



IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

EA/2005/0023

BETWEEN: **STEVEN SUGAR** **Appellant**

and

THE INFORMATION COMMISSIONER **Respondent**

and

THE BRITISH BROADCASTING CORPORATION **Additional Party**

RULING

Summary disposal of appeals

1. On viewing the notice of appeal and the Information Commissioner's (IC) reply in this appeal the Tribunal were of the preliminary opinion that the appeal was of such a nature that it could properly be determined under Rule 10 of The Information Tribunal (Enforcement Appeals) Rules 2005 as amended (the Rules), by summary disposal of the appeal. As a result the Tribunal carried out the processes required by Rule 10 and invited the appellant, Mr Sugar, to, inter alia, make written representations, which he did by way of letter dated 20 February 2006, against the proposal to determine the appeal by way of summary dismissal. The Tribunal has now sat to consider the matter.

The Tribunal's jurisdiction

2. Under s57(1) the Freedom of Information Act 2000 (FOIA) where a decision notice has been served by the Information Commissioner (IC), the complainant may appeal to the Information Tribunal.

3. Under s50(1) any person may apply to the IC for a decision whether a request for information made by the complainant to a public authority has been dealt with in accordance with Part I of FOIA.

4. The IC usually serves a decision notice in a particular format. Under s84 a “decision notice” *has the meaning given by section 50*. There is no provision for such a format in FOIA, but it has become the practice of the IC to issue a notice headed Decision Notice and take a particular format. No such format was used in this complaint.

5. Mr Sugar the complainant in this appeal requested a copy of the Balen Report from the

BBC. This was refused on the grounds that the BBC, although a designated public authority included in Part VI to Schedule I FOIA, was only subject to the Act *in respect*

of information held for purposes other than those of journalism, art and literature. Public

authorities to which FOIA has a limited application are provided for under s7(1) FOIA.

The language of this sub-section appears to be inconsistent with the way the BBC derogation is specified in Part VI. The sub-section envisages a derogation being expressed in terms that are positive and specific (“information of a specified description”), whereas the derogation is expressed in terms that are negative and general

(“information held for purposes other than ...”). However we find that information held

by the BBC for the purposes of journalism, art and literature are the ‘specified description’ subject to the derogation and FOIA does not apply to these purposes as far as

the BBC is concerned. There is no definition in the Act as to what these purposes mean.

6. On 24 October 2005 the IC’s senior complaints resolution manager, Maurice Asielue

(Mr Asielue), wrote to the complainant providing an “interim (and likely) decision on the

application of the derogation to your request.” Later he says that “my provisional view”

is that the derogation applies and that the BBC was not obliged to provide the information. He gave the complainant 30 days to comment on his provisional conclusions

after which he would make his “final determination”. On 2 December Mr Asielue wrote

to Mr Sugar (the Letter) with the “Commissioner’s final decision” which confirmed his

provisional view. It also confirmed “that this file will be closed because this office is unable to take this complaint further” and informing the complainant of his “right to request a judicial review of our decision.” In other words he had taken the view that this

matter was now outside the jurisdiction of the appeal mechanism established by FOIA.

7. Mr Sugar then appealed to this Tribunal on a number of grounds including those relating to the derogation referred to above. In the IC’s reply he argued that the

Information Tribunal had no jurisdiction to hear the appeal as he never issued a decision notice under s50 and the only route open to challenge the IC's findings was by way of judicial review, in effect repeating the position taken by Mr Asielue.

8. What do the IC's actions amount to in this complaint? Under s50(2), following receipt of an application for a decision on whether a request for information has been dealt with in accordance with the requirements of Part 1 of the Act, the IC is obliged to make a decision unless four specified circumstances apply, which the IC has not applied in this case. Then under s50(3) he shall either-

(a) *notify the complainant that he has not made a decision under this section as a result of the application and of his grounds for not doing so, or*

(b) *serve notice of his decision on the complainant and the public authority.*

Taking these sub-sections together, it seems clear that the "grounds" referred to in s50(3)

(a) must be one or more of the four circumstances set out in s50(2). In other words, if those circumstances do not apply, the IC is obliged to make a decision on an application made under s50(1).

9. Even if we are wrong on this point if the IC's actions amounted to serving a decision notice, even if not in his usual format, then the Tribunal does have jurisdiction. We find this is the position even if the IC failed to comply properly with s50(3)(b) by not serving the notice on the BBC or under s50(5) failing to provide particulars of the right to appeal to this Tribunal to Mr Sugar conferred by s57.

10. The IC found that the Balen Report was held by the BBC for a derogated purpose. Mr

Sugar disagrees with this finding, hence his appeal. The Tribunal finds that the IC made a decision under s50(3)(b), which means it has jurisdiction to hear this appeal. It has reached this finding for any one of the following reasons :

i. The IC's Letter states as a finding that the BBC "*has correctly applied Part VI of Schedule 1 to the Act*". , a conclusion reached after reading the Balen Report itself. The relevant references to Schedule I are in Part I of the Act. Also the other wording used in the Letter, referred to above, leads us to a finding that this was a decision following a s50 application;

ii. The IC has not concluded that any of the circumstances specified in s50(2) apply in this case. Therefore the option provided in s50(3)(a) of not making a decision is not available;

iii. S.7(1) excludes from Parts I to V of the Act information covered by the derogation. This could be interpreted as giving rise to an illogical position in which if the IC decides that information is not within the derogation, he is taking a decision under s.50(3)(b), and his decision can be appealed to the Tribunal; but if he decides that information is within the derogation, then no right of appeal exists, because Parts IV and V of the Act are then disapplied by

s.7(1). It cannot be right that a discretionary decision by the IC is susceptible to appeal if determined in one way, but not if determined in the other. If a decision that information is not covered by the derogation is a decision under s.50(3)(b), then a decision that the same information is covered by the derogation must also be a decision under s.50(3)(b).

11. This Tribunal finds that the IC's Letter has affect as a decision notice, which was properly served on Mr Sugar. The fact the notice may not have been fully compliant with

s50(3)(b) or S50(5) makes no difference. Therefore the Tribunal finds it does have jurisdiction to hear the appeal and under Rule 10(7) ceases to propose to determine the

appeal under Rule 10(1) and therefore the appeal proceeds.

How the appeal will proceed

12. The Tribunal will hear the matter of whether the Balen Report falls within the BBC's

derogation under s7(1) FOIA as a preliminary issue, which will be set down for a hearing

after directions have been given to enable the parties to prepare for the preliminary hearing.

Tribunal Orders

13. In order for the preliminary matter to be considered at a hearing the Tribunal orders:

13.1 the BBC be joined as a party to the appeal under rule 7(2);

13.2 the BBC provide a copy of the Balen Report to the Tribunal in confidence, which means the Tribunal will take measures to ensure that the said Report will only be seen by members of the Tribunal sitting on any hearing relating to this appeal and members of its secretariat serving the Tribunal.