RULING on an APPLICATION for PERMISSION to APPEAL

By

Trevor Marriott

In the Matter of EA//2010/0183

Marriott v Information Commissioner and Commissioner of Police for the Metropolis

1. The Appellant, Mr Marriott, seeks leave to Appeal to the Upper Tribunal (Administrative Appeals Chamber) from our decision dated 4 July 2011 ("the Decision"). His application was contained in two separate documents dated 20 and 26 July. One asserted an error on a point of law. The other raised a complaint of procedural unfairness and sought a re-hearing with a new Judge and two new members so that Mr Marriott should be able to present his appeal "in full without any restrictions or time limits being placed on me". We have treated the two documents as comprising a single application, which we will refer to simply as "the Application". Capitalised terms in this ruling adopt the meaning attributed to them in the Decision.

2. The detailed grounds for each part of Mr Marriott's application were contained in a separate document from the formal application document. However the first application included, within the body of the form, a complaint by Mr Marriott to the effect that he had asked to have a stenographer available at the hearing to prepare a transcript. This is not expressed to be part of the grounds of appeal and we are not able to say why his request was apparently not processed. The taking of a transcript is quite rare in this Tribunal. We do not think that a direction for a stenographer to attend would have been a proportionate use of resources for a case of this nature.

3. An application for permission to appeal is made under Rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). We are satisfied that the Application satisfies the procedural requirements of Rule 42 and that it was made in time.

4. Rule 43(1) provides that, on receiving an application for permission to appeal, we should first consider whether to review our decision. The procedure for such a review is set out in Rule 44 which reads, in relevant part:

"(1) The Tribunal may only undertake a review of a decision –
(a) pursuant to rule 43(1) (review on an application for permission to appeal); and
(b) if it is satisfied that there was an error of law in the decision."

5. On reading the Application we are satisfied that there was an error of law in the Decision. As Mr Marriott has pointed out, paragraph 21of the Decision proceeds on the basis that the exemption under FOIA section 30(2) will be engaged if either sub clause (a) or (b) applies, whereas in fact it is necessary for both to apply. We have erroneously read the subsection as having an "or" between (a) and (b), whereas it is the word "and" that appears there.

6. It is necessary, therefore, that we review the Decision. In particular we have reviewed paragraph 20, in which (as, again, Mr Marriott has pointed out) we said:

> "*...although we acknowledge that the opening phrase "it relates to" has a broad meaning we find it difficult to be sure that all of the disputed information can be said to relate to the obtaining of information from confidential sources."*

7. We have consulted on this and reminded ourselves that, although the information in the Ledgers and the Register was self evidently obtained or recorded for the purposes of functions related to a relevant type of investigation, it was difficult to be certain that every piece of redacted information was obtained from a confidential source. Believing, (erroneously as it transpires), that it was not essential to reach a conclusion on the confidential source issue, we did not pursue it further.

8. We have considered afresh the content of the Ledgers and the Register, based on both the copy extracts that were made available to us and our inspection of the originals. We remind ourselves that on a factual issue such as this we must be satisfied, on the balance of probabilities, that the asserted fact is true. The Ledgers and the Register contain information that is more than 120 years old. They record it, moreover, in rather cryptic language. We are nevertheless satisfied, on the balance of probabilities, that the greatest part of the disputed information in the Ledgers and the Register was derived from confidential sources. It would certainly involve a disproportionate amount of time and effort (contrary to the overriding objective set out in Rule 2 of the Rules) to perform a line by line analysis of the whole of the voluminous materials in an attempt to achieve greater certainty. And, given the nature of the material, there can be no guarantee that this would be successful.

9. In the light of those considerations we have decided, on review, that paragraphs 20 and 21 of the Decision should have read:

> *"20 Mr Marriott argued that the connection between an investigation, or investigations, carried out by the MPS, on the one hand, and the content of the Ledgers and the Register, on the other, was too remote for section 30(2) to apply. As regards section 30(2)(a) it is ~~C~~certainly, ~~it is~~ difficult to forge a link to a particular investigation but, as Mr Hopkins argued, the subsection uses the broad expression "for the purpose of its functions relating to …" so that we need only decide whether the records were created as part of the performance by the MPS of its duties to investigate crime. We consider that, reading subsection (2) with subsection (1), to which it cross refers, it is clear that they were. As regards section 30(2)(b) ~~Mr Hopkins also relied on subsection (2)(b). And although we acknowledge that the opening phrase "it relates to" has a broad meaning we find it~~it is difficult to be sure, so long after the disputed information was recorded, that all of ~~the disputed information~~it certainly ~~can be said to~~ related to the obtaining of information from confidential sources but we are satisfied, on a balance of probabilities, that the greatest part of it did .*
>
> *21 We are accordingly satisfied that ~~at least~~the requirements of both section 30(2)(a)and (b) are ~~is~~ satisfied. The exemption is therefore engaged and ~~therefore~~ we proceed to consider the public interest balance under section 2(2)(b)"*

10. The Decision, as recorded on the Tribunal's website, will be corrected accordingly.

11. In accordance with rule 43(2) of the Rules it is not now necessary for us to consider whether or not to give permission to appeal in relation to the point of law raised in the Application.

12. The second part of the Application does not raise a point of law and is not therefore susceptible to review. We accordingly proceed straight to consider whether to give permission to Appeal.

13. The essence of this part of the Application is that Judge Ryan interrupted Mr Marriott's cross examination to an unreasonable extent and forced him to complete it more quickly than was fair. In particular, it is said, Judge Ryan at one stage stated that if part of the cross examination was not completed by a certain time he would force Mr Marriott to end it, whether or not he had finished. Mr Marriott states that his case was heavily reliant on cross examination and, by inference, that it might have succeeded if he had been allowed to complete each part of it without Judge Ryan's interruptions or the imposition of a "guillotine".

14. The Tribunal had asked for a timetable for the hearing and this had been provided, in substantially agreed form, shortly before the hearing. All parties had contributed to its preparation, indicating the time they expected to take on the examination of each witness and the making of closing submissions. The timetable showed the hearing starting at 10 am on Day One and finishing at 1 pm on Day Three. In the event, as Mr Marriott says in his Application, the first morning was lost, due to a procedural application by another party. However, the hearing continued for the whole of the afternoon on Day Three, so that the time allotted for the substantive hearing was not curtailed. The timetable was reviewed from time to time during the hearing, in consultation between the panel and the parties, and adjustments made informally to accommodate changed circumstances. Some of the stages of the hearing took less time than had been anticipated but others overran. For example, it became clear by lunch on the final day that Mr Marriott would need more time to complete his closing submission. The timetable for the afternoon was therefore discussed and adjusted to allow him to do so.

15. Mr Marriott cross examined all four of the witnesses who had given a witness statement in support of the MPS case. The approximate timings were:

    a. Ms Arnold from about 3 50 pm until 4 40 pm on day 1 and from 10 am until about 10 25 am on day 2.

    b. Mr McKinney from just after 10 30 am on day 2 until about 1 pm.

    c. Mr Pearce from about 2 15 pm on day 2 until about 4 pm.

    d. Witness D from shortly after 10 am on day 3 until about 11 40 am.

16. The panel formed the view that Mr Marriott, although not a qualified lawyer (he is a retired police officer who now works as a solicitor's representative at police stations), presented his appeal with courtesy and skill. He carried out cross examination with considerable skill and coolness and subsequently presented a lucid and persuasive closing submission, drawing on an impressive recall of points that had arisen during earlier cross examination or argument. However, his cross examination did sometimes stray from the point, descend into

argument, and from time to time focus on matters of apparent personal interest which were of only peripheral interest to the main issue which the Tribunal was required to decide. That issue was whether the public interest in maintaining the exemption under FOIA section 30(2) (information held for the purposes of investigation) outweighed the public interest in disclosure. As will be apparent from paragraphs 43 and 44 of the Decision our determination, by a majority, was that it did. Put broadly Mr Marriott failed to persuade the majority that the public interest in having the Ledgers and the Register available to historians and others equalled or exceeded the public interest in maintaining the anonymity of police informants. It is therefore correct for Mr Marriott to say that his cross examination of witnesses who asserted the importance of maintaining that anonymity, even in respect of records dating back to the 1880s, was important. It was for this reason that, at his request and in the face of opposition by the MPS, we made an order (unusual outside criminal hearings) that each of the MPS witnesses should give evidence without the others in the room at the time.

17. Although all members of the panel felt that the hearing was conducted throughout in a courteous and workmanlike spirit by all concerned, some issues did arise during the course of Mr Marriott's cross examination. According to the panel's notes these were:

(a) During the afternoon of Day One Mr Marriott put some questions of a very general nature to Ms Arnold, who had been called to deal with certain specific aspects of the MPS's archiving practices. These seemed to be addressing the question of whether Ms Arnold was interested in and/or understood the public to be interested in, solving criminal mysteries dating back to the late 19th Century. Judge Ryan intervened after the second or third question along these lines to suggest that exploring Ms Arnold's personal interests did not appear to be leading towards evidence that was relevant to the public interest balance at stake in the Appeal.

(b) Later on the same afternoon Mr Marriott's cross examination of the same witness was focussing on contemporaneous internal memoranda suggesting that a particular senior officer at the time had suggested that a change of policy on document release to a 100 year rule would have been sensible. Judge Ryan asked Mr Marriott what was the relevance of Ms Arnold's view of that officer's proposal, as the document spoke for itself. This issue, whether the MPS had previously decided to change its policy, or had discussions as to whether it might do so, was evidently of considerable interest to Mr Marriott and he took pains to explore it by putting substantially the same questions to each witness. But, as the Decision reveals, it was not reflected in the factors that persuaded either the majority or the minority on the panel to reach the conclusions they did. The panel felt that Mr Marriott

pursued it in cross examination, to the detriment of other points which might have assisted his case more.

(c) The cross examination of the second witness, Mr McKinney, was interrupted on one occasion when Mr Marriott put to the witness a suggestion that two senior officers appeared to have endorsed a proposed change of policy to a 100 year rule and Judge Ryan said words to the effect of “Be fair; take the witness to the document [to which Mr Marriott was clearly referring]”.

(d) Later during the cross examination of the same witness, during the morning of Day Two, Judge Ryan suggested to Mr Marriott that he was not making the best use of the opportunity afforded by cross examination in pursuing his current line of questioning.

(e) On one occasion Judge Ryan suggested to Mr Marriott that he was arguing with the witness, rather than asking him questions, and that he would have time later to make his arguments in the course of his closing submissions.

(f) At the end of Day Two the panel considered the timetable for the following day. Mr Marriott indicated that he would need about an hour and a half to cross examine Witness D, who was due to attend in the morning. At one stage during the subsequent cross examination of that witness Judge Ryan said words to the effect of “you have 35 minutes left”. Mr Marriott voiced concern that he was being forced to curtail his cross examination and Judge Ryan suggesting that he was losing time unnecessarily, using words to the effect of “Once you have got the point you are after; stop”. On more than one occasion Mr Marriott continued to pursue what appeared to be a carefully planned line of questioning even though, in the panel’s view, he had got all he could reasonably expect on the point from the witness.

(g) In the course of this part of his cross examination Mr Marriott also suggested that the lengthy answers being given by the witness were slowing him down. Judge Ryan indicated that he was happy with the way the witness had answered so far but made a recommendation to Mr Marriott along the lines of “if you ask shorter questions, you may get shorter answers”.

(h) Towards the end of the cross examination of Witness D Mr Marriott commented that he was aware that he was getting to the end of his allotted time, but said that he was nearly finished. Judge Ryan made the point to him that, unlike earlier in his cross examination, his current line of questioning was highly relevant. He said words to the effect of “I am NOT guillotining you now – I think you’re on relevant material” and encouraged him to ignore the timetable and continue.

18. All members of the panel considered that such interruptions as Mr Marriott experienced during his cross examination were reasonable

and justified in the interests of helping him to present his case and disposing of the appeal in a businesslike and timely fashion. They also all felt that they had understood clearly the points he had pursued in cross examination (and which he subsequently covered comprehensively in his closing submissions).

19. It may be mentioned at this stage that the minority view in favour of Mr Marriott was in fact the view of Judge Ryan. The elements of the case that he found persuasive are set out in paragraphs 45 and 46 of the Decision.

20. In the circumstance the Tribunal does not believe that Mr Marriott has sustainable grounds for challenging the Tribunal's decision on the ground of unfairness and refuses permission to appeal.

21. Under rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended Mr Marriott has one month from the date of this Ruling being sent to him to lodge an Appeal with:

Upper Tribunal Office (Administrative Appeals Chamber)
5th Floor, Chichester Rents
81 Chancery Lane
London
WC2A 1DD

Chris Ryan

Tribunal Judge

31 August 2011