IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0167

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

The Information Commissioner's
Decision Notice No: FS50320529
Dated: 29 June 2011

Determined on the Papers

Appellant:	Mahmud Quayum acting on behalf of the Camden Community Law Centre
First Respondent:	Information Commissioner
Second Respondent:	The Foreign and Commonwealth Office

Before

David Marks QC
Tribunal Judge

Suzanne Cosgrave
&
Dr Malcolm Clarke

Subject matter:

Section 24, Freedom of Information Act 2000

Cases:

Secretary of State for the Home Department v Rehman [2003] 1 AC 153

Baker v Information Commissioner and others (EA/2006/0045)

APG v IC and the Ministry of Defence [2011] UKUT 153 (AAC)

Kalman v IC (EA/2009/0011)

People for the Ethical Treatment of Animals Europe v IC and the University of Oxford (EA/2009/0076)

DECISION

The Tribunal dismisses the Appellant's appeal against the Information Commissioner's (the Commissioner) Decision Notice, Reference No. FS50320529 dated 29 June 2011.

REASONS FOR DECISION

Introduction

1. The Appellant appeals against a decision of the Commissioner. The request which the Appellant had made was a request for disclosure of information relating to refused student visa applications under the Academic Technology Approval Scheme (ATAS, otherwise known in this judgment as the Scheme). The Foreign Office is the relevant public authority and invoked the provisions of section 24 of the Freedom of Information Act 2000 (FOIA) which is a qualified exemption dealing with the safeguarding of national security. It refused to publish a breakdown, as requested, of such refused applications. The request which was finally dealt with and which is the subject of this appeal was

a refined request to the original request dealing in effect with the nationalities and study subject of the refused applications.

2. At a point before the appeal was determined by the Tribunal, an application was made for the original individual Appellant whose name appears in the title to this appeal to be substituted by a reference to the Camden Community Law Centre on whose behalf the original Appellant was acting: this explains the description afforded to the Appellant in the title of the appeal. There has been no formal objection to this change.

3. The matter has been dealt with on the papers alone.

Background: ATAS, i.e. the Scheme

4. Most of the relevant factual background appears not to be in dispute. ATAS is a scheme which was introduced on 1 November 2007. The Scheme is one which is used to help and prevent the spread of knowledge and skills that could be used with regard to the proliferation of Weapons of Mass Destruction (WMD) and their means of delivery. It is well known that there is widespread international condemnation of the proliferation of WMD. In particular, the United Nations has formally declared as much on many occasions, especially in the form of Security Council Resolutions. Reference is made in particular to one such Resolution in this regard, namely, UNSCR 1540 of 2004.

5. The Scheme requires all students from outside the EEA and Switzerland who wish to embark on certain designated post-graduate courses to apply to the public authority's Counter Proliferation Department (CPD) for an ATAS certificate before they apply for a student visa. The same requirement applies to all those who wish to extend their stay in order to undertake certain designated courses. The Immigration Rules contain and reflect the legal basis of the Scheme.

6. All applicants must complete an online application form. The CPD then assesses the risk in terms of counter-proliferation in permitting an applicant to undertake the proposed course of study. The assessment and its outcome are usually undertaken within a period of 20 days from the date of receipt of the application.

7. It is enough at this stage to point to two factors which are said to be material to the above assessment. First, it has to be considered to what extent the proposed course of study will provide the applicant with training which might assist or provide assistance in developing a WMD program or related to the resistance.

8. Second, there must be an assessment of the risk related to the person who is the applicant himself, i.e., what is referred to as the background. Matters such as nationality and the impact of related international measures may well be relevant in this context. More difficult cases are addressed and undertaken by the public authority's Denials Committee.

The Request

9. By written request dated 10 February 2010 made by the Appellant, the following information was sought regarding the Scheme. The request was for the following, namely:

> " - how many applications were received and how many were granted, refused or withdrawn since [the Scheme's] introduction
>
> ***
>
> - provide a breakdown of the above information by each year since the introduction of the [Scheme]
>
> ***

- provide a specific breakdown of granted applications, refusals and withdrawals, by nationality of the applicants and subjects they wanted to study for every year since its inception."

10. The public authority's written response was sent by email dated 10 March 2010 and duly confirmed that the authority held information falling within the terms of the request. The public authority invoked section 24 and also claimed that it would need 20 more days properly to respond by means of a substantive reply. Such a reply duly followed by letter dated 7 April 2010. Some general information regarding the Scheme was sent out, in particular dealing with the first request which is highlighted above, but the specific information which had been requested was not disclosed.

11. With regard to the first specific request, the letter said that up to March 2010, 21,870 applications had been made, and 193 refused. Several thousand applications had been started but had not been completed or otherwise proceeded with. The costs exemption and dispensation under section 12 of FOIA was invoked with regard to the cost that had to be attributed to the verification of all applications that had been embarked on.

12. With regard to the second request, the public authority confirmed that from November 2007 to 31 December 2007, 1,455 applications had been approved and 14 refused. In 2008, a further 9,548 applications had been approved and 69 refused. In the calendar year 2009 9862 applications were approved and 94 were refused. The relevant figures for the period to 12 March 2010 were 1,005 and 16 respectively.

13. As to the third part of the request, the response again invoked section 12 of FOIA.

14. By email dated 10 May 2010, the Appellant asked for an internal review. He also asked by way of alternative for what he called:

"… a breakdown of partial information on the refused applications only (193 to March 2010, by nationality and the subjects they wanted to study by each year since [the Scheme's] inception) …"

15. The public authority responded to the effect that it was confident that a reasonable search had been made with regard to that request. It was therefore confirmed that section 12 applied. As for the second request, it confirmed that section 24 applied, it being stressed in particular that there was a strong public interest in safeguarding national security. However, the response concluded by stating that while the public authority was keen to remain as open and as accessible as possible, it was nonetheless felt that release of detailed information regarding the Scheme would undermine its effective operation as a whole. It was pointed out that the general public interest underlying the purpose and operation of the Scheme was already satisfied by the publication of general information about the Scheme on the public authority's own website.

16. The Appellant contacted the Commissioner's office by letter dated 25 June 2010. In due course, the Commissioner contacted the public authority by letter dated 1 March 2011. In that letter, the Commissioner's office pointed out that it had discussed matters with the Appellant and the Appellant had agreed that the Appellant wished to focus its attention on the public authority's application of section 24 in relation to the Appellant's so-called refined request of 10 May 2010 which had asked for the breakdown of partial information in the way articulated above.

17. The public authority duly responded by letter dated 13 May 2011. It confirmed that in the light of the refined request it no longer invoked section 12. It however continued to invoke section 24. Whilst it recognised that there was a public interest in favour of disclosure in the form of the need for transparency and open government, disclosure of the requested information would not add "greatly" to the public's

understanding of the subject. There was already a substantial body of information in the public domain. Disclosure was therefore refused.

The Decision Notice

18. The Decision Notice is dated 29 June 2011. It bears the reference number FS50320529. It addressed what has been called the refined request. At paragraph 24 it was pointed out that section 24 only applies where exemption is required for the purposes of safeguarding national security. A wide interpretation has to be given to that concept. In addition, the word "required" in this context means reasonably necessary: the term therefore sets what is called a fairly high threshold of the exemption. The Commissioner went on to quote from case law relating to Article 8(2) of the European Commission on Human Rights (ECHR) which states:

"There shall be no interference by a public authority with the exercise of this right except such as … is necessary in a democratic society in the interests of national security …".

19. In the view of the Commissioner and in this context, "necessary" means "less than absolutely essential but more than merely useful".

20. The Commissioner then went on to observe that he thought section 24 should not be applied in a "blanket fashion". The information in question must not merely relate to national security matters: there had to be evidence that disclosure of the information in question would "pose a real and specific threat to national security".

21. The public authority had indicated in its letter of 8 June 2010 to the Appellant that release of detail such as nationalities, courses and individuals that were refused could identify countries and possibly those institutions in those countries that were suspected of trying to

obtain sensitive information. The letter in question went on to say as follows:

"Such information could also identify certain institutions as having courses worth targeting by those seeking to circumvent our counter proliferation measures and deliver WMD and systems for their delivery. The identification of universities and courses might also bring unwelcome attention and impinge on their willingness to co-operate with the ATAS scheme. Such a loss of co-operation would undermine the ATAS scheme."

22. The Commissioner noted that the Scheme was part of the Government's initiative to counter the proliferation of WMD. The Commissioner then referred to confidential exchanges he had had in that regard with the public authority. The Commissioner stated that he was satisfied that in relation to the Appellant's request, the exemption of section 24 was properly engaged.

23. The Tribunal pauses here to note that it has seen and considered those exchanges, as well as further closed material provided by the public authority. The Tribunal has determined that nothing in the closed materials justifies the provision of a separate closed judgment.

24. The Commissioner then went on to consider the competing public interests. The Appellant had advanced three main arguments in favour of disclosure. First, it was claimed that little harm would result from disclosure since what was being sought was disclosure of information related to the universities and colleges which provided the courses in general: the Appellant later confirmed that he was not seeking the identification of specific institutions as such. Second, it was claimed that the public had a right to know whether the public authority was accountable for its decisions, and third, withholding the information fostered what was called "an atmosphere of secrecy over openness".

25. The public authority responded with two principal contentions. These augmented the arguments that had already been set out in the letter of

8 June 2010 which has been quoted above. The first constitutes a claim that it was contrary to the public interest to undermine the Scheme through disclosure: the second was a claim that it was contrary to the public interest adversely to affect levels of co-operation from academic institutions.

26. The Commissioner determined that release of the information sought would cause " a specific and real threat to national security", thereby endorsing his determination that section 24 was engaged. He accepted the arguments advanced by the public authority. He set out further details in a confidential Annex.

27. As for the first of the Appellant's contentions, the Commissioner claimed that identification of the relevant academic institutions could nevertheless be readily determined from an analysis of the withheld information. As for the second, the Commissioner accepted that there should be accountability with regard to this particular public authority. With regard to the third argument, the Commissioner found that the secrecy in question is necessary in this case in order to protect national security. The Commissioner therefore refused to order disclosure.

The Original Grounds of Appeal

28. The Appellant's Grounds of Appeal are largely built on the arguments which have found reflection in the Decision Notice. Although they will be revisited in greater detail in relation to the contentions put forward on the appeal, the additional factors identified by the Appellant are in effect the following. First, he pointed to the absence of any statutory right of appeal against a refusal of any ATAS application. Second, and expanding upon the first, accountability for refusals of particular nationalities was necessary if the public authority was otherwise to respect the terms of the Equality Act 2010 in the absence of dispensation by ministerial order. Third, the list of courses covered by the Scheme was already in the public domain by virtue of Appendix 6 of the Immigration Rules HC 393.

The Commissioner's Response

29. Much of the Commissioner's Response reflects the detailed submissions which have been advanced in the appeal. It is enough to allude to the principal manner in which the Commissioner referred to the various matters which have been highlighted in the preceding paragraph. First, although the Commissioner accepted that the absence of a statutory appeal could be relevant to accountability, the Commissioner nonetheless also stated that the public authority did permit applicants whose applications were refused under the Scheme to seek a review which in turn could give recourse to an application for judicial review.

30. As for the Appellant's third contention, the Commissioner pointed out that a request for the subjects sought to be studied did not mean that the information required necessarily equated with the list set out in Appendix 6, since the latter was a list of generalised subject headings only. Pausing here, the Tribunal notes that the Commissioner appears to have examined this issue closely given the terms of paragraph 24 of his Response dated 26 August 2011: in the circumstances the Tribunal has no reason to question the Commissioner's determination.

31. The Commissioner accepted in general terms that the public authority was under a duty not to discriminate on the grounds of race and/or national origins. However, section 192 of the 2010 Act exempted the public authority from their duty if it did, or does, any such act for the purpose of safeguarding national security. Even though the latter exemption was subject to a requirement in proportionality, the Commissioner contended that it was highly unlikely that the refusal of an ATAS certificate to an applicant on account of a concern that the individual had links to a weapon's program would be viewed as disproportionate.

Evidence

32. The Tribunal has received three open witness statements. They come from the Appellant himself, a Duncan Lane, of the UK Council for International Student Affairs and a Duncan McCombie, on behalf of the public authority itself.

33. With the greatest respect to the Appellant, the Tribunal did not find that there was any evidence or material in Mr Quayum statement which was not covered by the submissions or other materials which the Tribunal has since considered for the purposes of this appeal. The same can be said again with respect with regard to the statement of Mr Lane.

34. Mr McCombie is Deputy Head of the Counter Proliferation Department (CPD) within the public authority. He supervises the work of the team which deals with the Scheme. However, he remains independent from the individual assessment exercise conducted with regard to ATAS applications except in relation to the performance of his function as a reviewer of appeals.

35. He refers to the fact that the United Nations Security Council has confirmed on numerous occasions that the proliferation of nuclear weapons and biological weapons, as well as their means of delivery, constitutes a threat to national peace and security, referring in particular to UNSCR 1540 (2004).

36. He describes the counter proliferation risk as being the subject of assessment with regard to two factors. The first concerns the extent to which the proposed area of study would provide the applicant with training which might, or would be, useful in developing a program of delivery system which he calls a technology risk. Second, there is the risk associated with the individual applicant, which he calls a background risk. In assessing the latter risk, the CPD takes into account the applicant's nationality and any relevant international measures which are in place in respect of the applicant's nationality.

37. More difficult cases will be reviewed and addressed by the public authority's Denials Committee.

38. Mr McCombie later in his statement deals with the contentions which up to that point had been advanced by the Appellant.

39. The Tribunal is firmly of the view that for present purposes, it is enough to refer to just one of his answers to the Appellant's contentions. This matter addresses the alleged absence of a statutory right of appeal should an ATAS certificate be refused. If an ATAS certificate is denied, an applicant is entitled to submit further ATAS clearance applications for different courses which are then considered on their merits. An applicant can also ask for a review of a decision to deny ATAS clearance. A review is undertaken by reviewers who are independent from the original decision-maker and who assess the original recommendations and the procedures that are followed. Such a reviewer then takes a decision on whether to uphold or overturn the original clearance.

The Law

40. Section 24 of FOIA provides as follows, namely:

> "Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

41. As indicated above, this is a qualified exemption. Certain principles regarding this exemption are well established. Rather late in the progress of this appeal, issue has been taken with the application of this exemption to the facts of this case. However, none of the following propositions appear to be in issue.

42. First, the concept of national security is a wide one. It refers not only to actions which are aimed at, or against the United Kingdom, its system of government or its people. It includes the legal and constitutional

systems of this state as well as military activities. Indeed, actions against a foreign state are capable of indirectly, or directly, affecting national security: see generally *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, in particular per Lord Slynn at 15-16, Lord Hoffmann at 50 and Lord Hutton at 64. These propositions have been frequently applied in the Tribunal: see in particular *Baker v Information Commissioner and others* (EA/2006/0045), especially at 46.

43. Second, national security is predominantly the responsibility of the government and its various departments. The Second Respondent has contended, correctly in the Tribunal's view, that the Tribunal must at least initially afford due weight to what is regarded as the considered view of such departments, even though the exemption entails an element of public interest and the balancing test. In particular, and again the Tribunal endorses this approach, particular weight should be afforded to the views of the government or its appropriate department with regard to its or their assessment of what is required to safeguard national security in any given case and the prejudice likely to result from disclosure: see *Rehman supra* per Lord Slynn at 50-53 and in the Upper Tribunal, *APG v IC and the Ministry of Defence* [2011] UKUT 153 (AAC), especially at 56.

44. Third, the Tribunal is equally firmly of the view in accepting the contention advanced by the Second Respondent that the particular weight to be applied in favour of maintaining the exemption will be proportionate to the severity of the perceived threat. Thus, to take the point which is in issue here it can with some justification, in the Tribunal's judgment, be argued that since the proliferation of WMD would constitute one of the severest threats to the security of the state, given its potential wide-ranging effect, so must the countervailing public interest in disclosure be a weighty one, such that disclosure becomes a viable option. The Tribunal stresses that nothing that has just been said in any way converts the present exemption into an absolute one:

see generally *Kalman v IC* (EA/2009/0011), especially at 47, and see also *People for the Ethical Treatment of Animals Europe v IC and the University of Oxford* (EA/2009/0076), especially at 68.

45. The Tribunal pauses here to note that in the Reply (particularly at paragraph 3.7) put in by the Appellant, the Appellant appears to seek to modify the nature of the request even further. For perhaps self-evident reasons reflecting if nothing else the lapse of time since the request was made and from its initial form, further refined, the Tribunal has no hesitation in rejecting such a request for further information insofar as it is made.

46. As has been seen, the public authority provided information about the number of refusals in its initial response to the requests that were made. However, it withheld information about nationalities and subjects on account of their effect should disclosure be made on the grounds of national security. The Reply dated 18 January 2012 takes issue with the way in which reliance has been placed on section 24 by the public authority, especially given the contents of the letter of 8 June 2010 which has been referred to above. Three specific contentions are made in relation to the purported application of the exemption.

47. First, it is said that the said letter fails to address the request regarding "nationalities and subjects". Second, it is claimed that the Commissioner himself relied on the letter. Third, it is claimed that the public authority's concern or concerns as expressed in that letter are not "persuasive". As to the first of these propositions, the Tribunal is entirely satisfied that the subject matter referred to above was fully addressed by the public authority. However, even if that were wrong, the Tribunal is entirely satisfied that the matter has now been canvassed properly on this appeal.

48. What is said above applies to the second contention which has been made.

49. As for the third contention, one of the particular matters relied on by the Appellant is the alleged failure to provide any justification to release information concerning nationalities. The Tribunal, however, is fully satisfied that that matter too has been amply addressed by the public authority's materials and submissions, particularly in the form of the evidence of Mr McCombie. The Appellant claims that the information which could identify countries which are of particular concern is "already public" and alludes to the fact that, in that respect, Iran is referred to in terms by Mr McCombie.

50. However, the Tribunal again accepts the contentions of the public authority in that regard. Reference is made to Iran on account of there being Security Council Resolutions with regard to that country. Concerns about Iran are very well known and well publicised. Reference to Iran provides no justification for the wider assertion that information regarding any other countries of similar concern which might be related to the Scheme are "already public".

51. Much the same response can be made to the related contention made by the Appellant that international measures concerning certain countries, such as Security Council Resolutions therefore are also publicly well known. As the public authority points out, rightly in the Tribunal's view, the Appellant is seeking details of the nationalities of those whose applications have been refused. The Appellant is not seeking identification of the country for which there may exist sanctions such as the United Nations Resolutions.

52. The Appellant also takes issue with the public authority's assertion that refusal under the Scheme is not a surreptitious mechanism. The Tribunal is uncertain as to what this particular allegation means or refers to. An applicant will know if his or her request is refused. A review will then be open to that party. The Tribunal is persuaded that the availability of a review process contradicts any suggestion that there exists any form of surreptitious mechanism.

53. The Appellant also contends that it is "unreasonable" to assume that disclosure of the information requested would bring "unwelcome attention" to certain universities. The Tribunal, again, agrees with the public authority that this is to misread the submissions made by the public authority. There is no suggestion that institutions could or would withdraw from the Scheme. Instead, Mr McCombie clearly indicates that the operation of the Scheme (and even the monitoring of students who might seek in some way to evade the Scheme), relies on the co-operation of universities and similar institutions in order to ensure its proper and successful operation. The Tribunal, again, has no hesitation, not only in interpreting Mr McCombie's evidence in that way, but also in accepting the thrust of his evidence to the effect that such co-operation would be undermined by disclosure.

54. The Appellant also seeks recourse to the right to freedom of expression set out in Article 10 of the European Convention on Human Rights. A number of preliminary observations need to be made in that respect. First, Article 10 is itself a qualified right. Article 10(2) identifies national security as a proper and legitimate reason to restrict the freedom which is otherwise guaranteed. Second, in considering the application of Article 10, and similar to the way in which section 24 is applied, the issue is not whether there was or is a limitation on the right which is guaranteed and, in particular, whether the limitation was "reasonable or desirable": the issue is whether the exemption set out in section 24 is appropriate as contended for by the Commissioner in the Decision Notice. Third, and perhaps most significantly, the Tribunal does not perceive any material distinction between the approaches adopted with regard to section 24 by both the Appellant and the Respondent. In paragraph 1.3 of the Reply, the Appellant says that it was not sufficient for the information simply to relate to national security matters: disclosure must pose a real and significant threat to the interests of national security for the exemption to apply (see also paragraph 3.1 of the same Reply).

55. The Tribunal is therefore entirely satisfied that in the present case, the public authority and the Commissioner did not, and have not, assumed that the information was exempt solely because it related to matters of national security: instead it considered the effect of disclosure in the way apparently fully recognised by the Appellant itself.

The Rival Contentions

56. The real issue between the parties in the Tribunal's view concerns the balancing of the competing public interest considerations.

57. The principal factors referred to by the Appellant have already been referred to and can now be reviewed in the following way.

58. First, the Appellant points to the absence of any proper appeal process against an ATAS decision. However, enough has been said already (see especially at paragraph 39) to satisfy the Tribunal that there is a clear entitlement on the part of an aggrieved individual applicant to seek further relief by means of an assessment by an independent reviewer from within the public authority itself and thereafter by way of judicial review. In any event the Tribunal cannot easily identify any way in which the information requested addresses or informs the operation of the appeal process. In the circumstances, the Tribunal does not find that this element has any weight, certainly not enough weight so as to militate in favour of disclosure.

59. Second, the Appellant points to the need to maintain public confidence in the Scheme, coupled with the desirability of transparency and accountability. Again, the Tribunal is entirely satisfied that these objectives, however laudable, are outweighed by the gravity of the underlying matters relating to the Scheme as a whole.

60. Third, the Appellant relies upon certain provisions in the Equality Act 2010 to contend that the Scheme is being applied disproportionately. Again, as has been referred to, section 192 of the said Act exempts

public authorities from complying with the provisions for reasons of national security subject to a requirement of proportionality.

61. Fourth, insofar as the same is not necessarily dealt with in relation to the engagement of the exemption as a whole, the Tribunal rejects the Appellant's contention that the disclosure would not in any way undermine national security.

62. Fifth, the Appellant refers to the fact that the list of courses covered by the Scheme is already in the public domain. However, as the public authority and in the Tribunal's judgment correctly points out, the list published within the Immigration Rules as well as on the ATAS website merely set out the details of the broad subject areas within what is called the Joint Academic Coding System in order better to inform students or possible applicants of the manner in which they need to apply under the Scheme. The Commissioner has formally confirmed in his Response to the Notice of Appeal that an applicant under ATAS is required to supply to the public authority a more specific code relating to a specific course being undertaken.

Further Submissions

63. In further written submissions by way of Reply lodged and sent on behalf of the Appellant and dated 18 January 2012, a number of other contentions and observations were made.

64. The first contention again takes issue with the review process to which an applicant can have recourse after an application is refused. The Reply characterises a refusal as giving rise to a "pro-forma" response. It is therefore contended that the review process is of "limited value" and that the ability of a disappointed applicant to apply for the same course is "also undermined". It is pointed out that such an individual will not know the reason as to why the refusal was made and therefore not be in a position to remedy any defect in relation to the application which has been refused.

65. Second, attention is drawn to a concern which it is said has found expression in published form in both academic circles and others in support of the contention that the Scheme as a whole is not attracting or retaining sufficiently talented post-graduate students.

66. Third, and relating again to the issues arising in connection with the Equality Act 2010, concern is expressed as to what is called the "possibility" of discrimination with regard to decision-making by the public authority.

67. Particular issue is also taken with the two-fold distinction made by Mr McCombie and referred to above at paragraph 36, namely as to the effect that decisions are made based on two factors, namely, what he called the technology risk and the background risk. It is claimed that what is not clear from this distinction is whether decisions are also taken in which the background risk is determinative or such as to render it very unlikely that the applicant could ever succeed in any application for a course detailed in Appendix C to the Immigration Rules or to the majority of such courses.

68. With the greatest of respect to the careful way in which the Reply has been formulated in this request, the Tribunal finds that that above observations are of no relevance to the principal issues considered in this appeal, namely, whether section 24 is properly engaged and, if so, how the assessment of the rival or competing public interest should be addressed.

69. Insofar as occasions might arise in which detailed reasons for refusal might not have been provided, the same is no doubt, as the public authority points out, an unfortunate but inevitable consequence of the nature of the Scheme. The Tribunal is satisfied on the evidence that it has read and considered that there exists a proper review process to ensure that any refusal can be duly reviewed, but that on occasion, the result of any review will be stated on the shortest grounds.

70. It is not the function of the Commissioner, nor of the Tribunal, to assess the way in which the Scheme operates other than to be satisfied with respect to the public interest balancing test that there is a review process which is in place. Indeed, the Tribunal would make the same observation with regard to the allegation relating to the concern felt by some institutions as to the potential adverse impact of this Scheme as a whole. Indeed, it could be said that the Scheme is, of itself, somewhat controversial and bound to create some differing opinions as to its operation and scope.

71. In addition, the Tribunal would respectfully adopt the comment made by the public authority that it is in any event difficult to see how disclosure of nationalities and subjects of refused applications would or could materially affect and address the type of complaint referred to in the additional submissions in the Reply.

The Public Interest Balance

72. The public interest elements advanced by the public authority have been referred to above. The essence of those contentions concerns the particular severity of the risk from possible disclosure and the consequences flowing from such risks.

73. The Tribunal entirely accepts the main argument put forward by the public authority to the effect that the Appellant has failed to identify in what respect disclosure of nationalities and subjects would in any material way assist individuals in a way which would not also entail a corresponding increase in risk with regard to the effective operation of the Scheme.

74. In the latest Reply dated 18 January 2012 put in by the Appellant, the Appellant claims that recourse to a review or making application for an alternative course would not be “effective” for the various reasons referred to above, particularly at paragraph 64. The Appellant goes on to claim that the possibility of resorting to litigation in individual cases, particularly in circumstances where the merits of the challenge are

simply unknown given the paucity of the information, is not a meaningful alternative to a transparent and accountable scheme.

75. The Tribunal agrees with the public authority that it is difficult to understand what the proposition formulated at the end of the previous paragraph really means or properly implies. It is difficult to see what recourse a disappointed applicant could have other than the ability to resort to litigation.

76. The Appellant then claims that the Scheme should operate "fairly and as transparently as possible" so as to attract the best kind of student or those "of value". This is an observation that has already been referred to above. The Tribunal is quite prepared to accept that these matters do reflect a degree of public interest. However, in the Tribunal's view, this is not of itself, or even in conjunction with the other suggested evidence of public interest, sufficient to outweigh the risks attendant on disclosure.

77. Finally, the Appellant revisits the issue of discrimination. It is claimed that the public authority has breached the 2010 Act as well as Article 14 of the ECHR which prohibits discrimination. Again, with respect, the Tribunal fails to understand this argument. The duties under the 2010 Act have been addressed above: the terms of the Act are expressly disapplied with regard to national security subject to issues of proportionality. The Appellant refers to a "blanket ban". The Tribunal has seen no evidence of any such ban.

78. In the light of all the matters and arguments relating to the competing public interest, the Tribunal has no hesitation in upholding the determination of the Commissioner in the Decision Notice to the effect that section 24 is engaged and that the public interest in favour of maintaining the exemption under section 24 outweighs the public interest in disclosure.

Conclusions

79. For all the above reasons, the Tribunal dismisses the Appellant's appeal and upholds the Commissioner's Decision Notice.

David Marks QC
Tribunal Judge

Dated: 8 March 2012