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

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1. Mr Sugar seeks under rule 14(8) of the Information Tribunal (Enforcement Appeals) Rules 2005 (the Rules) the variation of the directions given by the Tribunal on 21 March 2006 (the Directions) requiring the British Broadcasting Corporation (BBC) to provide certain documents to the Tribunal but not to him (or to him in a redacted format). In particular, he objects to not being able to see a copy of the Balen report, which is the subject of his information request. In considering this application the Tribunal has had the benefit of written submissions from all the parties.

2. He makes two main arguments as to why these documents should be disclosed to him. Firstly that:

> **The Tribunal's rules do not make provision for exempt or other information to be kept from any of the parties. Mr Sugar contrasts the position with that in rule 23, which allows the Tribunal to exclude parties from the hearing.**

3. Rule 14 addresses the issue of directions made by the Tribunal, and states that (subject to an exemption protecting material that could not be compelled to be disclosed in legal proceedings and a requirement that information disclosed be used only for the purposes of the proceedings):

"[T]*he Tribunal may at any time of its own motion or on the application of any party give such directions as it thinks proper to enable the parties to prepare for the hearing or assist the Tribunal to determine the issues."*

Rule 14(2) sets out some examples of what the directions *"may in particular"* provide, but is not a complete list of the directions that the Tribunal can make. It states that the Tribunal may:

"(b) provide for -

(i) the exchange between the parties of lists of documents held by them which are relevant to the appeal;

(ii) the inspection by the parties of the documents so listed

...

"(d) require any party to send to the Tribunal and to any other party

(i) statements of facts and statements of the evidence which will be adduced, including such statements provided in modified or edited form."

Further, rule 24(4) (*"Conduct of proceedings at hearings"*) states that

"Except as provided for by these Rules, the Tribunal shall conduct the proceedings in such manner as it considers appropriate in the circumstances for discharging its functions and shall so far as appears to it appropriate seek to avoid formality in its proceedings."

4. The BBC points to rule 14(2)(d)(i) as permitting the making of an order for the redaction of the documents. Mr Sugar argues that this rule applies only to statements of fact and evidence and not to documents, which are governed by rule 14(2)(b). He says that there is nothing in that rule permitting an order to be made for redaction or other form of restriction.

5. However, nor is there anything in rule 14, or in the Rules generally, to suggest that no order is possible. Rule 14(1) is not restricted by the examples given in rule 14(2). In addition Rule 24(4) gives the Tribunal the power to make directions additional to those anticipated in the rules, and there does not, therefore, appear to be any restriction on the Tribunal's ability to make the order that it has made concerning the provision of the various documents to Mr Sugar in redacted or other form.

6. Mr Sugar's second argument is that:

Both the common law considerations of fairness and the more specific requirements in Article 6 of the ECHR require the disclosure of all of the materials to him because otherwise there will not be equality of arms, as the BBC and the Information Commissioner (Commissioner) will have an

advantage over him by knowing what is in the documents and he will not be able to counter their arguments.

7. Article 6 and the common law require that a hearing be fair, but this does not mean there is an unqualified right in either context to the disclosure of documents. In the (criminal) case *Doorson v Netherlands* (1996) EHRR 330 the ECtHR stated that

> *"No violation of Article 6(1) taken together with Article 6(3)(d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities."*

8. Also *Jasper v UK* (unreported, 16 February 2000) at 52 the ECtHR stated that:

> "[A]*s the applicant recognised…the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the Doorson v the Netherlands judgment…). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1…Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities…"*

9. If this is the position in the criminal context, it must also be so in the civil context, where protections are generally fewer. Indeed, the disclosure generally now ordered in civil proceedings, for example, is "standard disclosure" which only requires a party to disclose the documents on which he relies, or which adversely affect his own case, or another party's case, or which support another party's case, or which he is required to disclose by a Practice Direction. This new rule requires fewer documents to be disclosed than was previously the case under the Rules of the Supreme Court, when the parties were required to include in their lists even the documents that might lead to a "train of inquiry" enabling a party to advance his own case or improve that of his opposition.

10. Certainly the lack of any absolute right to any and all documents is accepted by all the commentators, with Hollander merely cautioning in "Documentary Evidence" (8th ed; 2003) that

> *"It is thus incumbent upon the court to adopt a procedure which will, so far as is practical, protect the rights of any party which has not had the opportunity to see*

the documents in question. The steps that may be taken will depend on the nature of the case."

11. Legislation and case law demonstrates a number of steps that may assist in this respect which again clearly demonstrate there is no absolute right to any or all documents in proceedings:

11.1 In some circumstances, a Special Advocate is appointed, who sees the material in question and can receive information from the defendant, but cannot take instructions from him or discuss the information with him. See for example the procedure set out for the Special Immigration Appeal Commission, the Proscribed Organisations and Pathogens Access Appeal Commission, Employment Tribunals and the Employment Appeals Tribunal. The House of Lords also accepted in *R (Roberts) v The Parole Board and anor* [2005] UKHL 45; [2005] 2 AC 738 that the procedure could be used by Parole Boards.

11.2 In other circumstances, disclosure may be permitted to a party's legal representatives, or experts, although obvious problems arise where the party is not represented and no expert has been instructed or is required.

11.3 Disclosure might also be permitted on strict terms as to where the material can be viewed and/or whether copies can be made of it and/or what use may be made of it after the proceedings are over.

11.4 Matthews and Malek state in their book "Disclosure" (2000) at para 9.142 that:

"The Court's discretion to order inspection is not exercisable merely in an "all or nothing" fashion but includes power to order such inspection subject to conditions or restrictions. These might include specific undertakings to be given in relation to the documents produced, or restrictions on where any copy documents may be kept or read, on who in the other party's camp may inspect them, and on the making of further copies or extracts. The Court will not order such additional protection lightly, but only where the risk of damage or loss to the producing party (or, exceptionally, to others) is so significant that some additional restriction on the usual position can be justified. Such cases are usually cases of trade secrets which, if disclosed at all, may be irretrievably lost, and they usually arise in intellectual property litigation. But the question can also arise in other types of action, such as breach of confidence or concerning a contested takeover bid."

The notes by the White Book editors (2006 edition) state at 31.19.3 that:

"The Court has inherent jurisdiction to take precautions against the possibility that disclosure and inspection may be abused, or cause

unjustifiable hardship and may to that end, impose restrictions upon inspection or permit it subject to undertakings."

Mr Sugar argues that disclosure in this case would be subject to the restriction that the documents may only be used during the proceedings themselves (because rule 14(6) states that *"It shall be a condition of the supply of any information or material provided under this rule that any recipient of that information or material may use it only for the purposes of the appeal."*) However, this overlooks the very real differences between a case of the sort in these proceedings and the more typical cases in which restrictions are made, such as those involving confidential information and trade secrets. This is referred to further below.

11.5 In addition, the court itself will often look at the documents or material sought to be protected from disclosure. This happened in *Roberts* (at first instance rather than on appeal) and often occurs in disputes over the disclosure of documents in purely civil proceedings.

12. The position in interim injunction proceedings where judges also have to be alert to the possibility that the grant of relief at the interim stage will in fact give the claimant what is sought in the proceedings, despite the lack of a full trial, is relevant to the considerations in this Ruling. This is particularly the case where a mandatory injunction is sought, requiring the defendant to do something, as opposed to a prohibitory injunction, which aims merely to preserve the status quo until trial, and there are arguably parallels with that situation and the issues facing the Tribunal in this case.

13. In *Shepherd Homes v Sandham [1971] Ch 340* Megarry J stated that

"In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction", adding that "the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it sought to enforce a contractual obligation."

14. In *Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670* Hoffmann J held that the

"high degree of assurance" test does not have to be satisfied in all cases and that the fundamental principle on interim applications for prohibitory and mandatory

injunctions alike is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out at trial to have been "wrong".

15. Chadwick J set out the principles to be applied in *Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468* as follows:

> *"Firstly, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J.*
>
> *"Secondly, in considering whether to grant a mandatory injunction the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thus preserving the status quo.*
>
> *"Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the [claimant] will be able to establish his right at a trial. That is because the great the degree of assurance the [claimant] will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.*
>
> *"But finally, even when the court is unable to feel any high degree of assurance that the [claimant] will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."*

16. These observations were approved by the Court of Appeal in *Zockoll Group Ltd v Mercury Communications Ltd [1998] FSR 354* and also applied in *Nikitenko v Leboeuf Lamb Greene & Macrae (a Firm) and Another (Times Law Reports, 26 January 1999).* In the Tribunal's view these observations are relevant to the effect of determining Mr

Sugar's application (at least insofar as disclosure to Mr Sugar is concerned, even if not publication to a wider audience).

17. The Information Tribunal's Practice Direction on Confidentiality and Redaction issued in March this year recognises that the Tribunal might need to go further and consider the information itself in the proceedings proper (rather than just in the course of an interlocutory argument about disclosure), without necessarily disclosing it to the requesting party if that would undermine the public authority's claim to an exemption. It states:

> *"As with all courts and tribunals, it is of course essential that information which is relevant to proceedings is, as far as is possible, available to all parties to a case.*
>
> *"However, the nature of appeals to the Information Tribunal under the Freedom of Information Act 2000 is such that the Tribunal will often require to see information which must be kept confidential from one or more of the other parties to the appeal.*
>
> *"For instance, there will be cases where a person who made a request for information under section 1(1) is a party to an appeal which examines the application of exemptions to the obligation to supply information. In many cases the Tribunal will need to see the information which has been withheld in order to reach its decision. However, in cases where disclosure has been refused, it would in most cases undermine the very object of the exemption if the information in question were to be disclosure, during the Tribunal proceedings, to the person who made the request. The Tribunal will need to ensure that that information is kept confidential."*

18. This Practice Direction highlights the difference between FOIA cases and others in which disclosure is limited or restricted in some way. In cases involving trade secrets or other confidential information, disclosure is sought in **support** of the claim (or defence, as the case may be). It may or may not eventually assist the party seeking it depending on what it reveals, but disclosure will not resolve the case simply by virtue of being given. In this case, disclosure of the report **would** resolve the matter at issue (which is simply a request for access to the report).

19. The BBC's submissions also point to section 15(2) of the Data Protection Act 1998 which says that when a court in determining any question whether an applicant is entitled to the information that he seeks

> *"a court may require the information constituting any data processed by or on behalf of the data controller…to be made available for its own inspection but shall not, pending the determination of that question in the applicant's favour,*

require the information sought by the applicant to be disclosed to him or his representatives whether by discovery…or otherwise."

20. This section has not, as far as the Tribunal is aware, been the subject of any challenge that it infringes the fair trial rights of applicants, which of course does not mean that it could not be the subject of such a challenge, but it is interesting to see the matter addressed in the primary legislation without apparent controversy. Mr Sugar suggests that it is

"quite possible that Parliamentary counsel realised in relation to FOIA that s15(2) might be incompatible with article 6 which they had failed to realise in relation to the DPA. The Human Rights Act 1998 had not been enacted and knowledge of the ECHR was not great."

However, nearly six years have passed since the coming into force of the Human Rights Act and no challenge has been made to section 15(2) on Article 6 grounds, despite it being considered in *Johnson v Medical Defence Union Ltd* [2004] EWHC 2509 (Ch); [2005] 1 WLR 750.

21. Mr Sugar argues at para 21 of his submissions that

"If I am given access to [the Balen report or other BBC documents which are the subject of the Qualification] and they are then found not to be disclosable to me under FOIA, I will be able to do nothing with them whatsoever…I am not interested in merely reading the Balen report myself. What I am seeking is its publication - which doubtless would follow if I am successful in this case."

However, if the FOIA is "motive-blind" and no consideration is to be given by a public authority to the purpose for which information is required, arguably such issues should also be irrelevant in this context. If the Tribunal finds it does not have jurisdiction when considering the preliminary issues in this appeal, the report may well not be published to a wider audience, but Mr Sugar would still have seen a copy of it, and his request for information would therefore in fact have been satisfied, even if he was not able to secure the wider publication that he says he wishes.

22. At para 22 he states that *"There cannot be any doubt that the Balen report would be disclosable in other legal proceedings"* and cites the example of a BBC journalist suing for libel on the basis of a statement made about him in the report. This appears to overlook the fact that, in such a case, only those parts of the report dealing with the allegations made about the journalist would be disclosable, while the rest could legitimately be redacted if it was not relevant to the proceedings. It might be the case that the issues in the proceedings required the entire report to be produced but, if it was divided into sections dealing with distinct parts of the BBC and its operations, with the claimant journalist only mentioned in one section, other parts may be totally irrelevant to the proceedings. In any case, it would again only be used in support of the libel

claim by the journalist, and may or may not assist him in that claim. Its disclosure would not be the focus of the claim.

23. Further, there is a restriction in CPR 31.22 on the subsequent use of disclosed documents unless they have been read to or by the court, or referred to at a hearing which has been held in public, or the court gives permission, or the party disclosing the document and the party to whom it belongs agree that it can be disclosed. To the extent that Mr Sugar argues that disclosure in civil proceedings would bring the report into the public domain, he is not necessarily correct.

24. An underlying basis of Mr Sugar's arguments seem to presuppose that proceedings before this Tribunal will be of an adversarial nature and that the determination of the proceedings will, inter alia, be dependent on him putting questions to witnesses. Under rule 24(4) the Tribunal has the power to conduct the proceedings inquisitorially where it considers it appropriate to the fair disposal of an appeal.

25. For the above reasons the Tribunal does not intend to vary the Directions.

Dated: 12th May 2006

John Angel

Chairman