



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

Appeal Reference: EA/2018/0244

**Decided without a hearing
On 7 February 2020**

Before

JUDGE BUCKLEY

PAUL TAYLOR AND MALCOLM CLARKE

Between

EDWARD WILLIAMS

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

CHIEF CONSTABLE OF KENT POLICE

Second Respondent

DECISION

1. The Appeal is dismissed. For the reasons set out below the Public Authority was entitled to withhold the information under section 30(1)(a) FOIA.

REASONS

Introduction

1. The Commissioner held in decision notice FS50745420 of 31 October 2018 that the Second Respondent ('Kent Police') were entitled to neither confirm nor deny that they held the requested information under s 30(3) of the Freedom of Information Act 2000 (FOIA).
2. The tribunal issued an interim decision dated 14 August 2019 allowing the appeal against the Commissioner's decision notice. In its interim decision the tribunal concluded that s 30(3) was engaged because the request was for information which is, or if it were held by Kent Police would be, by its nature exempt information by virtue of subsection 30(1) or (2). The tribunal concluded that the public interest in maintaining the exclusion of the duty to confirm or deny did not outweigh the public interest in confirming or denying that the information is held.
3. Kent Police confirmed on 17 September 2019 that they held information within parts 1 and 2 but not part 6 of the request (see below). They rely on s 30(1)(a) and s 40(2)(a) FOIA together with Articles 9 and 10 GDPR. They no longer rely on s 24(1).

Factual background to the appeal

4. The factual background to the appeal is set out in the tribunal's interim decision. It arises out of an incident in Calais on 12 March 2018 when Ms Lauren Southern was stopped and questioned and refused leave to enter the UK on the grounds that her presence in the UK was not conducive to the public good.

Request

5. This appeal concerns parts 1, 2 and 6 of the request made on 14 March 2018 by Edward Williams for the following information.

According to this video on Youtube:-

<https://youtu.be/odGiYJdFtE0>

Ms Lauren Cherie Southern, a Canadian citizen, was stopped at Calais, France, on or about 12 March 2018 and prevented from entering the UK by British authorities. She has named Kent Police as the relevant police force.

1. Provide all records held regarding the decision to invoke Schedule 7 Terrorism Act 2000 ('The Act') or other legislation/powers and to stop/detain Ms Southern.
2. Provide the custody record or similar record.
3. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a UK port (including Calais) pursuant to the powers under the Act.
4. Provide all training manuals, guidance, advisory circulars or similar material on how those stopped should be treated when stopped or detained at a UK port (including Calais) pursuant to the powers under the Act when the relevant person refuses to provide information orally (i.e. answer questions) or refuses to unlock any electronic device such as a telephone, computer etc.

5. Provide leaflet given to those detained.
6. Provide all material held which was (allegedly) distributed by Ms Southern on or about 24 February 2018 in Luton, UK.
6. Kent Police responded on 5 April 2018. It refused to confirm or deny that it held the requested information citing s 30(3) (investigations and proceedings) and s 40(5) (personal information) but provided links to Schedule 7 of the Terrorism Act 2000 and guidance issued by the College of Policing on that schedule.
7. On 10 May 2018 Kent Police conducted an internal review. It concluded that only questions 1, 2 and 6 fell within the scope of s 30(3) and 40(5) and further relied on s 24(2) (national security). In relation to those questions it upheld the decision. In relation to questions 3, 4 and 5, the Police confirmed that the information was held. Some was available in the public domain and links were provided. In relation to additional material held within the scope of questions 3 and 4 but not already in the public domain, Kent Police relied on s 24(1) and 31(1)(a)(b) (law enforcement).
8. In the course of the Commissioner's investigation the Respondent disclosed further information within the scope of parts 3 and 4, redacted in accordance with s 40(2). In relation to the remaining withheld material within the scope of parts 3 and 4, the Police relied on s 21(1), 24(1) and 31(1)(a)(b).
9. Mr Williams confirmed by letter to the Commissioner dated 10 May 2018 that he wished the Commissioner to consider parts 1, 2 and 6 of the request.

Decision Notice

10. In a decision notice dated 31 October 2018 the Commissioner decided that Kent Police was entitled to neither confirm nor deny whether it held any information within the scope of parts 1, 2 and 6 of the request relying on s 30(3). The decision notice does not deal with parts 3, 4 or 5 of the request.
11. The Commissioner decided that any information, if held, would be held in relation to investigation(s) into the individual named and would fall within s 30(1)(a)(i) because it would be held for the purposes of an investigation into whether a person should be charged with an offence. The exemption is therefore engaged.
12. The Commissioner held that the purpose of s 30 is to preserve the ability of the police to carry out effective investigations and that the public interest in maintaining the exemption outweighed the public interest in issuing a confirmation or denial.
13. In the light of her findings on s 30 she did not go on to consider the other exemptions.

Appeal

14. The Grounds of Appeal are:
 - 14.1. The decision notice is not in accordance with the law.
 - 14.2. Lauren Southern is not under criminal investigation.

Submissions

15. Given the tribunal's conclusions on s 30(1)(a) it is not necessary to set out the parties' submissions on s 40(2) and GDPR.
16. The tribunal took into account all the submissions from the parties where relevant. The submissions summarised below are those received after the interim decision.

Submissions of Kent Police dated 27 September 2019

17. The Police have confirmed that they held information within parts 1 and 2 of the request. They rely on s 30(1)(a) and s 40(2)(a) FOIA together with Articles 9 and 10 GDPR. They no longer rely on s 24(1).

Engagement of s 30

18. The purpose of Schedules 7 and 8 of the Terrorism Act 2000 ('TA') is to allow police forces to carry out investigations into suspected terrorists as defined by s 40 TA. Whenever an individual is stopped and questioned under these powers it is for the purposes of a criminal investigation of a terrorist nature. It follows that s 30 is automatically engaged when one or both of these powers are exercised.
19. The Appellant is not in a position to know if the person has been the subject of an investigation. Whether or not a person has been charged has no bearing on whether that person has been the subject of an investigation carried out to determine if that person should be charged with an offence. The investigation does not need to be 'live' for the exemption to apply.
20. Kent Police does not have the power to conduct proceedings and therefore the tribunal was wrong to conclude that s 30(1)(b) applies. Kent Police rely on s 30(1)(a).

Public interest balance

21. There is a measure of public interest in transparency and openness in every case. The public interest, as opposed to the interest of the public, in knowing if this specific person has been investigated is limited. The limited public interest in transparency is firmly outweighed by the public interest in ensuring that facts and details of investigations under schedule 7 are kept out of the public domain, which would be harmful to the integrity and efficacy of measures that are designed to uphold national security.

22. Kent Police rely also on their previous response, and the following submissions are of relevance to the public interest balance. The purpose of s 30 is to protect the ability of the police, inter alia, to carry out effective investigations. The public expect and wish for criminal investigations to be protected so that, where appropriate, offences are detected, prevented and/or punished effectively.

Appellant's further submissions dated 22 November 2019

23. Section 30(a)(i) cannot apply to any information which came into existence as a result of the port stop because:

23.1. The stop did not constitute a 'criminal investigation'

23.2. Kent Police was not under a 'duty' to conduct an investigation. A port stop is discretionary.

23.3. As regards an offence 'connected with terrorist activity' only the CPS can 'ascertain' 'whether a person should be charged with an offence'.

24. The College of Policing website shows that in relation to terrorist offences it is the CPS not the police who decide whether there is sufficient evidence to charge and who charge those offences.

25. Section 30(1)(a) only applies where the public authority has a duty to investigate offences, i.e. an obligation to carry out investigations as opposed to a discretionary power to do so.

26. Kent Police have not specified which offence or offences are relevant (see para 12 of the Commissioner's guidance).

27. When Kent Police stopped the person, they did not have an offence in mind and therefore s 30 cannot apply. The Notice of Detention states 'You are not under criminal investigation and are not under arrest on suspicion of having committed an offence. For this reason, you are not being issued with a caution and you do not have the right to remain silent.' Once the examining officer suspects that an offence may have been committed the port stop examination ends and further questioning is done under caution and subject to PACE. That is when the investigation starts.

28. Given the tribunal's conclusions on s 30(1)(a) it is not necessary to set out the Appellant's submissions on DPA 1998, 2018 or GDPR

29. In relation to the public interest under s 30(1)(a), the Appellant's submissions on legitimate interest are relevant. He submits that a detention and interrogation of about 3 hours cannot be justified in the case of a law-abiding journalist for the purposes of Kent Police deciding if she was a terrorist. He submits that Kent Police's demand for her phone password was unlawful because her professional data was protected by journalistic privilege.

30. He submits that the port stop was unlawful because it was not for the statutory purpose of deciding if Lauren Southern appeared to be a terrorist, relying on the following statement by the police in an audio recording of a telephone call to Lauren Southern's father: '...Just so you know, it sounds worse than it is. We don't suspect her of being a terrorist or anything like that.' There is therefore a legitimate interest in disclosure to find out the real reason for Kent Police carrying out the port stop.
31. The Appellant submits that it is in the public interest for the public to understand why Kent Police used anti-terrorism powers against a law-abiding, foreign, political journalist on her way to work in the United Kingdom. Kent Police chose to use schedule 7 in an abusive manner to humiliate Ms Southern and gain access to her data which is journalistic material and protected as excluded material under PACE.
32. It is in the public interest to know if the Border Force letter was correct to state that she admitted to being involved with distributing racist material in Luton.
33. In the light of **Beghal v United Kingdom** (application no. 4755/16) ECHR 2019 Kent Police knowingly violated Ms Southern's Article 8 rights when using schedule 7.

Legal framework

Section 30(1) Investigations and proceedings conducted by public authorities

34. Sections 30(1) and (2) provide that information is exempt information if it has been held by the authority for the purposes of certain investigations and proceedings. Under s 30(1) and (2):
 - (1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of -
 - (a) Any investigation which the public authority has a duty to conduct with a view to it being ascertained -
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
 - (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
 - (c) any criminal proceedings which the authority has power to conduct.
 - (2) Information held by a public authority is exempt information if -
 - (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct [...]
35. Sections 30(1) and (2) are class-based exemptions. There is no requirement for a public authority to demonstrate prejudice for them to be engaged. They are subject to the public interest test.

Terrorism Act 2000

36. Section 40 provides:

Terrorist: interpretation.

(1) In this Part “terrorist” means a person who –

(a) has committed an offence under any of sections 11, 12, 15 to 18, 54 and 56 to 63, or

(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism.

(2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by section 1.

37. Section 1 defines terrorism:

(1) In this Act “terrorism” means the use or threat of action where –

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [F1 or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.

(2) Action falls within this subsection if it –

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section –

(a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

38. Schedule 7 provides that the powers under Schedule 7 to stop, question and detain can only be exercised for the purposes of determining whether a person appears to be a person falling within section 40(1)(b).

Issues

39. The scope of the appeal is limited to parts 1, 2 and 6 of the request. Kent Police have confirmed that do not hold information under part 6. In relation to parts 1 and 2 they rely on s 30(1)(a) and s 40.

Section 30(1)

40. The issues under s 30(1)(a) are:
- 40.1. Is the request for information which is, or if it were held by the public authority would be, exempt information by virtue of subsection (1) or (2)?
- 40.2. If so, in all the circumstances of the case, does the public interest in maintaining the exclusion of the duty to confirm or deny outweigh the public interest in disclosing whether the public authority holds the information.

The role of the tribunal

41. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Discussion and conclusions

Engagement of section 30(1)(a)

42. We find that the request is for information which is, or if it were held by the public authority would be, by its nature, exempt information by virtue of subsection 30(1)(a).
43. We accept Kent Police's submission that the requested information is information that has been held by the authority for the purpose of an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.
44. We have considered the Appellant's arguments on the engagement of the exemption and our conclusions are set out below.

A port stop is not a criminal investigation

45. The powers under Schedule 7 to stop, question and detain can only be exercised for the purposes of determining whether a person appears to be a person falling within section 40(1)(b). They can only therefore be exercised for the purposes of determining whether a person appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. Although Kent Police have not specified a particular offence, the tribunal is satisfied from the statutory definition of terrorism that a number of offences could be relevant.
46. On this basis the Tribunal finds that the use of powers under Schedule 7 amount to an investigation within s 30(1)(a) which is conducted with a view to it being ascertained whether a person should be charged with an offence and that information obtained through questioning or the use of other powers by Kent Police under Schedule 7 would be held for the purposes of that investigation. We do not accept that an 'investigation' for the purposes of s30(1)(a) should be restrictively interpreted to include only the part after the officer has formed a suspicion and PACE begins to apply. There is no requirement under s 30(1)(a) that the police must have reached the stage where they have a suspicion that a person has committed an offence.
47. The appellant's argument is based in part on the decisions of the Supreme Court and the ECtHR in the case of **Beghal**. We repeat our reasoning from the interim decision in relation to the Appellant's reliance on the case of **Beghal**, which concerns the question of the application of article 6 of the European Convention on Human Rights. The decision that schedule 7 questioning did not, in **Beghal**, amount to a criminal investigation under article 6 is based on case law on the scope of article 6:

The Court has repeatedly held that the protections afforded by Article 6 § 1 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.

48. In our view, the question of whether or not schedule 7 questioning falls within article 6 is not relevant to the question under s 30(1)(a), i.e. whether or not it amounts to an investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.

The CPS make the decision to charge

49. It is not a necessary condition of s 30(1)(a) that the public authority that carries out the investigation is the same public authority that makes the decision whether or not to charge the offence, nor indeed the same public authority which has to 'ascertain' whether or not a person should be charged.

Discretion not a duty

50. The appellant submits that Kent Police have a discretion to conduct a port stop examination and are not under a duty to do so. It is true that on an operational basis an individual police officer must make a judgment in all the circumstances on whether or not it appears to be necessary to conduct any particular investigation. In our view this is not what the statute requires. It is a duty imposed on the authority not the individual that is required.
51. We find that the requirement that the public authority be under a duty to investigate is fulfilled by the police's public duty at common law to preserve the Queen's peace. This is set out in, for example, paras 29-35 of the Lord Toulson's judgment in **Michael and others (FC) (Appellants v The Chief Constable of South Wales Police and another (Respondents)** [2015] UKSC 2 in which Lord Toulson cites Viscount Cave LC's statement in **Glasbrook Brothers Ltd v Glamorgan County Council [1925] AC 270** on the nature of the duty of the police as:

...an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury.

Public interest

52. The question for us is therefore whether or not the public interest in maintaining the exemption outweighs the public interest in disclosure.
53. The Appellant's submissions are, in essence, that disclosure is in the public interest because the use of the schedule 7 powers were unjustified and unlawful.
54. The Appellant submits that Kent Police knowingly violated Ms Southern's article 8 rights in the light of the **Beghal** judgment. We reject this argument. The ECtHR in **Beghal** specifically stated that it was considering the version of schedule 7 in force at the time the applicant was examined, which had been amended by the date relevant to this appeal.
55. The bar for the exercise of the schedule 7 powers has been set by Parliament at quite a low level, and there is no evidence in the closed material to suggest that the police had not been satisfied that the conditions had been met before they proceeded. We do not accept the Appellant's submissions that the use of schedule 7 cannot be justified, nor that there is any evidence, including in the closed bundle, that it was not for the statutory purpose. We do not accept that disclosure will reveal any unlawful action by the police. Nor do we accept that there is any evidence to support the submission that Kent Police chose to use schedule 7 in an abusive manner to humiliate Ms Southern and gain access to her data which is journalistic material and protected as excluded material under PACE.

56. The Appellant states that it is in the public interest to know if the Border Force letter was correct to state that Ms Southern admitted to being involved with distributing racist material in Luton. The tribunal notes that although the statement by the police could be interpreted in two different ways, there is nothing in the closed materials that suggests that the police have made an inaccurate statement.
57. In conclusion having reviewed the closed material we do not accept the Appellant's argument that disclosure is in the public interest because the use of schedule 7 was unjustified or unlawful. Nor is there anything in the closed material which suggests any wrongdoing on the part of the police. Whilst there is a general public interest in transparency to enable public scrutiny of the use of police powers, and in particular in the use of schedule 7 powers, we find that this would be served only to a limited extent by the disclosure of this information.
58. Overall, we conclude that there is only a limited public interest in disclosure of the requested information.
59. Turning to the public interest in maintaining the exemption, the purpose behind s 30 is to ensure the effective investigation and prosecution of offences and the protection of confidential sources.
60. We do not accept the argument that a decision by this tribunal to release the information would set a precedent for details of schedule 7 stops being made public under the FOIA: our decisions are not binding.
61. In assessing the public interest in this case, we take account of the fact that this investigation relates to potential terrorism offences. We find that there is a very strong public interest in ensuring the effective investigation of terrorism offences. Placing the level of detailed information requested into the public domain would detail to potential terrorists the police's methods and tactics, and give detailed information about the content and conduct of the schedule 7 investigation. We accept that placing detailed information about a potential terrorist investigation into the public domain would be harmful to the efficacy of the schedule 7 stops.
62. Our conclusion is that this strong public interest in maintaining the exemption outweighs the more limited public interest in disclosure. The appeal is dismissed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 5 March 2020

Promulgated Date: 6 March 2020