IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Upper Tribunal Case No. GIA/605/2010

BETWEEN

THE OFFICE OF COMMUNICATIONS

Appellant

and

GERRY MORRISSEY

First Respondent

and

THE INFORMATION COMMISSIONER

Second Respondent

BEFORE

THE HON MR JUSTICE WALKER

JUDGE DAVID MARKS QC

JUDGE NICHOLAS WIKELEY

Decision and reasons of the Upper Tribunal

22 March 2011

Representatives at the hearing at Harp House on 15 December 2010:

For OFCOM: Monica Carss-Frisk QC and Jane Collier

For the Information Commissioner: Ben Hooper

DECISION OF THE UPPER TRIBUNAL

The DECISION of the Upper Tribunal is to allow the appeal by OFCOM.

The making of the decision of the Information Tribunal dated 11 March 2010 under file reference EA/2009/0067 involved an error of law. That decision is set aside. The Upper Tribunal remakes the decision in the following terms:

> The appeal to the First-tier Tribunal is allowed to a limited extent only. Two broadcasters had in fact consented to disclosure within the terms of section 393(1) of the Communications Act 2003. As a result, section 393(1) could not apply to such of the requested information as was provided by those two broadcasters. Accordingly, the First-tier Tribunal substitutes for the decision in paragraph 52 of the Information Commissioner's Decision Notice (FS50184499 dated 22 July 2009) a decision as follows:
>
> > *The Office of Communications (OFCOM) is ordered to release to Mr Gerry Morrissey, within 28 days of this decision, the information provided by:*
> >
> > 1. *Radio North Angus Ltd., and*
> > 2. *The Chinese Channel Ltd*
> >
> > *in relation to question 4 of OFCOM's "Questions for 2005 Returns" in respect of equal opportunities reporting.*
>
> As regards the remainder of the information sought by Mr Morrissey, the Information Commissioner's decision examined the question whether OFCOM dealt with the request for information in accordance with Part 1 of the Freedom of Information Act 2000. When examining that question the Commissioner adopted the approach taken by the Information Tribunal in *Hoyte v Civil Aviation Authority* (EA/2007/0101), and in consequence thought it necessary to determine whether OFCOM acted reasonably in not disclosing the information requested in this appeal pursuant to section 393(2)(a) of the Communications Act 2003. This involved an error of law, for the tribunal in *Hoyte* erred in proceeding on the basis that either it or the Commissioner had a general jurisdiction to determine whether a public authority had acted unreasonably when exercising a discretion not to disclose information. In the event, however, this error of law was immaterial to the outcome in the present case: the Commissioner's decision was correct to conclude as regards the remainder of the information sought that OFCOM had dealt with the request for information in accordance with Part 1 of the Freedom of Information Act 2000.

This decision is given under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. The Information Commissioner contends that, in some circumstances at least, he has power to review the reasonableness of a public authority's decision. In the present case that public authority is the Office of Communications (OFCOM). The general contention advanced by counsel for the Information Commissioner is framed in this way in his skeleton argument:

> "1. Various statutes - including the 2003 [Communications] Act with which this appeal is directly concerned - contain a general bar on the disclosure of information by a public authority that is itself subject to one or more specified exceptions. Requests may be made under FOIA [the Freedom of Information Act 2000] for information that falls within the terms of such a general bar. Further, cases may in principle arise where, given the exceptions to which the general bar is subject, the only rational course that is open to the public authority in response is to disclose the requested information. A public authority that refused disclosure in such circumstances would be acting unlawfully in a public law sense. Such unlawfulness would, of course, be susceptible to judicial correction. The central issue in this appeal is the forum for this. On OFCOM's case, the individual who is seeking the information cannot obtain it in the Tribunal. Rather, he would need to bring a separate judicial review claim in the Administrative Court (with the associated cost risks, and without a procedural regime designed to permit "closed" material), whilst continuing to litigate in the Tribunal any other FOIA issues, such as the application of exemptions other than s. 44. Such a result would not only be inconvenient: it is also contrary to the modern approach of the House of Lords and Supreme Court to procedural exclusivity claims. Under that modern approach, and in line with the Tribunal's decision below, the Tribunal / Upper Tribunal has jurisdiction to determine all issues in cases of this sort.
>
> …
>
> 4. … the Tribunal's jurisdiction mirrors that of the Commissioner. …"

2. Notwithstanding the customary clarity and elegance with which counsel developed this argument on behalf of the Information Commissioner, we reject the central plank of his analysis for the reasons that follow.

3. This appeal is from a decision of the Information Tribunal. The functions of the Information Tribunal were transferred to the First-tier Tribunal on 18 January 2010. We shall use the expression "the tribunal" to refer to the Information Tribunal prior to 18 January 2010 and to the First-tier Tribunal on and after 18 January 2010. The decision under appeal substantially agreed with the approach of the Information Commissioner. As we explain below, there is no challenge to the substantive outcome of the tribunal's decision. We have, unusually, nevertheless considered it appropriate to hear and determine the appeal as it raises points of general importance about the jurisdiction of the Information Commissioner and the tribunal. We have not found it necessary to deal with all points raised in argument. On analysis, however, it appears to us that two issues of general importance need to be determined in order to resolve the appeal.

4. The first concerns statutes which contain a general bar on the disclosure of information by a public authority unless that authority considers that a particular test is met. Does "the modern approach" require a presumption that FOIA provides for the Information Commissioner (subject to an appeal to the tribunal) to determine whether the only reasonable course that is open to the public authority in the circumstances of a particular

request is to disclose the requested information? We shall call this the "procedural inclusivity presumption issue".

5. The second is concerned with the application - in the absence of any such presumption - of the absolute exemption in s 44 of FOIA. This exemption applies where disclosure of information is prohibited "by or under" an enactment other than FOIA itself. Here we must consider the interaction between s 44 of FOIA and s 393 of the Communications Act 2003. When properly understood, do these provisions have the consequence that the Information Commissioner (and the tribunal) will examine the reasonableness of OFCOM's approach to what it can or should disclose under s 393 "for the purpose of facilitating the carrying out" by it of any of its functions? We shall call this the "statutory construction issue".

6. Below we set out relevant parts of the statutory framework found in the 2003 Act and in FOIA, and give a brief account of the history, before discussing the first and second issues in turn. We then give a brief commentary on some of the other arguments raised on the appeal and summarise our overall conclusions.

The Communications Act 2003

7. OFCOM is governed by the Communications Act 2003 ("the 2003 Act"). It has a wide range of functions including the regulation of the provision of electronic communications networks and services, the regulation of broadcasting and of the provision of television and radio services, as well as a role in ensuring competition in newspaper and other media enterprises. It took the place of various other regulators, including the Independent Television Commission ("ITC") as regards the awarding of licences for independent television services and digital television broadcasting.

8. Part 1 of the 2003 Act identifies certain of OFCOM's duties. In particular, s 27, which is concerned with "training and equality of opportunity" provides as follows:

> "(1) It shall be the duty of OFCOM to take all such steps as they consider appropriate for promoting the development of opportunities for the training and retraining of persons—
>
> (a) for employment by persons providing television and radio services; and
>
> (b) for work in connection with the provision of such services otherwise than as an employee.
>
> (2) It shall be the duty of OFCOM to take all such steps as they consider appropriate for promoting equality of opportunity in relation to both—
>
> (a) employment by those providing television and radio services; and
>
> (b) the training and retraining of persons for such employment.
>
> (3) It shall also be the duty of OFCOM, in relation to such employment, training and retraining, to take all such steps as they consider appropriate for promoting the equalisation of opportunities for disabled persons.
>
> (4) The reference in subsection (2) to equality of opportunity is a reference to equality of opportunity—
>
> (a) between men and women; and
>
> (b) between persons of different racial groups."

9. Part 3 of the 2003 Act is directed specifically towards television and radio services. Chapter 4 of Part 3, which deals with regulatory provisions, includes s 337, which is concerned with the promotion of equal opportunities and training, and provides as follows:

> "(1) The regulatory regime for every service to which this section applies includes the conditions that OFCOM consider appropriate for requiring the licence holder to make

arrangements for promoting, in relation to employment with the licence holder, equality of opportunity—

(a) between men and women; and

(b) between persons of different racial groups.

(2) That regime includes conditions requiring the licence holder to make arrangements for promoting, in relation to employment with the licence holder, the equalisation of opportunities for disabled persons.

(3) The regulatory regime for every service to which this section applies includes the conditions that OFCOM consider appropriate for requiring the licence holder to make arrangements for the training and retraining of persons whom he employs, in or in connection with—

(a) the provision of the licensed service; or

(b) the making of programmes to be included in that service.

(4) The conditions imposed by virtue of subsections (1) to (3) must contain provision, in relation to the arrangements made in pursuance of those conditions, requiring the person providing the service in question—

(a) to take appropriate steps to make those affected by the arrangements aware of them (including such publication of the arrangements as may be required in accordance with the conditions);

(b) from time to time, to review the arrangements; and

(c) from time to time (and at least annually) to publish, in such manner as he considers appropriate, his observations on the current operation and effectiveness of the arrangements."

10. Part 6 of the 2003 Act is headed "Miscellaneous and Supplemental". It includes s 393, which is headed "General restrictions on disclosure of information" and provides:

"(1) Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by—

(a) this Act,

…

is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.

(2) Subsection (1) does not apply to any disclosure of information which is made—

(a) for the purpose of facilitating the carrying out by OFCOM of any of their functions;

…"

The Freedom of Information Act 2000

11. OFCOM is a public authority for the purposes of FOIA. Accordingly OFCOM is required by FOIA s 1(1)(b), if it holds information that is the subject of a request, to comply with that request unless a relevant exemption applies. The relevant exemption in the present case arises under s 2(2)(a) where "the information is exempt information by virtue of a provision conferring absolute exemption".

12. Among the provisions in Part 1 conferring absolute exemption is s 44, entitled "Prohibitions on disclosure". In particular, s 44(1) provides that

"Information is exempt information if its disclosure (otherwise and under this Act) by the public authority holding it ...

(a) is prohibited by or under any enactment."

13. Following refusal to comply with a request after review, the matter may be raised with the Information Commissioner under s 50(1) of FOIA:

> "(1) Any person (in this section referred to as "the Complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the Complainant to a public authority has been dealt with in accordance with the requirements of Part I."

14. An appeal from the Commissioner's decision lies to the tribunal. The tribunal's powers in determining the appeal are governed by s 58 of FOIA:

> "(1) If on an appeal under section 57 the Tribunal considers—
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

A brief account of the history

15. The original complainant in this case was Mr Gerry Morrissey, the General Secretary of the Broadcasting and Entertainment Cinematograph and Theatre Union (BECTU). In a letter dated 5 June 2007 he wrote to OFCOM about one of its publications, *Broadcasters' Returns on Equal Opportunities 2005, Summary Report and Statistics*, issued in November 2006. He made a request for information ("the desired information"), namely "… the full report containing the statistical data for each of the 138 licensees from whom you have returns." In a letter dated 19 July 2007 OFCOM refused to disclose the desired information. That decision was confirmed following an internal review by OFCOM.

16. We understand that Mr Morrissey and BECTU have raised with the Equality and Human Rights Commission substantive issues relating to OFCOM's approach to equal opportunities. Those issues, of course, are not a matter for us.

17. The ITC, operating under a different statutory regime, had published broadcasters' detailed equal opportunities statistical returns, including each ITV franchisee individually, on an annual basis. OFCOM, however, decided to publish summary employment statistical data (in *Broadcasters' Returns on Equal Opportunities 2005, Summary Report and Statistics*) rather than detailed information in relation to each broadcaster.

18. Both initially and on review OFCOM refused to supply the desired information. It relied upon s 44 of FOIA and s 393 of the 2003 Act.

19. Mr Morrissey complained to the Information Commissioner on 19 November 2007 about OFCOM's refusal. The Commissioner issued his Decision Notice (FS50184499) on 22 July 2009, ruling that (i) the requested information was "with respect to a particular business" within the meaning of s 393(1); (ii) the requested information had been obtained in exercise of a power conferred upon OFCOM by the 2003 Act; and (iii) OFCOM was under no duty to seek consent for this disclosure from the persons for the time being carrying on the relevant business, again for the purpose of s 393(1). The Commissioner then turned (at paragraphs 38 onwards of the Decision Notice) to an argument by Mr Morrissey that a relevant permission applied. We shall refer to this as "the permission argument". The permission argument was that consent to disclosure was not required because disclosure of the desired information could be "made for the purpose of OFCOM's statutory functions to promote equal

opportunity". In that context Mr Morrissey relied upon the exception to s 393(1) identified in s 393(2) for "any disclosure of information which is made - (a) for the purpose of facilitating the carrying out by OFCOM of any of their functions".

20. When considering the permission argument the Commissioner noted that in *Hoyte v The Information Commissioner and the Civil Aviation Authority* [EA/2007/0101] the tribunal asked the question: "In so far as any exception provided … discretion to disclose the disputed information, was the decision not to exercise that discretion irrational or otherwise unlawful?" Adopting that approach, the Commissioner applied "a *Wednesbury* test of reasonableness" [i.e. the test set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223] to the question "whether OFCOM should in fact have considered it appropriate to disclose the information in pursuance of its functions with regard to s 27(2) of the Communications Act 2003." The Commissioner proceeded on that basis to determine that OFCOM's decision to withhold the information was within the range of "reasonable responses open to it as a regulator" and duly gave his reasons for that finding.

21. The exercise thus conducted by the Commissioner is one which we shall refer to as a "reasonableness review." It is an exercise which involves testing a decision which is not a decision made under FOIA, and the test focuses not on whether legislative pre-requisites to the decision have been met but on whether in the exercise of non-FOIA powers the authority has exceeded the range of reasonable responses open to it. The Commissioner's reasonableness review is at the heart of this appeal: OFCOM contends that it was an exercise which went beyond the Commissioner's statutory powers.

22. On 17 August 2009 Mr Morrissey appealed to the tribunal. OFCOM was joined as an additional party. The tribunal heard the appeal on 9 December 2009 and promulgated its decision on 11 January 2010 (EA/2009/0067). The tribunal's decision was to allow Mr Morrissey's appeal to the (very limited) extent that two of the broadcasters in question had in fact, it transpired, consented to disclosure of their statistical data within the terms of s 393(1) of the 2003 Act. In all other respects the tribunal upheld the Commissioner's decision that the remainder of the disputed information should be withheld. When doing so it considered but rejected OFCOM's complaint that the Commissioner had no statutory power to examine the reasonableness of what OFCOM had done or not done.

23. The tribunal (at paragraph [56]) framed the relevant question in this regard as "whether the IC and the Tribunal have jurisdiction to review OFCOM's s 27 decision, and if so was OFCOM's decision to withhold the requested information within the range of reasonable responses." The tribunal added that it accepted "that when OFCOM decides what appropriate steps to take [within s 27] that it may be exercising a discretion." Accordingly, the tribunal directed itself (at paragraph [57], emphasis in the original):

> "… we need to consider whether the Tribunal has the power to consider a challenge to the lawfulness of OFCOM's policy decision only to publish summary data. In other words Mr Morrissey's main ground of appeal as stated in his Notice of Appeal is directed to the issue of whether the IC erred in his consideration of the issue of "*whether OFCOM should in fact have considered it appropriate to disclose the information in pursuance of its functions with regard to s 27(2) of the Communications Act 2003."*

24. The tribunal concluded that both the Commissioner and the tribunal could entertain a public law challenge. Ms Gallafent on behalf of OFCOM relied upon cases which supported a rule of procedural exclusivity. Her submissions urged that there were distinct roles for the tribunal, the specialist forum for issues of freedom of information, and the Administrative Court, the specialist forum where decisions of public authorities were subject to its inherent supervisory jurisdiction by way of judicial review on public law grounds. As against this, Mr

Hooper on behalf of the Commissioner advanced a submission that the contrary approach in *Hoyte* was justified by a more general principle that:

> "... the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision."

25. Mr Hooper's submission was accepted by the tribunal, which commented in a footnote that:

> "Strictly speaking, it may be that the right of access to information that is granted to individuals by s 1(1) of FOIA is closer to a public law right than a private law right. But this can only weaken any argument for procedural exclusivity: if a court or tribunal is entitled to consider public law issues when adjudicating upon a matter of strict private law, the [tribunal] (which is specifically tasked by Parliament to consider the quasi-public law rights that arise under FOIA) must *a fortiori* have power to consider such public law issues also."

26. It was noted by the tribunal that, as had been accepted by Mr Hooper, its powers in this regard were subject to two qualifications (paragraph [66)], namely:

> "i. that public law challenge is of the form that <u>no</u> decision-maker could lawfully have so acted (or omitted to act) in the circumstances ...; and
> ii. but for that act or omission the public authority would not be able to rely on the statutory prohibition in question..."

27. In those circumstances the tribunal considered that both the Commissioner and the tribunal had to apply a test of "*Wednesbury* unreasonableness, irrationality or perversity" (paragraph [67]). The tribunal went on to examine Mr Morrissey's "challenge to the way that OFCOM exercised its s 27 powers" and held that what OFCOM had done was within a range of reasonable steps for OFCOM to take in the circumstances of this case (paragraph [68]).

28. OFCOM lodged an appeal to the Upper Tribunal against the tribunal's decision. The First and Second Respondents were Mr Morrissey and the Commissioner respectively. In practice, however, the appeal to the Upper Tribunal has pitched OFCOM against the Commissioner with Mr Morrissey taking the role of interested bystander. In large part this is because the proceedings in the Upper Tribunal have focused on the legal question of the scope of the Commissioner's jurisdiction (and, on appeal, that of the tribunal) to review OFCOM's decision, rather than on the underlying merits of the substantive decision taken with regard to the equal opportunities statistical data. OFCOM and the Commissioner have made detailed written submissions to the Upper Tribunal and were represented at an oral hearing on 15 December 2010 by counsel. OFCOM was represented by Ms Monica Carss-Frisk QC and Ms Jane Collier (neither of whom appeared before the tribunal). Mr Ben Hooper appeared for the Commissioner, as he had done below. Mr Morrissey did not make any written submissions to the Upper Tribunal but had sight of all the other parties' submissions and had a representative in attendance at the hearing. We are indebted to all counsel for the clarity of their arguments.

29. The main argument for OFCOM advanced by Ms Carss-Frisk QC and Ms Collier was that the tribunal fundamentally erred in concluding that the Commissioner, and on appeal the tribunal, had the jurisdiction to consider a public law challenge to OFCOM's decision not to disclose the requested information under the 2003 Act. They asserted a rule of procedural exclusivity: such a challenge, they submitted, could only be brought by way of judicial review in a court exercising public law jurisdiction. For this purpose they relied on what was said in

O'Reilly v Mackman [1983] 2 AC 237 by Lord Diplock at 285E: it would as a general rule be contrary to public policy, and as such an abuse of process, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law, to proceed otherwise than by way of judicial review and by this means to evade the procedural provisions for the protection of such authorities.

30. Mr Hooper responded on behalf of the Commissioner that if the only reasonable course open to OFCOM at the time in question was disclosure of the information in question, then disclosure was not "prohibited by or under" the 2003 Act for the purpose of s 44(1)(a) of FOIA. It followed that the Commissioner (and on appeal both the First-tier Tribunal and the Upper Tribunal) had to decide upon the reasonableness of OFCOM's decision in order to determine whether or not Mr Morrissey was entitled to receive information under FOIA, and there was no need to raise the issue in separate and cumbersome judicial review proceedings. As to procedural exclusivity, Mr Hooper asserted as his primary stance that the modern approach requires a presumption that it is for the Commissioner (subject to an appeal to the tribunal) to determine whether the only reasonable course that is open to the public authority in the circumstances of a particular request is to disclose the requested information. This assertion had not had the prominence before the tribunal that it gained in the submissions before us. It gives rise to what we have called the "procedural inclusivity presumption issue". If there is no such presumption then what we have called the "statutory construction issue" arises for consideration.

31. OFCOM advanced additional arguments which were only necessary in the event that the tribunal did indeed have power to review whether OFCOM had acted unreasonably in not disclosing the information in question. As that event does not in our view arise, it is not necessary for us to examine these additional arguments in any detail.

The procedural inclusivity presumption issue

Mr Hooper's submissions on the procedural inclusivity presumption issue

32. Mr Hooper sought to construct the following argument to support his contention that the Commissioner and the tribunal were right to adopt the view that they did on the procedural inclusivity presumption issue. First, under s 50(1) of FOIA the Commissioner is to examine whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.

33. Second, where a party exercises a right of appeal under s 57, the tribunal's broad powers under s 58 of FOIA enabled it to consider whether the notice against which the appeal is brought is not in accordance with the law, or to the extent that the notice involved an exercise of discretion by the Commissioner, whether he ought to have exercised his discretion differently. In so doing the tribunal could review any finding of fact on which the decision notice was based.

34. Third, where a person (e.g. Mr Morrissey) makes a request for information that is held by a public authority, then that authority is required to communicate the information to him (s 1(1)(b)), unless – as regards the present case - "the information is exempt information by virtue of a provision conferring absolute exemption" (s 2(2)(a)).

35. Fourth, s 44 provides for an absolute exemption (see s 2(3)(h)) in relation to information where "its disclosure (otherwise than under this Act) by the public authority holding it ... is prohibited by or under any enactment". Accordingly, in a case involving s 44, the question as to whether a public authority dealt with the request "in accordance with the requirements of Part I" (for the purposes of s 50(1) and, on appeal, s 58) must turn on

whether the disclosure of the information was "prohibited by or under any enactment" (within s 44(1)(a)) at the time that the public authority refused disclosure.

36. Fifth, if, in the circumstances of the case, and having regard to the "enactment" in question, the only reasonable course of action open to the public authority at the time was disclosure, then – at that time – such disclosure was not "prohibited by or under" that enactment for the purpose of s 44(1)(a).

37. It was at this stage of the argument that what we have called the procedural inclusivity presumption issue came into play. A question had arisen as to the reasonableness of the public authority's decision. Mr Hooper submitted that where such an issue arises in the context of s 44, the Commissioner and the tribunal cannot decide whether to uphold the complainant's right to receive information under FOIA without answering that question. There was, therefore, no need to raise the matter in separate proceedings by way of judicial review (see *Boddington v British Transport Police* [1999] 2 AC 143). This contention was supported by detailed argument which we examine in our discussion below.

The procedural inclusivity presumption issue: a discussion

38. Mr Hooper expressly disavowed any submission to the effect that FOIA demonstrated a Parliamentary intention that the Commissioner and the tribunal should be vested with a power of public law review. Rather, he contended that the question should be put the other way round: was there any provision in FOIA which clearly prevented the Commissioner, and on appeal the First-tier Tribunal and the Upper Tribunal, from determining a relevant public law challenge that arises in the context of a FOIA appeal and that needs to be resolved in order to decide the appeal? Framed in that way, he submitted, the answer was clear, namely that there is no such exclusion.

39. Furthermore, Mr Hooper argued, there was no reason why a public law reasonableness challenge had to be raised in separate proceedings by way of judicial review. As had been said by Lord Steyn in *Boddington* (at 172F-G):

> "Since *O'Reilly v. Mackman* decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision."

40. Mr Hooper also relied on *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), where Sales J. held that, as a matter of principle, Oxfam's legitimate expectation claim was within the jurisdiction of the then VAT & Duties Tribunal, under the Value Added Tax Act 1994 s.83(1)(c), being a legal question "with respect to" the amount of input tax which should be credited. As Sales J. explained (at paragraph 68):

> "It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to determination of questions falling within their statutorily defined jurisdiction. No special language is required to achieve that effect. Where they are themselves independent and impartial courts or tribunals (as the Tribunal is) there is no presumption that public law issues are reserved to the High Court in the exercise of its judicial review jurisdiction."

41. In addition Mr Hooper cited *Manchester City Council v Pinnock* [2010] UKSC 45, in which the Supreme Court held that the county court had the power to determine domestic public law challenges to a local authority's decision to issue or continue possession

proceedings (at paragraph 81). In particular, when asked to make an order for possession under s 143D(2) of the Housing Act 1996 in respect of a demoted tenant, the county court had power to consider whether a reasonable local authority and panel could have reached the conclusion that such breaches existed and the proportionality of making such an order (at paragraph 83). Mr Hooper emphasised the Supreme Court's reaffirmation of:

> "the principle stated by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, that a citizen's 'recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words'" (paragraph 86).

42. From these authorities, Mr Hooper submitted that there is a presumption that the tribunal will decide public law issues necessary to vindicate a complainant's right to receive information under FOIA. The presumption operated in the present case, it was submitted, because there was no provision in FOIA that clearly prevented the Commissioner and the tribunal from determining a public law challenge that needed to be resolved to decide a matter arising in the context of a FOIA appeal.

43. In order to establish the presumption he relies upon, however, Mr Hooper needs to do more than show that there is a presumption that a tribunal will decide certain public law issues. Under the relevant provisions of FOIA the tribunal's role arises only on an appeal from the Commissioner, and is only to do one or both of two things. The first is to decide whether the notice against which the appeal is brought is or is not in accordance with the law. The second is, if and to the extent that the notice involved an exercise of discretion by the Commissioner, to decide whether or not the Commissioner ought to have exercised that discretion differently. Thus the tribunal's functions are limited by reference to the functions of the Commissioner. The Commissioner is not a tribunal. On the contrary, the Commissioner's functions can broadly be described as those commonly associated with a regulator. It is only if there is an appeal that the tribunal becomes involved.

44. The authorities do not suggest that there is a presumption that a regulator will decide public law issues as to the reasonableness of a decision taken by a public authority as to whether or not to exercise its powers in a particular way. Nor did Mr Hooper argue for a presumption in those terms. His argument in support of a presumption as to what the Commissioner could do worked by reference to a presumption as to what the tribunal could do. Without intending any disrespect to the tribunal (which was not focusing on this particular aspect) or to Mr Hooper, this was to put the cart before the horse. Only if the Commissioner was empowered to decide a relevant question could any jurisdiction arise in the tribunal to pronounce upon that question.

45. Ms Carss-Frisk suggested that we should not follow the approach of Sales J in *Oxfam v Revenue and Customs Commissioners.* Among other things she noted that Sales J. conceded that he had not heard detailed argument on the point and also acknowledged that he was departing from "a widely held view that the Tribunal's jurisdiction is more limited" (paragraph 80). We prefer to put those points on one side at this stage, for we note that, far from relying upon a presumption, Sales J. relied upon "the natural and ordinary meaning of the words used" in the particular statutory provision concerned (see paragraph 78). In the same way, and on ordinary principles of statutory construction, we must examine the statutory provisions in question in context in order to determine whether the Commissioner and the tribunal have the role that Mr Hooper asserts.

46. In short, what Mr Morrissey is entitled to seek under FOIA is that the Commissioner should make a decision whether, in any specified respect, a request for information made by Mr Morrissey to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That will involve considering the extent of obligations imposed by FOIA and

whether they have been complied with. Questions of law may arise as to what circumstances would permit a request under FOIA to be declined. Questions of fact may arise as to whether those circumstances existed. These questions focus on FOIA. True it is that an appeal from the Commissioner lies to the tribunal. That fact without more is not in our view sufficient to bring into play as regards the Commissioner's role any presumption as to the extent to which public law issues will fall to be determined otherwise than by way of judicial review.

Conclusion on procedural inclusivity presumption issue

47. We readily accept that the authorities cited by Mr Hooper show that there is no presumption that public law questions can only be raised by invoking the courts' supervisory jurisdiction. For the purposes of argument we accept that there is a presumption that a tribunal may examine the validity of a public law decision when an individual seeks to establish private law rights which cannot be determined without such an examination. We part company with Mr Hooper, however, when he asserts that there is a presumption that the Commissioner can determine public law questions of reasonableness of the kind said to arise in the present case. There being no such presumption as regards the Commissioner's jurisdiction, it must follow that there is no such presumption as regards the jurisdiction of the tribunal. Accordingly we turn to examine the position in the absence of such a presumption.

The statutory construction issue

48. This issue concerns statutory construction of relevant provisions in the absence of any presumption one way or the other. The essential question for us to determine is whether, on their true construction, relevant statutory provisions empowered, and indeed required, the Information Commissioner to consider a public law question of reasonableness. For this purpose the Commissioner would, while acknowledging OFCOM's decision not to disclose the information in carrying out its functions, consider whether to treat that decision as invalid, and hold that an exception to s 393(1) arose under s 393(2), because the only reasonable conclusion open to OFCOM was that disclosure should be made for the purpose of facilitating the carrying out of its functions.

49. To a considerable extent the arguments of the parties in supporting or opposing such a construction formed part of the arguments supporting and opposing the applicability of a procedural inclusivity presumption. Reliance was understandably placed by Mr Hooper on *Boddington.* The factual circumstances of *Boddington* are some way removed from those in the present case. The fundamental issue in *Boddington* was whether an individual who was charged with a criminal offence in the magistrates' court could, in his defence before that court, challenge the lawfulness of the relevant bylaw. The House of Lords held that the rule of procedural exclusivity was no bar to such a challenge being raised before, and resolved by, the magistrates. The present case is very different. Mr Morrissey is not seeking to defend himself in a criminal prosecution. Nor is he within the principle identified by Viscount Simonds and amplified by Lord Steyn (paragraphs 41 and 39 above): he is not seeking to establish private law rights.

50. In its decision now under appeal the tribunal noted that it may be that the right of access to information that is granted to individuals by s 1(1) of FOIA is closer to a public law right than a private law right. We are unable to agree with the tribunal that this can only weaken any argument for procedural exclusivity: it seems to us that much must depend upon the nature of the task conferred on the tribunal by Parliament.

51. Ms Carss-Frisk also placed reliance on *Jones v Powys Local Health Board* [2008] EWHC 2562 (Admin) as establishing a "primary focus" or "dominant issue" test as governing the appropriate forum for a public law challenge. We are inclined to agree with Mr Hooper that *Jones* is not so much an extension or elaboration of the principle in *Boddington* but

rather an application of that doctrine. With respect, however, insofar as *Pinnock* is concerned with the procedural inclusivity principle, the same argument may be made. Indeed, the Supreme Court in *Pinnock* expressly stated that they were "satisfied that we should apply the approach of the House of Lords in *Wandsworth London Borough Council v Winder* [1985] AC 461" (at paragraph 88).

The solution lies closer to home: the FOIA framework

52. In our view the solution to this appeal is to be found closer to home and in the structure of FOIA itself. We must apply the processes contained in FOIA to the actual subject matter and treatment of the request. It is the function of the Commissioner under the legislation to consider whether the specific request has been dealt with in accordance with the requirements of Part 1 of FOIA. Plainly, the person's right to information embodied in s 1(1) of FOIA involves two stages, addressed by subsections (a) and (b) respectively. The person making the request is, first, entitled to be informed in writing by the public authority whether the latter holds the information of the type requested (s 1(1)(a), known as the "duty to confirm or deny": see s 1(6)) and, secondly, if such be the case, "to have that information communicated to him" (s 1(1)(b)).

53. However, the duty to confirm or deny does not arise where Part II confers an absolute exemption, as under s 44 (section 2(1)(a)). Furthermore, s 2(2)(a) provides that:

> "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 …".

54. The language of s 2(2)(a) confirms that it must be for the public authority initially to determine whether the information requested is exempt "by virtue of" s 44. This in turn means that it is for the public authority to consider whether, in the light of the specific nature of the request made, and of the particular nature of the information sought to be disclosed, the applicability of some other statutory enactment results in the prohibition encapsulated in s 44. It will then be for the Commissioner to verify whether or not the public authority has dealt with the matter in accordance with the requirements of Part I of FOIA.

55. In the present case the other statutory enactment was the 2003 Act and in particular s 393. There is no dispute but that the statistical data gathered from the broadcasters about their employment and equal opportunity practices fell within the ambit of the general restriction on disclosure of information under s 393(1) and so, subject to s 393 (2), was exempt from disclosure by virtue of s 44(1)(a). Such information related to particular businesses, which were still in business and (for the most part) had not given their consent to its onward disclosure, and had been obtained under OFCOM's statutory powers.

56. The question then for the public authority was whether that general restriction had been disapplied under s 393(2)(a). The only information which OFCOM had disclosed to the general public "for the purpose of facilitating the carrying out by OFCOM of any of their functions" was the aggregated summary statistical data. Plainly there could no longer be any general restriction on the disclosure of <u>that</u> information. As noted below, OFCOM argued that the ability to disclose only arose once there had in fact been a disclosure under s 393(2), and will not arise unless and until there has been such a disclosure. On this narrow point we see force in the contrary argument that s 393(1) is not intended to be read as applying where OFCOM has decided that it is right to disclose under s 393(2). However, a purposive approach to the construction of the relevant statutes in our view makes it unnecessary to decide that narrow point. On either view it is a prerequisite that OFCOM has at least decided that it is right to disclose under s 393(2). OFCOM goes further and says that disclosure must

have in fact have been made before the prohibition in s 393(1) ceases to apply, but it is immaterial to our analysis whether this further step is indeed required.

57. The starting point for our analysis is that OFCOM is a body exercising powers within the supervisory jurisdiction of competent courts and a public authority for the purposes of FOIA. Individual commercial broadcasters are not public authorities and are not subject to FOIA. When those broadcasters provide information about their businesses, which OFCOM as a regulator requires from them under its detailed statutory powers, they may consent to onward disclosure of the information they supply. If they do not give consent for onward disclosure of that information, the purpose of s 393 is to reassure them that OFCOM can only lawfully disclose it if - as a prerequisite - OFCOM considers it right to do so for one of the purposes in s 393(2). Conversely, those who seek disclosure of the information know that such information can only lawfully be disclosed if that prerequisite is met. Section 393 clearly identifies OFCOM as the body which decides on disclosure under s 393(2). It is not in dispute that OFCOM's approach to s 393 will be subject to the supervisory jurisdiction of a court of competent jurisdiction (which in England and Wales will be the High Court).

58. The Commissioner's statutory remit, in accordance with ss 18 and 50 of FOIA, is to decide whether a public authority has failed to deal with a request in accordance with the requirements of Part I of FOIA. It follows that the Commissioner is then charged with the responsibility of verifying whether the exercise *required by FOIA* has been correctly conducted by the public authority in question. The exercise which the Commissioner conducted was, insofar as it examined the reasonableness of OFCOM's failure to conclude that disclosure should be made under s 393(2), not in our view an exercise required by FOIA in the circumstances of the present case. As s 44 confers an absolute exemption, the role of the Commissioner, and thereafter that of the tribunal if appropriate, is limited to a verification process. There is, of course, a question of statutory construction as to what it is that FOIA contemplates will be involved in the verification process. Once that is resolved it is not the role of the Commissioner to stray beyond that remit.

59. In the present case the exercise to be conducted by the Commissioner was a verification process which may not have been limited to seeing merely whether OFCOM had in fact made disclosure under s 393(2). As noted earlier, we can see good reason for thinking that the prohibition on disclosure in s 393(1) would not apply once OFCOM reached the conclusion that it would be right to make disclosure under s 393(2).

60. When the two statutes are read together, however, it would strain the statutory language considerably to say that the Commissioner's task under FOIA included deciding whether OFCOM acted unreasonably in failing to reach such a conclusion. In our view the strain is too great for the language to bear. The role of a court of supervisory jurisdiction examining the limits of reasonableness for the purpose of the 2003 Act is entirely different from the Commissioner's role under FOIA. The difference is so great that we cannot conceive that FOIA intended the Commissioner to consider whether an exercise of judgment by OFCOM under the 2003 Act was vitiated by unreasonableness. It follows that Mr Hooper's argument breaks down at its fifth stage because the exercise proposed is not an exercise envisaged by FOIA. The means that the fourth stage of the argument does not produce the result urged by Mr Hooper, for without the fifth stage the exception in s 393(2) must be examined by reference to the assessment of the position made by OFCOM. It follows that disclosure is in our view undoubtedly prohibited within the meaning of s 44 of FOIA by s 393(1) of the 2003 Act, for OFCOM has not reached a conclusion that disclosure would be appropriate for the purpose of facilitating the carrying out by it of any of its functions, and it is not the role of the Commissioner to tell OFCOM that under the 2003 Act it should have reached such a conclusion.

61. Thus on our analysis the statutory roles of the Commissioner and the tribunal in this regard are very different from the role of the tribunal under consideration in *Oxfam*. As noted earlier, under FOIA the tribunal's powers are restricted by reference to those of the Commissioner. The relevant functions of the Commissioner for present purposes are limited to a verification exercise. The Commissioner and the tribunal both have expert knowledge of matters concerned with freedom of information – among them, although not relevant in the present case, assessing the public interest in disclosure of particular information. Neither has expertise, however, in the functions entrusted to OFCOM by the 2003 Act. These are all significant distinctions from *Oxfam*, and accordingly nothing in our reasons should be taken as casting doubt on the decision reached in the circumstances of that case, or its potential relevance to other cases.

62. We have noted earlier that both the Commissioner and the tribunal made reference to the decision of the tribunal in *Hoyte*. The tribunal in that case examined whether or not the public authority (the Civil Aviation Authority) had acted unreasonably when it exercised its discretion not to disclose the disputed information. We take the view that *Hoyte* does not take matters any further forward. The point about jurisdiction to conduct a reasonableness review does not appear to have been identified as arising; at paragraph [53] onwards the tribunal examined the lawfulness of the public authority's exercise of discretion without any indication that its jurisdiction to do so was in dispute. Having had the benefit of full argument on the point, we take the view that as regards this particular issue the tribunal in *Hoyte* was wrong to embark upon a reasonableness review. In that case, as in this, the substantive outcome of the case is unaffected.

63. In short, the task of the Commissioner is to make a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. That may well require a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation. In the circumstances of the present case it did not extend to asking the questions which might be asked on the subject of reasonableness by a court of supervisory jurisdiction examining a challenge to OFCOM's failure to exercise powers available to it under the 2003 Act.

OFCOM's additional submissions

64. As noted earlier, our conclusion on the appeal means that OFCOM does not need to rely on what we have described as its "additional submissions," and we do not find it necessary to analyse these submissions in detail. The first such submission was that s 393(2) provides only that s 393(1) does not apply to any disclosure of information which "is made" for the purpose of facilitating OFCOM's carrying out of any of its statutory functions (or indeed other purposes). The use of the expression "any disclosure of information which *is made*" is said by Ms Carss-Frisk to be significant. The legislation does not provide that there is an exception to the prohibition in s 393(1) for any disclosure of information which *should be made* "for the purpose of facilitating the carrying out by OFCOM of any of their functions" but, as a matter of fact, is not made. We observe here that the phrase "any disclosure of information which is made" governs each separate head of s 393(2). It is by no means obvious that in context the distinction between a disclosure "which is made" and "which should be made" carries as much significance as OFCOM asserts.

65. Ms Carss-Frisk's second submission was that s 393(2) provides only that disclosure of information is not prohibited by s 393(1) if the disclosure is made for the purposes set out in s 393(2)(a) to (f). Accordingly, it is said, even if such disclosure is made to one person for those purposes, then s 393(1) still prohibits a subsequent further disclosure to another person of the same information (without consent) in any other circumstances. We did not understand Mr Hooper to dissent from that proposition.

66. It necessarily follows, according to Ms Carss-Frisk, that such information remained exempt under s 44. Ms Carss-Frisk articulated a number of possible scenarios in which disclosure might be permitted and/or made to a limited number of or class of persons, e.g. for the purposes of criminal proceedings and investigations within s 393(2)(d), but where disclosure to the world as a whole would still remain prohibited under s 393(1). So, she submitted, once a disclosure had been made for a specific purpose under s 393(2), the information would nonetheless remain protected by s 393(1) and accordingly exempt under s 44.

67. Mr Hooper submitted that this argument involved a *non sequitur* – the proposition that a prior limited disclosure does not mean that information may be freely disclosed thereafter does not of itself mean that OFCOM can successfully rely on s 44 where the only reasonable course open to it was to disclose the information in question. We can see the force of that objection, but it does depend on the underlying premise that the reasonableness of OFCOM's decision as to the carrying out of its functions is to be determined by the Commissioner.

68. In this context Ms Carss-Frisk placed reliance on the approach of the First-Tier Tribunal in *PricewaterhouseCoopers v Information Commissioner and HMRC* (EA/2009/0049). That case turned in part on the construction of s 18(1) of the Commissioners of Revenue and Customs Act 2005, which provides that HMRC officials must not disclose certain information, subject to exceptions where disclosure is permitted, as set out in s 18(2). The tribunal rejected the Information Commissioner's submission that the general prohibition on disclosure under s 18(1) fell away whenever one of the situations specified in s 18(2) occurred.

69. However, we do not think that *PricewaterhouseCoopers* takes us any further forward. In our view the structure and formulation of s 18 of the 2005 Act differs fundamentally from s 393 of the 2003 Act. Section 18(1) begins with a broadly-worded and absolute bar on disclosure by providing that "Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs." The scope of the expression "in connection with a function" of HMRC may well involve considerations which go beyond the much more limited "gateways" provided in the present appeal by s 393(1) and s 393(2) of the 2003 Act. Moreover, the 2003 Act addresses different criteria to those considered in the 2005 Act, namely the carrying on of the relevant business and the question of consent.

70. Ms Carss-Frisk also referred us to other statutory provisions such as s 237 of the Enterprise Act 2002 and s 348 of the Financial Services and Markets Act 2000. This was to demonstrate that, even if a disclosure were made for a specific purpose (as under s 393(2)), as a general principle the information would nonetheless remain exempt for the purposes of s 44 of FOIA. With respect to the careful way in which these arguments were deployed, we have some difficulty in seeking to develop some form of general rule of interpretation for the purposes of the present appeal which is derived from an assortment of different statutory formulations in diverse legislative contexts.

71. Thus we conclude that OFCOM's submissions specifically concerning the 2003 Act and similar statutes do not assist us to decide the present appeal.

Conclusion

72. We allow OFCOM's appeal, as the decision of the tribunal involves an error of law for the reasons set out above. Neither the Information Commissioner nor the tribunal has jurisdiction to determine whether OFCOM acted unreasonably in not disclosing the disputed

information pursuant to the 2003 Act. We accordingly set aside the tribunal's decision (s 12(2)(a) of the Tribunals, Courts and Enforcement Act 2008).

73. There is nothing to be gained by remitting the case for re-hearing by a fresh tribunal. We therefore re-make the decision in the terms set out above (s 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2008).

74. Although it has played no part in our reasoning, we add that judicial review proceedings may not need to be as cumbersome as Mr Hooper suggests. Tribunal Procedure Rules enable the President of the General Regulatory Chamber of the First-tier Tribunal, with the consent of the President of the Administrative Appeals Chamber of the Upper Tribunal, to transfer an information rights appeal to the Upper Tribunal. Under relevant statutory provisions, a court seised of judicial review proceedings may transfer those proceedings to the Upper Tribunal. Accordingly, if the judicial review court and the chamber presidents consider this appropriate, it will be possible for both the information rights appeal and the judicial review to be dealt with together in the Upper Tribunal.

Mr Justice Walker, Chamber President

Upper Tribunal Judge Marks QC

Upper Tribunal Judge Wikeley

Signed on the original
on 22 March 2011