



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

Appeal No: EA/2019/0019

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50738182

Dated:

Christopher Stanley (KRW Solicitors)

Appellant

and

Information Commissioner

First Respondent

Northern Ireland Office

Second Respondent

Heard at: Royal Courts of Justice, London

Date of Hearing: 6 & 7 February 2020

Before

**Chris Hughes
Judge**

And

**Anne Chafer & David Wilkinson
Tribunal Members**

Date of Decision: 24 February 2021

Date of Promulgation: 17 March 2021

Attendances:

For the Appellant: Sam Fowles

For the Respondent: Christopher Knight

For the Second Respondent: Andrew Deakin

Subject matter:

The Freedom of Information Act 2000 s23(1) & s24(1)

Cases:

All Party Parliamentary Group on Extraordinary Rendition v ICO and MoD [2011] UKUT 153 (AAC) - *APPGER*

Al-Masri v Former Yugoslav Republic of Macedonia [2012] ECHR 2067

Corderoy and Ahmed v Information Commissioner, Attorney General, Cabinet Office [2018] AACR 19

Keane v Information Commissioner, Home Office, Metropolitan Police Service [2016] UKUT 0461

DECISION

The appeal is dismissed.

REASONS

Introduction

1. Mr Stanley is a lawyer with substantial experience of human rights issues in relation to the conflict in Northern Ireland, this has included archival research on available records in Belfast, Dublin and London. His firm is representing the family of one of those murdered by bombs placed by the Provisional IRA in Guildford pubs on 5 October 1974 where the inquest was due to resume later in 2020. His firm also represented 10 relatives of those similarly murdered in Birmingham on 21 November 1974 at an inquest which concluded with findings that they had been unlawfully killed. The firm continues to represent this group.
2. In 1975 six men were found guilty of the attacks in Birmingham in 1975. Their convictions were quashed in 1991. In 1975 four men were found guilty of the Guildford bombings, their convictions were quashed in 1989.

3. The tribunal was informed that the processes in place in Northern Ireland for “Addressing the Legacy of Northern Ireland’s Past” which seek to give support to survivors do not apply to the attacks carried out in Great Britain,

The request for information

4. On 15 November 2017 Mr Stanley made a request of the Northern Ireland Office (the NIO) in the following terms:-

“I request release of the file CJ/6052 under FOIA 2000:

Reference : CJ/6052

Description: Provisional IRA intentions and activities in Great Britain

Date: 1975 Jan 01 – 1975 Dec 31

This file is retained by NIO under s3.4 of FOIA 2000.”

5. NIO replied on 18 January 2018 refusing to provide the information relying on two provisions of FOIA; s23(1) which requires the withholding of information supplied by or relating to, bodies dealing with security matters and s24(1) information (not falling within s23(1)) where exemption from disclosure is required for the purpose of safeguarding national security. NIO maintained the position on internal review, explaining that *“it is not appropriate in the circumstances of the case, to say which of the two exemptions is actually engaged so as not to undermine national security or reveal the extent of any involvement, or not, of the bodies dealing with security matters.”*

The Complaint to the Information Commissioner

6. Mr Stanley complained to the Information Commissioner. In her decision notice she explained why although the two exemptions are mutually exclusive it is proper for public authorities to cite both exemptions in the alternative to avoid revealing whether or not a s23 security body is involved. She confirmed that given the subject matter of the file – a terrorist organisation (dn 17) *“there is clearly potential for some or all of the withheld information to relate to the involvement of one or more of the security bodies.”* She was satisfied that s23(1) had not been applied in a blanket manner.
7. She accepted that information about the Provisional IRA would be relevant to national security *Disclosure of the withheld information would inform the public, and by extension, terrorist organisations, as to the level of interest taken by the police and other bodies at the time. It may also expose the intelligence held, or lack of intelligence held, and how such intelligence was obtained. This would be likely to assist terrorist organisations in evading detection, even taking into account the age of the information (dn 18).* She considered Mr Stanley’s argument with respect to the age of the information and concluded that information from the 1970s may still be relevant to current live issues, and that the age of the information does not prevent its disclosure from undermining national security.

8. In addressing the public interest balance (on the basis that it was the qualified exemption in s24(1) rather than the absolute exemption in s23(1) that was relevant) she found that there was a general public interest in openness and transparency, and that disclosure would inform the public as to how activities of a terrorist organisation were identified and analysed and that *“there is a legitimate public interest in assuring the public that threats to national security are effectively considered by the relevant bodies”*.
9. She confirmed that there was (dn 25-26): *“an inherently strong public interest argument in favour of maintaining the exemption, given that it is only engaged if it is required to safeguard national security. The Commissioner acknowledges that the exemption is qualified, therefore Parliament considered it possible that the public interest may lie in disclosing information even though its disclosure may harm national security, However the Commissioner is of the opinion that such cases will be exceptional. Having inspected the withheld information in this case the Commissioner is not satisfied that it demonstrates an exceptional case, and in any event the public interest in disclosure is limited.”*
10. In the light of this conclusion the Commissioner upheld the NIO position that the s24(1) exemption should be upheld.

The appeal to the Tribunal

11. In his appeal Mr Stanley raised issues as to the disaggregation of the material between s23(1) and s24(1) and the public interest in disclosure using the standard reasoning which the Information Commissioner applied and which he submitted would apply heavily to the withheld information. He acknowledged that “relates to” in s23(1) had a wide meaning. He found it hard to believe that 45 year old information could still be relevant to safeguarding national security under s24.
12. In resisting the appeal the Commissioner emphasised the breadth of meaning of the term “relates to” citing a passage from the UT in *APPGER* :-

“26... information in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions, is highly likely to be information which relates to an intelligence or security body and so exempt under section23.

27 Further, in our view this approach is likely to provide an answer in the great majority of cases to the question whether the relevant record (and so here and in many cases the document(s) in question) and so all of the information within it is covered by the section 23 exemption.”
13. She confirmed that she had inspected the file and had not applied s23 in a blanket manner and that to the extent that information was not within s23(1) it fell within s24. She submitted that while there had been progress in Northern Ireland since 1975 there remained a considerable threat to national security from organisations in Northern Ireland

and the terrorism threat level in Northern Ireland had been SEVERE since 2009. The terrorism threat related to Northern Ireland in Great Britain at the time of the request was SUBSTANTIAL.

14. NIO supported the Commissioner's reasoning that non-disclosure under s24(1) was reasonably necessary to safeguard national security. The file remain classified as Secret. In 2019 there had been a bombing and the shooting of a journalist in Northern Ireland, and letter bombs in Great Britain and the Republic of Ireland. NIO argued further that disclosure created a wider risk of a mosaic effect when taken with other information and that a perceived identification of individuals or organisations from the material could create a risk of violence despite the passage of time. NIO submitted that there was no compelling public interest to outweigh the substantial public interest in withholding any s24(1) information.

The issue for the Tribunal

15. The NIO maintained its position that it was entitled to rely on s23 and or s24 to withhold the information and the Commissioner broadly accepted that position but invited the tribunal to scrutinise carefully the information to which s24 was applied. Mr Stanley (disadvantaged by not knowing the contents of the information), sought to have all the information not properly subject to s23 disclosed.
16. The questions for the tribunal to decide, on the basis of the examination of all the withheld material on a document by document basis and in the light of all the evidence before it, is whether s23 or s24 applies to all the information, and if s24 applies to any of it, whether the public interest favours disclosure of that information.

17. Evidence

18. In his evidence Mr Stanley discussed the implications of the Good Friday Agreement and the attempts to discover the truth for victims and survivors of the Conflict in Northern Ireland. He emphasised the steps being taken in Northern Ireland to facilitate this; however in England there were no equivalent processes and therefore inquests were the only means of investigating deaths arising in England. He claimed that archival material was important for the Birmingham inquest and would be for the Guildford inquest; although he acknowledged that only a limited amount of material had been found as a result of searches for the Birmingham inquest. He argued that release of the information would help the understanding of the relatives of those murdered in Birmingham and Guildford. He argued that if the withheld material disclosed improper conduct by state agents then withholding the information would harm the national security it purported to protect by undermining democratic constitutional values. He acknowledged that there was a current threat in Northern Ireland from dissident Republican groups, however that threat was very different from that applying when the material was created; the material dealt with a decommissioned paramilitary organisation, the Provisional IRA. A witness to the Birmingham inquest had been authorised by Provisional IRA to give evidence. His view was that this had created a truth and reconciliation moment. Mr Stanley stated:-

“The PIRA was decommissioned. It splintered into dissident Republican groups now operating in Northern Ireland. Decommissioning does not mean that a veterans-structure could not exist, the head of which directed Witness O...

It does not mean that PIRA is a threat now or that material in the file CJ5/6052 should not be examined in public. The threat posed by dissident Republicans in Northern Ireland is a threat to the peace and the Agreement [of] 1998 not to the release of information which is historic but it could contribute to answering the questions asked by the relatives of victims and survivors...”

19. On 3 February NIO released certain information. Mr Stanley, in a witness statement commenting on that information stated that it disclosed tensions as to the proper way to address loyalist terrorism in reaction to PIRA terrorism, with officials and Ministers prepared to speak to both sides and recognising that all paramilitary activity posed a threat to communities in Northern Ireland and Great Britain. Mr Stanley counter-posed this to concerns about collusion between state agents and Loyalist paramilitary groups. On cross-examination he confirmed that nothing in the disclosed information showed evidence of collusion. He confirmed that the bombings in Great Britain were outwith the provisions of the Good Friday Agreement and that the Stormont House Agreement would not result in any progress on the search for truth with respect to those bombings. He considered the threat levels now were very different to those in 1975 and that any risk to individuals could be minimised by redaction.
20. Julie Hambleton’s sister was murdered in one of the Birmingham pub bombings. She gave evidence of the grief and suffering caused by the bombings and the long campaign by families of victims to obtain the truth. She appreciated the issue of exposing individuals to risk but could not accept the national security exemption. She emphasised that the Provisional IRA had been decommissioned and that the current threat in Northern Ireland came from those who never agreed to the Good Friday Agreement. She respected the need for National Security but queried how it could justify the withholding of material that *could possibly contribute to my understanding as to why my sister Maxine was killed?...If the material contained in file CJ4/6052 were to add to my understanding of how my government was monitoring the PIRA in England after the murder of my sister then that would be a further layer of knowledge.*
21. Professor Mark McGovern is a sociologist who has worked on issues arising from the conflict in Northern Ireland for over 20 years. He has provided advice and evidence for a range of civil liberties community and victims organisations. He had researched collusion between the state and paramilitaries as part of his work on the truth and reconciliation process. He assumed that the withheld material related to surveillance of PIRA and an assessment of its activities and intentions in the wake of its bombing campaign. He argued that the scale of violence was vastly different now from in 1975 when there had been 1800 shootings; in 2019 there had been 15 shootings, with two people killed. The current threat was much lower. Current dissident Republican splinter groups target police and prison officers; the journalist Lyra McKee had been murdered

during indiscriminate shooting at police. While both Loyalist and Republicans engage in reprisals these are not causally connected with the past and reflect intergroup rivalries and their control strategies within the communities. Activity from such groups is geographically dispersed on certain estates in urban centres and there is strong community resistance to them, Sinn Fein had substantial support, was a party of government and had 25% support in the Republic, dissident republicans had minimal support with a couple of councillors. Of the other republican groups from the 1970s the Official IRA had split into the Workers Party and the paramilitary Irish National Liberation Army (INLA) The INLA was largely defunct and was a mere shadow with some criminal activity.

22. He emphasised his view that the default position of government when faced with a FOIA request was to prioritise the possible harms of disclosure over the obvious harms of non-disclosure. He endorsed the Stormont House process as an internationally innovative approach to enable communities to put the legacy of the past out of the picture and to move forward. He suggested that if the information was released and showed that the government had been acting appropriately it would disprove the scepticism that silence has created if it demonstrated that everything possible was done for the Birmingham families.
23. Mr Larmour a Director in the NIO who has had responsibilities relating to a wide range of issues including National Security for nine years gave evidence in both open and closed sessions. In open he confirmed that he had examined all the material in the file on a document by document basis and had released some of them. He confirmed that there remained a strong and violent aspiration from some republicans opposed to the Good Friday Agreement to carry out terrorist attacks. Since 2011 there had been over 120 such attacks resulting in five deaths. The threat remained SEVERE. Asked if he knew of any national security incidents arising from investigations into the legacy of the Troubles, he stated that it was very hard to explore motivations behind incidents. Asked if the Provisional IRA accepted the Good Friday Agreement and had disarmed, he confirmed that this was broadly the case and that while its members believed it still exists the broader republican movement was entirely committed to peace. However some dissidents were still committed to violence.
24. In closed session Counsel for the Commissioner repeated his question as to whether former members of the Provisional IRA remained members of current dissident republican groups. He answered on the basis of his knowledge and the information to which he had access in his role. He was then taken through the withheld information in each document in the requested file exploring the basis for the exemption(s) claimed, including matters of fact relied upon and interpretations reached by Mr Larmour based on his experience and understanding. The position of the NIO was tested and the possibility of disaggregation addressed. The tribunal and Counsel for the NIO asked supplementary questions. Mr Larmour confirmed that he was not aware of any proposals regarding the institutions to deal with the past in Northern Ireland set out in the Stormont House Agreement that would act as a bar to terrorist incidents which had occurred in Great Britain being considered. He accepted the potential value to Mr Stanley and the other

witnesses in disclosure of information held by the NIO as informing an understanding of the wider picture of activities of Government in the mid-1970s in relation to Northern Ireland.

25. In closed session Counsel for NIO and the Commissioner made submissions as to the application of s23(1) and s24(1) to the withheld information.

Legal submissions

26. In his submissions Counsel for Mr Stanley emphasised the extent of change in Northern Ireland since the Good Friday Agreement with all main parties supporting peace, the police enjoying a high level of legitimacy and the main paramilitary organisations having abandoned violence. The past remained a live issue being addressed through various truth and reconciliation processes, however the families of those affected by the Birmingham bombings had been denied closure by the failures of the investigation and prosecution of those arrested at the time and the failure to prosecute anyone subsequently. National security included protecting the rule of law from erosion of legitimacy. He acknowledged the expertise of the NIO but sought to cast doubt on it by the late disclosure of material relating to discussion (including in Parliament) of possible Provisional IRA involvement in DHSS fraud where he emphasised that there was no application of s23 or s24.
27. He submitted that s24 was not applicable. He emphasised that the terrorist threat was different and that since the names of individuals was not sought the risk was different from that considered in other cases. He acknowledged that while Professor McGovern had accepted that there may be a crossover of personnel from Provisional IRA into dissident republican groups he submitted that the groups were fundamentally different.
28. If, contrary to his submissions s24 was applicable, then he submitted in favour of disclosure the first was that the public interest in disclosure in the context of the Troubles was a high level of public interest, he relied on dicta in *El-Masri* (paragraph 191):-

The Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case.”

29. He submitted that transparency and engagement dispelled suspicion and that truth recovery was a jigsaw where the relevance of information might not be appreciated until a mosaic had been created. Referring to material disclosed by NIO on 3 February he stated that it showed “displeasure of the writer at the cancellation of meetings” but there was the potential that further disclosure would provide evidence of meetings with paramilitaries or of collusion. The very act of disclosure contributed to faith in the working of democracy.
30. He emphasised that the state had not delivered justice to the families bereaved by the Birmingham bombings, the families did not consider that enough had been done. As the

state was not taking active steps to address this there was an enhanced interest in disclosing the information. There was significant political support for an inquiry.

31. He submitted that disaggregation of information within documents would be possible and enable the disclosure of information not caught by s23(1).
32. He advanced a further argument that s3(4) of the Public Record Act 1958 creates a presumption that records of government departments would be transferred to the Public Record Office (PRO). On transfer to the PRO s23 becomes a qualified and not an absolute exemption.
33. In resisting the appeal Mr Knight for the Commissioner submitted that s23 was an absolute exemption since the records had not been transferred to the Public Record Office but continued to be held in NIO under the authority of an Instrument under s3(4) of the Public Record Act made by the Lord Chancellor on 19 December 2011.
34. In resisting the appeal Mr Deakin for NIO noted that since s3(4) of the 1958 Act did not create a deeming provision, the fact that the information was held by NIO meant that s23 remained an absolute exemption. He reminded the tribunal that the fact that the state had not been able to prevent the Birmingham bombings occurring was not evidence of a failing in law to prevent the bombings.

Consideration

35. Although Counsel for Mr Stanley advanced an argument that s23 did not apply as an absolute exemption it was a speculative and ill-founded assertion based on a misreading of FOIA and the Public Records Act. The file continues to be lawfully held in NIO under the authority of an instrument made by the Lord Chancellor; accordingly to the extent that information in the withheld material falls within s23 then it is exempt from disclosure.
36. APPGER makes clear that the information which relates to a section 23 body should be widely interpreted. Section 23 bodies are omitted from the list of bodies to which the Act applies and s23 is a means of ensuring that the exclusion is not circumvented. Information supplied to a s23 body for the purpose of the discharge of their statutory function is highly likely to be exempt. While in the caselaw there is discussion of theoretical issues such as whether government-wide circulars on leave arrangements could fall within s23 a note of realism is appropriate – the file under consideration is a record relating to the Provisional IRA's activities and intentions, it is vanishingly improbable that any material within the file would not be concerned with the security issues indicated by the file name and accordingly any information within it which had been supplied to a s23 body would reveal something about the activities of a s23 body *Corderoy*. Accordingly having carefully considered the evidence of Mr Larmour and from an inspection of the documents the tribunal is satisfied that no meaningful material can be disaggregated.

37. Section 24 provides exemption from disclosure where this is required for the purpose of national security. It is clear that there continues to be a national security threat from dissident republicans; There is some continuity between 1975 and the present day. The national security analysis of the issues information sources and responses remains relevant.
38. In his notice of appeal Mr Stanley set out the background to the request which was for a file retained by NIO as catalogued by The National Archives. These records relate to a major issue 45 years ago. This age sets it apart from the usual considerations of this tribunal. The information is held in a file entitled "Provisional IRA intentions and activity in Great Britain." The file is held by the Northern Ireland Office, as such it is held by one government department and relates to terrorist activity outside its geographical area of responsibility. This presents something of a paradox.
39. The two public interest arguments advanced by Mr Stanley in relation to disclosure are firstly that it will advance the truth and reconciliation process – which on the evidence he brought forward is largely a Northern Ireland issue and therefore unlikely to benefit from material about IRA intentions and activity in Great Britain. The second argument is that it may cast light on the Birmingham bombings. The difficulty with that claim is that those atrocities were committed before the time period covered by this file. During the period of the file the presumed culprits were in prison facing trial or convicted. From a consideration of this time frame, the location and title of the file, the Commissioner's conclusion (set out at paragraph nine above) that public interest in disclosure is limited is clearly probable.
40. It is buttressed by consideration of the material which, following a careful analysis to determine what material could be properly released, Mr Larmour disclosed shortly before the hearing. As was acknowledged by Counsel for Mr Stanley a letter complaining that meetings were not happening and material discussing press stories about possible links between social security fraud and the Provisional IRA do not add anything to the public interest he was seeking to advance and these were the highlights of the material disclosed. The discussion on public source information was information on "Provisional IRA intentions and activity in Great Britain" and this was properly disclosed. For the remainder of the contents of which NIO continue to maintain that the exemptions in s23 and s24 apply.
41. The tribunal has considered with the greatest care of care the public interests points and in particular Ms Hambleton's concerns and the value of advancing the truth and reconciliation process in Ireland and Britain. However it is satisfied that the public interest in disclosure of s.24 material, is, as found by the Commissioner, very limited. There would be some prejudice to national security, this far outweighs any benefit from disclosure *Keane*. The appeal is not made out and is dismissed, save that one further document be disclosed. There is a closed annex to this decision.

Judge Chris Hughes