Neutral Citation Number: [2009] EWHC 1811 (Admin)

Case No: CO/5642/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2009

Before:

MR JUSTICE BLAKE

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Between :

HM Treasury	**Appellant**
- and -	
The Information Commissioner	**Respondent**
- and -	
Evan Owen	**Interested Party**

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- -

Jonathan Swift and Clive Sheldon (instructed by **Treasury Solicitor**) for the **Appellant**
Timothy Pitt-Payne (instructed by **The Office of the Information Commissioner**) for the **Respondent**
Anthony Speaight QC and Elspeth Owens for the Interested Party.

Hearing dates: 9 July 2009

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Judgment

The Hon Mr. Justice Blake :

Introduction

1. On 6 April 2005 Mr Owen, the interested party in this matter, applied to HM Treasury to see counsel's opinion supporting Mr Gordon Brown's declaration that the Financial Services and Markets Bill was compatible with the Human Rights Act 1998 and related documentation. On 5 May, the Treasury responded in the following terms:

> "I am unable to confirm or deny whether the Treasury holds any information relating to the provision of advice by the Law officers or relating to any request for advice by the Law Officers. This should not be taken to indicate that the Treasury did or did not consult the Law Officers. Section 35(1)(c) of the Freedom of Information Act 2000 provides that information is exempt if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. Section 35(3) and section 2(1)(b) together provide the duty to confirm or deny does not arise in respect of information which

> is exempt (or would be exempt) under section 35(1) if the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether or not the Treasury holds the information. In applying this exemption we have had to balance the public interest in excluding the duty to confirm or deny against the public interest in disclosing whether the Treasury holds the information. In this case we have concluded that the public interest in neither confirming nor denying outweighs the public interest in disclosing whether the Treasury holds the information. This is because of the importance of the government being able to consult its most senior legal advisers without fear that either the advice itself, or the fact that the advice was requested will be disclosed. Disclosure of the occasions when advice has been sought from the Law Officers would have the effect of disclosing various matters which the government judges to have a particularly high political priority, or are assessed to be of particular legal difficulty. There is a strong public interest in ensuring a government department is able to act freely from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing Convention (recognised in paragraph 24 of the Ministerial Code), neither the advice of Law Officers nor the fact that their advice has been sought, is disclosed outside the government."

2. That response summarises the issues in this case. Mr Evans was dissatisfied with it and he accordingly made representations to the Information Commissioner for directions that there be disclosure for the material that he sought under the Freedom of Information Act 2000 (FOIA), which had come into force on 1 January 2005. On 22 May 2007 the Information Commissioner issued his decision. He concluded that insofar as the Interested Party was seeking disclosure of the substance of legal advice the application was correctly refused under section 42(1) FOIA 2000 that concerned legal professional privilege. However, he also concluded:

> "Section 35(3) was not applicable and that the public authority should disclose to the complainant whether it holds Law Officers' advice in relation to the subject matter of the complaint's request".

3. The Treasury appealed that decision to the Information Tribunal. On 15 May 2008 the Tribunal upheld the Commissioner's decision and dismissed the Treasury's appeals. This is an appeal on point of law against that decision of the Tribunal.

The Freedom of Information Act 2000

4. FOIA section 1 (1) grants members of the public two new rights:

> "(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…"

The duty of a public authority to comply with section 1(1)(a) is referred to as 'the duty to confirm or deny' (s.1 (6)). But the duty is not an absolute one. Section 2 (1) provides:

> "Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply…".

5. The subject matter of the Commissioner's ruling did not attract absolute immunity. Neither did it fall within the general provisions for exemption by reason of the fact that disclosure would be likely to prejudice specified interests relating to law enforcement (FOIA s.31). It did not fall to be treated as exempt because "in the reasonable opinion of a qualified person" disclosure would be likely to prejudice the Convention of the collective responsibility of Ministers (FOIA s.36(2)(a)) or the effective conduct of public affairs (s.36(2)(c)) or would be likely to inhibit the free and frank provision of advice of exchange of views for the purposes of deliberation (s.36(2)(b)). Rather by FOIA s.35 (1):

> "Information held by a government department or by [the Welsh Assembly Government] is exempt information if it relates to:-
>
> a) the formulation or development of government policy,
>
> b) Ministerial communications,
>
> c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
>
> d) the operation of any Ministerial private office …

As the material fell within section 35(1)(c) above, then section 35(3) applied which provides that:

> "The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

The exemption however is subject to the overriding balance required to be performed by section 2. It was common ground that where the strength of the public interest in disclosure was as strong as the public interest in maintaining the exemption then it could not be said that the latter outweighed the former and the consequence would be disclosure.

The Law Officers' Convention

6. In support of its appeal to the Information Tribunal the appellant lodged two witness statements that had not been before the Information Commissioner from Jonathan Guy Jones, a barrister and senior civil servant, presently director and head of the Attorney General's office and Mr Rankin, director of Financial Services at HM Treasury. Mr Jones' witness statement attests to the existence of a long-standing rule or convention that:

> "neither the fact that the Law Officers have (or have not) advised nor the content of their advice may be disclosed outside government without their consent. This has been observed by successive governments to enable them to obtain frank and full legal advice in confidence and without revealing which matters are assessed within government to be most politically or legally sensitive such as to merit an approach to the Law Officers (and without revealing, by inference where the law offices advice is not sought, which issues are thought within government to be less politically or legally sensitive). The effect of the convention means that Law Officers' advice, being confidential is not usually laid before parliament, cited in debate, provided in evidence to select committees or made available to the public. It is necessarily inherent in the convention that it applies regardless of whether any law officers' advice exists and (if it does exist) regardless of the content of that advice."

7. The convention appears to be a long-standing one going back to the mid-nineteenth century. It is referred to in memoirs of past holders of the office of Attorney General, and in speeches made both within and without the Houses of Parliament by previous holders of that office. Its existence is noted in Erskine May Parliamentary Practice 23rd Edition 2004, page 443 where it is said "the purpose of the convention [is] to enable the government to obtain full and frank legal advice in confidence".

8. Since at least the 1950's there has been guidance to Cabinet Ministers on the conduct of their duties. In July 1997 the Cabinet Office published the Ministerial Code, a code of conduct and guidance on procedures for ministers. This was the code current at the time of the events that were the subject of Mr Owen's request, the passage of the Financial Services Bill. Paragraph 22 of the Code sets out the circumstances where it will normally be appropriate to consult the Law Officers. Paragraph 24 is in the following terms:

> "the fact and content of opinions of advice given by the Law Officers including the Scottish Law Officers either individually

> or collectively must not be disclosed outside government without their authority".

9. The Ministerial Code published by the Cabinet Office in July 2007 is in similar terms at paragraph 2.13. Mr Jones' statement goes on to give examples where the fact of advice and sometimes the content of the advice had been made public outside government for exceptional reasons. To his knowledge, and no-one has been able to contradict him, there are only five occasions in the 40 years before 2008 when the government of the day decided that the public interest favoured disclosure of such advice. These were: 1971, when the substance of the advice but not the actual advice relating to the United Kingdom's obligations to supply arms to South Africa under the Simonstown Agreement; 1986: the disclosure of a letter of advice in respect of issues arising under the so called Westland Affair, there having been an unauthorised partial leak of advice; 1992: the advice of the Law Officers regarding the legal regime governing arms sales to Iraq was disclosed to the Scott Enquiry following the collapse of the Matrix Churchill trial; 1997: the advice of the Law Officers was disclosed in connection with the government's liabilities for breaching community law in the Factortame litigation; 2003 and 2006: the advice of the Attorney General on the legality of the use of force against Iraq was disclosed in March 2003 in part and subsequently in May 2006 in whole. Mr Jones points out that these decisions were taken at the highest level in government for exceptional and compelling reasons. In no case that he is aware of has the convention been over-ridden simply to disclose whether or not the law officers have been consulted about a particular matter.

10. It is at least clear from the Ministerial Codes issued since 1997 that where the executive decides to disclose material in accordance with the Code it needs to be taken with the consent of the Attorney General, rather than at the instigation of the individual ministers. Mr Jones makes the point that the convention applies even when a minister may regard it as politically advantageous to disclose the fact of advice or indeed its substance. Unlike legal professional privilege, this is not an immunity that can be waived by the recipient of the advice. Disclosure of the advice or the fact of having asked for the advice without the consent of the Law Officers is a breach of the convention. Thus, on the 2 November 2005, during a debate upon the Terrorism Bill, the Home Secretary told the House of Commons that the Attorney General was "completely satisfied" that proposed detention periods complied with human rights obligations. This was a breach of the convention. The following day the Home Secretary had to admit that the opinion he had quoted from did not come from the Attorney personally and he had to apologise to the House for breaching the convention not to disclose whether the Law Officers had advised or not (Hansard 3 November 2005, Column 1072 page 33a-33c).

11. Conventions of this sort appear to be part of the peculiar make up of the British unwritten constitution. A useful discussion as to their nature is to be found in John McEldowney *Public Law*, second edition 1998 at page 112-120 where at 4.14 (page 115) he says this:-

> "Conventions seem to arise in ordinary day usage and develop over a period of time culminating in a general recognition and acceptance. Once a convention is accepted and then followed it becomes an acceptable form of good practice. Little is known about why conventions are actually obeyed. They do not

> normally imply any sanction for their breach and ….they have a remarkable ability to survive and change…"
>
> "It is a mistake to confine the discussion of conventions to merely good political practices and thereby beyond constitutional significance. Although unwritten in form and unclear in existence, they offer important guidance over the behaviour of government."

12. In his witness statement Mr Jones indicates that the complex nature of modern government is such that there are almost 2000 lawyers employed in the government legal service in addition to a large number of independent counsel engaged to provide legal services to government. It is not possible or sensible for the Law Officers to deal with all the issues that might arise and they can only be involved in a very small proportion of cases. Their time and expertise must necessarily be used selectively and it should be for government to determine how to use this valuable resource, what legal advisers engage in a given situation and at what stage to employ them. He therefore concludes:

> "46. ….to disclose, other than exceptional cases, whether the Law Officers have advised or not would subject this process to inappropriate and undesirable pressure. On the other hand it could lead to their advice being sought for the wrong reasons (for example, in order to provide a minister or department with political 'cover', rather than because of the nature of the issue itself): this in turn would risk unduly politicising the role of the law officers and lead to their being held responsible for essentially political decisions. On the other hand it could lead to the Law Officers' advice <u>not</u> being sought (e.g. because of the fear this would imply that a department was uncertain about the strength of its legal position and possibly invite legal challenge), even though this would be justified by the issue in question.
>
> 47. I consider such consequences would risk seriously undermining the processes by which the government obtains legal advice, and in particular the Law Officers' role as the government's chief legal advisers. This would, in my view, be inimical to the public interest in good governance and the maintenance of the rule of law within government, which the convention against disclosure against Law Officers' advice is designed to protect.
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> 48. Against that it is difficult to see what countervailing public interest benefit would be achieved by disclosing whether or not the Law Officers have advised in a case such as this. To disclose that fact would not provide access to the legal advice itself, which would in any event, of course, be subject to legal professional privilege. There may sometimes be a legitimate public interest in knowing the legal basis for key government decisions and actions. However, merely revealing whether the

> Law Officers did or did not advise would not advance that interest. Equally, it is not necessary for anyone to know who gave the advice to be able to question a minister or hold him to account for the legality of his conduct, whether through Parliament, the courts or ultimately the electoral system".

13. The nature of the role of the Attorney General is also described in an article in the Hertfordshire Law Journal, 2003 (173-94) by K.A.Kyriakides to which the Tribunal refers in its decision. The article quotes from Lord Goldsmith QC who described some of his advisory functions when giving the 13th Annual Tom Sargeant Memorial lecture and said that the Attorney General sits at the apex of the structure of legal advice consisting of departmental lawyers and the Treasury Solicitor. The article also refers to the Law Officers' Convention, which it indicates is a term that seems to have been coined by J.L.J.Edwards in his work "The Law Officers of the Crown, a study of the offices of the Attorney General and Solicitor General of the United Kingdom" (1964).

14. Mr Kyriakides observes at p.76:

> "However, the principal reason [why the advisory role is rarely visible] arises from the well-established convention (the 'Law Officers' convention') whereby neither the substance of any advice tendered by the Law Officers nor even the fact they have given any advice may be disclosed outside government circles save in exceptional circumstances and as will be shown later in this article this convention has been invoked on numerous occasions to prevent MP's (or others) from unearthing details as to any advice tendered by the law officers on sensitive questions of law. As a result the academic lawyers who have written about the advisory function of the Law Officers … had to confine their analysis to subjects such as the confidential nature of law officers' opinions. In fairness to the Law Officers of today, it must be admitted they are displaying far more openness than many, if not all, of their predecessors."

The Passage of the Financial Services and Markets Act 2000.

15. The Financial Services and Markets Bill which ultimately became the FSM Act 2000 was subject to extensive parliamentary scrutiny on a wide range of issues during its passage through parliament including its compatibility with the European Convention on Human Rights. Although most of the duties arising under the Human Rights Act 1998 did not come into force until the 2 October 2000, the duty on a promoting minister to make a statement to the effect that, in his view, the provisions of the bill are compatible with the convention rights provided under the HRA came into force on the 24 November 1998 (Section 19 HRA and SI 1998/2882 Article 2).

16. A feature of the debate was the issue as to whether the disciplinary proceedings against financial advisors who had been deregulated by the Financial Services Authority complied with the fair trial standards imposed by Article 6 of the ECHR.

Evidence was given before the Joint Committee of both Houses of Parliament by Lord Lester of Herne Hill, QC and Javan Herberg and a subsequent written advice was obtained from Lord Lester and Monica Carss-Frisk. A particular issue was whether the disciplinary regime for financial advisers involved a criminal sanction and therefore fair trial rights relevant to criminal trial or whether they were civil proceedings.

17. In the light of that issue the Joint Committee heard oral evidence from the Economic Secretary to the Treasury, Patricia Hewitt, MP and from leading and junior counsel instructed on behalf of the Treasury to advise on the human rights issues raised by the Bill. These were Sir Sidney Kentridge QC and James Eadie, now first Treasury counsel. Before issuing its second report in May 1999 the Committee also had written memoranda commenting on the issue from Lord Hobhouse, Lord Steyn and a number of other distinguished lawyers. Certainly, the fact that Sir Sidney Kentridge and James Eadie gave evidence on behalf of the Treasury on legal issues on which they had advised the government was an exceptional practice, and perhaps this was the first time this had ever been done.

18. The FSMA was thus one of the first notable Acts of Parliament to be passed following the enactment of the Human Rights Act and to be accompanied by very considerable discussion of whether it adequately met human rights obligations. The Information Commissioner was aware of most of this history but Mr Rankin's statement supplied further detail.

The other evidence of Paul Rankin

19. He also sought to support the decision not to confirm or deny whether the Law Officers were consulted in the passage of this Bill because he expressed the opinion that in the light of this history it was difficult to see how the information would contribute in any significant respect to the promotion of the public interest in an understanding of any issues arising in relation to the FSMA.

20. He further sought to maintain the exemption for similar reasons to those relied on by Mr Jones, namely if the government *had* consulted the Law Officers that might give rise to the implication it regarded provisions as controversial or debateable, whereas if it *had not* it might be regarded as open to the criticism that it failed to secure the best advice. In either case disclosure could create uncertainty and undermine confidence in the FSMA regime.

21. Third, he indicated his view that there was a danger that if the Information Commissioner's decision was upheld it would lead to further more targeted FOIA requests attempting to establish the issues on which that advice had been requested and confirming or denying whether or not advice had been sought would have a strong tendency to reveal to some extent the focus and extent of the advice given.

22. Finally, he argued that there was a strong public interest in government departments obtaining high quality legal advice from appropriate sources as part of the policy development process and governments should be free to decide whether or not to seek legal advice and if so from whom in confidence and without being subject to outside pressure which might otherwise distort the approach taken.

The Decision of the Information Tribunal

23. The decision of the Tribunal was a substantial one of 126 paragraphs. Having recognised at paragraph one that the appeal concerned a matter of relatively high constitutional importance, it sets out extensively the history of the matter, namely the request, the complaint to the Commissioner, the Commissioner's decision, the notice of appeal, the Commissioner's reply, the evidence relied upon by the appellant, the appellant's contentions, the appellant's grounds of appeal and finally, at paragraph [103]-[114], the Commissioner's response. It was principally in this last section by way of interpolations of its comments of its own that the Tribunal moved from a narrative description of matters to its own judicial determination. At paragraph [104] the Tribunal said this:

> "the Tribunal remains mystified as to why the convention took no account of the evident impact of FOIA in the period leading up to the publication of the 2007 edition. At the end of this judgment the Tribunal will make some recommendations as to the manner to which the convention could perhaps be reviewed in the light of FOIA mindful of the observations made by the commissioner in his decision notice".

24. In the final section of its determination under the heading "The Way Forward" the Tribunal addressed the question of how the convention might be modified to take into account the principles of the FOIA. At [116] it:

> "repeated its surprise at the omission of any reference to the FOIA in the Code and this surprise was not lessened by the fact that section 35(1)(c) specifically refers to the subject matter of the Convention itself."

It then said at [117]:

> "At the heart of the Tribunal's concerns however, remains the question of consent. Quite apart from the effect of reviewing the history as to the party or parties whose consent was required for the period leading up to Westland Affair in 1986, the fact that disclosure of information which is otherwise clearly the subject of a FOIA regime should be dependant on the sole approval of the very party who holds the information is completely at odds with the spirit and letter of the FOIA. There can be no doubt of the Tribunal's view that the convention became subject to the 2000 Act".

25. The Tribunal's reference to the fact that it was the holder of the information who could decide whether it could be disclosed under the Convention appears to be a reference back to paragraph [43] of its decision where it quoted another passage from the 2004 edition of Erskine May "that if a Minister deems it expedient that such opinion should be made known for the information of the house, the speakers ruled that the orders of the house are in no way involved in the proceedings." The Tribunal itself had commented at [44] upon the curiosity arising from that passage that far from it being within the gift of the Law Officers themselves to allow disclosure of not only

the fact of their advice but also its content, historically it was the position that a *Minister* could regard it expedient that the Law Officer's advice be made known to the House.

26. Although this point did not feature in the grounds of appeal, the emphasis the Tribunal places on this point appears to be the product of a misunderstanding. The Ministerial Code from 1997 onwards makes it plain that disclosure of the advice or the fact that the advice has been sought is not within the gift of the department who received it but is a matter for the Law Officers themselves. There was substantial evidence to the same effect before the Tribunal and that on the occasion where a Minister made reference to the fact of such advice without having first sought the permission of the Law Officers that was regarded as a breach of the convention and an obligation to apologise arose (see [10] above). The passage in Erskine May was not dealing with how the convention operates nor could it since Erskine May is not a guide on the duties of members of the Cabinet, it merely reflects the fact that if government decides that information be made known then no orders of the House are involved in such a decision. The prior question whether and if so how the Minister deems it expedient is dealt with by the Ministerial Code itself. It thus seems that there was a fundamental misunderstanding as to the nature of the Law Officers' Convention which was at the heart of the Tribunal's concerns.

Appellant's submissions

27. Mr Swift advanced three interconnected submissions as to why the Tribunal's determination was wrong in law. His first submission was that the Tribunal had not reasoned for itself whether there was a public interest in disclosure of whether or not the Law Officers' advice had been sought. It, therefore, could have made no proper assessment of the weight that could be attached to that factor. Insofar as the Tribunal had adopted the Commissioner's reasons on the question, the context of those reasons demonstrated material errors and/or had been supervened by the evidence of the Treasury's witnesses and/or in context no reasonable tribunal could have concluded that those reasons amounted to weighty reasons for now ordering disclosure.

28. The second broad ground of challenge was that the Tribunal misdirected itself as to the existence of a weighty matter in favour of maintaining the exemption from disclosure. It did not regard the statutory language of section 35(1)(c) as evidence of a statutory intention or even presumption that whether or not the Law Officers had advised was an exempt matter. It gave no weight to general considerations in favour of maintaining such exemption, and expressly disagreed with the proposition that in its own deliberations it should attach weight to the reasoning of the Treasury for maintaining the exemption.

29. Thirdly, the Tribunal's determination was materially influenced by an irrelevant consideration, namely its concern that the Ministerial Code of Conduct had not been updated in light of the obligations under the FOIA. The Tribunal had erred in concluding that the FOIA had somehow operated as a matter of statute law to modify the Law Officers' convention rather than the statute referring to the convention precisely for the purpose for preserving its existence into the post FOIA world whilst recognising that in particular cases there may be a greater public interest to over-ride it.

30. Mr Pitt-Payne, for the Information Commissioner, responded as follows. As to the first ground, although the Tribunal did not identify its own conclusions on the question, it must be assumed to have adopted the Commissioner's reasons particularly those referred to at paragraph 25(5) and (7) of the Tribunal's decision. Paragraph 25(7) of the Tribunal's decision (read with a necessary agreed typographical correction) is as follows:

> " disclosure of the fact of seeking advice from the Law Officers would have provided reassurance to the public that fully informed decisions were being made on the basis of the best possible legal advice; equally, if advice had not been sought there would have been a 'very strong' public interest in that fact being disclosed as it would have raised 'legitimate and important issues' about the basis on which the government was satisfied that the bill was compatible with the Human Rights Act."

31. Mr Pitt-Payne submitted that as to the second ground that the Tribunal were entitled to reach that conclusion, that was supported by both authority of this court and the language of section 2 of the FOIA. As to the third ground the advice that the Tribunal tendered was irrelevant to its decision and could be severed from it without damaging the integrity of its reasoning.

32. Though he had taken no part in the appeal, Mr Owen, the interested party, had been given permission to make written and oral representations to the court through Mr Speaight QC. He pointed out broader issues of human rights concerns than the lawyers had presented to the Joint Committee of Parliament and that ground one of the Treasury's grounds of appeal appears to have been an after-thought as it did not appear in its original notice of appeal to the Tribunal and only emerged late in the day.

<u>Ground 2 the public interest in maintaining an exemption.</u>

33. I propose to deal with the second of Mr Swift's areas of submission first. In my judgment, if the Tribunal misunderstood one critical element in the performance of the balance between the maintenance of the exemption and the public interest in disclosure, then this would have affected its whole approach to the case and would require the decision to be set aside and re-determined.

34. At paragraph [94] of its decision the Tribunal had rejected the proposition that there was a presumption of public interest in favour of non-disclosure generally in such a case. It observed that the High Court had rejected such a presumption in its decision in the case of the *Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of the House of Commons* [2008] EWHC 737 (Admin) 11 April 2008, (the OGC case).

35. In that case Mr Justice Stanley Burnton, as he then was, allowed an appeal by the OGC on different grounds relating to parliamentary sovereignty in respect of documents dealing with the formation of government policy relating to identity cards. The Commissioner had recognised that the material fell within section 33(2) of FOIA, (audit information) as well as section 35(1)(a) (formulation of government policy).

36. Having allowed the appeal on grounds of breach of Parliamentary privilege his Lordship indicated at [67] that it was unnecessary for him to decide other grounds of appeal, although having been argued he proposed to address them although not reach a final conclusion on all of them. He concluded that section 2 and section 19 of the FOIA indicated that there was generally a public interest in disclosure in the interest of transparency. As against that a public authority seeking to withhold the information must first identify whether there was a significant public interest in maintaining the exemption. If there was not, then application of the public interest test in section 2(2)(b) would lead to disclosures. He accordingly thought that whether there was a presumption in favour of exemption under section 35 generally is always likely to be arid.

37. At paragraph [79] he said this:

> "Be that as it may, if it is interpreted literally, I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to 'the public interest in maintaining the exemption', which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms and interpreted literally it covers information that cannot possibly be confidential. For example a report of the law commission being considered by the government with a view to deciding whether to implement its proposals would be or include information relating to the formulation or development of government policy yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to parliament an intention to create a presumption of public interest against disclosure."

38. Although *obiter* to the decision in the case, I give substantial weight to the reasoning of an experienced judge on this statute. However, the context of the decision in the OGC case and the present is very different. The statutory exemption relating to the formation of government policy appears to have been so wide that any reliance on the words of the statute as an indication as to the weight to be attached in a particular case was likely to have little or no value.

39. By contrast, the ground of exemption here relied upon is very specific. Parliament has precisely identified as exempt the issue as to whether or not the Law Officers have given their advice. As the Tribunal itself accurately noted (see [24] above) , this was statutory language intending to reflect the substance of the Law Officers' Convention itself, a long-standing rule adopted by the executive for the promotion of good government. A consideration adopted by the draftsmen as a ground for exemption without having to prove specific prejudice, naturally fits into a regime where there is an assumption of a good reason against disclosure. The strength of the assumption and the weight to be attached to it in the light of the strength of competing considerations fall for determination by the public authority in the first instance and the Information Commissioner and the Tribunal thereafter.

40. Closely related to this question, I consider there is substance in the appellant's complaint that the Tribunal erred in concluding that the Convention and the Code had now been somehow displaced by the FOIA. In my judgment the operation of the FOIA with its concomitant public interest in disclosure in the interests of transparency fell to be applied against the structure of the various classes of exemption set out elsewhere in the statute. In other words, in certain areas where a specific public interest against disclosure had been identified the change brought about by the FOIA might best be described as rendering the decision on which hitherto government had the last word, being capable of being outweighed by other considerations on which it does not. However, that does not suggest that the Law Officers' convention or equivalent principles of good government set out in the Ministerial Code cease to have substantial relevance or automatically have less weight the day after the passage of the FOIA.

41. At paragraphs [95] and [96] of its determination the Tribunal emphasised its approach to this question by expressly rejecting the submission made to it that it should afford appropriate weight to the experience of those who have responsibility for a given subject matter in government and who have access to special sources of knowledge and advice. These were observations made by Lord Bingham in the context of weighing competing considerations in judicial decisions on Article 8 (*Huang v Secretary of State for the Home Department)* [2007] UKHL 11, [2007] 2AC 167. The Tribunal concluded that reliance on the possibility of damage must be determined on a case by case basis. It considered that the degree of damage envisaged in the present case was likely to be minimal if not non-existent because it concluded that disclosure of the fact of advice from the Law Officers in the light of all the debate that the Financial Services Bill engendered would have had little if any impact on the over-all public perception of the government's stance on the legislation.

42. Thus the Tribunal did not regard the appellant's witnesses as having special experience to which appropriate weight should be given, nor did they regard general considerations in the absence of actual damage on a case by case basis to be weighty consideration.

43. In my judgment both those conclusions are flawed. If Parliament had intended material of this kind to only enter the process of weighing the strength of rival public interests on proof of prejudice, it would have said so. It expressly did not. Moreover, a number of decisions of judicial bodies applying the FOIA have recognised precisely the weight to be attached to general considerations.

44. In the case of *Export Credits Guarantee Dept v Friends of the Earth* [2008] EWHC 638 (Admin) [2008] Env.L.R.40. Mr Justice Mitting was concerned with Environmental Information Regulations 2004 that reflected a balance for competing interests (albeit with express presumption of disclosure) that is similar to the balance under the FOIA. Mr Justice Mitting at paragraphs [37] and [38] of his judgment said this:

> "the impression given… is that the Tribunal did set up a hurdle or threshold of proof of actual particular harm which forms no part of the statutory test which I should apply. If I had been satisfied that the error was central to its decision I would have

> allowed the appeal and remitted the issue to be determined afresh by the Tribunal.
>
> ….The considerations are not.. ulterior: they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters which will ultimately result, or are expected to result in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight will be given and those in which less weight may be appropriate but I can state with confidence that the cases in which it will not be appropriate to give any weight are those considerations will, if they exist at all, will be few and far between".

45. Observations in a somewhat similar vein are also to be found in the judgment of Mr Justice Wyn Williams in the case of *Department of Business Enterprise and Regulatory Reform & Dermod O'Brien v the Information Commissioner* [2009] EWHC 164 (QB) (the *O'Brien* case).

46. This was a case concerned with legal professional privilege that is exempt from disclosure under section 42 of the FOIA, but like cases under section 35 such exemption is not absolute. The learned judge concluded that the Tribunal had properly directed itself that there was a strong public interest in non-disclosure inbuilt into legal professional privilege but said this:

> "48. In the light of the consistent line taken by the Tribunal as to the weight to be attached to the public interest against disclosure inbuilt into legal professional privilege (an approach I have found to be the correct one) it was incumbent upon the Tribunal in the instant case to give significant weight to that interest. Further, the Tribunal was obliged to consider whether the weight to be given to the public interest considerations militating against disclosure were countered by considerations of at least an equal weight which supported an order for disclosure."

47. A little later on in his judgment the learned judge found that the Tribunal had failed to attach appropriate weight to the exemption and said:

> "53… The inbuilt public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the feature supporting disclosure (including the underlying public interests which favour disclosure) would have equal weight at the very least"

48. It should be pointed out that at the conclusion of his judgment at paragraph [58] his Lordship approved the suggestions of the Information Commissioner that although there is no formula for how a tribunal draws up its judgment, the process required in the case of qualified exemption involves a) identifying the public interests in favour of disclosing the particular information; b) identifying the public interest factors which favour maintaining particular exemption and c) analysing whether the latter interests outweigh the former.

49. Mr Pitt-Payne, responds that legal professional privilege is a distinct issue under the statute and the principles applicable in that context cannot be applied without more to section 35 cases. I acknowledge that LPP is a statutorily discrete topic where a long-standing and very high public interest in public confidentiality is reflected. The observations of Wyn Williams J cannot therefore be transported across to apply to *all* classes of section 35 claims without more. However, it is to be observed that the Commissioner found that the substance of the legal advice that the interested party was seeking was protected by section 42. Mr Pitt-Payne recognised that there could be circumstances where particular questions about whether advice was obtained and who it was obtained from might themselves tend to indicate an answer to what the advice was about or what the advice was. Section 42(2) provides that:

> "The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings".

50. It is relevant to reflect that in the context of specific requests for information as to whether the Law Officers were consulted regarding a Ministerial declaration of compatibility under section 19 HRA, the question identifies what the advice (if any) was about. It would not be much of a further step in many circumstances to deduce what the advice (if any) in response was. The very particularity of the context in which the Information Commissioner thought there was a public interest disclosure of whether advice was obtained in the interests of transparency, risks transgressing the related public interest under section 42 itself.

51. In any event, given the confined nature of the Law Officers' Convention reflected in section 35(1)(c), I consider that the observations of Mr Justice Wyn Williams in the *O'Brien* case have a general supportive resonance in the present. The statute assumes that the case for exemption is a substantial one. All this is subject to the act of weighing the comparative public interests in the case, which is certainly fact-specific, and considering whether either presumptions or general considerations will necessarily determine the outcome.

52. Mr Swift in support of his second submission draws attention to a decision of the Information Commissioner dated the 30 August 2007 in a case where the Ministry of Justice held information and declined to confirm or deny whether the Law Officers had advised on the question and had identified similar consequences to the two-fold detriment relied upon in the present case. At paragraph [30] of the decision notice it is stated:

> "the Commissioner considers that there is a public interest in disclosing both whether the Law Officers have provided advice to the government and, where this is the case, the disclosure of that advice. However, the Commissioner accepts the DCA's public interest argument supporting the exclusion of the duty to confirm or deny. As such he has reached the conclusion the conduct in the context of Law Officer's advice, there must be exceptional circumstances for the public interest in disclosure in order for that exclusion from the duty to confirm or deny to be over-ridden. The Commissioner does not consider the subject matter of the complainant's request to be of such exceptional public interest to match the DCA's arguments that the maintenance of the exclusion from the duty to confirm or deny."

53. Of course this is reasoning that is non-binding upon the Tribunal let alone this court. But it is indicative of the weight to be afforded to general considerations in the precise context of the present case.

Conclusions on Ground 2

54. In my judgment, although mere deficiencies in the reasoning process or even isolated errors of law will not suffice to set aside a determination by the Information Tribunal, I am satisfied that this Tribunal has erred in considering how to approach the strength of the public interest in maintaining the exemption from disclosure of the information whether the Law Officers have advised or not. I am satisfied that the Tribunal misdirected itself:

    i) By failing to conclude that Parliament intended real weight should continue to be afforded to this aspect of the Law Officers' Convention:

    ii) By failing to conclude that the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption even in the absence of evidence of particular damage.

    iii) By failing to conclude that the evidence of the two witnesses before it, supported with detailed arguments the reasons why the general principles applied in this case, deserved some weight as emanating from senior civil servants with experience of the requirements of government in this field. This does not mean that the Tribunal were bound by these decisions or prevented from reaching their own conclusion upon the issue. Since preparing a draft of this judgment I have became aware of the decision of Keith J in *Home Office v Information Commissioner QBD* [2009] EWHC 1611 (Admin) where he rejected any suggestion of deference being required on the facts in that case at [65]. I see no inconsistency with the conclusion I have reached on the facts of the present case.

    iv) The Tribunal were unduly and wrongly influenced by a misdirection that the FOIA had tended to modify the Law Officer's Convention, as opposed to preserve it but render it amenable to being out-weighed by greater

considerations of the public interest requiring disclosure of information in either limb of the Convention.

v) The Tribunal misdirected itself that the way the Convention worked operated as a trump card in the hands of the Ministerial department concerned as to whether or not to disclose but could be deployed for its advantage. If this were the case I would agree with the Tribunal's comments that this is inconsistent with the principled reasoning and the interests of transparency required by the FOIA. The history of the convention and the evidence of Mr Jones precisely in point demonstrated that it was not. Where Ministers had disclosed without the prior consent of the Law Officers this was considered to be a breach rather than an application of the convention and a matter for reprimand.

Ground 3 Irrelevant considerations taken into account

55. My conclusions on this submission have been anticipated in considering the second submission. The issue between the parties was whether this was merely extraneous reasoning that could be severed from the decision without undermining it, or whether it had materially affected the reasoning process on the public interest in maintaining the exemptions. I have no doubt that the latter is the case.

56. The Tribunal's remarks under the heading "The Way Forward" from paragraph [115] onwards were not merely a self-contained addendum distinct from its disposition of the issues in the appeal. The Tribunal anticipated that part of its reasoning in the second part of paragraph [104] where it reached its conclusion that the Convention cannot of itself be a determining consideration. No one suggests that it can, but a mistaken apprehension as to whether the convention has survived undiminished by the passage of the FOIA will mislead a Tribunal as to the appropriate weight to be assigned to it in a particular case. I further observe that similar concerns are also apparent in paragraph [110] of the Tribunal's reasoning dealing with the substantive part of the appeal, where it observes that there is no balancing test reflected in the Ministerial Codes.

Ground 1 failure to assess the public interest in disclosure

57. In the light of these conclusions I can return to Mr Swift's first ground. In my judgement there is substance in the complaint that the Tribunal did not evaluate for itself the strength of the public interest in disclosing whether the law officers had advised the department on the section 19 question.

58. It may very well be that the Tribunal were adopting the Information Commissioner's approach that the interests of transparency favoured such an outcome on the facts of this case. However, there was substantial evidence from both Mr Jones and Mr Rankin that there had been substantial transparency by government and the Treasury as to its thinking on issues of compatibility with human rights, and the unique course had been adopted of permitting its independent counsel, who had advised on the question, to give evidence to the joint committee on the subject matter of their advice. The question of what public interest was *now* to be obtained by confirming that the Law Officers had or had not advised on the question remained undetermined by the Tribunal in the light of this evidence. In many ways the high profile of the issues leading to the passage of the FSMA, and the extraordinary open debate in Parliament

and elsewhere that preceded it diminish rather than substantiate public interest for disclosure of whether the Law Officers advised.

59. Mr Pitt-Payne, stressed that neither the Commissioner nor the Tribunal were indicating that in *all* cases or even all section 19 cases, could it be said that the public interest in disclosure outweighed the public interest in maintaining the exemption. But if that is so, it is difficult to see what is so special about the present case. For reasons already noted, the fact that the subject matter is the issue of whether a Minister can give a statement that the legislation contemplated is compatible with Human Rights, means that there is a very narrow window for confirming or denying the obtaining of such advice without either undermining section 42 or the content of the advice as part of the first limb of a public exemption under section 35(1)(c).

60. The arrangements available to government as to how to obtain advice whether in-house from its departmental lawyers, or seeking external advice from independent counsel through the Treasury Solicitors, or using the limited resources available of approaching Law Officers themselves is very much a choice the government should be able to make on the appropriate factors in each case, and undeterred by factors that might lead them to seek advice from the apex unnecessarily, or to avoid it when it should have been obtained. On this ground as well I conclude that the Tribunal has misdirected itself.

Conclusion and remedies

61. However, in my judgment, Mr Swift goes too far in submitting that in all the circumstances of the case that are now before this court there was nothing capable of being a weighty public interest in favour of disclosure of the information in the present case, and accordingly any decision by the Tribunal to uphold the Commissioner's decision despite the strength of the evidence placed before it would have been perverse.

62. I accept the submission of Mr Pitt-Payne that however much weight may be given to the public interests protected by the established Law Officers' Convention these are not determinative of the outcome of a particular case. The overall judgment to be made is one for the Tribunal properly directing itself as to the existence of and the weight to be given to the competing public interests. It is not clear to me what decision the Tribunal would have come to if it had properly directed itself on the question. I cannot conclude there is no possibility that a reasonable tribunal properly directing itself could conclude that the public interest in disclosure nevertheless remained so strong as to outweigh or at least equal the general considerations in favour of the Law Officers' exemption continuing to apply.

63. Although I consider that the approach of the Information Commissioner in the Ministry of Justice case (above at [52]) is generally sound, a test of exceptionality as predictive of the outcome of the balance is not generally a helpful statement of the approach to be applied. So much depends as to what is the norm from which the anticipated exception is the departure.

64. Nothing in this judgment is intended to undermine the important new principles of transparency and accountability that the FOIA has brought to government in many ways. The Law Officers' Convention will now operate subject to the principles of the

FOIA, which means that neither the government department that may have sought or received the advice or the Law Officers that gave it will any longer make final or binding decisions on what, whether and when information may be disclosed. I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that irrespective of the decision of government to make partial disclosure, the strength of public interest in disclosure of the advice as to the legality of the Iraq war might well have out-weighed the exemption in its general and particular aspects.

65. I am conscious that the process whereby the interested party receives a definitive decision on his request has been protracted and what appears to have been a very early request for disclosure since the Act came into force has now taken over four years to determine. This would be a factor against remittal if the court could properly conclude within the limits of its functions on an appeal on a point of law only that there was only one answer that could be given. For reasons already outlined I do not consider that is the case here.

66. It is important that the expert bodies entrusted by Parliament for the administration of this Act and appellate scrutiny of decisions from the Information Commissioner should direct their respective minds to the issues that properly arise in the case. It is unclear whether human rights occupy a special class of advice or not. It is unclear whether the passage of time since the Bill with which this request is concerned was passed diminishes the public interest on the grounds of staleness or increases it on the grounds that a lot of water has now flown under the bridge. Finally it is unclear whether the quite exceptional parliamentary scrutiny of the legal advice relating to the issues of concern to Parliament and the general public during the passage of this bill diminishes the public interest in learning whether the Law Officers themselves were approached for an opinion on the topic or increases it by reference to the principle that so much has been disclosed there is little left by way of justification from revealing this last matter.

67. The Commissioner's approach to this question was the subject of a number of criticisms. It appears to me that it might have the generally undesirable effect of discouraging government openness about legal issues in the legislative process. I would have thought there was much to be said for encouraging it. These are all issues for the Tribunal to explain its reasoning on reconsideration. In my judgment it is constitutionally important that the Tribunal reaches its own decision rather than this court second guess it on the question.

68. In all the circumstances, for the reasons set out above, I will allow this appeal to the extent of quashing the Tribunal's decision and remitting it for reconsideration. If the parties are able to agree in the light of this judgment whether that consideration should be by a fresh Tribunal, starting again, or the same Tribunal re-examining matters in the light of this judgment, that can be expressed in a draft order which may be agreed without the need for further submissions or directions.

69. I repeat my gratitude to all counsel in the case for their clear, cogent and succinct submissions on a case of considerable constitutional interest.