First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0281

Heard at Leicester Tribunal Centre on 12 July 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Nigel Watson
and
Ms Anne Chafer

Between

Anthony Webber

Appellant

And

The Information Commissioner

1st Respondent

and

The Home Office

2nd Respondent

The Appellant represented himself

The Information Commissioner chose not to be represented at the hearing.

The Home Office were represented by Mr Ustych of counsel.

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the Commissioner's decision notice dated 30 October 2017 which held that the Home Office had properly applied section 36(2)(c) FOIA, when refusing to disclose. information requested that related to the Syrian Vulnerable Persons Resettlement (VPR) Scheme in relation to Guernsey, Jersey and the Isle of Man. The Commissioner required no further action to be taken.

BACKGROUND AND DECISION MAKING PROCESS

2. On 23 August 2016 the Appellant requested that the Home Office make disclosure as follows:-

> Could you please provide details of the approaches made by Guernsey, Jersey and the Isle of Man governments in respect of assisting with the Syrian refugee situation. Please provide copies of correspondence between them and the UK government concerning this.

3. Following some holding correspondence the Home Office told the Appellant that reliance was being placed on s36(2)(b) FOIA (prejudice to effective conduct of public affairs) to justify withholding the requested information. After the Appellant had complained to the Commissioner, the Home Office confirmed its reliance on s36 FOIA, citing sections 36(2)(b)(i) and (ii) and 36(2)(c) FOIA. It also stated that it considered section 40(2) FOIA (personal information) applied to some of the withheld information.

4. It is appropriate at this stage to set out the relevant parts of section 36 of FOIA. Section 36 reads materially in this case: -

> **36.— Prejudice to effective conduct of public affairs.**
> (1) This section applies to—
> (a) information which is held by a government department or by [the [Welsh Government] [2]] [1] and is not exempt information by virtue of section 35, and
> (b) …
> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
> (a) …
> (b) would, or would be likely to, inhibit—
> (i) the free and frank provision of advice, or
> (ii) the free and frank exchange of views for the purposes of deliberation, or
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
>
> (3) …
> (4) …
> (5) In subsections (2) and (3) *"qualified person"* —
> (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
> (b) ....

DISCUSSION AND DECISION

Applicability of the exemption

5. The Decision Notice discusses these exemptions, firstly by noting that section 36 FOIA can only be cited on the basis of the reasonable opinion of specified qualified person that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. The Commissioner also points out that Section 36 FOIA is a qualified exemption and subject to the public interest test pursuant to s2(2)(b) FOIA.

6. The qualified person needs to be a Minister of State and the Commissioner says that the opinion was that of the Rt Hon Robert Goodwill MP, given on

20 October 2016, when he endorsed a submission to him by Home Office officials concerning the request. It was accepted by Mr Ustych on behalf of the Home Office at the hearing that there is no indication that Mr Goodwill actually considered the material itself for which the exemption was claimed.

7. The Commissioner explains as follows in the decision notice:-

> The Commissioner has seen the submission produced by officials at the Home Office upon which the opinion of the Qualified Person was based. This included a summary of the information to be withheld, an explanation of the section 36 exemption, a discussion of the harm arising from disclosure and brief analysis of the public interest arguments both for and against the release of the information.
>
> It was recommended that the Qualified Person 'agree to the use of section 36'.
>
> The submission explained why the Home Office considered disclosure could be detrimental to the VPR scheme. For example, it argued that disclosing such information could lead to the Crown Dependencies to be reluctant to engage with the UK Government in future.
>
> …
>
> Having considered the submission, the Commissioner notes that it was the view of officials at the Home Office, and endorsed by the Qualified Person, that disclosure would be likely to inhibit the free and frank provision of advice or otherwise prejudice the effective conduct of public affairs should the requested information be released.
>
> During the course of the Commissioner's investigation, the Home Office confirmed that the qualified person considered that sections 36(2)(b)(i) and (ii) as well as 36(2)(c) were engaged. It acknowledged that the submission to the qualifies person 'could have made this clearer'.
>
> In correspondence with the Commissioner, the Home Office stated that it considered that section 36(2)(c) 'is the primary limb' in terms of arguments for withholding the requested information.

8. The Commissioner considered whether the qualified person's opinion on s36(2)(c) FOIA was reasonable, and noted her view that the Home Office submission endorsed by the qualified person 'lacked clarity as to how the arguments the qualified person was asked to give an opinion on applied to each of those subsections of the exemptions'.

9. During the investigation the Commissioner asked the Home Office to clarify the nature of the prejudice claimed under section 32(2)(c) FOIA. The Home Office said that it considered that disclosure in this case would be likely to discourage other authorities from participating in the resettlement scheme, and that the development of the Syrian VPR is ongoing and the co-operation of local authorities is crucial to this development.

10. The Commissioner recognised that section 36(2)(c) may refer to 'the adverse effect on a public authority's ability to offer an effective public services to meet its wider objections or purpose', and so, notwithstanding her concerns about the quality of the submission to the qualified person the Commissioner said she 'is satisfied that the overall conclusion of the process was correct' and that in her view it was not unreasonable to engage s36(2)(c) given the nature of the withheld information.

11. In relation to this part of the appeal, we accept that Mr Goodwill was a qualified person as required by s36 FOIA. We share the concerns of the Commissioner about the process adopted in seeking and obtaining his opinion. This involved obtaining his endorsement (which can be seen in a one line reply in an email from his private secretary on 8 November 2016 that Mr Goodwill was 'content with the use of section 36 and for the information to be exempted from disclosure') on the basis of a submission which the Home Office said 'could have been clearer', and in circumstances where the Minister had not seen the actual material to be withheld (although we accept there may be understandable reasons why a Minister would not have time to

study the material directly). Nevertheless, we also accept that the opinion was a reasonable one, even if it is not one which the Tribunal – having seen the material- would necessarily have reached itself.

Public interest

12. With that we move on to consideration of the public interest in this case. The first point to mention is that there are two different views as to how much weight (if any) the Tribunal should given to the opinion of the qualified person when assessing where the balance of the public interest lies. In the case of *Guardian Newspapers and Brooke v Information Commissioner and BBC* EA/2006/0011 and EA 2006/0013 (8 January 2007) the First-Tier Tribunal said this:

> 92. In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur..

13. This is essentially the approach taken by the Commissioner in the Decision Notice at paragraph 51. However, nine months after the judgment in the Guardian Newspapers case, a differently constituted FTT in *Evans v Information Commissioner and Ministry of Defence* (26 October 2007) took a somewhat different approach when it said that:-

> 36. Nor do we attach much weight to the Minister's opinion in itself as a factor in the balancing exercise. It is a necessary threshold to show that the exemption is engaged, and without it there would be no balancing exercise to conduct. For this reason we do not see the logic of then placing the

> Minister's opinion in the scales as a factor to be weighed in favour of maintaining an exemption whose engagement has been triggered by that very opinion. This seems to us like double counting the opinion which is a necessary safeguard to prevent inhibition being claimed without due cause. In the scheme of the Act, we regard the opinion as a threshold condition, required to engage section 36, rather than a major piece of evidence in its own right. We note that in this aspect we take a different view from that expressed in Brooke.

14. In our view we do not need to decide between these two approaches in this case. Even if we give the qualified person's some weight as advised in *Brooke*, it will not amount to very much, given the concerns of the Commissioner about the quality of submissions the qualified person received, and the fact that he has not viewed the material (whereas the Tribunal has done).

15. We take into account that there really is nothing controversial in the closed material, and nothing that goes beyond the stated public position of the Crown Dependencies that there were specific reasons why it was not appropriate for them to take part in the scheme at the present time. Thus, the passage in an email in the withheld material upon which Mr Ustych placed most weight was one from an official in Jersey in which various demographic factors were set out to explain why Jersey might not be an appropriate place to take part in the settlement programme.

16. But in a public statement (included with our closed papers, but readily available online and reported by the BBC) dated 1 December 2015 (prior to the request in this case), the Chief Minister explained in terms that Jersey would not participate in the scheme because:-

> "This would include immediate access to work, education and health services, plus the provision of housing and the provision of benefits, or an equivalent income.
>
> …

> If we were to make special provision for Syrian refugees, we would leave ourselves vulnerable to a legal challenge of the grounds of discrimination. And this would mean that any refugee – whether or not they were Syrian - who was living legally in the UK and who entered Jersey could potentially, from their point of arrival, be entitled to the same special provisions.
>
> We cannot expose Jersey to that risk. Our Island simply would not have the capacity to manage the impact on housing stock, on public services, or on the work market".

17. As the withheld material contains general discussions of these very issues, we cannot see how it can be said that a request for information in August 2016 which, upon inspection, turns out to have to have been accurately reflected in a public statement some eight months previously, could lead, if disclosed, to the reluctance of Crown Dependencies or other authorities to co-operate with the UK Government. We accept, as set out in paras 52-53 of the Decision Notice, that the VPR is a voluntary scheme dependant on the goodwill of local authorities and devolved administrations, but we do not think that there is much of a risk at all that disclosure of this correspondence about the feasibility and applicability of the scheme to Crown Dependencies, will put that goodwill in jeopardy, and disclosure is very unlikely to deter other authorities co-operating in relation to the scheme, or that the scheme will be disrupted. As the Appellant has shown with the papers in the bundle, other local authorities have been willing to disclose a lot of information about they have dealt with the VPR scheme.

18. We think there is considerable public interest in knowing the approach of the Crown Dependencies to this issue, and the response of the Home Office. As the Commissioner says the public interest extends not only to those affected but also with respect to the impact the programme has on the wider community. There is a public interest in openness and transparency, both in relation to those who reside in the Crown Dependencies, but also more widely

for those interested in how the VPR scheme is being implemented. In our view, the balance of the public interest in this case is in favour of disclosure.

19. When Crown Dependencies and local authorities communicate with the UK government about this or any other issue they know already that FOIA will apply to correspondence and communication, and that disclosure will be made when requests are received, if the legal provisions for disclosure are satisfied. Everything will depend on the context and nature of the request.

20. We should make it abundantly clear, that our judgment in this case has no impact at all on communications on any other subjects between the Crown Dependencies and the UK government. In relation to any further request the same questions will need to be addressed to see whether the claimed exemptions apply and whether the public interest balance is in favour of disclosure or not.

21. For the reasons stated this appeal is allowed and this judgment is substituted for the Commissioner's decision notice. As the Commissioner and the Home Office said, there is personal information which needs to be redacted before disclosure, and the next step is for the Home Office to make those redactions, before disclosure to the Appellant is made.

22. Our decision is unanimous

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 01 August 2018.

(Case considered by Panel on 12 July 2018).