



Neutral citation number: [2024] UKFTT 804 (GRC)

Case Reference: EA.2023.0302

**First-tier Tribunal
General Regulatory Chamber
Information Rights IC-199628-S6R4**

**Considered on the papers on: 30 July 2024
Decision given on: 06 September 2024**

Before

**TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER MIRIAM SCOTT
TRIBUNAL MEMBER EMMA YATES**

Between

JAMES COOMBS

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) HOME OFFICE**

Respondents

Cases

Department of Health v ICO and Lewis [2015] UKUT 0159 (AAC), [2017] AACR 30

Decision: The appeal is Allowed

Substituted Decision Notice.

To: Home Office, 2 Marsham Street, London, SW1P 4DF

The Home Office shall disclose the requested information "The Historical Roots of the Windrush Scandal" within 30 days of the date of this decision

REASONS

1. For some years the Home Office has been embroiled in controversy about the impact of successive changes to UK Nationality and Immigration law and policy and the effect that the destruction of Home Office records of individuals arriving in the UK had many years later when many thousands of citizens were unable to prove their UK citizenship and suffered as a result.
2. The matter became a matter of public concern following coverage in the Guardian newspaper and led to the resignation of Home Secretary Amber Rudd. The new Home Secretary Sajid Javid in April 2018 commissioned a review from the Chief Inspector of Constabulary (Wendy Williams) which was published on 19 March 2020. In September 2020 the Home Secretary Priti Patel published an action plan which she stated would 'deliver for the Windrush generation'. In November 2021 the Home Affairs Select Committee found that fewer than 6% of those entitled to compensation for the injustices they had suffered had received it.

3. On 31 May 2022 the Appellant sought information from the Home Office:

'Please provide copies of any reports commissioned by the Home Office to investigate the underlying causes of issues faced by immigrants from the Caribbean who arrived in the UK prior to 1973. These people are commonly referred to as the Windrush generation. I understand that one such report is entitled, "Historical Roots of the Windrush Scandal".'

4. The Home Office responded on 16 June 2022. It refused to provide the requested information, citing section 35(1)(a) of FOIA – the exemption for the formulation or development of government policy. The complainant requested an internal review on 2 September 2022 and reminded them on 6 October that it was outstanding. The Home Office responded, apologising saying that the review had taken longer than anticipated. The Home Office had still not responded when on 29 October the Appellant contacted the Information Commissioner suggesting the Home Office was delaying its response since the information was "politically embarrassing". The Commissioner in turn prompted the Home Office. Belatedly on 21 November the Home Office responded, it now relied on:

- Section 36(2)(b)(i) disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank provision of advice.
- Section 36(2)(b)(ii) disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
- Section 36(2)(c) disclosure of the information under FOIA would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

5. In its letter of 21 November the Home Office set out its position:

"The report considers important issues which required a safe space to ensure frankness and openness. If this report was to be disclosed, it would be likely to prejudice the ability of the

department to develop further training material in the future with regards to the lessons learnt in a 'safe space'. Disclosure would inhibit discussions and the ability of officials to provide and receive advice in a free and frank way. This would not be conducive to the effective conduct of public affairs as it would result in a less robust, well-considered package. There is of course a public interest in transparency, however taking the above into account I am satisfied the public interest falls in favour of withholding the information."

6. The Appellant pursued his complaint with the Information Commissioner who issued the decision on 23 May 2023.
7. The Commissioner accepted as reasonable the following propositions accepted by the Qualified Person and advanced by the Home Office in refusing the request:
 - 36(2)(b)(i), the requested report was not intended for external publication. He considered that a hypothetical future author commissioned to write a similar report may self-censor in fear of future disclosure, thereby affecting the quality of the advice provided by the Home Office. Ministers may also be reluctant to commission, or be asked to commission, similar reports that may include criticism of their predecessors or could become associated with current policies.
 - 36(2)(b)(ii), disclosure of the requested report would be likely to inhibit the ability of Home Office officials to partake in free and frank exchange of views needed to ensure effective future policy development, as a result of negative media coverage staff participating in the training may not feel that the Home Office can provide a 'safe space' for controversial discussions, so staff would be less inclined to voice their opinions and fully participate in debate. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the free and frank exchange of views for the purposes of deliberation.
 - 36(2)(c), reaction to the requested report is likely to be unfavourable and reflect the Home Office in a poor light, as demonstrated by The Guardian report in 2022, this negativity would be likely to influence Home Office staff and may deter them from engaging in training programmes on the history of migration with associated costs of rewriting the training programme.
8. In considering the public interest, the Commissioner considered the arguments advanced on both sides by the Home Office.
 - In favour of disclosure, the report brings together in one document commissioned by the Home Office, the historical roots of the Windrush scandal including in terms of legislation that is still in use. Therefore, there is interest in this issue, and interest in this Report. Moreover, the act of disclosing the Report would promote transparency and may help build trust and understanding on Windrush. Furthermore, the release of information could have the effect of encouraging greater public involvement in immigration

policy, thus increasing public participation in the political process and the level of public debate

- Against, that disclosure of the Report would be likely to damage communities' trust in government ways of working, principally its future development of immigration policy and/or legislation, and it would undermine the training programme for staff.

9. The Commissioner having accepted that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur considered the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure. He concluded that the inhibition of staff participation in training would have the contrary effect to that intended by commissioning the report and would harm future policy formulation. He weighed the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion was that the public interest in avoiding this inhibition was a relevant factor and he considered that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.

10. The Appellant in the grounds of appeal argued that the Commissioner was focused on procedural issues rather than the substantive issue of how the various problems envisaged by s36 would operate, he further argued that none of the elements in s36 were engaged – the free and frank provision of advice was not prejudiced, the document was not policy and the issue of whether an author would self-censor was not germane to 36(2)(b)(i) nor was a reluctance of Ministers to seek advice. The significant public interest in Windrush enhanced the likelihood that documents would be disclosed - “The Public Interest in the Windrush scandal would have been abundantly clear to anyone providing advice on it. The Information Commissioner erred in law by accepting that the ‘chilling effect’ argument was valid under these circumstances.” With respect to 36(2)(c) he summarised the Home Office position as:

- Disclosure would ‘reflect the Home Office in a poor light’.
- This would deter Home Office staff from engaging in training.
- Training courses would then have to be redesigned.

11. The Appellant argued that the Home Office’s approach was driven by fear of criticism and he justified his stance in the tradition of Athenian democracy exemplified by Pericles in his Funeral Oration (translated as) “*Although only a few may originate a policy, we are all able to judge it*”.

12. In resisting the appeal the Home Office and Information Commissioner relied on the decision notice, that the opinion of the Minister was reasonable and had an evidential basis.

13. Elizabeth Dermody Assistant Director (G6) assigned to the Windrush Business of State Team since March 2023 submitted written evidence on behalf of the Home Office. This explained that a submission was made on 1st November 2022, this assessment was remitted to Robert Jenrick, who had been appointed on 25 October 2022 as Minister of State for Immigration. He and Lord Murray of Blidworth each reviewed the submission; Lord Murray determined that s36 was engaged. Officials advised that whilst there were public interest arguments in favour of disclosure, these were outweighed by the arguments against so doing.
14. The Commissioner had received several complaints about the refusal of FOI requests relating to this report. In the course of the investigation the Commissioner wrote to the Home Office in March 2023 and this led to officials writing to Lord Murray of Blidworth in April 2023, the Parliamentary Under Secretary of State for Migration and Borders (Lords Minister), whose responsibilities include matters relating to Windrush. There was a further assessment of the use of s36 by Lord Murray.
15. The April 2023 submission gave a short background to the Home Office responses to the Windrush Scandal which led to the production of the report. It explained that one recommendation in the 2020 Windrush Lessons Learned Report was that the Home Office should provide its staff with a comprehensive learning programme covering the history of migration developed in conjunction with academic experts. In the same year the Home Office announced that its Race Action Programme Team had commissioned an independent historian (with the support of Home Office staff and using the resources of the National Archives) to write a historical guide to the roots of the Windrush Scandal for Home Office staff - "The Historical Roots of the Windrush Scandal". This was intended to be used as a resource to improve understanding of the historical development of immigration policy at the Home Office in the context of the role of race in the British Empire. The historical guide was separate from the learning programme on migration. The Historical Roots Report was published on the Home Office Windrush intranet learning site in 2021 and remained there at the time of the April submission. It had been leaked to the Guardian which had prompted a number of FOI requests.
16. The 20th April 2023 submission reviewed the arguments with respect to the three limbs of s36 relied on, listing and then evaluating the claims:-
 - 36(2)(b)(i) disclosure could adversely affect the commissioning of external reports for internal consumption – Ministers could be reluctant to commission such reports criticising previous decisions which could be associated with future policy issues and external experts might self-censor for fear of disclosure.
 - 36(2)(b)(ii) adverse impact on the readiness of staff to discuss these issues in the training programme, due to renewed media criticism and a reluctance of staff to engage for fear that these discussions would not remain in a safe space.

- 36(2)(c) prejudice to the effective conduct of public affairs if staff disengaged from the training, leading to a need to redesign and re-deliver the training.

17. The counter arguments were considered in turn:-

- 36(2)(b)(i) such commissioning decisions are context specific and, in this case, Ministers had accepted there had been errors and lessons needed to be learned, they could still commission reports on past errors, the author of this report had been aware of the possibility of publication and this had not led to self-censorship.
- 36(2)(ii) public comment could lead to more interest and the staff discussions would not be recorded.
- 36(2)(c) the historic report is not part of the training package.

18. Having reviewed the arguments on both sides of the question, the submission also identified risks flowing from a decision not to disclose which included further coverage and dissemination of the report and further discussion about changes to immigration law and the immigration bill then before Parliament. The submission noted that there needed to be consideration of any implications for the report author.

19. The reliance on s36 was approved for the second time by Lord Murray on 24th April 2023.

Consideration

20. This is an unusual case to be appealed to the GRC Information Rights jurisdiction. The normal fodder for the workhorses of the tribunal is consideration of whether information requested is commercially sensitive, contains personal information or a request is vexatious. On this occasion however, while the document was completed three years ago, it entirely relates to historic events culminating in the British Nationality Act 1981 - 43 years ago (with a brief discussion of a leaflet on the Act published in 1987).

21. To the extent it draws on government records, they have long been transferred to the National Archives; which was formerly known as the Public Record Office, there is no reason to believe that these documents are not publicly available. To the extent that it contains the names of individuals, almost all (if not all) are now dead. It is not, despite the initial attempt to withhold it on the basis of s35 FOIA (information relating to the formulation of government policy), in any meaningful way to do with the formulation of public policy.

22. Rather it is a short work of historical scholarship sketching the evolution of legislation and structures which led to the 1981 Act; so setting the scene for the many individual tragedies which played out in the last 20 years and are called Windrush. The report itself is explicit as to what it is and is not:

“This is a research report commissioned by the Home Office in Response to a Windrush recommendation but does not represent government policy and the views included in it are those of the author.”

23. In the decision notice under “other matters” is a response from the Home Office to criticisms raised by the Appellant

Responding to the point about academics, it is our view that while we agree that, in general academics, may theoretically – and practically – strive towards objectivity, they are still subject to biases and subjectivity, such as through the evidence that they include or exclude, and can indeed be motivated by their own personal politics as well a desire to influence the public, fellow academics, or the political debate. Academics acknowledge that pure objectivity does not exist, and that reasonable people can interpret a similar evidence base and come to different conclusions or weigh up arguments and evidence in different ways.

The historical Report that the Home Office commissioned is the view of that particular historian but – in addition to not necessarily representing the view of the Home Office - does not represent the views of every historian nor is it the only reasonable interpretation of historical events. However, the Report was commissioned and has been published internally because it has value in bringing together a body of evidence and sources, establishing an argument, and - through this - prompting discussion and debate among Home Office staff and Ministers.

24. The tribunal would endorse that view, the treatise covers a thousand years of history and touches on many issues and figures and their relationship to a single theme in a document of barely 50 pages. Much could be said on many of them (for example a more nuanced view of the evolution of Hume’s thought on race); however the function of the document “*bringing together a body of evidence and sources*” used in “*prompting discussion and debate*”, is of value, not just to the 50,000 Home Office staff who have access to it, but more widely.
25. In considering the prejudice based exemption raised by the three aspects of s36 relied on to justify non-disclosure it is appropriate to consider the weight and relevance of the evidence identified with respect to each element.
26. For 36(2)(b)(i) the assertion is that free and frank provision of advice would be likely to be inhibited by disclosure since independent academics might self-censor if the material were published and Ministers might be less likely to commission reports which could be critical. This would require academics, whose reputation is made by publication, to hold back from their best efforts for fear if publication. This paradoxical proposition is unlikely. The second aspect is that Ministers would be unlikely to commission reports which could be critical. This again has difficulties. In practice Ministers have to commission reports when unanticipated adverse events occur, it is the pressure of events rather than the Ministerial desire to control narrative which is the issue. Furthermore this report is not advice, it is an investigation of past events. The commissioning of this study and the making available of it to the entire staff of the Home Office suggests a preparedness to learn from Santayana; **“Those**

who cannot remember the past are condemned to repeat it". In this context it is highly improbable that the wider dissemination of the study would impair the provision of advice.

27. The 36(2)(b)(ii) argument also has significant flaws. Renewed public interest in the controversy would inhibit participation of civil servants in discussions around the issue for fear that their views would be recorded and leak out. It is comforting to see a Government department having such confidence in its staff. However, many aspects of government activity attract controversy and debate, all the areas of Home Office responsibility are constantly in the media – crime, terrorism, immigration, alcohol, drugs and fire. Civil servants understand the significance of the Nolan principles and the Civil Service code identifying the values of honesty, integrity, impartiality and objectivity as core for civil servants and the leadership behaviours civil servants should demonstrate. Nor is there any basis for suggesting that the views of civil servants considering this report will enter the public domain. The concerns underlying the reliance on 36(2)(b)(ii) are overblown and dystopic.
28. The 36(2)(c) argument is that disclosure would be likely to prejudice the effective conduct of public affairs as disclosure resulting in media controversy could lead to disengagement from voluntary participation in the training programme requiring the programme to be re-written. However this slim volume is separate from the training programme, not integral to it and is one of several documents in a possible reading list. The causal link between disclosure and the identified detriment is exceptionally weak.
29. While the relevant qualified person found it reasonable to conclude that all the exemptions were engaged each is at most tenuous and uncertain in impact.
30. In considering whether the balance of public interest favoured disclosure, it is significant that there is no new information not already in the public domain. It is a piece of historical writing worth drawing to the attention of 50,000 civil servants as helping to set a context for future work. Although the Home Office has expressed concern about the impact on training, this is not significant; the suggestion that it could harm communities' trust in government ways of working and developing future legislation is problematic since public understanding of these issues would be enhanced by the availability of this study.
31. What was clearly a an opinion on withholding the material based on very weak evidence has been adopted uncritically by the Commissioner. The Appellant has suggested that the reluctance to disclose what was a widely reported document was founded in embarrassment and there was an absence of substantive grounds for refusal. In Eric Blair's masterpiece a justification for Winston Smith's constant re-writing of old news stories was explained:- "Who controls the past controls the future. Who controls the present controls the past." There is no more justification for Winston Smith's work than for withholding from wider readership a significant study of the background to Windrush.

32. Whether or not the exemptions could reasonably be said to be engaged, the balance of public interest lies strongly in favour of disclosure.

Signed Hughes

Date: 3 September 2024