



and the Tribunal convened to hear oral submissions on 11 May 2009. The IC decided not to appear at the hearing and relied on his written submissions dated 30<sup>th</sup> April 2009.

3. Following the House of Lord's decision the BBC decided to proceed with its appeal against the "derogation" decision to the High Court and the appeal is likely to be heard the week commencing 29<sup>th</sup> June 2009.
4. In this hearing the Tribunal was asked to consider the following issues:
  - a. Whether the BBC can claim exemptions now in these proceedings:
  - b. If the BBC can claim exemptions now does this apply to s.36 (prejudice to the effective conduct of public affairs) FOIA which requires the reasonable opinion of a qualified person;
  - c. If exemptions can be claimed whether the BBC is required to state which exemptions it wishes to rely on now; and
  - d. If so whether the Tribunal should proceed to determine whether the exemptions apply before or during the course of the High Court proceedings.

#### Whether exemptions can be claimed in these proceedings

5. The BBC has not yet claimed any exemptions in these proceedings. The Tribunal has already considered in previous cases whether it can accept the late claiming of exemptions. The parties all agree that the leading authorities which set out the applicable legal principles can be found at §42 of *Department for Business, Enterprise and Regulatory Reform v. Information Commissioner and Friends of the Earth* ("BERR", EA/2007/0072) and §§72-73 of *Home Office and Ministry of Justice v. Information Commissioner* (EA/2008/0062). These principles may be summarised as follows:
  - a. Despite ss 10 and 17 FOIA providing time limits and a process for dealing with requests a public authority is not necessarily precluded from seeking to rely, in proceedings before the Tribunal, on exemptions that were not relied upon within the time limits;
  - b. whether new exemptions may be claimed for the first time in Tribunal proceedings should be decided on a case by case basis and taking into account all the circumstances of the particular case;
  - c. public authorities, however, must have reasonable justification for the late claim.

6. Mr Eicke on behalf of the Appellant seemed to accept these principles in his written submissions but at the hearing appeared to argue that these principals did not apply in this case because of the Court of Appeal's decision in *Jones v MBNA International Bank* [2000] EWCA Civ 514 at §52. We do not agree with Mr Eicke. The circumstances of this case are very different to the one envisaged by the Court of Appeal. At the time of the request the BBC considered it was not a public authority for the purposes of the Act and therefore had no obligations under FOIA. Although this Tribunal did not agree the IC, High Court and Court of Appeal agreed with the BBC. It was the House of Lords who upheld the Tribunal's jurisdiction decision. Up until then the matter was far from certain and the BBC in our view was justified in taking the course of action it did.
7. We adopt the principals in §5 above and have applied them to this case. We consider there is reasonable justification for the BBC being able to claim exemptions now in the particular circumstances of this case for the following reasons:
  - a. The appellant's original request dated 8 January 2005 was made at a very early stage of the implementation of FOIA (the operative provisions of FOIA came into force on 1 January 2005). As was recognised in *BERR* at §43-44, such circumstances may justify a late claim.
  - b. Further, in investigating the appellant's complaint under s. 50 of FOIA, the Commissioner did not himself require the BBC to specify whether, in the alternative to its primary case that the requested information fell within the derogation, it was also seeking to rely on any exemptions.
  - c. In the derogation decision the Tribunal did not expressly require the BBC to specify within 20 days which exemptions it was seeking to rely on. Rather at §§139-140 the Tribunal sought submissions from the parties on the more general question of how the case should be dealt with in the light of the derogation decision. In any event, given the subsequent appeals and the stay of the Tribunal proceedings, it was reasonable for the BBC to understand this direction to have been overtaken by events and to await further directions by the Tribunal as to the conduct of the proceedings before it.
8. We would observe that if the circumstances of this case arose now we would be unlikely to come to the same conclusion because the BBC has much more experience of the Act. Furthermore the practice of the Commissioner has evolved since then. Where the BBC claims in the course of dealing with a request that the requested information falls within the derogation the IC now generally asks the BBC to specify whether it wishes to rely, in the alternative,

on any of the FOIA exemptions. We were informed that the BBC now does so.

#### Whether s.36 can be claimed

9. Mr Eicke argued that even if late exemptions can be claimed this does not apply to the s.36 exemption because it requires the reasonable opinion of a qualified person. He continues this cannot be given, inter alia, because:
  - i. The BBC Trust which is now the designated 'qualified person' was not the same person at the time of the request. It was the BBC Board of Governors.
  - ii. The wording of s.36(2) requires that the exercise of seeking the opinion of the qualified person is at the time of the request and not later or certainly not as late as would be necessary in this case, if the exemption was claimed.
10. We do not agree with Mr Eicke. We do not consider that this exemption would need to be treated differently from other harm or prejudiced based qualified exemptions. We do not consider that the wording of s.36(2) requires the opinion to be obtained at the time of the request. In our view the section only requires that a reasonable opinion is obtained as to whether there would, or would be likely to, be prejudice to the effective conduct of public affairs before the exemption is claimed. As a result we do not agree that any change of qualified person matters provided the qualified person is designated as such at the time he/she gives the opinion.

#### Should the BBC specify the exemptions now?

11. If we decide that the BBC can claim exemptions at this stage of the proceedings Ms Carrs-Frisk, on behalf of the BBC, asks us to reinstate the stay in view of the pending High Court appeal. She argues that it would be a waste of time and costs to take the matter further in this case as the High Court may uphold the appeal and find that the derogation applies.
12. We are aware that the BBC, and the other parties, have already expended significant time and costs in this case. The BBC accepts that in order to identify exemptions the additional costs will only be internal costs. Moreover this case has now be running for several years and as Mr Eicke says information is perishable over time. We consider it is in the interests of justice that cases continue to be progressed so as to ensure there are no unnecessary delays. We are aware that the High Court could also come to other conclusions not put to us by Ms Carrs-Frisk. The Court could dismiss the appeal which would mean that the Tribunal would then hear the substantive issues. Alternatively the Court could make a different finding as to

what is “journalism” and remit the case back to the Tribunal to decide whether the Balen Report was held for the purposes of the derogation. If not so held then the Tribunal would proceed to decide the substantive issues. In either of these scenarios it would expedite matters if exemptions had already been claimed and all the parties knew the issues to be determined.

13. The Tribunal considers that on balance it is in the best interests of justice that the BBC decides now whether it wants to claim any exemptions and if so to identify which exemptions.

14. Mr Eicke asks us to consider the application of any claimed exemptions and maintain the lifting of the stay of proceedings. In the light of the imminent High Court hearing we do not consider that this is the appropriate course to take.

#### Direction

15. The Tribunal orders that the BBC provide, in effect, a refusal notice under s.17 FOIA specifying which exemption(s) it wishes to claim and why the exemption(s) applies within 30 days of the date of this hearing. In order to comply with s.17 the BBC will need, in relation to any qualified exemptions claimed, to set out the public interest factors taken into account and how the public interest balance favours maintaining the exemption.

16. Provided this direction is fully complied with the Tribunal will then re-impose the stay pending the outcome of the High Court decision.

Dated: 14 May 2009

John Angel  
Chairman

John Randall and Henry Fitzhugh  
Lay Members