



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2009/0077**

**Information Commissioner's Ref: FS50121838**

**CROWN PROSECUTION SERVICE**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Ruling**

1. In this case the Information Commissioner's Decision Notice was dated 23<sup>rd</sup> June 2009 (DN) and was sent to the Crown Prosecution Service (CPS) by post under cover of a letter of even date. It was received by the Appellant on 25<sup>th</sup> June 2009. On 20<sup>th</sup> August 2009 the Tribunal received a fax giving notice that an appeal would be served on the Tribunal. The Tribunal responded on the following day indicating that the appeal was approximately 30 days out of time and that "the Tribunal may not accept your out of time appeal and suggest you submit the notice without delay for the chairman's consideration".
2. The notice of appeal to this Tribunal is dated 27<sup>th</sup> August 2009 (NOA) and was served on the Tribunal at 18:58 by email on the same day, some 37 days outside the 28 day period required for such notices under Rule 5(1) of the Information Tribunal (Enforcement Appeals) Rules 2005 as amended (the Rules).
3. In the NOA the CPS requests that the Tribunal extend the time for lodging the appeal. Under rule 4(2)(b)(v) the appellant must state in the notice of appeal *where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 5(2) below*. The Appellant seeks to do this at paragraphs 39 to 41 of its NOA. The application is opposed by the Information

Commissioner (IC) in his response to the notice dated 18<sup>th</sup> September 2009. The Appellant was given the opportunity to reply to this response which it did in a reply date 25<sup>th</sup> September 2009 (the Reply).

4. The request was in three parts and the IC made decisions in relation to each part. The CPS is only appealing against the decision relating to the third part of the request.
5. Under rule 5(2) of the Rules *the Tribunal may accept a notice of appeal served after the expiry of the period permitted by paragraph (1) above [28 days] if it is of the opinion that, by reason of special circumstances, it is just and right to do so.*
6. At this stage it should be pointed out that the Tribunal has rarely allowed appeals which have been made so long after the 28 day period as in this case and that the length of the delay is a matter which the Tribunal should take into account when considering its opinion.
7. The CPS puts forward two main “special circumstances” why the Tribunal should exercise its discretion to allow the appeal out of time:
  - a. That the DN arrived just before the summer vacation and because the decision as to whether to appeal involved consultation with a number of other public authorities it took some time to decide;
  - b. That there are a number of significant points of law that will be of importance in future cases, and it is likely to serve the interests of justice for these important points of principle to be determined by the Tribunal. The main points are firstly that the IC wrongly determined the public interest balance relating to the disputed information where the IC accepted that s.35(1)(a) was engaged. Secondly that the IC should have considered whether the s.42 exemption (legal professional privilege) was engaged although not claimed by the CPS before the IC and not raised until these proceedings.
8. The IC opposes the application for a number of reasons.
9. The CPS has asked for “*time to be extended to allow the appeal to go forwards*”, whereas the IC maintains what the CPS should have asked for is for the appeal to be admitted out of time under rule 5(2).
10. There is nothing in the wording of rule 5 which prescribes how an application should be made to the Tribunal. The rule gives the Tribunal discretion to accept a notice of appeal served after 28 days where it is of the opinion that, by reason of special circumstances, it is just and right to do so. The Tribunal finds that the CPS has requested that the Tribunal admit the appeal out of time under rule 5(2).

11. The main ground is that the CPS has not provided any *special circumstances* to enable the Tribunal to exercise its discretion under rule 5(2).
12. In relation to the first circumstance in paragraph 7.a. above the IC argues there are no special circumstances which justify such a long delay before submitting the appeal. In brief the IC contends that at the time of this DN other decision notices were served on large organisations and those that appealed managed to do so in time although no doubt having to consult widely. The DN was served sufficiently before the summer vacation and the vacation should not have delayed consultation. In any case the CPS employs a large number of lawyers who could help with the process which would minimise the impact of holidays. Moreover the CPS did not inform the Tribunal of the possible late appeal and in fact informed the IC office (ICO) that it would not be appealing.
13. The CPS disagrees and explains why it was difficult for it to consult on whether it should appeal, particularly because of the involvement of other public authorities. It maintains that the fact other organisations have not had similar difficulties is irrelevant and that although it employs many lawyers few have experience of freedom of information matters. Finally, the CPS contends that it did contact the Tribunal to inform the Tribunal that it would be appealing and disputes that it informed the (ICO) that it was not appealing.
14. The Tribunal has considered these arguments and is not convinced that in the circumstances of this case, where the appeal was submitted so long out of time, that this ground is a special circumstance under rule 5(2). Even if it is the Tribunal is not of the opinion that it would be just and right to allow the appeal to be accepted out of time on this ground alone. The Tribunal is particularly concerned that if it was to allow this application from a public authority whom, because of its functions, is more than aware of the need to comply with court and tribunal rules of procedure, then it would make it very difficult to refuse other applications made on a similar ground.
15. We therefore come to the second ground, namely that there are a number of significant points of law that will be of importance in future cases, and it is likely to serve the interests of justice for these important points of principle to be determined by the Tribunal.
16. Most special circumstances put forward for appeals to be heard out of time are where there is a need to consult or a key person is away or the decision notice is served during a vacation as is claimed in this case. The application is rarely based on the importance of points of law which should be determined by the Tribunal. *Special circumstances* are not defined in the Rules. The Tribunal considers that Parliament intended that it could consider any circumstances put forward by the appellant and can determine whether they are special and if so

whether in the Tribunal's opinion it would be just and right to accept the appeal out of time. Therefore the Tribunal is in a position to determine that important points of law are a special circumstance.

17. In this case the first point of law which is put forward by the Appellant in the NOA, but with less prominence in the Reply, is that having accepted that s.35 was engaged the IC applied the public interest test wrongly. The arguments advanced by the CPS have been advanced in a number of previous cases before the Tribunal and there are now Tribunal decisions relating to this point of law which have also been considered by the High Court which means there is now established jurisprudence on this point of law. As a result the Tribunal is not of the view that considering the same point again, albeit on different facts, necessarily amounts to a special circumstance under rule 5(2). Even if it does, the Tribunal is not of the opinion that it would be right and just to allow the appeal out of time on this ground.
18. The second point of law relates to the fact that the CPS claims that some of the disputed information is covered by the Legal Professional Privilege (LPP) exemption under s.42 of FOIA. The CPS argues that even though it did not claim the exemption before the IC, that the IC should have recognised that some of the information was covered by LPP and should not have ordered the disclosure of that information. The IC argues that under the Tribunal's current jurisprudence it was not required to do so and in any case the late appeal was tantamount to waiving privilege.
19. The legal issue of whether exemptions can be claimed late or whether the IC or the Tribunal are required to consider exemptions even though not claimed by the public authority is a significant issue. It was recently raised before the High Court in **Home Office & MoJ v the Information Commissioner** [2009] EWHC 1611 but the judge declined to rule on the matter.
20. In this case it would appear to the Tribunal on reading the papers before it that this is a significant issue here. Clearly if the LPP exemption is engaged for some of the disputed information, as the Tribunal has held in many previous decisions, there is a strong inbuilt public interest in maintaining the exemption. The Tribunal considers that this case potentially raises an aspect of the law on the late claiming of exemptions which may still require clarification and because of the nature of some of the disputed information, in this particular case, that this amounts to a special circumstance under rule 5(2). The Tribunal is of the opinion that this issue raised by the CPS is of such importance that it is just and right for the appeal to be accepted out of time.
21. The Tribunal asks the parties to agree draft directions and submit them to the Tribunal by 12 noon on 28<sup>th</sup> October 2009. When drafting

directions the parties should consider what issues they wish the Tribunal to determine bearing in mind this ruling.

Signed:

John Angel  
Chairman

Date: 12 October 2009