Neutral Citation Number: [2009] EWHC 164 (QB)

Case No: QB/2008/APP/0759

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2009

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- - - - - - - - - - - - - - - - - - - -

Between :

DEPARTMENT FOR BUSINESS ENTERPRISE AND REGULATORY REFORM	**Appellant/ Claimant**
- and -	
(1) DERMOD O'BRIEN **(2) THE INFORMATION COMMISSIONER**	**Respondents/ Defendants**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

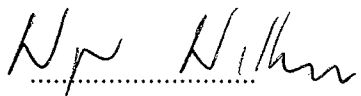
Mr Phillip Havers QC (instructed by **The Treasury Solicitor**) for the **Appellant**
First Respondent appeared in Person
Ms Anya Proops (instructed by **The Information Commissioner**) for the **Second Respondent**

Hearing dates: 22 January 2009

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



THE HONOURABLE MR JUSTICE WYN WILLIAMS

Mr Justice Wyn Williams:

1. This is an appeal against the decision of the Information Tribunal dated 7 October 2008. The appeal is brought pursuant to section 59 of the Freedom of Information Act 2000 ("FOIA"). An appeal lies only upon a point of law.

Relevant Background

2. At all material times the First Respondent held an appointment as a recorder. On 1 July 2000 the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the Regulations") came into force. Regulation 17 provides:-

> "***Holders of judicial offices***
>
> *17. These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis.*"

3. By virtue of his appointment as a recorder the First Respondent was a holder of judicial office. However he was also remunerated on a daily-fee basis.

4. On 13 April 2005 the First Respondent wrote to the Department of Trade and Industry. He asked the Department to disclose to him *"all documents relating to the inclusion of what became Regulation 17 including, but not limited to, all letters, memoranda, emails, minutes and drafts produced internally or passing between DTI and the Lord Chancellor's Department/Department for Constitutional Affairs and/or the Treasury and/or the Department for Work and Pensions and/or any other persons or body relating to the form of, the reasons and justification for, and/or the validity of Regulation 17."*

5. By letter dated 17 May 2005 DTI refused to disclose the information which the First Respondent had requested. The justification for refusal was said to be the exemptions contained in sections 35(1)(a), 35(1)(b) and 42 of FOIA. The last paragraph of the letter, however, was in the following terms:-

> *"Although the Department has decided not to disclose the documents to you, it may helpful if I set out some of the background to Regulation 17. As you will appreciate, those who we customarily call part-time (or fee-paid) judicial office holders have not been considered in the past as workers for the purposes of domestic law, nor have they generally been considered as "part-timers" in the conventional sense of the term. The Government therefore took the view that certain of the benefits of the kind that are provided to part-time employees are not appropriate to the particular circumstances of fee-paid judicial office holders, the great majority of whom are practitioners otherwise engaged in the legal practice. The Government takes the view that fee-paid judicial officers are not workers for the purposes of the part-time work directive* [a reference to the Part-Time Workers Framework Directive 1997/81/EC] *and, on the basis of previous precedent, there would have been no expectation that the Regulations would have had application to fee-paid judicial officers. However, because of the uncertainty that arose in respect of other regulations, it was felt appropriate in*

implementing the Directive to include a specific exemption for the avoidance of doubt."

6. The First Respondent was not satisfied with this response. Accordingly, as was his right, he sought an internal review by the DTI of its decision letter of 13 May 2005. The decision upon that review was given by letter of 21 June 2005. An exchange of letters referred to as B10 was released at this stage but essentially the Department maintained its refusal to disclose the information sought.

7. By letter dated 27 June 2005 the First Respondent sought an order from the Second Respondent compelling the disclosure of the documentation which he was seeking from the DTI. As I understand it, the Second Respondent considered whether 9 documents B1 to B9 should be disclosed.

8. The Second Respondent gave his decision on the application by a decision notice dated 8 January 2008. By this date the Appellant had become the relevant Government Department. The decision notice is a fully reasoned document but its effect is accurately set out in the Summary with which the notice commences.

> "*The complainant made a request to the former Department of Trade and Industry (DTI) for release of the information which led to the inclusion of Regulations 17 in the Part-Time Workers Regulations 2000. DTI refused to release the information relying upon the exemptions in sections 35 and 42 of the Act. DTI also sought to apply the exemption in section 36 in respect of one document after the Commissioners' investigations had commenced. The Commissioner has examined the exempt information and is satisfied that the public authority has correctly applied the exemptions above. However the Commissioner finds, in respect of one document withheld under section 35(1)(a)* [document B2] *that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and accordingly orders release of it……*

9. The First Respondent exercised his right of appeal to the Information Tribunal. Such a right arises under section 57 of FOIA. It is clear that the appeal before the Tribunal was fiercely contested. The First Respondent appeared in person. Both the Appellant and the Second Respondent appeared by Counsel. By the time of the hearing two further documents had been discovered by the Appellant. The Appellant resisted disclosure of B11 and B12. The Information Tribunal allowed the First Respondent's appeal and made the Order which is set out in its Decision Notice. In summary it ordered the Appellant to communicate to the First Respondent the information which he had requested, specifically, B1, B3 to B9, B11 and B12 and it also ordered the Appellant to use its best endeavours over the four weeks following the publication of its decision to find and retrieve any other information held by it of the description specified in the First Respondent's initial request.

10. I am told that a significant amount of further documentation was discovered. I am invited by the Second Respondent, particularly, to give directions to facilitate a speedy decision upon whether or not this further documentation must be disclosed.

Statutory Framework

11. Section 1 of FOIA provides as follows:-

> *"(1) 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.*
>
> *(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."*

By section 2:-

> *"(1) (1) 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.*
>
> *(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that–*
>
> *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*
>
> *(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption"*
>
> A number of exemptions are then listed.

Part II of the Act contains the following provisions which are relevant to the instant case. By section 35 the Act provides:-

> *"(1) Information held by a government department ..... 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."

"Ministerial communications" are defined under sub-section (5) to mean any communication between Ministers of the Crown and includes, in particular, proceedings of the Cabinet or any committee of the Cabinet.

Section 42 deals with legal professional privilege. Its provisions are: -

"(1) Information in respect of which a claim to legal professional privilege ..... could be maintained in legal proceedings is exempt information.

(2) 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."

12. It is common ground in this appeal that the provisions contained within section 35 and 42 are not provisions conferring an absolute exemption within section 2(3). It follows that they are exemptions to which section 2(2)(b) applies.

13. I should also record that before the Tribunal section 36 of the Act was the subject of debate. During the course of the proceedings, however, the Appellant abandoned the suggestion that one of the documents under consideration fell within the terms of section 36 and accordingly, there is no need for me to set out its provisions.

14. Although there is no express provision to this effect contained within FOIA it is common ground, as I understand it, that information may be of such a nature and type that it falls within both sections 35 and 42 of the Act. In that event whether or not disclosure should be ordered must be considered by reference to the exemptions contained within both sections.

15. It was also common ground before me that a proper application of section 2(2)(b) demands that if the public interests in withholding information and disclosing information are equally balanced disclosure of the information should be ordered.

The Second Respondent's Decision.

16. As I explained above the Second Respondent found that none of the documentation he considered should be disclosed save for document B2. The Second Respondent's view was that documents B1 and B5 were exempt from disclosure because they were ministerial communications within section 35(1)(b) and that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Second Respondent considered that document B9 was exempt by virtue of the provisions of section 36(2)(b)(1) and he

considered that the remaining documents, B3, B4, B6, B7 and B8 were documents which fell within section 42 and that in respect of each the public interest in maintaining the exemption outweighed the public interest in disclosure. It is clear that the Second Respondent considered each document against the exemption which was said to apply to it; the Second Respondent was not asked to consider whether a document fell within both sections 35 and 42; so far as I can discern he was not asked to make that assessment.

The Hearing Before Me

17. Mr Havers QC pursued four grounds of appeal. They are the grounds which are set out in the Appellant's Notice of Appeal. I will consider each ground in the next section of my judgment. Mr Havers QC adopted the stance that if his appeal was wholly successful I should remit the case to a differently constituted Tribunal so that it could consider, afresh, whether any of the documents should be disclosed.

18. The First Respondent resisted the appeal. His stance was that the appeal should be dismissed.

19. Ms Proops, on behalf of the Second Respondent, neither supported nor resisted the appeal. Nonetheless she presented a detailed Skeleton Argument and she made oral submissions. She did so in order to identify what she described as "concerns" about the way in which the Tribunal approached this case.

20. Not without some hesitation, I have thought it appropriate to express my views upon the concerns expressed by Ms Proops. I will do so in a later section of this judgment. As is obvious, however, my primary task is to consider whether or not the Tribunal made any errors of law in its decision. It is to that task which I turn now by reference to each ground of appeal. Although in the Skeleton Arguments and oral submissions the exemption contained in section 42 FOIA was considered first, I proposed to address first the issues raised in relation to the exemptions contained within section 35.

Grounds of Appeal and Discussion

21. Mr Havers QC accepts that the Tribunal accurately summarised the public interests underlying the exemptions in section 35 in paragraph 27 of its decision. That paragraph reads:-

> *"The exemptions in section 35 are "class" exemptions. The public interest underlying them is, in the widest sense, also good government. As to section 35(1)(a), there is a public interest in maintaining the confidentiality of discussions and advice within and between government departments on matters leading to a policy decision: this is to allow ministers and officials to have a full and frank exchange and to have the time and space to explore options and "hammer out" policy safe from the threat of lurid headlines see paras 38 and 40 of ECGD decision, paras 100 -101 of OGC decision and para 17 of Secretary of State for Children, School and Families [2008] EWHC 1199 (Admin) so that they can reach good policy decisions. As to section 35(1)(b) there is also a specific interest in maintaining the confidentiality of ministerial communications arising from the convention of collective responsibility of Ministers of the Crown, which*

> *is that once a policy decision has been reached by the Government it has to be supported by all ministers whether they approve of it or not unless they resign: that convention and the free discussion between ministers may be prejudiced by "premature disclosure" of the views of individual ministers (see Attorney General v Jonathan Cape [1976] 1 QB 752 at 764E, 771B-D to which we were referred by Ms Proops). The convention obviously applies with extra force in relation to Ministers or members of the Cabinet."*

22. The reference in paragraph 27 to the **ECGD** decision and the **OGC** decision is a reference to two decisions of the Administrative Court in appeals brought under section 59 FOIA. The third decision to which the Tribunal makes reference (**Secretary of State for Children, School and Families**) is also a decision of the Administrative Court on an appeal under section 59. It is clear, in my judgment, that the paragraphs within those decisions which are set out in paragraph 27 of the decision of the Tribunal support what the Tribunal says about section 35(1)(a). In those circumstances it suffices that I quote from paragraph 17 of the decision in **Secretary of State for Children, Schools and Families v JN** [2008] EWHC 1199 (Admin) where Dyson LJ (sitting as a Judge of Administrative Court) said:-

> *"I accept the submission of Ms Olley* [Counsel for the Appellant Government Department] *that the public interest is best served by the maintenance of an environment in which ministers can receive free and frank advice from their advisers. Officials and advisers need to be able to put forward their views which are frank and candid, and to express their views freely, and this process should be protected from inhibiting factors arising from the knowledge or fear of subsequent disclosure……"*

23. Despite Leading Counsel's acceptance that the Tribunal correctly summarised the public interests underlying the section 35 exemptions, he submits that it failed to weigh these public interests in the balance when determining whether the public interest in disclosing information contained in the relevant documents was outweighed by the public interest in maintaining these exemptions (Ground 3 of the Notice of Appeal). He focuses, in particular, upon paragraphs 37 and 38 of the decision in advancing his submission.

24. Paragraph 37 records that the Tribunal specifically asked itself the statutory question based on section 2(2)(b). It then records its firm conclusion that the public interest in disclosing the information substantially outweighs the public interest in maintaining the exemption. In paragraph 38 the Tribunal sets out the *"main considerations"* which lead it to its conclusions and, so far as section 35 is concerned, it seems clear to me that those main considerations are those which are set out in sub-paragraphs 1 to 7.

25. It does not seem to me to be necessary to quote from paragraph 38. I say that since it is clear that the considerations set out therein are those which the Tribunal felt to be specific to the instant case. There is no reference in paragraph 38 to the public interests underlying the section 35 exemptions.

26. As well as paragraphs 27, 37 and 38 it also seems to me that paragraph 23 of the decision is important in relation to the ground of appeal now under consideration. That reads:-

> *"We were referred to a large number of cases on the proper approach to the public interest test in relation to the section 35 and 42 exemptions, mainly decisions of this Tribunal. The only relevant binding authorities are two recent High Court decisions namely [ECGD and OGC]; those decisions referred to and approved passages from the decisions of this Tribunal in DfES (EA/2006/0006, 19.02.07) and Secretary of State for Work and Pension (EA/2006/0040, 5.3.07). We propose to follow the approach set out in those cases and the general guidance in the early Tribunal decision in Hogan ……"*

27. As I set out in paragraph 22 above **ECGD** and **OGC** are decisions which consider and describe the public interests underlying the exemptions within section 35. The other Tribunal decisions to which reference is made are also decisions which consider and identify those public interests. The Tribunal says in terms that it proposes to follow the approach adopted in the decisions to which it refers.

28. In these circumstances it seems to me to be impossible to conclude that the Tribunal failed to weigh the underlying public interests in the balance when considering this case. It specifically identified those interests (paragraphs 27) and it had earlier said that it would adopt an approach which demanded that those interests be taken into account (paragraph 23). I do not consider that its failure to repeat the fact that it was taking those interests into account in paragraph 38 demonstrates that it failed to do so. In my judgment paragraph 38, essentially, focuses upon those factors which are specific to this case; however, it is not to be read as though the Tribunal has ignored the underlying public interests which always arise in cases under section 35.

29. In my judgment this criticism of the Tribunal's decision is not made out.

30. As an alternative Mr Havers QC submits that the Tribunal failed to give any or any sufficient weight to the public interests which underlie section 35 (Ground 4). However, as I understand it, he accepts that the weight to be attached to these interests will vary depending upon all the circumstances relevant to the statutory question under section 2(2)(b) as they arise in a particular case.

31. Even if Mr. Havers QC does not accept that proposition, however, it seems to me to follow from the approach adopted by Mitting J in **ECGD**. At paragraph 38 the Learned Judge said:-

> *"…… There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately 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 may 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 to those considerations will, if they exist at all, be few and far between."*

32. Having found, as I have, that the Tribunal took into account the underlying public interests when reaching its decision about disclosure I cannot say that it gave those interests insufficient weight. True it is that there is no passage in the decision which identifies, expressly, the weight which was given to these considerations. However, since the Tribunal, in terms, was following the approach which it described in

paragraph 23 there is really no basis upon which I can conclude that appropriate weight was not given to the underlying considerations in this case. A court is usually slow to find that a specialist Tribunal has failed to afford appropriate weight to factors relevant to its decision. In my judgment, that pragmatic approach should be applied in the context of a statutory appeal under FOIA certainly so far as issues arising under section 35 are concerned.

33. I am not persuaded that the Appellant has demonstrated any error of law on the part of the Tribunal in its approach to the issue of whether the public interest in preserving the exemptions within section 35 should outweigh the public interest in disclosure.

34. I turn to the more difficult issues which arise in relation to the exemption contained within section 42.

35. Mr Havers QC submits that the Tribunal has, in a series of cases, expressly acknowledged two features of the exemption under section 42. I quote from his Skeleton Argument:-

> *"(1) What it has described as the "in-built public interest in legal professional privilege itself", the "in-built weight that must be given to legal professional privilege" and "the heavy hurdle – the in-built weight" which must be overcome if disclosure is to be ordered.....*
>
> *(2) The strength of the public interest in-built into the privilege itself ....."*

36. Mr Havers QC points out that in the recent decision of Tribunal in **Calland** (EA/2007/0136, 30.7.08) the Tribunal expressed itself in this way:-

> *"What is quite plain, from the series of decisions beginning with Bellamy ... is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyers and client, which the client supposes to be confidential".*

37. In my judgment there can be no doubt that the submissions of Mr Havers QC about the approach taken by the Tribunal in previous cases are well founded. I was provided with a number of decisions of the Tribunal beginning with **Bellamy** (EA/2005/0023) and ending with **Calland** (EA/2007/0136) which amply justify his submissions. During the course of oral argument I was handed the decision of the Tribunal in **Rosenbaum** (EA/2008/0035/ 4.11.2008) which is thought to be the most recent decision of the Tribunal upon the exemption contained within section 42. This case is of some interest since Mr Rosenbaum specifically argued that although some weight should be given to the protection of legal professional privilege the extent of such weight should vary case to case and, further, that the weight to be attached to legal professional privilege in the particular case had been overstated by the Commissioner.

38. The Tribunal in **Rosenbaum** reviewed the effect of **Bellamy** and two of the cases which followed namely, **Pugh** (EA/2007/055/17.12.07) and **Mersey Tunnel Users Association** (EA/2000/00052/15.2.08). It then concluded:-

> *"36 The Tribunal's consideration of the application of LPP* [legal professional privilege] *to the facts of this case follows below, however, the Tribunal does not*

agree with Mr Rosenbaum that LPP merits only "some weight" or that in his general approach the Commissioner has overstated this. From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place."

The approach consistently taken by the Tribunal, as summarised by Mr Havers QC above, is based squarely upon decisions of courts of the highest authority upon the importance to be attached to the concept of legal professional privilege. It suffices that I simply identify two such decisions; **R v Derby Magistrates Court ex parte B** [1996] 1 AC 487 and **R(Morgan Grenfell and Co Ltd) v Special Commissioner for Income Tax** [2003] 1AC 563.

39. As foreshadowed by Lord Taylor in **Ex parte B** in FOIA Parliament has specifically legislated to permit the disclosure of communications to which legal professional privilege attaches. Neither section 2(2)(b) nor section 42 use words which, necessarily, lead to the conclusion that the party seeking disclosure of information to which section 42 applies faces a more onerous task than a party who is faced with exemptions based upon other sections of the Act. That said, I have no doubt that the general approach which the Tribunal has adopted to cases under section 42 is entirely correct. Indeed I do not understand that the Tribunal in this case or the First Respondent disagrees. In the instant case the Tribunal tentatively suggests that there may be a difference in emphasis between **Bellamy** and some of the later cases of which **Mersey Tunnel** is the clearest example. In the event that such a difference exists the Tribunal in the instant case expressed a preference for the approach in **Mersey Tunnel**. In his Skeleton Argument the First Respondent wrote:-

"16. This Respondent respectfully deprecates the practice of extensive citations which illustrate rather than explain applicable principles. The Tribunal was right not to add a yet further excursus reviewing the case-law on the in-built public interest in maintaining the LLP exemption. It was not in issue that such a public interest exists. When the Tribunal referred in para 24 to preferring the approach of the Tribunal in Mersey Tunnel it was referring to paras 35-51 of that decision which deal in terms with "the central argument of the in-built weight that must be given to the legal professional privilege" in the balancing exercise.

17 Like the Tribunal this Respondent adopts those paragraphs. It is not suggested in the present case that the Tribunal was wrong to adopt them."

I should add for completeness that the First Respondent said nothing in his oral submissions which was inconsistent with that position.

40. In my judgment, therefore, it is appropriate to approach the issue of whether the Tribunal made any errors of law in its approach to the exemption under section 42 on the basis that Mr Havers QC is correct in his identification of the two features of the exemption which are set out in paragraph 35 above. For the avoidance of any doubt I should repeat that I consider that successive Tribunals have adopted an approach to section 42 which is essentially consistent. The only differences in the various decisions are linguistic rather than substantive.

41. It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b). A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption. As Ms Proops submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

42. Mr Havers QC submits that in the instant case the Tribunal failed to acknowledge either the in-built public interest in this exemption or the strength of that public interest. Further he submits that it failed to weigh the in-built public interest in the balance when considering the statutory test for disclosure set out in section 2(2)(b). He develops these points in paragraph 15 of his Skeleton Argument. In paragraph 16 Mr Havers QC submits that the Tribunal failed to understand that it was unnecessary when considering the section 42 exemption to demonstrate a specific prejudice or harm from the disclosure either in the instant case or in any case when section 42 was invoked.

43. In making these submissions Mr Havers QC focuses upon paragraphs 28, 37 and 38 of the Tribunal's decision. He also draws attention to Rider D. This Rider appears in an Annex to the decision which has not been disclosed to the First Respondent.

44. I am not persuaded that the Tribunal's consideration of the exemption under section 42 is confined to the paragraphs identified by Mr Havers QC in his Skeleton. In relation to section 42 paragraphs 24 and 25 are also important. They read:-

> *"24. None of those cases deal directly with the application of the public interest test in a legal professional privilege case. In relation to this we were referred to a series of Tribunal cases, namely Bellamy ..... Mersey Tunnel ..... (which itself quotes extensively from the decision in Pugh..... and Fuller.... If and in so far as there is any conflict in the approach adopted by the Tribunal in those cases we prefer the approach adopted in the Mersey Tunnel case. We make only two observations:*
>
> *(1) Even in a section 42 case all the circumstances of the case must be considered and the public authority's disclosure obligation will only be disapplied if the public interest in maintaining the legal professional privilege outweighs the public interest in disclosure in that particular case;*
>
> *(2) Legal professional privilege clearly includes not only "litigation privilege" but also legal advice privilege; the existence or threat of litigation is therefore not necessary for section 42 to apply but may well be a highly relevant factor in assessing where the public interest balance lies.*

25. We were invited (in effect) to resolve a continuing debate of principle between the Commissioner and Government department relating to the relative strengths of public interest underlying the exemptions in section 35 and 42. We do not think that it is necessary or helpful to take up that invitation and to add to the length of this decision and the Tribunal's already quite extensive jurisprudence on these issues. Rather we prefer to approach matters simply by (a) reminding ourselves of the rationale underlying the relevant exemptions and the nature of the respective public interests to be weighed; (b) identifying the relevant circumstances of this case and (c) asking ourselves the statutory question raised by section 2(2)(b) as at the relevant date, which is the date of the DTI's review of the decision, June 2005."

45. Mr Havers QC accepts that there are no errors of law disclosed in paragraphs 24 and 25. The First Respondent went rather further; he described the approach identified in paragraph 25 as "classic" self-direction.

46. I regard the identification of the line cases beginning with **Bellamy** in paragraph 24 as a short-hand method of informing the reader of the decision that the principles laid down in those cases were clearly understood. The use of the word *"Even"* as an introduction to sub-paragraph 1 of paragraph 24 is a further indication, in my judgment, that the Tribunal fully understood that cases under section 42 were to be approached somewhat differently from cases involving other exemptions and given that this recognition appears immediately following the identification of the **Bellamy** line of cases, it seems to me to be clear that the Tribunal understood fully why that was so. In paragraph 25 the Tribunal expressly reminded itself of the *"rationale"* underlying the relevant exemptions. At paragraph 28 it quoted from the speech of Lord Hoffman in **R(Morgan Grenfell and Co Limited) v Special Commissioner of Income Tax** [2003] 1 AC 563 which encapsulated one of the aspects of the underlying rationale.

47. In the light of what was said in these passages I find myself unable to accept the suggestion that the Tribunal had no regard to the strong public interest in non-disclosure in-built into legal professional privilege. I ask myself this rhetorical question. What was the purpose in the Tribunal identifying the line of cases beginning with **Bellamy** unless to demonstrate that it was seeking to apply the principles contained therein? I am not prepared to find that the Tribunal simply ignored or failed completely to take account of or weigh in the balance the public interest in non-disclosure in-built into legal professional privilege.

48. However, that is not the end of the matter. In the light of the consistent line taken by the Tribunal as to the weight to be attached to the public interest against disclosure in-built into legal professional privilege (an approach which 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.

49. On this issue I accept the submissions of Mr Havers QC that there is nothing in the decision and for the avoidance of doubt in Rider D which demonstrates that the Tribunal has undertaken the necessary assessment. In paragraph 37 the Tribunal

expressed the conclusion that *"in all the circumstances of this case as at June 2005 the public interest in disclosing information substantially outweighed the public interest in maintaining the* [exemption]*"*. In paragraph 38 the Tribunal listed what it described as the main considerations leading to this conclusion. It seems clear, however, that sub-paragraphs 1 to 7 relate to the exemption under section 35 and that the considerations relevant to section 42 are dealt with in just one sub-paragraph, namely sub-paragraph (8). That reads:-

> *"As to the information covered by legal professional privilege, we set out relevant considerations under Rider D in the Annex, which can be read into the decision at this point."*

50. I have considered Rider D with care. I am conscious that the First Respondent can make no submissions upon it since he has not seen it. At one point during the course of the oral submissions it appeared at least possible that the First Respondent would invite its disclosure during the course of the hearing but, in the end, he did not. To repeat, however, since the First Respondent has not seen this part of the Tribunal's decision I have considered its contents with particular care.

51. Rider D consists of 4 paragraphs. The first three paragraphs consist of an assessment, in general terms, of the nature of the information contained within the relevant documents and what specific harm, if any, might be caused to the Appellant in the event of disclosure of the information. Nothing in those paragraphs can be read as an acknowledgement of the in-built public interest in legal professional privilege or, just as importantly, as an acknowledgement of the significant weight which attaches to that in-built public interest. In my judgment, the first three paragraphs of Rider D demonstrate the strength of the point which Mr Havers QC makes at paragraph 16 of his Skeleton namely that the Tribunal failed to understand or give effect to the fact that it was not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question.

52. In that same paragraph of his Skeleton Mr Havers QC quotes verbatim from part of paragraph 4 of Rider D. I see no reason why I should not quote the whole paragraph. It reads:

> *"We are therefore of the view that the public interests underlying legal professional privilege are unlikely to be damaged by disclosure in this particular case and that the public interest in maintaining the exemption is therefore of less weight in this case than many others."*

53. In my judgment that paragraph is a clear indicator that the Tribunal failed to attach appropriate weight to the exemption. The in-built 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 effect to the 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 features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

54. In her Skeleton Argument (in particular paragraphs 19(5) and (6)) Ms Proops expresses herself somewhat cautiously about whether the Tribunal approached the application of the public interest test under section 42 in a lawful manner. I have given anxious consideration to whether this is one of those cases where the Tribunal has in fact applied the correct test albeit that it is somewhat difficult to demonstrate that clearly from the language of the decision. Ultimately, however, I have reached the clear conclusion that the Tribunal failed to give appropriate weight to the inbuilt public interest in withholding information to which legal professional privilege applies. Not only is there nothing in the decision from which one can deduce that appropriate weight was given but, as I have identified, there is a clear indicator that appropriate weight was not given.

55. Accordingly I propose to allow the appeal to the extent of quashing that part of the Tribunal's decision which orders disclosure of documents to which section 42 applies. In respect of those documents I order that the issue of their disclosure be remitted to a differently constituted Tribunal so that the matter can be considered afresh. As I understand it this quashing order applies to documents B3, B4, B6, B7, B8 and B12, although I stand to be corrected if I have categorised any document inaccurately.

56. I do not accede to the submission of Mr Havers QC that I should remit consideration of all the documents considered by the Tribunal to a freshly constituted Tribunal. I see no reason why the Tribunal's decision in relation to those documents where disclosure was opposed on the basis of section 35 should not be upheld. I do not think it appropriate to allow the Appellant a second bite of the cherry before the Tribunal in the sense of allowing it to argue the section 42 exemption in respect of some or all of these documents.

57. I turn finally to the points of concern raised by Ms Proops on behalf of the Second Respondent. Those concerns are expressed in paragraph 17 of her Skeleton Argument and further developed in paragraph 19(7). Paragraph 17 reads:-

> *"17. Whilst it is not a matter upon which BERR has focussed particularly in its appeal, the Commissioner takes this opportunity to note his concern as to the approach which the Tribunal took to the question of whether the disputed information should be treated as falling within section 42, section 35 or both.*
>
> *(1) The content of some 11 documents was in issue before the Tribunal (those documents having been labelled B1 and B3-B12)*
>
> *(2) The Commissioner had approached the information in these documents on the basis that information in some documents fell within the ambit of section 42, whereas the information in other documents fell within the ambit of section 35 (or section 36) – see §§24-50 of the Commissioner's decision (OB 56-61).*
>
> *(3) In its decision, the Tribunal states as follows: 'We do not think it is possible to categorize the information document by document in the way the Commissioner has done but we are quite satisfied that (apart from some paragraphs in documents which do not come within Mr O'Brien's request at all which we note in para. 40 below) the information in all those documents and in documents B11 and B12 was exempt by virtue of sections 35(1)(a) and/or (b) and/or 42' (§19).*

(4)The Commissioner contends:

(a) that it is not appropriate for the Tribunal to adopt an 'and/or' approach to categorising information in this context; and

(b) that the Tribunal should instead state clearly which information it considers falls within the ambit of which exempting provisions;

(c) that this is important not least because, when it comes to applying the public interest test, it is essential that there be clarity as to which exempting provision is in issue; and

(d) that the Tribunal ought to have approved the categorisation of the information which the Commissioner adopted in his Decision Notice (see further §19 of the Tribunal's decision where this categorisation is summarised)."

Paragraph 19(7) is in the following terms:-

"Moreover, he invites the Court to approve an approach to the application of the public interest test which entails the Tribunal systematically;

(a) identifying the public interest factors in favour of disclosing the particular information;

(b) identifying the public interest factors which favour maintaining the particular exemption; and then

(c) analysing whether the latter interests outweigh the former."

58. I share the concerns expressed by Ms Proops on behalf of the Second Respondent. I commend in general terms the approach which she advocates in paragraph 19(7), in particular. In making these observations I would not, for one minute, wish it to be thought that there is any particular way in which a decision should be crafted or that the writing of a decision is any anything other than a matter for the members of the Tribunal charged with that task. To repeat, however, the concerns expressed about this decision are, in my judgment, well founded and the general approach suggested in paragraph 19(7) has much to commend it. I am fortified in this view, of course, by having read so many decisions of the Tribunal which, effectively, adopt the methodology which is suggested in paragraph 19(7).

59. This appeal is allowed to the extent indicated in paragraph 55 above.