



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

Case No. EA/2011/0191

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50360052

Dated: 27 July 2011

Appellant: ADAM WEISS

First Respondent: INFORMATION COMMISSIONER

Second Respondent: THE HOME OFFICE

Heard at Bedford Square, London

Date of hearing: 17 January 2012

Date of decision: 20 February 2012

Before

Andrew Bartlett QC (Judge)

Michael Hake

Marion Saunders

Attendances:

For the Appellant: Andrew Legg

For the 1st Respondent: Michael Lee

For the 2nd Respondent: Oliver Sanders

Cases:

Department for Education and Skills v IC and Evening Standard EA/2006/0006, [2011] 1 Info LR 689

Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295

Molentova v Secretary of State for the Home Department IA/13763/2011, 7 June 2011

Smith v East Elloe RDC [1956] AC 736

Telaustria Verlags GmbH v Telekom Austria AG Case C-324/98 (7 December 2000)

Subject matter:

Freedom of Information Act 2000 – qualified exemption - formulation or development of government policy – FOIA s35 – public interest test
Freedom of Information Act 2000 – qualified exemption – legal professional privilege – FOIA s42 - public interest test

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with information concerning a UK Border Agency pilot scheme for removing homeless EEA nationals. It involves consideration of two Freedom of Information Act (“FOIA”) exemptions: s35 (exemption for information relating to the formulation or development of government policy) and s42 (exemption for information covered by legal professional privilege).

The disputed information and the appeal

2. The free movement of persons is a highly regulated area of European law, which constrains what the UK Government may lawfully do. In March 2010 the UK Border Agency (an agency of the Home Office) started removing homeless EEA¹ nationals on the basis that they were not exercising European treaty rights. This part of the scheme rested on the footing that administrative removal was considered appropriate where the EEA national was not exercising a treaty right in a particular category (worker, self-employed person, self-sufficient, student, or job seeker), and had been in the UK for longer than three months and less than five years.² Mr Weiss, the Assistant Director of the AIRE Centre,³ took the view that the expulsions

¹ The European Economic Area consists of the EU countries, together with Norway, Iceland, Liechtenstein and, in the present context, Switzerland.

² Five years of continuous lawful residence gives a right of permanent residence. The rights for workers and job seekers were qualified in the case of A8 and A2 nationals. A8 and A2 refer respectively to eight states which joined the EU in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia) and two in 2007 (Bulgaria, Romania).

³ “AIRE” stands for Advice on Individual Rights in Europe.

might be illegal. (In autumn 2010 he published his opinion in the *Journal of Immigration, Asylum and Nationality Law*.⁴) The scheme had a second strand, which was to identify cases where EEA nationals might be subject to removal for low level persistent offending. Mr Weiss's focus was on the first strand, and it is not necessary for us to refer further to the second strand.

3. Mr Weiss applied to the Home Office on 14 May 2010 asking for disclosure of

“all information that you have about the UKBA's scheme (or pilot scheme) to expel EEA nationals on the basis that they are not exercising Treaty rights. I believe this scheme or pilot scheme is being carried out in exercise of the UKBA's powers under Regulation 19(3)(a) of the Immigration (European Economic Area) Regulations 2006.”

4. Regulation 19(3)(a) states that an EEA national who has entered the UK (or the family member of such a national who has entered the UK) may be removed if that person does not have or ceases to have a right to reside under the Regulations.
5. In a decision dated 17 June 2010, which was maintained on internal review in late October 2010, the Home Office withheld some of the information requested on the basis that it formed part of the formulation or development of Government policy pursuant to section 35(1)(a) FOIA, and that the public interest balance favoured maintaining the exemption. In addition, some information was withheld because it was regarded as personal data exempt under FOIA s40(2). The Home Office disclosed to Mr Weiss some statistics of the numbers of persons served with 'minded to remove' letters, the numbers served with immigration decision notices and the numbers administratively removed. The Home Office also disclosed (subject to redactions of the names of junior members of staff) the detailed operational guidance issued to operational staff, headed "EEA Removals Pilot: Instructions for assessing whether to administratively remove an EEA national". At a later date, in response to a further specific request, the Home Office provided some statistics broken down by nationality.
6. In written submissions to the Information Commissioner, the Home Office raised an additional ground for withholding information, namely that pursuant to section 42 FOIA some of the information requested was protected by legal advice privilege and the public interest favoured withholding it.

⁴ *Unqualified persons: the lawfulness of expelling homeless EEA nationals from the UK*, *Journal of Immigration, Asylum and National Law*, 24:3 (2010), pp246-256.

7. In a Decision Notice dated 27 July 2011 the Information Commissioner upheld the Home Office's approach to withholding disclosure. Mr Weiss appeals to the Tribunal.
8. It is agreed between the parties that names of junior civil servants may properly be withheld by redaction pursuant to FOIA s40(2). Having regard to the full terms of the request and the information that was released, the information about the scheme remaining in dispute falls within the descriptions:
 - a. "correspondence within the UKBA or between the UKBA and other Government departments or agencies (including within and beyond the Home Office and local authorities)" and
 - b. "documents related to the scheme (including assessment of the risk of litigation arising from the scheme)".
9. The appeal is on the following grounds:
 - a. FOIA s 35(1)(a) is not engaged because, inter alia, the free movement of persons is not an area in which the Government is permitted to develop policy unilaterally. Accordingly, information related to the expulsions does not and cannot fall within the exemption.
 - b. Even if this is wrong, the public interest in maintaining the exemption does not override the strong public interest in favour of disclosure of the information, particularly in light of the significant legal constraints imposed on Member States by EU law.
 - c. Any information that might be covered by legal advice privilege should also be disclosed in the public interest in light of serious concerns that the Government acted in knowing contravention of European law in conducting the expulsions.
10. The disputed information was made available to the Tribunal for the purposes of considering the appeal. At the request of the Tribunal a summary description of it was provided to Mr Weiss. It was described as comprising some 240 pages and including meeting minutes and notes, emails between policy advisers, senior officials, operational staff and legal advisers, drafts of documents related to the pilot, submissions to ministers,

and correspondence with other government departments and local authorities.

Evidence

11. We received voluminous evidence. We were provided with the relevant European materials in the agreed bundle. The factual accuracy of the evidence given by the witnesses was not in issue; only their analyses and opinions were contested. We confine ourselves to a sufficient summary to make our decision intelligible.

12. Mr Weiss's first witness statement explained the activities of the AIRE Centre and the background to and purpose of the request for information. These matters were not in dispute, in the sense that it was accepted by the other parties that the AIRE Centre held the views and had the concerns which it expressed, including as to the lawfulness of the scheme and whether homeless persons of particular nationalities were being targeted. Some other voluntary sector bodies shared those concerns. His second witness statement gave more detail and fuller explanation, including details of the involvement of the European Commission in the related area of using the right-to-reside test as a condition for certain social security benefits. In that statement he contended that the pilot scheme for expulsions could not be part of the formulation of government policy; the expulsions could only be case by case applications of EU law, as illustrated by the case of *Molentova v Secretary of State for the Home Department* IA/13763/2011, 7 June 2011. In relation to the public interest balance, his second statement drew attention to the importance of the issue over the legality of the scheme and the severe impact of removals upon individuals, and explained how he said the AIRE Centre and other groups would make use of the information, if disclosed, both to provide assistance to vulnerable individuals and to engage with the European Commission and other bodies concerned with the compatibility of the scheme with EU law.

13. The Home Office called Dr Haddad, currently Deputy International Director within the International Directorate, which is part of the Strategy, Immigration and International Group in the Home Office. She was cross-examined.

14. Dr Haddad explained that due to a lack of employment and language skills and issues of drug and alcohol dependency, many rough sleepers who had come from Central or Eastern Europe had little or no hope of finding work or integrating into UK society, and were considered by the Home Office not to be exercising Treaty rights for the purposes of the Regulations. The EEA

removals pilot was operated in 2010 to explore, establish and test possible administrative means of addressing this problem. Its aims were to trial and evaluate the available legal options and possible procedures, examine the scope for and pros and cons of a multi-agency approach, gather empirical data relating to cost and resource implications, and assess issues of practicability, required work levels, efficacy and cost effectiveness. It was operated from March to December 2010 in up to seven areas. The information request was made and dealt with within this period. The extent and methods of application varied as experience accumulated. After the initial period, the pilot procedures remained in use in certain areas. As at December 2011 the Free Movement Policy Team was finalising its evaluation of the pilot and policy recommendations for Ministers.

15. Dr Haddad did not accept that the pilot was merely a case by case application of European law. It was focused on formulating policy, because there was a margin of discretion in the interpretation and the application of the European legal constraints. The whole underlying reason for the pilot was to examine whether and how to exercise the power to remove on a more regular basis, which had not previously been done, and to trial different approaches.

16. In regard to the public interest balance, Dr Haddad acknowledged the general public interest in transparency, accountability and public participation in connection with the matters addressed by the pilot scheme, and she did not dispute the importance of protecting the vulnerable. However, she placed emphasis on the promotion of effective decision making through the provision of a safe space in which officials and politicians could debate and deliberate without the distraction of external comment or pressure. She also expressed concern as to the future chilling effect that disclosure could have, by generating a need to pre-empt ill-informed or unjustified criticisms by hedging communications around with qualifications and careful choice of words:

“A point about the practicalities of enforced removal could be portrayed as draconian or uncaring if taken in isolation but it should be possible for a Minister or official to note or address it as part of a brief, unvarnished exchange without having to reiterate an otherwise implicit contextual point about, for example, the complementary need to consider human rights issues”.

17. She asserted that it was clear, both from the information disclosed and from the disputed information, that Mr Weiss’s suggestions of unlawfulness were

unfounded and did not justify or require further disclosure. She was emphatic that no particular nationality had been singled out.

18. She gave further evidence in closed session. The Tribunal was able to put questions concerning the scope, meaning, and significance of the disputed information, and concerning the application of the two exemptions relied upon. The application of s42 (legal privilege) to certain parts of the information was self-evident.

Analysis: the exemptions

19. The pilot scheme was not itself policy. It was an operational scheme, which was run as a short-term exercise undertaken with a view to establishing a formal policy. The criteria and instructions by which it was operated were disclosed to Mr Weiss in response to his request. The remaining disputed information consists substantially of correspondence and records of discussions about the formulation, setting up, implementation, boundaries, resource requirements, adjustment and assessment of the scheme. Having regard to the purpose of the pilot scheme as explained by Dr Haddad in her evidence, we agree with the Information Commissioner that the substance of the disputed information within the scope of the request falls squarely within the exemption in s35 as being information which relates to the formulation or development of government policy. As Mr Lee succinctly put it, the disputed information relates to a scheme being used to evaluate the use of a power, to determine whether it should be used in future and, if so, how and in what circumstances: these are all questions of the formulation and development of government policy. In addition, certain items are covered by s42 (legal privilege).
20. We are not able to endorse every individual marking in the bundle of disputed information which purports to identify which material is out of scope, which is covered by s35, and which by s42. Dr Haddad in her evidence acknowledged that some of the particular allocations were debatable. But the Tribunal has read the whole of the bundle and we are satisfied as to the substance of the position, namely, that the bulk of the information is exempt under s35, and that there are some individual items in the bundle which are either out of scope or are additionally exempt under s42. In the circumstances of the present case where the disputed information consists of a large volume of emails, notes of meetings and the like, we gratefully adopt the broad approach proposed in *Department for Education and Skills v IC and Evening Standard* EA/2006/0006, [2011] 1 Info LR 689 at [58]. Where such documents are generated as part of the formulation or development of government policy, minute dissection or classification sentence by sentence

is not required or appropriate. In cases like the present no other course would be practicable, either for the public authority responding to the request or for the Commissioner or the Tribunal upon appeal.

21. We reject Mr Weiss's contention that the disputed information could not be policy information because of the impact of European law. We accept that freedom of movement is legally protected at the highest level of the EU legal order, in Articles 20 and 21 of the Treaty on the Functioning of the European Union and Article 45 of the EU's Charter of Fundamental Rights, as well as by the Free Movement Directive (2004/38), and that the Government's room for manoeuvre was limited by European law; nonetheless, as a matter of fact, it is plain to us that space remained for the formulation and development of government policy. Mr Weiss contended that the subject area of the pilot scheme involved only departmental expertise and not political judgment, because the relevant policies were formulated at European level, not at government level; in our view this contention was unrealistic and did not reflect the facts. We accept Mr Weiss' argument that individual case decisions taken in pursuance of the scheme were not matters of policy, but the disputed information was not concerned with individual case decisions.

22. Mr Legg also argued on behalf of Mr Weiss, based on *Telaustria Verlags GmbH v Telekom Austria AG* Case C-324/98 (7 December 2000), for a free-standing European obligation of transparency on governmental authorities to ensure the application of the principle of non-discrimination on the ground of nationality. He urged us to give effect to such obligation directly, or to read FOIA s35 more narrowly in the light of it. The *Telaustria* case was concerned with procurement of contracts for public services. We were not persuaded by his argument that there was any such obligation applicable in this case, and moreover we did not find any evidence that the pilot was targeted at particular nationalities. We do, however, accept Mr Legg's argument that the fundamental rights of freedom of movement and of non-discrimination on the ground of nationality are matters to be taken into account in assessing the public interest balance.

Public interest balance

23. Mr Legg contended that the 'safe space' arguments were overstated, and he identified the following factors in favour of disclosure:
 - a. To encourage good practice and increase public confidence in the basis of government action;

- b. To promote accountability for and understanding of government policy;
- c. To encourage public debate and participation in the development and formulation of government policy;
- d. To broaden policy input;
- e. To address the real concern that the UK authorities were acting unlawfully, contrary to European law and the fundamental rights identified above;
- f. To protect the interests of the individuals affected by the scheme, who are predominantly vulnerable and unrepresented minorities, so that scrutiny of government action is all the more important.

24. The existence and relevance of these factors was not disputed by the Commissioner or the Home Office, except that the latter argued both that the scheme and regulations were lawful and that we were obliged to presume that they were lawful. For the latter proposition Mr Sanders cited *Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 and *Smith v East Elloe RDC* [1956] AC 736. We found no support for his proposition in those cases. We accept that a statutory regulation issued with the authority of Parliament is valid and binding unless or until declared otherwise, but Mr Weiss' point is that in the appropriate form of proceedings it ought to be declared otherwise. We consider it would be wholly artificial for us to approach the assessment of the public interest balance under FOIA without taking into account that a responsible voluntary sector organisation has raised a question over the lawfulness of the scheme. (Mr Sanders agreed with Mr Legg that it was not our task to decide on its lawfulness.)

25. Nevertheless we find the argument concerning the lawfulness of the scheme to be of little weight in this case. Details of the operation of the pilot scheme have been disclosed. Anyone wishing to challenge its legality is able to do so. It does not seem to us that the disclosure of the discussions which took place in connection with the development and formulation of policy would have any significant bearing upon the question of lawfulness. The same is true of the legal advice that was given. If the lawfulness of the scheme, or of a decision taken under it, were challenged in an appropriate legal forum, the advice given to the Government would not be relevant or admissible. Lawfulness of the scheme which would fall to be considered objectively, based on the operational instructions and, where relevant, the circumstances of individual cases. We should make clear that we accept in principle Mr

Weiss's argument that additional information about the pilot scheme, even if legally inadmissible in the courts, could strengthen the hand of those who wish to engage in political lobbying rather than court action. But in the particular circumstances of the present case, having regard to the content of the disputed information and the nature of the issues, we do not find this to be a weighty factor.

26. Considerations of transparency and accountability would provide strong reasons for disclosure in a case where the disputed information showed that the Government intentionally embarked upon an illegal course of action. That is not this case.
27. As regards the public interest in the maintenance of the s35 exemption, the Commissioner and the Home Office stressed the importance of officials being able to hold frank discussions without the hindrance of external comment. This consideration is of particular weight where, as here, the area of policy is one of considerable political sensitivity. In our view, disclosure in response to the request would have undermined officials' ability to run, discuss and test the efficiency and feasibility of the pilot scheme, and would have substantially hindered the formulation and development of government policy.
28. At paragraphs 25-26 of the Decision Notice the Commissioner gave only limited weight to the 'chilling effect' argument, ie, that officials would not give candid advice in future if past advice was disclosed. The evidence did not persuade us that this argument should be given substantial weight; it is the 'safe space' argument which is the important one in the present case.
29. On the balance of public interest, having taken into account the nature of the information and all the points urged on us by the parties, our view is the same as the Commissioner's, namely, that the public interest in maintaining the s35 exemption outweighed the public interest in disclosure. In arriving at this view we place particular emphasis on the relatively limited usefulness of the information for purposes of transparency and accountability, given the extent of other disclosure concerning the pilot scheme, and on the real harm which would have been done to the policy-making process if the requested disclosure had been made.
30. The public interest in maintaining legal privilege, so that public authorities can obtain legal advice that is frank, realistic, unvarnished, and uninfluenced by an expectation of disclosure, is strong. There are no considerations in this case which in our view are capable of outweighing that interest. Our

judgment on the balance of public interest in relation to s42 is accordingly that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

31. The parties cited a large number of legal cases. Their excursions into European law concerning the right to reside, welfare benefits and connected matters were informative but ultimately not determinative of anything that we had to decide. Where we have not referred to cases cited to us, that is because we have found it unnecessary to do so for the purposes of reaching our decision.

32. In our judgment, for the reasons set out above, the Home Office acted in compliance with its FOIA obligations. The appeal is dismissed. Our decision is unanimous.

Andrew Bartlett QC

Tribunal Judge

[signed on original]