Neutral Citation Number: [2011] EWCA Civ 367

Case No: C1/2010/0283

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE CALVERT SMITH
CO/7463/09

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 May 2011

Before:

LORD JUSTICE WARD
LORD JUSTICE JACOB
and
LORD JUSTICE ETHERTON

- -

Between:

Dominic Kennedy	Appellant
- and -	
(1) The Information Commissioner	
(2) The Charity Commission	Respondents

- -
- -

Philip Coppel QC and Andrew Sharland (instructed by Bates, Wells and Braithwaite LLP) for the Appellant
The First Respondent was unrepresented and did not attend.
Jason Beer (instructed by Charity Commission Legal Services) for the 2nd Respondent

Hearing date: 18th November 2010

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Judgment

Lord Justice Ward:

Introduction

1. Mr George Galloway attracts attention. In the 1990s he mounted a campaign to overturn sanctions against Iraq imposed by the UN Security Council Resolution 661 following Iraq's invasion of Kuwait. In 1995 the United Nations relaxed that boycott through the Oil-for-Food Programme which permitted the export of Iraqi oil in return for food and medicine imported into that country. In 1998 Mr Galloway launched his "Mariam Appeal". Mariam Hamza was a four-year old girl living in Iraq and suffering form leukaemia. The appeal, surrounded by considerable publicity at the time, was for funds to bring Mariam to the United Kingdom to receive treatment here. The constitution of the Mariam Appeal recited its objects to be "to provide medicines, medical equipment and medical assistance for the people of Iraq; to highlight the causes and results of the cancer epidemic in Iraq and to arrange for the medical treatment of a number of Iraqi children outside Iraq". From its creation in 1998 until it ceased operation early in 2003 the total known income of the Mariam Appeal was very nearly £1.5 million.

2. In the spring of 2003, Mr Dominic Kennedy, the appellant, a journalist with The Times, started to investigate the sources of funds for the Mariam Appeal and the manner in which those funds were used. He discovered that the Mariam Appeal was not registered as a charity and he believed that its activities had spread beyond its stated objects. He reported that Mr Galloway had used funds from the Mariam Appeal to pay for his visits to Iraq and to other countries, to campaign against the economic sanctions then imposed upon Iraq and to denounce Israel. The publicity this engendered led the Charity Commission to open an inquiry in June 2003 into the Mariam Appeal under section 8 of the Charities Act 1993 to investigate how the monies raised for the Appeal had been spent. A second inquiry was begun in November 2003 and the results of both inquiries were published on 28th June 2004. The Statement of the Results of the Inquiry recorded that the inquiries had closed on 17th May 2004. Its conclusions were, in summary, as follows:

   (1) the objects of the Mariam Appeal were charitable and the Appeal should have been registered with the Charity Commission and placed on the Register of Charities;

   (2) apart from public donations, the major funders of the Appeal were the United Arab Emirates, a donor from Saudi Arabia and a Jordanian businessman, Mr Fawaz Zureikat;

   (3) two of the Appeal's original trustees received unauthorised benefits in the form of salary payments from the Appeal's funds;

   (4) some of the activities of the Appeal were political in nature, in particular a campaign to end the sanctions against Iraq but these political activities were capable of being viewed as ancillary to the purposes of the Appeal in as much as ending sanctions might have an impact on enabling better treatment for sick children;

   (5) it was not proportionate to pursue enquiries further; and

(6) while some of the payments made to Mr Galloway and the other trustees were made in breach of trust, the Charity Commission would not pursue the recovery of those sums because there was no bad faith.

3. Mr Kennedy reported his surprise at the superficiality of this statement which he considered had not really answered any of the key issues and had left the public in the dark without any details as to what had occurred, thereby eroding public confidence in the Charity Commission's supervision of organisations such as the Appeal that sought and received money for worthy causes.

4. Meanwhile, in October 2005, the Independent Inquiry Committee appointed by the UN published a report into the Oil-for-Food Programme and concluded that certain allocations of contracts in the Programme had involved the payment of "illegal surcharges" to the Iraqi government and that the Mariam Appeal had received donations linked to contracts made under the Oil-for-Food Programme. This again excited considerable press coverage.

5. Faced with that conclusion the Charity Commission decided to conduct its own inquiry as to whether funds under the Programme were donated to the Appeal, to establish the legal status of those funds and to examine the extent to which the trustees of the Appeal properly discharged their duties and responsibilities in receiving those funds. The institution of this third Inquiry aroused a further flurry of media interest.

6. As the Commission was later to report, it had conducted an extensive inquiry and had, among other things, "sourced and independently examined a large volume of sensitive evidence obtained from international sources"; "assessed and considered the information contained in the PSI and IIC Reports; "examined the various evidence and testimonies obtained by the PSI and IIC Reports together with the responses [thereto] made under oath and in writing by Mr Galloway … and other public statements made by some of the charity trustees"; and "exchanged information with various agencies and regulators".

7. The Statement of Results of the Inquiry was published on 8th June 2007. It recorded that the inquiry was closed in April 2007. In summary it found that Mr Zureikat had made substantial donations of nearly £300,000 from funds deriving from contracts made under the Oil-for-Food Programme, an improper source; that the trustees had not made sufficient enquiries as to the source of funding from Mr Zureikat and that Mr Galloway may have known of the connection between the Oil-for-Food Programme and the Mariam Appeal.

8. This prompted Mr Kennedy to make a request for information under section 1 of the Freedom of Information Act 2000 (the "FoIA") inviting the Charity Commission to release information concerning the inquiry into the Mariam Appeal. Section 1 provides:

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

Section 2 reads:

> "(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—
>
> …
>
> (c) section 32,
>
> …"

9. On 7th July 2007 the Charity Commission responded by a letter informing Mr Kennedy that it did hold information about the Inquiry but it was withholding the information on grounds, among others, that it was exempt from disclosure under

section 32 of the Act. The Commission subsequently reviewed but upheld its decision.

10. In those circumstances Mr Kennedy made complaint to the Information Commissioner by letter dated 1st November 2007. On 9th September 2008 the Information Commissioner issued his Decision Notice rejecting Mr Kennedy's complaint and stating that the Information Commissioner had concluded that all of the requested information was exempt by virtue of sections 32(2)(a) and 32(2)(b) of the Act.

11. Mr Kennedy appealed to the Information Tribunal which ruled on 14th June 2009 that although some of the material fell outside the section 32(2) exemptions, the bulk of the material fell within it. This information is held in 20 lever arch files containing about 10,000 pages.

12. Mr Kennedy appealed to the High Court but on 19th January 2010 Calvert-Smith J. dismissed his appeal. Permission to appeal was refused on paper by Sir Richard Buxton but on a renewed hearing of that application Rimer L.J. granted permission to appeal on one ground only, namely that the judge had wrongly interpreted section 32(2) as conferring:

> "(a) A blanket exemption from disclosure that carried on for thirty years after statutory inquiry has closed, regardless of content, regardless of the harmlessness of the disclosure, and regardless of the public interest in the disclosures; and
>
> (b) exemption in respect of documents held by a public authority prior to the commencement of a statutory inquiry."

13. Section 32 is to this effect:

> "(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
>
> (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
>
> (c) any document created by—
>
> (i) a court, or
>
> (ii) a member of the administrative staff of a court,
>
> for the purposes of proceedings in a particular cause or matter.
>
> (2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section.
>
> (4) In this section—
>
> (a) "court" includes any tribunal or body exercising the judicial power of the State,
>
> (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
>
> (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
>
> (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies."

14. The narrow issue which arises in this appeal is whether this exemption provided by section 32 subsists only for the duration of the inquiry or whether it continues after the inquiry has concluded. The problem can be that shortly stated but I have found it far from easy to resolve and I confess that my views changed during the argument and while writing this judgment. Between them counsel, who have now argued this case three times, have with indefatigable energy submitted 76 pages of closely reasoned written argument analysing in detail every nuance, and every shift in the nuances, of their respective contentions. This has been very helpful and I intend no denigration of their effort if I confine myself to what I regard as the key points on the construction of these seven disputed lines of legislation.

Does section 32(2) have a clear grammatical meaning?

15. It seems to be common ground that whether any information is held by a public authority (such as the Charity Commission), depends on what, if any, information is held at the time the request for it is received. Here the Charity Commission acknowledged holding the 20 lever arch files of information. So the question is this: is the information being held only by virtue of being contained in either (a) any document placed in the custody of a person conducting an inquiry or arbitration [whom I shall call the "PCI"], for the purpose of the inquiry or arbitration or (b) any document created by the PCI, for the purposes of the inquiry or arbitration?

16. The first point of grammatical significance is the place of the word "only" after "held". This means that the information is exempt if the only reason it is held is that it is held "by virtue of" the circumstances prescribed by section 32, the width of those circumstances being in dispute. If it is being held for some other reason or purpose

other than the specified reason or purpose it will not be exempt. That seems to be common ground.

17. The troublesome question is whether the phrase "for the purposes of the inquiry or arbitration" relates to and qualifies (i) the reason for placing the document in the custody of the PCI or (ii) the reason why the document is being held by the public authority.

18. The tribunal held that:

> "87. … the adverbial phrase "for the purposes of the inquiry or arbitration" qualifies the word "placed" in s. 32(2)(a) and not the word "held" in the preceding general words to s. 32(2). Subsequent events cannot alter the purpose for which a document was placed in somebody's custody. The words "held only by virtue of being contained in" simply provides a causal connection between the presence of the document in the public authority's records and the placement with the person conducting the inquiry. However we find that it does not limit the exemption. If that information was also received independently for some other source it may not be exempt."

19. If one reads the words of section 32(2) without a break or pause and asks is the information held only by virtue of being contained in a document placed in the custody of the PCI for the purposes of the inquiry, then the answer depends on (1) is the information contained in a document placed with the PCI and (2) when it was placed with him, was it placed there for the purposes of the inquiry? Read in that way then, if the answers to those questions are in the affirmative, the exemption continues, as the Charity Commission contend, even after the inquiry has concluded. If, however, one reads the words with the pause suggested by the comma between "inquiry or arbitration" and "for the purposes of the inquiry or arbitration", then the break in the flow of the language leads to a different construction. Then the relevant questions are (1), as before, is the information contained in a document placed with the PCI; but now question (2) changes to: is the document held by the public authority for the purposes of the inquiry. The answer then favours the appellant's construction because the authority would no longer hold the information for the purpose of an enquiry which had concluded but would be holding the documents for archival reasons.

20. Punctuation may be used as a guide to interpretation but the presence of comma may often be a slender thread on which to hang the answer to a disputed point of construction. However, here one cannot completely ignore the fact that the comma is present in section 32(2) but absent in section 32(1) and that difference cannot be assumed to be accidental. If one starts with section 32(1) the information is contained in a document filed with the court and the document was filed with the court for the purpose of the proceedings in the particular cause or matter. Thus it would remain exempt. The comma in section 32(2) links "the purposes of the inquiry or arbitration" to the reason for holding the information rather than the reason for placing the information in the custody of the PCI and the exemption would cease when the inquiry has concluded its task.

21. In my judgment the grammatical construction is at least ambiguous if not in favour of the appellant. The grammar certainly does not provide a clear cut answer. So I must look to pointers either way before arriving at a firm conclusion.

A purposive construction

22. Mr Coppel strongly submits that the teleological approach favours the appellant. He submits that the stated objective of the FoIA was to bring about more open government. This is apparent from the White Paper, *Your Right to Know: the Government's Proposals for a Freedom of Information Act* Cm 3818, December 1997, which stated:

> "The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. The fundamental and vital change in the relationship between government and governed is at the heart of this white paper."

Similarly, *Freedom of Information, Consultation on Draft Legislation presented to Parliament by the Secretary of State for the Home Department* Cm 4355 May 1999 stated:

> "2. Freedom of Information is an essential component of the Government's programme to modernise British politics. This programme of constitutional reform aims to involve people more closely in the decisions which affect their lives. Giving people greater access to information is essential to that aim. The effect of Freedom of Information legislation will be that, for the first time, everyone will have the right of access to information held by bodies across the public sector. This will radically transform the relationship between government and citizen."

23. Attractive as that argument is, it is undermined by Lord Hope's opinion in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 [2008] 1 WLR 1550 at [4]:

> "There is much force in Lord Marnoch's observation in the Inner House 2007 SC 231, para 32 that, as the whole purpose of 2002 Act is the release of information, it should be construed in as liberal a manner as possible. But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with 1988 Act [the Data Protection Act]. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework."

24. Closely allied with this submission is the rule that ordinarily exemptions should be construed strictly. Although this case has no European element, the view of the Court of Justice is instructive. *Turco v Council of the European Union* [2004] ECR II-4061 was a case regarding public access to European Parliament, Council and Commission documents unless disclosure was precluded in the public interest. The court held:

> "60. It is true that, according to settled case-law, the exceptions to access to documents fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions."

It is an approach, again favouring the appellant, that I shall have to bear in mind.

The arguments over sections 32(1) and 32(2)

25. I have already adverted to the difference in the punctuation of the two sub-sections but the language itself is to all intents and purposes identical. It should, therefore, be given the same meaning. The natural meaning of section 32(1) is that the conditions set for the exemption to apply are that (1) the information is contained in a document filed with the court or served upon or by public authority or created by the court in each case for the purpose of the proceedings in the particular cause or matter and (2) that the information was held by the public authority at the time of the request for its disclosure only by virtue of being contained in such a document. Since Mr Coppel seemed to have accepted before the tribunal that the protection given to court documents continued after the proceedings had concluded, he would be in difficulties if the same meaning attached to the two subsections. He sought to evade this difficulty by arguing that the subsections are crucially different in that courts and tribunals are enduring bodies whereas an inquiry ceases to exist once its business has concluded. He submits that an inquiry has a limited life. Whilst it is in existence it has powers and it has purposes. Once it has concluded, it is no longer in being; it cannot resurrect itself; its membership cannot be reconstituted; the members cannot re-clothe themselves with the powers they had; they cannot decide to re-assemble to amend their shortcomings or omissions. Their powers are spent and their purposes are served. The inquiry is *functus officio.* Thus subsection 32(2) cannot bear the same meaning as section 32(1).

26. The tribunal rejected this submission holding that:

> "91. The distinction Mr Coppel makes between courts under s. 32(1) and authorities under s. 32(2) focuses unduly on the nature of the institution rather than the information and the reason it came into the authority's possession in the first place. In our view an inquiry has the same need to regulate publication of material which has been produced to it or created by it as a court. If a person is required to provide a document to a statutory inquiry, why should either his/her right to continue in confidentiality after its conclusion be governed by different exemptions from that which would apply if production had been to a court?"

Mr Coppel does not really have an answer to that hypothetical question.

27. As an alternative argument advanced in this Court, Mr Coppel submits that if and insofar as section 32(1) and section 32(2) are to be construed in the same way, then both courts and inquiries lose protection when the proceedings are concluded or the inquiry closed. There is a good policy argument for this, namely the objective of section 32 being to prevent interference with the process of an inquiry, an arbitration or a court proceeding whilst each is on foot. The objective is not to render secret for thirty years any information received or generated by the inquiry, arbitration or court. He draws comfort from the analogous case of *Kingdom of Sweden v ASBL* [2010] EUECJ C-514/07 where the Grand Chamber held:

> "130. … the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court.
>
> 131. In the latter case, there are no longer grounds for presuming that disclosure of the proceedings would undermine the judicial actives of the Court since those activities come to an end with the closure of the proceedings."

28. He submits, moreover, that no policy can explain why section 32(2) should be read so as to produce a blanket exemption for all documents, regardless of content, regardless of harmlessness of disclosure and regardless of the public interest in that document and so as to keep that shroud in place for thirty years after the inquiry ceases to be.

29. It seems to me that the policy justification for this absolute exemption lies in the acknowledgement by the legislature (1) that decisions over court documents should be taken by the court and (2) that courts and inquiries should be treated in the same way. I find it difficult to see why the exemption for court documents should subsist whilst the proceedings are on foot but die as soon as the proceedings have concluded. I find it surprising that court records, which may for example have attracted public interest immunity, but which are also records held by a public authority, should suddenly become liable to disclosure, subject, of course, to the other exemptions in Part II of FoIA narrowing the obligation to disclose them. The court has power to control disclosure of its documents both whilst the proceedings are ongoing and afterwards by virtue of CPR 5.4C and 5.4D. The FoIA does not circumvent the power of the courts to determine their own disclosure policy and by the court's own rules to decide if and when court records are to be disclosed. The Chairman of the Information Tribunal recommended to the Charity Commission that it considers introducing rules in relation to the documents it holds in statutory inquiries in the same way as courts so that interested parties are aware on what basis they may be disclosed despite exemption under section 32(2) and Calvert-Smith repeated that encouragement. So do I: to have consistency of approach across the board is a virtue.

30. Mr Coppel is in the embarrassing position of having thrust back at him that which he wrote in his treatise *Information Rights* 3rd edition:

> "20-035 The thinking behind the exemption is that the disclosure of information contained in court documents (which may include confidential information and which may have special restrictions upon its re-use) should be regulated by the procedure applying in the court or tribunal in question rather than by the general freedom of information regime."

It would be surprising if the rules of court could be subverted by a non-party seeking the very same documents from any public authority that happens to hold them after the proceedings have concluded. What Parliament intended to exclude under section 32 was a whole class of documents irrespective of their content and that applies as much to section 32(2) as it does to section 32(1).

The impact of section 63(1)

31. Part VI of the FoIA deals with historical records which are defined in section 62(1) in this way:

> "For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created."

Section 63 then deals with "removal of exemptions: historical records generally". It provides:

> "63(1) Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a),42 or 43."

32. The other information removed from exemption by section 63(1) covers section 28 (relations within the United Kingdom), section 30(1) (certain local authority investigations), section 33 (audit functions), section 35 (formulation of Government policy), section 36 (information prejudicial to the effective conduct of public affairs), section 37(1)(a) (communication with Her Majesty and the Royal family), section 42 (legal professional privilege), and section 43 (commercial interest).

33. The effect of section 63(1) is, therefore, that after a period of thirty years has elapsed, material to which section 32 would otherwise apply ceases to enjoy the exemption provided by that section. If, however, as the appellant contends, section 32 ceases to apply immediately following the conclusion of an inquiry, then the consequences are that (1) section 63(1) would be restricted in application only to those court proceedings, inquiries or arbitration that had been ongoing for over thirty years and/or (2) section 63(1) was enacted to cover those cases where the court, the inquiry or arbitration was considering a document which was itself thirty years old or more. Both of these possibilities are remote and the reality is, as the tribunal held, that section 63(1) would be otiose if the appellant's construction of section 32 was correct but it would, on the other hand, have a purpose to serve if the documents remained exempt until the exemption ceased to apply by virtue of section 63(1).

The impact of section 18(3) of the Inquiries Act 2005

34. This section provides as follows:

> "18(3) Section 32(2) of the Freedom of Information Act 2000 (c. 36) (certain inquiry records etc exempt from obligations under that Act) does not apply in relation to information contained in documents that, in pursuance of rules under section 41(1)(b) below, have been passed to and are held by a public authority."

Section 41 provides for rules to be made as follows:

> "41 (1)The appropriate authority may make rules dealing with—
>
> …
>
> (b) the return or keeping, after the end of an inquiry, of documents given to or created by the inquiry; …"

35. The rules are the Inquiry Rules 2006 which so far as is relevant provides for "Records management" as follows:

> "18(1) Subject to the legal rights of any person—
>
> (a) …
>
> (b) at the end of the inquiry, the chairman must transfer custody of the inquiry record to a department of Her Majesty's Government in the United Kingdom or to the appropriate public record office, as the Minister directs.
>
> (2) In this rule, the "appropriate public records office" means the National Archives, the Keeper of the Records of Scotland or the Public Record Office of Northern Ireland."

36. Mr Beer submits that the effect of these provisions is that by section 18(3) Parliament made specific provision for the disapplication of section 32 of FoIA where an inquiry constituted under the Inquiries Act 2005 comes to an end and information contained in documents has been passed to a public authority in accordance with section 44(1)(b) of the 2005 Act and Rule 18 of the 2006 Rules. He submits that those provisions would have been entirely unnecessary if the construction that the appellant contends for was correct and the documents became free of the exemption provided by section 32(2) at the end of the inquiry. He submits that if the appellant is correct then these provisions of the 2005 Act are otiose. The tribunal said this:

> "89. We consider Mr Beer's submissions on ss. 18(3) and 41(1) of the 2005 Act … are formidable. Whilst the view of Parliament or the draughtsman as to the interpretation of an earlier provision as demonstrated by the enactment of a later provision is not definitive we consider it gives substantial weight to the interpretation we are adopting in this case. In our

> view Mr Coppel's counter-arguments do not adequately overcome this hurdle."

37. Mr Coppel submits that reliance upon sections 18(3) and 41 of the Inquiries Act 2005 was misplaced. That Act created a code for the administration of inquires that are constituted under it as provided for by section 1 of the Act:

> "1(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that—
>
> (a) particular events have caused, or are capable of causing, public concern, or
>
> (b) there is public concern that particular events may have occurred."

In other words, the Inquiries Act is intended, as the explanatory notes to it assert, "to provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern."

38. Mr Coppel submits that the only real relevance of the Inquiries Act 2005 is to confirm that the Charity Commission's interpretation of section 32(2) is devoid of any policy basis. If inquiries under the 2005 Act afford protection for the information placed before the inquiry only for so long as the inquiry is deliberating on the matter of public concern, why should not the same position prevail for other inquiries? I have some sympathy with that view. It does seem odd that different rules operate for different inquires especially when, as Mr Coppel points out, an inquiry held by persons appointed otherwise than under the Inquiries Act 2005 can be converted into an inquiry under the 2005 Act: section 15. But odd though this different treatment may be, the fact is that no wholesale amendment of the FoIA was made even though the draughtsman of the 2005 Act clearly had section 32(2) in mind.

39. Mr Coppel seeks to sweep the 2005 Act aside by asserting that the FoIA and the Inquiries Act 2005 are not *in pari materia* and consequently it is unsound to interpret the meaning of words used in an Act passed in 2000 by reference to a provision in another Act passed five years later dealing with a totally different subject matter. The FoIA is concerned with the conferral of a generalised right of access to information held by public authorities; the Inquiries Act 2005 provides a standing code for the conduct of inquiries constituted under it. In those circumstances the general rule is that words of a later statute do not colour the meaning to be given to an earlier statute. The limits on the proposition that recourse may be had to subsequent legislation as an aid to the construction of the earlier legislation were confirmed by Oliver L.J. in *Finch v I.R.C.* [1985] 1 Ch. 1, 15:

> "It is, as it seems to me, clear from this that it is not enough to show simply that there are two arguable constructions [of the earlier legislation]. One has to go further and show that they are both equally tenable, and that there are no indications in the Act under construction favouring one rather than the other."

40. Although Mr Beer would no doubt contend that section 32(2) is not so ambiguous in the sense referred to in *Finch*, and that section 63(1) gives the clue to the proper construction, his argument in this Court is that consideration of whether the FoIA and the 2005 Act are *in pari materia* is not necessary because section 18(3) of the 2005 Act is an indirect express amendment. If one conflates the two texts then the combined meaning is clear. Section 18(3) of the 2005 Act may not expressly amend the text of section 32(2) of FoIA, but it does amend its effect in relation to inquiries to which section 32(2) of FoIA apply. He submits that the reason for passing section 18(3) must lie in some perceived defect in the existing law and the need to eradicate that mischief. Here but for section 18(3) of the 2005 Act the absolute exemption from disclosure provided by section 32(2) of FoIA would continue to apply to information contained even in an inquiry conducted under the 2005 Act.

41. Mr Coppel submits that when the legislature wanted the Inquiries Act 2005 to make amendments, then amendments were expressly made, for example section 46 expressly amended section 14 of the Financial Services and Markets Act 2000 in identified respects and he refers to sections 47, 48 and Schedule 2 for other similar express amendments.

42. I prefer Mr Beer's submissions. Section 18(3) of the 2005 Act would not be necessary if the exemption provided by section 36(2) of FoIA ceased to operate at the end of the inquiry.

My conclusion on the ordinary meaning of section 32(2)

43. I have not found the case altogether easy. Looking at section 32(2) of FoIA I cannot extract a clear and certain meaning. That subsection is, in my judgment, at least susceptible to the meaning being given to it by the appellant. A purposive construction also favours the appellant. But one does not construe a disputed provision in isolation. One must look at it in its context and in its place in the legislation as a whole. In context the language is identical to all intents and purposes to the language in section 32(1). Section 32(1) does more naturally read as if the words "for the purposes of the inquiry" qualify the reason why the document was placed in the custody of the person conducting the inquiry rather than the reason why it is being held by the public authority. In the sense that different minds may come to different conclusions as to the meaning, there is, therefore, an ambiguity. That ambiguity would be resolved by section 63(1) of FoIA. That provision would be wholly otiose if the appellant's construction were correct. The controversy is put to rest when reference is made to section 18(3) of the Inquiries Act 2005 which cannot be construed otherwise than as taking effect as an amendment of section 32(2) of FoIA. There would have been no need to pass it otherwise. The need to construe the exemptions restrictively cannot displace the true meaning. Thus, for the reasons largely given by Mr Beer whose submissions I prefer on these points of the conventional approach to construction, I would have dismissed the appeal.

44. Having seen this conclusion when our judgments were handed down in draft, Mr Coppel perfectly properly asked to revisit the judgments in order to deal with his submission that the court must pursuant to section 3 of the Human Rights Act 1998 read and give effect to section 32(2) in a way that is compatible with Convention rights, including, in particular, the right to freedom of expression protected by Article 10 of the ECHR. I had dismissed that argument without even mentioning it because it

had not been raised before the tribunal or the High Court and, as Mr Beer so strongly pointed out, the appellant had not addressed any evidence in relation to the factual situation that it would be necessary to demonstrate to support his arguments in the circumstances of this case. That in the normal course of events would be fatal to any new argument being advanced for the first time in the Court of Appeal. But Mr Coppel is respectfully insistent that I deal more fully with his argument, not least because the Court, as a public authority, is bound by section 6 of the Human Rights Act 1998 to act compatibly with a Convention right.

45. I am, therefore, prepared to reconsider his case and I have had regard to the way the case was presented in argument and to the detailed skeleton arguments that were placed before us. I now find myself in the embarrassing position that, having given this matter further careful thought over many days, I feel impelled to accede to the argument. My reasons for doing so are these:

(1) Although the point was not argued before the appeal tribunal there is an understandable reason for that omission. Both judgments of the Strasbourg Court upon which Mr Coppel relies were only delivered at or about the time of the hearing before the tribunal and were not reported until later. These cases are *Tarsasag a Szabadsagjogokert v Hungary* [2009] ECHR 618 decided on 24th March or 14th April 2009 and apparently finalised only on 14th July 2009 and *Kenedi v Hungary* [2009] ECHR 78, (2009) BHRC 335 which was dated 26th May 2009. Although the arguments is late, it is not so late that we should ignore these very recent and potentially important new developments of Strasbourg jurisprudence.

(2) The present case is moreover an ideal one for the Article 10 point to be tested. Important and difficult questions are raised in the counter-argument of Mr Beer. If the appellant has to rely on his status as a journalist to bring Article 10 into play, should the Court be reading section 32(2) down when it would not be obliged to do so were the applicant an ordinary citizen not able as the public watchdog to invoke Article 10? Mr Beer submits that the FoIA is "applicant and motive blind". Another important question is whether the Charity Commission hold an information monopoly which may be the necessary pre-condition to establish before Article 10 can be engaged: see *Tarsasag*. If Article 10 is engaged and interfered with is such interference justified and proportionate? All these matters may require further evidence.

(3) It is unlikely, at least so far as concerns the Charity Commission, that a better case for analysing the Convention point will arise again in the near future. If, as we are told, the Charity Commission are considering changing their rules to reflect more accurately procedures adopted by the courts for disclosure of information, then it would be helpful they did so with the implications of the Human Rights Act known in advance.

(4) The matters which the appellant seeks to investigate are obviously matters of general public interest and his investigation may be totally thwarted if his case fails as it would if we refused to countenance the Human Rights argument.

(5) If section 3 of the Human Rights Act requires the reading down of section 32(2) then my hesitations about the proper construction to place upon that subsection, and the more firmly expressed disenchantment of Jacob L.J., can be assuaged.

46. Consequently, after this further anxious consideration and not withstanding my embarrassment on this volte face, I would not dismiss the appeal but would, in the exercise of the power provided by CPR 52.10(2)(b), refer the Human Rights issue to the tribunal for its determination having taken such evidence and heard such further argument as it considers may be appropriate. The appeal will be stayed in the meantime and will be restored for further hearing in the light of the tribunal's report. I would take that course rather than allow the appeal and remit the matter back in the usual way because if there is to be further argument about the difficult questions arising under Article 10, then it is preferable the matter comes straight back to the Court of Appeal rather than incur the further cost of an intermediate appeal to the High Court.

Lord Justice Jacob:

47. I agree. But for the question of whether it is necessary to read s.32(2) down so as to comply with the ECHR I would with reluctance dismiss the appeal. My reluctance stems from the absurdity which may arise from the conclusion. Mr Coppel put that at the forefront of his argument. He pointed out that the construction favoured by the Judge means that all information deployed in a statutory inquiry (other than one under the Inquiries Act 2005) allows all information deployed in the inquiry to be kept secret for 30 years after the end of the inquiry, regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure. The blanket ban would apply to each and every document deployed in the inquiry, even if those who deployed it were entirely content that it should be published. It means that the operation of the inquiry will not be open or fully open to public scrutiny for no apparent reason.

48. My reason for being forced to this conclusion is the identity of s.32(1) and s.32(2). Clearly and obviously Parliament was treating documents deployed in legal proceedings before a court in exactly the same way as those deployed in an inquiry. It simply overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not. That may well have been a blunder which needs looking at.

49. Subject to the ECHR point I see no escape from that. I reach my conclusion solely on the basis of s.32. The supporting arguments, based on s.63(1) of the FoIA and s.18(3) of the Inquiries Act 2005 do not impress me.

50. The former is an argument from redundancy which, as Lord Hoffmann observed in *Beaufort Developments v Gilbert Ash* [1999] 1 AC 266 at 273-4, is "seldom an entirely secure one." It alone would not be enough to persuade me that the absurdity of an absolute ban was intended.

51. The latter involves the illegitimate exercise of construing an Act of Parliament by reference to a later Act. It may well be that the later draftsman construed the earlier Act in a particular way and drafted his Act on that basis. But the Court is in no way bound by the way the draftsman of a later Act construed an earlier Act. There is not even a presumption that he did so correctly.

Lord Justice Etherton:

52. I agree with the conclusions and proposed directions of Ward L.J.