Amended under the slip rule on 21 December 2018 pursuant to Ms Gibbs' application

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal References: EA/2017/0258 & 0275

Heard in London 4-6 July 2018

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS JOHN RANDALL AND ROGER CREEDON

BETWEEN

MARGOT GIBBS (EA/2017/0258)
FOREIGN AND COMMONWEALTH OFFICE (EA/2017/0275)

Appellants

and

THE INFORMATION COMMISSIONER

First Respondent

and

FOREIGN AND COMMONWEALTH OFFICE (EA/2017/0258)
MARGOT GIBBS (EA/2017/0275)

Second Respondents

SUMMARY

Ms Gibbs' appeal is allowed in part and so to a limited extent is the FCO's. The information to be disclosed is identified in the closed annex.

REPRESENTATION

Ms Gibbs: Jack Castle

Foreign and Commonwealth Office: Zoe Leventhal

Information Commissioner: Peter Lockley

DECISION AND REASONS

NB Documents in the main open bundle are signified [OB/xx] and those in the closed bundle [CB/xx]. The exhibits to Ms Gibbs' witness statement are marked [MG/xx]

1. These are two appeals against the decision of the Information Commissioner (the Commissioner) on 3 October 2017. One appeal is by Ms Margot Gibbs and the other by the Foreign and Commonwealth Office (FCO). Ms Gibbs had made a complaint that the FCO had wrongly refused to disclose certain information to her under section 1(1)(b) Freedom of Information Act 2000 (FOIA). The ICO upheld her complaint in part: the FCO challenges that part and Ms Gibbs argues that her complaint should have been upheld in full.

2. The parties opted for an oral hearing. This took place between 4 and 6 July 2018. The Commissioner and the FCO were each represented by Counsel, Mr Peter Lockley and Ms Zoe Leventhal respectively, and Ms Gibbs by Mr Jack Castle, who was then studying for the Bar. The Tribunal is grateful to all of them for the erudition of their submissions and the constructive manner in which the hearing was conducted.

3. The Tribunal found it necessary to issue three sets of directions after the hearing, which goes some way to explaining the delay in issuing the decision. [1] It has not been helped either by piecemeal and somewhat chaotic disclosure by the FCO and the mass of duplicate emails.

The context and the constitutional importance of FOIA

4. In *Kennedy v Charity Commission* (*Kennedy*), [2] Lord Sumption described FOIA as of 'great constitutional significance'. [3] Lord Mance elaborated: [4]

> '*Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs [non-governmental organisations] and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise be forthcoming …*' (emphasis added).

5. The present request falls squarely within the purpose underlying FOIA as identified by Lord Mance, and that is not disputed. Ms Gibbs, an investigative journalist working closely with

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[1] The final set of directions gave the FCO (in particular) and the Commissioner the opportunity of correcting errors in the draft decision and closed annex, because of the sensitivities involved. The Tribunal has acceded to the FCO's request for a few corrections, mostly to reflect accurately the open evidence of FCO witnesses. The corrections do not impact on the Tribunal's analysis or alter the information the disclosure of which it had indicated it was minded to order

[2] 2015] 1 AC 455, [2014] 2 WLR 808, [2014] WLR(D) 143, [2014] EMLR 19, [2014] 2 All ER 847, [2014] HRLR 14, [2014] UKSC 20, [2015] AC 455 http://www.bailii.org/uk/cases/UKSC/2014/20.html at [1]

[3] At [153]. Lords Neuberger and Clarke agreed with the judgments of both Lord Sumption and Lord Mance

[4] Para 1

anti-corruption NGOs, seeks the information she has requested so that she can 'report on an issue of public importance'.

6. The Tribunal discusses below whether the Grand Chamber of the European Court of Human Rights (ECtHR) decision in *Magyar Helsinki Bizottsag v Hungary* (*Magyar*) [5] assists Ms Gibbs. Its significance for present purposes is that the ECtHR, like the Supreme Court, recognised the important role which journalists and NGOs play in a democratic society in the dissemination of information of public importance.

The arms trade and the controversy it inspires

7. The case relates to the export of an ex-Norwegian Navy supply vessel, the *MV Horten* (the Horten), to Nigeria via an English company. The Horten is 87.4m long with a crew of 86. It is characterised as a 'vessel of war' by the UK military section of the Strategic Export Control List. [6]

8. The arms trade is controversial. Those who are opposed to it argue that it is unethical, that because of the large profits to be made and the control which people with weapons can exert it is mired in corruption and bribery and that by contributing to instability in dangerous regions of the world it inevitably comes back to bite the UK. They point to the role weapons sold to Saudi Arabia play in the current conflict in Yemen. The economic benefits of the trade could be preserved by turning swords into ploughshares, it is said.

9. Those who support the trade, in controlled circumstances, counter that it creates employment, is inextricably linked to the strong defence industry which the UK requires and helps the country to exert disproportionate influence in global institutions.

10. The position of the Government (HMG) was set out in the FCO's *Information Note for Members of the Foreign Affairs Committee on the FCO's Role in Arms Export Licensing* in December 2016 (the FCO Information note) **[MG/513]**:

> '*The Government supports responsible exports from the UK defence and security sector, which make a major contribution to national prosperity. In the UK these businesses employ over 215,000 people (predominantly highly-skilled), support a further 150,000, and provide 6,500 apprenticeships. In 2014, the sector as a whole had a collective turnover of over £30 billion, including defence and security export future orders worth £10.9 billion. Licensing controls are a vital service to industry, protecting companies' reputation and the legitimacy of their business.*
> *HMG takes its arms export control responsibilities very seriously and operates one of the most robust arms export control regime sin the world. We rigorously examine every application on a case-by-case basis against the Consolidated EU and National Arms Export Licensing Criteria, known as the Consolidated Criteria*'.

11. The arguments for and against the arms trade are political, economic and philosophical and it is not for the Tribunal to resolve them. Most people would agree, however, that because of the controversy it engenders the trade should be as open as possible, consistent with the

[5] Application No 18030/11 https://hudoc.echr.coe.int/eng#{"itemid":["001-167828"]}
[6] ML9 (surface vessels: warships)

protection of other legitimate interests. As will be explained, there are particular features of the export of the Horten which underline the need for as much transparency as possible.

The FCO and transparency

12. The FCO acknowledges the importance of transparency in the arms trade as in other areas where its writ runs. So does HMG as a whole.

13. For example, in a letter to Mr Roger Godsiff MP on 11 April 2017 about the Horten **[MG/62]**, Mr Mark Garnier MP, Parliamentary Under Secretary of State at the Department for International Trade (DIT), said that HMG was committed to the transparency of export licensing through the publication of the Annual and Quarterly Reports on Strategic Export Controls, which contain 'detailed information on export licences issued, refused or revoked, by destination, including the overall value, type (e.g. Military, Other) and a summary of the times covered by these licences' (although, because of commercial confidentiality, there were no plans, Mr Garnier said, to publish the names of end-users).

14. In a keynote speech entitled *UK's transparency agenda to renew citizens' trust in government* **[MG/380]** on 7 May 2018, Mr Paul Arkwright, British High Commissioner to Nigeria, stressed HMG's commitment to global transparency:

> '*Open government is the simple but powerful idea that governments and institutions work better for citizens when they are transparent, engaging and accountable… Secrecy enables corruption, injustice and negligence to go unchecked … When governments show openness and willingness to listen to citizens' concerns, and when they respond to those concerns, trust grows. Women and men are more likely to engage in political processes. Citizens begin to pay taxes because they see that they are getting something for their money; and with more taxes collected, service delivery improves'*.

15. Mr Arkwright discussed the UK's Global Transparency Agenda and referred to the launch in 2017 of the UK's first ever Anti-Corruption Strategy, with its strong focus on transparency. This was part of the UK's third Open Government Partnership National Action, which contains pledges on (*inter alia*) 'world-leading commitments to tackle corruption'. Through the PERL and FOSTER programmes, HMG had helped civil society in Nigeria develop new skills to support a constructive relationship with government. Mr Arkwright announced £12m new funding 'for priority countries like Nigeria to deepen and implement open government reform commitments'.

16. Mr Arkwright, inevitably, was focusing primarily on the UK's efforts to help foster transparency in Nigeria and other developing countries. But he would no doubt accept that HMG's approach at home has to reflect its evangelising abroad, particularly where its decisions impact on other countries.

Factual background

17. Ms Gibbs has been looking into corruption in Nigeria since 2015. She works closely with Corruption Watch, a UK-based NGO which discusses the impact of bribery and corruption on democracy, governance and development, predominantly but not exclusively with regard to the global arms trade. Its geographical remit includes

Nigeria. Ms Gibbs has also written for *Africa Confidential*, a fortnightly journal, on corruption in the Nigerian oil industry and currently works as a reporter for Finance Uncovered focusing on corruption and kleptocracy.

18. In May 2017, she co-wrote a report for Corruption Watch entitled *Dereliction of Duty: How Weak Arms Export Licence Controls in the UK Facilitated Corruption and Exacerbated Instability in the Niger Delta* **[MG/86]**. The report focused on the export control licence granted by HMG to CAS-Global Ltd (CAS) on 1 July 2014 for the Horten. CAS is an English company with its registered office in Surrey. The licence permitted CAS to export the Horten to a Nigerian company called GWS Global West Ltd (Global West). CAS had purchased the vessel from the Norwegian Government.

19. It is common ground that Global West was at that time controlled by Mr Government Ekpemupolo, known as Tompolo. Tompolo had been a leading light in the Movement for the Emancipation of the Niger Delta (MEND), which waged a war of terror in the Niger Delta up to an amnesty in 2009. One of MEND's *modi operandi* was oil bunkering, under which oil pipelines are drilled into and the crude siphoned off. The proceeds were then used to bribe local politicians and fund arms purchases. Between 2006 and 2009, the conflict caused the displacement of 200,000 people and 400 oil workers were taken hostage. Death and destruction were commonplace. Tompolo was a beneficiary of the amnesty.

20. The sale of the Horten had been preceded by that of six hauk patrol boats (fast-attack craft also known as motor torpedo boats or MTBs) to the same ultimate buyer. These also originated in the Norwegian navy and passed through CAS. Three came to the UK en route to Nigeria.

21. The Norwegian Parliament has conducted two inquiries into the export of the hauks and the Horten and published its reports.

22. Ms Gibbs wanted to understand more about why HMG granted an export licence for the Horten and the FCO's role in that decision; hence her FOIA request. She has also made a series of related requests of the Department for Business, Innovation and Skills (BIS) and the Maritime and Coastguard Agency (MCA).

Relevant sections within the FCO and arms export regulation

23. The FCO has 'desks' in London specialising in countries or regions. So, it has an Africa Desk covering Nigeria. It also has 'posts' overseas: embassies (as in Norway), high commissions (as in Nigeria) and consulate offices. It has a consulate office in Port Harcourt in the Niger Delta.

24. The FCO also has an Arms Exports Policy Team (AEPT) advising on applications for export control licences. [7] It is part of the Export Controls Joint Unit (ECJU), which is based at the

[7] There are four main categories of export licences: Standard Individual Export Licences (SIEL) (specifying goods, amount, end-user and consignee); Open Individual Export Licences (for multiple shipments of specific categories of goods to a specified destination(s)); Gifting Licences (for goods donated by HMG to another government or other overseas end-user); and Anti-Piracy Licences (for weapons, ammunition and protective and communications equipment for private security firms operating on board vessels traversing both international and other territorial waters). A Standard Individual Trade Control Export Licence is a variant of the SIEL: the only difference is that goods will not pass through the UK. The Horten licence appears to have been a SIEL. MOD Form 680 is used for

DIT and brings together teams of export licensing officials from DIT, FCO and the MOD. Where necessary, it consults the Department for International Development (DfID). The FCO Information Note (which postdates the request) says that some export licensing applications, particularly those related to security sales, require the AEPT to consult with FCO desks, posts and other interested departments to gather more detailed information to inform their assessment.

25. Arms export licences are granted by the Export Control Organisation (ECO), which at the time in question was part of BIS and is now part of the DIT.

26. On 25 March 2014, shortly before the licence for the Horten, the then Secretary of State for Business, Innovation and Skills, Vince Cable MP, gave a written statement to Parliament about the Government's approach to arms exports **[MG/507]**. He explained the complex matrix of legislative and other instruments which govern exports. [8] He did not mention the Export Control Order 2008 (the 2008 Order) [9] which is made under the Export Control Act 2002 (the 2002 Act) and deals with the detail of export licences applications.

27. Section 9 of the 2002 Act empowers the Secretary of State to issue guidance relating to the exercise of licensing or other functions. The Consolidated EU and National Arms Export Licensing Criteria governing arms exports (the Consolidated Criteria) are the result. These are very similar to the criteria set out in EU Council Common Position 2008/944/CFSP. The Consolidated Criteria were revised via Mr Cable's statement. For example, the list of international obligations in Criterion One was updated and an explicit reference to international humanitarian law included in Criterion Two.

28. Criteria One to Four are mandatory. If they are satisfied, the other criteria are then considered. The FCO advises on six of the criteria, including the first four. The relevant criteria in the present case are:

- **Criterion One**

  Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

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the pre-clearance check required if an exporter plans to sell, demonstrate, promote or export certain equipment, goods or classified information for export promotion purposes

[8] The Export Control Act 2002; EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment; Council Regulation (EC) No 1236/2005 (dealing with trade in goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment); Directive 2009/43/EC simplifying the terms and conditions of transfers of defence-related products within the EU; the re-cast Council Regulation (EC) 428/2009 setting up an EU regime for the control of exports, transfer, brokering and transit of dual-use items; and the international arms trade treaty, adopted by the UN General Assembly on 2 April 2013 and signed by the UK on 3 June 2013

[9] SI 2008/3231

- **Criterion Two**

  The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.

- .**Criterion Three**

  The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

- **Criterion Four**

  Preservation of regional peace, security and stability.

- **Criterion Seven**

  The existence of a risk that the items will be diverted within the buyer country or re-exported under undesirable conditions.

The chronology

29. This is the essential chronology:

- **May 2011**: Global West enters into its first contract with the Nigerian Maritimes Administration and Safety Agency (NIMASA) for the supply of five vessels for a monthly fee

- **December 2011**: CAS submits an end-user statement in support of its bid for the six hauk boats, stating that they would be used for fisheries protection in West Africa, registered and operated under a UK flag and crewed by Europeans

- **January 2012**: Global West enters into a 10 year Supply, Operate and Transfer agreement with NIMASA **[WE16 to Ms Gibbs' witness statement]**. The contract is later suspended pending an investigation

- **February 2012**: CAS signs a contract with the Norwegian Defence Logistics Organisation (known by its Norwegian acronym FLO) for the purchase of the six hauks for a total of £2.7m

- **August 2012**: HMRC warns its Nigerian counterpart of potential corruption at the Nigerian Coastguard and links Global West to Tompolo

- **October 2012**: FLO and CAS enter into a contract for the Horten for $7.75m

- **February/March 2013**: the first three hauks are collected from Norway and transit via Felixstowe to Lagos without a full export licence but, it appears, as goods in transit

- **September 2013:** CAS applies for British registration for the Horten as a pleasure vessel

- **November 2013**: the final three hauks are collected and transported direct to Nigeria

- **February 2014**: the Horten arrives in Ramsgate. It is detained by the MCA because of safety and other concerns (later resolved). It subsequently re-flags to Nigeria (and, briefly, to Togo)

- **April 2014**: CAS applies for an export licence for the Horten via SPIRE (the ECO's online export licensing system) [10]

- **16 June 2014**: *Dagbladet*, a Norwegian newspaper, contacts the FCO for comment about claims that the hauks are being used by Global West and that the company is controlled by Tompolo

- **24 June 2014**: the AEPT recommends grant of a licence for the Horten

- **1 July 2014**: BIS (ECO) grants the licence

- **8 July 2014**: FCO Africa Desk asks for the decision to be put on hold while Post reviews the application

- **23 July 2014**: Post gives its views on whether the consolidated criteria are met

- **October 2014**: one of two Norwegian parliamentary inquiries is initiated

- **November 2014**: the Horten sails from Ramsgate

- **24 March 2016**: Ms Gibbs makes her request of the FCO

- **May 2016:** one of the Norwegian parliamentary inquiry reports. One of its findings is that 'the Norwegian authorities could have been more active towards the British authorities in order to prevent exports of the ship to Nigeria' **[MG/50]**

- **July 2016**: the FCO's initial response

- **May 2017**: Bjorn Stavrum, a Norwegian official, is convicted in Norway in of taking some £110,000 in bribes from CAS. His appeal was due to be heard in September 2018. CAS and its personnel deny being involved in the bribery

The request

30. On 24 March 2016, Ms Gibbs made the following request **[OB/138]**:

> '***For the period March 2014 and October 2014***
> *1. Any documentation including communications concerning*
> *a. MV Horten or its export licence ML9a1*
> *b. CAS Global*
> *c. Global West Vessel Services*

[10] https://www.spire.trade.gov.uk/spire/fox/espire/LOGIN/login

In your search for documents please ensure that you search for communications between the FCO and

i. UKTI [UK Trade & Investment]
ii. Cabinet Office
iii. Department for Business and Skills

If exceptions apply please provide a schedule of the information held with generic description of the information withheld

„„'.

31. Ms Gibbs said that, if the FCO wished to narrow its searches to certain departments, it should do so to the West Africa Directorate (including the British Embassy in Nigeria) and the Office of the Secretary of State.

32. It will be seen that the scope of the request was limited to relevant communications between March and October 2014. That was no doubt to avoid the FCO needing to rely on section 12 FOIA (cost of compliance), as BIS had done in relation to another request. Ms Gibbs must have calculated that communications during this period would fill the material gaps in her knowledge about the Horten licence.

The initial response and review

33. The FCO eventually replied substantively on 20 July 2016 **[146]**. It released considerable information **[OB/294] to [OB/402]** (and has released further information since the hearing). However, it also made significant redactions, relying on the exemptions in sections 27 (international relations), 30 (investigations and proceedings conducted by public authorities), 40 (personal information) and 35 (formation of government policy). It has now abandoned reliance on sections 30 and 35, substituting section 31(1) (law enforcement) for section 30.

34. Section 27 is a qualified exemption. The FCO argued that the public interest favoured withholding the remaining information: 'The disclosure of information detailing our relationship with the Norwegian, Togolese and Nigerian Governments could potentially damage the UK's bilateral relationships with those States and hamper the Government's ability to act in pursuit of key foreign policy priorities including in counter terrorism and EU affairs. For these reasons, we consider that the public interest in maintaining this exemption outweighs the public interest in disclosure'.

35. Ms Gibbs requested a review on 10 August 2016 **[OB/149]**. [11] She set out the history, referring, for example, to: the fact that MEND killed 18 British citizens in 2006 alone; the suggestion by Mr John Campbell, the former US ambassador to Nigeria, that the sale of the Horten and the hauks had transformed Tompolo into the largest maritime power in Nigeria; the fact that he had, shortly after the Horten arrived, joined with other former militants in threatening to resume military activities if President Jonathan was not re-elected in elections scheduled for February 2015; and the fact that the newly-elected President Buhari was making concerted efforts to tackle corruption and, as part of that, Tompolo, now on the run, had been charged by the Economic and Financial Crimes Commission with defrauding £79m from the Nigerian state. She complained that, unlike in Norway, there had been no transparency in the UK over how or why the export licence was granted and made the point

[11] Her letter is incorrectly dated 10 August 2015

that the export was not mentioned in the UK Strategic Export Controls annual report or considered by the relevant parliamentary committee. The FCO knew of Tompolo's involvement with Global West when recommending approval of the licence application, she said.

36. Ms Gibbs noted that a number of attachments to emails had not been disclosed and wondered why information held on SPIRE and downloaded by FCO officials had similarly not been disclosed. She referred to the 'destabilising effects of providing arms to militants' and suggested that '[r]ectifying past mistakes depends on all sides being transparent and taking responsibility'. She conceded that some of the information might harm relations between the UK and Nigeria but argued that, with a matter as grave as the export of warships to a former militant, there was clearly public interest in the truth coming out. Where 'fantastically corrupt' governments such as Nigeria's (David Cameron's description of the country at an international convention on corruption in London in 2015) gave multimillion dollar contracts to former militants, the UK Government would be acting in the other country's interests by subjecting such relationships to scrutiny.

37. The FCO provided its review decision on 22 November 2016 **[OB/155]**. It explained the searches which had been made for the request. SPIRE was the responsibility of DIT. In relation to the exemption in section 27(1)(a), it simply reiterated that releasing the withheld information could damage relations with Norway, Nigeria and Togo. The FCO also said that it was relying on section 31(1)(a) (without formally at that stage abandoning reliance on section 30): maintaining confidence in law enforcement and the criminal justice system was crucial to the public interest. It referred briefly to section 35.

38. This was an inadequate response to Ms Gibbs' closely-argued review request. It had taken the FCO three and a half months to conduct the review. This was on top of the four months it took to reply substantively to the request.

Proceedings before the Commissioner

39. Ms Gibbs had in fact already made a complaint to the Commissioner under section 50 FOIA on 28 July 2016 **[OB/157]**. [12] She essentially repeated her review request but also asked that, in relation to section 40, domain names should be disclosed to show the departments for which correspondents worked. That has since been done where possible. There is in general no dispute about the FCO's entitlement to rely on section 40 to protect the identity of individual officials, both within and without the department.

40. The Information Commissioner's Office (ICO) asked a series of questions of the FCO on 16 January 2017 and asked for the withheld information **[OB/167]**. Mr Leslie Tant of the AEPT replied on 9 March 2017 **[OB/177]**. The copy of his letter in the open bundle is heavily redacted. He explained for the first time that the FCO was relying on both paragraphs (a) and (c) of section 27(1) and supported the department's arguments with examples. He did not add materially to those arguments, save that he suggested that the exemption in section 31(1)(a) was designed to cover all aspects of the prevention and detection of crime. He explained that the FCO could not disclose the eight attachments to emails to which Ms Gibbs had referred because they were exempt under section 31. He attached the DIT's and MCA's responses to Ms Gibbs' related FOIA requests.

[12] Her complaint is again incorrectly dated, 28 July 2015

41. On 18 April 2017 **[OB/284]**, the ICO asked the FCO about the attachments. The FCO provided them in its reply of 3 May 2017 **[OB/289]**. It also conveyed this response from an unidentified third party in relation to section 31:

> '*As you are aware from our previous response, we have been in discussions with the relevant public bodies who have the main equity in this information, and on whose behalf we have applied this exemption. They have reiterated the significance of the fact that, since the original response to the requestor was made, further investigation interest, in other words, another investigatory body, has engaged and that the exemption contained in section 31(1)(b) – the apprehension or prosecution of offenders – also applies. We have now been informed that the release of the information currently withheld would, or would be likely to prejudice the prosecution of an offender, or offenders by inferring and/or thereby revealing that criminal activity is likely to have been carried out. Furthermore, the release of the information currently withheld could adversely impact on any investigative action and the ultimate outcome of that investigative action. We are informed that this prejudice is, on the balance of probabilities, more likely than not to adversely impact on any enforcement process and its ultimate outcome*'.

42. At the behest of the ICO, the FCO reviewed whether it could disclose any of the attachments. On 3 July 2017, it wrote to Ms Gibbs **[OB/403]** disclosing some of them in redacted form. It continued to withhold two of the attachments [13] under section 31. The disclosed attachments are at **[OB/406] to [OB/416]**. The first **[OB/406]** is a draft of the recommendation by an official of the AEPT to grant the licence. The second **[OB/408]** is the approved recommendation. It does not show that four new paragraphs had been added and redacted on page 2. The third **[OB/410]** does show those redactions. It also says 'The goods are rated UK Military/Paramilitary – Schedule 2. HRDD consulted. Post/Desk not consulted'. There is also a redacted 'Lines to take' **[OB/416]**, a reference to possible media interest.

The Commissioner's decision

43. The Commissioner gave her decision on 3 October 2017 **[OB/1]**. She concluded that the FCO had properly relied on section 27(1)(a) and (c) but that sections 31(1)(a) and (b) and 35(1)(a) did not apply.

44. In relation to section 27(1), which requires prejudice to the interests in question, she was guided by observations by Tribunal in *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* [14] that prejudice had to be real and of substance and met these tests 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise been necessary'. The FCO was now concerned only about relations with Norway and Nigeria (not Togo). The thrust of the FCO's argument was that the subject-matter was sensitive and 'required the use of appropriate channels and diplomacy, and that disclosure of information that was intended for internal discussions only would be likely … to harm both the UK's relations with Nigeria and Norway'. [15]

[13] Relating to emails sent on 17 June 2014 at 12:08 and 16:18
[14] EA/2006/0040 para 81
[15] Para 15

45. In light of the examples provided by the FCO, the Commissioner was persuaded that there was more than a hypothetical risk of prejudice occurring from disclosure of the withheld information; rather, it was real and significant. She agreed with Ms Gibbs that there was a clear and weighty public interest in disclosure of information which would increase the transparency of the action of Government departments, particularly given the relatively transparent way the issue appeared to have been addressed in Norway. Disclosure of the information withheld under section 27 would go a notable way to clarifying how and why the Horten licence was granted. However, there was a very strong public interest in ensuring that the UK enjoyed effective relations with other states. On balance and 'by a narrow margin', the Commissioner concluded that the public interest favoured withholding the information.

46. In relation to section 31(1), the Commissioner accepted that there was a causal relationship between disclosure of the relevant information and the types of prejudice covered. Single articles in the *Independent* (before the request) and the *Guardian* (after it) confirmed that some form of criminal investigation was being conducted. However, the FCO had failed to meet the real and substantial risk test.

47. The Commissioner also concluded that section 35 was not engaged.

The appeals: the parties' positions

48. As noted, both Ms Gibbs and the FCO appealed the Commissioner's decision. The two appeals were consolidated.

49. Ms Gibbs only needed to appeal the decision on section 27 since she had prevailed on sections 31 and 35. She argued that neither paragraph (a) nor (b) of section 27(1) was engaged in relation to the withheld information but if they were the public interest favoured disclosure. She prayed in aid Article 10 (freedom of expression) of the European Convention on Human Rights (the Convention) following *Magyar*.

50. In its Amended Grounds of Appeal **[OB/50]**, **t**he FCO challenged the Commissioner's decision on sections 31 and 35. It later abandoned reliance on section 35. It raised the possibility of relying on section 36(2)(b) and (c) FOIA (inhibition of the free and frank provision of advice or exchange of views and prejudice to the effective conduct of public affairs) but has not pursued this. It also argued that section 27 applied to some material for which only sections 31 and 35 had previously been claimed. The basis was the same as for the existing section 27 material. The Tribunal has considered whether section 27 applies to all the relevant material.

51. In relation to section 31, the FCO argued that, even if it was not available at the time of its initial response to the request, matters had moved on to the extent that the Tribunal should exercise its discretion not to order disclosure (known as the 'no steps discretion': see further below). At the hearing, Ms Leventhal said that her clients were abandoning reliance on section 31 and relying solely on the Tribunal's no steps discretion, albeit that exercise of the discretion was rooted in the exemption.

52. During the course of the appeal, the FCO also raised the possibility of the no steps discretion being exercised in relation to matters falling within the scope of section 27 as an alternative

to relying on that exemption. However, at the hearing Ms Leventhal abandoned that argument too.

53. Ultimately, the FCO's position, therefore, was that section 27(1)(a) and (c) applied to the relevant information at the time of its initial response and that, if this was wrong, it did not seek to rely on the no steps discretion for that information. With regard to matters falling within the scope of section 31, its position was the opposite.

54. The Commissioner has largely supported the FCO on section 27. She continued to maintain that section 31 was not engaged at the time of the initial response but accepted that the no steps discretion should apply to *some* of the section 31 material. Both the Commissioner and the FCO argue that Article 10 of the Convention has no application.

Post-hearing developments

55. Following the hearing, the FCO disclosed, in redacted form, some additional documents which it had identified as coming within the scope of the request. It also removed what it described as minor redactions from previously disclosed documents. At the Tribunal's request, it prepared a fresh closed bundle.

56. Mr Lockley and Ms Leventhal, via separate Notes, completed a table setting out which documents in the closed bundle their clients believed should attract the no steps discretion, with brief reasons. Ms Leventhal agreed with all the documents identified by Mr Lockley but added some of her own. Ms Leventhal also provided an open Note explaining the documentation relating to the FCO recommendation that an export licence should be granted.

57. The Tribunal gave the Crown Prosecution Service as a non-party the opportunity of assisting the Tribunal with an analysis of the legal principles governing prejudice to a criminal trial caused by advance publicity. In the event, the CPS decided not to make a submission. Each of the parties made further submissions on the approach to be taken to this issue (see below).

The evidence

i. Ms Gibbs

Witness statement

58. In her witness statement dated 15 June 2018, Ms Gibbs set out the background. She referred to the connections between political power players in Nigeria and militants as documented in a report commissioned as part of a DfID funded programme (FOSTER). DfID had described FOSTER's approach as 'politically savvy and opportunistic providing technical support, research and evidence to those dissenting voices in government or groups outside of government that were willing to champion the cause of reform' and recognised the sea-change in the climate introduced by the Buhari government. The threats of violence which preceded the February 2015 election in Nigeria had, Ms Gibbs said, unfortunately materialised via the Niger Delta Avengers (NDA), with newspaper reports suggesting that Tompolo was actively linked to it. Ms Gibbs noted that CAS's accounts signed in October 2014 showed that the company had received a legal claim in respect of a $540,000 commission payment. Mr Stavrum had now been jailed.

59. She contended that there was no sign that the ECO and its constituent departments had properly scrutinised the decision to grant an export licence for the Horten. The Minister continued to maintain that the decision was a reasonable one. The lack of scrutiny contrasted with what took place in Norway. It was from the Norwegian inquiries that information emerged that the HMRC had given the initial tip-off about alleged corruption in the NIMASA/Global West; and that, according to Ms Gibbs, CAS had lied in its UK licence applications. Only on 1 June 2018, she added, did it become clear that HMRC was in communication with the FCO and other departments with regard to the licence application

60. Ms Gibbs explained why she had made the request. The overarching reason was that she wanted to know how and why the UK authorities had granted the licence. In more detail: how did three hauks pass through the UK to Nigeria when HMRC had tipped off the Norwegian authorities about the alleged corruption in the contract? Had Article 17 of the 2008 Order (goods in transit) been applied correctly to the hauks? What did the FCO and the other licensing authorities know about the alleged corruption at CAS and Global West and what account had been taken of this? Was Article 37 of the 2008 Order (false and reckless statements) applied properly (what did the FCO and other departments know about CAS's allegedly false statements?)? When applying Criteria Two (respect for human rights in the destination country) and Three (internal situation there) did the second FCO assessment repeat the mistake of the first that the end user was the Nigerian Navy or NIMASA? How had Criterion Three been applied? Why was Criterion Seven (diversion of goods) not considered? What factors external to the consolidated criteria did the FCO apply and did these improperly affect application of the criteria? What was the final recommendation given by the FCO and on what basis? Were the criteria fit for purpose, given that they appear to allow for corrupt arms sales?

61. Ms Gibbs identified other public interest factors pointing to the need for disclosure. For example, transparency about decision-making in this area – whether good or bad – would help develop public understanding and could lead to policy reforms. Some of the disclosed information indicated that the FCO recommendation was based on false premises, such as the claim that Tompolo 'fights corruption in the political realm'. How the FCO applied Criteria Three was of general importance because it made hundreds of recommendations a year about the export of arms to counties which experience election violence. The withheld information would enable Ms Gibbs and Corruption Watch (which was, she said, a recognised expert in the arms industry and corruption) to identify weaknesses in the application of the consolidated criteria, or the criteria themselves. Ms Gibbs made the point that the accountability of export controls has significantly diminished over the past three years without the involvement of the parliamentary Committees on Arms Exports Control (CAEC) (made up of representatives from the select committees on defence, foreign affairs, international development and international trade, shadowing the departments involved in ECO). She also said that, according to the Strategic Export Controls Annual Report for 2015, HMG approved as many as 13,653 arms exports in 2015. It was therefore important to ensure that applications were being properly considered.

62. Ms Gibbs finished her statement with this claim: 'Any prejudice caused by release to the UK will be insignificant: the information itself will be known to both Nigeria and Norway. While there may be some harm in this information being broadcast to the public at large, this will not be significant'.

Oral evidence

63. In her oral testimony, Ms Gibbs recognised that the hauks' transaction fell outside the scope of the request but argued that it was relevant to public interest. More generally, one arm of the UK Government (DfID, through its approval of the FOSTER programme) was highlighting corruption in the oil industry in Nigeria whereas another (the FCO) was facilitating it with this export. Many British hostages had been taken in Nigeria. The Horten could be useful as a support ship for the fast attack craft (the hauks). Shell, an Anglo-Dutch company with large interests in Nigeria, was about to be tried in the biggest corruption trial in the world. The level of corruption was part of the reason the Delta is so dangerous. Although the Corruption Watch report had already argued for a specific corruption criterion, information about this licence could help exemplify the need.

64. Ms Gibbs said she was not suggesting that the FCO had been deliberately misleading but thought that it might want to cover up its embarrassment over the Horten licence. The impression was that it wanted to process the application quickly, without, for example, checking the share ownership of Global West.

65. She did not know the legal basis on which an export licence could be revoked once granted but felt that the public interest in transparency should trump legal considerations. That said, she recognised that there could, in principle, be a degree of damage to international relations and UK interests which was more important than transparency: it was not transparency at any cost.

66. It was pointed out to Ms Gibbs that there was considerable information already in the public domain, as reflected by her ability to co-author the report for Corruption Watch. What were the gaps which she thought the withheld information could fill? Ms Gibbs suggested these categories. First, how was the risk of corruption assessed by the FCO, given that it was known that Criterion Seven was not considered? The FCO knew that the hauks were destined for Global West. There was therefore diversion as far as the Norwegians were concerned. Diversion could cover end-use as well as end-user. Second, what was the state of the information which the FCO had (for example with regard to diversion risks)? Third, what does the FCO consider to be internal repression?

67. Ms Gibbs explained that her main case was on public interest rather than engagement of the exemptions.

ii. <u>Detective Constable Roger Dainty</u>

68. DC Roger Dainty is with the Overseas Anti-Corruption Unit the City of London Police (CoLP). The unit is funded by DfID.

Open witness statement

69. In his open witness statement dated 15 June 2018 **[OB/433]**, DC Dainty described Operation Argus, which is a bribery investigation relating to the subject-matter of Ms Gibbs' request. The investigation is into the alleged bribery of a Norwegian official (presumably, Mr Stavrum) in connection with the purchase by CAS of ex-naval vessels from 2012 onwards. It commenced in December 2014 following a referral to CoLP by the Norwegian authorities. The joint investigation with the Norwegian authorities had led to the arrest of four men.

70. The CoLP submitted an investigation file to the CPS in November 2017. The CPS considered it during a case conference in May 2018 and instructed the CoLP to seek further evidence domestically and internationally and undertake further analysis of the existing evidence. Should the CoLP conclude the further enquiries, DC Dainty anticipated a charging decision by the end of 2018, although it could take longer. It could take a further 12 to 18 months before any trial was concluded.

71. DC Dainty explained that the CoLP's practice at this stage of an investigation was to protect evidence which had been gathered. This was to ensure the integrity of future criminal proceedings and to respect confidentiality with regard to the subjects of an investigation.

72. He said he had reviewed the withheld information. It was clearly relevant to Operation Argus and therefore fell within the Criminal Procedures and Investigations Act 1996. It would be scheduled as unused material and continually reviewed until the case was concluded. Some of the material might be used as evidence. Any disclosure to third parties before the case was concluded was likely to prejudice the prevention or detection of crime (within section 31(1)(a) FOIA) or the apprehension or prosecution of offenders (within section 31(1)(b)). The chances of serious prejudice to the investigation, likely charging decision and potential trial was more than 50%. As with any criminal proceedings, media reporting (of the sort which had already taken place around the sale of the vessels) could publicly undermine the credibility of the suspects and prevent them from receiving a fair trial. It could affect the jurors who would be eventually selected. Release of information outside the process of secondary disclosure which would follow defence case statements would prejudice the investigation.

73. In addition, DC Dainty suggested that release could jeopardise working relationships with the CoLP's partners in Norway and Nigeria, potentially affecting the exchange of information in this and other cases. The CoLP had a formal Joint Investigation Team agreement with the Norwegian authorities and a Letter of Request with the Nigerian authorities. Both authorities were entitled to expect the UK authorities to retain investigation material in confidence until the end of investigations.

74. DC Dainty explained that the material relevant to section 31 consisted of emails relating to the Horten and the hauks and how they were bought and transported to Nigeria. CoLP was given the material in February 2018, with the exception of two additional emails provided in June 2018.

75. DC Dainty referred to the investigation conducted by HMRC (now concluded). He was aware that HMRC had relied on section 31 in relation to the withheld material in response to a FOIA request.

76. Finally, DC Dainty exhibited a letter from A White of the CPS dated 15 June 2018 following the case conference in May 2018 **[OB/438]**. Mr/Ms White said that Operation Argus was an investigation into bribery of foreign officials and money laundering and involved multiple witnesses from multiple jurisdictions. Further lines of enquiry involved approaching potential witnesses both domestic and overseas and might involve approaching foreign law enforcement and government agencies for assistance. Some of the material already gathered was sensitive and some had been given in confidence.

77. As foreshadowed in his open witness statement, DC Dainty expanded in a closed witness statement of the same date on the lines of inquiry, the prejudice likely to be caused by release of the material and the detrimental affect which disclosure could have on the agreements with Norway and Nigeria and their confidence about the CoLP's ability to handle their information.

Open oral evidence

78. In his open oral testimony, DC Dainty suggested that all the withheld information was relevant to his investigation; he did not agree that some of the information was on the fringes. The police had to schedule (list) it for the CPS and send the actual information to the CPS if it was considered relevant. The CPS is responsible for disclosure to defendants. Defendants were given the unused material schedule and could ask for documents listed. They do not see any sensitive unused material. There were three or four potential defendants here. Disclosure was a hot potato at the moment. Protecting the integrity of any trial was his priority – this was more important than Ms Gibbs' priorities, he felt. There were still lines of inquiry being pursued and there was an ongoing investigation in Nigeria..

Closed oral evidence

79. This is the gist of DC Dainty's closed evidence as reported to Ms Gibbs:

> '*DC Dainty regards the potential criminal proceedings as the top priority. Nothing should be allowed to imperil them. His preference is that FOIA disclosure should await the conclusion of any criminal proceedings.*
>
> *His concerns are twofold. First, that CoLP should not be open to criticism by the trial judge for failing to do everything to protect the integrity of the trial process by resisting disclosure. Second, that premature disclosure of certain documents might encourage the putative defendants to argue that they could not receive a fair trial. It is best to avoid any risk.*
>
> *DC Dainty had highlighted certain examples from the disputed information in his closed witness statement and these were discussed. Even where relevant information is already in the public domain, prejudice could still arise from the revelation that the issues, and CAS Global's role in particular, were being assessed by Government agencies. A chain of emails has to be considered as a whole: there is danger in piecemeal disclosure. Information might also be misreported.*
>
> *DC Dainty has not had the chance to consider each piece of disputed information but notes that things may have moved on to some extent since his statement.*
>
> *DC Dainty is also concerned that disclosure of certain documents could be seen as a breach of bilateral agreements with Norway and Nigeria. Partners expected confidentiality.*
>
> *HMRC has declined to share information with CoLP following the conclusion of its (HMRC's) investigation. CoLP's investigation has run alongside, but in isolation from, HMRC's*'.

iii. Rob Dixon

80. Mr Dixon has been head of the West Africa department at the FCO since September 2016, responsible for policy on the UK's bilateral relations with 16 countries, including Nigeria.

Open witness statement

81. Mr Dixon made an open witness statement on 15 June 2018 addressing the FCO's reliance on section 27(1)(a) and (c) **[OB/424]**. He explained that the UK and Nigeria have a strong partnership building on longstanding economic ties and mutual security interests. The UK provides significant development assistance with military training and advisory support.

82. Mr Dixon explained that comments in the withheld information by HMG officials about former President Jonathan and his government were capable of harming the UK's relations with Nigeria. Mr Jonathon remains an influential political figure as former President, an important and active member of the main opposition party, the People's Democratic Party, and a prominent Delta politician of Ijaw origin. He was regarded by his supporters as a representative and champion of that important geopolitical region. Release of the material could, regardless of content, have been misinterpreted or misused within Nigeria as signalling UK political partiality (an assertion on which Mr Dixon expanded in his closed witness statement of the same date).

83. Release of the material in 2016 would have necessitated a damage limitation exercise by HMG within Nigeria, both in terms of public diplomacy and engagement with senior political figures, before and after release. Mr Dixon's judgement was that it would not have been possible fully to mitigate the consequences. Prejudice would have been more than purely short-term. He added that the negative effects would be even greater now given the febrile pre-election political atmosphere ahead of the February 2019 presidential, parliamentary and state elections. (However, that is not directly relevant in light of the FCO's abandoning reliance on the next steps discretion under section 27).

84. Mr Dixon stressed that UK relations were with states, not governments or particular politicians. States transcended elections and '[i]t is not the approach taken by States to pass comment on former administrations on the basis that a new government has no interest in the activities of pervious political figures'.

85. The statement also addressed prejudice to UK interests (i.e. section 27(1)(c)). Mr Dixon said that Delta State is important to the UK for economic, political and security reasons. 85% of federal government revenue comes from the oil and gas industry. Oil and gas revenues account for 7% of the UK-Nigeria bilateral trade relationship, with Shell the largest foreign investor in Nigeria. Since 2006, there had been numerous kidnappings of international and Nigerian oil workers in the region. Four British missionaries were kidnapped in Delta State in 2017; one of them died. Promotion of stability in the region and the protection of UK nationals there were direct UK interests. Mr Dixon referred to the emergence of the NDA in February 2016 and its attacks on oil installations (including a Shell terminal). There were threats to workers and from falling international prices. Oil production had reduced by more than half.

86. Mr Dixon added that the FCO judged that release of the withheld information would create a risk of prejudice to the UK's influence in the Delta. He expanded on this in his closed

statement. Finally, he suggested that, although he recognised that openness is important in a democratic society, the public interest favoured withholding the material.

Open oral evidence

87. In his oral testimony, Mr Dixon said that the FCO sought to be as transparent as possible. The UK had been involved with the Open Government Partnership since its creation. But there are limits to transparency. He did not know if there was a damage limitation exercise after the Corruption Watch report in 2017. The key point was the need to withhold HMG assessments.

88. He was aware of the FOSTER programme and confirmed that there was an appetite for change in Nigeria, particularly with regard to corruption. President Buhari had campaigned on a change platform. The corruption in Nigeria public life was a matter of record.

89. Mr Dixon was sure that Nigeria was aware of FOIA (he was not sure of a Nigerian equivalent). However, the concern was about the manipulation of the withheld information if disclosed and the use to which it would be put. Even the fact that HMG officials had been discussing something could be relevant. The change of administration in 2015 made no difference: officials from the Jonathan era remained in post.

90. Mr Dixon was not able to say whether there would have been greater scrutiny with an ex-Royal Navy ship. He was not an expert on revocation of export licences and did not know if something new had to be shown.

Closed oral evidence

91. This is the gist of Mr Dixon's closed evidence:

> '*Mr Dixon explained that Nigeria was an important partner for the UK. There was a close and strong link between the countries. There were many challenges in the Delta region and in the north east. HMG's opinion was listened to in Nigeria, and HMG worked in partnership with Nigeria to support it in the challenges it faced. The UK had publicly raised concerns about militancy in the Delta (though that region has been relatively peaceful the past couple of years) and the north-east and about human rights abuses.*
>
> *With regard to damage to international relations with Nigeria, Mr Dixon expanded on his assertion in his open statement that a perception of political partiality on the part of HMG could be created by misinterpretation within Nigeria. Misinterpretation was an issue in Nigeria and it could arise from disclosure of some of the withheld communications. Mr Dixon was taken through several. It would not be helpful for Nigeria to know that the FCO was conducting assessments of particular issues. In this connection, the fact that some information feeding those assessments was in the public domain did not matter. He acknowledged that some communications were more sensitive than others.*
>
> *Mr Dixon felt that a perception of partiality would be damaging and the FCO would have to work hard to counter it and would not fully be able to.*

The UK had a number of interests in Nigeria including in the Delta. Most important was the safety of HMG staff and UK nationals. The UK also had an interest in being seen as a neutral honest broker. It had an interest in a stable Delta. The situation in Nigeria was increasingly febrile in the run up to next year's elections. Instability and attacks on oil facilities would lead to a rise in oil prices and in government revenues going down (as had happened during previous periods of instability). The UK also had an interest in creating stability, security and prosperity in Nigeria so as to reduce migration flows to Europe and to militate against radicalisation. Already, there was widespread poverty and a burgeoning population. The UK had a stake in energy security too.

Although this was not fundamentally about UK PLC, UK companies did have a considerable stake in the Delta which in turn also created revenue for the Nigerian exchequer.

Mr Dixon recognised that there had to be causality between release of the disputed interest and prejudice to UK interests. He had given this very careful thought to this. It was a difficult judgement but he remained of the view that release of the information could lead to the feared consequences.

The risks arising from disclosure were particularly strong at present in the pre-election period but Mr Dixon thought that the correct judgement with regard to disclosure had been made in 2016 (although he was not in post then).

He acknowledged the importance of transparency with regard to arms exports'.

iv. <u>Mark Gooding</u>

92. Mark Gooding has been the FCO's deputy director for European and head of the Europe North department since September 2017, responsible for 15 countries across Northern and Central Europe, including Norway.

Open witness statement

93. In his open witness statement made on 15 June 2018 **[OB/429]**, Mr Gooding explained that Norway is a key partner for the UK. Both are members of NATO and share many global objectives from conflict prevention and resolution to development. Relations are warm and UK officials and Ministers have regular and unhindered access to their Norwegian counterparts, not simply in Oslo and London but within multilateral organisations such as the United Nations.

94. Mr Gooding stressed the importance of maintaining a relationship of trust with Norway. This allowed the free and frank exchange of information on the understanding that it would be treated in confidence. Otherwise, the UK's ability to protect and promote its interests in Norway would be hampered. Releasing all the requested information would damage the UK's ability to work as effectively as possible for the UK. This was not in the public interest, particularly at a time when the UK was seeking to intensify bilateral relationships with European partners (presumably a reference to Brexit). The candour of contributions 'would be likely to be affected by officials' assessment of whether the content could be disclosed in the near future'. Ease of communication would be adversely affected if it was thought that

conversations between diplomatic colleagues were likely to be routinely disclosed into the public domain, despite concerning matters of high sensitivity to both states.

95. Mr Gooding explained that the withheld material included emails and records of telephone conversations in which sensitive information was provided by Norwegian officials while speaking to the FCO in a 'safe space'.

96. Finally, Mr Gooding said that Ms Gibbs was wrong to conclude from the internal and external scrutiny which had taken place in Norway that the Norwegian authorities would welcome public release of candid communications about the Horten by their own and UK officials. This belied a misunderstanding of the true nature of diplomatic relations. He expanded on this in his closed statement.

Open oral evidence

97. In his oral evidence, Mr Gooding said there were two categories of discussion at issue: those between the UK and Norway and those between UK officials. In his judgement, release of the vast majority of the withheld information would be damaging.

98. Norway was one of the UK's closest partners, Mr Gooding said. During the closed session, he agreed that this paragraph from his closed statement could be disclosed to Ms Gibbs:

> '*Norway and the UK are close foreign policy partners on many global issue such as the peace process in Colombia, climate change, UN reform and humanitarian support for Syrians. Norway is a staunch NATO ally, and we are working together increasingly closely on North Atlantic defence, as well as in the UK-led Joint Expeditionary Force, in the counter-Daesh coalition, in Afghanistan, and in South Sudan. New defence equipment programmes, such as the F35 and P8 maritime patrol aircraft, as well as winter training in northern Norway for the Royal Marines and other armed forces (consistently since the 1960s), are high priorities*'.

Closed oral evidence

99. This is the gist of Mr Gooding's closed evidence:

> '*Mr Gooding explained that he has two principal concerns with regard to release of the disputed information.*
>
> *First, there is a reasonable expectation that information between governments submitted via diplomatic channels will be kept confidential. This does depend on the subject-matter but would apply in this case. This is despite the fact that Norway would be aware of FOIA. If confidentiality is not respected, trust and confidence will be affected and foreign governments – Norway here – will be less likely to share information.*
>
> *Second, disclosure of particular communications – and Mr Gooding was asked to comment on a number during the session – had the potential to cause difficulty, principally because of their content. The FCO would then have to manage the situation and engage in damage limitation, including warning the Norwegian Government in advance of disclosure. Damage limitation would probably be short-term but damage*

to trust could be longer lasting. The Norwegian Government would have to deal with increased interest from the public.

Mr Gooding agreed, however, that some of the communications were less sensitive than others in this regard.

The fact that particular emails may have emanated from other UK government agencies did not matter. They would still be seen to as coming from HMG. In any event, HMRC was involved in enforcement, which was relevant to the issues the Norwegians were dealing with.

Mr Gooding explained that the above two concerns were the primary rationale for his recommendations. However there was a third consideration in respect of the bilateral context. This is that it is particularly important in the context of Brexit that relations with Norway are not damaged. The request was made just prior to the referendum and the initial response shortly after it.

Norway is a close ally of the UK, for example as a NATO partner and with regard to trade'.

Discussion

A. Magyar

i. Introduction

100. Ms Gibbs relies on the ECtHR decision in *Magyar*. She only needs to do so, of course, to the extent that the Tribunal finds that the FCO is entitled to withhold information applying domestic principles. (The ECtHR is also known as 'the Strasbourg court').

101. Article 10 of the Convention provides:

> '*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*'.

102. The ECtHR held that Article 10 could entitle a journalist (such as Ms Gibbs) or an NGO (such as Corruption Watch) to information held by public bodies, where disclosure was in the public interest, the requester intended to disseminate the information and the information

did not need to be collated. [16] The Article was not limited to protecting the voluntary exchange of information between citizens, as most previous caselaw had held. It now created a right to information in certain circumstances.

103. The Tribunal has concluded that *Magyar* does not advance Ms Gibbs' case and that the appeal must be decided under FOIA unsupported by the Convention. However, in case Ms Gibbs wishes to appeal the Tribunal's decision that some of the withheld information need not be released and to rely on *Magyar* in so doing, the Tribunal will briefly explain its reasoning. There are two issues. First, can domestic courts and tribunals (together, judicial bodies) below the Supreme Court have regard to *Magyar* given the common law rules on judicial precedent? Second, if so, is *Magyar* relevant in the circumstances of this appeal?

ii. Precedent

104. The Commissioner has quite properly drawn the Tribunal's attention to two developments since the hearing. First, the Upper Tribunal has given permission for the requester in *Moss v The Information Commissioner* [17] to argue the Tribunal erred in failing to take account of *Magyar* in that case. Second, the First Section of the ECtHR has given its ruling on the joint complaint by Times Newspapers Ltd and Mr Kennedy (a *Times* journalist) that the UK is in breach of Article 10 through its access to information regime. This followed the Supreme Court decision in *Kennedy* and Mr Kennedy's subsequent request outside FOIA for information of the Charity Commission. [18] The Commission gave him some information but withheld other information. The ECtHR ruled that the complaint was inadmissible because Mr Kennedy had not exhausted domestic remedies (by bringing a judicial review of the Commission). As a result, it did not decide the substantive issue.

105. It is necessary to understand how the Human Rights Act 1998 (HRA), the conduit which Ms Gibbs must use at domestic level to rely on ECtHR caselaw, operates.

106. Section 2(1) HRA provides:

> '*A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—*
>
> *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights*
>
> *...*
>
> *whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen*'.

Note that judicial bodies are not bound to *follow* judgments etc of the ECtHR. This reflects the constitutional settlement represented by the HRA, under which a balance is struck between the UK's international obligations and its retention of the freedom to develop its law in the way it thinks appropriate, until and unless the Strasbourg court tells it otherwise on a complaint following a UK judicial decision. Judicial bodies are,

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[16] Paras 158 and 161-162

[17] EA/2016/0250. The Upper Tribunal reference is GIA/1531/2017

[18] *Times Newspapers Ltd and Kennedy v United Kingdom* (application no 64367/14) (6 December 2018)

however, mandated to take ECtHR judgments etc into account: they cannot simply ignore them.

107. Under section 3, primary legislation and subordinate legislation must so far as is possible be read and given effect in a way which is compatible with Convention rights. Where that is not possible, the High Court, Court of Appeal and the Supreme Court (but not the Tribunal or Upper Tribunal) may make a declaration that primary legislation (such as FOIA) is incompatible with the Convention: section 4. They cannot, however, strike down the legislation: it is up to Parliament whether to pay heed to the declaration. Under section 6(1), it is unlawful for a public authority to act in a way which is incompatible with a Convention right: that includes courts and tribunals. There is an exception, under section 6(2), where primary legislation compels a public authority so to act.

108. The question has arisen whether lower judicial bodies should, under the doctrine of precedent, follow the decision of a higher judicial body court (in particular, the Supreme Court) even though it is now seen to be at odds with a later decision of the ECtHR. That is relevant in the present context because the Supreme Court has said in two relatively recent cases, *BBC and another v Sugar (No 2)* [19] and *Kennedy*, that Article 10 does not extend to a right to information from a public authority. In other words, they appear to be odds with *Magyar*.

109. Those two decisions preceded *Magyar*. However, in *Kay and others v London Borough of Lambeth and others; Leeds City Council v Price and others*, [20] the House of Lords said that lower courts were bound to follow its decisions even where inconsistent with a later Strasbourg ruling. There could be extremely limited exceptions, such as where the policy which underpinned a House of Lords decision made prior to the HRA and which had not referred to any Strasbourg caselaw was no longer sustainable under the HRA. [21] In *R (RJM) v Secretary of State for Work and Pensions*, [22] the Supreme Court reiterated that lower courts must follow its decisions even where clearly inconsistent with a later Strasbourg ruling (the Court of Appeal had more latitude when faced with one of its own decisions which was inconsistent with later Strasbourg authority, as in that case). The Court again allowed for 'wholly exceptional circumstances', without elucidating what they might be.

110. The general principle is therefore clear. Strictly speaking, what the Supreme Court said in *Kennedy* about Article 10 is not binding because it recognised that it did not form part of the *ratio* of its decision: it decided the case on the basis of its construction of section 32(2) FOIA (documents relating to inquiries and arbitrations) and the Charity Commission's duty outside FOIA to consider whether to release information. Its comments were therefore *obiter*, meaning that they are not binding on lower judicial bodies. Whether the remarks about Article 10 in *Sugar* are part of the *ratio* is a more difficult question: only one justice considered the issue in any depth and two (out of the five) did not consider it all. One of the other two who did, Lord Wilson, differed from the other four on the construction of the phrase 'in respect of information held for purposes other than those of journalism, art or

[19] [2012] 1 WLR

[20] [2006] 2 WLR 570

[21] The example given was the House of Lords decision in *X(Minors) v Bedfordshire County Council* [1995] 2 AC 633, from which successful complaint was made to the ECtHR in *Z v United Kingdom* (2001) 34 EHRR 97

[22] [2009] 1 AC

literature' in part VI of schedule 1 to FOIA which was at the heart of the decision. However, the question is probably not one which the Tribunal need answer. This is because, even if *obiter*, considered analysis by Supreme Court justices is of such strong persuasiveness for the Tribunal as might in effect be considered binding. The analysis in *Kennedy* is of particular persuasiveness because it was a seven-justice court (albeit that not all spoke with the same voice). The Tribunal does note, however, that the ECtHR in *Times Newspapers and Kennedy* recorded [23] that HMG argued that '… the Supreme Court's conclusions as to the scope of Article 10 were expressly stated by Lord Mance to be *obiter*, and it would now be open to the High Court and Court of Appeal to revisit the question [whether judicial review was an effective remedy in the circumstances] in light of *Magyar …*'. If the High Court and the Court of Appeal are free to take account of *Magyar* despite *Kennedy* and *Sugar*, so, logically, must the Tribunal and the Upper Tribunal.

111. Mr Lockley and Ms Leventhal submitted (before they were aware of HMG's acknowledgement to the ECtHR) that, in line with *Kay* and *RJM*, the Tribunal had to ignore *Magyar*, on the basis that the latter was at odds with *Sugar* and *Kennedy*. At first sight, the proposition that the Tribunal should decline to do what section 2(1) HRA says clearly it must do – to take into account *Magyar* – is a startling one, and the proposition becomes more startling, not less, when the explanation is that this is what the House of Lords (in *Kay*) and the Supreme Court (in *RJM*) says it must do. There is no difficulty where the House of Lords/Supreme Court (and other precedent-setting judicial bodies) are analysing *existing* Strasbourg caselaw in applying Convention rights, because in that case lower judicial bodies are simply following the analysis of a higher judicial body. However, the position is more surprising where a Strasbourg decision post-dates earlier domestic analysis. Section 2(1) HRA says that courts and tribunals must take into account Strasbourg decisions 'whenever made or given'.

112. That said, the common law proceeds on the basis of precedent, itself reflective of a strict judicial hierarchy. If a higher judicial body says that the law is x, the Tribunal cannot say that it is y; if a higher judicial body says that a particular approach must be taken, the Tribunal cannot plough its own furrow. In the present context, in *Kay* Lord Bingham said that judicial bodies complied with their section 2(1) duty in the scenario under discussion by giving leave to appeal, including where appropriate by leapfrog to the Supreme Court. With Tribunal decisions, leave would need successively to be given from the Tribunal, the Upper Tribunal and the Court of Appeal for a case to reach the Supreme Court, all of which would take some considerable time.

113. It is nevertheless necessary to consider what the Supreme Court decided in *Sugar* and *Kennedy* and whether that is in truth inconsistent with the later ECtHR decision in *Magyar*, such that the *Kay* and *RJM* injunctions come into play. For what proposition, in other words, are *Sugar* and *Kennedy* authority (leaving aside the *obiter* issue)? It might be argued that the proposition was a narrow one: that, *as of the date of each decision* (in 2012 and 2014), the weight of Strasbourg authority, confusing though it was, was that Article 10 did not give a right to information from public authorities. Lord Brown led on the issue in *Sugar* and Lord Mance in *Kennedy*. Each considered in depth the Strasbourg caselaw (Lord Mance's burden was greater because there had been further ECtHR cases since *Sugar*). On this analysis, the Supreme Court's decisions simply constituted authoritative statements of where Strasbourg had reached, and were not predicting where it might go. In that narrow sense, there is no

[23] Para 84

inconsistency between *Sugar* and *Kennedy*, on the one hand, and *Magyar*, on the other, and the *Kay* and *RJM* decisions on precedent do not therefore apply.

114. A difficulty with this argument is that there was also confusing ECtHR caselaw about the substantive issue in *RJM* - whether Article 1 of the First Protocol (the right not to be deprived of property) extended to non-contributory social security benefits. The domestic courts which had ruled that, on the balance of that caselaw, it did not were, it could be said, also simply giving authoritative assessments for a snapshot of time only.

115. However, the position with domestic decisions about Article 10, and *Kennedy* in particular, may be different, for this reason. There was much discussion in *Kennedy* as to whether the direction of travel in Strasbourg was towards a right to information and, indeed, whether the destination had been reached. Lord Mance decided that it had not. What the Supreme Court did *not* say was that Strasbourg would never reach that destination. Clearly, it could not peer into the future in that way. The Strasbourg court is the guardian of the Convention and it is for it, not domestic courts, to decide how interpretation should evolve in light of social developments across the 47 contracting states. In *R (Ullah) v Special Adjudicator*, [24] Lord Bingham had suggested that it was the duty of the House of Lords to keep pace with the evolving Strasbourg jurisprudence 'no more, but certainly no less'. In *R (Al-Skeini) v Secretary of State for Defence*, [25] Lord Brown responded that the duty was to keep pace with it 'no less, but certainly no more'. The difference in emphasis reflects liberal and conservative approaches to deference to Strasbourg but each approach acknowledges that the ECtHR takes the lead on interpretation of the Convention and that domestic courts, even the Supreme Court, should seek to follow its rulings. In that connection, the Supreme Court was not in either *Sugar* or *Kennedy* saying, as it could have done under section 2(1) HRA, that it had decided not to follow Strasbourg caselaw: it was simply trying to make sense of it.

116. Seen in this way, *Sugar* and *Kennedy* are not inconsistent with *Magyar*. In each case, the Supreme Court decided that the ECtHR had not (yet) reached a clear conclusion that Article 10 could extend to the right to information. [26] *Magyar*, a decision of the Grand Chamber (and therefore of greater authority than those of ECtHR sections), decided that the time had now come to say that it could. It avowedly made a policy decision to that effect: [27]

> '*In short, the time has come to clarify the classic principles. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen*

[24] [2004] 2 AC 323

[25] [2008] AC 153

[26] At [94], Lord Mance said:

> '*Had it been decisive for the outcome of the appeal, I would have considered that, in the present unsatisfactory state of the Strasbourg case law, the Grand Chamber statements on article 10 should continue to be regarded as reflecting a valid general principle, applicable at least in cases where the relevant public authority is under no domestic duty of disclosure …*'

[27] [156]

from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right' (emphasis added)

It was the latter scenario that the ECtHR considered entitled someone to information held by a public authority where the information was of public importance and he or she intended to disseminate it. The fact that the ECtHR decided to go down a *different* path in this decisive way shows that the Supreme Court analysis in *Sugar* and *Kennedy* that the ECtHR had not *previously* chosen to do so is consistent, not inconsistent, with *Magyar*.

117. It is true that the Strasbourg Court – again, the Grand Chamber – made a similar policy decision in *Stec v United Kingdom* [28] (that Article 1 of the First Protocol did now extend to non-contributory benefits). However, The Tribunal's provisional view is reinforced by a comment by Lord Toulson in *Kennedy*: [29]

'*If the Leander principle [the traditional, narrow view of Article 10] is to be abrogated, or modified, in favour of an interpretation of article 10 which makes disclosure of information by a public body in some circumstances obligatory, it seems to me with respect that what the new interpretation would require is a clear, high level exegesis of the salient principle and its essential components*'.

The Grand Chamber in *Magyar* has now provided precisely that clear, high level exegesis. It has explained at some length when Article 10 gives a right to information. Lord Toulson clearly anticipated that it might do so. Lords Clarke and Neuberger agreed with the three justices who gave substantive judgments on Article 10 (Lords Toulson, Mance and Sumption) and so evidently thought those judgments were speaking with one voice. In this context, it would seem an odd result that courts lower than the Supreme Court and all tribunals should be debarred from applying *Magyar* simply because the Supreme Court had earlier decided (with every justification given the then caselaw) that the ECtHR had not yet extended Article 10 in this way. It might be many years before the Supreme Court has an opportunity to revisit Article 10 – and in the meantime the UK could be in breach of the provision if lower judicial bodies are not entitled to take account of *Magyar*.

118. For these reasons, the Tribunal would be inclined to conclude that *Sugar* and *Kennedy* were intended simply as authority as to where Strasbourg caselaw stood in 2012 and 2014 respectively and are therefore not inconsistent with *Magyar*. If this is wrong, the particular circumstances might be thought to fall within the class of exceptionality allowed for by both *Kay* and *RJM*, particularly given the constitutional nature of the (qualified) right to information represented by FOIA which the Supreme Court identified in *Kennedy* (indeed, a constitutional right of great significance, according to Lord Sumption): it is perhaps unlikely that the Court intended that a constitutional right of great significance should be circumscribed for as long as it takes for the lottery of litigation to produce a suitable case for the Supreme Court to reconsider the issue, when it had clearly anticipated that the ECtHR

[28] (2005) EHRR SE 295
[29] [148]

might bring the right to information squarely and authoritatively within Article 10. None of the other domestic cases were dealing with constitutional rights.

119. In short, there would be no bar, under the precedent decisions, to the Tribunal taking *Magyar* into account, on one or more of three bases: (i) HMG's acknowledgment in *Times Newspapers and Kennedy* that the Supreme Court's comments in *Kennedy* do not constitute binding precedent, thereby freeing up lower judicial bodies to have regard to ECtHR's later decision in *Magyar*; (ii) those comments and *Magyar* are in any event not at odds on proper analysis; and (iii) even if they are, the circumstances are sufficiently exceptional to justify departure from the guidelines on precedent set down by *Kay* and *RJM*.

iii. **Does *Magyar* assist Ms Gibbs?**

120. Ultimately, whether this analysis is right does not matter. The Tribunal does not believe that *Magyar* assists Ms Gibbs. This is because, in its view, the case is only likely to be relevant in the UK context to absolute exemptions. The ECtHR decided that the right to information applies where (*inter alia*) the information sought is of public importance. With qualified exemptions under FOIA, the Commissioner and the Tribunal must have regard to the public interest. They can therefore balance the public's interest in knowing information against other interests captured by the exemptions. Section 27 is a qualified exemption and the Tribunal has applied the public interest test, in many cases in Ms Gibbs' favour. Similarly, public interest is relevant to the no steps discretion. It is highly doubtful that the *Magyar* approach would lead to a different result, particularly given that Article 10 requires the same need to balance different interests.

121. True, the ECtHR in Magyar reiterated longstanding caselaw that the exceptions in Article 10(2) should be applied restrictively (there is no such principle with FOIA exemptions). It is also true that, unlike the prevention and detection of crime (equivalent to section 31), there is nothing explicit in paragraph (2) about international relations or protecting the interests of contracting states abroad. However, the Tribunal accepts Ms Leventhal's submission that the interests enumerated are sufficiently broad to encompass these. In fact, in relation to Nigeria, as is explained below the only UK interest which the Tribunal has accepted should trump the public interest in disclosure is the safety of British nationals and that of other nationals working for its missions, and that must be covered by one or more of '… public safety, for the prevention of disorder or crime, for the protection of health …' within paragraph (2), even allowing for the limited extra-territorial reach of the Convention beyond Europe. The 'prescribed by law' and 'necessary in a democratic society' preconditions in the paragraph are also met.

122. Importantly, Ms Gibbs does not argue that section 27 or 31 FOIA should be interpreted in a strained way, under section 3 HRA, to ensure compatibility with Article 10; still less, that they are incompatible with the Article.

123. In short: Ms Gibbs may well be entitled to rely on *Magyar* but in the particular circumstances it does not advance her case. Even allowing for her special status as a journalist and Corruption Watch's as a campaigning NGO, her Convention rights are fully protected by proper application of the public interest test in relation to section 27 and judicious exercise of the no steps discretion in relation to section 31.

B. Deference

124. Central to the FCO's case is that the Tribunal should accord considerable deference to the expertise of Mr Dixon and Mr Gooding. It relies on two principal authorities in this regard. The first is the Court of Appeal decision in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd and others intervening)*, [30] the denouement of long-running litigation arising out of the torture and other ill-treatment of a British subject, a former Guantanamo Bay prisoner, at the hands of the US Government with the alleged connivance of HMG. The precise issue in the latest round was whether it was appropriate to publish seven paragraphs redacted from a previous judgment on the basis of the assessment of the Foreign Secretary that that might impede the flow of intelligence from the US Government to HMG and therefore damage UK national security.

125. The Court of Appeal decided that the seven paragraphs should be published, but only on the basis that a US judge had by this time found as a fact that the claimant had suffered the mistreatment and torture he alleged and the Foreign Secretary's position about the impediment to the flow of information had in the circumstances become irrational. For present purposes, the significance of the decision is that the Court of Appeal said that courts should not lightly reject the judgement of the Foreign Secretary on intelligence matters, even where they are sceptical about it. Lord Neuberger of Abbotsbury MR said [31] that the court would normally expect to give great weight to the certificate at issue, given that the Foreign Secretary, with the benefit of his FCO and intelligence service advisers, was better able to assess the risk from disclosure of intelligence material than a judge.

126. The second case is the Upper Tribunal decision in *FCO v Information Commissioner and Plowden*. [32] Like the present case, at issue (*inter alia*) was section 27 FOIA. The request was for the record of a telephone call between Tony Blair and President George W Bush just prior to the Iraq War. The First-tier Tribunal agreed that section 27(1) was engaged but decided that the public interest favoured disclosing the information emanating from Mr Blair. Upper Tribunal Judge Jacobs, in allowing the FCO's appeal, said: [33]

> '*… There will be places to which [the expertise of Tribunal members] cannot reach. This is such a case. By its nature, the members will not have had personal experience of the diplomatic consequences of disclosure. The tribunal admitted as much in its reasons when it said that: "the executive branch of Government has expertise and experience in relation to foreign policy matters as well as security matters which the Tribunal cannot match". In such a case, the tribunal has to rely more on the evidence and less on its own experience in assessing the balance of the public interest than in the general run of cases …*'.

127. The deference principle is undoubtedly important. However, it must be seen in its proper context. As UTJ Jacobs recognised, it reflects the fact that a witness may have greater expertise than a court or tribunal in relevant subject-matter (indeed, a court or tribunal may have no relevant expertise). It is common sense that the court or tribunal should then defer

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[30] [2011] QB 218
[31] At [144]
[32] [2013] UKUT 0275 (AAC). See also *APPGER v Information Commissioner and the Ministry of Defence* [2011] UKUT 153 (AAC) at [56]
[33] Para 13

to the expertise of witnesses who do carry such expertise. The principle applies in all kinds of situations, not simply to evidence about intelligence matters or international relations. Indeed, in the present case it also applies to the evidence of DC Dainty, even taking into account his junior rank: he is likely to have greater experience about trials being aborted because of inappropriate pre-trial publicity than members of the Tribunal.

128. That said, it is indeed a principle, not a rule of law. Like all legal principles, it is to be applied flexibly, according to the particular circumstances. The caselaw does not say that, in matters of intelligence or international relations, the evidence of ministers or officials has to be accepted unquestioningly. Indeed, in *Mohamed*, the Court of Appeal made it clear that judicial forensic skills still have to be applied to conclusions from intelligence evidence. For example, Sir Anthony May P pithily summarised the constitutional separation of powers: [34]

> '*It is for the appropriate departmental minister, not the court, to judge and assert any risk to national security. It is for the court to judge whether the minister's judgment and assertion are rational and sufficiently evidence-based*'.

In other words, deference is not the same as subservience.

129. This is significant because national security, and the intelligence which underpins it, is the area of public life where the need for secrecy is the greatest, and the consequences of a court or tribunal inappropriately disregarding the caution of a minister or senior official potentially the most serious. The UK's relations with other countries are also extremely important, and the consequences of a court or tribunal inappropriately disregarding the judgement of a minister or senior official potentially still serious. But they are of a somewhat lesser order than national security and intelligence. That is no doubt why section 23 (information supplied by, or relating to, bodies dealing with security matters) is an absolute exemption whereas section 27 is qualified. (Section 24 (national security) is a qualified exemption but, under subsection (3), a certificate signed by a Minister certifying that the exemption is or was required for safeguarding national security is, subject to appeal rights, conclusive evidence of that fact). The FCO does not rely on either section 23 or section 24 in the present case.

130. Similarly, in *Plowden* UTJ Jacobs said that the Tribunal has to rely more on the evidence and less on its own experience – not that it has to accept the evidence and disregard its own experience. [35]

131. The UK is very fortunate in its senior civil servants. They are, with the rarest of exceptions, highly-educated and incorruptible and seek to serve governments conscientiously and with the maximum impartiality human beings can muster: all according to Northcote-Trevelyan principles. The Tribunal has no doubt that Mr Dixon and Mr Gooding fit the template. But, in relation to the application of FOIA exemptions, it also has to be conscious that, as Lord Mance put it in *Kennedy*, [36] 'unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection'. The Tribunal

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[34] [285]

[35] See also the Tribunal's decision in *Foreign & Commonwealth Office v Information Commissioner and Friends of the Earth* (29 June 2007), where the Tribunal rejected the argument of the FCO that it was bound by the FCO's assessment of likely prejudice from disclosure of communications between HMG officials and those of another state

[36] At [1]

does not believe that either Mr Dixon or Mr Gooding are consciously motivated in the present case by a desire to avoid embarrassment for the FCO or their colleagues. But a desire to avoid embarrassment or criticism, like bias, can be subconscious. As discussed below, the decision to grant a licence to CAS for the Horten calls for explanation, and the process leading to the FCO recommendation appears to have been inadequate, with no referral to Desk or Post. The Tribunal therefore has to be astute to ensure that judgements are not being clouded by self-protection.

132. Whilst the Tribunal claims no expertise in matters of international diplomacy, its ignorance is not as complete as with intelligence and national security. The default position is that diplomacy is normally conducted away from public gaze but this is by no means always the case. It is often conducted in public, sometimes by megaphone. Reporting diplomatic initiatives and exchanges is a staple of particularly the serious media (as with Brexit). It is by no means rare for HMG publicly to criticise other nations, even its allies (even, in recent times, its closest ally). The Tribunal would not be able to assess intelligence material or take much more than an ill-educated guess in judging whether its disclosure could harm national security. It feels at somewhat less of a disadvantage with matters pertaining to international relations (or UK interests abroad).

133. There is a further consideration. Norway and Nigeria are both democracies, with periodic elections at various levels. Both have free presses. But they are very different. Norway is a secular, Western-style liberal democracy built on the Westminster model. Whereas corruption in public life is the exception in Norway, it remains endemic in Nigeria, despite the best efforts of the Buhari regime. The foreign nature of Nigerian governance means that the Tribunal should be particularly wary of substituting its own judgement about how disclosure of information might affect UK-Nigeria relations or UK interests related to Nigeria. Tribunal members are not quite such innocents abroad with Norway.

134. In assessing the opinions expressed by the FCO officials, the Tribunal also has to ensure that they are based on a correct understanding of the law. In this respect, the Tribunal accords greater weight to the opinion of Mr Dixon than to that of Mr Gooding. Mr Dixon showed himself acutely aware of the need to draw a causative link between disclosure of particular information and prejudice to relations between the UK and Nigeria or to UK interests. It seemed to the Tribunal that Mr Gooding took more of an absolutist position. In both written and oral evidence, he focused more on the damage to trust and confidence from disclosure of information passing between governments *per se* than on the damage which particular disclosure could cause. At one point in his oral testimony, he said that he would not be impressed if another government revealed even administrative information he had provided, although his later position was more nuanced.

135. In fact, there is a particular exemption dealing with information obtained in confidence from other states. Section 27(2) provides: 'Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court'. That is a class-based exemption: prejudice does not have to be shown. The FCO might have relied on it to the extent that withheld information was given in confidence by the Norwegian Government, but it has not done so.

136. Parliament has not taken an absolutist position in FOIA. Section 27 is a prejudice-based exemption and, even if prejudice is shown, the public interest may dictate that disclosure should take place. That includes information given to the HMG via diplomatic channels. In

other words, the expectation of confidence has to be a qualified one because of FOIA. As Mr Gooding acknowledged, Norway knows about FOIA, just as the UK knows about the Norwegian equivalent. It follows that Norway can have no absolute expectation that HMG will not release information Norway gives it, any more than HMG can have an absolute expectation the other way round. The most that Norway can expect is that HMG will resist disclosure where appropriate, and the FCO has necessarily fulfilled that obligation by resisting disclosure of the withheld information. Responsibility for any inappropriate disclosure then rests with the Tribunal rather than HMG.

137. It is also worth noting that Mr Gooding only took up his current post in September 2017, over a year after the initial FCO response (the time the Tribunal has to focus on). He was endeavouring to assist the Tribunal to understand the basis for reliance on the exemption given the circumstances at the time. It is no criticism of him to say that he cannot speak about events in July 2016 with the personal authority he can about events now.

138. DC Dainty's evidence also merits diminished deference because of the absolutist position he took to disclosure. He struck the Tribunal as a dedicated and conscientious police officer, motivated by bringing white-collar wrongdoers to justice. But so concerned is that he that any trial of the protagonists in the transactions involving the hauks and the Horten is not prejudiced that he would prefer not to take any risks with FOIA disclosure. He was candid in saying that his priorities should take precedence over those of Ms Gibbs: any FOIA disclosure should await a criminal trial. From his perspective, that is a perfectly respectable position. But it is not what FOIA requires. As with section 27, section 31 is a prejudiced-based exemption, and a qualified one. Under the no steps discretion, the Tribunal's task is in effect to assess what risk (if any) FOIA disclosure now would represent to investigations or to the integrity of any trial and the prevention and detection of crime more generally and, even if prejudice could occur, whether there is greater public interest in disclosure than in withholding particular information.

139. The final point on deference is this. The expertise of Mr Dixon and Mr Gooding is, in the present context, in the prejudice to relations between the UK and Nigeria and Norway respectively and to related UK interests (only relevant to Nigeria). However, assuming that the Tribunal accepts their evidence about this, the public interest test still has to be applied. The public interest test necessarily involves a balancing of competing interests. In the present context, the public interest in withholding particular information is really coterminous with the avoidance of the relevant prejudice (i.e. the basis for the engagement of section 27(1)(a) and (c)). In that sense, the expertise of Messrs Dixon and Gooding is equally relevant to the *withholding* side of the public interest equation. But they have no more expertise in the *disclosure* side of that equation than any other informed member of the public, or therefore in how the balance should be struck. When an FOIA request is rejected, how the balance should be struck is for the Commissioner, first, and then the Tribunal, and they are obliged to make a judgement in the particular context about the importance of transparency relative to the interests protected by the relevant exemptions.

140. The Tribunal is conscious that UTJ Jacobs' remarks quoted above were in the context of the public interest test. However, strictly speaking those remarks were *obiter*. The *rationes* for his decision (set out under the heading *How the tribunal went wrong in law*) were, first, that the Tribunal did not properly identify the public interest in disclosure (Judge Jacobs described the information the Tribunal thought should be disclosed as 'not particularly informative') and, second, that the Tribunal had been wrong to isolate one half of the Blair-

Bush conversation. The judge's passage about deference is short. It would be surprising if he intended to say that the FCO witnesses in that case had expertise (to which appropriate deference should be shown) not only in the degree of prejudice to relations between the UK and the US which disclosure would be likely to cause but also in the benefits of disclosure, or therefore in how the public interest balance should be struck. All the officials could legitimately say is that prejudice was likely to be caused by disclosure and how much. The (First-tier) Tribunal in *Plowden* had accepted prejudice. Having applied due deference to expertise about prejudice (including how much), whether there is a greater public interest in disclosure must be for the Tribunal, freed of a need to be particularly deferential. The Tribunal understood Ms Leventhal to agree with this general proposition. Indeed, the need to apply the public interest balance with many of the FOIA exemptions is a principal reason why the Tribunal has lay members: those members are regarded as particularly qualified to judge where the public interest lies in any case, even where they are constrained by lack of expertise to accept the weight to be attached to the withholding side of the equation accorded by the public authority. If it were otherwise, the Tribunal (and the Commissioner) would be largely redundant in a case of this nature.

141. In short: the Tribunal has accorded considerable deference to the expertise of all the FCO witnesses in identifying and quantifying prejudice, but the degree of deference varies between the witnesses. In assessing public interest, it has certainly listened to the views of the FCO witnesses about how the balance should be struck but it has reached its own judgments.

C. Information already in the public domain

142. In all that follows, the Tribunal has had regard to the information which is, or was at July 2016, in the public domain, in assessing whether section 27(1) is engaged and in striking the section 27(1) public interest balance. In exercising its no steps discretion, it has also had regard to information which is now in the public domain or information which has been disclosed by the FCO even though not made public by Ms Gibbs (given that FOIA disclosure is generally deemed to be disclosure to the world at large).

143. However, the fact that information is already in the public domain is not determinative. Prejudice could still, in principle, arise from the fact that someone or something was being discussed at a particular time . Tone, extent of discussion and context are also relevant. Each of these considerations could constitute a new element afflicting the disclosure of public information with prejudice it would not otherwise possess.

D. Section 27

i. The approach

144. Section 27(1) provides, so far as material:

> '*Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
>
> *(a) relations between the United Kingdom and any other State,*
>
> *…*
>
> *(c) the interests of the United Kingdom abroad*

…

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

145. When marking up the revised close bundle after the hearing, the FCO differentiated between paragraphs (a) and (c) in relation to particular items of information for which it claims the section 27(1) exemption (as the Tribunal had invited it to do). Sometimes it claimed both paragraphs. However, in evidence Mr Gooding said that the FCO does not claim that disclosure of Norwegian information would prejudice UK interests (as distinct from the UK's relations with Norway). Unlike Nigeria, only paragraph (a) is therefore claimed in respect of Norway.

146. It is an oddity of section 27 and other prejudice-based exemptions that it is engaged either when FOIA disclosure would prejudice the relevant interests or when it would be likely to. Since the lesser threshold ('would be likely to') is always available, it is not obvious what function the higher threshold ('would') has.

147. The civil standard of proof applies to both limbs, such that the exemption is engaged if, on the balance of probabilities, prejudice would be likely to be caused. That inevitably lowers the threshold still further.

148. A leading case on section 27(1) is *CAAT*, where the Tribunal said: [37]

'*80. As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be "real, actual or of substance", as described in* ***Hogan*** *[38]*
81. However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the [Kingdom of Saudi Arabia (KSA)] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk'.

149. For the most part, the Tribunal adopts that analysis. The relevant meanings of 'prejudice' in the *Shorter Oxford English Dictionary* are 'injury, detriment or damage caused to a person

[37] [81]
[38] *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 (17 October 2006) at [30]. *Hogan* was a case about section 31. The reference to 'real, actual or of substance' emanated from the Minister sponsoring the Freedom of Information Bill in the House of Lords, Lord Falconer of Thoroton QC: Hansard HL vol 162 col 827 (20 April 2000)

by judgement or action in which his rights are disregarded; hence injury to a person or thing likely to be the consequence of some action'. This captures the fact that actual harm is not essential as long as it is likely. A relationship can be prejudiced even though, in the event, no harm to it ensues. So, section 27(1)(a) is engaged where, on the balance of probabilities, it is likely that disclosure would either damage relations between the UK and Nigeria, or between the UK and Norway, or at least that there is a significant risk of this happening. The same approach should be taken to section 27(1)(c) and section 31(1). The risk of an adverse effect has to be significant because otherwise the threshold would be lower than Parliament can have intended. Significance is judged partly by possible consequences (see below).

150. Importantly, however, the lower the qualifying threshold in any particular case, the easier it will be to show that the public interest favours disclosure. [39]

151. The one qualification to the *CAAT* passage is that the present Tribunal doubts whether the need or otherwise for a particular diplomatic response adds very much. Whether and to what extent a response is required will be a strong indicator of whether the prejudice is of such a degree as to engage section 27(1). For example, if the diplomatic problem caused by disclosure can be resolved by a single telephone call or meeting, that probably means that there was no prejudice meeting the section 27(1) threshold in the first place. The position would be different if concerted efforts over a significant period of time were required to repair the damage, or if the damage could not be repaired in the short- or medium-term despite the best efforts at mitigation.

152. It is clear, both from the definition in section 27(5) and international law, that the FCO is correct to contend that the concept of a 'state' transcends individual administrations or politicians. So, the UK's relations are with Nigeria, not with the Jonathan or Buhari administrations; and similarly with Norway.

153. The Tribunal now explains its approach to the withheld information in relation first to Nigeria and then to Norway. It sets out in a closed annex where its approach leads it in relation to particular information in particular documents. In some cases, part of an email or other document is disclosable and part not.

ii. Section 27(1)(a): analysis - Nigeria

154. Unlike with Norway, there are no communications between HMG and the Nigerian Government in the withheld material. There is, therefore, no risk that disclosure would breach a reasonable expectation of confidentiality with consequent damage to relations between the two countries. Rather, a principal argument is that some of the material could be construed, albeit wrongly it is said, as demonstrating partiality on the part of HMG towards and against one or other of the major players in Nigerian politics, with a consequent damage to relations. Misinformation, it is explained, is part of the currency of political life in Nigeria and the fact that material did not, on any reasonable basis, demonstrate partiality was not necessarily decisive for the question of prejudice.

[39] See *Hogan* and *England and the London Borough of Bexley v Information Commissioner* EA/2006/0060 (10 May 2007)

155. The Tribunal accepts Mr Dixon's broad analysis. However, it doubts that disclosure of some of the withheld material could meet even the relatively low threshold for prejudice under section 27(1)(a). It is important to bear in mind that the FCO's abandonment of the no steps discretion in relation to section 27 means that the Tribunal has to view the situation as though it were July 2016, when the department gave its initial response to Ms Gibbs. At that time, Nigeria was just over one year into the Buhari administration, with nearly three years to go until the next scheduled presidential election. It is true that, when focusing on a particular time, the Tribunal can take into account later events to the extent that they throw light on the situation at that time. It is also true that, in July 2016, the FCO knew that there would be another election and that it was important that it continued to maintain even-handed relations with all the parties, not least because there could easily be another change of administration at the next election. For example, in July 2016 Mr Jonathan was still an active participant in Nigerian politics, with his eye on regaining power, and some officials from his presidential era were still in post.

156. For all that, however, the fact that the focus has to be 2016 rather than late 2018 (just a few months before the next election) is not without relevance. The atmosphere which Mr Dixon described as currently febrile was less feverish in 2016 and comments by HMG would therefore, to continue the pyrexic imagery, have been less likely to lead to a spike in temperature. Already by 2016 the comments were two years old.

157. That said, the Tribunal accords deference to Mr Dixon's view that significant prejudice would have been caused in 2016 by release of the relevant information. However, it has no hesitation in finding that the public interest favours disclosure of section 27(1)(a) material. In no particular order, these are some of the factors pointing to disclosure in addition to others identified by Ms Gibbs in her witness statement and pleadings:

- The importance of transparency in foreign policy generally (an objective acknowledged by the FCO)

- The particular importance of transparency in relation to arms exports (consistent with the protection of other important interests such as commercial confidentiality)

- The fact that, on the face of it, the export of an ex-military vessel to a company apparently controlled by an ex-militant calls for explanation and accountability. The fact that the FCO (or the DIT) has no statutory obligation to give reasons for export licence decisions does not, contrary to what it argues, detract from the need for scrutiny in the particular circumstances

- The fact that, unlike in Norway, there has been no parliamentary scrutiny of the export of the Horten or the three hauks which came via the UK

- Whether the FCO followed appropriate processes, bearing in mind that neither Desk nor Post was consulted prior to the recommendation for approval for the Horten and that Desk asked for the licence to be put on hold when it was eventually consulted. The FCO now acknowledges that earlier consultation was appropriate. [40] The fact that it did not happen underlines the importance of scrutiny of what did happen and whether the failure to consult may have had an effect on the FCO's decision to recommend grant of a licence

[40] See, for example, paragraph 49 of its skeleton argument

- The fact that HMG continues to maintain that the decision to grant the licence was correct (it is not for the Tribunal to second-guess the decision but, clearly, lessons are less likely to be learnt if any mistakes are not acknowledged)

- The potential impact of the export on human rights in a notoriously volatile region (relevant to Consolidated Criterion Two)

- What is the FCO's approach to Criteria Two and Three more generally

- Whether consideration was given to Criteria Seven (diversion) and, if so, what

- Whether Article 17 of the 2008 Order was correctly applied in relation to the three hauks which came via Felixstowe (to the extent that information within scope throws light on this)

- The extent of the FCO's knowledge about statements made to the Norwegian authorities and end-use at the material time and whether it knew or suspected that three of the hauks and the Horten came via the UK to circumvent Norway's embargo on military exports to Nigeria.

158. The Tribunal notes that the Commissioner, in her skeleton argument,[41] acknowledged that the grant of the export licence raised questions of very weighty public interest, both about whether it should have been granted at all (given the delicate security situation in the Niger Delta) and about the process which the FCO followed, in particular the failure to consult Post and Desk. In her decision, she considered that the FCO's arguments on public interest in relation to section 27 prevailed by only a narrow margin. The Tribunal believes that, for much of the withheld information, the balance is the other way.

159. It is important to stress that there does not need to be a smoking gun (to use an inappropriate analogy) for disclosure to be warranted. There is also a powerful interest in the public knowing that things were, in fact, done properly and that an export licence was granted on rational grounds. Only thus can there be confidence in FCO procedures and judgements. In *CAAT*, the Tribunal said: [42] '[The weight to be placed on transparency in government transactions especially in international dealings and the arms trade] becomes the greater where there is prevailing suspicion and some evidence of corrupt dealing or the giving of commissions or bribes, if for no other reason than to make clear that those circumstances did not apply in the instant cases'. The dispelling of suspicion where it is unwarranted is not only in the FCO's parochial interest; it is in the public interest. Absence of evidence can be as significant as its existence.

160. The Tribunal acknowledges that there is an important public interest in the avoidance of prejudice to relations with an important ally such as Nigeria, even if the prejudice would be at the lower end of the spectrum. Any prejudice to international relations is undesirable, particularly given the current volatility in the world order. Nigeria is an important partner of the UK, not only in Africa but in the Commonwealth and on the wider world stage. It is, in particular, a partner in the drive for better governance, of which the fight against corruption

[41] Paras 3 and 4
[42] [97]

and for transparency are key components. In addition, both countries are targets for terrorism and it is vital that intelligence-sharing is preserved. In all this, the ability to work together constructively and harmoniously is key.

161. However, Ms Gibbs argues (and the Tribunal accepts), it is as much in Nigeria's interest as the public interest in the UK that there should be maximum transparency about the Horten licence, particularly given that the Buhari regime has made the fight against corruption a central part of its mission. It is widely recognised that corruption and the poverty and injustice it spawns provides a fertile breeding ground for terrorism. The public interest therefore moves both ways in this respect.

162. The Tribunal has also taken account of the fact that there is considerable information about the Horten licence in the public domain, not least through the disclosure which the FCO has made, to the extent that Ms Gibbs has been able to co-author a report for Corruption Watch which does not pull any punches. However, the conclusions in that report are inevitably provisional, because they are based on incomplete information. There is a public interest in facilitating an assessment of whether the provisional should become more final.

163. For these reasons, the Tribunal has concluded that, if and to the extent that the withheld information relating to Nigeria engages section 27(1)(a), the public interest in disclosure outweighs that in withholding. That does not always avail Ms Gibbs because some material which the Tribunal considers is not caught by section 27(1)(a) (though within the general scope of the provision) is caught by section 27(1)(c).

iii. Section 27(1)(c) analysis: Nigeria

164. At the hearing, Mr Dixon identified the following 'interests of the United Kingdom abroad' for the purpose of section 27(1)(c):

- The safety of HMG staff and UK nationals, particularly given the history of kidnappings in the Delta
- Perception of the UK as a neutral honest broker
- A stable Delta
- A stable, secure and prosperous Nigeria so as to reduce migration flows to Europe and to militate against radicalisation
- The prosperity of UK businesses, especially in the Delta

165. With the exception of the first and maybe the last, it is perhaps questionable whether these constitute 'interests' within section 27(1)(c) but, to the extent that they do, there is no or insufficient causal connection between disclosure of the withheld information and prejudice to them: that would be considerably to overstate the significance of the information. Even if that is wrong, the public interest favours disclosure for the reasons set out above (this applies equally to any damage to the interests of UK businesses which disclosure could cause).

166. However, the Tribunal accepts that section 27(1)(c) is engaged where disclosure could endanger the safety of UK nationals in Nigeria and that of non-UK staff in UK missions. It does not accept Mr Castle's submission that section 27(1)(c) interests must relate to international relations. The UK has an interest in ensuring the safety of its citizens abroad and that of foreign nationals who work for it. In other words, paragraph (c) does not necessarily take its colour from paragraph (a). But there must be a causal connection between disclosure of requested information and the safety of British nationals and foreign employees, bearing in mind that information in the public domain may already have imperilled safety.

167. In his open witness statement, Mr Dixon said:

> '*The New Delta Avengers (**"NDA"**), a militant group in the Niger Delta, emerged in February 20166. Attacks by them on oil installations (including on Shell's Forcados terminal and Chevron's Escravos terminal) and threats to oil workers including kidnappings, combined with falling international oil prices, reduced oil production by more than half (from 2.2mbpd to less than 1mpbd) almost crippling the economy*''
>
> He elaborated on this in his closed witness statement and his closed evidence. It is difficult to assess how much of a risk to safety disclosure might cause. The correct approach, in the Tribunal's view, is that there are two facets to the assessment of risk: the chances of something bad happening and the seriousness of the consequences if it does. So, there may be a high chance of something happening even though the consequences may not be particularly serious; conversely, there may only be a small change of something happening but the consequences if it does could be serious. An example of the latter is where someone crosses a quiet country lane at 3am without looking: the chances of being hit by a car are small but the potential consequences serious.

168. This duality of approach to risk is that often taken by the law. For example, in *Overseas Tankship (UK) Ltd v The Miller Steamship Co* or *Wagon Mound (No. 2),* [43] which concerned damage resulting from an oil spillage and a consequent risk of fire acknowledged to be low, the Judicial Committee of the Privy Council held that loss is recoverable where the extent of possible harm is so great that a reasonable person would guard against it (even if the chance of the loss occurring is very small). Similarly, in *RJ, GMcL and CS v Secretary of State for Work and Pensions*, [44] a three-judge panel of the Upper Tribunal said that, for the purposes of the definition of 'safely' in regulation 4(4)(a) of the Social Security (Personal Independence Payment) Regulations 2013 '… in assessing whether a person can carry out an activity safely, a tribunal must consider whether there is a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case. It follows that both the likelihood of the harm occurring and the severity of the consequences are relevant …'.

169. In the same way, the Tribunal has asked itself whether there is a real possibility of harm to UK nationals and mission staff from release of withheld information and has

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[43] [1967] AC 617

[44] [2017] UKUT 105 (AAC) at [56] https://assets.publishing.service.gov.uk/media/5a7b1ef1ed915d3ed90624e3/_2017__AACR_32ws.pdf (9 March 2017)

concluded that in some cases there is. The chance of harm occurring may be small but not so small that it can safely be ignored. Kidnapping and murders have been rife in the Delta in the recent past, including that of British nationals. Mr Dixon expressed legitimate concern about the safety of staff at the consulate office in Port Harcourt in the Delta. Where section 27(1)(c) is engaged on this basis, the public interest favours withholding the information, for reasons which are self-evident.

iv. Section 27(1)(a) analysis: Norway

170. As explained above, Mr Gooding put his case on section 27(1)(a) on two principal bases: (i) breach of the reasonable expectation of confidentiality; and (ii) damage from the disclosure of particular communications.

171. As to (i), the Tribunal, paying due deference to Mr Gooding's assessment, is doubtful that prejudice would occur from the very fact of disclosure of communications passing HMG and the Norwegian Government, whether via diplomatic channels or otherwise. Both countries are aware that the other has freedom of information legislation under which a member of the public has a *prima facie* right to information, subject only to various exemptions. As already noted, the expectation can only be that each government will resist disclosure of information which is genuinely sensitive, including if necessary by opposing proceedings for its release. Each understands that ultimately decisions lie within the judicial system.

172. A more realistic approach, therefore, is to consider whether there is information in category (ii) the disclosure of which would be likely to prejudice relations between the two countries. For the most part the Tribunal considers that the withheld information does not meet that test (again paying due deference to Mr Gooding's assessment). There are, however, a couple of examples, set out in the closed annex, where it accepts that it does. The comments in question, not made by FCO officials, are gratuitous and meet the section 27(1)(a) threshold, with little public interest in disclosure.

173. The Tribunal is fortified in its general conclusion on engagement with regard to relations with Norway by the very closeness of the two countries, in terms of economic reliance on one another but in particular of their mutual interests on the world stage (see in particular the paragraph from Mr Gooding's closed statement which he agreed could be released). These factors mean, in the Tribunal's judgment, that it is highly unlikely that either country would allow communications about a relatively small arms export to prejudice relations. As Mr Gooding says in his open statement, '[the UK and Norway] are NATO allies and share many global objectives from conflict prevention and resolution, to development'.

174. The gist of his closed evidence refers to a third consideration: '… it is particularly important in the context of Brexit that relations with Norway are not damaged. The request was made just prior to the referendum and the initial response shortly after it'. There has been much public discussion about the merits and demerits of the UK's future relationship with the EU being on the same or similar basis as Norway's. It is again difficult to see that either country would allow this export adversely to affect the much larger issues at stake. However, the Tribunal accepts Mr Gooding's assessment that it is particularly important in the context of all the uncertainty caused by Brexit that good relations are maintained with

Norway, as with other countries within the broader EU orbit. It is possible that the Brexit factor might take some of the withheld information over the section 27(1)(a) threshold.

175. Ultimately, it again does not matter. Except for the identified examples, the Tribunal's judgment is that, if and to the extent that section 27(1)(a) is engaged for any of the Norway information, the public interest favours disclosure, for much the same reasons as set out above.

E. The no steps discretion based on section 31(1)

i. Introduction

176. Formally, section 31(1) is no longer in issue. The Commissioner decided that it was not engaged at the time of the initial FCO response and the FCO now concedes that that is correct. However, it contends that the Tribunal should exercise the discretion it has parasitic on the Commissioner's under section 50(4) FOIA (the no steps discretion) not to require the FCO to disclose some of the withheld information. The Commissioner agrees with the FCO's general position. Ms Gibbs argues that this is not an appropriate case for exercise of the no steps discretion.

177. Although not formally relied upon, the no steps discretion, if exercised, would be rooted in section 31(1), which provides:

> '*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
>
> *(a) the prevention or detection of crime,*
>
> *(b) the apprehension or prosecution of offenders*
>
> *(c) prejudice to the administration of justice*'

178. Unlike with section 27(1), the FCO has not differentiated between paragraphs (a) and (b) of section 31(1) in relation to the no steps discretion. This is because there is considerable overlap in the ground the paragraphs cover.

ii. Which possible offences are in issue

179. Four individuals associated with CAS have been arrested, three of them in January 2015 and the other a year or so later. They are not currently on police bail.

180. It is important to identify for which offences the individuals are being investigated and in respect of which any investigation and trial which could, in principle, therefore be prejudiced by FOIA disclosure. There have been investigations by two different agencies: HMRC and the CoLP. HMRC could, of course, only investigate alleged offences falling within its remit. In the present context, these relate to the import and export of the three hauks and the Horten. CoLP has been investigating more general offences, such as bribery and money-laundering. The two investigations have been entirely separate – indeed, DC Dainty barely concealed his frustration at the lack of cooperation by HMRC.

181. Crucially, the HMRC investigation is closed. It has decided not to press any charges. Many of the documents in respect of which the Commissioner and the FCO argue for the no steps discretion relate to HMRC offences. This is misconceived. Self-evidently, there can be no prejudice to an investigation which is closed or to a trial which will not take place. The only possible prejudice is in respect of CoLP offences. There was some mention at the hearing about CoLP now investigating alleged false representations, but it is difficult to believe that it would duplicate the work of HMRC, particularly when the latter had concluded that charges were not warranted.

iii. Distinction between FOIA disclosure and prosecution disclosure

182. It is also important to bear in mind the distinction between disclosure under FOIA and disclosure by the prosecution to defendants in a criminal trial. Under section 3(1) Criminal Procedure and Investigations Act 1996 (CPIA), a prosecutor must 'disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'. There is an obligation on the prosecution continually to review the material until the conclusion of the case. The police and prosecution have to schedule all the material they gather whether or not they intend to use it in any trial.

183. It follows that the question for the Tribunal is not whether disclosure of the withheld information could help the putative defendants. If and to the extent that it could, it will have to be disclosed to them in any event. The Tribunal is concerned with disclosure to Ms Gibbs and, thereby, to the world at large since she will be able to use it free of constraint. Given her role as an investigative and campaigning journalist and the fact that she clearly regards the report she co-authored for Corruption Watch as unfinished business, it must be assumed that she would put information disclosed as a result of the Tribunal's decision into the public domain. It is the effect of that publication, as opposed to disclosure under CPIA, which must engage section 31(1) interests if the no steps discretion is to be exercised in favour of the FCO.

184. In this connection, it is significant that DC Dainty explained that all the withheld information currently resides in unused schedules. Although that might change – and defendants are entitled to ask for material in unused schedules – this gives an important pointer about the relevance or otherwise of the information to the ongoing criminal process. The CoLP request for a charging decision from the CPS appears to be based on the information it has gathered independently rather than on the withheld information it has (belatedly) received from the FCO. That is not surprising because neither the FCO nor any of the other government agencies involved in the discussions represented by the withheld information were investigating the CoLP offences.

iv. The need for exceptionality

185. The no steps discretion may only be exercised in exceptional circumstances: see the Upper Tribunal decision in *Information Commissioner v HMRC and Gaskell*. [45] This is because it would otherwise in effect give a public authority two bites at the cherry – an exemption could either apply at the time of the initial response or when the Commissioner

[45] GIA/3016/2010 (20 July 2011)

or Tribunal made its decision. A requester has no such luxury (true, he or she could repeat the request but, even if not met with section 14(2) (repeated requests), a fresh request will inevitably cause delay, especially if the public authority again resists disclosure). In *Home Office v Information Commissioner and Cobain*, [46] Upper Tribunal Judge Wikeley, drawing on what he identified as the default position under FOIA that requested information should be disclosed, said that the onus of proof lay on a public authority arguing for the no steps discretion. Indeed, it was because of the need for exceptionality that Ms Leventhal realistically accepted that the no steps discretion was not appropriate for section 27.

186. That said, the Tribunal accepts that exceptionality does apply if and to the extent there would be a realistic risk to an investigation into or prosecution of the CoLP offences. Under the Bribery Act 2010, the maximum penalty for bribing another person, including a foreign official, is 10 years in prison. Parliament has thereby signalled that, reflecting the UK's international obligations, it regards bribery as a serious offence. It follows that the Tribunal should not do anything which could realistically imperil the prospects of bringing to justice individuals who it is alleged have engaged in bribery, including of an official of an important European ally. In other words, whether FOIA disclosure could realistically prejudice a successful prosecution and whether the no steps discretion should be exercised really collapse into a single question. Similarly, there is a strong public interest in not prejudicing prosecutions for money laundering, a key feature of the illicit arms trade. Indeed, it cannot be in Ms Gibbs' or Corruption Watch's campaigning interests for a prosecution arising out of the transactions in question to be thwarted. [47]

v. <u>The law relating to prejudice to a fair trial and its application here</u>

187. Given the gravity of what is alleged in relation to the CoLP offences, the Tribunal assumes that any trial would be by indictment and therefore with a jury.

188. As explained above, the CPS declined to give the Tribunal guidance, even at a relatively high level of generality, of the approach of the courts to prejudice to a fair trial. This was because it said it did not know enough about the case. The parties did, however, make helpful post-hearing submissions.

189. Mr Castle correctly identified that there are really three questions in the context of section 31(1): (i) whether FOIA disclosure could realistically prejudice investigation; (ii) whether it could realistically prejudice a successful prosecution; and (iii) whether it could realistically prejudice a fair trial. The second and third, in particular, overlap.

190. As to (i), although DC Dainty and A White of the CPS gave a nod in the direction of prejudice to a CoLP investigation (i.e. to one aspect of section 31(1)(b)), they do not convincingly explain how FOIA disclosure could have that effect. Indeed, since the CPS says it does not know enough about the case to assist the Tribunal, little weight can be given to its assertions in this or any other respect. It was clear from DC Dainty's evidence that his prime concern is about a judge ruling that a fair trial was not possible.

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[46] [2015] UKUT 0027 (AAC) at [25] (20 January 2015)

[47] In her Response to the FCO's appeal **[0B/124]**, she says that she does not want to endanger a criminal investigation

191. As to (ii), it is very difficult to see how FOIA disclosure of material the CoLP has placed in unused schedules could make the task of a prosecution more difficult. To the extent that it could, it would have to be disclosed to the defendants in any event.

192. This case is really about (iii). In this respect, the following principles may be derived from caselaw as to when a submission by a defendant that advance publication prevents a fair trial might succeed:

- The ability of the trial judge by direction to eliminate or at least minimise any pre-judgement by jurors is central. In *Montgomery v. H.M. Advocate; Coulter v. H.M. Advocate*, [48] the Privy Council said, in the context of the right to a fair trial by an independent and impartial tribunal guaranteed by Article 6 of the Convention:

> *'... the question is not confined to the residual effect of the publicity on the minds of each of the jurors. Account must also be taken of the part which the judge will play in order to ensure, so far as possible, that the defendants will receive a fair trial. An examination of the measures which he can take under the system which has been laid down for the conduct of criminal jury trials forms an important part of the whole exercise*'.

In *R v Abu Hamza*, [49] the Court of Appeal observed:

> '*The fact ... that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties*'

- The proximity of the publication to any future trial may be an important consideration. The Privy Council in *Montgomery* quoted with approval the Lord Justice General's observation in *Stuurman (Jan Cornelius) v HM Advocate*: [50]

> '*The publications occurred almost four months before the trial diet was called. In considering the effect of these publications at the date of the trial the Court was well entitled to bear in mind that the public memory of newspaper articles and news broadcasts and of their detailed contents is notoriously short and, that being so, that the residual risk of prejudice to the prospects of fair trial for the applicants could reasonably be expected to be removed by careful directions such as those which were in the event given by the trial Judge*'.

Similarly, in *Ali v United Kingdom*, [51] the ECtHR said:

> *'Even in cases involving jury trials, an appropriate lapse of time between the appearance of any prejudicial commentary in the media and the subsequent*

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[48] 2003] 1 AC 641 http://www.bailii.org/uk/cases/UKPC/2000/D1.html
[49] [2007] 1 Cr.App.R.27
[50] 1980 JC 111 at p123
[51] (2016) 62 EHRR 7 at [89] https://hudoc.echr.coe.int/eng#{"fulltext":["ali v united kingdom"],"itemid":["001-155715"]}

criminal proceedings, together with any suitable directions to the jury, will generally suffice to remove any concerns regarding the appearance of bias (see Beggs, [no. 15499/10, § 123, 16 October 2012] … § 124-128; and, as regards in particular the importance of jury directions, Pullicino v. Malta (dec.), no. 45441/99, 15 June 2000; and Mustafa (Abu Hamza), cited above, §§ 39-40). In particular, where the impugned newspaper reports appeared at a time when the future members of the jury did not know that they would be involved in the trial process, the likelihood of any appearance of bias is all the more remote, since it is highly unlikely that the jury members would have paid any particular attention to the detail of the reports at the time of their publication (see Beggs, cited above, § 126). In such cases, a direction to the jury to disregard extraneous material will usually be adequate to ensure the fairness of the trial, even if there has been a highly prejudicial press campaign (for an example where such a direction was sufficient, see Beggs, cited above, § 128). It is essential to underline in this respect that it is reasonable to assume that a jury will follow the directions given by the judge in the absence of any evidence suggesting the contrary (Beggs, cited above, § 128; and Szypusz v. the United Kingdom, no. 8400/07, § 85, 21 September 2010)'.

In that case, the period in question was just five months.

- Account must be taken of the totality of pre-trial publicity: *A-G v Independent Television News Ltd* [52]

- Whether the publication reveals any evidence which could be ruled inadmissible: *A-G v Times Newspapers Ltd* [53]

193. Applying these principles to the present case, the Tribunal has concluded that it should not exercise its no steps discretion in relation to the vast majority of material for which the FCO and the Commissioner, to slightly different extents, contend it should be exercised. Its reasons are as follows. First, as already noted, much of the material is relevant only to HMRC offences. Second, by currently scheduling it as unused material the CoLP appears to believe that it is not relevant to the offences it is investigating. Third, no decision has yet been taken to charge anyone. Fourth, any trial is some considerable time away (perhaps 18 months). Fifth, as a result no juror has been chosen. Sixth, there is considerable information available on the internet about the export of the hauks and the Horten, including the Corruption Watch report and information around the Norwegian inquiry, without any suggestion that *that* material would prevent a fair trial. Seventh, the decision to grant a licence for the Horten has thus far excited little mainstream media interest in the UK (with just two articles, in the *Guardian* and the *Independent*): it is perhaps unlikely that publication over the next few months of withheld information will change that.

194. Finally, and most importantly, even if any prejudice were *prima facie* caused by FOIA disclosure in the near future, the trial judge could ensure by appropriate directions that the jurors approached their task in an impartial manner, basing their decision simply on the evidence before them, and that the defendants could therefore receive a fair trial.

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[52] [1995] 2 All ER 370

[53] [2012] EWHC 3195 (Admin)

195. Ms Leventhal relies on the Tribunal's decision in *Hargrave v Information Commissioner*. [54] The issue in that case was whether Mr Hargrave was entitled to information held by the National Archives about an investigation by the Metropolitan Police into an unsolved murder committed in the 1950s. His case was that the investigation had been inadequate, even corrupt, and that a further investigation was needed. The Tribunal held that the National Archives was entitled to rely on section 31(1)(a), (b) or (c) because there was still a significant possibility that there might be a trial and some of the information from the police files, if disclosed under FOIA, could prejudice it.

196. The Tribunal derives little assistance from the decision. The requested information was directly relevant to the police's investigation into the murder. The Tribunal accepted [55] that the police file would 'contain a wealth of information and conjecture which would not amount to admissible evidence'. It is obvious that, if the alleged perpetrator were identified and charged, pre-trial publication of such material could prevent a fair trial, even with a strong direction from the judge. In the present case, the withheld information does not relate directly to CoLP offences.

197. In response to post-hearing directions, Mr Lockley explained the Commissioner's approach to the next steps discretion:

> '*Her guiding principles have been that where, as here, there is a significant chance that criminal proceedings may result, a cautious approach is justified. However, it is not appropriate to order no steps in relation to <u>any</u> information that could have <u>some</u> bearing on an eventual trial, particularly given the detailed factual picture already in the public domain. The Commissioner has therefore concentrated on information that has some clear relevance to what she understands to be the alleged offences: that is, information that discloses something about the allegedly false statements made by CAS Global as part of the licensing process, or about the degree of knowledge of UK Government officials about those statements*'.

198. The Tribunal does not accept that revealing the degree of knowledge on the part of officials about any false statements made by CAS need have any impact on any trial. It does accept, however, that a handful of statements made by officials which could be read as commenting adversely on the integrity of likely defendants could prejudice a fair trial. It has therefore exercised its next steps discretion in relation to those statements. This is because some jurors might regard comments by civil servants, [56] even those not involved in criminal investigation, about integrity as authoritative, even in the face of a direction by the trial judge that they should ignore them and even if the comments were not directly about CoLP offences. Those comments are identified in the closed annex.

199. In further post-hearing submissions, Mr Lockley cited section 31(1)(c), which is concerned with 'prejudice to the administration of justice'. This, he said, was even broader than paragraph (b) – 'prejudice to the prosecution of offenders'. He suggested, in relation to paragraph (c), that '… the authority of the criminal court may appear to be undermined if evidence which is normally controlled through its processes is disclosed by other routes'. Even allowing for the fact that the no steps discretion is not constrained by any particular

[54] EA/2007/0041
[55] [33]
[56] UK or Norwegian

aspect of the exemption which underpins it (or indeed anything else), it is now far too late to raise paragraph (c). In any event, it adds nothing to the arguments. Release of withheld information would not prejudice the general administration of justice. FOIA is as much part of the justice edifice as criminal proceedings, and there is no principle that it cannot be used to obtain information which might be of interest in the context of separate proceedings.

200. From post-hearing submissions there is one document in respect of which the Commissioner, certainly, and the FCO, it appears, accept that the public interest justifies any prejudice to section 31 interests: a submission by the MCA to the Minister for Transport on 16 April 2014 **[CB/144C-D]**. The Tribunal agrees that the submission should largely be disclosed, but on the basis that disclosure would be unlikely to prejudice section 31 interests rather than that the document is of such import that the public interest justifies such prejudice.

vi. Breach of protocols with Nigerian and Norwegian authorities

201. DC Dainty worried that FOIA disclosure would breach protocols (to use a generic term) between UK authorities and their Nigerian and Norwegian counterparts and that this would mean that the latter would be less inclined to share information in the future (including in relation to Operation Angus). The UK honouring bilateral protocols is clearly important, as is the free flow of information between countries in the fight against serious crime.

202. The Tribunal was not shown the protocols and therefore cannot assess whether FOIA disclosure would constitute breaches. Even if it would, since the evidence is that both Nigeria and Norway are aware of FOIA they must have known that some information which they shared might become public. In addition, it is not in the interests of either country to cease without very good grounds giving information to UK authorities, because that would lead to a drying up of information which they need from the UK.

203. In any event, the damage which DC Dainty identified would have resulted equally in July 2016. Exceptionality is therefore not demonstrated. Finally, to the extent that section 31(1) would have been engaged then for this class of information, in the Tribunal's judgment the public interest would have favoured disclosure, again for much the same reasons as outlined above. That is highly material to the no steps discretion if it arises.

F. Section 40(2) (third party personal data)

204. The earlier dispute about the FCO's application of section 40(2) FOIA had effectively been resolved by the FCO agreeing to reveal the domain names in email addresses so that Ms Gibbs could see which Government departments were corresponding. No domain name is shown where an email is internal but it should in most cases be clear from the context which department was involved (in any event, under FOIA public authorities do not have a duty to create information). Section 40 did not feature in pre-hearing submissions or during the hearing itself.

205. However, in his post-hearing submissions Mr Lockley argued that the names of senior civil servants and Government press officers in the additional documents should be released. Neither Mr Castle nor Ms Leventhal has had the chance to comment. It is again too late to raise this issue, not least because logically the Tribunal would need to consider whether the names of senior civil servants and press officers in the original documents should also be

released. There would need to be a further round of submissions and deliberations. That would represent disproportionate use of resources, contrary to the overriding objective.

206. The FCO may wish to consider Mr Lockley's arguments on a voluntary basis. The Tribunal simply notes that it is far from clear that, applying data protection principles, the names of Government press officers should be released because, whilst they are dealing with matters which may end up in the public domain, they are not normally identified.

Conclusion

207. For these reasons, Ms Gibbs' appeal is allowed in part (relating to section 27) and so to a limited extent is the FCO's (relating to the no steps discretion). Some of the information which the Commissioner and the FCO, separately or in conjunction, argued should remain withheld need not be released, as indicated in the confidential annex. The remaining withheld information should be disclosed to Ms Gibbs within 28 days or the conclusion of any appeal proceedings initiated by the Commissioner or the FCO (depending of course on the outcome of those proceedings).

208. The decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 20 December 2018