened in Chambers, and received the closed material.

4. The following day, 1 May 2018, all parties attended the hearing, with the Appellant being represented by Mark Bassett BL, of Counsel, the IC by Christopher Knight of Counsel, and the Second Respondent by Philip Aldworth, of Leading Counsel.

5. The Tribunal was informed at the outset of the hearing, however, that the Walker Report which was at issue in the appeal was to be further considered for disclosure in a forthcoming Inquest. To that end its terms were under further consideration by the Northern Ireland Office, and further, previously withheld, parts of it may be disclosed to the Appellant or into the public domain.

6. In those circumstances all parties agreed that it may well not be necessary for the Tribunal to determine this appeal at all, and they jointly sought a stay of the appeal for the potential release of either the whole of the Walker Report , or in such redacted form as may satisfy the Appellant , rendering the instant appeal otiose.

7. The Tribunal accordingly acceded to the joint application of the parties to stay the appeal pending these further developments. It was stayed to 31 August 2018.

The re-listing of the appeal.

8. By letter of 24 July 2018 the Appellant notified the Tribunal that there remained aspects of the appeal which it wished to pursue in relation to three parts of the Walker Report.

9. The Appellant had been in communication with the Second Respondent prior to this notification to the Tribunal, and the Second Respondent had set out its position in relation to the remaining issues.

10. Having notified the Tribunal that the appeal was still to proceed, but on a narrower basis, the Tribunal made arrangements with the parties as to the way in which the appeal should proceed. It was agreed that there was no need for a further oral hearing in Belfast, but that a consideration without a hearing, on further written submissions , could be held at Field House, London.

11. Consequently on 12 November 2018 the Tribunal convened in private at Field House to consider the appeal. The Tribunal had viewed the closed material when sitting in Belfast, but would need to have access to it again for this consideration. Unfortunately, the Second Respondent made no arrangements for the material to be available at or near Field House on 12 November 2018. Enquiries made that day revealed that it could not be made available that day, or the following day, and hence the Tribunal could not proceed.

12. The appeal was re-listed for 5 and 6 December 2018 at Field House. On 5 December 2018 the closed material was made available, along with the Second Respondent's closed submissions.

13. The Panel considered the closed material, and all the submissions made by the parties, and now gives this decision. The Tribunal apologises for the delay, necessitated by the logistics of preparation of the Decision, which could only be drafted and finalised at Field House, at which two further attendances were necessary after the December deliberations.

The material before the Tribunal.

14. The Tribunal had before it and has considered the following submissions from the parties:

From the Appellant:

Skeleton Argument dated 15 April 2018

Letter of 24 July 2018 seeking to re-list the appeal

Amended Submissions dated 11 November 2018

Further Submissions dated 28 November 2018

From the ICO:

Skeleton Argument dated 16 April 2018

Letter re pending Article 10 appeal in ***Moss v ICO*** dated 14 November 2018

From the Second Respondent:

Skeleton Argument dated 16 April 2018

Further Open Submissions dated 9 November 2018 (and , with heading, also 11 November 2018)

Closed Submissions dated 22 November 2018

The Background.

15. The Appellant , the Committee on the Administration of Justice (" CAJ") is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It lobbies and campaigns on a broad range of human rights issues. It has published reports in a number of areas such as policing, emergency laws and the criminal justice system. The Second Respondent is the Police Service of Northern Ireland, established as the successor Police Authority to the Royal Ulster Constabulary ("the RUC")

16. By a request dated 18 January 2016 CAJ made a request under s.50 of FOIA of PSNI for :

A copy of the contents page, or similar document , of the Walker Report

A copy of the Walker Report redacting any personal information of individuals in accordance with the framework in the Data Protection or Freedom of Information Acts

17. On 2 March 2016 PSNI confirmed that it held the requested information , but declined to release it, a decision confirmed on review on 10 May 2016. The refusal to provide the information was justified on the grounds that the requested information was exempt under the provisions of s.23 of FOIA, as being "information supplied by, or related to, bodies dealing with security matters."

18. The Walker Report was commissioned by the Chief Constable of the RUC in January 1980. It was carried out by Sir Patrick Walker, a former Director of MI5, from 1988 to 1992. The Report was not prepared in his capacity as an MI5 oficer.Its existence

has been a matter of public knowledge for some time, long before the Appellants' request under FOIA. It is a report, as it is entitled, into the "Interchange of Intelligence between Special Branch and CID and on the RUC Units involved , including those in crime branch C1(1)". The Appellant sought its release for the purpose of publicly examining the relationship between state security services and paramilitaries during the Troubles, and in particular the possibility that the Report led to the institutionalisation of an informer - led approach to policing in Northern Ireland. The Appellant wishes to explore whether there was, thereby, a distortion of the rule of law in Northern Ireland at this time, whereby handlers of informers were instructed to ignore serious breaches of the criminal law in order to obtain intelligence.

19. PSNI having taken the stance that none of the Walker Report would be disclosed, as the s.23 exemption applied to the whole of it, the Appellant on 4 August 2016, complained to the ICO that PSNI had refused its request. That complaint was based on two grounds, the first was that PSNI had misapplied the s.23 exemption, and the information was not exempt, and the second , in the alternative , that if that was the effect of s.23, this was a disproportionate interference with the Appellant's Article 10 rights to freedom of expression.

20. The IC made further enquiries of PSNI to understand more fully its grounds for relying upon the s.23 exemption. She also viewed the Walker Report.

21. Having received further responses from PSNI, the IC issued her Decision Notice on 30 August 2017 (Ref.No FS50640773) . She found that the exemption under s.23 was engaged, and that the information was correctly withheld by PSNI. She did, however, find that PSNI were in breach of the requirement to reply to a FOIA request within 20 days.

22. The Appellant appealed against the IC's decision by Notice of Appeal dated 26 September 2017. The Grounds of Appeal were , in essence, the same two grounds raised with the ICO in the complaint to it, based on the non - applicability of s.23 to the information requested, and the Article 10 argument in the alternative.

23. The IC filed a Response dated 3 November 2017. In it she argued that PSNI and her interpretation of s.23 was correct, and that the information requested fell within its scope, and was thus rightly withheld. In response to the alternative Article 10 argument, she argued that Article 10 was not engaged at all in these circumstances. If, however, it was, she considered that any interference with CAJ's Article 10 rights was justified. Finally, if CAJ's argument was right, this would require the Tribunal to strike down s.23, as incompatible, which would require a declaration under s.4 of the HRA, which is outwith the competence of this, and indeed, the Upper , Tribunal.

24. The IC and the Appellant agreed that PSNI should be joined as Second Respondent, and this done by order of 24 November 2017. In its response dated 16 January 2018, the Second Respondent adopted the response of the IC, made additional submissions in

support of the exempting effect of s.23 , and against the application of Article 10 to the issues raised in the request by CAJ and the appeal.

25. The Appellant filed a Reply, undated , but received on 6 February 2018. This largely reiterates the arguments already made, and recites further caselaw in support of the Appellant's position.

26. By letter dated 5 March 2018 , PSNI informed the Tribunal that consideration was being given to disclosure of the Walker Report, in redacted form, for the purposes of an Inquest. That disclosure was to be limited to families of the deceased, subject to a duty of confidentiality as regards further disclosure. PSNI , however, expressed the view that voluntary disclosure outside the framework of FOIA did not alter the position that the Report was exempt under s.23.

27. It was against this background that the parties attended the hearing in Belfast on 1 May 2018. Following the adjournment , a redacted copy of the Walker Report was supplied to CAJ , and a public interest immunity certificate was issued by the relevant Minister in relation to the redactions. It is unclear upon what basis this disclosure was made to CAJ, and given the contents of the letter of 5 March 2018, it may have been the case that PSNI would continue to seek to maintain the exemption from disclosure under s.23 for the whole report . That, of course, was the basis of the IC's Decision.

28. The letter from CAJ, however, of 24 July 2018 , states that "CAJ intends to continue the appeal in respect of:

i.Paragraph 11 of the redacted report

ii.Paragraph 13 of the redacted report

iiii.Redaction of the name of the Report referred to in paragraphs 8, 14, 28 & 52."

In that letter it is also stated that having received a copy of the redacted report, and following completion of the PII process in the Coroner's Court , the redacted report "was published by CAJ on the 2nd July 2018."

29. In the Second Respondent's further Open Submissions, after a recital of the history following the adjournment of 1 May 2018, at para. 3, PSNI say this:

"PSNI continues to rely on the Section 23 exemption in relation to the redacted parts of the copy of the Report provided to CAJ ."

Reference is then made to additional grounds for withholding the redacted information under sections 24(1), 30(2) , 31(1) and 40(2) of FOIA. Whilst these are, and are acknowledged to be, new grounds, the Appellant has responded to them in its further submissions, and takes no point that they have been raised at this stage in the appeal.

30. Putting to one side those additional grounds, the Tribunal thus understands the position now therefore to be that PSNI does not now seek to rely upon the s. 23 exemption in relation to any of the unredacted parts of the Walker Report, but only in relation to the redacted parts identified in the letter from CAJ dated 24 July 2018. If so, this rather departs from the PSNI position stated in its letter of 5 March 2018, but if this is so, the Tribunal will make its determinations accordingly. This will, however, make no practical difference, as the Tribunal's understanding is that it is ICO's and the second respondent's position that the report as a whole either does or does not fall within the exemption in s.23 , and no specific parts are to be treated any differently from the rest of it.

31. The second respondent's alternative grounds , relied upon in its further submissions of November 2018, however, are more narrow, and relate specifically to those parts of the Walker Report which remain redacted. They will , if necessary, be considered separately.

Open judgment.

32. This is an open judgment. That is because we do not consider the precise details of the information that is contained in the still redacted parts of the Walker Report has any bearing on the decisions we have come to. The redacted paragraphs are :

i.Paragraph 11:

ii.Paragraph 13 :

iiii.Redaction of the name of the Report referred to in paragraphs 8, 14, 28 & 52."

This relates to another report , the identity of the author of which is redacted.

The central issue in the appeal - the exemption claimed under s.23 of FOIA.

The relevant provisions of s.23 of FOIA are:

23Information supplied by, or relating to, bodies dealing with security matters

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

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

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

(a)the Security Service,

(b)the Secret Intelligence Service,

(c)the Government Communications Headquarters,

(d)the special forces,

(e)the Tribunal established under section 65 of the Regulation of [2000 c. 23.] Investigatory Powers Act 2000,

(f)the Tribunal established under section 7 of the [1985 c. 56.] Interception of Communications Act 1985,

(g)the Tribunal established under section 5 of the [1989 c. 5.] Security Service Act 1989,

(h)the Tribunal established under section 9 of the [1994 c. 13.] Intelligence Services Act 1994,

(i)the Security Vetting Appeals Panel,

(j)the Security Commission,

(k)the National Criminal Intelligence Service, and

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

(4)In subsection (3)(c) "the Government Communications Headquarters" includes any unit or part of a unit of the armed forces of the Crown which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in carrying out its functions.

(5)The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

33. The Walker Report is now in the public domain, save for the redactions, so the Tribunal is in a better position to consider it than the IC was when she made her Decision. At that time, whilst she viewed it, she did so in closed session, so could not make any specific references to its contents.

34. The Appellant's position is that this exemption is not applicable because the RUC Special Branch is not one of the bodies listed in s.23 of FOIA, which is an exhaustive list, and s.23(1) should be read carefully. It is submitted that the test in s.23 of the information being exempt only if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in s.23(3) is not met in this case. Reference is made to ***Corderoy & Ahmad v ICO and AGO (2017) UKUT 495***, where , it is submitted the Upper Tribunal held that the exemption should not be applied in a blanket fashion, and information could be "disaggregated", and then be subject to the public interest test under FOIA.

35. In his submissions, Counsel for the Appellant argues that nothing in the facts that there may have been a "close working relationship" between the RUC Special Branch and MI5 or other s.23(3) bodies during the Troubles, or that MI5 may now perform some of the functions previously exercised by it is sufficient to convert the RUC Special

Branch into a s.23(3) . That is so, but it is not necessary for the Tribunal to find that it did for the exemption to apply . As is clear (acknowledged in the Appellant's submissions) , the first – tier Tribunal found that the nature of the relationship between the RUC and the security services was sufficient to engage the exemption in ***Dowling v ICO & PSNI EA/2011/0118*** (cited by Mr Bassett as ***Stevens Enquiries (Stevens II and Stevens III***). In its judgment the Tribunal said this , at para. 20:

"We consider that any significant connection between such a body and such information is caught by s.23(1)."

The Tribunal then referred to another first instance decision, ***Metropolitan Police Commissioner v. ICO EA/2010/0008*** where a broad view was taken of what the words "relates to" in the section mean, observing that :
"that very broad class of information plainly embraces, not just the content of information handled by a specified body but the fact that it handled it."

36. We consider that our task is the same as that which fell to the Tribunal in ***Dowling*** , and requires us to determine what the words "relates to" mean, as it did.

37. Mr Bassett submits (para. 28 of his Amended Submissions) that the relevant factors relied upon must not be "too remote" to satisfy the statutory meaning of "relates to". We agree, in principle, but take into account the words "any significant connection between" such bodies and such information referred to in ***Dowling*** .

38. As observed in the respondents' submissions, however, the Appellant goes rather further than contending that there "may have been a close working relationship" between the RUC and the Security Services , it is a central theme of much of the material produced in support of the appeal that this was so, indeed, it is one of the issues that gives rise to the Appellant's concerns that prompted it to seek this information. It is thus rather paradoxical, and self – defeating to argue on the one hand that there was such this close working relationship, but on the other that this does not lead to the application of s.23 to this material.

Disaggregation.

37. That finding would, in itself be sufficient to dispose of this appeal , at least as far as the application of s.23 goes, were it not for the argument also advanced that the decisions of the Upper Tribunal in ***APPGER v. ICO and FCO (2015) UKUT 377*** and ***Corderoy and Ahmad v. ICO and FCO (2017) UKUT 495*** should be considered as authority for this Tribunal taking a different approach , on the basis that it may be appropriate to "disaggregate" the information . In particular the Tribunal is invited to consider the remaining redacted paragraphs of the Walker Report, and consider whether they should be "disaggregated" from the report as a whole, and be considered as falling outside s.23, and subject to any other exemptions that would require the public interest test to be satisfied.

38. The concept of "disaggregation" requires careful analysis. It is a central feature of the Upper Tribunal's decision in ***Corderoy*** (and one member of this panel sat on it) . It has its roots in the ***APPGER*** decision , and the distinction that was rightly drawn between information and records or documents which contain information. The point was rightly made in both cases, and accepted that the focus has to be upon information, not records or documents, giving rise to the possibility of an examination of what information was being said to be caught by the s.23 exemption, which need not necessarily be applied in a "blanket" fashion to a whole document or record.

39. That said, it is important to examine the type of "disaggregation" that was applied on the facts of ***Corderoy*** . That was a case which concerned requests relating to the carrying out of drone strikes by the RAF in Syria in which two British subjects were killed. Requests were made for the legal advice which had been received by the Prime Minister. The s.23 exemption (amongst others) was invoked, and was considered on the appeal. What was sought by the requesters was the legal analysis provided to the Prime Minister as to the legality of the strike. In the Decision, the Tribunal say this:

"41. As we have acknowledged ..... the legal analysis sought by the requests would have been and is of interest to the section 23 bodies (by the intelligence agencies referred to by the Prime Minister).

42. We accept that the existence of this interest can found a conclusion that, as a matter of language , that legal analysis "relates to" section 23 bodies whether they sought the advice alone or together with others or were provided with the advice.

43. The Appellants inevitably accept that the absolute nature of the exemption in section 23 will preclude disclosure under FOIA unless:

(a) the legal analysis to found the view that the policy decision was lawful can be disaggregated and provided in an intelligible form, and
(b) any such disaggregated information falls outside the scope of section 23.

Only if (a) and (b) above are satisfied will the issue turn to whether the "qualified" exemptions in sections 35(1)(c) and 42 apply to the disaggregated information.....

44. It follows that the public interest arguments are founded on and address the policy decision and not (i) the authorisation decision for the Raqqa Strike made by the Defence Secretary or (ii) the operational decisions made in respect of it, save to the extent , through the relevant chain of command, their legality is founded on the same legal analysis and so is of interest to those involved.

45. ..... we consider that generally such an analysis can be extracted from the documents that contain it and provided as, in effect, a text book or lecture analysis based on hypothetical or possible circumstances and so divorced or disaggregated from the facts of a strike made pursuant to it."

40. Properly understood in the context of its application to the facts in ***Corderoy*** we consider there is no basis for such disaggregation in his case. This request relates to a information contained in a report about what took place, historically, during the Troubles. There is nothing hypothetical or academic about it. It could not "stand alone" as the analysis on the legality of an air strike may do. Secondly, the second condition in para. 43 (b) must not be overlooked. There is a double hurdle, as it were. If the information still would "relate to" the security services under s.23, it cannot be "disaggregated". By its very nature, and without the need to consider the material from the closed sessions, this information still would.

41. The Tribunal therefore does not find that the ICO was wrong to apply the s.23 exemption, and that ground is dismissed.

42. That renders it unnecessary to consider, in the alternative, the arguments that the second respondent sought, in further submissions to make as to the application of any qualified exemptions.

The Article 10 issue.

43. That does leave the remaining issue, advanced in support of the appeal that Article 10 of the European Convention on Human Rights, as applied by the Human Rights Act 1998, requires s.23 to be read in a way compatible with the right to freedom of expression .

44. The respondents' position in relation to this is that, firstly, Article 10 is not engaged. Reliance is placed upon the Supreme Court judgment in ***Kennedy v Charity Commissioner [2015] A.C. 455*** . In the judgments of Lords Mance and Toulson whilst *obiter* because the appeal was determined on other grounds, Article 10 does not afford a freestanding right to access to information held by public authorities. In any event, the Court of Appeal judgment in the same case is to the same effect, and was not *obiter.*

45. The Appellant relies upon the judgment of the Grand Chamber in ***Magyar Helsinki Bizottsag v Hungary 92016) ECHR 975*** which was not available to the Supreme Court when it decided ***Kennedy.*** It is contended, and to a certain extent conceded by the two respondents, that the Court did, for the first time, recognise that Article 10 may, in certain circumstances, give rise to a right of access to information. This must, however, be where access to the information is "instrumental for the individual's exercise of his or her right to freedom of expression".

46. In determining whether those circumstances exist, the Court set criteria as follows:

Receipt of the information has to be necessary for the person requesting the information to receive and impart information and ideas to others

The information must be of public interest

The requester must be carrying out a role with a view to informing the public in the capacity of a watchdog

The fact that the information is ready and available is a relevant factor.

47. The respondents' primary position is that the Tribunal should consider itself bound by ***Kennedy*** and not consider Article 10 any further. That was the approach taken by another first – tier Tribunal in ***Moss v ICO EA/2016/0250*** , and one we are inclined to adopt. We are told that Decision is subject to an appeal to the Upper Tribunal, but no party invited us not to determine this appeal pending an Upper Tribunal decision in that one.

48. That said, and for completeness, our view would be that this information (by which we now mean the redacted portions of the Walker Report) would not be, in our view "necessary" or "instrumental for" the Appellant carrying out its watchdog functions which it clearly carries out. It has participated in and maintained a public debate about these issues for many years, and now has the bulk of the remainder of the Walker Report to enable it to continue to do so.

49. Further, even if Article 10 is engaged, we would not consider that this entitles us to "read down" the clear wording of absolute exemption in s.23 to include a public interest test , in any event, for the reasons advanced by the respondents. In particular we note the dictum from Lord Rodger in ***Ghaidan v Godin – Mendoza [2004] 2 A C 557*** to the effect that s.3(1) of the Human Rights Act 1998 does not entitle a Court (or Tribunal) to change the substance of a provision completely, which is what we consider the Appellant's submissions invite us to do.

50. That would mean , of course, the only recourse would be to a declaration of incompatibility under s.4 , which is outwith our jurisdiction.

Signed :

Judge Paul Holmes

Judge of the First-tier Tribunal
Date: 5 July 2019
Promulgated: 5 September 2019