

FOIA s.42(1) – Qualified exemption: legal professional privilege

Leslie Keith Gillingham and Ann Patricia Gillingham v IC

EA/2007/0028

26th September 2007

Cases:

Bellamy v IC and The Secretary of State for Trade and Industry [2006] UKIT EA_2005_0023;

Shipton v IC and National Assembly of Wales [2007] UKIT EA_2006_0028;

Kitchener v IC and Derby City Council [2006] UKIT EA_2006_0044

Facts

The applicants wanted disclosure of counsel's advice to the Crown Prosecution Service (CPS) on possible prosecutions for use of a public footpath by motor vehicles. The CPS refused, relying on the exemptions under FOIA s.40(2) and s.42. On review the CPS confirmed the refusal to disclose the information, relying on s.42 FOIA.

The IC found that the qualified exemption in FOIA s.42(1) applied, but, for reasons set out at some length, that the public interest in maintaining the exemption outweighed the public interest in disclosure. He therefore upheld the CPS's refusal.

Findings

Public Interest

The Tribunal noted that the public interest reasons for maintaining the legal professional privilege exemption are particularly strong, following the approach in the cases of *Bellamy* and *Kitchener*, and referring to *Shipton*. This is because the purpose of the privilege is to serve the administration of justice and to safeguard the right of any person to obtain entirely frank and realistic legal advice. The privilege is a fundamental human right long established in the common law and now supported both by European law and by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Nevertheless the balance of public interest must be assessed in each case to see whether in the particular circumstances the public interest in maintaining the exemption outweighs the public interest in disclosure. For the public interest in maintaining legal professional privilege not to outweigh the public interest in disclosure, the public interest in disclosure needs to be particularly strong, because proportionate reasons are required for not upholding a fundamental human right. The Tribunal considered that the fact that the information was concerned with a public footpath was not a particularly strong factor as the number of people affected was small.

Conclusion

The Tribunal held that the public interest considerations in maintaining the exemption were much stronger than those which supported disclosure and thus upheld the Decision Notice.