



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

Appeal Reference: EA/2019/0092

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Michael Jones
Suzanne Cosgrave

**Determined, by consent, on written evidence and submissions.
Considered on the papers on 20 September 2019**

Between

Adam Hussein Belaon

Appellant

and

**The Information Commissioner
The Foreign and Commonwealth Office**

Respondents

DECISION AND REASONS

INTRODUCTION

1. The Appellant submitted a request to the Foreign and Commonwealth

Office (FCO) on 10 April 2018 which read as follows:-

'1. Please provide the dates on which the foreign office or the high commission has communicated with the Bangladeshi authorities on the case of Yasin Talukder?

2. Do the British government have evidence/intelligence that Yasin Talukder is still alive?

3. Do the British government have evidence that Yasin Talukder is being held by the Bangladeshi authorities?'

2. The FCO responded on 7 August 2018 and refused to confirm or deny whether it held any information, citing section 40(5) of FOIA.
3. The Appellant contacted the FCO on 6 September 2018 to ask for an internal review of this decision. On 5 November 2018 the FCO informed the Appellant that the review had upheld the decision to apply section 40(5) FOIA. Following the FCO's response and review, the Appellant complained to the Commissioner and argued that the information requested should be disclosed under FOIA. He also complained about the length of time it took the FCO to process this request.
4. The Commissioner says that during the complaint investigation the FCO said that it was prepared to confirm that it held information falling within the scope of part 1 of the request. This change seemed to have been initiated because the FCO confirmed that 'Mr Talukder's case was raised by the then Minister of State for Foreign and Commonwealth Affairs during a meeting with the Bangladeshi Foreign Minister in Dhaka on 3 March 2017'.
5. However, the FCO considered that any further information it held falling within the scope of this part of the request was then exempt from disclosure on the basis of section 40(2) FOIA. The FCO's initial position was maintained for parts 2 and 3 of the request.

THE RELEVANT FOIA PROVISIONS

6. This is an appropriate place to set out the relevant provisions that apply in this case.
7. The right of access provided by FOIA is set out in section 1(1) and is separated into two parts, both of which are relevant in this case.
8. Section 1(1)(a) FOIA gives an applicant the right to know *whether* a public authority holds the information that has been requested.
9. Section 1(1)(b) FOIA gives an applicant the right to be *provided with* the requested information, if it is held.
10. However, both of these rights are subject to exemptions.
11. As the FCO's refusal of the request was after 25 May 2018, the date the Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) came into force, the DPA 2018/GDPR applies.
12. In this case, in relation to part 1 of the request, the FCO having confirmed that it holds the information, the important issue is whether the FCO is entitled to rely on section 40(2) FOIA to refuse to disclose the dates on which it has communicated with the Bangladeshi authorities on the case of Yasin Talukder. Section 40 (2) reads as follows:-
 - (2) Any information to which a request for information relates is also exempt information if –
 - (a) it constitutes personal data which does not fall within subsection (1) (personal information of the applicant], and
 - (b) the first, second or third condition below is satisfied.
13. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.

14. The relevant condition (as referred to in s40(2) FOIA) in this case is found in s40(3A)(a):

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –
(a) would contravene any of the data protection principles.

15. Under s40(7) FOIA the relevant data protection principles in this case are to be found in Article 5(1) of the GDPR. Materially, Article 5(1)(a) reads:-

Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency').

16. Further, by Article 6(1) GDPR:-

Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...

17. In relation to parts 2 and 3 of the request, the only issue is whether on the basis of section 40(5B) FOIA the FCO is entitled to refuse to confirm or deny whether it holds information falling within the scope of these parts of the request. S40(5B) reads, materially:-

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies –

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) –

(i) would (apart from this Act) contravene any of the data protection principles

THE DECISION NOTICE

18. The Commissioner concluded as follows in relation to part 1 of the request:-

- (a) The dates on which the FCO communicated with the Bangladeshi authorities about Mr Talukder's detention do constitute his personal data as such information clearly relates to him and is of biographical significance to him.
- (b) The information can only be disclosed if to do so would be lawful (that is, would meet one of the lawful bases listed in Article 6(1) GDPR), and also fair and transparent.
- (c) The lawful basis most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR (set out above).
- (d) There is a legitimate interest in the public knowing what action the UK government is taking to assist those being detained abroad, particularly in cases where there is some controversy or confusion as to nature of their detention.
- (e) Disclosure of a list of dates (beyond the date which the FCO has disclosed) upon which the FCO had communicated with the Bangladeshi authorities could serve this legitimate interest.
- (f) There is no other obvious way in which this legitimate interest could be addressed other than disclosure of the withheld information and therefore disclosure of the information is necessary.
- (g) Disclosure of the withheld information, given Mr Talukder's situation, is arguably unlikely to have a significant infringement on his rights and freedoms in comparison to his incarceration. Nevertheless, disclosure of the withheld information could, to some limited degree,

infringe upon his privacy.

- (h) The FCO's comments about disclosure of information about consular cases having the potential to undermine efforts in supporting the individual are noted.
- (i) There is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. There is distinction between the FCO confirming one particular date on which a consular case was discussed with another state, and the FCO revealing the list of *all* dates on which it was discussed.
- (j) Disclosure would not meet the condition under Article 6(1)(f) and would therefore be unlawful.
- (k) As disclosure would not be lawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair and transparent.

19. In relation to Parts 2 and 3 of the request, the Commissioner found as follows:-

- (a) Section 40(5B)(a)(i) FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the data protection principles to provide that confirmation or denial.
- (b) Therefore, for the FCO to be entitled to rely on section 40(5B) FOIA the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the principles.

- (c) If the FCO confirmed that it held information falling within the scope of parts 2 and 3 of the request it would reveal whether Mr Talukder was still alive, and that he was being held by the Bangladeshi authorities. This would clearly disclose something of biographical significance about him and so amounts to his personal data.
- (d) The same three part test needs to be considered as with part 1 of the request: namely (i) the legitimate interest test; (ii) necessity test; and (iii) the balancing test.
- (e) The legitimate interest in the public knowing what action the UK government is taking in respect of Mr Talukder's case extends to the FCO confirming whether it holds any information sought by parts 2 and 3 of the request.
- (f) For the FCO to confirm or deny whether the requested information is held is necessary in order to serve this particular interest.
- (g) The FCO argued that confirming or denying whether it held this information would release very specific information about Mr Talukder into the public domain. The FCO acknowledged the general interest in transparency, but it considered that the arguments it set out in relation to part 1 of the request were also relevant to parts 2 and 3.
- (h) The FCO also argued that confirming whether or not it held information would have implications for future requests regarding consular assistance cases where the circumstances of the individual are not in the public domain.

- (i) The Commissioner accepted these arguments from the FCO.
- (j) Thus, the Commissioner decided that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that confirming whether or not the FCO holds information falling within the scope of parts 2 and 3 of the request would not be lawful.
- (k) As confirming or denying that the material in parts 2 and 3 of the request would not be lawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair and transparent.

THE APPEAL

- 20. The Appellant's appeal is dated 25 March 2019. He expresses his concern for Mr Talukder who he says is incarcerated following his abduction by the Bangladeshi state. His appeal concentrates on part 1 of the requested information and notes that one particular date has been disclosed.
- 21. It is unclear from the grounds of appeal whether the Appellant is disputing whether the dates upon which the FCO has contacted the Bangladesh authorities constitute Mr Talukder's 'personal data' (the appeal notice reads as though this is accepted, but in context, that does not seem to be what the Appellant intended).
- 22. The Appellant also asks why, if Mr Talukder's personal data (if that is what it is) could be disclosed in relation to the one date accepted by the FCO, why cannot the other dates be disclosed? He argues that it is important that the information about the FCO interaction and assistance is disclosed for the safety of Mr Talukder himself. He also states that 'an

understanding of the level of interaction between the FCO and the Bangladeshi authorities may assist in launching a habeas corpus petition on behalf of Mr Talukder'. He notes that the Commissioner has found that disclosure of the withheld information, given Mr Talukder's situation, is arguably unlikely to have a significant infringement on his rights and freedoms in comparison to his incarceration. He says it is important to scrutinise whether the FCO is diligently pursuing the cases of Britons imprisoned abroad. He fears that the FCO has not raised Mr Talukder's case other than the one time recorded in Parliament.

23. Under the 'outcomes' heading of the appeal form, the Appellant states that he is 'seeking the dates which the FCO has raised the case of Mr Talukder with the Bangladesh authorities'.

DISCUSSION AND DECISION

24. It seems to us to be a fair interpretation of the Appellant's appeal that he is only seeking to appeal the decision in relation to part 1 of his request (see in confirmation of this, the 'outcomes' he seeks), and we have proceeded on that basis. The Appellant also confirms that this is the case in his reply to the Commissioner's response.
25. We also note the circumstances whereby the fact that there had been one contact between the FCO and the Bangladesh authorities in relation to Mr Talukder has been disclosed. Thus, a parliamentary question was asked by Jim Cunningham MP to the foreign office minister which read 'when he last met his counterpart in Bangladesh; and what issues were discussed at that meeting'. Clearly that question did not require the disclosure of Mr Talukder's name but, on 13 March 2017, the minister replied that he had met the Bangladeshi foreign minister on 3 March 2017, and that one of the

subjects of discussion was 'the disappearance of UK national Yasin Talukder'.

26. In these circumstances, we understand the reason the Appellant then queries why further dates where there has been contact cannot be disclosed. The answer, it seems to us, is that just because some personal data has already been disclosed (through the answer to a parliamentary question) cannot mean that further personal data can also be disclosed if it would be in breach of FOIA and the DPA 2018 to do so.
27. We agree with the Commissioner that Mr Talukder is unlikely to expect the FCO to release a full list of the dates when his case has been discussed.
28. We also agree that the information sought is Mr Talukder's personal data as such information clearly relates to him (and only him) and is of biographical significance to him.
29. For the purposes of assessing whether processing is necessary for the purposes of the legitimate interests pursued by the Appellant (for the purposes of s40(2) FOIA and associated provisions) we accept that there is a legitimate interest in the public knowing what action the UK government is taking to assist those being detained abroad, particularly in cases where there is some controversy or confusion as to nature of their detention, and that disclosure of the full list of dates upon which the FCO had communicated with the Bangladeshi authorities could serve this legitimate interest. We note what the Appellant says about his doubts that the FCO has pursued this case and that the disclosure of information would indicate whether those doubts are well founded or not.
30. As the Commissioner found, there is no other obvious way in which this legitimate interest could be addressed other than disclosure of the

withheld information and therefore disclosure of the information is necessary to meet the legitimate aims.

31. Although the Appellant says that disclosure of the information could also assist with an application for habeas corpus, he does not say why or how this would be the case, and in our view, on the basis of the information before us, disclosure is not necessary for this course of action to be pursued.
32. It is true that the Commissioner has said that disclosure of the information would only be a limited infringement of Mr Talukder's rights, but the fact is that the Commissioner does say that there would be *an* infringement. That it is only limited is something to take into account when considering whether disclosure would be lawful.
33. We also accept the FCO and the Commissioner's submissions that Mr Talukder's case cannot necessarily be compared with that of Nazanin Zaghari- Radcliffe (which has been raised by the Appellant as a comparative case), and that there can be different considerations by the FCO as to what information is released depending on the facts of the case and the consent of the parties concerned.
34. As explained other than revealing what actions have been taken by the FCO, the Appellant has not identified in our view any other legitimate interests that he wishes to pursue and for which disclosure is necessary. In our view, even if there would be only a limited interference with Mr Talukder's rights as a data subject, given the importance attached to the protection of personal data, these rights outweigh the interests identified by the Appellant.

35. As did the Commissioner, as we have found that disclosure would not be lawful, we do not think it is necessary for the Tribunal to go on and consider separately whether disclosure would be fair and transparent.

CONCLUSION

36. Therefore, we dismiss the appeal in this case.

Signed Stephen Cragg QC

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 17 October 2019

Promulgated: 21 October 2019

(Case considered by Panel on 20 September 2019).