



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

Appeal Reference: EA/2018/0149

**Heard at Field House
On 8 January 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

HENRY FITZHUGH & PAUL TAYLOR

Between

DAMIEN SHANNON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CABINET OFFICE

Second Respondent

Appearances

Damien Shannon:	in person
Information Commissioner:	Elizabeth Kelsey
Cabinet Office:	Neil Sheldon

Cases

Baker v Information Commissioner EA/2006/0045

Magyar Helsinki Bizottság v Hungary 18030/11 8 November 2016

Kennedy v Charity Commission [2015] AC 455

Times Newspapers Limited and Kennedy v United Kingdom ECHR 64367/14 6 December 2018

Moss v Information Commissioner EA/2016/0250

DECISION AND REASONS

Background

1. The Fast Track Graduate Scheme is the primary route by which future senior civil servants enter their profession. The effective and fair administration of this scheme is consequently a matter of public importance. The Government is concerned to ensure this and each year a review of how the recruitment process is been conducted in that year is published as well as other studies commissioned by the Government. In February 2016 the Cabinet Office published a 146-page independent report containing detailed statistical analyses by the Bridge Group on recruitment into the Fast Stream *Socio-Economic Diversity in the Fast Stream*". In the executive summary it stated: -

"Senior colleagues in the Civil Service are actively engaged in efforts to secure socio-economic diversity in the Fast Stream, and many good practices are well developed. These include the collection and publication of socio-economic background (SEB) data, the removal of candidate screening criteria (e.g. UCAS points and university attended), the targeting of marketing activity based on campus diversity, and an internship programme exclusively for under-represented groups. Much progress has been made in relation to some diversity indicators, including Black, Asian and Minority Ethnic (BAME) and disability. However, in relation to socio-economic diversity, the Fast Stream is unrepresentative of the population at large. To put this in context, the profile of the intake is less diverse than the student population at the University of Oxford."

2. In response, the late Sir Jeremy Heywood (then Cabinet Secretary) wrote in the foreword to the report on the 2016 recruitment cycle *Fast Stream and Early Talent Annual Report 2016*: -

In response the Civil Service has moved quickly to improve our processes and introduce important changes to how we attract, assess and support individuals into the Fast Stream These changes include....

...the application experience has been significantly improved since 2016, with the 2017 process completing several months faster than before...

Many of these changes are too early to be covered in the period of this annual report. But I am confident that the actions we are taking will improve the diversity of the Civil Service now and in the years to come. That means a fairer, more meritocratic and more effective Civil Service and one the whole country can be proud of."

3. That report contained a 43 page detailed analysis of the recruitment covering analysis of the relative success of applicants by university of the applicant's first degree, class of degree, type of degree, by gender, ethnicity, disability, sexual orientation, socio-economic status of parents of applicants, eligibility for free school meals, which part of the fast stream applicants had applied to, together with some trend data exploring how these rates had shifted over a time, the amount of trend data varying according to the length of time that particular data had been captured.

The request for information

4. The Appellant in these proceedings sought information on 25 February 2016. He withdrew the request (believing he had an alternative source of information from his position within the Civil Service) but when this was unavailing he renewed the request on 5 September 2016. He asked: -

1) Could you please break down for me the number of applicants recommended for appointment to the Diplomatic and Parliamentary Fast Streams by Socio-Economic Background and University Attended? I would like this data for as many year groups as you can provide, within the FoI cost limits.

2) If you have the information, the number of applicants that advanced to the Final Selection Board for the Diplomatic and Parliamentary Fast Streams by Socio-Economic Background and University Attended. Again, I would like this data for as many year groups as you can provide, within the FoI cost limits.

3) If you have the information, could you please also indicate which Department 'Central Department' Fast Stream entrants were posted to, for their first posting, broken down by Socio-Economic Background and University Attended?

4) If you have the information, could you please also indicate the geographical distribution of 'Central Departments' Fast Stream entrants' first postings, broken down by Socio-Economic Background and University Attended?"

5. The Cabinet Office provided links to some published information and confirmed that other information was exempt from disclosure under FOIA under s21 and s22 (information available by other means (s21) or meant for future publication (s22)). Following the intervention of the Information Commissioner the Cabinet Office disclosed tables of data with redactions made under s40(2) (the protection of personal information) and withheld information relating to University attended relying on s23(1) and s24 (1) in the alternative (It should be noted that the exemption provided for under s23 is an absolute exemption; that under s24 is subject to a public interest balancing test): -

(23) Information supplied by, or relating to, bodies dealing with security matters

(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)

(24) National security

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.)

6. The Appellant complained to the Commissioner. During the course of her investigation the Appellant confirmed that in seeking the socioeconomic background of applicants he was seeking information concerning their parents' occupations.

The Commissioner's Decision

7. In her decision notice the Commissioner referred to her published guidance *How sections 23 and 24 interact* which may permit the two exemptions to be relied on in the alternative: -

"26... To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.

38. Where the Commissioner finds in favour of the public authority, the decision notice will not allude to which exemption has actually been applied. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information."

8. The need for this approach is explained in the decision of the Information Tribunal *Baker v Information Commissioner*. Applying this approach, she confirmed that section 24(1) can be engaged, since it is a qualified exemption a balance must be struck between the competing claims of public interest. In weighing the public interest, she noted that given the information already in the public domain there was little public interest in disclosing this level of information and concluded (DN paragraph 28): -

However, the Commissioner accepts that the public interest in protecting information required for the purposes of safeguarding national security is a very strong one, and in the circumstances of this case, she has concluded that, on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

9. In considering the application of the s40 exemption the Commissioner considered the unredacted raw data tables held by the Cabinet Office (DN para 34): -

The information comprises data tables breaking Fast Stream applicants down by department and occupational status of parent 1 and parent 2. These occupational statuses are further broken down into 10 categories.

10. Given the small numbers involved she considered that the risk of identifying individuals from the data was real. She applied the first data protection principle: -

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

11. She then considered the rights and expectations of the data subjects (DN para 38), whether there could be an over-riding public interest in disclosure (DN 39) the Cabinet Office’s account of how the data had come to be in the form it was (DN 40-44) – the information was not held by the Cabinet Office in the form requested and the information provided was created by the Cabinet Office’s contractor in response to the request. She also considered the consequences of disclosure: -

45 The Cabinet Office confirmed that it had considered aggregation of multiple years of data but the numbers remained unacceptably small and it considered disclosure of aggregated data would still constitute a breach of the DPA.

46. The Cabinet Office explained that if a staff member could be identified this would, in turn, reveal the occupational status of his or her parents.

12. The Appellant argued that recruitment statistics had been published for over a decade and he had made his request as two particular sections of the fast stream were omitted. He argued that applicants consented to the publication of information when they applied and there was a strong public interest in establishing accurately whether the Government was attempting to meet its own diversity targets.

13. The Commissioner noted that applications had been informed that statistical information would be anonymised before publication, considered that given the scale of the numbers involved individuals could be identified, and from that their parent’s occupations and considered that disclosure of the redacted information met the need for transparency without risk of breaching the data protection principles and upheld the position adopted by the Cabinet Office.

The Appellant’s arguments

14. The Appellant argued misconduct by the Commissioner and Cabinet Office in that they “knowingly misapplied” S40(2), s23(1) and 24(1) of FOIA and breached his rights under Article 10 ECHR.

15. With respect to s40 he argued that the fast Stream Annual Report had three categories for socio-economic status but that the Cabinet Office had provided data divided into 10 categories which was not sought and this resulted in a large number of small groups of individuals where the data was then redacted. Further the Annual Report disclosed some data related to groups of individuals as low as two; there was unjustifiable inconsistency.
16. There had been no proper explanation of how the Commissioner or Cabinet Office came to conclusions on s23(1) and s24(1). However, the Cabinet Office had already published the information in an amalgamated form, some individuals had already published the information about themselves, neither the Houses of Parliament nor Foreign and Commonwealth Office were bodies within s23.
17. It was established jurisprudence of the ECHR that Article 10 included a right to seek information from public bodies *Magyar Helsinki Bizottság v Hungary* and that the tests laid down for exercising this right were met by him.

The Respondents' position

18. In resisting the appeal, the Commissioner confirmed the analysis of the data protection issues in the decision notice, observing there was no obligation on the Cabinet Office to create further information if it did not hold it at the time of the request. She noted that whether individuals could be identified from as small a data set as two depended on the surrounding circumstances; she had reviewed the redactions and concluded there was a possibility of identification if the redactions were not made. She maintained her position with respect to S23 and S24. She submitted that the effect of UK jurisprudence was that rights under FOIA were not the route by which any potential Article 10 right to information could be realised and accordingly the decision in *Magyar Helsinki Bizottság v Hungary* was of no assistance to the Appellant.
19. The Cabinet Office supported the Commissioner.

Evidence

20. The tribunal heard evidence from Gregory Hobbs; a senior civil servant in the Cabinet Office with responsibilities for the administration of the Fast Stream. He confirmed that the privacy notices associated with the Fast Stream meant that applicants would not expect to be publicly identified from information they provided during the recruitment process, nor would their parents expect to be so identified from information supplied by their children. While some hundreds are recruited through the process each year the vast majority are recruited into a system where they are encouraged to move between departments. However, for recruits into the Foreign and Commonwealth

Office or to the staff of Parliament there is no such expectation or mechanism. The Houses of Parliament Scheme recruits between 2 and 4 entrants each year and in these circumstances the triangulation of the various pieces of information sought could lead to the identification of individuals.

21. He explained that the Cabinet Office had released redacted data sets with respect to generalist fast stream entrants' parental occupations and by location and a document giving the number of applications which proceeded to the final selection board for the diplomatic fast stream by parental occupation for the years 2013-2015. These documents were prepared from data held by a private sector contractor and redactions had been carried out where the number of applicants in any category was less than or equal to five. The disclosure of further information would involve a breach of s40. In cross-examination the witness was taken to the statistical tables published in the Fast Stream Annual Report where he explained that small numbers of applicants in certain areas would not be easily identifiable as they rotated through different departments. In closed session the tribunal explored the relationship between the material and the exemptions under s23(1) and s24(1).
22. In his submissions the Appellant considered the history of recruitment to the civil service, the application of the duty under Constitutional Reform Act 2010 to recruit on merit. He argued that the decision in Kennedy should not be followed in the light of Magyar and that s23(1) and s24(1) were incompatible with his rights under Article 10. He argued that the exemptions contained in those sections denied him of information unlawfully.

Consideration

23. In support of his challenge to the application of S40 to the material the Appellant pointed to the material voluntarily put into the public domain by some of the successful applications to the fast-stream. Analytically this is not helpful to his case. While some individuals have put such material into the public domain others have not and there is no indication that they would consent to such publication. On the contrary they have been given assurances that personal data will not be revealed. The publication of information in an "amalgamated form" does not, as the Appellant implied, mean that the information *as personal data* has been published. The tribunal is satisfied that, given the small number of some of the groups identified within the data, the publication of the data sought would mean individual applicants could be identified from it, as could their parents, together with information about the parents which could include the fact that a parent was unemployed. The tribunal is therefore satisfied that the material falls within s40 as personal data.
24. For the sake of completeness, the tribunal has considered whether Schedule 2 Condition 6 could have any application to considering whether the release of

the information would be fair and lawful under the first data protection principle. This provides: -

"6. – (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

25. The Appellant's legitimate interest is his desire to publish material on what he considers to be the failure of the Fast Stream recruitment process to recruit fairly from all parts of British society but rather to recruit disproportionately from graduates from a small number of universities with privileged family backgrounds. The difficulty however is that the Civil Service itself publishes a mass of quantitative data which demonstrates this as well as publishing its developing plans to redress the balance. The tiny increment of information which he seeking is not necessary to enable him to comment on this situation.
26. The Appellant relied heavily on the ECHR case of *Magyar Helsinki Bizottság v Hungary* in support of his argument that he had an article 10 right to the information requested. In that case a long-established human rights organisation sought information as to the appointment of public defenders, who in Hungary are appointed by the relevant local police force. The relationship between the defender and the prosecuting authority and the possibility of lack of independence of the public defender clearly raise issues as to an accused's access to a fair trial. The information requested was denied on the basis that it was personal data of the public defenders and under the relevant Hungarian legislation "the respondent police departments cannot be obliged to surrender such personal data." (*Magyar* paragraph 30).
27. In resisting the appeal by the Commissioner and Cabinet Office argued that the previously decided Supreme Court decision in *Kennedy v Charity Commission* had settled that Article 10 did not give a free-standing right of access to information held by public bodies. While in this case there was an absolute exemption from disclosure of the specific information sought under s32(2) other statutory or common law rights to information continued to exist side by side with the FOIA rights since s78 FOIA provided "*Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it.*" There was therefore another route, an alternative remedy to FOIA through which individuals could obtain the information.
28. The First Section of ECHR in *Times Newspapers Limited and Kennedy v UK* considered the appeal against the decision of the Supreme Court in *Kennedy* acknowledged the existence of the alternative route to FOIA and stated (paragraph 82):-

"Although the applicants have focussed their complaints on the Article 10 compliance of the "absolute exemption" under s32(2) of FOIA, in examining the complaints the

Court will have regard to the domestic legal framework as a whole and not simply the FOIA. While the Court has now recognised that Article 10 of the Convention might, under certain conditions, include a right to access to information (see Magyar..) it does not include a right of access to information by a particular legislative scheme. What matters, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence."

29. If indeed the Appellant is correct in his interpretation of the impact of the decision in Magyar then for him to be entitled to receive the information the failure to disclose the information must breach Article 10: -

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

30. Magyar identified four criteria which must be met. These were helpfully summarised by the tribunal in Moss: -

- *Purpose of request. As a prerequisite, the purpose of the request must be to enable [the requester's] exercise of the freedom to receive and impart information and ideas to others. The information must be "necessary" for the exercise of freedom of expression;*
- *Nature of information sought. The information must meet a legitimate public interest test to prompt a need for disclosure under the Convention.*
- *Role of requester. The applicant must be in a privileged position, seeking the information with a view to informing the public in the capacity of a public watchdog. Such a privileged position should not be considered to constitute exclusive access.*
- *Information ready and available. Weight should be given to the fact that the information requested is ready and available.*

31. Where the right is protected by Article 10(1) Article 10(2) provides the framework for restrictions which are -

are prescribed by law and are necessary in a democratic society, in the interests of national security...

32. The combination of s23(1) and 24(1) is such a restriction prescribed by law. The necessity to protect national security in a democratic society is, under FOIA weighed under S2(2) which provides: -

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

....

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

33. In the light of the evidence it has heard and seen the tribunal has accepted that the exemption identified by the Cabinet Office as S23(1)/S24(1) applied. This means that, since S24(1) is a qualified privilege, a balancing exercise needs to be applied; weighing the public interest in disclosure (most relevantly the Appellant's desire to publish discussed in paragraph 25 above) with the public interest in protecting national security. As discussed above; the interest in publication given the plethora of information provided by the Cabinet Office on the Fast Stream that interest is minimal. Due regard must be paid to the risk of harm to national security which greatly outweighs any interest in disclosure.

34. The tribunal is therefore satisfied that, if indeed an article 10 right is engaged, the balancing exercise produces no difference in result from that under FOIA.

35. The tribunal is satisfied that the Commissioner's decision is correct in law and dismisses the appeal.

Signed

Judge of the First-tier Tribunal

Date: 23/01/2019