FOIA s.42 – Qualified exemption: legal professional privilege

HRA Art 10 – Right to freedom of expression

HRA Art 8 – Right to private and family life

Jonathan Fuller v IC & Ministry of Justice

EA/2008/0005
5th August 2008

Cases:
Bellamy v IC & The Secretary of State for Trade and Industry [2005] UKIT EA_2005_0023

Facts
The Home Office issued a consultation paper, "Consultation: On the possession of extreme pornographic material" to which much concern was expressed over its compatibility with the European Convention on Human Rights (ECHR). The Appellant made three requests for information, including for 'legal advice confirming that possession of certain sexual material can be successfully prosecuted and that Art 8 ECHR does not apply'. The Home Office refused to confirm or deny that it had the requested information, since to do so would either indicate or suggest the content of the advice which it had obtained, depending on the thrust of such advice.

The IC concluded that the Home Office was entitled to treat this request as relating to the substance of the advice which it held, not simply the question whether it had obtained advice at all. S.42 was therefore engaged.

Findings
Section 42
The Tribunal observed that whether legal advice has been obtained is a question which does not, of itself, give rise to issues of legal privilege. They noted however, that where a request is framed so as to require the public authority to disclose in its answer, by implication, the general effect of that advice, then issues of legal advice privilege arise. Where a government department must clearly have been advised, a request, as in this case, to state whether it holds advice confirming a specified opinion is a request to disclose the broad thrust of the advice which it has received. The Tribunal held that s.42 was therefore engaged.

The Public Interest Test
The Tribunal noted from the decision in *Bellamy* that the very fact that a document is privileged is of significant weight in the balancing exercise.

The Tribunal considered the following arguments in favour of disclosure:

a) It is right that the advice received by MoJ should be disclosed so that the public can judge the strength of its case on compatibility. If the proposal as

implemented (now s.63) is incompatible, large sums will be paid in compensation, which could be saved by disclosure.

b) The proposed legislation would destroy lives and drive some to suicide, who were engaged in nothing worse than private consumption of material portraying consensual behaviour.

c) Disclosure would show that the Minister who certified compatibility, when the bill was introduced to Parliament was lying.

The Tribunal also considered the Appellant's argument that the provision unfairly discriminated against a single minority, namely those who wished to engage in and watch in private consensual sado-masochistic behaviour and that this was the clearest possible case for the Tribunal to find that the public interest favoured disclosure, notwithstanding legal professional privilege and that, if it did not do so, it should say that it would never rule in favour of disclosure under s.42 so as to save everybody much time and money.

The Tribunal rejected the Appellant's arguments holding in relation to the first argument that if the government was wrongly advised and followed that advice, that is no reason to require its publication. Also they stated with regard to the second argument that whether or not suffering was or is being caused by the creation of the s.63 offence, any such suffering would result from Parliament `s decision, not from the correctness of the advice which the government received. They rejected the notion that publication would cause a change of heart in the Home Office or MoJ. Finally, they held that disclosure of the advice received would not demonstrate that the certifying minister lied.

Conclusion

The Tribunal dismissed the appeal.