

FOIA: ss 2, 17, 58: right to rely on new exemptions
S35(1)(b) ministerial communications and public interest

HOME OFFICE v INFORMATION COMMISSIONER

Case Number: EA/2010/0011

8 June 2010

Cases:

CPS v Information Commissioner EA/2009/0077

DBERR v Information Commissioner EA/2007/0072

Facts

Section 12 of the Asylum and Immigration Act 2004 abolished the right of successful asylum seekers to back-payments of income support. On 29 July 2008 the complainant requested a copy of a civil service submission dated 1 April 2004 dealing with the issues raised by the then proposed reform introduced by section 12 and other material relating to section 12. The Commissioner found that although s35(1)(a) of FOIA was engaged in relation to the April submission the public interest favoured disclosure. On appeal the Home Office abandoned reliance on s35 in relation to the April submission but sought to rely on ss40 and 42. The Home Office also disclosed for the first time the existence of ministerial correspondence which it sought to withhold in reliance on s35(1)(b).

Issues

The issues for the Tribunal were:

- (1) Whether the Home Office had a right to rely on the new exemptions in relation to the April submission;
- (2) Whether as a matter of discretion the Tribunal would allow such reliance;
- (3) Whether such exemptions in fact applied in relation to the April submission;
- (4) Whether s35(1)(b) entitled the Home Office to withhold the ministerial correspondence.

Findings

- (1) Notwithstanding the series of decisions of the Tribunal that late reliance on new exemptions may be permitted as a matter of discretion on a case by case basis where such reliance is shown to be justified, the Tribunal ruled in the light of full argument that a public authority has a *right* to raise new exemptions for the first time before the Tribunal; its reasons in summary were:
 - (a) s58 FOIA could be construed either as meaning that an appeal should be allowed if there is an error in the decision notice itself or as requiring the Tribunal to consider whether, all things now considered, the Commissioner reached the right result; the Commissioner argued for the former interpretation but that interpretation is not consistent with even a discretion to consider a new exemption raised before the Tribunal for the first time;
 - (b) the latter (wider) interpretation must be the correct one;
 - (c) but it does not require the Tribunal to seek out exemptions for itself: it remains a judicial body, not an investigator;
 - (d) under ss 1 and 2 FOIA there is no right to disclosure of information which is exempt;
 - (e) s17 is purely procedural; the issue here is one of jurisdiction;
 - (f) the Tribunal's conclusion was influenced by the nature of the appeal to it, namely a rehearing rather than a review;
 - (g) there is no express provision conferring any discretion to consider or not to consider late exemptions;
 - (h) the point raised that giving a right to public authorities to raise late exemptions will encourage them to be cynical or lazy is met by the ability of the Tribunal to order costs against them.
- (2) The Tribunal would in any event have considered the exemptions because s40 involved the familiar issue of named public servants and in relation to s42 a further closed matter favoured its admission regardless of justification for it not being raised earlier; although this decision arguably rendered the decision on issue (1) otiose the Tribunal having heard full argument considered it right to rule on that issue.
- (3) On s40, both sides accepted that it applied in relation to the names of junior officials. On s42 a recitation of legal advice will be privileged even if it does not refer to the advice or the advisor (as the Tribunal found in this case); the particularly strong public interest attaching to the protection of legal professional privilege which was conceded by the Commissioner and the relatively limited redactions required to apply the exemption meant that the public interest lay in favour of upholding the s42 exemption. Disclosure of the April submission subject to s40 and s42 redactions was therefore ordered.
- (4) S35(1)(b) was clearly engaged in relation to the ministerial

correspondence. On the public interest the Tribunal reached the view that that in disclosure clearly outweighed that in upholding the exemption; the Tribunal took into account the following factors: (a) the importance of the principle of collective responsibility (perhaps even more important in a time of coalition government) (b) the strong legitimate interest of the public in knowing how decisions like the one in question are made (c) the passage of over four years from the passage of the 2004 Act (d) that the exchanges related to an issue of substantial sensitivity and public concern (e) that they were “constructive, civilised, mildly informative” and (f) that the government had by the time of the request been superseded by Gordon Brown’s administration.