

Steven Sugar v IC & The British Broadcasting Corporation

EA/2005/0032

29th August 2006

Cases:

Facts

Malcolm Balen was asked to advise on the BBC's coverage of the Israel and Palestine conflict following allegations that reporting was not even handed. During 2004 he produced an internal written report which was eventually considered by the Journalism Board of the BBC in November 2004. The report was never published. On 8 January 2005 Mr Sugar requested a copy of the report. The BBC responded to the effect that the Report directly impacted on the BBC's reporting of crucial world events and that FOIA did not apply.

Mr Sugar complained to the IC who decided that the Balen Report was held for the purposes of journalism and that the BBC was not a public authority in relation to the request and therefore was not subject to FOIA. The IC advised Mr Sugar that he could seek a judicial review of the IC's decision. Instead Mr Sugar appealed to the Tribunal.

Findings

Jurisdiction

The Tribunal directed that the question as to whether the Tribunal had jurisdiction to hear the appeal point should be dealt with as a preliminary issue. By the time of the preliminary hearing the IC had changed his mind and was not disputing the Tribunal's jurisdiction because he considered that as he had made a decision under s.50 and that meant the Tribunal had jurisdiction. The Tribunal found that it did have jurisdiction to hear the appeal. It then went on to consider a second preliminary issue, namely was the Balen Report held for the purposes of journalism. The Tribunal found that although the Report was created for the purposes of journalism by the time of the request it was held for the dominant purpose of strategic policy which lay outside the derogation. As a result the Tribunal found that the Report was held for purposes other than journalism and was not caught by the derogation.

In coming to its decision the Tribunal took into account that if there is no appeal to the Tribunal because it has no jurisdiction then the BBC is, in effect, the only arbiter of whether a request is in or outside the derogation. The only means of appeal is by way of judicial review to the Administrative Court which, to say the least, is inconvenient in its consequences. An appeal to the Tribunal would not require leave of any court; would be prospectively much more informal and would normally involve no exposure to legal costs; would involve a panel having particular expertise; and would be more "open-ended" under s.58 as compared to the traditionally more

restricted approach of the Administrative Court. Other anomalies would arise such as the public authority having an appeal to the Tribunal against a decision of the IC, but not the complainant.

The Administrative Court's decision

The BBC appealed both findings to the High Court. They sought a judicial review of the decision on jurisdiction and a statutory appeal on the derogation decision. [In order to meet the possibility that the court might hold that the Tribunal had no jurisdiction to entertain this appeal, Mr Sugar sought alternatively to ventilate the journalism issue by seeking permission to apply for judicial review, challenging the original decision of the IC that the Balen Report was held for the purposes of journalism.]

The Court found that a strict interpretation of s.7(1) should be adopted and that when taken with Sch I it meant that where information was held for the purposes of journalism (art and literature) then Parts I to V of the Act no longer applied and in effect the Tribunal had no jurisdiction. In relation to this decision it found that the IC had not issued a decision notice. Accordingly, the Tribunal's derogation decision fell away and was a nullity.

The judge confessed "that I do not find a conclusion on this whole issue altogether straightforward or clear-cut" and recognised that it is "manifestly inconvenient."

The Court of Appeal's decision

Mr Sugar, supported by the IC, appealed against the judge's decision on jurisdiction. Mr Sugar argued that the Administrative Court had no jurisdiction to hear the BBC's appeal from the Tribunal because that had been a preliminary decision, and the right of appeal under s.59 of the Act applies only to final decisions. The Court rejected Mr Sugar's contention.

The Court upheld the Administrative Court's decisions on s.7(1) and the fact that a decision notice was not issued. Lloyd LJ stated "that the correct reading of the Act does not allow for a decision notice in the instant notice, and therefore does not allow for an appeal to the Information Tribunal, even if the letter of 2 December 2005 had been in other terms than it was. I agree that the suggested anomaly cannot justify giving the language an interpretation that it cannot properly bear, which is that for which the appellant and the Information Commissioner contended."

Summary

The Tribunal found as a preliminary matter that it had jurisdiction to hear the appeal. The BBC appealed by way of judicial review to the Administrative Court which found that the Tribunal did not have jurisdiction. The High Court decision was upheld by the Court of Appeal. The House of Lords has given leave to appeal. As at October 2008 the appeal is still to be heard.