

Freedom of Information Act 2000

**Preliminary Hearing heard at Procession House London
On 14th June 2006**

Decision Promulgated

29th August 2006

Before

JOHN ANGEL

Chairman

HENRY FITZHUGH and JOHN RANDALL

Lay Members

Between

STEVEN SUGAR

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

THE BRITISH BROADCASTING CORPORATION

Additional Party

Representation:

For the Appellant: in person

For the Respondent: Mr Paul Nicholls

For the Additional Party: Ms Monica Carrs-Frisk QC and Ms Kate Gallafent

DECISION

The Tribunal finds that it has jurisdiction to hear this appeal.

REASONS FOR DECISION

The Preliminary Issue before the Information Tribunal

1. The Tribunal decided on 2 March 2006, under its rule 10 procedure (summary disposal of appeals – The Information Tribunal (Enforcement Appeals) Rules 2005 (the Rules), in the absence of the British Broadcasting Corporation (the BBC), that the Information Commissioner’s (IC) letter of 2 December 2005 was a decision notice, and, in effect, that the Information Tribunal (the Tribunal) therefore had jurisdiction to consider Mr Steven Sugar’s (Mr Sugar) appeal. The Tribunal did not decide whether the Balen Report was held for the purposes of journalism. This was repeated and explained in the Tribunal’s Ruling of 16 March 2006.
2. Subsequent to the joining of the BBC into the proceedings, the Tribunal has agreed to reconsider as a preliminary issue whether it has jurisdiction to proceed with Mr Sugar’s appeal. The BBC submits that the IC’s letter of 2 December 2005 (December Letter) was not a s.50 of the Freedom of Information Act 2000 (FOIA) decision notice. The consequence of this submission is that the only available route for Mr Sugar to challenge the IC’s Decision Letter is by proceedings in the High Court for judicial review. This was also the original view of the IC in the December Letter, but before this Tribunal the IC now takes a different position.

General Considerations

3. The central question at issue between Mr Sugar and the other parties, on which the release of the Balen Report principally depends, is whether the report is held by the BBC for the purposes of journalism. The reason why the IC rejected Mr Sugar’s complaint was that he decided that the report was held for the purposes of journalism.
4. Whether the report is held for the purposes of journalism is a question partly of fact and partly of law. In so far as it is a question of fact, it needs to be decided by assessing factual

evidence. It is a question of law only in the sense that the correct legal interpretation of Part IV of Schedule I of FOIA (see paragraph 7 below), must be applied when deciding the factual issue.

5. It would be surprising if Parliament intended a question of this nature to be decided by proceedings for judicial review, rather than by the Tribunal, for several reasons:

(1) Judicial review procedure is not designed for resolving questions of fact. On judicial review the High Court rarely hears conflicting evidence or cross-examination. In contrast, the procedure of the Tribunal is expressly designed for resolving disputed questions of fact – see s.58(2) FOIA.

(2) The restriction of appeals from the Tribunal to appeals on matters of law alone (s.59 FOIA) shows that Parliament intended questions of fact affecting the release of information to be decided by the Tribunal.

(3) The Tribunal was intended to provide a relatively inexpensive remedy, available to members of the public who have requested information. Judicial review proceedings in the High Court are likely to be substantially more expensive than the more informal proceedings before the Tribunal.

(4) The converse case should be considered. If the IC had taken the view that the Balen Report was not within the derogation in Part IV of Schedule I and ought to be released, he would have served a decision notice to that effect. The convenient remedy for the BBC in those circumstances would be to appeal to the Tribunal, contesting the IC's view of the facts and his non-application of the derogation.

The Legislative Framework

6. FOIA imposes obligations on 'public authorities' to disclose information. S.3 defines a public authority as, inter alia, a body listed in Schedule I. S.7 provides that--

Where a public authority is listed in Schedule I only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.

7. The BBC appears in Part IV of Schedule I in the following terms--

The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.

8. The provisions dealing with decisions by the IC and appeals from his decisions are contained in ss.50 and 57 FOIA. S.50 provides as follows--

- (1) Any person (in this section referred to as “the complainant”) may apply to the IC for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
- (2) On receiving an application under this section, the IC shall make a decision unless it appears to him-
 - (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
 - (b) that there has been undue delay in making the application,
 - (c) that the application is frivolous or vexatious, or
 - (d) that the application has been withdrawn or abandoned.
- (3) Where the IC has received an application under this section, 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 (in this Act referred to as a “decision notice”) on the complainant and the public authority.
- (4)
- (5) A decision notice must contain particulars of the right of appeal conferred by section 57.

9. The material part of S.57 provides--

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

Jurisdictional Reasoning

10. Where the IC ‘receives an application under s.50’, he has only two choices- (1) to decline to make a decision on one of the grounds set out in s.50(2)(a)-(d), none of which is relevant in this case, or (2) to serve a decision notice.
11. An appeal only lies to the Tribunal under s.57(1) where a s.50 decision notice has been served. If there has been no s.50 decision notice, there is no jurisdiction to hear an appeal.
12. Mr Sugar contends that the December Letter was in substance a s.50 decision notice. The Commissioner has now accepted this contention. The BBC contends that it was not, because it submits that the BBC is not a public authority where the derogation applies and therefore any decision issued by the IC is not therefore a ‘decision notice’ under s.50.
13. There are two arguable grounds on which the December Letter could be something other than a s.50 decision notice-
 - (1) *Form* – it did not purport to be a s.50 decision notice
 - (2) *Substance* - the IC had not received from Mr Sugar *an application under s.50*.
14. As to form, the December Letter stated that the letter was “a final decision” for the purposes of Mr Sugar’s request. We are not persuaded by the argument as to form, and this argument has not been advanced by the BBC in any of its submissions to the Tribunal nor has it ultimately been relied on by the IC.
15. The IC now accepts that the December Letter was a s.50 decision notice. He contends his only power to take decisions is under s.50 and any decision he takes must be under that section and, when taken, must be contained in a decision notice. He considers there is no other statutory basis for him to take a decision. This was not a case where the IC declined to take a decision. He did not do so, as can be seen from the way he expressed his conclusion in the December Letter. The IC further contends that he was not empowered not to take a s.50 decision. The power to do so exists only where one of the conditions in s.50(2) is present, which was not the case here.

16. It is therefore necessary to look at the substance of the position. The most pertinent question is whether the IC had received from Mr Sugar an application under s.50.
17. Mr Sugar had made a request for information to the BBC. The BBC is a public authority. He contended that the BBC had not dealt with his request in accordance with the requirements of Part I of FOIA. The application that Mr Sugar made certainly appeared on its face to be an application under s.50.
18. The principal ground on which the BBC contends that Mr Sugar's application was not made under s.50 is that the Balen Report was held for the purposes of journalism, and (so it is said) the BBC was not therefore a public authority for the purposes of Mr Sugar's request, so that his complaint to the IC was not an application made under S.50.
19. The BBC's argument is circular. It can only be valid if one presupposes its premise, which is that the Balen Report was held for the purposes of journalism. But the premise is the very point which is in dispute, and which needs to be judicially decided.
20. The inconvenience of the BBC's analysis comes into sharp relief if one considers what would have happened if the IC had taken the view that the Balen Report was not within the derogation and ought to be released. In that event the IC would undoubtedly have served what would have purported to be a s.50 decision notice. Given the nature of the issue to be decided, the convenient method of obtaining a judicial determination of the status of the Balen Report would have been by an appeal to the Tribunal. In the event of an appeal by the BBC to the Tribunal, no jurisdictional issue would have been raised. But on the BBC's current argument, a decision by the Tribunal on such an appeal in favour of the BBC would be a nullity, and therefore not binding on the IC or on the person who requested the information.
21. In our judgment the BBC's argument is wrong in asserting that the derogation – assuming it applies - has the result that the BBC is not a public authority within the meaning of FOIA. The BBC's argument proceeds as if S.7(1) stated that the BBC was not a public authority when the information requested was within a derogation described in Schedule 1. S.7(1) does not say that. In fact the side heading to the section states "Public authorities to which

Act has limited application". The BBC remains a public authority within the meaning of FOIA whatever request for information anyone may make to it. It is particular information that is excepted by the derogation and s.7(1) from the provisions of Parts I to V, not the public authority itself.

22. In our view Mr Sugar made an information request to the BBC, which is a public authority within the meaning of FOIA. There was nothing in the formulation of the request to take it outside the ambit of FOIA. It was a request for information that was properly made under s.1 of FOIA.
23. The basis for the BBC's rejection of his request was that, upon careful examination of the factual circumstances, the report which he asked for was (in the BBC's view) held for the purposes of journalism. If the BBC was right in taking this view, that did not mean that Mr Sugar had not made an information request to the BBC as a public authority. In our judgment when, following the rejection, Mr Sugar applied to the IC, his application was made under s.50(1).
24. We consider that the IC's duty under s.50(1) to consider whether a request has been dealt with in accordance with the requirements of Part I can include, in appropriate cases, consideration of whether Part I lays down any requirements for the particular information in question. The Commissioner was entitled to decide that failure to produce the report was not a contravention of the requirements of Part 1. In the present case he effectively so decided. That was in substance a decision under s.50.
25. BBC argues that the IC has incidental and ancillary powers to decide whether something that comes before it is within its true statutory remit or not. It contends that in this case the IC exercised such powers as he did not have power under s.50 to consider Mr Sugar's complaint. It further contends that in order to challenge the IC it is necessary to do this by way of judicial review and to go to a different forum, namely the High Court. This would apply whichever way the decision went. The BBC argues there are threshold issues, like the one the subject of this preliminary issue, that are not for this Tribunal and that should only go to the High Court for either side, whichever way the threshold issue is decided. Once the threshold issue is dealt with, then it may be for this Tribunal.

26. The Tribunal does not accept these contentions because of our above findings.
27. The BBC makes a further submission as to the construction of s.50. It contends that its argument as to the limited scope of the Tribunal's jurisdiction is supported by the terms of the Rules. We do not think this is a valid argument. The contents of the Rules cannot alter the proper interpretation of FOIA. The fact that the Rules are silent on the derogation is of no particular significance as there are many matters on which the Rules contain no express provision.
28. The Tribunal will now proceed to consider the second preliminary issue, namely whether the Balen Report, the information requested by the Appellant under s.1(1) FOIA in this appeal, is held by the BBC for the purposes of journalism or for some other purpose within the meaning set out in Schedule I Part VI to FOIA.

Signed

Date: 29th August 2006

John Angel
Chairman