



Appeal number: EA/2020/0105

V¹

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Between

MOHAMED MOHAMOOD ABDULLAH Appellant

- and -

INFORMATION COMMISSIONER Respondent

**TRIBUNAL: JUDGE LYNN GRIFFIN
 TRIBUNAL MEMBER ANNE CHAFER
 TRIBUNAL MEMBER RAZ EDWARDS**

**Appearances: The Appellant appeared in person
 The Respondent did not attend and was not represented**

By video hearing on 30 April 2021

¹ V: video (all remote)

DECISION

The appeal is allowed.

The Tribunal's Decision Notice in appeal reference EA/2020/0105 is substituted for the Commissioner's Decision Notice FS50895606 dated 4 March 2020.

Substituted decision

1) The Appellant has requested documents related to his father's military service.

2) The Tribunal is not satisfied that the public authority, the Ministry of Defence

(a) conducted sufficiently detailed searches in order to locate the service records of the Appellant's late father.

(b) had provided advice and assistance to the Appellant in accordance with the duty under s16 FOIA to provide such assistance that is reasonable in the circumstances.

3) The Tribunal requires the public authority to take the following step to ensure compliance with the legislation.

The Ministry of Defence shall make a fresh response to the Appellant's request for information which will be subject to the rights given under s50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.

4) The public authority must take these steps within 35 calendar days of the date on which the Information Commissioner sends them notification of this decision in accordance with the Direction below.

5) Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Act and may be dealt with as a contempt of court.

Directions

1. The Information Commissioner is directed to send a copy of this decision to the Ministry of Defence within 28 days of its promulgation or an unsuccessful outcome to any appeal that is made.

2. A copy of the bundle pages E195 -256 and the document submitted by the Appellant on 26 April 2021 should be sent with the copy of this decision UNLESS the Appellant objects to that course in writing, copied to the Tribunal, within 14 days of the promulgation of this decision.

REASONS

Mode of hearing

1. The proceedings were held by the cloud video platform. All parties joined remotely.
2. The Appellant represented himself. The Respondent had indicated that she did not intend to participate in the hearing and relied on her response which maintained the position set out in the decision notice.
3. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Evidence

4. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 264 and a further document submitted by the Appellant on 26 April 2021. References in this decision in square brackets are to pages in the open bundle.
5. The Tribunal heard from the Appellant. His first language is not English but the Appellant's language skills were more than sufficient to understand the questions he was asked and to communicate his answers to the Tribunal. The connection was stable and apart from a momentary interruption due to the sounds of music being played which meant that the Appellant could not hear until he closed the door to his room, there were no other interruptions in the hearing.

Background to Appeal

6. Before he died the Appellant's father, Mr Mohamood Abdullah Hasan told his son that he served the British Crown in the conflicts in Korea, Suez and Aden where he was wounded in the neck and hand in the war at Little Aden in three days of fighting. The Appellant believed his father to be a "Royal Navy Soldier".
7. The Appellant believes that his father began his military career at a young age before becoming a fully-fledged soldier as he reached his majority. He had told his son that as part of his service he had been sent to London to study the

law of the Navy and fighting. His father said he was working in the Navy store alongside his studying and that after he passed the exam he was sent to Aden [45]. He had worked at the Aden headquarters.

8. Mr Hasan was still serving in Aden when, in 1966, he travelled to Somalia to visit his ailing father, this Appellant's grandfather. In Somalia he was arrested and put in jail where he was kept until 1991 by which time he was in poor health due to the conditions of his imprisonment. This Appellant believes that he was imprisoned because he was a serving member of the British forces and that his father had never resigned from his service. On his release he was unable to contact any authorities in Aden due to the change in government but during an interview with the British Embassy, once his documents had been examined, questions had been asked about why he ran away from the army.

9. The Appellant was born in 1994. His father died in 2013 aged 80, and his mother passed away in 2018 at the age of 48. The English version of the Appellant's father's name, Mohamood Abdullah Hasan, is a translation from the Arabic and so the Appellant could not be sure if there were other possible acceptable spellings such as a double 's' in Hassan instead of a single letter. His father used both Mohamood Abdullah Hasan and Mohamood Abdullah but the Appellant did not know what name he had used when in the military.

10. The Appellant describes himself as a person without nationality for any country. He lives in Ethiopia. He has tried to establish a right to a British passport and has contacted the British Consulate and High Commission in Nairobi in that regard. As part of that process he was asked to obtain his father's record of service to support his application for late registration of his birth.

11. This appeal is not about this Appellant's nationality or any right derived from his father. Neither is this appeal about whether or not, or in what way, the Appellant's father served the British Crown. This Tribunal has no power to determine those issues and nothing we say should be interpreted as an expression of opinion on that issue.

12. This appeal is about the request for information that this Appellant made to the Ministry of Defence in an effort to obtain his father's service record and the decision of the Information Commissioner in response to this Appellant's complaint made under section 50 Freedom of Information Act 2000 ['FOIA'].

The request

13. The Appellant made a request for information to the Ministry of Defence ('MOD') on 3 September 2019. We have not been provided with a copy of the original request but its content is reflected in the documents as being a request for his father's Royal Navy service record.

14. We considered whether to adjourn to obtain a copy of the request but decided that this was not in the interests of justice having regard to the overriding objective when the case could be determined fairly and justly on the basis of the evidence before us.

15. We accepted the Appellant's evidence that he had sent supporting documentation to the MOD as he had done to the British diplomatic services. This was consistent with the Appellant's approach to his complaint to the Information Commissioner and the way in which he has conducted this appeal.

16. The response of the MOD [C119] to his request was made on 25 September 2019. In the interim they had made no attempt to contact the Appellant. The response stated that after an unspecified "extensive search" of the Naval database and "all databases available" the MOD had been unable to locate any record of Mr Hasan having served in the Royal Navy.

17. There followed correspondence in which the Appellant expressed his disappointment at the outcome provided by MOD. The Royal Navy Disclosure Cell then wrote on 30 September to confirm that they could not find any service record of the Appellant's late father and that the number he had provided was not a Royal Navy service number.

18. The Appellant wrote to the MOD on 26 October 2019 requesting an internal review. In that review [C121] dated 21 November 2019 the MOD stated that the request had been treated as a request for information under their publication scheme.

19. The internal review set out that "all relevant searches had been made", and there was no record of 'Mohamood Abdullah Hasan' having served in the Royal Navy in the period stated by the Appellant. The MOD had extended the search to include the archives of the British Army and Royal Air Force. The use of quotation marks around the name is important as the details of the relevant searches are not set out in the internal review and the Tribunal concluded from

their use that it was more likely than not that this was the only formulation of the name that was searched for by the MOD. No evidence was provided of any other alternative formulation or spelling of the name that had been used in the search criteria.

20. The Tribunal also concluded that the extension of the search to the other services indicated that the initial response's assertion that all available databases had been searched was not accurate in terms of what was available to the MOD as opposed to a section thereof.

21. The MOD internal review considered the question of advice and assistance under s16 FOIA. The review stated

"It is possible that your father worked alongside British Armed Forces while serving in the Armed Forces of another nation. Unfortunately, there is no useful advice or assistance that I can provide you to help identify the country for which he may have completed his military service."

The review concluded that the MOD was unable to provide any specific advice and assistance under s16 FOIA.

22. The Appellant complained to the Information Commissioner on 22 November 2019 [D124]. He enclosed background information about his father. These included an identity card of his father's that entitled him to be in Aden, which showed his name as 'Mohamood Abdullah' without reference to 'Hasan' and the signature as 'Mahmoed'. The card also shows his nationality as 'British Pro Person'; this may be an indication that he held British protected person status at that time.

23. The Appellant sent emails to the Respondent explaining more of the background and his aims in relation to establishing his father's entitlements and his own nationality.

24. In a letter to the appellant dated 27 February 2020 [D189], the Respondent correctly identified the range of her enquiry as follows; a stated approach that was repeated in the text of the decision notice in due course

"...the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request."

In applying this test the ICO will consider the scope, quality, thoroughness and results of the searches, and/or any other explanations offered as to why the information is not held."

25. The Appellant having indicated he required a formal decision, the Commissioner issued Decision Notice FS50895606 dated 4 March 2020 [A1]. She decided that on the balance of probabilities that she was satisfied that the MOD did not hold the Appellant's father's service record. This conclusion was reached on the basis of her conclusions that the MOD

- a) had conducted sufficiently detailed searches in order to locate the service records of the Appellant's late father.
- b) searched not only the relevant records of the Royal Navy, but also the relevant records of the Army and Royal Air Force.
- c) stated that the service number provided by the Appellant is not a valid one assigned to the British Armed Forces.

26. When making this decision the Commissioner did not ask the MOD for any further information. If she did she has not provided that material to the Tribunal. Paragraph 12 of the decision notice relies on the internal review to set out the MOD position.

27. Further, it appears that the Respondent did not require any clarification or submissions from the MOD. In the only email to the MOD from the Commissioner's office [D192] it is stated

"Given the particular circumstances of this case I do not need the MOD to provide the ICO with any submissions to assist us with our consideration of this matter."

28. The Tribunal concludes from this that the Respondent relied solely on the MOD response and internal review [C119- 121] in reaching her conclusions. This is consistent with the text of the decision notice.

Appeal to the Tribunal

29. The Appellant's Notice of Appeal dated 5 March 2020 [A5] raises the following issues, in his own words,

"This case regards to the human rights.

*The British Law confirming that to protect the human rights.
My father was born in place in British colony under the British flag.
He was fighting for British flag, not another nation and there is no rule
that explain to ignore human rights.
In that way I am disagree the decision notice from ICO.”*

30. Not all of the matters raised are relevant to the Tribunal’s decision.
31. The Appellant is a litigant in person without representation; his grounds of appeal were read by the Tribunal in the context of the remainder of his submissions within the correspondence.
32. The Commissioner’s Response dated 7 April 2020 maintains her analysis as set out in the Decision Notice. The Commissioner submits that
- a) the Appellant’s grounds of appeal do not articulate any specific reason why the exemption at s.1(1) FOIA is not engaged and/or
 - b) any reason why the Commissioner’s Decision Notice is wrong to find that the exemption applied.
 - c) As stated in paragraph 13 of the Commissioner’s decision, the MOD had carried out searches against the Appellant’s late father’s name to no avail. The MOD also confirmed that the service number the Appellant provided is not one recognised by the MOD or any of its armed forces.
 - d) Apart from the name and service number, there was nothing further for the MOD to search against.
33. In her response the Respondent applied for the Appellant’s case to be struck out. This application was refused by the Registrar in her decision of 9 March 2021 [B115] after the resolution of the preliminary issue, see below.
34. This Appeal was one of those considered by the Tribunal in its decision on the territorial scope of FOIA. The decision on the preliminary issue was promulgated on 24 February 2021 [B88] and later amended under the slip rule [B102]. It is not necessary to consider that issue further in this decision.

The Law

35. Under section 1(1) of FOIA, a person who has made a request to a ‘public authority’ (such as the MOD) for information is entitled to be informed in

writing whether it holds the information requested, see section 1(1)(a). If the public authority does hold the information, to have that information communicated to him see section 1(1)(b) FOIA. This entitlement is subject to the other provisions of the Act.

36. In the case of *Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072) this Tribunal held that when deciding whether information is held by a public authority for the purposes of section 1 FOIA,

“the test to be applied [by the Commissioner and the Tribunal] was not certainty but the balance of probabilities” [13].

This decision is not binding on this Tribunal, but we note that this test has become established and a similar approach has been taken in numerous Tribunal decisions since.

37. In accordance with the test in *Bromley*, when a public authority claims the information is not held, the Commissioner decides whether this is the case on the balance of probabilities and will reach a decision based on the adequacy of the public authority’s search for the information and any other reasons explaining why the information is not held.

38. In *Oates v Information Commissioner* (EA/2011/0138) another decision of this Tribunal, it was concluded, that: -

“As a general principle, the IC was ...entitled to accept the word of the public authority and not to investigate further in circumstances where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession. Were this to be otherwise, the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation possibly onsite, in every case in which a public authority is simply not believed by a requester”(emphasis added)

39. The scope of the necessary search to be conducted by a public authority in response to a request will depend on its analysis and interpretation of the request. The public authority will need to understand what it is looking for in order to decide where to search.

40. Section 16 FOIA states

16. – Duty to provide advice and assistance.

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

41. If the public authority has reason to believe that the information is held by another public authority, it could consider obtaining consent to transfer the request to them or advise the requester to redirect their request.

42. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

43. As it applies to this matter section 58 entitles the Tribunal to allow the appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the Respondent ought to have exercised her discretion differently.

44. The starting point for the Tribunal is the Respondent's Decision Notice but the Tribunal also receives evidence, which is not limited to the material that was before the Information Commissioner. The Tribunal, having considered all the evidence, may make different findings of fact from the Information Commissioner and may come to the conclusion that the Decision Notice is not in accordance with the law because of those different facts.

45. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Analysis and Decision

46. The Tribunal considered whether the matters raised by this Appellant in his complaint called for further investigation by the Respondent or whether she was entitled to rely on the assertions of the MOD as to the nature and quality of the searches it had performed.

47. The Tribunal was not satisfied that the Information Commissioner should have concluded that the public authority had undertaken sufficient searches in order to properly conclude that the material was not held. This is because the MOD

a) Only searched one spelling or formulation of the name although the documents provided showed that the Appellant's father used more than one name formulation.

b) Did not search for any other keyword.

48. The Tribunal also notes with reference to the Equal Treatment Bench Book that it is important to avoid imposing only the format of the naming system most familiar in the UK.

49. Before relying on the assertion of the MOD that "extensive" searches had been made, the Information Commissioner should have critically analysed the statement in the light of the searches actually undertaken in the context, not only of the request but also the wider circumstances revealed by the documents submitted in support. Had she done so, she would have noted the different formulations of the Appellant's father's name and the broader context of the explanations about how he might have served the Crown.

50. The Commissioner erred in her conclusion that “it was difficult to see what other steps the MOD could take to locate the information sought”, see paragraph 13 of the decision notice. There was insufficient evidence before her on which it could be properly concluded that “extensive” searches had been made, particularly in the light of the use of that adjective to describe the more restricted search completed by the Royal Navy Disclosure Cell before the expansion of the search to the other services. Conversely, there was evidence before the Commissioner that demonstrated that the Appellant’s father had used different formulations of his name.

51. Therefore, in this case there was evidence of an inadequate search by the public authority which the Commissioner should have considered before deciding not to make further investigation. In the circumstances of this case we have decided that she was not entitled to accept the word of the public authority without further inquiry.

52. Thus in applying the test in *Bromley*, the Commissioner fell into error in accepting the assertion of the public authority, on the basis of which she decided on the balance of probabilities that it was more likely than not that the MOD did not hold the information requested.

53. We make it clear that we are not deciding that the MOD does hold the information requested but that in this case there was insufficient evidence to support the conclusion that it was more likely than not that the MOD did not hold the information requested.

54. Further, the Tribunal was not satisfied that the public authority had provided sufficient advice and assistance to the Appellant in accordance with the duty under s16 to provide such assistance that is reasonable in the circumstances. While it is not the job of the public authority to perform genealogical research for a requestor of information it was incumbent upon them to clarify the search and consider whether to transfer the request to another public authority or to refer the appellant to another organisation which may hold the information.

55. The MOD did not engage with the Appellant to clarify the request. The Appellant had framed his request in terms of his father’s service record with the Royal Navy based on his belief; however on closer inspection the request was intended to elicit information about how his father had served the Crown in the named conflicts. The Appellant had provided a number that transpired

not to be one used within any of the British Armed forces. He had provided a name which could be formulated in more than one way. He had described his father as a Royal Navy soldier and also as part of the army. In combination with the context set out in the documents the MOD had enough information to conclude that there was a possibility that the Appellant's father had served alongside British forces in the forces of another nation but stated that there was no useful advice or information they could provide to help identify that country.

56. However, the MOD knew what conflicts the Appellant said his father had fought in from the documents, or if they needed clarification could have asked the Appellant, and would have known which forces fought with the British military in those engagements as the Ministry of State tasked with the defence, security and resilience of the UK and its overseas territories.

57. Therefore the Tribunal does not agree that there was no useful advice or assistance that could have been provided in that regard as the MOD could reasonably have set out the foreign forces who served with the British Military in Korea, Suez and Aden which would have assisted the Appellant to direct his request to a more appropriate authority.

58. The Tribunal also noted that the documents provided to the Ministry of Defence, and later the Information Commissioner as well as the Tribunal, indicated through the descriptions of Mr Hasan's history, that there may be other public authorities that might hold information, such as regimental archives, educational establishments, veterans associations, or museums. Thus, there was a duty on the MOD to consider whether another public authority would hold the information sought and if they should refer the Appellant to that authority or transfer the request.

59. For the reasons given, we are satisfied that the Ministry of Defence did not comply with its duty under s16 to provide advice and assistance so far as it was reasonable to do so on the facts of this case.

Was the Decision Notice in accordance with the law or involve an exercise of discretion that ought to have been exercised differently?

60. The Respondent fell into error, for the reasons set out above, as in our view she was not entitled to accept the word of the public authority and decide

not to investigate further in these circumstances, because there was evidence before her as to an inadequate search.

61. The Respondent's decision notice is silent on the issue of the public authority's discharge of their s16 FOIA duty save to state at paragraph 6 that "in line with its duty" under s16 the MOD had made the suggestion that the Appellant's father may have served with the forces of another nation. For the reasons given above we are satisfied that the Commissioner erred in this conclusion which she advanced without any reasoning.

62. For all these reasons we have decided that the Information Commissioner's Decision Notice was not in accordance with law and the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised differently. Accordingly this appeal is allowed and the Tribunal's decision above is substituted for that of the Respondent.

28 September 2021

Tribunal Judge Lynn Griffin

Promulgated

29 September 2021