



Neutral Citation Number [2010] EWCA Civ 715

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
The Hon Mr Justice Irwin
Case No CO/7618/2006

C1/2009/2326

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 23/6/2010

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE MOSES
and
LORD JUSTICE MUNBY

Between:

STEVEN SUGAR **Appellant**
- and -
(1) THE BRITISH BROADCASTING COMMISSION **Respondents**
(2) THE INFORMATION COMMISSIONER

Tim Eicke and David Craig (instructed by **Forsters LLP**) for **Mr Sugar**
Monica Carss-Frisk QC and Jane Collier (instructed by **British Broadcasting Commission**)
for the **BBC**

Hearing date: 17th May 2010

Approved Judgment

The Master of the Rolls:

1. The issue on this appeal is whether the Information Tribunal (“the Tribunal”) was right, or at least entitled, to rule that a report prepared by Michael Balen, which analysed the BBC’s news coverage of the Middle East, and in particular the conflict between the Israelis and the Palestinians, was “held [by the BBC] for purposes other than those of journalism, art or literature” within the meaning of part VI of schedule 1 to the Freedom of Information Act 2000 (“FOIA”), and accordingly should be produced by the BBC pursuant to a request made by Steven Sugar pursuant to the section 8 of FOIA. Irwin J held that the Tribunal had erred in law, and reversed their decision; Mr Sugar now appeals to this court.

The Freedom of Information Act 2000

2. According to its title, section 1 of FOIA gives a “general right of access to information held by public authorities”. Section 1(1) is in these terms:

“Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(4) makes it clear that “the information in question” is, at least normally, information which is “held at the time the request is received”.

3. A “public authority” is defined in section 3(1)(a)(i) as including, “... any body which, any other person who, or the holder of any office which ... is listed in Schedule 1 ...”. Schedule 1 to FOIA has several parts, and part VI, which is entitled “Other Public Bodies and Offices: General”, includes the following:

“The Bank of England, in respect of information held for purposes other than those of its functions with respect to—

(a) monetary policy,

(b) financial operations intended to support financial institutions for the purposes of maintaining stability, and

(c) the provision of private banking services and related services.

...

The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.

...

The Channel Four Television Corporation, in respect of information held for purposes other than those of journalism, art or literature.

...

The Competition Commission, in relation to information held by it otherwise than as a tribunal ...

The Gaelic Media Service, in respect of information held for purposes other than those of journalism, art or literature...

Sianel Pedwar Cymru, in respect of information held for purposes other than those of journalism, art or literature...”.

4. Section 7 of FOIA is in these terms:

“(1) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.

(2) An order under section 4(1) may, in adding an entry to Schedule 1, list the public authority only in relation to information of a specified description.

(3) The [Secretary of State] may by order amend Schedule 1—

(a) by limiting to information of a specified description the entry relating to any public authority, or

(b) by removing or amending any limitation to information of a specified description which is for the time being contained in any entry...”.

5. Section 2 explains that the provisions of Part II of FOIA (incorporating sections 21 to 44) contain exemptions from the duty to disclose; in some cases the exemption extends to the obligation to disclose whether the information is held at all, and in others it extends only to the obligation to disclose; in some cases, the exemption is absolute, and in others it depends on balancing the public interest in disclosure against the public interest in non-disclosure.

6. It is worth referring briefly to two of the sections in Part II of FOIA. Section 36 is headed “Prejudice to effective conduct of public affairs” and, by virtue of subsection (2)(b), it extends to information disclosure of which “in the reasonable opinion of a qualified person [in this case, we were told, designated as the BBC itself], disclosure of the information under this Act”:

“would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

Secondly, there is section 43, which is headed “Commercial interests”, and subsection (2) of that section provides that “Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

7. Where a person is dissatisfied with the way in which a request under FOIA is being, or has been, dealt with, he or she (as a “complainant”) may make an application under section 50 to the Information Commissioner (“the Commissioner”), who must issue a “decision notice”. By virtue of section 57, either the complainant or the public authority may appeal against a decision notice, and such an appeal is heard by the Tribunal, who, pursuant to section 58(1), can allow the appeal either on the grounds that the decision notice was “not in accordance with the law” or that the Commissioner “ought to have exercised his discretion differently”; the Tribunal also is given power by section 58(2) to “review any finding of fact on which the notice was based”. Section 59 gives a right to appeal against any decision of the Tribunal “on a point of law”, in this jurisdiction, to the High Court.

The genesis and use of the Balen Report

8. From about the middle of 2003, the BBC news coverage of the Middle East was being publicly scrutinised by various lobby groups. Richard Sambrook, the Director of BBC News at the time, decided to ask a senior journalist to consider the issue, and to report on the BBC’s coverage of the Middle East, and in particular of Israeli and Palestinian affairs. He asked Malcolm Balen, who had been editor of the BBC Television’s Nine O’Clock News, and had had wide journalistic experience, to carry out this task.
9. In October 2003 Mr Balen agreed to act as the BBC’s “Middle East consultant in news” for a year from 1 November 2003. His post was an unusual one: while defined as being “a senior editorial adviser”, it had no formal editorial or managerial function. During the first four months, he delivered reports, on average every three weeks, to Mr Sambrook, in which he addressed various complaints about the BBC’s Middle East coverage. For that purpose, he discussed the issue widely with internal editors and journalists, as well as with representatives of lobby groups. From about February 2004, Mr Balen concentrated on writing his report.
10. Mr Sambrook received a draft of the Balen Report in June 2004, and on 5 July a later draft was sent to Mr Byford, then the Director of BBC World Service. It seems clear that the report was completed at some point in July 2004. In his evidence to the Tribunal, Mr Balen described the aim of his report as twofold, namely:

“to examine the pattern of the complaints against the BBC and, if you like, examine the coverage that I was reviewing through the filter of those complaints, to see whether I thought the complaints were justified or not, not individual complaints but the pattern of them. I was also examining over time a considerable amount of BBC output to see what it added up to over time, how those individual decisions, journalistic decisions, on a daily basis, what they amounted to in their totality.”

11. Although Mr Balen stated that he did not know precisely how the report would be used by Mr Sambrook, he said that he was “very clear” as to the nature and purpose of his report:

“I was preparing it in order to improve BBC journalism, identify where we were getting it right or wrong, irrespective of the complaints we were receiving. My role was to give Mr Sambrook my view as an experienced journalist and editor. The idea was that because I was not making programmes, I could stand back and look at what the BBC had been doing. ... [Following wide research]...in the light of my findings I suggested how the quality of our journalistic output might be improved. The paper was to be an internal briefing document for Mr Sambrook. I decided that I would include some practical recommendations although I did not know whether he would want to use these – this would depend on his views of the report...My recommendations were simply my own personal view on how the BBC's journalism could be improved.”

12. Following the resignation of the Chairman and the Director General as a result of the criticisms contained in the Hutton report, the BBC was reorganised. Mr Byford became Deputy Director General in January 2004 and a new Director General, Mark Thompson, was appointed in June 2004. In August 2004, Mr Sambrook became Director of World Service and Global News, and he was replaced by Helen Boaden as Director of News. Mr Balen therefore began to report to her.
13. As part of the reorganisation, the BBC set up a Journalism Board. Stephen Whittle, Controller of Editorial Policy, was a member of this Board and described its functions to the Tribunal in the following terms:

“Between us, we were responsible for setting the strategy and values, as well as overseeing journalism across all areas of the BBC's output, including the UK-wide television and radio services, news on line, national and regional news programmes, local radio, the world service and BBC world, the BBC's international-facing commercial channels.”

14. By late autumn 2004, the Balen Report was in circulation amongst the Journalism Board members, and it was considered at the Board's meeting on 9 November 2004. In the course of his evidence, Mr Balen said that his report went to the Journalism Board “as part of a wider strategy review of the Middle East from which several decisions flowed.” He confirmed that he was subsequently asked to assist in implementing various recommendations made in his report following a meeting of the Board all of which “were directed towards improving the BBC's journalism and programme content”.

15. This is consistent with an email sent by Mr Byford to the Journalism Board members on 9 November 2004, which was in the following terms:

“Following our very good discussion at the Journalism Board today on our Middle East coverage and on Malcolm's report. ... [W]e will now take forward a number of strands of work which we will then bring together for approval at the Journalism Board as soon as possible in the new year. ... [A]ll these strands can be brought together in a paper ‘taking forward BBC coverage of the Middle East’ in January/February, which should be set in the context of the Governor's 2004/5 objective: ‘[to] ensure the BBC meets the highest standards of independence, impartiality and honesty in its journalism and implements recommendations on training, editorial control and complaints handling.’”

16. When Mr Balen was asked in evidence before the Tribunal to explain the initiative which stemmed from his report he summarised it as follows:

“...[T]he establishing of the post of Middle East editor, reviewing the BBC's analysis capability, developing a Key Facts Guide, auditing the use of on air Middle East experts and developing BBC training. I think those all have a journalistic imperative.”

Mr Balen agreed that he was concerned about the impartiality of the BBC's coverage, but he did not accept that was the “prime aspect” of his work. His work was, he said, “far more wide-ranging than that.”

17. In May 2005 the BBC announced that it was creating a Middle East Editor, and Jeremy Bowen was appointed to the post in August 2005. Around June 2005, Mr Byford commissioned a news gathering strategy paper from Ms Boaden and Mr Sambrook. They used the Balen Report as one of their sources, although there were other sources. During 2005, the Board of Governors appointed a panel under Sir Quentin Thomas to conduct an external independent review of BBC reporting in the Middle East and this resulted in “the Thomas Report”, which was published in May 2006. In the course of his work, Sir Quentin asked for a copy of the Balen Report, and, after some hesitation, he was given a copy on terms of confidentiality, a stipulation which Sir Quentin and his Panel respected.

The procedural history

18. On 8 January 2005, Mr Sugar requested the BBC to disclose the Balen Report under FOIA. On 11 February 2005, the BBC declined to comply with this request, on the basis that FOIA did not apply to the Report. The BBC adhered to that decision following an internal review, stating that the Report “...directly impacts on the BBC's reporting of crucial world events...”, and relying on the fact that FOIA was only applicable to information held by the BBC for purposes other than journalism.
19. On 18 March 2005, Mr Sugar complained to the Information Commissioner about the BBC's handling of his request. Following extensive correspondence between the parties, the Commissioner, on 24 October 2005, communicated his provisional view, which was supportive of the BBC's position. He formally confirmed this view in a letter dated 2 December 2005, which set out his final decision that the Report was

held by the BBC for purposes of journalism, and that the BBC had correctly applied part VI of Schedule 1 to the Act.

20. By letter dated 30 December 2005, Mr Sugar appealed to the Tribunal against the Commissioner's determination. On 21 March 2006, the Tribunal directed that there should be a hearing of two preliminary issues: (i) whether the Tribunal had jurisdiction to entertain the appeal and (ii) assuming the Tribunal did have jurisdiction, whether the Balen Report was excluded from disclosure by the definition in Schedule 1 to FOIA.
21. Following that hearing, on 14 June 2006 the Tribunal (John Angel, chairman, and Henry FitzHugh and John Randall, lay members) gave their decision on the two issues. First, they concluded they did have jurisdiction to hear Mr Sugar's appeal. Secondly, they concluded that the BBC was a public authority in relation to the Balen Report at the time of Mr Sugar's request for disclosure, and that the Report was disclosable. Accordingly, the Tribunal reversed the Commissioner's decision. The reasons for its two decisions were given on 29 August 2006; the Tribunal's full and careful reasons on the second issue, namely why the Report was not exempt from production, are contained in Appeal Number EA/2005/0032.
22. The BBC appealed against the Tribunal's decision on the first issue, and succeeded before Mr Justice Davis, whose decision was upheld by the Court of Appeal, but reversed by the House of Lords - see [2007] 1 WLR 2583, [2008] 1 WLR 2289, and [2009] UKHL 9 - [2009] 1 WLR 430. The determination of the Tribunal on the second issue therefore stood, namely that the Balen Report was held by the BBC for a "purpose... other than journalism ...". That conclusion was appealed by the BBC to the High Court. In his decision, dated 2 October 2009, Irwin J decided that the Tribunal had erred, and that the BBC was effectively entitled to refuse to disclose the Balen Report pursuant to Mr Sugar's request - see [2009] EWHC 2349 (Admin). Pursuant to permission granted by Sir Richard Buxton on 30th November 2009, Mr Sugar now appeals to this court.

The proper approach to this appeal

23. Although this is an appeal from the High Court, it seems to me that this court should primarily concentrate on the reasoning and decision of the Tribunal. Once there is an appeal from a decision of the Commissioner, it is the Tribunal, not the High Court, to whom the legislature has primarily entrusted the decision-making process. Thus, section 58 enables the Tribunal to review and reverse the Commissioner's decision, not just on a point of law, but also on the exercise of discretion, or any finding of fact. By contrast, section 59 limits the grounds on which the High Court can interfere with a determination by the Tribunal to a point of law.
24. Further, on an appeal from a specialist tribunal, such as the Information Tribunal, as Sir Richard Buxton pointed out when granting permission to appeal, a court (whether the High Court or this court) should always bear in mind the remarks of Baroness Hale of Richmond in *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678, paragraph 30, where she said this:

"This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. ... [T]he ordinary courts should approach

appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it rightThey and they alone are judges of the facts. ... Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find misdirections simply because they may have reached a different conclusion on the facts or expressed themselves differently.”

25. Toulson LJ made the same point from a slightly different angle in *HM Revenue & Customs v Procter & Gamble UK Ltd* [2009] EWCA Civ 407, paragraph 60:

“Where a Tribunal has taken into account all relevant factors, and has not been influenced by impermissible factors, a court will only exceptionally entertain a challenge based on the Tribunal’s evaluation of those factors for the reason given by Baroness Hale in *AH*. The challenge would have to show that the decision was perverse”

26. That does not, of course, mean that the court has no role to play; apart from anything else, so to hold would fly in the face of section 59. The court has an important and familiar role under FOIA, namely to correct any error of law, where it has been made by the Tribunal in a particular case, and, in some cases, to settle an issue of law, which is difficult, controversial or has been wrongly determined by the Tribunal, thereby clarifying the position for future cases.
27. In some cases, it may be difficult to decide whether the issue raised on an appeal is really one of law, as opposed to judgment or inference, and sometimes the point may be almost a mixture of law and judgment or inference. The clear message from Baroness Hale is that the court should not go out of its way to find an error of law, and I would respectfully endorse that approach. However, I would add that the court would be failing in its duty if it did not step in where an error of law had been made by the Tribunal, which, if corrected, produced a different outcome from that arrived at by the Tribunal.
28. That was effectively the view taken by Irwin J here, and, while this court should concentrate on the reasoning and conclusion of the Tribunal, it would be wrong not to consider the reasons the Judge gave for concluding that the Tribunal had gone wrong in law. An advantage for a court hearing a second appeal is, or at least should be, that, with the benefit of the argument and the judgment on the first appeal, the issues have become more refined and the analysis more focussed than was the position after the first instance decision. This is such a case.

The Tribunal’s reasoning

29. The Tribunal’s reasoning is full and detailed, running to some 38 pages and 140 paragraphs. In paragraphs 1 to 45, they begin by setting out the procedural history and relevant statutory provisions, and then turn to discuss in some detail the legislative and policy background to FOIA. In paragraphs 46 to 72, the Tribunal consider the background, preparation and subsequent use of the Balen Report. Paragraphs 73 to 93 contain a summary of the parties’ arguments as to the meaning of “journalism” in part VI of schedule 1 to FOIA, where the Tribunal characterise the effect of the expression

“in respect of information held for purposes other than those of journalism, art or literature” conveniently, if perhaps inaccurately, as a “derogation”.

30. In paragraphs 94 to 117, the Tribunal express their view on the meaning of “journalism” in part VI of schedule 1 to FOIA. In those paragraphs, the Tribunal begin by summarising the parties’ respective arguments. In paragraph 104, the Tribunal reject the contention “that a line should be drawn between journalism and the management of journalism” on the ground that it was “not a helpful distinction”. The Tribunal then say this:

“Management can be exercised at many different levels. The management of a front-line journalist by a more senior journalist is, arguably, directly for the purpose of journalism. Management at a strategic or directing level may have an impact on journalism but is, arguably, too remote from the journalistic function to be said to be for the purpose of journalism, as opposed to the overall direction of the organisation”.

31. The Tribunal then express their own view as to the meaning of “journalism” in the following way:

“105. [A] more useful distinction may be between functional journalism and the direction of policy, strategy and resources that provide the framework within which the operations of a [public service broadcaster] take place.

106. In relation to functional journalism we find that it covers collecting or gathering, writing, editing and presenting material for publication, and reviewing that material. In order to further understand functional journalism the Tribunal considers the following three elements constitute functional journalism

107. The first is the collecting or gathering, writing and verifying of materials for publication.

108. The second is editorial. This involves the exercise of judgement on issues such as:

- the selection, prioritisation and timing of matters for broadcast or publication,
- the analysis of and review of individual programmes,
- the provision of context and background to such programmes.

109. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleague, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.”

32. At paragraphs 118 to 124, the Tribunal consider the proper approach under FOIA in cases where the BBC holds documents for “multiple purposes”, i.e. for the purpose of

journalism (or art or literature) and for another purpose (or other purposes). In paragraph 124, they express agreement with the argument then supported by the BBC, namely that the correct approach was to assess the “dominant” purpose for which the document was held, accepting that that purpose could change from time to time.

33. From paragraph 125 onwards, the Tribunal turn to the resolution of the central issue before them, namely whether, by the time that Mr Sugar made his request, the Balen Report was held by the BBC “for purposes other than those of journalism”. At paragraph 132, the Tribunal referred to the function of the Journalism Board as being, at least in relation to the Report, as being “of a policy and strategic nature, ... and ... the discharge ... of the [BBC’s] Charter responsibilities”.
34. At paragraph 133, the Tribunal say that they are “clear that, when originally commissioned, Mr Balen’s work was for predominantly journalistic purposes. It formed part of the third leg of the meaning of journalism ... , in that it was primarily an output review intended to assure and enhance quality”. “However”, as the Tribunal immediately go on to say, “when elevated to the Journalism Board on 9 November 2004, as a formal report, it was being used for, and hence was being held for, wider purposes of strategic policy and resource allocation, which lie outside the scope of the derogation”.
35. In their conclusion, immediately before summarising their findings, the Tribunal say at paragraph 135 that “[t]he seniority of the Journalism Board, and the strategic and resource consequences of its consideration of the Report, lead the Tribunal to the view that, as at 9 November 2004 the dominant purpose for which the information was held lay outside the scope of the derogation.”

Information held for purposes of journalism and other purposes

The parties’ respective positions

36. Although the BBC argued, and argued successfully, before the Tribunal that “information” was “held for purposes other than journalism”, unless journalism was the dominant purpose for which the information was held, Irwin J did not agree. He considered that, provided that journalism was one of the purposes for which the information was held, that would suffice to take the information out of the ambit of FOIA. In reaching that conclusion, he also rejected Mr Sugar’s case before the Tribunal, which was his alternative stance on interpretation before the Judge, that, unless the information was held exclusively for journalism, it was within the ambit of FOIA.
37. The BBC now adopts the Judge’s view as its primary case, although it still maintains its original position as its secondary case; Mr Sugar adheres to the stance which he adopted before the Judge. The issue turns on the meaning of the expression “information held for purposes other than those of journalism ...” in part VI of schedule 1 to FOIA.
38. When it comes to information which is held for multiple purposes, i.e. both for the purpose of journalism and for another purpose (say, for financial purposes), it seems to me that, at least as a pure matter of ordinary language, it is arguable either way as to whether the information is “held for purposes other than those of journalism”. On

one view, that advanced (now as his alternative case) by Mr Sugar, it can be said that such information is held, albeit only in part, for other purposes, namely for financial purposes. On the other hand, as the BBC now primarily contends, it can be said that, as the information is held, albeit not exclusively, for the purpose of journalism, it is not held other than for purposes of journalism, as it is held for those purposes.

The “dominant purpose” approach

39. In common with Irwin J, I have difficulty with what amounts to a middle way between these two more extreme alternatives, namely that one should read the expression as referring to information held by the BBC for the predominant, or dominant, purpose of journalism, although this was the approach adopted by the Tribunal (to be fair to them, at the invitation of the BBC).
40. In the first place, that is simply not what the expression naturally means. That is not necessarily conclusive of the issue, as the purpose of interpretation is to identify the meaning of words by reference to their context, which sometimes results in the apparent meaning of the words, read on their own, having to yield to a less natural meaning. It would have been only too easy for the legislature to include the word “dominantly”, or some other such word, in the expression, after the word “held”, if the dominant purpose test was intended to apply.
41. It also appears to me that the interpretation favoured by the Tribunal could lead to uncertainty and difficulty. I accept that, on any interpretation of the expression, a degree of uncertainty and difficulty may sometimes arise in cases where information is said to be held for more than one purpose. However, at least on the interpretations now favoured by the BBC and (albeit to a lesser extent) by Mr Sugar (as his alternative), the determination of the purposes for which the information was held would be a reasonably objective, and, normally at least, a reasonably predictable, exercise. On the other hand, deciding which purpose is the dominant purpose would seem to me to involve a rather subjective, and often speculative, exercise. Further, such an exercise could involve other difficulties: if the information is held for three or more (say, four) purposes, would it be enough for the BBC to show that journalism was more dominant than each of the other three taken on their own, or than all the other three taken together?
42. Further, if the dominant purpose test applies in relation to the BBC, it should, as a matter of logic, also apply to the Bank of England and the Competition Commission, in the provisions of part VI of schedule 1 to FOIA relating to them. If information is held in part by the Competition Commission as a tribunal and in part for other purposes, or by the Bank of England in part for monetary policy purposes and in part for other purposes, it seems to me unlikely that the legislature would have intended that the information would be subject to FOIA unless the tribunal or monetary purpose was the dominant purpose.
43. The Tribunal were impressed with the dominant purpose test applied in cases of litigation privilege, as laid down by the House of Lords in *Waugh v British Railways Board* [1980] AC 521, but that does not seem to me to be an appropriate analogy. It was not a case involving statutory construction, and the policy issues involved were entirely different.

The meaning of “... held for purposes other than those of journalism...”

44. So, one is faced with the stark choice between the two more extreme rival interpretations of the expression. On this issue, again I am in agreement with Irwin J. In my view, the BBC’s interpretation is to be preferred: once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.
45. The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was “both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.” This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks.
46. This suggests to me that, provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA. After all, there must be a great deal of information held by the BBC which is not solely held for journalistic purposes, if “journalism” is given the meaning which the Tribunal accorded to it, and it could well have a chilling effect on BBC journalism and could well operate unfairly on the BBC against its commercial rivals, if any document held for journalistic purposes and another purpose was liable to be disclosed to the public.
47. As the Tribunal’s reasoning in this case demonstrates, it is very easy to contend, and to conclude, particularly if the entity concerned is as large and multi-faceted as the BBC, that information was produced for multiple purposes, or, even where it was produced for the purpose of journalism, that it is held by the entity for purposes additional to journalistic ones. Purposes such as management, financial, employment, strategic could easily be invoked, and, unless one gives “journalism” a very, and unnaturally, wide meaning, a requirement that information is only exempt if it is held by the BBC solely for purposes of journalism could be in danger of being rendered almost meaningless.
48. That argument can, of course, be turned on its head, at least to an extent. Just as it can be said that not that much information held by the BBC may be excluded from the ambit of FOIA if the Judge is wrong, so it can be said that relatively little information held by the BBC will be within the ambit of FOIA if the Judge’s interpretation is correct. However, although “the public’s right to know”, in the sense of having access to information held by government and other public bodies, is a very important aspect of a modern, free and democratic society, it is a general right, which, as it seems to me, can be expected to yield to society’s more specific public interest in the media being free from the sort of constraints which would arise if journalism-related thoughts, investigations, or discussions could not be freely conducted within organisations such as the BBC. Sunlight is the best disinfectant, but it can also burn, and when it comes to information held by the BBC for the purposes of journalism, it seems to me that the legislative policy is that the risk of burning outweighs the benefit of disinfectant.

49. Another reason for agreeing with the Judge is that it is much easier to decide if information is held for purposes of journalism, irrespective of whether or not it is also held for other purposes, than it is to decide if it is held solely for purposes of journalism. As the Tribunal's reasoning in this case shows, it is relatively easy to find that an entity such as the BBC holds information partly for purposes such as deployment, strategy, public relations, Charter compliance, or management. The issue whether such purposes are outside the ambit of "journalism" would often be difficult to resolve, and could involve a rather subjective assessment. Such an assessment would not be needed if the Judge's analysis was correct.
50. For the reasons already touched on in paragraph 41 above, I believe that this conclusion is also supported by considering the provisions in part VI of schedule 1 relating to the Bank of England and the Competition Tribunal.
51. Furthermore, if information held by the BBC for some purpose in addition to the purposes of journalism was disclosable, it would almost be a matter of happenstance if information held for the purposes of journalism was or was not within the ambit of FOIA. It would seem somewhat surprising if information, not otherwise disclosable, became disclosable merely because, as a result of some development, as well as being held for purposes of journalism, it was also now held for another, perhaps less significant, purpose. A similar point cannot be made if the Judge's view was correct: so long as the information is held, at least in part, for purposes of journalism, then it will be outside the ambit of FOIA.
52. Mr Sugar relies on a number of provisions of Part II of FOIA, and particularly section 36, and to a lesser extent section 43, as providing exemptions which could be relied on by the BBC in appropriate cases, and which therefore support the notion that the Judge's conclusion where information is held for mixed purposes was wrong. I doubt whether section 36, or section 43, would often apply to such information, but, more importantly, it does not seem to me that the fact that there are exemptions which might apply to some of the information held by the BBC, if the Judge is wrong, really impinges on the point at issue.

What are the "purposes ... of journalism"?

53. I have briefly canvassed, and rejected, the possibility of attributing to the word "journalism" in part VI of schedule 1 to FOIA an unnaturally wide meaning. It seems to me that the word should be given its natural meaning, and, in that connection, the Tribunal's analysis in that part of its decision which is quoted in paragraph 30 above is not one which I could improve on, at least in the present context. However, having decided on the meaning of the word "journalism", it seems to me that one should not approach the question of whether the FOIA applies by being too generous on the question of whether information is "held for purposes ... of journalism", and, in particular, one should bear in mind that today's journalism is tomorrow's archive.
54. It is both difficult and dangerous to lay down guidance, even in general terms, as each case must be decided on its particular facts by the Tribunal. However, it is worth saying a little more on this topic, as we were shown decisions of the Commissioner which, at least at first sight, suggest a very wide meaning is being adopted to the words "held for purposes ... of journalism", following the Commissioner's understanding of the reasoning of Irwin J in this case.

55. In my view, whatever meaning is given to “journalism” I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be “held for purposes ... of journalism”. No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be “held for purposes ... of journalism”. The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow, rather than a relatively wide, way.
56. That view is reinforced by the fact that, in the expression, “journalism” is linked to “art and literature”. One cannot say that financial information which may affect the financing of an arts programme, a drama series, or a broadcast opera is *ex hypothesi* held “for purposes ... of ... art or literature”, and such programmes are rarely within “journalism”. It would be surprising and internally inconsistent if FOIA provided for a wholly different test when considering whether information was held “for the purposes ... of journalism” than when considering whether it was held “for the purposes ... of ... art or literature”. Having said that, I would be inclined to accept that “journalism” probably embraces significantly more activities than “art or literature” when it comes to the activities of the BBC.
57. It should be emphasised that I am not saying that the decisions of the Commissioner referred to in paragraph 53 above were wrong: they were only referred to and discussed cursorily in argument (and quite rightly so). Further, I am not saying that financial information held by the BBC could never escape the reach of FOIA. Far from it. Each case must be decided on its own facts, and there will no doubt be cases where such information is held for the purposes of journalism (or art or literature).
58. As the Tribunal rightly observed, information held at one point for purposes of journalism may, at some later point, cease (either temporarily or permanently) to be held for that purpose. In the case of journalism, above all news journalism, information “held for purposes ... of journalism” may soon stop being held for that purpose and be held, instead, for historical or archival purposes. The BBC, and the Commissioner and the Tribunal, will no doubt carefully consider whether this applies to the information, which originated as purely journalistic-related material.
59. Finally on this aspect, some discussion was given over to the question of whether information might be “held for purposes ... of journalism” only to a *de minimis* extent. This is an unhelpful concept, at least in this context. If a court concludes that the journalistic purposes are *de minimis*, then, in reality, that would really mean that they are non-existent. Information either is, or it is not, held for a particular purpose.

The resolution of this appeal

60. In my opinion, the Tribunal reached the wrong decision, and the extent and nature of the error was such that the court ought to step in. The error was in essence two-fold, although the two aspects may overlap.

61. In order to explain this, I start by recapitulating what the Tribunal said in paragraph 133 of their reasons. Having accepted that “when originally commissioned, [the Report] was for predominantly journalistic purposes [as] it was primarily an output review intended to assure and enhance quality”, the Tribunal said that “when elevated to the Journalism Board on 9 November 2004, as a formal report, it was being used for, and hence was being held for, wider purposes of strategic policy and resource allocation, which lie outside the scope of the derogation”.
62. The first error is attributable to the fact that it was based on the BBC’s case at the time, and to the fact that nobody contended for what I think is the correct construction. That error is the Tribunal’s conclusion that information was exempt only if the dominant purpose for which it is held is that of journalism, art or literature. For the reasons discussed above, such information is exempt if journalism, art or literature is one of the purposes for which it is held.
63. In this connection, the Tribunal proceeded on the basis that the dominant purpose test was correct, and they decided that the dominant purpose for which the Report was held by the BBC from 9 November 2004 was strategic or managerial, rather than journalistic. The unsatisfactory nature of that approach, in principle, is well demonstrated by the obvious difficulty in deciding whether the “wider purposes” or the “output review” purpose (which still survived) was dominant – a particularly difficult exercise as they overlapped. The exercise would have been much easier and less subjective, if, as I believe, the issue had been whether the Report was held for the purpose of journalism as the sole purpose, and even easier if the issue was whether it was held for the purposes of journalism, either as the sole purpose or as one of the purposes.
64. The second problem with the Tribunal’s reasoning is the absence of any sensible basis for distinguishing, for the purposes of part VI of schedule 1 to FOIA, between the initial purpose for which the Report was held and the purpose for which it was held after 9 November 2004. In paragraph 133, having correctly held that “when originally commissioned, Mr Balen's work was for predominantly journalistic purposes”, the Tribunal seem to me to have had no logically or legally sustainable basis for concluding that “when elevated to the Journalism Board on 9 November 2004, as a formal report, it was being used for, and hence was held for, wider purposes of strategic policy and resource allocation, which lie outside the scope of the derogation.”
65. In each case, the purpose for which the Report was held was the same, namely to ensure that the BBC’s Middle East coverage was effective and impartial. The only difference between the initial state of affairs and that after 9 November 2004 was the level at which the ensuring of effectiveness and impartiality was being effected. One of the aspects of what the Tribunal described (in paragraph 109 of their reasons) as the third of the elements of “journalism”, namely “professional supervision and guidance, and reviews of the standards and qualities of particular areas of programme making”. That is a fair description, it seems to me, of the purpose for which the Journalism Board was using the Report from 9 November 2009. The fact that it was at a higher, perhaps more strategic and more managerial, level does not alter that simple fact.

66. Although I have no difficulty with the Tribunal's definition of "journalism" as quoted in paragraph 30 above, it seems to me that where they went wrong in paragraph 128 and onwards of their reasoning, was in concluding that, even where the purpose for which the information was held fell within that definition, it was excluded therefrom, because it was being considered by a committee, namely the Journalism Board, which primarily had "strategic", "policy" and "Charter" concerns and responsibilities. While it may be a perfectly apt characterisation of the Board's purpose when considering the Report as being strategy, policy and Charter issues, that does not prevent those purposes being journalistic. Further, as already discussed, the reasoning of the Tribunal highlights the difficulties which can arise if one adopts a "dominant purpose" approach, or if information held by the BBC was not exempt from FOIA unless held solely for the purposes of journalism (art or literature).
67. In truth, it seems to me that the distinction drawn by the Tribunal in paragraph 133 of their reasons amounts to the same thing as the distinction between "front-line" management of journalism and journalists, and management of journalism and journalists "at a strategic or directing level", which the Tribunal had eschewed at paragraph 104 of their reasons.
68. The Judge expressed himself to much the same effect in paragraphs 74 to 78 of his judgment, and it is worth quoting what he said at [2009] EWHC 2349 (Admin), paragraph 76, with which I agree:
- "The BBC's obligations of impartiality, obligations which are perhaps more apt to 'journalism' than to art or literature, are not divorced from the activity of journalism. Indeed, it seems to me that in taking decisions which ensure that the BBC conforms to its obligations of impartiality, journalistic considerations are absolutely central. Indeed, such decisions seem to me to fall squarely within the definition the Tribunal gave of the third limb of 'functional journalism'. Ensuring impartiality, whilst creating conditions in which challenging and penetrating journalistic coverage is possible, may well be described as strategic thinking and decision-making, but such a task is surely intrinsically concerned with journalistic output, even if the immediate activity of reviewing adherence to the Charter obligations may not be 'journalism' in the sense of the activity of journalism."
69. I have no doubt about the propriety of the first reason for reversing the Tribunal's decision: the question of whether the Tribunal was right to adopt a "dominant purpose" approach when the BBC holds information for multiple purposes, is a question of statutory interpretation, and therefore is a point of law, where the court has a duty to interfere if satisfied that the Tribunal went wrong.
70. I am more diffident when it comes to the second reason. It can be said that the Tribunal's decision as to whether information is held for purposes other than for journalism is a determination which classically should be left alone by an appellate court, especially bearing in mind Baroness Hale's guidance in *AH (Sudan)* [2007] UKHL 49, [2008] 1 AC 678, paragraph 30. However, I have concluded that the error made by the Tribunal was not to apply their own definition of "journalism" consistently, and that the decision they reached, although closely argued, was simply one they could not have reached on the basis of the evidence before them.

71. For these reasons, and also for the reasons contained in the judgment of Moses LJ, which I have seen in draft, I would dismiss Mr Sugar's appeal.

Lord Justice Moses:

72. I agree that Mr Sugar's appeal should be dismissed for the reasons given by the Master of the Rolls. Two essential features of the appeal dictate that conclusion.
73. Firstly, the status of "Public Body" is only conferred on the BBC, in circumstances where it holds information, at the time the request is made, "for purposes other than those of journalism, art or literature" (Schedule 1 Part VI). Once it is established that the information was held, at the relevant time, for the purposes specified, *in casu* those of journalism, the BBC is not a public body in respect of that information: the fact that the information was also held for other purposes is not to the point. Holding information for purposes other than journalism, art or literature does not identify the BBC as a Public Body in respect of that information unless it is not held for the purposes specified. Any other construction would lead to a result which Parliament clearly sought to avoid, namely that information held for the purposes of journalism, art or literature would nonetheless be disclosable because it was also held for another purpose (see The Master of the Rolls at [50]). If Parliament had wished the process of examining whether disclosable information was exempt, under Part II of FOIA, to be applied to information held by the BBC for the purposes of journalism and for other purposes, it could have said so. Accordingly, no question of identifying a dominant purpose arises under the statutory scheme.
74. Nor do I believe any assistance is to be derived from consideration of Article 10 (freedom of expression) of the European Convention on Human Rights. Both parties to the appeal invoke Article 10, the BBC in order to make good its contention that disclosure of the Balen Report would have a 'chilling effect' on freedom of expression, and Mr Sugar as providing the source of the growing recognition of a right of access to information.
75. The BBC relied upon *Goodwin v UK* (1996) 22 EHRR 123. But that case is miles away from the facts and circumstances of the instant appeal; it concerned protection of journalistic sources and is useful in the present case only to permit re-iteration of the forensic cliché.
76. *Tarasag a Szasbadsagjogokert v Hungary* (No 37374/05 14 April 2009) a landmark decision on freedom to information, on which Mr Eicke, for Mr Sugar, relied, establishes that article 10 may be invoked not only by those who seek to give information but also by those who seek to receive it (see also *A v Independent News and Media Limited & Others* [2010 EWCA Civ 343 {43} and {44}).
77. But in the context of a case where the information is said to be held for the purpose of maintaining and improving the quality of the BBC's journalistic output (see quote at [12]), it does not seem to me to be possible to identify within Article 10 itself or within the jurisprudence relating to that Article any pointer for or against the rival contentions. It is plainly consistent with Article 10 to protect an uninhibited discussion and review as to how the dissemination of fact and opinion about Israel and Palestine may be improved. It is plainly consistent with Article 10, as it is now interpreted, that there should be freedom of access to such a review, providing that the

prospect of disclosure does not risk inhibiting its preparation, the subsequent consideration by the BBC to which it led and, in the result the maintenance and improvement in the standards of journalism relating to that region. In those circumstances, invocation of the freedoms enshrined in Article 10 provide no assistance.

78. The second feature of the appeal which I seek to emphasise relates to the Tribunal's own approach to what is meant by 'journalism'. Its approach must command respect and must be upheld unless it discloses a substantial error of law dictating a different conclusion. The Tribunal recognised that journalism involved the exercise of judgement on 'the analysis and review of individual programmes' (108, quoted [30]) and 'the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness)' and 'reviews of the standards and quality of particular areas of programme making' (109, quoted [30]).
79. The Tribunal's error stemmed from its attempt to distinguish those processes when undertaken at the stage when the Report was originally commissioned, from those processes undertaken when the Report was 'elevated' to the Journalism Board (133, quoted [33]). It sought to reinforce that distinction by placing those processes undertaken at the commission stage within the category of 'functional journalism' and distinguishing that category from 'the direction of policy, strategy and resources' (105, quoted [30]).
80. The distinction appears to have stemmed from the Tribunal's belief, expressed at paragraph 104, that no helpful distinction can be drawn between journalism and the management of journalism. But it then drew a line between management by a senior journalist and management at a strategic level :
- "The management of a front-line journalist by a more senior journalist is, arguably, directly for the purpose of journalism. Management at a strategic or directing level may have an impact on journalism but is, arguably, too remote from the journalistic function to be said to be for the purpose of journalism, as opposed to the overall direction of the organisation" (paragraph 104).
81. In the next paragraph, the Tribunal appears to be making the same distinction, a distinction which it carried forward to its conclusion at paragraph 133. In paragraph 106, the Tribunal deployed its expertise in recognising those features of journalism which I have repeated. It was that recognition which the Tribunal should have carried forward and adopted in its conclusion.
82. The error of the Tribunal lay in the importance it attached to the distinction between functional journalism and the direction of strategy. If the maintenance and enhancement of the standards of journalism and reviews of those standards are processes undertaken for the purposes of journalism, they are no less so when undertaken for strategic purposes. The Journalism Board (whose name provides some clue to its function) undertook the self-same processes acknowledged by the Tribunal to be part of what it described as 'functional journalism'. Its position in the BBC's News Organisation shows that it was responsible for, "News, Global News, Regions and Nations and Editorial Policy". It held the Report, at the time of Mr Sugar's

request, for the purposes of the processes identified by the Tribunal itself as aspects of ‘functional journalism’. There was, accordingly, no basis for the Tribunal’s conclusion that because of its position in the hierarchy, the Journalism Board held the Report for purposes other than those of journalism. The application of the Tribunal’s own assessment of what the processes of journalism entail dictates a conclusion contrary to that which the Tribunal reached.

83. I suggest that the Tribunal’s error did lie in the distinction it made in the latter part of paragraph 104 and paragraph 105 between functional journalism and the direction of policy and strategy. But I remain loyal to the need, urged by Baroness Hale, to acknowledge the expertise of the Tribunal. Application of that expertise demonstrates that the Report was held by the Journalism Board for the purposes of journalism, as Irwin J accepted, and should, I agree, lead to dismissal of the appeal.

Lord Justice Munby:

84. There is nothing I can sensibly or usefully add. I agree with both judgments and agree, accordingly, that the appeal should be dismissed.