



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2016/0136**

**Heard at Fleetbank House, London  
On 23rd. March, 2017**

**Before**

**Judge**

**David Farrer Q.C.**

**Tribunal Members**

**Pieter de Waal**

**and**

**Narendra Makanji**

**Between**

**The Right Honourable The Lord Naseby ("Lord N")**

**Appellant**

**and**

**The Information Commissioner ("The ICO")**

**First Respondent**

**and**

**The Foreign and Commonwealth Office ("The FCO")**

**Second Respondent**

Lord Naseby appeared in person.

Christopher Knight appeared for the ICO.

Julian Blake appeared for the FCO.

### **Decision and Reasons**

The Tribunal finds that the exemption provided by s.27(1)(a) was engaged and that the balance of public interests favoured the withholding of the disputed information. The appeal is therefore dismissed.

1. For many years up to 2009, Sri Lanka suffered a devastating civil war involving Tamil rebels (the “Tamil Tigers” or “the LTTE”) controlling large areas in the North and East of the country and the armed forces of the majority Sinhalese government.
2. The final months from January to May, 2009, leading to the defeat of the Tamil Tigers, were particularly terrible. Many thousands of civilians in the Tamil - occupied areas were killed. Who killed them and in what circumstances remains a bitterly disputed question to this day. It is clear from the material placed before us that the answers are not necessarily straightforward. For some years the Sri Lankan government of President Rajapaksa did not cooperate in an independent investigation into these questions and UK relations with Sri Lanka were injured as a result.
3. In March, 2014, with the support of a new administration in Sri Lanka, the United Nations Human Rights Council (“UNHRC”) passed a resolution calling for an international investigation into allegations of violations of human rights and of international law by both sides in the conflict. It also called for progress on a reconciliation between the previous combatants, respect for human rights and a political settlement. It called upon the government of Sri Lanka to cooperate with the investigation and to take a range of other steps to discover what had occurred and to hold those responsible to account.
4. The Report of the OHCHR Investigation on Sri Lanka (“OISL”), produced in response to that resolution, was published in September, 2015. Its findings were highly critical of the actions of the Sri Lankan security forces and associated paramilitary groups in the last few months of

the war. It stated that there were reasonable grounds to believe that they were implicated in widespread unlawful killings of Tamil civilians. Their actions might amount to war crimes and crimes against humanity. There were numerous allegations that senior government officials had ordered killings and “disappearances”.

5. The LTTE were also accused of killing people of all ethnic groups and religions who appeared to dissent from their views. They had indiscriminately bombed and mined civilians and targeted particularly political figures, public officials and academics.
6. OISL described further atrocities and apparent war crimes by both sides but suggested that government forces were still more extensively involved than the LTTE. It is not necessary to go into further detail in this judgment but it is perfectly clear that these were terrible events and that there is a very powerful public interest in identifying the perpetrators and bringing them to justice. Moreover, reconciliation may well depend on publicizing the truth.
7. Lord Naseby had a lengthy and distinguished career as an MP before becoming a member of the Upper House. He was Chairman of Ways and Means from 1992 - 1997. He founded the All - Party Sri Lanka Group in 1975 and was Chairman for many years until 2015, when he became President. This interest reflected his earlier background, living and working in Pakistan, India and Sri Lanka in the 1950s and 60s. He claims, with every justification, a deep understanding of the culture, history and politics of Sri Lanka, based on many years' visits, close relationships with important and influential individuals within the country and regular meetings with people of all ethnic groups within Sri Lankan society.
8. He is evidently a knowledgeable, fair - minded and disinterested observer of events in a country for which he has a deep affection. He is not convinced that OISL uncovered the whole truth as to responsibility for the events of early 2009, although open to a change of mind, should further disclosures support the OISL conclusions. In support of his case, he exhibited an “Expert Military Report” by Major General John Holmes, dated March, 2015, prepared for the Sri Lankan Commission for Missing Persons, which cast doubt on significant aspects of the OISL
9. Colonel Anton Gash was military attache to the British High Commission in Colombo for a number of years, including the period covered by OISL and some substantial time on either side of it. His duty in 2009 was to provide expert military on - the - spot reports and

assessments of the conflict to the South Asia Desk of the FCO and insights into the thinking of both sides.

10. Some of his sources of information would be the local media. Sometimes political gossip. More important was the information obtained from local military or political contacts within the Sri Lankan administration who were prepared to give him briefings or simply pass on allegations on a confidential basis, circulation being restricted to his contacts in the FCO. The value of such information was a matter for his assessment.
11. The development of such a network of contacts is an essential part of work of the kind undertaken by Colonel Gash and other military attaches around the world. The fact that UK relations with the Rajapaksa government were fragile would not preclude the maintenance of such productive links.

#### The Request

12. On 6th. November, 2014 Lord Naseby addressed to the FCO a request for -

*“Details of the despatches written by Colonel Anton Gash, the defence attache of the British High Commission in Sri Lanka, to the UK Foreign Office during the period January, 2009 to May, 2009. These despatches described his assessment of what he had seen during this period of the Sri Lankan civil war”.*

13. On 5th. January, 2015, the FCO provided heavily redacted copies of those email despatches. It justified its refusal to provide the redacted passages by reference to a number of FOIA exemptions, including s.27(1)(a) and (b) and s.27(2), which relate to prejudice to international relations and the protection of confidential information from foreign states or international organisations. The Tribunal does not need to look beyond s.27(1)(a), given matters that have been agreed and its own factual findings.
14. Lord Naseby sought an internal review which maintained the partial refusal of information. Lord Naseby complained to the ICO.
15. Some further emails were uncovered and were provided to him, subject to similar redaction. Other redactions were removed because the s.27(1)(b) exemption no longer applied.

The Decision Notice (“the DN”) dated 4th. May, 2016.

16. The ICO concluded that the FCO had probably located all the information within the scope of the request. He found that disclosure of redacted information provided in confidence would be likely to cause real and substantial prejudice to UK channels of communication with the Sri Lankan regime and a wider loss of confidence in the UK’s use of confidential intelligence.
17. He readily acknowledged the public interest in a full understanding of what had taken place in 2009. Nevertheless, it was clearly outweighed by the need to protect good relations with friendly states and the continuing flow of authoritative information which Colonel Gash and his counterparts elsewhere provided. He ordered the FCO to disclose some further information for which other exemptions had been claimed and which is immaterial to this appeal.
18. Lord Naseby appealed.

#### The Appeal

19. Although the grounds of appeal may imply that the engagement of s.27(1)(a) was unchallenged, the further submissions and the course of the hearing make it essential that the Tribunal make findings as to the engagement of s.27(1)(a) and, if it is engaged, whether this is a case of prejudice proved on a balance of probabilities or the likelihood of prejudice. The appeal case as to the balance of public interests was very clearly stated.
20. Lord Naseby’s case was set out in his Grounds of Appeal, his Reply to the Responses and a skeleton argument. He detailed his impressive credentials as an authority on the modern history of Sri Lanka.
21. He provided a helpful summary of the historical background to the long - running conflict between the government and the LTTE. He described the period from January to mid - May, 2009 as absolutely key to an understanding of the contemporary situation. The UN had concentrated on this final phase when initially taking evidence for the Darusman report. The Sri Lankan government had refused to cooperate and the evidence was therefore largely confined to what was said by LTTE survivors, NGOs and the media. The report had been

rejected by the government, which nevertheless delayed setting up its own independent inquiry until August, 2013. It was to this inquiry, led by Maxwell Paranagama, that Major General Holmes provided his expertise (see §8). His report was exhibited to Lord Naseby's submissions.

22. Lord Naseby knew Colonel Gash well and had met him in Sri Lanka. He regarded him as a first - rate source of information and objective evaluation, an assessment with which the FCO fully agreed. He argued that the risks involved in disclosure of Colonel Gash's reports were not comparable to similar publication relating to Saudi Arabia or Iran, examples referred to by the FCO. Sri Lanka is a friendly democratic member of the Commonwealth. Disclosures relating to those other states posed very different problems. There was no solid ground for fearing damage to relations with the current Sri Lankan administration if the despatches were fully published.
23. Partial disclosure of these despatches had not damaged relations and it is not clear that the redacted material is fundamentally different in character.
24. As to the public interest, the high importance of reaching the truth as to what occurred was common ground. The value of OISL had been compromised by the refusal of the Rajapaksa government to cooperate, because it regarded the civil war as an internal matter. As with earlier inquiries, the result was a report unduly dependent on LTTE evidence. Colonel Gash was an ideal source of carefully evaluated information from the other side, enabling the public to form a balanced judgement on what had taken place.
25. It is vital that the truth as to these events is revealed.
26. The Paranagama report represents a well - informed alternative view to that of OISL. It demonstrated the importance of obtaining credible evidence from the government side, when assessing the accuracy of the OISL findings.
27. Suitably redacted so as to protect vulnerable individuals, the full content of the Gash despatches would be an invaluable contribution to the revelation of what truly occurred. The balance of public interests firmly favours disclosure.

28. The large Sri Lankan population within the UK had a particularly powerful interest in gaining a clear and full picture of the events of 2009.
29. No UK security interests were at risk through disclosure.
30. Release of the emails could reduce the risk of prosecutions for war crimes.
31. The FCO had made no attempt to consult the Sri Lankan authorities and discover whether they objected to disclosure.
32. Lord Naseby reinforced his submissions with extensive relevant documentary evidence, including the Holmes opinion, ministerial statements and extracts from Hansard.
33. In response, the ICO and the FCO adopted broadly similar positions, though Mr. Knight for the ICO probed the evidence of Ms. Clarke ( see §35 ) with great care.
34. As to the engagement of s.27(1)(a), the FCO stressed a specific and a more general consequence of disclosure. As to the former, the change of government in Sri Lanka had produced an administration more sympathetic to the UK than its predecessor. Nevertheless, disclosure of material provided to Colonel Gash on a strictly confidential basis would seriously damage that administration's trust in the UK as a recipient of such information. More widely - and perhaps still more significantly - it would send a very unwelcome message to other friendly governments which allowed information to reach the FCO by such channels in the expectation that it would go no further.
35. Ms. Laura Clarke, the head of the South Asia desk, giving evidence on these issues quoted Colonel Gash and his successor in Sri Lanka, both very experienced diplomats whom she had consulted on the consequences of disclosure. The Tribunal regards their views as highly significant and quotes them in full.
36. Colonel Gash observed -  
*"I believe the Tribunal should take into account that I have also requested that a number of redactions should stand. As the author I am undoubtedly best-placed to make a holistic assessment of the impact on individuals, organisations and relationships."*

*I am particularly concerned about the impact on individuals with the UN, who gave me information that they were not authorised to release. Additionally there is huge potential for this issue to undermine the credibility and trustworthiness of the entire UK Defence Attaché network, if host nations see that even briefings which were given to DAs on a strictly confidential classification will subsequently be disclosed, and if allies see that their personal and confidential opinions and assessments are released.”*

37 Captain Stuart Borland (UK Non-resident Defence Advisor for Sri Lanka) stated:

*“Without this mechanism [close personal relationships with contacts within the military and the government] I would not be able to function as a DA in either India or Sri Lanka or probably any other country.*

*I have absolutely no doubt that the relationship between me as the DA and the military and Government in Sri Lanka would dry up and revert to official releases only. I suspect that this would also extend to my FCO colleagues and the High Commissioner would find himself similarly frozen out. We might as well close up and just operate a consulate in this case.*

*More importantly, I also suspect that most other Governments would see what the UK has done and channel and contacts would dry up in other countries. Would we really expect the Indians to trust me in conversation once our activities in Sri Lanka were laid open. They would worry that the same might happen to them. And there are some key countries where this communication channel is the most effective if not the only one.”*

38 Ms. Clarke, who has a wide experience of such channels of communication, gave evidence as to recent relations with the different Sri Lankan administrations and strongly confirmed the above opinions. She explained that some parts of the despatches related information which had not come from a confidential source or was now common knowledge. The surviving redactions withheld confidential material from informed sources or comments from Colonel Gash which were plainly never intended for publication. In discriminating between the disclosable and the confidential, Ms. Clarke’s FCO team had “gone through the despatches with a toothcomb” and had disclosed everything which could be revealed without damage to UK interests.

39 Ms. Clarke gave evidence briefly in closed session. We refer to it in the closed annex to this decision. The only significant matter which was disclosed had already been communicated to Lord Naseby on terms, express or implied, as to confidentiality and he was therefore, most unusually, present when it was referred to in the absence of the public and



therefore able to comment on this evidence in his closing submissions. (He did not do so, in fact).

### The Tribunal's findings

#### The law

40 Section 27(1)(a) of FOIA provides –

*“(i) 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, “*

This is an exemption to which FOIA s.2(2)(b) applies, hence, if engaged, the Tribunal must assess the balance of public interests in disclosure and maintaining the exemption.

41 The exemption is engaged if it is more probable than not that some identified prejudice will result or if there is a significant and weighty risk of such prejudice from disclosure. The degree of risk may well be relevant to the balance of public interests (see *R (Lord) v Secretary of State for the Home Department [2003] EWHC2073{Admin.} [2011] 1 Info L.R.239*).

42 When assessing the strength of evidence from a department of state such as the FCO as to the likely reaction of foreign governments, the court must be alive to the individual expertise of senior staff, such as Ms. Clarke, and the institutional knowledge on which they can draw. Such authoritative opinions are to be contrasted with the probable absence of any judicial knowledge of such matters – see *R (Lord Carlisle of Berriew v Secretary of State for the Home Department [2014] UKSC 60 [2015] A.C. 945*. That does not require a slavish subservience to the expert opinion but it does mean that the Tribunal needs a very clear justification for rejecting it and preferring its own assessment.

43 Our first task is to identify the prejudice which, it is said, may result from disclosure. Although, initially, it seemed that the FCO was largely concerned with the specific prejudice to UK relations with Sri Lanka, that is the Sri Lankan government's loss of trust following what it perceived as a major breach of confidence, it was clear at the hearing that still wider damage was contemplated, namely, a general loss of confidence in the discretion of the UK government, leading to the closing of confidential channels of communication by many friendly states, within or without the Commonwealth. The quotations from the opinions of Colonel Gash and Captain Borland at §§33 and 34 are compelling evidence to that effect.

44 Given those assessments, coupled with the evidence of Ms. Clarke, which we found highly persuasive, we conclude that disclosure of the redacted passages in the despatches would, on a balance of probabilities, undermine not only the trust of the Sri Lankan administration but of foreign governments more generally in the FCO's respect for the confidentiality attaching to information provided off the record to UK defence attaches and perhaps other UK diplomats. That would amount to serious prejudice to the interests of HM Government.

45 We accept that the disclosed material was carefully reviewed and very probably came from non – sensitive sources. That is, inevitably, a generalised finding because the Tribunal is not equipped to form its own independent view, in relation to most of the redactions, as to the likely source of any disclosed information.

46 The public interest in disclosure is substantial. Beyond the general interest in transparency as to events of such importance, there is the likely value of information from Colonel Gash's contacts with the security forces to any balanced assessment of the responsibility of both sides to the carnage of the last months of the war. There is evidently a perception, shared by a body of informed opinion, that reports so far published have been devalued by the shortage of evidence and appraisal from the government side, largely due to a reluctance to participate in what was seen as an intrusion into Sri Lanka's internal affairs. Furthermore, Lord Naseby submits, the public interest would be served by the publication of Colonel Gash's authoritative comments and assessments, where they occur.

47 We acknowledge the strength of the public interest in such information from such sources, marshalled by such a well qualified and objective observer. Nevertheless, we consider the public interest in maintaining confidential channels of communication for UK defence attaches clearly outweighs it. Our finding that prejudice would, rather than would be likely to, result from disclosure is a significant factor supporting that assessment.

48 That finding, as related to the balancing of public interests, is not dependent on the view we formed as to the effect on specific relations with Sri Lanka but is founded also, to a most significant degree, on our conviction that disclosure would inflict much wider prejudice on UK sources of information from confidential contacts in other countries.

49 For these reasons we dismiss this appeal.

50 This decision is unanimous.

Signed David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 18th. April, 2017

Promulgated: 3<sup>rd</sup> May, 2017