**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2008/0083
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**REPORT TO THE COURT OF APPEAL** **Case No.** CI/2010/0283

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| **Appellant:** | **Dominic Kennedy** |
| **Respondent:** | **The Charity Commission** |
| **Heard at:** | **Field House London** |
| **Date of hearing:** | **26 & 27 October 2011** |
| **Date of report:** | **18 November 2011** |

**Before**

John Angel
(Judge)

and

Jacqueline Blake and Marion Saunders

**Attendances:**

For the Appellant: Mr Philip Coppel QC and Mr Andrew Sharland
For the Respondent: Mr Jason Beer QC and Ms Rachel Kamm

**Subject matter: Whether s 32(2) FOIA should be read down pursuant to s 3 HRA and Article 10 ECHR.**

**Cases:** *Bergens Tidende v Norway* (2001) 31 EHRR 16
*Sunday Times v The United Kingdom* (1979) 2 EHRR 245.
*Handyside v* UK (1976) 1 EHRR 737
*McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277
*Ambrose v Harris (Procurator Fiscal, Oban) (Scotland), Her Majesty's Advocate v G (Scotland), Her Majesty's Advocate v M (Scotland)* [2011] UKSC 43
*R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323
*Brown v Stott* [2003] 1 AC 681, [2001] 2 WLR 817
*Leander v. Sweden* (1987) 9 EHRR 433
*Gaskin v. UK* (1989) 12 EHRR 36
*Roche v. UK* (2006) 42 EHRR 30
*Tarsasag a Szabadsagjogokert v Hungary* [2009] ECHR 618
*Kenedi v Hungary* [2009] ECHR 786
*A v Independent News & Media* Ltd [2010] EWCA Civ 343
*BBC v Sugar (No 2)* [2010] 1 WELR 2278
*In re Guardian News and Media Ltd* [2010] 2 AC 697
*R(Guardian News & Media) v City of Westminster Magistrates' Court* [2011] 1 WLR 1173
*De Frietas v Permanent Secretary of Minister of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC69, PC
*Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167

# REPORT

## Introduction

1. On 18 November 2010 the Court of Appeal heard Mr Kennedy's appeal against the judgment of Calvert-Smith J[1] in which he dismissed Mr Kennedy's appeal against the Information Tribunal's decision of 14 June 2009[2]. By Order sealed 18 May 2011, the Court of Appeal ordered:

> " 1. Pursuant to CPR 52.10(2)(b) the following issue be remitted to the First-Tier Tribunal (Information Rights) to be determined:
>
> Whether s 32(2) of the Freedom of Information Act 2000 should in the circumstances be read down pursuant to s 3 of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights, so that the exemption that it provides from disclosure of information ends upon the termination of the relevant statutory inquiry.
>
> 2. Pending the determination by the First-tier Tribunal (Information Rights) of the said issue the appeal be stayed.
>
> 3. Liberty to the parties to restore the appeal after the determination of the said issue by the First-Tier Tribunal (Information Rights).
>
> 4. The costs of the appeal be reserved."

2. The First-tier Tribunal ("**FTT**") issued directions on 15 June 2011 in order to take further evidence and arguments as directed by the Court of Appeal.[3] The FTT permitted the Information Commissioner ("**IC")** and the Ministry of Justice ("**MoJ**") to make written submissions, which they both provided dated 12 October 2011. Mr Kennedy, a journalist with The Times, and Ms Baxter, a senior legal adviser with the Charity Commission ("**CC**"), provided further evidence to the FTT.

3. The issue before the Court of Appeal is whether the absolute exemption contained in s 32(2) of the *Freedom of Information Act 2000* ("**FOIA**") lasts only for the duration of an inquiry or whether it continues for another 30 or so years after it has ended. In its judgment dated 12 May 2011, the Court of Appeal held that, applying the "conventional approach to construction," the exemption does continue to disapply the access right for 30 years after the inquiry has ended. The Court of Appeal went on to hold that this did not conclude the matter, holding that the conventional approach to construction might well have to yield to one compelled by s 3 of the *Human Rights Act 1998* ("**the Human Rights Issue**"). As quoted above, the Court of Appeal has referred the Human Rights Issue back to the FTT for determination having taken such evidence and heard such further argument as we

[1] [2010] EWHC 475 (Admin)
[2] EA/2008/0083
[3] Para 46 *Kennedy v The Charity Commission* [2011] EWCA Civ 367

consider may be appropriate.[4] Once the FFT has reported on the Human Rights Issue, the parties will restore the appeal in the Court of Appeal so that the hearing can be concluded.

4. The Court of Appeal has provided the FTT with a daunting task and we have done our best to provide this report so as to assist the Court of Appeal with its further deliberations. Our examination has involved an extremely complex analysis of human rights law more suited to higher courts. However we have been ably assisted in this task by the submissions of the parties and the IC and MoJ for which we are extremely thankful.

5. Mr Kennedy claims that the Court of Appeal's "conventional construction" of s 32(2) FOIA results in an infringement of his right to freedom of expression, thereby contravening Article 10 of the European Convention of Human Rights (**"ECHR"**). Mr Coppel, on his behalf, contends that s 32(2) FOIA can be construed in a manner that is consistent with Article 10 ECHR by reading it to apply for the currency of an inquiry, but not beyond. This construction, he argues, is mandated by s 3 of the *Human Rights Act 1998* ("**HRA**") since it accords with both the Court of Appeal's grammatical analysis and its purposive reading of s32(2) and that the FTT should prefer it to one that offends Article 10 of the ECHR.

6. The IC puts the Human Rights Issue in an even wider context. The IC says that if Mr Kennedy was to have such an Article 10 right to obtain information then this could potentially apply to other aspects of FOIA particularly other absolute exemptions.

7. The CC, IC and MoJ all contend that, in effect, there is no Human Rights Issue and the conventional construction of s.32(2) FOIA, already found by the Information Tribunal (now the FTT), High Court and the Court of Appeal, should stand.

## Questions for the FTT to determine

8. The parties have helped with setting out four questions which the FTT should answer in order to comply with the Court of Appeal's Order. These are:

   **i) Does the refusal to disclose the information applying the s.32(2) FOIA exemption interfere with Mr Kennedy's right to freedom of expression under Article 10(1) ECHR?**
   **ii) If yes, is such an interference justified under Article 10(2)?**
   **iii) If no, should s.32(2) be construed in a way which is consistent with Article 10?**

[4] *Kennedy v The Charity Commission* [2011] EWCA Civ 367, [46] *per* Ward LJ. It is to be noted that the remittal does not (and jurisdictionally could not) resurrect the original appeal that was before the Information Tribunal. That appeal having been concluded, the Information Tribunal is *functus officio*. The FTT is engaged in a free-standing determination for which it derives its jurisdiction from CPR 52.10(2)(b), rather than s 14 of the *Tribunals, Courts and Enforcement Act 2007*.

**iv) If yes, does limiting s.32(2) to information held until the termination of the relevant statutory inquiry avoid the breach of Article 10?**

We do not intend to set out the background to the appeal as this is more than adequately covered in the three decisions of the Information Tribunal, High Court and Court of Appeal.

9. We remind ourselves that Mr Kennedy's refined request was for:

(1) Documents containing information that explains or evidences the Charity Commission's conclusion that George Galloway may have known that Iraqi bodies were funding the appeal;
(2) Documents from the Charity Commission to George Galloway inviting him to set out his position or speak to the Charity Commission and documents containing George Galloway's response to that/those invitation(s);
(3) Documents received by the Charity Commission from other public authorities (as defined by the FOIA) and documents sent by the Charity Commission to other public authorities;
(4) Documents that contain information describing or revealing the reason that (or otherwise explaining why) the Charity Commission decided to commence and continue the [three Inquiries]."[5] ("**the Refined Request**")

10. We note that the effect of the conventional construction of s.32(2) is that the information requested by Mr Kennedy is kept secret for at least 30 years, if the information still exists. Ms Baxter in evidence before us explained that some information following an inquiry may be destroyed before the remainder is deposited with the National Archives. Therefore there is no guarantee that the requested information or some of it would exist in 30 years time.

## Does the application of s.32(2) FOIA interfere with Mr Kennedy's Article 10(1) rights?

11. In order to answer this question we need to analyse the jurisprudence of the European Court of Human Rights ("**ECtHR**") and how that has been applied by UK courts.

12. The parties in their skeleton arguments and submissions before us and the MoJ and IC in their written submissions have set out at length (132 pages) their views on the position.

13. Our task is to try and provide a comprehensible way through this which we have done by not repeating all the arguments and submissions, although having considered them in detail, but summarising what we consider the

[5] The request was further clarified by an email from the Appellant's solicitor dated 20 January 2009.

jurisprudence is and the extent to which it has been adopted by UK courts. This is still a daunting task.

14. Article 10 ECHR provides:

> " 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

15. Article 10(1) sets out the positive freedom, while Article 10(2) sets out the limitations on that freedom. The ECtHR has stated that, when adjudicating on Article 10 cases, the Court is faced:

> " not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted ... It is not sufficient that the interference belongs to that class of the exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."[6]

16. The importance of freedom of expression has constantly been emphasised. In one of the first major judgments on Article 10, the Court stated:

> " Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man."[7]

17. The ECtHR has recognised that the press and other media have a special place in a democratic society as 'purveyor of information and public watchdog', and thus any restrictions that impact on such organisations tend to be scrutinised very closely. In *Bergens Tidende v Norway*[8] the Court emphasized:

> " Where…measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for."

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6 *Sunday Times* v *The United Kingdom* (1979) 2 EHRR 245, at p. 281, [65].

7 *Handyside* v *UK* (1976) 1 EHRR 737, at [49]

8 (2001) 31 EHRR 16.

18. The media receives protection under Article 10 because it has a duty to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest.[9] The House of Lords, in *McCartan Turkington Breen v Times Newspapers Ltd*,[10] has similarly recognized the importance of the media in a modern democracy. Lord Bingham stated:

> " In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognized the cardinal importance of press freedom…".[11]

19. In interpreting Article 10, the FTT is required by s.2 HRA to take into account any relevant judgment of the ECtHR and, by virtue of s. 3(1) HRA, "*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*".

20. The Supreme Court has very recently considered these obligations in *Ambrose v Harris (Procurator Fiscal, Oban) (Scotland), Her Majesty's Advocate v G (Scotland), Her Majesty's Advocate v M (Scotland)* [2011] UKSC 43 which involved Article 6 of the ECHR. Lord Hope considered Lord Bingham's opinions in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at 20 and in *Brown v Stott* [2003] 1 AC 681, [2001] 2 WLR 817at 59. He concluded that:

> " 19. […] Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.
>
> 20. That is why, the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies."

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9 See, e.g., *Jersild v Denmark* (1994) 19 EHRR 1, [31].

10 [2001] 2 AC 277.

11 Ibid at 290G-291A. See also *R v Shayler* [2003] 1 AC 247 per Lord Bingham at [21] where he commented on the potent and honourable "role of the press in exposing abuses and miscarriages of justice".

Lord Dyson also quoted [101] from Lord Kerr in *Ullah* that "the duty of national courts is to keep pace with the Strasburg jurisprudence as it evolves over time: no more, but certainly no less."

We will attempt to understand where the Strasbourg jurisprudence now lies.

Before doing this we note Mr Beer's words of caution that decisions of ECtHR are not strictly binding on national courts. However national courts should follow any clear and constant jurisprudence of the Strasbourg court and that although it is open to national states to go further than the ECHR (by legislation) it is not open to national courts to do so. [12]

21. As is apparent from the title of Article 10 - "freedom of expression" - this Article is primarily directed at State action that prevents or inhibits a person from imparting information and ideas to others, as opposed to affording such a person a general right of access to information held by the State.

22. Article 10(1) does however provide that the right to freedom of expression includes the right "to receive ... information and ideas without interference by public authority and regardless of frontiers" (emphasis added). The issue is thus whether this aspect of Article 10(1) gives rise to the general right of access to information for which Mr Kennedy contends or at least at right of access to Mr Kennedy in the circumstances of this case.

23. The ECtHR considered the meaning of these words in Article 10(1) in *Leander v. Sweden* (1987) 9 EHRR 433. Mr Leander had been refused employment, having been assessed to be a security risk on the basis of information that had not been disclosed to him. He complained that he should have been provided with the information in question, and should have been given the chance to refute it. The ECtHR rejected his claim under Article 10. Under the heading "Freedom to receive information", the ECtHR held at §74:

> " The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual." (Emphasis added.)

24. It follows from this analysis (and, in particular, the word "others" in the first sentence quoted above) that, at least at the time of the *Leander* judgment, the right to "receive" in Article 10(1) did not include a right to receive information from the State when the State was unwilling to provide it.

[12] We also note that in *Re G and others* [2008] UKHL 38 the House of Lords seems to have held that a domestic court can go beyond the protection afforded by existing Strasbourg jurisprudence if it is of the view that although such jurisprudence does not currently provide protection, were the matter to be considered by the ECtHR, such protections would be likely to be provided.

25. The above passage from *Leander* has been subsequently applied in a number of Strasbourg cases, including *Gaskin v. UK* (1989) 12 EHRR 36, at §52 (an attempt to obtain local authority records relating to the applicant's childhood); and *Guerra v. Italy* (1998) 26 EHRR 357 (an alleged failure on the part of the State to provide information to the public about a chemical factory), at §53. In each case, the claimed Article 10 right to obtain information from the State was rejected.

26. In *Roche v. UK* (2006) 42 EHRR 30, this line of authority was expressly endorsed by the Grand Chamber of the ECtHR. *Roche* concerned a former serviceman who *inter alia* complained under Article 10 that he had been given inadequate access to information about the Porton Down tests in which he had participated in the 1960s. As to this, the Grand Chamber held (unanimously, on this point) at §172:

> " The Court reiterates its conclusion in *Leander v. Sweden* (judgment of 26 March 1987, Series A no. 116, p. 29, § 74) and in *Gaskin* (... § 52) and, more recently, confirmed in *Guerra and Others* (... § 53), that the freedom to receive information 'prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him' and that that freedom 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to ... disseminate information of its own motion'. It sees no reason not to apply this established jurisprudence."

On this basis Mr Roche's Article 10 complaint was dismissed.

27. Mr Beer argues this is, in effect, the end of the matter. *Leander* represents the clear and consistent jurisprudence of the Strasbourg Court which has now been upheld by the Grand Chamber. There is no right under Article 10(1) for Mr Kennedy to receive the information unless the CC was willing to disclose it to him, which it is clearly not, although it has always been at liberty to.[13]

28. Mr Coppel says firstly, that the primary focus of these cases was not Article 10. It was Article 8 (personal information) in all the cases, except *Roche* where it was Article 6. These cases were not concerned with the exercise of a statutory right to access to information.

29. Secondly, the UK courts (as per Lords Bingham and Dyson at paragraph 20 above) are able to take into account developments in ECtHR jurisprudence.

30. Thirdly, there have been such developments which are concerned with Article 10 alone. In *Tarsasag a Szabadsagjogokert v Hungary* [2009] ECHR 618 the Hungarian Civil Liberties Union ("**HCLU**"), complained to the Constitutional Court that the Criminal Code which concerned certain drug related offences was unconstitutional. They then requested the Constitutional Court grant them access to the pleadings (including a submission by an MP) in the pending case before it under s.19 of what is known as the Data Act 1992, which is similar to a combination of our FOIA

[13] See s.78 FOIA.

and Data Protection Act 1998. The request was refused. The HCLU then brought an action in the local courts which dismissed the action and this decision was upheld by the Hungarian Court of Appeal. The HCLU then alleged this was a violation of Article 10 and the matter was considered by the ECtHR. Hungary conceded that there had been an interference with the applicant's rights under Article 10 and the ECtHR went on to find

" Whether there has been an interference

26. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters (see *Observer and Guardian v. the United Kingdom,* 26 November 1991, § 59, Series A no. 216, and *Thorgeir Thorgeirson v. Iceland,* 25 June 1992, § 63, Series A no. 239). In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III, and *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298), even measures which merely make access to information more cumbersome.

27. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. 68416/01, § 89, ECHR 2005-II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see *Riolo v. Italy,* no. 42211/07, § 63, 17 July 2008; *Vides Aizsardzības Klubs v. Latvia,* no. 57829/00, § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.

28. The subject matter of the instant dispute was the constitutionality of criminal legislation concerning drug-related offences. In the Court's view, the submission of an application for an a posteriori abstract review of this legislation, especially by a Member of Parliament, undoubtedly constituted a matter of public interest. Consequently, the Court finds that the applicant was involved in the legitimate gathering of information on a matter of public importance. It observes that the authorities interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in

question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

29. There has therefore been an interference with the applicant's rights enshrined in Article 10 § 1 of the Convention.

35. The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, 26 March 1987, § 74 *in fine*, Series A no. 116) and that "it is difficult to derive from the Convention a general right of access to administrative data and documents" (*Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)). Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information.

36. In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander*, op. cit., § 74). It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny (see *Chauvy and Others v. France,* no. 64915/01, § 66, ECHR 2004-VI). Moreover, the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available (see, *a contrario, Guerra and Others v. Italy*, 19 February 1998, § 53 *in fine, Reports of Judgments and Decisions* 1998-I) and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant."
(Emphasis added).

31. Moreover in *Kenedi v Hungary* [2009] ECHR 786 the ECtHR upheld its decision in *Tarsasag.* Here the applicant was a historian specialising in the functioning of the secret services of dictatorships, comparative studies of the political police forces of totalitarian regimes and the functioning of Soviet-type States. With a view to publishing a study concerning the functioning, in the 1960s, of the Hungarian State Security Service of the Ministry of the Interior, the applicant requested the Ministry to grant him access to certain documents deposited with it, which was refused. The applicant brought a successful claim under the same Data Act of 1992. Later the Ministry offered him the documents in confidence provided he did not disclose them. Even later it decided to lodge all except one document with the National Archive so they were available to the public. The applicant brought his case before ECtHR in relation to the one outstanding document

to which he did not have unrestricted access. Again there was a concession by the state that there was an interference with freedom of expression. The ECtHR said:

> " 33. The Court observes that the domestic courts recognised the existence of the right underlying the access sought by the applicant. The access was necessary for the applicant, a historian, to accomplish the publication of a historical study. The Court notes that the intended publication fell within the applicant's freedom of expression as guaranteed by Article 10 of the Convention. In that connection, it recalls that the right to freedom of expression constitutes a "civil right" for the purposes of Article 6 § 1. Moreover, the applicability of this latter provision has not been disputed by the parties.
>
> ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION
>
> 40. The applicant also complained that the Ministry's protracted reluctance to grant him unrestricted access to the documents in question had prevented him from publishing an objective study on the functioning of the Hungarian State Security Service.
>
> 41. The Court considers that this complaint falls to be examined under Article 10 of the Convention ….
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> 42. The Government conceded that there had been an interference with the applicant's right to freedom of expression. They submitted that the retroactive classification of the documents in question pursued the legitimate aim of national security, in which field States enjoy a certain margin of appreciation. Moreover, it was the applicant's own fault that the study in question had not been accomplished since, intransigently, he had insisted on having completely unrestricted access. The applicant contested these views.
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> 43. The Court observes that the Government have accepted that there has been an interference with the applicant's right to freedom of expression. The Court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see, *mutatis mutandis, Társaság a Szabadságjogokért v. Hungary…).*"
>
> (Emphasis added).

32. Mr Beer says the Hungarian Data Act goes further than FOIA and prohibits the state from disclosing personal data without the owner's consent. This seem to us to be similar to s.40(2) FOIA which largely requires consent for 'fair and lawful' processing. Mr Beer goes further and argues that the difference is that the CC could have chosen not to have claimed the s.32(2) exemption,[14] but that is not possible under the Data Act. However, in this case it is not just personal data that is involved. Moreover, the CC refused to disclose the information whether or not the owners of the information would have consented to its disclosure. It appears to us therefore that in this case s.32(2) is acting as an arbitrary restriction which potentially becomes a form of indirect censorship to gather information.

[14] S.78 FOIA.

33. Mr Beer also criticises *Tarsasag* and *Kenedi* because he says they are only decisions of a second chamber and not the Grand Chamber like *Roche.* The cases did not involve oral submissions and the Court only comprised 5 judges – the same in both cases.

34. However Lord Judge CJ in the Court of Appeal in *A v Independent News & Media Ltd* [2010] EWCA Civ 343 said about *Tarsasag*

> " 41. There have also been two more recent decisions of the Strasbourg Court which appear to provide support for the notion that article 10 is engaged in a case such as this, essentially for two reasons. First, the Strasbourg jurisprudence seems to have developed since the *Leander* case….so that article 10 seems to have a somewhat wider scope; secondly, where the media is involved and genuine public interest is raised, it may well be that, at least in some circumstances, one is anyway outside the general principle laid down in the *Leander* case, at para 74."
>
> 42. It was seen as a new development, and described as "a landmark decision on the relation between freedom of information and the …Convention", by the European Commission for Democracy through Law (the Venice Commission) in its Opinion on the Draft Law about Obtaining Information of the Courts of Azerbaijian No 548/2009."
>
> (Emphasis added).

Lord Judge clearly had *Leander* in mind when making this statement because he mentions the case several times during the course of his judgment.

35. Moreover in *BBC v Sugar (No 2)* [2010] 1 WELR 2278, which is a FOIA case, Lord Justice Moses in the Court of Appeal at [76] again says *Tarsasag* is

> " a landmark decision on freedom of information which establishes that article 10 may be invoked not only by those who seek to give information but also by those who seek to receive it."

36. Mr Beer refers us to the Supreme Court decision in *In re Guardian News and Media Ltd* [2010] 2 AC 697 [34] which quoted *Leander* as the existing Strasbourg case law on the scope of Article 10 and that did not grant the press a right to be supplied with information that would not otherwise be available to them. However we note that this case mainly focussed on Article 8, that only the *Leander* judgment of the ECtHR was referred to and not the more recent developments in *Tarsasag* and *Kenedi,* and that, in any case, the Supreme Court, in effect, allowed the disclosure of personal data under Article 10 to the press.

37. Mr Beer says that FOIA is "applicant blind" and therefore we should ignore the fact that Mr Kennedy might be exercising the functions of a social watchdog. This means that Mr Kennedy's case is weakened as Article 10 particularly relates to the rights of the press. Although the FTT agrees with Mr Beer that FOIA is applicant blind there is nothing in FOIA which prevents us from considering who the requester is and his motives. In fact we do this

regularly when considering vexatious requests or the strength of a public interest when applying the public interest test.[15]

38. Our attention has also been drawn to the recent Divisional Court's decision in *R(Guardian News & Media) v City of Westminster Magistrates' Court* [2011] 1 WLR 1173 where it considered that *Tarsasag* was restricted to the information in the claims before the ECtHR and that the press does not have a unfettered right to information. However in the judgment we note that the appellant sought the totality of the information regardless of whether its disclosure could be harmful to other interests. This is very different from Mr Kennedy's case because if s.32(2) falls away the CC still has a raft of other exemptions to protect the majority of documents from disclosure. Moreover the Divisional Court acknowledged that *Tarsasag* was applied by the Court of Appeal in *A v Independent News & Media Ltd.* We note that the case (*Guardian News & Media)* is currently under appeal.

39. The FTT, having considered all the arguments of the parties and MoJ and IC, considers that the Court of Appeal, having been referred to the most recent developments in the ECtHR in relation to the right to access under Article 10, has recognised since *Leander,* which was a 1987 decision, that there is a new development in relation to the Article 10 jurisprudence. We note that both 2009 decisions were unanimous. That it is not only the Second Chamber of the ECtHR but that the Fourth Chamber in *Waizerkaniuk v Poland* (App No 18990/05) [65] and the Fifth Chamber in *Matky v Czech Republic* (Application No 18990/05) at page 7 also recognise the development, hence the reference to the latter decision in *Társaság* at § 35..

40. What the Court of Appeal is doing is keeping pace with this developing jurisprudence as it evolves over time and no more, but certainly no less.

41. In Lord Hope's words in *Ambrose v Harris* [2011] UKSC 43 [20] what the court must do is identify "as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on the issue."

42. As best we can the FTT considers that this developing jurisprudence is not necessarily granting a general right to receive information under Article 10. Such a general right of access still only exists as set out under *Leander.* It has advanced, however, towards a broader interpretation of the notion of freedom of information which has recognised an individual right of access conferred by Article 10(1) but which is subject to certain "formalities, conditions, restrictions or penalties" described in Article 10(2). This may be where a social watchdog is involved and there is a genuine public interest as in *Társaság* or where historical research is being hindered on a matter of public importance as in *Kenedi*. It appears to us that this extension of scope of Article 10(1) is now being consistently applied and recognised by a number of chambers of the ECtHR. Our Court of Appeal has also recognised this as a clear development. In our view this has not led to a general right to receive information as that would be going too far. However

[15] S.2 FOIA.

it is now clear that the ECtHR has developed a wider approach from that first established in 1978 to the notion of "freedom to receive information". There is now recognition of an individual right of access to information in certain circumstances.

43. We try to explain this by reference to what the ECtHR says in *Tarsasag* which seem to us to establish, particular in relation to social and media watchdogs, that:

    i) Where a State makes no provision for a right of access to official information (at least so far as the right is needed to help inform public debate), that absence will itself constitute an interference with the right to freedom of expression which is protected by Article 10(1);

    ii) Where a state does confer such a right of access but the right is shaped (i.e. so that there is no right of access outside its bounds), then for information falling outside the bounds of the right:

        (a) there is an interference with the right to freedom of expression which is protected by Article 10(1); and

        (b) that interference falls to be addressed by Article 10(2).

44. In Mr Kennedy's case the CC were able to refuse to disclose information to him by applying an absolute exemption under FOIA. The conventional construction of s.32(2) in effect allows the State to prevent the disclosure of information for 30 years or more. As Jacob LJ recognises this is "regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure". All members of the Court of Appeal in this case recognise difficulties with the conventional construction, hence asking the FTT to consider the effect of Article 10. This amounts to an interference with Mr Kennedy's right to freedom of expression in the circumstances of his appeal. The particular circumstances are that

    i) He is seeking to gather information on a matters of public concern – Mr Galloway and the Miriam Appeal and the way the CC conducted its inquiries into the Appeal;

    ii) The CC, by refusing to disclose such information, is imposing a form of censorship; and

    iii) Mr Kennedy's right to impart information is also impaired.

45. Mr Beer argues that *Társaság* requires an 'information monopoly' before there can be an interference with freedom of expression and there is not one is this case.

46. Mr Coppel says an information monopoly is not a prerequisite for the engagement of Article 10 as an information monopoly did not feature in and was not considered by the ECtHR in *Kenedi.*

47. Even if the presence of an information monopoly is necessary, Mr Coppel argues, it exists in this case in relation to the Refined Request. The fact the CC has invoked the s.21 exemption (information reasonably accessible by other means) for such a small percentage (1.2%) of the withheld information speaks for itself.

48. If we take the first class of documents sought by Mr Kennedy (documents containing information that explains or evidences the Charity Commission's conclusion that George Galloway may have known that Iraqi bodies were funding the appeal) we make the following findings from the evidence:

    i) If as Ms Baxter says in her evidence before us at this hearing the materials referred to in three published reports[16] largely provide the basis for the CC's conclusion on funding then why has the CC not said so before. Moreover the documents listed as dealing with this part of the Refined Request are not the reports;

    ii) The description of the documents suggest the information is different or more detailed than anything contained in the reports;

    iii) S.21 is not claimed for any of them.

49. In relation to the second class of documents (documents from the Charity Commission to George Galloway inviting him to set out his position or speak to the Charity Commission and documents containing George Galloway's response to that/those invitation(s)) Ms Baxter says that Mr Kennedy could have asked Mr Galloway or his solicitors for them. From the evidence we find that Mr Galloway had already made it very clear to Mr Kennedy that he would not co-operate with him and in any case his solicitors would only act on their clients instructions. Mr Galloway is not subject to FOIA, even as an MP. Therefore the only source that Mr Kennedy could realistically obtain this information from was the CC.

50. In relation to the third class of documents (documents received by the CC from other public authorities and documents sent by the CC to other public authorities) Mr Beer suggested at least 10 other public authorities from whom Mr Kennedy could have requested the 59 documents. Mr Kennedy accepts that some of the documents listed in the schedules are probably held by other public authorities, but says this does not lift an information monopoly. Mr Kennedy points out in his evidence that it is simply not possible for a journalist, with limited time and resources, to seek information from every public authority who may have corresponded with the CC in relation to its inquiry. To require him to make multiple FOIA requests to various public authorities, some or all of which may, like the CC, seek to resist such a request through the courts, would place substantial obstacles in the way of gathering of information on matters of considerable public concern.

[16] Independent Inquiry Committee into the United Nations Oil for Food Programme, the United States Senate Permanent Sub-committee on Investigations and the report of the Parliamentary Commission for Standards.

51. There was no evidence before us that any of these documents were published or otherwise available. It is not realistic to assert that they are reasonably accessible from other sources in an easy and timely manner.

52. In relation to the fourth class of documents (documents that contain information describing or revealing the reason that or otherwise explaining why the CC decided to commence and continue the three inquiries) from the list these all seem to be CC documents mainly internal notes, reports, emails and internal legal advice. Ms Baxter did not provide any evidence that there was any other source for this information other than to indicate that the summary of the reasons was set out in the SOIRs.

53. Whether or not an information monopoly is a prerequisite before there can be an interference with Article 10, we find there is an information monopoly in this case which strengthens Mr Kennedy's position as a public watchdog that there has been an interference with his freedom of expression.

54. We conclude, having taken into account all the above matters, that the conventional meaning of s.32(2) FOIA is an interference with Mr Kennedy's Article 10 rights in this case.

**Is such an interference justified under Article 10(2)?**

55. In order for us to determine whether the interference with Article 10 is justified we need to consider whether s.32(2) FOIA is applied pursuant to a legitimate aim and that it is proportionate in the sense of being "necessary in a democratic society".

56. All parties agree it is a legitimate aim to protect information lodged with or created during the course of an inquiry. However Mr Coppel considers that it is not proportionate and therefore no longer legitimate to protect that information under s.32(2) after the inquiry has ended.

57. Mr Coppel maintains that the four-limb test to be applied when considering the proportionality under the HRA is as follows:

> (1) the objective of the legislative provision is sufficiently important to justify limiting a human right; and
> (2) the measures designed to meet the objective are rationally connected to it; and
> (3) the means used to impair the right are no more than is necessary to accomplish the objective; and
> (4) the measure should reflect a fair balance between the rights of the individual and those of society.

58. The first three limbs come from the Privy Council judgment in *De Frietas v Permanent Secretary of Minister of Agriculture, Fisheries, Lands and Housing*[17] and have been approved on numerous occasions by the House

[17] [1999] 1 AC69, PC

of Lords/Supreme Court in relation to proportionality under the HRA.[18] The fourth limb was added by the House of Lords in *Huang v Secretary of State for the Home Department*.[19] The fourth limb was described as an 'overriding requirement.'[20]

59. Mr Coppel develops his argument as follows. As to the first limb of the proportionality test (the existence of a sufficiently important objective served by the conventional construction), during the currency of an inquiry the exemption recognisably furthers a sufficiently important objective — the efficient and even-handed conduct of that inquiry by document-control being in the hands of the inquiry chair (or the like) and by the avoidance of a parallel (and potentially time-consuming, conflicting and distracting) regime of document access. However, once an inquiry has closed, that objective falls away. No objective takes its place. Indeed, upon the conclusion of an inquiry the chair ceases to command control of its documents. They are held by the commissioning public authority. The former chair cannot order the commissioning public authority to disclose them. He is *functus officio*. Disclosure is within the gift of the commissioning public authority. S.32(2), Mr Coppel says, is emptied of its objective.

60. Mr Coppel then submits that the Information Tribunal, the High Court, the Court of Appeal and the CC failed to identify any remaining or replacement objective. The CC has asserted that s 32(2) should continue to provide blanket exemption so as to protect the rights of others — namely, the charity and those who co-operated with its inquiries. Mr Coppel argues that, in taking this stance, the CC has accepted that upon the conclusion of an inquiry s 32(2) is no longer for the CC's benefit. The CC's stated concern to protect the charity and the persons who co-operated with the inquiry is misplaced. Their rights and interests are already fully protected by the suite of other exemptions in Part II of FOIA. Once the inquiry is over and without s 32(2), they are being treated on exactly the same basis as any person who supplies information to a public authority, whether voluntarily, in support of some sort of benefit or under compulsion. There can be no suggestion that these exemptions afford inadequate protection to anything deserving protection. That is borne out here by the array of other exemptions invoked by the CC in relation to the majority of documents captured by the Refined Request. Given these other exemptions covering all the protected interests, there is no objective — let alone one of sufficient

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18 *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [27] *per* Lord Steyn; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [38] *per* Lord Steyn; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 at [33] *per* Lord Bingham, [61] *per* Lord Hope; *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [30] *per* Lord Bingham, where he quoted with approval Lord Steyn's dicta in *Daly* where Lord Steyn stated that the relevant test was that articulated by the Privy Council in *De Freitas*; *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 at [35] *per* Lord Carswell; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [19] *per* Lord Bingham on behalf of the Judicial Committee; *R(F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17 at [17] *per* Lord Phillips.

19 [2007] UKHL 11, [2007] 2 AC 167.

20 [2007] UKHL 11, [2007] 2 AC 167, at para 19 *per* Lord Bingham.

importance — achieved by reading s 32(2) FOIA so as to confer a 30 year post inquiry exemption for everything else.

61. In relation to the second and third limbs of the proportionality test, Mr Coppel argues, these are not satisfied either. As already noted, there is no "sufficiently important objective" served by the conventional construction of s 32(2). Even if one were to pretend that the construction of s 32(2) FOIA serves the "important objective" of protecting the rights of the charity which is being investigated and of the persons who co-operated with the inquiry, the other exemptions in Part II — which together cover the field of interests worthy of protection from disclosure — already secure this objective. An objective secured is no longer an objective. The rights of the charity and persons who co-operated with the CC's inquiry are thus perfectly well protected by the other exemptions. Mr Beer does not suggest that these other exemptions will not be up to the task.

62. In relation to the fourth limb of the test of proportionality, namely the measure should reflect a fair balance between the rights of the individual and those of society, we note that Mr Kennedy is a journalist with The Times. Lord Bingham says

> " The proper functioning of modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognized the cardinal importance of press freedom."[21]

We consider that where a 'social watchdog' in involved that balance is more likely to weigh in favour of the individual's rights.

63. Moreover, Mr Coppel argues, continuation of the exemption for 30 years after the conclusion of the inquiry, regardless of its public importance and the harmlessness of disclosure to the protected interests, fundamentally impairs the right of access to information on matters of public concern. The 30-year blanket exemption urged by the CC:

— regardless of a document's content;

— regardless of the harmlessness of its disclosure;

— regardless of the public interest in its disclosure;

— regardless of whether its author is entirely content that it should be disclosed,

does not just impair Mr Kennedy's Article 10 ECHR right. Mr Coppel says it destroys it. The construction urged by the CC produces a paradigm of a disproportionate measure. Mr Coppel therefore argues that the breadth of this absolute exemption is neither necessary nor justified. This, he says, is borne out by the fact that under the *Inquiry Act 2005* no such similar

[21] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323

exemption exists. We also observe that s.32(1) is different in that a court continues to exist after proceedings are completed and that in any case courts have rules for dealing with documents held by them.

64. We agree with Mr Coppel's arguments. We do not consider the CC, MoJ and IC provide any convincing countervailing arguments as set out in their submissions[22]. We find that such an absolute exemption does not adequately balance the interests of society with those of individuals and groups. The public interest in disclosure of information to Mr Kennedy, that is not properly withheld under other FOIA exemptions, clearly outweighs any interest in it being withheld.

65. We therefore conclude that there is no justification for s.32(2) interfering with Mr Kennedy's Article 10 rights in the circumstances of this case.

**Should s.32(2) be construed in a way which is consistent with Article 10?**

66. S.3 HRA provides that:

> " So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

It places a very substantial duty on the interpretive body. That body has no discretion in the matter: it must interpret s 32(2) FOIA in a manner that is consistent with Article 10 ECHR "so far as is possible." This phrase has been held to mean "unless it is plainly impossible".[23] It is only if it is "plainly impossible" that the Court may be required to consider issuing a declaration of incompatibility.[24] S. 3 may require the Court or Tribunal to depart from the unambiguous meaning that legislation would otherwise bear.[25]

67. We conclude that s.32(2) should be interpreted in a manner that is consistent with Article 10.

68. Mr Beer argues that if we conclude that it is interpreted in this way then this construction should only be adopted when the person seeking the information is a member of the press. Mr Coppel does not agree because it mischaracterises Mr Kennedy's argument. He argues that the CC's construct is inconsistent with both the language of Article 10 ECHR which provides that "everyone has the right to freedom of expression" and the case law interpreting the right. The ECtHR in *Társaság* made clear that the right to receive information in the public interest was a right of "the public".[26] Neither of the applicants in the two recent Strasbourg cases was a journalist. The applicant in *Társaság* was a non-governmental organisation. The applicant in *Kenedi* was a historian with an interest in a particular matter of public concern.

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22 Their case mainly rests on whether there is an interference under Article 10(1).

23 *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 *per* Lord Steyn.

24 Neither the First-Tier Tribunal or the Upper Tribunal have the power to issue such a declaration.

25 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 30 *per* Lord Nicholls.

26 *Társaság a Szabadságjogokért v Hungary* [2009] ECHR 618 at [26].

69. Mr Coppel goes further. He argues, in any event, if the interaction of Article 10 and s 32(2) FOIA were limited to the journalists, that would not disable the Court from using its s 3 HRA power to construe s 32(2) FOIA consistently with Article 10 ECHR for the reasons set out in Mr Kennedy's points of reply before the Court of Appeal.[27] This is no different from the position in *Ghaidan v Godin-Mendoza*[28] and *R (Middleton) v West Somerset Coroner*.[29]

70. Whatever the arguments of the parties we only need to conclude that in the circumstances of this case that s.32(2) should be construed in a way which is consistent with Article 10.

**Does limiting s.32(2) to information held until the termination of the relevant statutory inquiry avoid the breach of Article 10?**

71. In the present case, s 3 HRA does not require a construction of s 32(2) FOIA in a manner that departs from its unambiguous meaning. On the contrary, it merely requires the adoption of a construction of s 32(2) FOIA that accords with both a grammatical analysis and a purposive reading which has already been recognised by the Court of Appeal. There is no need to read in words or to embark on a strained construction. As such, this is not a difficult case for the purposes of s 3 HRA.

72. We find that limiting s.32(2) FOIA to exempting information that it provides from disclosure so that it ends upon the termination of the third statutory inquiry in this case, has the effect of complying with s.3 HRA.

**Conclusions**

73. We unanimously determine as follows:

    (1) The conventional construction of s 32(2) FOIA interferes with Mr Kennedy's right to freedom of expression.
    (2) This interference is not "necessary in a democratic society" because it is not proportionate to a legitimate aim.
    (3) In the circumstances, s 32(2) FOIA should be construed in a manner that is consistent with Article 10 ECHR "so far as it is possible to do so."
    (4) By limiting s 32(2) to documents held by inquiries that have not concluded, Mr Kennedy's Article 10 rights will not be interfered with in a disproportionate way.

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27 [6/1774].
28 [2004] 2 AC 557.
29 [2004] 2 AC 182

Signed:

John Angel
Principal Judge

Date: 18 November 2011