



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2010/0044

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50241934
Dated: 2 February 2010**

Appellant: Mr Alan Fisher

Respondent: Information Commissioner

Additional Party: Department of Work and Pensions

Date of hearing: 20 July 2010

Date of Decision: 29 July 2010

Before
Melanie Carter
(Judge)

and

Dr Malcolm Clarke
Alison Lowton

Subject:

FOIA Legal professional privilege s.42

Cases:

R v Derby Magistrates Court ex parte P [1996] 1 AC487
Expandable Ltd and another v Rubin [2008] EWCA Civ 59 at [37]-[42].
DBERR v O'Brien & Information Commissioner [2009] EWHC

Bellamy v Information Commissioner EA/2005/0023
DFES v IC EA/2006/0010
Mersey Tunnel Users Association v Information Commissioner & Mersey
EA2007/0052
Pugh v Information Commissioner EA/20070055
DBERR v Information Commissioner & Friends of the Earth EA/2007/0072
FCO v Information Commissioner EA/2007/0092
Calland v Information Commissioner & FSA EA/2007/0136
Fuller v Information commissioner & Ministry of Justice EA/2008/0005

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the decision of the Information Commissioner and dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal arises from a letter of request from Mr Fisher, the Appellant, under the Freedom of Information Act 2000 ("FOIA") to the Department of Work and Pensions ("DWP") dated 20 April 2008. The request concerned the Health & Safety at Work (Offences) Bill (now an Act) and in particular the proposed legislative change to impose a term of imprisonment for certain offences. These are offences in relation to which the statutory defence has a reverse burden of proof. The focus of the request was whether the introduction of imprisonment for these offences would entail a breach of article 6, the right to a fair trial, under the European Convention of Human Rights. The part of the request under appeal is :

"Any document or legal opinion which contains the opinion of the dept of the DWP referred to in para 21 of the explanatory notes".

The reference to paragraph 21 was to a statement in the Explanatory Notes to this Bill stating that in the DWP's view, the proposed change was compliant with human rights. Paragraph 21 stated:

"The Department for Work and Pensions is of the opinion that, in making imprisonment available as a potential penalty for an offence to which the reverse burden applies, the Bill is compatible with Article 6 of the ECHR, in that it strikes a fair balance between the fundamental right of the individual and the general interests of the community..."

2. The DWP identified one document which it said represented the 'settled' legal advice giving rise to the Minister's opinion for the purposes of paragraph 21 of the Explanatory Notes. It initially refused disclosure in a letter dated 16 June 2008. On internal review, dated 23 October 2008 it upheld its decision not to release the information placing reliance on the exemption under section 42 FOIA relating to legal professional privilege. Mr Fisher complained to the Information Commissioner ("IC"). Following his investigation, the IC served a

Decision Notice dated 2 February 2010 upholding the refusal to disclose the information (“the disputed information”). He appealed this decision to the First Tier Tribunal (Information Rights) (“the Tribunal”).

3. Mr Fisher’s appeal fell into three main grounds of appeal:
 - (a) The IC had erred in accepting that the disputed information was subject to legal professional privilege; rather the Minister had ‘adopted’ the legal advice contained in the disputed information and thereby it had either become his opinion and was therefore not subject to legal professional privilege or had lost its status of being legally professionally privileged through waiver;
 - (b) The IC had erred in identifying the factors to be taken into account in considering the application of the public interest test;
 - (c) The IC had erred in attributing weight to those factors.
4. In light of this, the Tribunal proceeded on the basis that the essential questions were:
 - (a) Was section 42 engaged ie: was the disputed information subject to legal professional privilege;
 - (b) If so, where did the public interest lay, in favour of disclosing the information or maintaining the exemption?

Evidence

5. Before the Tribunal was a bundle of papers including evidence as to the passage of the Bill through Parliament, Cabinet Office Guidance on Making Legislation, section 19 statements (see below), and as to the way in which his request and the subsequent IC investigation had been handled.

6. The Tribunal was provided with a copy of the disputed information. This was not however disclosed to Mr Fisher during the proceedings as to have done so would have been to defeat the purpose of the appeal.

7. There was no witness evidence.

The Law

8. This Tribunal's jurisdiction in relation to appeals is pursuant to section 58 of FOIA. For the purposes of this appeal, the Tribunal must consider whether the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the so-called public interest test in section 2(2)(b), as here, a mixed question of law and fact is involved. If the Tribunal comes to a different conclusion under section 2(2)(b) on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.

9. Section 42, which is contained in Part II of FOIA, provides:

“(1) Information in respect of which a claim to legal professional privilege....could be maintained in legal proceedings is exempt information”.

10. In determining whether the section 42 exemption is engaged, the Tribunal had regard to the scope of legal professional privilege. A differently constituted Information Tribunal in the case of *Bellamy v IC & Secretary of State for Trade and Industry EA/2005/0023* provided the following guidance as to the scope of legal professional privilege, which we adopt:

“9. In general, the notion of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, or its lawyers, as well as

exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence”.

11. It is not in dispute in this appeal that only legal advice privilege as opposed to litigation privilege, is relevant – there was no litigation ongoing or threatened at the relevant time.
12. After forming a view on whether legal professional privilege applies and section 42 is engaged, our task is to consider the public interest balancing test in section 2(2) of the Act. Section 2(2), provides:

“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 –

.....

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing information”.

13. To this end, the Tribunal must consider “*all the circumstances of the case*” and to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The Tribunal reminded itself that the way in which the public interest test in section 2(2) is set out creates a presumption in favour of disclosure. The burden of proof remains on the public authority to satisfy the Tribunal that the public interest in maintaining

the exemption outweighs the public interest in favour of disclosure (*DFES v IC* EA/2006/10 paragraphs 61 & 64).

14. Mr Justice Wynn Williams in the High Court case of *DBERR v O'Brien & Information Commissioner [2009] EWHC* upheld the Tribunal's approach in recognising that there is a significant in-built weight of public interest in maintaining the exemption under section 42. This is on account of the fundamental importance attached to legal professional privilege and thereby the protection of free and frank communications between lawyers and their clients. The judge stated at paragraphs 41 and 53 of the judgement:

"It is also common ground, however, that the task of the Tribunal, ultimately, is to apply the test formulated in section 2(2)(b). A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption. As [counsel for the IC] submits in her Skeleton Argument, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

.....

The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the

underlying public interests which favoured disclosure) were of equal weight at the very least”.

Thus, whilst it was not necessary for there to be “exceptional” factors in favour of disclosure, the in-built weight in the LPP exemption is such that it is “*more difficult to show the balance lies in favour of disclosure*” (“*Pugh v Information Commissioner & MOD EA/2007/0055*).

Is section 42 engaged?

15. The Tribunal satisfied itself from a consideration of the disputed information that this was legal advice provided by a lawyer to his client. As such, subject to the question of waiver, it was clear that section 42 was engaged. The Tribunal could not see how the subsequent reliance by the Minister upon this legal advice could strip it of its original status as having been legally professionally privileged. It would have understood a criticism that there ought perhaps to have been another document which evidenced the Minister’s adoption of this advice, but this was a matter beyond the jurisdiction of the Tribunal. Mr Fisher had agreed with the IC that the investigation and indeed the appeal proceed on the basis that the disputed information was properly the only information under consideration. As such this was not a matter dealt with in the Decision Notice.
16. That was not to say, however that there were not other documents which might have come within the scope of the letter of request. Indeed, the DWP, whilst maintaining that the disputed information was the only information within scope, told the Tribunal that there were other documents containing legal advice – just not the ‘settled’ legal advice of the Department. The Tribunal noted that Mr Fisher had another, recently made, FOIA request to the DWP which would not be hampered by the limited scope of what had been agreed to be the disputed information.
17. The question arose whether insofar as the Explanatory Note contained the legal advice contained in the disputed information this had led to a waiver of the legal professional privilege. The Tribunal noted however that waiver did

not, as a matter of law, apply to legal advice privilege (as here) – its application was restricted to litigation privilege. Moreover, even in the context of litigation, a mere reference to a privileged document does not amount to a waiver of privilege: *Expandable Ltd and another v Rubin*. Therefore, the reference to the “opinion” in paragraph 21 of the Explanatory Notes would not amount to a waiver in any event.

18. Mr Fisher sought in this regard to pray in aid rule 31.14 of the Civil Procedure Rules. The Tribunal was of the view that as there was no litigation ongoing this was not sufficiently relevant to affect its view that there had not been any waiver of the legal professional privilege in the disputed information.

The Public Interest Test

19. The Tribunal reviewed the public interest factors considered by the IC and put forward during the appeal by the parties in order to assess whether a lawful decision had been made.

Factors in favour of disclosure

20. The factors in favour of disclosing the requested information were in summary
 - (i) Disclosure would help the public to better understand the legal and therefore the ‘intellectual’ basis, as Mr Fisher put it, for the DWP’s claim that the proposed legislative change was in compliance with the European Convention of Human Rights; the introduction of a sanction of imprisonment for an offence which contained a reverse burden of proof defence was a matter of considerable importance;
 - (ii) Disclosure would promote accountability and transparency in relation to this particular exercise of Parliamentary scrutiny. Mr Fisher had originally understood that the Minister’s statement in the Explanatory Notes had been given further to the legal duty in section 19 of the Human Rights Act 1998. This provides:

“A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second reading of the Bill –

- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”): or*
- (b) make a statement to the effect that although he is unable to make a statement of compatibility the Government nevertheless wishes the House to proceed with the Bill.*
- (2) The statement must be in writing and be published in such a manner as the Minister making it considers appropriate.”*

The Tribunal noted that all that was required was a ‘statement’ of the Minister’s view as to compatibility, not the reasons for that view. It understood however from Cabinet Guidance that the Government had committed itself to providing details of its reasons in Explanatory Notes.

The Bill was a Private Member’s and not a Government initiated Bill. As such, the Tribunal determined that section 19 did not apply as the Minister had not been “in charge” of the Bill. It accepted however that it was the Government’s practice, as a matter of policy, to make an equivalent statement in relation to Private Members’ Bills that it supported. In forming this view, the Tribunal took into account the Cabinet Office Guidance on Making Legislation.

The Tribunal was of the view that the Minister’s opinion, given in the Explanatory Notes, albeit not further to the legal duty in section 19, was the Government voluntarily acting as if the section did apply.

- (iii) As a proposed legislative change it potentially affects a very large number of people.

Factors against disclosure

21. The factors in favour of maintaining the exemption put forward by the DWP and supported by the IC were, in summary:

- (i) the inbuilt public interest accorded to legal professional privilege and thereby:
 - the protection of the DWP's ability to communicate freely with legal advisors to obtain advice;
 - ensuring that decisions are made on the basis of fully informed and thorough legal advice;
 - the preservation of the ability of the DWP and other Government departments/agencies to defend its decisions in the event of legal challenge;
 - the preservation of the general concept of legal professional privilege.
- (ii) the fact that the disputed information consisted of legal advice which was considered still to be 'live' (in the sense of being relied upon at the relevant time). The Bill was at the relevant time still subject to Parliamentary scrutiny.

The Tribunal did not accept however the contention of the DWP that there was a 'litigation context' to this advice. DWP put this on two bases, first that there was the possibility of judicial review against the Government aimed directly at the enactment of the Bill.

Given the remoteness of this possibility (judicial review of legislation passing through Parliament was acknowledged to be difficult to imagine) the Tribunal discounted this basis for the argument. It also discounted the second basis, that is, the disputed information being

used in some way in a human rights challenge during a criminal prosecution. The Tribunal noted that there had already been important cases before the courts on this human rights issue pre-dating the proposed legislation. The resolution of any such challenge during the criminal prosecutions would, in the Tribunal's view, rather be influenced by argument around those previous cases and current legal advice – not the historical advice relied upon by the Government in passing the Bill.

22. The Tribunal accepted that the factors identified above did apply in this case, subject to the comments on weight below.

Application of the public interest test

23. The Tribunal gave careful consideration to where the public interest lay. It noted that there were significant factors operating on both sides of the balance. The Tribunal was particularly concerned, whilst acknowledging the significant in-built public interest in maintaining the exemption in section 42, not thereby to, in effect, treat this exemption as absolute.
24. The starting point in section 42 cases was the significant weight to be given to the in-built public interest in maintaining the legal professional privilege exemption. In this case, there had been no witness evidence as to the potential impact disclosure of the disputed information might have on the importance of lawyers and clients communicating freely. The Tribunal accepted that no witness evidence was strictly required for it to take the in-built interest into account, but noted that this diminished its ability to assess whether any particular factors in this case either increased or diminished the 'significant in-built weight'.
25. The Tribunal considered cases where disclosure had been ordered by previously constituted Tribunals, in particular *Mersey Tunnel Users Association v Information Commissioner & Mersey Tunnel* EA2007/0052, paragraph 45, where it was said:

“Routine disclosure might lead to those consequences [reluctance to seek advice, poorer quality of decision making etc.]. But disclosure under FOIA can never be routine. The public interest balance, with its inbuilt weight in favour of maintaining the exemption, must be struck in the particular circumstances of each case”.

26. The Tribunal agreed with this view and was sceptical, in the absence of any evidence, as to the ‘floodgates’ type submissions being made by the IC and the DWP. Each case had to be looked at on its merits and public authorities should not assume that the existence of the section 42 exemption obviated the need for this exercise.
27. The Tribunal agreed with the IC and the DWP that in addition to the in-built weight to the public interest in maintaining the exemption under section 42, a specific further factor against disclosure was that the legal advice was, at the relevant time, ‘live’. At the date of the refusal, 16 June 2008, the Bill was still on its Parliamentary journey. The legal advice was moreover, at this date and at the date of internal review of the refusal, relatively recent. Thus, the Tribunal was of the view that the DWP and the IC in turn had been correct to treat this information as still being relied upon. This factor added to the in-built weight meant that, despite the Tribunal’s reservations set out above, there was considerable public interest in maintaining the exemption for legal professional privilege in this case.
28. In favour of disclosure, the Tribunal accepted the importance of the underlying human rights issue. This would heighten the public interest in the Minister’s opinion on compliance. The passage of legislation gives rise to a particular public interest in the integrity of Government statements as Parliamentary scrutiny is, of course, the most important way in which proposed legislation is rendered democratically accountable. This was not mere curiosity or a desire to better understand the statement on compatibility, it was rather a question of Ministerial accountability – what legal reasoning underpinned the Minister’s opinion? Did this substantiate the view given in the House? In this regard, the Tribunal noted that whilst the reasons given in

the Explanatory Notes were relatively full, they did not refer to the leading case of *R v Davies (David Janway)* [2009] EWCA 2949. Reference had been made in Minister's speech to this case subsequently in the House of Lords, however the letter of request referred to the Explanatory Notes and thereby the Minister's statement made at that time.

29. That was not to say that the public ought to be able to see behind all Ministerial statements made during the Parliamentary passage of legislation to the supporting advice. This should, in the Tribunal's view, be viewed as an exceptional set of circumstances, when one takes into account the 'section 19 context' (albeit not directly applying the Government had decided to act as if it did) and the importance of the reverse burden of proof to human rights. This gave rise to a particular public interest in understanding and testing the legitimacy of the Minister's statement. Disclosure of the disputed information would render the Government further accountable in the exercise of this important and unusual function.
30. Also in favour of disclosure was the Tribunal's view that there would be no actual prejudice in this case if the legal advice was disclosed. It noted that the disputed information did not go much beyond the content of the Explanatory Notes (although this had the effect of correspondingly lessening the public interest in the public better understanding the Minister's reasoning).
31. The Tribunal's reading of the disputed information moreover dispelled any fear that the public had been misled or that the legal reasoning in the Explanatory Notes was a misrepresentation. Although Mr Fisher had been careful not to allege any wrongdoing either intentional or inadvertent, nevertheless the Tribunal took it upon itself to consider this issue. This was not a factor in this case either for or against disclosure; it was rather a matter which the Tribunal wished to mention in order to provide reassurance to the Appellant.
32. Whilst not binding, the Tribunal found useful the indications from differently constituted Tribunals of the sorts of factors that might constitute a public

interest in favour of disclosure that equalled or outweighed the significant in-built public interest arising in section 42 cases. Thus, in the case of *Fuller v Information commissioner & Ministry of Justice* EA/2008/0005, it was said at paragraph 12:

“There will be some cases in which there could be stronger contrary interests; for example, if the privileged material discloses wrongdoing by or within the authority or a misrepresentation to the public of the advice received or an apparently irresponsible and wilful disregard of advice, which was merely uncongenial”.

33. A differently constituted Tribunal in the case of *Calland v Information Commissioner & FSA* EA/2007/0136 stated that *“some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.*
34. The Tribunal acknowledged that the weight of public interest in favour of disclosure would, in the light of the High Court case of *O’Brien*, need to be of a strong nature in order to at least equal the significant in-built public interest arising from the legal professional privilege exemption. With due respect to the previously constituted Tribunals cited above, this Tribunal was of the view that the strong countervailing public interest in favour of disclosure would not necessarily need to arise from an individual specific factor of the gravity of the examples given, but could arise from a variety of public interests which, taken together were sufficiently compelling. In this case, had it not been for the ‘live’ nature of the disputed information, the Tribunal would have concluded that the factors in favour of disclosure were sufficient to at least equal those against.
35. Nevertheless, in all the circumstances, the Tribunal was of the view that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Conclusion

36. The Tribunal upheld the IC's Decision Notice and dismissed the appeal. This had been a difficult decision to make and the public interests were nearly balanced. It was only the fact that the legal advice was 'live' at the relevant time that had tipped the balance against disclosure. The Tribunal wished to recommend to the DWP that, in considering Mr Fisher's subsequent FOIA request, it consider its position in the light of this aspect of the Tribunal's assessment of the public interest factors. Whilst not within the scope of this appeal, it wished to express its doubt that the 'live' nature of the disputed information could still be maintained at this point in time.
37. Our decision is unanimous.

Signed:

Melanie Carter
Judge

Date: 29 July 2010