



Hilary Term
[2012] UKSC 4
On appeal from: [2010] EWCA Civ 715

JUDGMENT

**Sugar (Deceased) (Represented by Fiona Paveley)
(Appellant) v British Broadcasting Corporation and
another (Respondents)**

before

**Lord Phillips, President
Lord Walker
Lord Brown
Lord Mance
Lord Wilson**

JUDGMENT GIVEN ON

15 February 2012

Heard on 23 and 24 November 2011

Appellant
Tim Eicke QC
David Craig
(Instructed by Forsters)

Respondent
Monica Carss-Frisk QC
Kate Gallafent
(Instructed by BBC
Litigation Department)

LORD WILSON

A: INTRODUCTION

1. Although the British Broadcasting Corporation (“the BBC”) is listed as a public authority in the Freedom of Information Act 2000, the Act, as I will call it, applies to the BBC only to a limited extent. The words of limitation are found in Part VI of Schedule 1 to the Act: they provide that the Act applies only “in respect of information held for purposes other than those of journalism, art or literature”. I will describe these words of limitation as the designation. This appeal requires the court to consider the meaning of the designation. The focus of the debate is on the word “journalism” rather than on the words “art” or “literature”. How widely – or narrowly – should the phrase “purposes other than those of journalism” be construed? The answer of course lies in the narrowness – or width – of the concept of the “purposes ... of journalism” in the context of the Act.

2. But the appeal also presents a more particular conundrum. It proceeds, albeit not on foundations as solid as one might wish, upon the premise that the information in issue was held by the BBC partly for purposes of journalism and partly for purposes other than those of journalism (or, for that matter, of art or literature). In a situation in which information is held for such dual and opposite purposes, does the information fall within the designation and thus within the scope of the Act?

3. The primary contention made on behalf of the BBC is that, where it is held by the BBC even only partly for purposes of journalism, information is beyond the scope of the Act; and thus that, provided that the purposes of journalism are significant (i.e. more than minimal), they leave the information beyond the scope of the Act even though it is also held – perhaps even predominantly held – for purposes other than those of journalism. I will describe this as the BBC’s polarised construction; and it was approved by the Court of Appeal (Lord Neuberger MR, Moses and Munby LJJ) on 23 June 2010, [2010] EWCA Civ 715, [2010] 1 WLR 2278, when making the order against which this appeal is brought. The Court of Appeal, however, approved the construction only on the basis that the phrase “purposes ... of journalism” should be construed “in a relatively narrow...way”: see para 55, per Lord Neuberger.

4. Sadly the appellant, Mr Steven Sugar, is deceased. His death occurred in January 2011, after he had filed Notice of Appeal to this court; and, by consent, the court appointed Ms Fiona Paveley to represent his estate in the appeal. The

contention made on behalf of Mr Sugar is precisely the opposite of the primary contention made on behalf of the BBC. It is that, where it is held by the BBC even only partly for purposes other than those of journalism, information is within the scope of the Act; and thus that, provided that the purposes other than those of journalism are significant (i.e. more than minimal), they draw the information within the scope of the Act even though it is also held – perhaps even predominantly held – for purposes of journalism. I will describe this as Mr Sugar’s polarised construction.

5. But the very expression of these polarities foreshadows a middle way, which represents the secondary contention made on behalf of the BBC. It is that, in circumstances in which it holds information partly for purposes of journalism and partly for purposes other than those of journalism, the designation should be so construed as to draw the information within the scope of the Act only if the purposes other than those of journalism are the dominant purposes for which it is held. I will describe this as the dominant purpose construction.

B: THE FACTS

6. By October 2003 the BBC’s coverage of the Israeli-Palestinian conflict had come under close scrutiny from pressure groups both pro-Israeli and pro-Arab. There were complaints, particularly from pro-Israeli groups, that its coverage was not impartial. Mr Richard Sambrook, then the BBC’s Director of News, decided to commission a senior journalist to analyse the BBC’s domestic Middle Eastern coverage, to survey the views and analyse the complaints of the pressure groups and to suggest whether and if so how it might be improved. Following discussion with Mr Mark Byford, then the Director of the BBC’s World Service, Mr Sambrook caused Mr Malcolm Balen to be appointed to conduct the exercise. Mr Balen had at one time been editor of the BBC’s Nine O’Clock News but, by 2003, he had ceased to be employed by the BBC and was working as Head of News for a commercial television channel. So Mr Sambrook caused Mr Balen to rejoin the BBC under a one-year contract, which took effect on 1 November 2003. It was unusual to bring someone into the BBC from outside to make a report for internal use. The contract described Mr Balen as a “Middle Eastern Consultant in News” but he and Mr Sambrook regarded his position more as that of a senior editorial adviser. The contract did not specify his duties; but what was clear was that he was to have no line-management responsibilities.

7. For the first three months Mr Balen discussed the BBC’s Middle Eastern coverage with journalists and editors, considered some of the complaints about it and gave regular oral reports to Mr Sambrook. Then in about February 2004, in response to a request by Mr Sambrook, he began to compose a full, written, report. It was to be a broad survey both of the quality (including the impartiality) of the

BBC's coverage of Middle Eastern affairs in recent years and of the validity or otherwise of the complaints about it, taken as a whole; and it was to include practical suggestions, perhaps only tentative, for improvement of the quality of its coverage including of its impartiality. In July 2004 Mr Balen sent the final version of the report to Mr Sambrook and Mr Byford. The Balen report, as I will describe it, was an internal briefing document for the use of the BBC's top management and reflected only Mr Balen's personal views.

8. Meanwhile, in the wake of the publication in January 2004 of Lord Hutton's "Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG" HC 247, there had been several changes in the top management of the BBC. Mr Byford had become Deputy Director-General. In August 2004 Mr Sambrook became Director of the Global News division and Ms Helen Boaden took his place as Director of News. Mr Mark Thompson, the new Director-General, set up three new boards, including a Journalism Board ("the Board"), of which Mr Byford was the chair and Mr Sambrook, Ms Boaden and other senior managers were members. The Board was to be responsible for setting the strategy which would direct, and for defining the values which would inform, journalism across all areas of the BBC's output.

9. At its meeting on 9 November 2004 the Board considered the Balen report. It considered it as part of its review of strategy in relation to its coverage of conflict in the Middle East. In response to the report the Board commissioned a paper, to be entitled "Taking Forward BBC Coverage of the Middle East", which was intended to ensure that the BBC both met the highest standards of impartiality and honesty in its journalism and implemented recommendations in relation to training, editorial control and the handling of complaints, and which could be placed before even more senior bodies at the BBC. The Taking Forward paper, which in effect took forward the Balen report, was first presented to the Board in February 2005.

10. Perhaps in part as a result of the consideration afforded to it in the Taking Forward paper, the Balen report had a number of practical consequences. The most obvious – to the ordinary viewer of BBC television – was the establishment in 2005 of the post of Middle East Editor, to which Mr Jeremy Bowen was soon appointed. There were also internal changes in the BBC in relation to its analysis of capability, its compilation of a Key Facts Guide, its audit of the use on air of Middle Eastern experts and its development of training.

11. In 2005 the Board of Governors of the BBC appointed Sir Quentin Thomas to chair a panel which was charged with undertaking an external, independent, review of the impartiality of the BBC's reporting of the Israeli-Palestinian conflict. In his report, published in May 2006, Sir Quentin recorded

that his panel had been supplied with the Balen report albeit on a confidential basis in that it had been only an unpublished report prepared internally for BBC management; that the report had been helpful; and that a number of its recommendations had already been implemented.

C: THE FORENSIC HISTORY

12. Mr Sugar was a respected solicitor and a supporter of the State of Israel; he considered that the BBC's coverage of Israel's conflict with the Palestinians had been seriously biased against it. By letter dated 8 January 2005 he made a request to the BBC for disclosure to him of a copy of the Balen report pursuant to the Act. The BBC refused the request on the basis that it held the report – or, more strictly, the information in the report – for purposes of journalism and thus that it lay beyond the scope of the Act.

13. In March 2005 Mr Sugar applied to the Information Commissioner (“the Commissioner”) pursuant to section 50 (1) of the Act for a decision whether the BBC had determined his request in accordance with the requirements of the Act. By letters to Mr Sugar dated 24 October and 2 December 2005 the Commissioner, who had privately read the Balen report, communicated his decision, which was to the effect that the BBC had lawfully rejected his request. The Commissioner observed that:

- (a) the purpose of the designation was “to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme-makers to produce programmes free from the interference and scrutiny of the public”;
- (b) information held by the BBC fell beyond the scope of the Act only if there was a direct and creative journalistic relationship between it and programme content;
- (c) there was such a relationship between the Balen report and programme content;
- (d) in this regard it was relevant that those mainly likely to be affected by the report were journalists and editors rather than managers and business advisers;

- (e) if, which he did not accept, the report was held for any non-journalistic purpose, it continued to lie beyond the scope of the Act because the journalistic purpose was manifestly dominant; and
- (f) had it been impossible to discern which of two such opposite purposes was dominant, he would have applied a rebuttable presumption that the information lay within the scope of the Act.

14. Had the Commissioner's observations stopped at that point, the issue about the disclosure of the Balen report to Mr Sugar would have been resolved long ago. But, by a postscript, the Commissioner proceeded to set a hare running and, although he soon repented of what he had done and sought to recapture it, the hare remained at large and was chased all the way up to the Appellate Committee of the House of Lords. It was to prove a most unfortunate distraction.

15. With respect to certain eminent judges with whom it was later to find favour, the postscript which the Commissioner appended to his decision was entirely misconceived. It was that, because the Balen report was outside the designation and thus beyond the scope of the Act, the BBC was not "a public authority" for the purposes of the Act in relation to Mr Sugar's request. The consequence was, according to the Commissioner, that Mr Sugar had no right of appeal against his decision to the Information Tribunal ("the Tribunal") under section 57 of the Act. This consequence was said to flow from the conjunction of section 57 itself, which provided that an appeal to the Tribunal lay from the Commissioner's "decision notice", and of section 50, which provided that a "decision notice" related to a decision whether a request for information had been lawfully determined by "a public authority". At first, therefore, the Commissioner took the view that his letters to Mr Sugar could not represent a "decision notice"; and he advised Mr Sugar that, if he wished to challenge his decision, he should seek a judicial review of it rather than appeal to the Tribunal.

16. On 30 December 2005, undeterred, Mr Sugar appealed to the Tribunal under section 57 of the Act. The Commissioner and the BBC entered a preliminary objection that the Tribunal lacked jurisdiction for the reasons set out above. By the time when, in June 2006, the Tribunal heard argument about the preliminary objection, the Commissioner had changed his mind and was supporting Mr Sugar's rebuttal of it. But the BBC energetically pursued the objection. The Tribunal overruled it (the "jurisdiction decision") and proceeded to consider the merits of Mr Sugar's appeal. Its decision dated 29 August 2006, by which it upheld Mr Sugar's contention that the Balen report was within the scope of the Act (the "journalism decision"), will require study. But it is convenient first to chart the development of the argument on jurisdiction to its quietus.

17. The BBC appealed on points of law to the High Court under section 59 of the Act against the Tribunal's jurisdiction decision as well as against its journalism decision. Mr Sugar and the Commissioner opposed the appeal. The BBC also issued an application for judicial review of the Tribunal's jurisdiction decision, to which, in that no order was to be made on it, there is no need again to refer. In order to protect himself against the risk that the High Court would set aside the Tribunal's jurisdiction decision, Mr Sugar issued an application for judicial review of the Commissioner's decision.

18. These proceedings came before Davis J. By a judgment delivered on 27 April 2007, [2007] EWHC 905 (Admin), [2007] 1 WLR 2583, he:

- (a) allowed the BBC's appeal against the Tribunal's jurisdiction decision;
- (b) accordingly set aside its journalism decision; and
- (c) dismissed Mr Sugar's protective application for judicial review on the ground that the Commissioner's decision had been rational and therefore lawful.

19. Supported by the Commissioner, Mr Sugar appealed to the Court of Appeal against the decision of Davis J to allow the BBC's appeal against the Tribunal's jurisdiction decision. At this stage he ceased to appear in person and began to enjoy the benefit of representation by Mr Tim Eicke QC pro bono. By order dated 25 January 2008, [2008] EWCA Civ 191, [2008] 1 WLR 2289, the Court of Appeal (Buxton and Lloyd LJ and Sir Paul Kennedy) dismissed the appeal.

20. Mr Sugar appealed to the House of Lords against the dismissal of his appeal by the Court of Appeal. By order dated 11 February 2009, [2009] UKHL 9, [2009] 1 WLR 430, the House (Lord Phillips, Lord Hope and Lord Neuberger, Lord Hoffmann and Baroness Hale dissenting) allowed the appeal. Thus, at last, the effect of the BBC's inclusion in the Act became clear. Even in relation to a request to the BBC for information which lay outside the designation and thus beyond the scope of the Act, the BBC remained a public authority for the purposes of the Act: see, in particular, paras 26 to 36 per Lord Phillips and para 54 per Lord Hope. A decision by the Commissioner that a request was of such a character should therefore be, and in this case had been, set in a decision notice under section 50 of the Act and the proper avenue of challenge to it was by appeal to the Tribunal under section 57: see paras 37 and 38, per Lord Phillips. The House therefore remitted to the High Court the BBC's appeal against the Tribunal's journalism decision, which Davis J had

found it unnecessary to consider. For, from his further conclusion that the Commissioner's decision had been lawful, it in no way followed that the BBC's appeal against the Tribunal's journalism decision was entitled to succeed: see para 38, per Lord Phillips.

21. In reaching its journalism decision the Tribunal, which had privately read the Balen report, had addressed the application of the designation to a situation in which the requested information was held for dual and opposite purposes. It had noted the polarised constructions advanced by Mr Sugar and by the BBC to which I have referred but had preferred the BBC's secondary contention, which accorded with the Commissioner's approach, that in such a situation the Act required reference to the dominant purpose for which the information was held. The Tribunal found that the BBC had originally held the Balen report predominantly for purposes of journalism; that, however, once the report had been placed before the Journalism Board on 9 November 2004, the BBC had begun to hold it predominantly for purposes other than those of journalism, namely for purposes of strategic policy and resource allocation; and thus that, at the date of its receipt of Mr Sugar's request in January 2005, the information was within the scope of the Act. The Tribunal did not find – and Mr Sugar does not appear to have asked it to find – that, at the date of its receipt of his request, the BBC held the report solely for purposes other than those of journalism.

22. The BBC's remitted appeal against the Tribunal's journalism decision came to be determined by Irwin J. By order dated 2 October 2009, [2009] EWHC 2349 (Admin), [2010] 1 WLR 2278, he allowed the appeal. Although Mr Sugar reserved the right to advance his polarised construction in the event of a further appeal, all three parties – i.e. including the Commissioner, who in the further appeals has ceased to play an active part in the proceedings – accepted before Irwin J that the Tribunal had been correct to adopt the dominant purpose construction; the issue between them related to its application of that test to the facts. But at this point the litigation took another unexpected turn. Concerned that he was being invited to determine the appeal on a false legal basis, the judge invited the parties to address him on the polarised constructions which the Tribunal had rejected. In the event he adopted the BBC's polarised construction. "My conclusion is" said the judge, at para 65, "that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes." Not even Mr Sugar was disputing that, at the date of its receipt of his request, the BBC was continuing to hold the report to some (other than minimal) extent for purposes of journalism; so it followed that the appeal should be allowed. The judge added that, had it been appropriate to determine the appeal by reference to the dominant purpose for which, at the date of its receipt of Mr Sugar's request (or, rather, which the judge considered would be less arbitrary, "in the period during which the request was

made”), the BBC held the report, he would, again, have allowed the appeal: for he considered that the Tribunal had erred – in law, presumably – in finding that, once it had been placed before the Journalism Board, the purposes for which the BBC held the report had become predominantly other than those of journalism.

23. It is against the dismissal by the Court of Appeal of Mr Sugar’s appeal against the order of Irwin J that the present appeal is brought. In that court, and in the light of Irwin J’s judgment, the BBC reverted to casting its polarised construction as its primary contention; and the dominant purpose construction once more became only its secondary contention. In delivering the leading judgment, with which both Moses LJ (who delivered a concurring judgment) and Munby LJ agreed, Lord Neuberger rejected the dominant purpose construction and, although he described each of the polarised constructions as arguable, he agreed with Irwin J that that put forward by the BBC was preferable. Since on any view the purposes for which the BBC held the report at the date of its receipt of Mr Sugar’s request to some extent included those of journalism, his appeal therefore failed.

24. But a question arises whether the Court of Appeal approached the case on the basis that the purposes for which the BBC held the report at the relevant date were *solely* those of journalism. Observations which tend in that direction are to be found in the judgments both of Lord Neuberger at para 65 and of Moses LJ at para 83. Nevertheless, had such been its conclusion, it would have been unnecessary for the Court of Appeal to address at length the application of the designation to a situation in which information is held for purposes partly of journalism and partly otherwise. In considering it necessary to address the same point Irwin J must have held that, as the expert fact-finder, the Tribunal had been entitled at any rate to find that the purposes for which the BBC held the report had been to some extent for purposes other than those of journalism; and the Court of Appeal did not dissent from Irwin J’s analysis in any way. At all events the BBC positively invites this court to proceed on the premise that it held the report for purposes partly of journalism and partly otherwise: it seeks a definitive ruling on the application of the designation to such a situation.

D: THE SCHEME OF THE ACT

25. The purpose of the Act is stated at its outset to be “to make provision for the disclosure of information held by public authorities or by persons providing services for them...” Section 1, described in the side-note as providing a “General right of access to information held by public authorities”, provides by subsection (1) that, subject to other specified provisions, any person making a request for information to a public authority is entitled (a) to be informed by the authority whether it holds information of the description specified in the request (described as “the duty to confirm or deny”) and (b), if so, to have the information

communicated to him. Subsection (4) provides that, for the purposes of the section, the information is that “held at the time when the request is received”.

26. Section 2 (2) is important for present purposes. It provides:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

As the subsection foreshadows, Part II of the Act provides for the exemption of certain categories of information from disclosure. Section 2(3) confers absolute exemption upon various of the categories. The other categories enjoy only qualified exemption: information in such categories is not required to be disclosed only if the test in subsection (2)(b) is satisfied; and the bias of the Act in favour of disclosure is visible in the requirement that the public interest in maintaining the exemption should “outweigh” the public interest in disclosing the information.

27. Among the categories upon which the Act confers absolute exemption is information which relates in specified respects to national security (section 23), to court proceedings (section 32) or to personal data of which the applicant is the subject (section 40(1)), or the disclosure of which would constitute an actionable breach of confidence (section 41) or be unlawful in other specified respects (section 44).

28. Among the categories upon which the Act confers qualified exemption is information the disclosure of which would be likely to prejudice the defence of the British Islands and colonies (section 26) or the UK’s international relations (section 27) or its economy (section 29) or law enforcement (section 31) or which relates to the formulation of government policy (section 35).

29. But, in the context of the present appeal, it is worth noting, in particular, two further categories of information upon which the Act confers qualified exemption. The first is information the disclosure of which would be likely to prejudice the commercial interests of the public authority (section 43(2)). The second is information the disclosure of which, in the reasonable opinion of a qualified person (which in the case of the BBC is the corporation itself, acting by

its governors) “would, or would be likely to, inhibit – (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation” (section 36(2)(b)). One might have expected that, in the event that the Balen report were to be held to fall within the scope of the Act, the BBC would wish to seek exemption from its disclosure under section 36(2)(b). By letter to Mr Sugar dated 10 June 2009, however, the BBC confirmed that, in that event, it would not claim any exemption under the Act. Perhaps its stance was tactical, designed to sharpen the edge of the current issue.

30. Section 3 of the Act defines a public authority as any body, person or office-holder listed in Schedule 1 (or designated by future order of the Secretary of State) and any publicly-owned company, as defined. Schedule 1 contains a long list of bodies, persons and office-holders, some defined generically and others specifically. The schedule is divided into seven parts, namely I “General”, II “Local Government”, III “The National Health Service”, IV “Maintained Schools and Other Educational Institutions”, V “Police”, VI “Other Public Bodies and Offices: General” and VII “Other Public Bodies and Offices: Northern Ireland”. The BBC (together with the designation) is placed into Part VI. In para 56 of his judgment on the jurisdiction issue Lord Hope explained that the length of the list in Schedule 1 was testament to Parliament’s wish to obviate dispute about the identity of the public authorities who were subject to the Act.

31. Section 7(1) of the Act provides:

“Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts 1 to V of this Act applies to any other information held by the authority.”

32. Four public authorities are listed in Schedule 1 in terms of the designation, i.e. “in respect of information held for purposes other than those of journalism, art or literature”; they are the BBC, the Channel Four Television Corporation, the Gaelic Media Service and Sianel Pedwar Cymru (being the Welsh television channel known as S4C). Other authorities are listed only in relation to information of other specified descriptions. For example the House of Commons, the House of Lords and the National Assembly for Wales are listed in respect of information other than of a specified sort which might serve to identify the residential addresses of their members (Part I, paras 2, 3 and 5, as amended by article 2 of the Freedom of Information (Parliament and National Assembly for Wales) Order 2008 (SI 2008/1967)). The Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple are listed in respect of information held in their capacities as a local authority (Part II, para 10). Those providing medical, dental and ophthalmic services are listed in respect of information relating to their provision of services under the NHS (Part III, paras 43A, 44 and 51). Seven bodies

– for example the Pharmaceutical Society of Northern Ireland – are listed in respect of information held by them otherwise than as a tribunal (Parts VI and VII, as amended by articles 3 and 5 of, and Schedules 2 and 4 to, the Freedom of Information (Additional Public Authorities) Order 2005 (SI 2005/3593)). And the Bank of England is listed

“in respect of information held for purposes other than those of its functions with respect to –

- (a) monetary policy,
- (b) financial operations intended to support financial institutions for the purposes of maintaining stability, and
- (c) the provision of private banking services and related services.”

E: “PURPOSES ... OF JOURNALISM, ART OR LITERATURE”

33. Although they also to some extent reflect the terms of section 12(4) of the Human Rights Act 1998 (to which I will refer in para 58), the words of the designation are essentially derived from the Data Protection Act 1998 (“the DPA”).

34. The DPA was passed pursuant to Directive 95/46/EC of the European Parliament and of the Council, dated 24 October 1995, “on the protection of individuals with regard to the processing of personal data and on the free movement of such data”. Article 1(1) of the Directive declared its object to be the protection of a natural person’s fundamental right to privacy with respect to the processing of personal data. By recital 37, however, the European Parliament and the Council recognised that the processing of personal data “for purposes of journalism or for purposes of literary or artistic expression” also engaged “the right to receive and impart information, as guaranteed in particular in article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms” 1950 (“the ECHR”) and should therefore be exempt from the Directive’s requirements to the extent necessary for the reconciliation of such conflicting rights. Article 9 of the Directive therefore mandated exemption “for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression”.

35. The UK’s response to article 9 lies in sections 3 and 32 of the DPA. The former defines the purposes of journalism and artistic and literary purposes as “the special purposes”. The latter provides that personal data processed “only for the

special purposes” are exempt from most of the provisions of the Act, in particular the individual’s central right of access under section 7 to data of which he is the subject, if the processing is undertaken with a view to the publication of any journalistic, literary or artistic material and if the data controller reasonably believes both that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest and that compliance with the relevant provision would be incompatible with the special purposes.

36. The government had initially entertained doubts about the inclusion of the BBC in the Freedom of Information Bill. In a published paper setting out background material relevant to the publication on 11 December 1997 of its White Paper entitled “Your Right to Know” (Cm 3818) about the proposed Bill, the government wrote, at para 23:

“the BBC, Channel 4 and S4C are public corporations that operate to a defined remit specified in the Royal Charter (BBC) and legislation (Channel 4 and S4C). All three operate independently of Government editorially and to the greatest extent possible in economic and regulatory terms. It might be regarded as anomalous for them to be within the scope of the FOI legislation when the private media (Channels 3 and 5, cable and satellite channels, the Internet, the press and freelances of all sorts) would not.”

37. In the event the public service broadcasters were included in the Bill. But, in the course of the passage of the Bill through Parliament and following representations to the Home Office both by the BBC and by Channel 4, their inclusion was made subject to the designation. The designation had two, linked, purposes. Its general purpose, reflective of the genesis of its three specified concepts in the EU Directive dated 24 October 1995 in relation to access to personal data, was to protect the right of the public service broadcasters to freedom of expression, in particular under article 10 of the ECHR. Its particular purpose, foreshadowed in the background material quoted above, was (as confirmed in a letter dated 13 January 2000 from an officer in the Home Office, which had responsibility for the Bill, to an officer in another department) that the public service broadcasters should not be placed at a disadvantage in relation to their commercial rivals.

38. Before I turn to “purposes”, let me reflect on the meaning, in the context of the Act, of the words “journalism”, “art” and “literature”. I suggest that the key to it lies in the omnibus word “output”. Article 5 of the BBC’s Royal Charter (Cm 6925), presented to Parliament in October 2006, provides, at para (1), that the BBC’s main activities should be the promotion of its six Public Purposes, specified

in article 4, “through the provision of output which consists of information, education and entertainment” supplied by means of television, radio, online and similar services; and the Charter provides, at article 5(2), that the BBC may carry out other activities, subordinate to its main activities, provided that they promote the Public Purposes. In his letter to Mr Sugar dated 24 October 2005 the Commissioner, echoing the word in the Charter, wrote that he interpreted the three words in the designation broadly so as to include all types of the BBC’s “output”. In this respect I discern no dissent from his view in any of the three subsequent decisions in these proceedings; and in my opinion he was right. I would be surprised if any later set of facts was to yield a conclusion that something which the BBC put out, or considered putting out, to the public or to a section of the public did not fall within the rubric either of journalism or of art or of literature. So, although one might have an interesting debate whether nowadays the word “journalism” encompasses more than news and current affairs, the debate is likely in this context to be sterile. For any output which did not obviously qualify as journalism would be likely to qualify either as literature or – in particular, in that its meaning has a striking elasticity – as art.

39. On any view the subject of this appeal leads us to forsake art and literature – and even output itself – and to revert to journalism. In what circumstances will the BBC hold information for the purposes of journalism? The Tribunal attempted to answer that abstract question; and the substantial criticism of its decision has been directed not at its analysis but at its application of its analysis to the circumstances in which the BBC held the Balen report. Within the word “journalism” in the designation (which it described as “functional journalism” – a puzzling qualification in that, without elaboration, it implied the existence of other areas of journalism) the Tribunal identified three types of activity: first, the collecting, writing and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and third, the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists. In relation to this third type, the Tribunal added, at para 116:

“Self-critical review and analysis of output is a necessary part of safeguarding and enhancing quality. The necessary frankness of such internal analysis would be damaged if it were to be written in an anodyne fashion, as would be likely to be the case if it were potentially disclosable to a rival broadcaster.”

40. The Tribunal contrasted the three suggested types of journalistic activity with the direction of policy, strategy and resources which provides the framework within which a public service broadcaster conducts its operations.

41. In the Court of Appeal Lord Neuberger said, at para 53, that, at any rate in the present context, he could not improve upon the Tribunal's general analysis.

42. Apart from pointing out that its tripartite classification does not readily encompass the actual exercise of broadcasting or publishing the material, the BBC does not quarrel with the Tribunal's analysis of what falls within and without the concept of journalism for the purposes of the Act. In my view, and subject to that point, this court should endorse the Tribunal's analysis but should decline the BBC's invitation to clothe it with greater specificity. It is important to note, however, that not all financial information will be held by the BBC for purposes other than those of journalism. If financial information is directly related to the making of a particular programme, or group of programmes, it is likely to be held for purposes of journalism. On the same day, namely 2 October 2009, as that on which he handed down his judgment in the present proceedings, Irwin J handed down his judgment in *BBC v The Information Commissioner* [2009] EWHC 2348 (Admin), [2010] EMLR 121. He held that information about (among other things) costs referable to its broadcast of "EastEnders", about its annual budget for "Newsnight" and about the price paid for its right to cover the winter Olympics in Turin in 2005/06, was held at an operational level in order to assist in the making of editorial and creative choices and so was held partly (and, if relevant, predominantly) for purposes of journalism.

43. The application of Ireland's Freedom of Information Act 1997 to its public service broadcasters is worthy of note. By regulations made in 2000, SI No 115 of 2000, Radio Telefis Éireann and other broadcasters were made subject to the Irish Act in relation only to their functions of management, administration, finance, commerce, communications and entry into contracts of service; but the regulations provide that such functions are to be deemed not to include the gathering and recording of material for journalistic purposes, the consideration of programme content, the editing and storing of such material, the making of editorial decisions about programmes and the process of post-transmission internal review. There is a close parallel between the effect of the express provisions made in Ireland and the meaning to be attributed to the bare words of the designation in our Act. There was also an interesting application of the Irish Act in the decision of the Irish High Court in *Radio Telefis Éireann v The Information Commissioner* [2004] IEHC 113. RTE is under a statutory obligation to ensure that its broadcasts of current affairs are impartial. To that end it collected data as to the amount of broadcast time which it had afforded to each political party during the general election campaign in 2002. Ó Caoimh J held that the data related to editorial decisions and to post-transmission internal review and so did not fall to be disclosed under the Irish Act.

44. The BBC has an obligation to seek to ensure that its broadcasting of news is impartial as well as accurate: see clause 6(1) of the Framework Agreement

between the Secretary of State for Culture, Media and Sport and the BBC made on 30 June 2006 (Cm 6872) for the purposes of the BBC's Charter. Inevitably the Tribunal found that, when it first came into existence, the Balen report into the impartiality or otherwise of the BBC's coverage of the Israeli/Palestinian conflict was held (or, as it preferred to say, was predominantly held) for purposes of journalism. Its error, as correctly identified by Irwin J and the Court of Appeal, was to conclude that, once the report had been placed before the Journalism Board, it came predominantly to be held for purposes other than those of journalism, namely for those of strategic policy and resource allocation. Irrespective of the level at which, within the BBC, it was appraised, the purpose for which the report was held remained the same: it was to enable the BBC to monitor its coverage of the conflict with a view to its making any and all such changes as might further secure its impartiality. At all material times the BBC held the report – at least predominantly – for purposes of journalism. But, since the appeal proceeds upon the premise that, at the date of its receipt of Mr Sugar's request, the BBC also held the report for purposes other than journalism, I turn finally to address the application of the designation to a situation in which the information is held for such dual and opposite purposes.

F: THE POLARITIES

45. Had I considered that the court was required to choose between the two polarised constructions of the designation in its application to a situation of dual and opposite purposes, I would on balance have chosen that advanced on behalf of Mr Sugar. First, his contention should probably prevail at a purely literal level: if the purposes for which the BBC holds information comprise even only to a minor extent purposes other than those of journalism, then, so I would conclude, the BBC holds it “for purposes other than those of journalism...”; and in my view there is probably no scope for altering the conclusion by reference to the fact that it also holds the information for purposes of journalism. But, were one to rearrange the terminology of the designation only marginally, so that it became “in respect of information *otherwise than* held for purposes of journalism...”, then the literal construction would probably yield the opposite conclusion. These semantic reflections – with which others might reasonably disagree in any event – represent far too slender a thread upon which to hang any overall conclusion. Second, however, and more importantly, the designation falls to be construed in the context of the Act as a whole, and thus, in particular of Part II. The beauty (says Mr Eicke) of construing the situation of dual purposes as falling within the scope of the Act is that the focussed exemptions in Part II then become available so as to winnow the information which should not be disclosed from that which should be disclosed; by contrast, were such a situation to be drawn, as if on a blanket, beyond the scope of the Act, the focussed exercise would have no place. Third, there is the bias of the Act in favour of disclosure and, in the resolution of any issue of construction, it would be permissible, as a last resort, to have regard to it. The BBC strongly

argues that the designation defines the extent to which its information is included within the scope of the Act, as opposed to the extent to which it is excluded from it. But the distinction, though theoretically valid, is practically elusive: in reality the designation defines an exception, albeit very important, from the subjection of the BBC to the Act and should be construed accordingly.

46. In the Court of Appeal Lord Neuberger suggested, at para 55, that the question whether information is “held for purposes... of journalism” should be considered in a relatively narrow way. With respect, his suggested departure from the natural construction of the word “purposes” raises in my mind a question-mark against his overall conclusion about the Act’s application to a situation of dual and opposite purposes. No doubt his suggestion flowed from his concern, expressed at para 48, that the effect of his overall conclusion would be that relatively little information held by the BBC fell within the scope of the Act; for a relatively narrow construction of the word “purposes” would mitigate such an effect. There is – in my respectful view – a loose analogy here with the driver who, in proceeding down a straight road, nevertheless steers to the left and then has to rectify his position by steering to the right: he would have done better to keep straight.

47. So is it necessary to choose between the two polarised constructions?

G: THE DOMINANT PURPOSE

48. Sometimes Parliament specifically refers to “the principal purpose” (section 678 (2)(a) Companies Act 2006) or to “the reason (or, if more than one, the principal reason)” (section 103A Employment Rights Act 1996, as inserted by section 5 of the Public Interest Disclosure Act 1998). Does Parliament’s failure to make such a reference in the designation betoken its rejection of an approach that the purposes to which it there refers should be the dominant (or principal) purposes? We may confidently answer that question in the negative. Everything points to a conclusion that Parliament failed to consider the application of the designation to a situation in which the BBC holds the information for purposes partly of journalism and partly otherwise. Had it considered such a situation, it would have spelt out – in one way or another – how the designation should then operate.

49. *Bennion on Statutory Interpretation*, 5th ed (2008) states at p 1268:

“Similarly, an enactment may lay down a qualifying condition in terms of the *purpose* of some person in doing an act as if it were the

only purpose possible, whereas it may in the instant case, be in fact, one of several purposes. Here the court will construe the enactment as requiring the main or dominant purpose to be the one specified.”

It has to be acknowledged that the two authorities cited in support of the statement represent a slender foundation for the bold and unequivocal terms in which it is couched.

50. The first authority is *Chohan v Saggar* [1992] BCC 306. There the High Court held that the power under section 423 of the Insolvency Act 1986 to set aside a transaction entered into by a person at an undervalue “for the purpose” of putting assets beyond the reach of his creditor was exercisable if such was his dominant, even if not his sole, purpose. As it happens, the decision was overruled by the Court of Appeal in *Commissioners of Inland Revenue v Hashmi* [2002] EWCA Civ 981, [2002] BCC 943, on the basis that, in the context of the 1986 Act, it sufficed that the statutory purpose should have been a substantial, even if not the dominant, purpose. Laws LJ observed, at para 32, that to qualify the word “purpose” by the word “dominant” was not required in order to make sense of that Act or to give it pragmatic efficacy.

51. The second authority is *Peach v Commissioner of Police of the Metropolis* [1986] QB 1064. There the Court of Appeal held that statements made to the police about the death of Mr Blair Peach should be disclosed to his mother in her action against the police because, although they were made partly for the purpose of a complaint against the police and so would to that extent, in principle, attract public interest immunity from disclosure, they were made predominantly for the purpose of the investigation by the police of a violent death, to which no such immunity attached. The court applied the decision in *Waugh v British Railways Board* [1980] AC 521. There the House of Lords held that a report into a fatal accident made for two purposes – namely for the purpose of the operation and safety of the railway (in which respect it would fall to be disclosed) and for the purpose of obtaining legal advice (in which respect it would fall, in principle, not to be disclosed) – should be disclosed because the former was the dominant purpose. The decisions in *Waugh* and *Peach* thus both relate to the resolution of conflict between two principles of law which require the existence of different purposes and both of which are engaged by the facts of the case. No doubt the decisions demonstrate in general terms the common sense which may lie behind resort to the dominant purpose but neither represents authority upon statutory construction.

52. But while therefore the statement in *Bennion*, set out above, is in my view expressed too strongly, I consider that, as it suggests, it may well be appropriate for the court to construe a statutory requirement of a specified purpose as

mandating, in the case of dual purposes, examination of whether the specified purpose is dominant. All will depend upon the objective meaning of the words in the statute when appraised in its context as a whole, including by reference to the purpose of the particular provision: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396 G-H, per Lord Nicholls. In ordinary conversation we frequently – no doubt unconsciously – refine our reference to purpose to a reference to dominant purpose. You ask me why I went out last night. I tell you that I went out in order to visit a friend in hospital. I do not add that I did so in order also to catch the post, to buy sausages and to fill my petrol tank – significant though those subsidiary purposes may have been for me.

53. In the Court of Appeal Lord Neuberger identified three objections to adoption of the dominant purpose test when applying the designation to a situation in which information is held for dual and opposite purposes.

54. First, he said, at para 40, that the test defied the natural meaning of the words of the designation and that Parliament had not spoken, yet could have spoken, of “information *predominantly* held for purposes other than those of journalism...” Yet the Court of Appeal’s preferred solution also fails that test for its reading is of “information *solely* held for purposes other than those of journalism...”.

55. Second, Lord Neuberger said, at para 41, that identification of the dominant purpose would be a subjective and often speculative exercise. I respectfully disagree. In the case of *Waugh*, in the course of explaining why they favoured a test of dominant purpose in the different context to which I have referred, both Lord Simon, at p 537G, and Lord Russell, at p 545E, observed that the test would not be difficult to apply. In *BBC v The Information Commissioner*, cited above, Irwin J appears to have had no difficulty in concluding that the dominant purpose for which the BBC held the financial information was that of journalism. Indeed in my opinion it is easier for the Commissioner and the Tribunal to identify the *dominant* purpose than to conduct an inquiry into the existence of *any* purpose of journalism in accordance with the various pieces of guidance given first by Lord Neuberger at para 55 (namely to consider it “in a relatively narrow rather than a relatively wide way”), then by Lord Phillips at para 67 below (namely to ask whether “an immediate object of holding the information is to use it” for that purpose) and finally by Lord Walker at para 83 below (namely “to have some regard to the *directness* of the purpose”).

56. And, third, Lord Neuberger drew attention, at para 42, to the fact that, if the word “purposes” in the designation referable to the BBC was, in the case of dual purposes, to be construed as a reference to the dominant purpose, the same word in

the designations referable to the Bank of England and to the Competition Commission would need to be construed in the same way. Lord Neuberger suggested that Parliament was unlikely to have intended that, to take the case of the Bank of England, information which it held for dual purposes would be within the scope of the Act unless the purposes of its functions with respect to monetary policy etc were dominant. But Lord Neuberger's point fails to take account of the exemptions in Part II of the Act which might in that event be available, particularly exemptions from disclosure likely to prejudice either the economic interests of the UK (section 29) or the effective conduct of public affairs (section 36(2) (b) and/or (c)).

57. So I find myself unable to subscribe to Lord Neuberger's concerns about the dominant purpose test. I am convinced that, had Parliament actively considered the situation of information held by the BBC for purposes partly of journalism and partly otherwise, it would expressly have provided that the information was within the scope of the Act if it was held predominantly for the other purposes; that, however, the words which in the event Parliament favoured, namely the words of the designation, are in themselves apt to permit such a construction; and that, since in my view it is more consonant with the Act as a whole than either of the polarities, this court should therefore proceed to endorse it.

58. The further submission on behalf of Mr Sugar is that his request for disclosure of the Balen report engaged his right to receive information under para 1 of article 10 of the ECHR and that such restrictions on the exercise of his right as are permitted by para 2 of the article extend no further than is reflected by the designation (when read in accordance with his polarised construction), together with the exemptions in Part II of the Act. To this submission Lord Brown devotes paras 86 to 102 of his judgment below; with the essence of them I respectfully agree. In short article 10 carries Mr Sugar's case no further. Even if (being a possibility which I would countenance somewhat more readily than does Lord Brown) the refusal to disclose the report did interfere with the freedom of Mr Sugar to receive information under the article, the words of the designation, when given the balanced interpretation which I favour, represent a restriction upon it which is legitimate under para 2 of the article in that it is necessary in a democratic society for the protection of the freedom to impart information enjoyed by the BBC under the same article. This conclusion becomes all the stronger when the court obeys the injunction cast upon it by section 12(4) of the Human Rights Act 1998 to have particular regard to the importance of freedom of expression and, in particular, to the extent to which it would be in the public interest for "journalistic, literary or artistic material...to be published".

59. In urging this court not to take an extravagant view of any rights of Mr Sugar under article 10 Miss Monica Carss-Frisk QC on behalf of the BBC cites the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*

[2007] UKHL 26, [2008] AC 153 and, by reference, its earlier decision in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323. It was in *Ullah* that, in para 20, Lord Bingham suggested that it was the duty of the House to keep pace with the evolving jurisprudence of the European Court of Human Rights (“the ECtHR”) “no more, but certainly no less”. It was in *Al Skeini* that, in para 106, Lord Brown suggested that its duty was to keep pace with it “no less, but certainly no more”. I would welcome an appeal, unlike the present, in which it was appropriate for this court to consider whether, of course without acting extravagantly, it might now usefully do more than to shadow the ECtHR in the manner hitherto suggested – no doubt sometimes in aid of the further development of human rights and sometimes in aid of their containment within proper bounds.

60. It is, therefore, my view – a solitary view – that, after six years, the case returns, in a full circle, to where it began; and that it was the Commissioner who both adopted the correct test and properly applied it. The Balen report was held for purposes of journalism. On the premise that it was also held for purposes other than those of journalism, it was not predominantly so held. That is why I consider that the report lay beyond the scope of the Act; and why I agree that the appeal should be dismissed.

LORD PHILLIPS

61. The effect of the relevant provision of Part VI of Schedule 1, when read with section 7, to the Freedom of Information Act 2000 (“the Act”), is that Parts I to V of the Act apply in the case of the BBC only to “information held for purposes other than those of journalism, art or literature” (the “*definition*”). I agree with the other members of the Court on the following matters that are sufficient to resolve this appeal in favour of the BBC:

- i) At all material times the Balen report was held by the BBC predominantly for the purposes of journalism;
- ii) On the true construction of Part VI of Schedule 1 to the Act information held predominantly for the purposes of journalism does not fall within the *definition*, even if the information is held for other purposes as well.

It follows that the BBC is under no duty to disclose the Balen report and that this appeal must be dismissed. The judgments of Lord Wilson and Lord Walker have, however, disclosed an issue that is academic but is none the less of importance. Does the *definition* mean “information held *solely* for purposes other than

journalism, art or literature” or “information held *predominantly* for purposes other than journalism, art or literature”?

62. A similar issue arises in relation to the Bank of England, where the relevant definition is

“information held for purposes other than those of its functions with respect to-

(a) monetary policy,

(b) financial operations intended to support financial institutions for the purposes of maintaining stability, and

(c) the provision of private banking services and related services.”

63. I am not able to find an answer to the issue in the language of the *definition* itself. It is capable of bearing either meaning. The answer to the issue must lie in adopting a purposive approach to the *definition*.

64. We are concerned with a provision that provides protection against the disclosure obligations that are the object of the Act. What is the purpose of that protection? It is not, as is the protection against disclosure of documents protected by legal professional privilege, designed to remove inhibition on the free exchange of information. Were that the case the protection would focus on the purpose for which the information was *obtained*. The protection is designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. That is why it focuses on the purpose for which the information is *held*. The same is true of the information provided to the Bank of England. The object of the protection is to prevent interference with the performance of the specified functions of the Bank.

65. A purposive construction of the *definition* will prevent disclosure of information when this would risk interference with the broadcasting function of the BBC. This will not depend upon the predominant purpose of holding the information. It will depend upon the likelihood that if the information is disclosed the broadcasting function will be affected. The same is true in the case of the Bank of England. For this reason I do not agree with the approach of Lord Wilson to this issue.

66. Lord Neuberger of Abbotsbury MR at para 53 remarked that “today’s journalism is tomorrow’s archive” and at para 58 “In the case of journalism, above all news journalism, information ‘held for purposes ... of journalism’ may soon stop being held for that purpose and be held, instead, for historical or archival purposes”. I imagine that the Bank of England also archives information initially used for the purposes of carrying out its functions. No doubt the BBC has recourse to its archives for journalistic purposes from time to time and, if “held for purposes of journalism” is given a broad meaning it could be said in relation to the BBC that one of the purposes of holding archived material is journalism, albeit a relatively remote purpose.

67. However, Lord Neuberger accepted that archived material would not, as such, fall within the protection afforded by the *definition*. I consider that he was right to do so. Disclosure of material that is held only in the archives will not be likely to interfere with or inhibit the BBC’s broadcasting functions. It ought to be susceptible to disclosure under the Act. If possible “information held for purposes other than those of journalism, art or literature” should be given an interpretation that brings archived material within that phrase. Can this be achieved? I believe that Lord Walker has the answer. He has concluded, as have I, that the protection is aimed at “work in progress” and “BBC’s broadcasting output”. He suggests that the Tribunal should have regard to the directness of the purpose of holding the information and the BBC’s journalistic activities. I agree. Information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes. If that test is satisfied the information will fall outside the *definition*, even if there is also some other purpose for holding the information and even if that is the predominant purpose. If it is not, the information will fall within the *definition* and be subject to disclosure in accordance with the provisions of Parts I to V of the Act.

LORD WALKER

68. This appeal requires the Supreme Court to focus closely on the language and legislative purpose of the provisions of the Freedom of Information Act 2000 (“FOIA”) dealing with public authorities to which that statute has limited application. Without that focus, a long trawl through the Strasbourg jurisprudence on article 10 of the European Convention on Human Rights is of little assistance.

69. The relevant provisions are in section 7 of and Schedule 1 to FOIA. Section 7(1) provides that where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of the Act is to apply to any other information held by the authority. Schedule 1, Part VI lists the British Broadcasting Corporation (“BBC”) “in respect of information held for

purposes other than those of journalism, art or literature.” A similar form of words appears (in adjectival form) in section 3 of the Data Protection Act 1998, which defines “the special purposes” as meaning “any one or more of the following – (a) the purposes of journalism, (b) artistic purposes, and (c) literary purposes.” Section 32 of the Data Protection Act gives a limited exemption where personal data is processed “with a view to the publication by any person of any journalistic, literary or artistic material”, and the data controller reasonably believes “that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest”, and that compliance with some specified provisions of the Data Protection Act would be incompatible with the special purposes.

70. Both sets of statutory provisions are evidently aimed at promoting freedom of expression, the value embodied in article 10 of the European Convention on Human Rights. There is no relevant definition of journalism, art or literature in either statute. The three words are abstract nouns which can be used to describe either an activity or the product of that activity. “Journalism” is a word introduced into the English language from French in the 19th century. The *Oxford English Dictionary* gives its primary meaning (by reference to “journalist”) as the occupation of editing or writing for a public journal. In a loose sense it can cover the production of just about anything published in a newspaper (or, today, broadcast on sound radio or television). But in the context of FOIA, its collocation with art and literature suggests that “journalism” is used to refer primarily to output on news and current affairs (no doubt including sport, an important part of the BBC’s output); and the composite expression “journalism, art or literature” seems to be intended to cover the whole of the BBC’s output in its mission (under article 5 of its Royal Charter) to inform, educate and entertain the public. On that comprehensive approach the purposes of journalism, art or literature would be, quite simply, the purposes of the BBC’s entire output to the public. Mr Jeremy Clarkson must, it seems, have moved from the pigeonhole of journalism to that of literature when, as Irwin J recorded in *British Broadcasting Corporation v Information Commissioner* [2009] EWHC 2348 (Admin), [2010] EMLR 121, para 36,

“it was decided for editorial reasons to change the format of ‘Top Gear’ so that it became primarily an entertainment programme rather than a consumer programme, [which] increased the production costs to an important degree.”

71. *British Broadcasting Corporation v Information Commissioner* [2009] EWHC 2348 (Admin) (“the financial information case”) was heard by Irwin J immediately after he heard the case [2009] EWHC 2349 (Admin) in which this appeal is brought, and he handed down his judgment in the two cases on the same day, 2 October 2009. Important parts of the two judgments are, as Irwin J noted in

the first paragraph of each judgment, expressed in identical or very similar terms. There is also one other first-instance judgment calling for mention, that is the judgment of Davis J in the first round of Mr Sugar's litigation, *British Broadcasting Corporation v Sugar* [2007] EWHC 905 (Admin), [2007] 1 WLR 2583. The judgment of Davis J contains a valuable discussion of the relevant provisions of FOIA but proceeds on the footing that the Information Tribunal ("the Tribunal") had no jurisdiction, in the circumstances, to hear an appeal from the Information Commissioner ("the Commissioner"). That premise was later shown by the decision of a bare majority of the House of Lords to be erroneous: [2009] UKHL 9, [2009] 1 WLR 430.

72. One of the most important issues of law considered by Irwin J in his twin judgments is whether, as a matter of construction, the word "predominantly" should in effect be inserted in Schedule 1, Part VI before the phrase "for purposes other than those of journalism, art or literature"). Irwin J described this (in para 3 of each judgment) as a concession made by the BBC before the Tribunal, but that description depends on the spectator's viewpoint. The Court of Appeal (Lord Neuberger MR, para 36) described it as a successful argument. So it is worth looking at how this point developed.

73. Apart from any *de minimis* principle, which the Court of Appeal (Lord Neuberger MR, para 59) rightly regarded as unhelpful in this context, there are four possible categories of information held by the BBC that need to be considered: (1) information held exclusively for non-journalistic purposes; (2) information held predominantly, but not exclusively, for non-journalistic purposes (the other purposes being those of journalism); (3) information held predominantly, but not exclusively, for journalistic purposes (the other purposes being non-journalistic); and (4) information held exclusively for journalistic purposes. Before the Tribunal Mr Sugar argued that the BBC's immunity under Schedule 1 Part VI (as opposed to its possible exemption under other particular provisions of FOIA) was limited to information in category (4). In other words he was insisting on disclosure (apart from particular exemptions) of categories (1), (2) and (3). The BBC did not oppose categories (1) and (2) (so that category (2) could be termed a concession) but opposed disclosure of category (3), and was successful in that argument.

74. Irwin J felt unable to accept the concession, either in the *Sugar* appeal or in the appeal in the financial information case. He held that category (1) was the only category of information that the BBC had to disclose (again, subject to particular exemptions). His reasons are at paras 44 to 66 of his judgment in the *Sugar* case and at paras 53 to 73 of his judgment in the financial information case, which are in almost identical terms. The Court of Appeal agreed with his reasoning and conclusions (Lord Neuberger MR, paras 39 to 52).

75. I respectfully agree. In my judgment the correct view is that (as Lord Neuberger MR put it at para 44):

“once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under the Act, even if the information is also held by the BBC for other purposes.”

So in effect there are only two categories: one is information held for purposes that are in no way those of journalism, and the other is information held for the purposes of journalism, even if it is also held for other (possibly more important) purposes.

76. That conclusion follows both from FOIA’s legislative purpose and from its language. First, legislative purpose. It is common ground that FOIA was enacted in order to promote an important public interest in access to information about public bodies. There are (as Schedule 1 to FOIA reveals) thousands of public authorities, large and small, which are paid for out of public funds, and whose actions or omissions may have a profound effect on citizens and residents of the United Kingdom. There is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities. It adds to parliamentary scrutiny a further and more direct route to a measure of public accountability.

77. There is therefore force, in relation to FOIA as well as in relation to the Freedom of Information (Scotland) Act 2002, in the proposition “that, as the whole purpose of the 2002 Act is the release of information, it should be construed in as liberal a manner as possible.” That is how it was put by Lord Marnoch in *Common Services Agency v Scottish Information Commissioner* [2006] CSIH 58, 2007 SC 231, para 32, approved by Lord Hope in the House of Lords [2008] UKHL 47, [2008] 1 WLR 1550, para 4. But Lord Hope continued:

“But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with the [Data Protection Act 1998]. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act’s complex analytical framework.”

(The *Commons Services Agency* case serves to explain the position on freedom of information in Scotland, which is not immediately apparent from FOIA itself. FOIA extends to Scotland and so applies to operations in Scotland of public authorities which operate throughout the United Kingdom; but Scotland also has its own statute applying to Scottish public authorities.)

78. In this case, there is a powerful public interest pulling in the opposite direction. It is that public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses. A measure of protection might have been available under some of the qualified exemptions in Part II of FOIA, in particular those in sections 36 (Prejudice to effective conduct of public affairs), 41 (Information provided in confidence) and 43 (Commercial interests). But Parliament evidently decided that the BBC's important right to freedom of expression warranted a more general and unqualified protection for information held for the purposes of the BBC's journalistic, artistic and literary output. That being the purpose of the immunity, section 7 and Schedule 1 Part VI, as they apply to the BBC, would have failed to achieve their purpose if the coexistence of other non-journalistic purposes resulted in the loss of immunity.

79. That is confirmed by the language of these statutory provisions. The disclosable material is defined in terms ("held for purposes other than those of journalism, art or literature") which are positive in form but negative in substance. The real emphasis is on what is not disclosable – that is material held for the purposes of the BBC's broadcasting output. It is the most natural construction, which does not depend on reading in any words. That was the view formed both by Irwin J (see especially paras 55 to 58 and 63 to 65 of his *Sugar* judgment) and by Lord Neuberger MR (see especially paras 40 to 42, 44 to 46, and 49 of his judgment). Mr Eicke QC was critical of para 49, submitting that it assumed the very answer that the Court of Appeal was seeking to justify. I consider that criticism to be unjustified, though the reasoning was perhaps rather compressed. The unspoken premise is that Parliament must have intended to lay down a workable test, and both an "exclusively" and a "predominantly" test would raise almost insoluble problems in their practical application.

80. That is not to say that the test approved by Irwin J and the Court of Appeal is without its difficulties. Parliament has, in trying to provide machinery for determining where the stronger public interest lies, placed a heavy burden on the Tribunal as an expert decision-maker. Davis J cited the well-known speech of Lord Mustill in *R v Monopolies and Mergers Commission, Ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 32-33 (where the relevant statute referred to "a substantial part of the United Kingdom"):

“But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational: *Edwards v Bairstow* [1956] AC 14. The present is such a case. Even after eliminating inappropriate senses of ‘substantial’ one is still left with a meaning broad enough to call for the exercise of judgment rather than an exact quantitative measurement.”

I consider that Davis J was right to regard the present case as falling within that category. He was however mistaken in supposing that the Tribunal had no jurisdiction to hear an appeal, and so he should have treated the Tribunal, and not the Commissioner, as the crucial decision-maker.

81. Irwin J concluded (para 66 of his *Sugar* judgment) that the Tribunal had erred in law in applying the predominant purpose test. So did Lord Neuberger MR (para 62). So did Moses LJ (para 73), though I have some difficulty with the way his reasoning is expressed on this point, as it seems to come close to conflicting with the reasoning of the majority of the House of Lords in the first round of litigation, [2009] 1 WLR 430. Munby LJ agreed with both judgments.

82. I would therefore dismiss this appeal, but for reasons different from those set out in the judgment of Lord Wilson. I would add that I am conscious that this interpretation of the limitation may be seen as conferring on the BBC an immunity so wide as to make the particular statutory redemptions redundant, and leave the BBC almost free of obligations under FOIA. As the Tribunal observed (paras 96 and 102):

“On a broad definition, it could be argued that all of the activities of the BBC are for the purposes of journalism, art and literature, as these are broad descriptions of a substantial part of its broadcast output . . . However, if a very broad definition was intended, there would be little point in including the BBC in Schedule 1, Part VI of FOIA. The BBC could have been omitted altogether from the scope of the Act.”

The same point was made by Davis J [2007] 1 WLR 2583, para 55.

83. In my view the correct approach is for the Tribunal, while eschewing the *predominance* of purpose as a test, to have some regard to the *directness* of the purpose. That is not a distinction without a difference. It is not weighing one purpose against another, but considering the proximity between the subject-matter of the request and the BBC's journalistic activities and end-product. As Irwin J observed in the financial information case, para 87, in the context of a critique of what was "operational":

"The cost of cleaning the BBC Boardroom is only remotely linked to the product of the BBC."

84. I respectfully agree with the measured comments of Lord Neuberger MR (para 55):

"In my view, whatever meaning is given to 'journalism' I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be 'held for purposes . . . of journalism'. No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be 'held for purposes . . . of journalism'. The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way."

That is the best way forward in order to strike the difficult balance of competing interests for which Parliament must be taken to have been aiming. But it will still leave some difficult decisions for the Commissioner and, on appeal, the Tribunal. There cannot be (in the words of Davis J, para 57) any "unequivocal, bright-line" test.

LORD BROWN

85. All of us agree that on any conventional approach to the construction of the Freedom of Information Act 2000 (the Act) and in particular the expression "information held for purposes . . . of journalism" within the meaning of Schedule

1 to the Act, it clearly encompasses the Balen Report (the Report) throughout the whole period that the BBC has held it.

86. It is the appellant's contention, however, that this approach to the construction of the Act and the consequent non-disclosure of the Report would violate article 10 of the European Convention on Human Rights and that the Court is accordingly bound, consistently with section 3 of the Human Rights Act 1998, to read and give effect to the Act so as to require the Report's disclosure. It is this contention that I am here principally concerned to address. Given, however, that a disagreement exists within the Court as to whether information held for the purposes of journalism but held also for other purposes must be subjected to a test as to which purpose is predominant and disclosed if the predominant purpose is non-journalistic, I shall in conclusion briefly address this issue too, irrelevant though it is to the outcome of this particular appeal.

87. The appellant's article 10 contention is not one that appears to have been advanced before Irwin J at first instance (certainly there is no mention of article 10 in his judgment). Article 10 was, however, invoked in the Court of Appeal, indeed by both sides. The BBC submitted that disclosure of the Report (and any other information held for the purposes of journalism) would have a chilling effect upon their right to freedom of expression; the appellant submitted that, subject only to narrow exceptions (none being applicable here), article 10 gives him a right of access to all such information. The Court of Appeal, however, derived no assistance from article 10 either way, Moses LJ (at para 77) finding it impossible to identify within the jurisprudence "any pointer for or against the rival contentions".

88. Before this Court Mr Eicke QC has vigorously returned to article 10 and advances what is essentially a two stage argument. First, he contends, in reliance principally upon a trilogy of Strasbourg decisions – *Matky v Czech Republic* (Application No 19101/03) (unreported) 10 July 2006, (*Matky*), *Tarsasag A Szabadsagjogokert v Hungary* (2009) 53 EHRR 130 (14 April 2009) (*Tarsasag*), and *Kenedi v Hungary* (Application No 31475/05) (unreported) 26 August 2009 (*Kenedi*) – that the ECtHR has recently moved towards the recognition of a right of access to information and that in the particular circumstances of the present case an interpretation of the Act which withholds from disclosure a document such as the Report interferes with the right of access to information protected by article 10(1). Secondly he submits that such interference is not necessary in a democratic society so as to be justified under article 10(2). He not only disputes that the release of the Report would have a chilling effect on freedom of expression but submits that only the need to protect journalistic sources – or perhaps, indeed, more narrowly still, the need to protect sources who might otherwise be deterred from assisting journalists – would constitute an overriding requirement of the

public interest sufficient to justify this interference with the citizen's article 10(1) right of access to information.

89. Before turning to the trilogy of decisions upon which the appellant mainly relies it is helpful first to note the well-established body of Strasbourg jurisprudence which is recognised to define, generally speaking, the nature and extent of the right under article 10(1) "to receive . . . information and ideas without interference by public authority". It is sufficient for present purposes to cite a short passage from the unanimous Grand Chamber decision in *Roche v United Kingdom* (2005) 42 EHRR 599 at para 172:

"The Court reiterates its conclusion in *Leander v Sweden* (1987) 9 EHRR 433 and in *Gaskin v United Kingdom* (1989) 12 EHRR 36 and, more recently, confirmed in *Guerra v Italy* (1998) 26 EHRR 357, 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 is right to observe, before moving on, that the circumstances of those particular cases were that the applicants were attempting to obtain information respectively about their being regarded as a security risk (*Leander*), about their childhood (*Gaskin*), about a chemical factory (*Guerra*) and about long-past Porton Down tests in which they had participated (*Roche*).

90. I come then to the first of the trilogy of cases on which the appellant so strongly relies: *Matky*. The complainant there was seeking, against the background of a general right to information under the Czech legal system, access to documentation concerning the construction of a new nuclear power station and in particular was challenging a requirement of the domestic legislation (article 133 of the Building Act) that a request for information had to be justified. The Court accepted that the rejection of his request constituted an interference with the complainant's right to receive information. But it held that the decision could not be considered arbitrary, recognised that "Contracting States enjoy a certain margin of appreciation in this area" and unanimously rejected the complaint as manifestly ill-founded.

91. *Matky* seems accordingly an unpromising foundation upon which to build any significant departure from what may be called the *Roche* approach to the freedom to receive information protected by article 10.

92. Nevertheless, in *Tarsasag* (the second in the appellant's trilogy of cases) it was to *Matky* that the Second Section of the Court referred as (the sole) authority for the proposition that, the *Leander* line of authority notwithstanding, "the Court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information". In *Tarsasag* the court upheld a complaint by the Hungarian Civil Liberties Union that a refusal by the Constitutional Court to grant them access to an MP's pending complaint as to the constitutionality of certain proposed amendments to the Criminal Code breached its article 10 right to receive information. The Government having accepted that there had been an interference with the applicant's article 10 rights, Mr Eicke relies in particular upon the following passage in the Court's judgment:

"[The Court] 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. . . . 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." (para 36)

93. *Kenedi*, the third in the trilogy of cases, was decided just four months after *Tarsasag*, also by the Second Section of the Court (including six of the same seven judges who had decided *Tarsasag*). The applicant there was a historian specialising in the functioning of the secret services of dictatorships. Although a succession of domestic court judgments had held him to be entitled to access to various documents for research purposes, the Ministry had refused to disclose them. Once again, hardly surprisingly in this case, the government conceded that there had been an interference with the applicant's article 10 rights. The Court had no difficulty in finding in the result a violation of article 10:

"the Court cannot but conclude that the obstinate reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness."

94. In my judgment these three cases fall far short of establishing that an individual's article 10(1) freedom to receive information is interfered with whenever, as in the present case, a public authority, acting consistently with the domestic legislation governing the nature and extent of its obligations to disclose information, refuses access to documents. Of course, every public authority has in one sense "the censorial power of an information monopoly" in respect of its own

internal documents. But that consideration alone cannot give rise to a prima facie interference with article 10 rights whenever the disclosure of such documents is refused. Such a view would conflict squarely with the *Roche* approach. The appellant's difficulty here is not that Mr Sugar was not exercising "the functions of a social watchdog, like the press." (Perhaps he was.) The Jewish Chronicle would be in no different or better position. The appellant's difficulty to my mind is rather that article 10 creates no general right to freedom of information and where, as here, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with when access is refused to documents which *are* held for journalistic purposes.

95. True it is, as Lord Judge CJ noted when giving the judgment of the Court in *Independent News and Media Ltd v A* [2010] 1 WLR 2262 (para 42), that the Venice Commission has described *Tarsasag* as "a landmark decision on the relation between freedom of information and the . . . Convention". Whatever else might be said about Mr Eicke's trilogy of cases, however, they cannot to my mind be said to support his first proposition having regard to the particular relationship between the parties in this case.

96. I should perhaps add for the sake of completeness that there is absolutely nothing in *Independent News and Media Ltd v A*, still less in *R (Mohamed) v Secretary of State for Foreign Affairs (No 2)* [2011] QB 218, to support Mr Eicke's reliance on article 10 in the present context.

97. It follows that for my part I would hold that the appellant's article 10 case fails at the first stage. There was no interference here with Mr Sugar's freedom to receive information. The Act not having conferred upon him any relevant right of access to information, he *had* no such freedom.

98. Even were that not so, however, I would reject the second stage of Mr Eicke's argument too. Even were one to start with the supposition that any refusal by a public authority to disclose information involves a prima facie interference with a person's freedom to receive that information, it seems to me open to the State to legislate, as here, a blanket exclusion of any requirement to disclose information held (whether predominantly or not) for the purposes of journalism.

99. The appellant's contrary argument fixes in particular upon a line of Strasbourg cases concerned essentially with journalistic sources: *Goodwin v United Kingdom* (1996) 22 EHRR 123, *Nordisk Film and TV A/S v Denmark* (Application No 40485/02) (8 December 2005) and *Sanoma Uitgevers BV v The Netherlands* (Application No 38224/03) (14 September 2010). What must be recognised, however, is that in each of these cases it was the journalists who were

the complainants, that what they were complaining about were domestic court orders requiring disclosure of their sources or research material, and that the starting point for the Strasbourg Court's consideration of these complaints was, as the Grand Chamber noted at paragraph 59 of its judgment in *Sanoma*:

“In its earlier case-law the Court has found various acts of the authorities compelling journalists to give up their privilege and provide information on their sources or to obtain access to journalistic information to constitute interferences with journalistic freedom of expression.”

The applicant in *Goodwin* succeeded on the basis that he had been ordered to reveal the identity of a person who had provided him with information on an unattributable basis. The applicant in *Nordisk* failed because on the particular facts of that case (which it is not here necessary to rehearse) the applicant was not being ordered to disclose its journalistic source of information but rather part of its research material and that, even though the latter “may have a chilling effect on the exercise of journalistic freedom of expression”, there it was justified by an overriding requirement in the public interest: assisting in the prosecution of paedophiles.

100. The applicant company in *Sanoma* succeeded because there was an order for the compulsory surrender of journalistic material containing information capable of identifying journalistic sources, an interference with its article 10 rights which the Court there held was not “prescribed by law”: “the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.” (para 100)

101. Helpful though these cases may be, however, in explaining the limitations placed upon a journalist's prima facie right to protect both his sources and his research material from compulsory court orders for their disclosure, they say little if anything about what other interests and concerns may properly be invoked by journalists in resisting the disclosure to others (whether or not themselves journalists) of *other* information held for journalistic purposes (ie information apart from that necessary to protect confidential sources and research material, including for example the Balen Report).

102. To my mind it stands to reason that the disclosure of a document such as the Report would be likely to affect the candour of any similar future report. As the Information Tribunal itself found in the present case (at para 116):

“Self-critical review and analysis of output is a necessary part of safeguarding and enhancing quality. The necessary frankness of such internal analysis would be damaged if it were to be written in an anodyne fashion, as would be likely to be the case if it were potentially disclosable to a rival broadcaster.” (Or, one may add, to anyone else.)

In short I would reject also the second stage of the appellant’s argument: the contention that section 3 of the Human Rights Act should be invoked here to limit the information stipulated by the Act to be undisclosable through being held for the purposes of journalism merely to that held for the purpose of safeguarding the BBC’s confidential sources.

103. I turn then briefly to the question whether, in a case where information is held partly for journalistic and partly for non-journalistic purposes, it is necessary to ask which purpose is predominant and to disclose any information held predominantly for non-journalistic purposes. I conclude, in common with Lord Phillips and Lord Walker (and, indeed, with the Court of Appeal), but in respectful disagreement with Lord Wilson, that the answer is no. My reasons being essentially the same as those given by both Lord Phillips and Lord Walker (although perhaps more particularly those of Lord Walker), I can explain my concurrence very shortly indeed.

104. Really it comes to this. With regard both to the BBC (together with the three other listed broadcasters) and the Bank of England, Parliament, for differing but in each case compelling reasons of national interest, was concerned not to subject these institutions to the operation of the Act – including, for example, the need to resort to Part II of the Act to justify any reluctance to withhold some particular information from disclosure – save only in strictly limited circumstances. In the case of the BBC and other broadcasters it is only in respect of “information held for purposes other than those of journalism, art or literature”. In the event that information *is* held to any significant degree (and we are all agreed that the *de minimis* principle would otherwise apply) for the purposes of journalism, then to my mind it would seem artificial and impermissible to construe the Act as applying to that information. Quite simply, it remains information held for the purposes of journalism and therefore constitutes (within the meaning of section 7) “other information” than “information held for purposes other than those of journalism”. The mere fact that it may be held (even perhaps to a predominant extent) also for purposes other than those of journalism cannot sensibly serve to enlarge the basic category of information in respect of which the BBC is listed and with regard to which, therefore, the Act is not disapplied by section 7.

105. In short, like Lord Walker, I find that the natural construction of the Act, and Parliament's evident concern to ensure that the interests of free expression trump without more those of freedom of information, supports the BBC's case on this issue.

106. As for the point at which information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes, that necessarily will depend on the facts of any particular case and involve a question of judgment. I too agree with Lord Walker that the central question to be asked in such a context will be, not which purpose is predominant, but rather whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes.

107. I too would dismiss this appeal.

LORD MANCE

108. The question on this appeal is whether the Balen Report commissioned by the BBC in relation to its Middle Eastern coverage and completed in July 2004 constituted "information held for purposes other than those of journalism, art or literature" (within Part VI of Schedule 1 to the Freedom of Information Act 2000). The appeal falls to be approached on the basis that the Report was at the material time held predominantly for journalistic but partly also for other purposes. The material time was in 2005, when Mr Sugar first requested disclosure of the Report.

109. I agree with the other members of the Court that this appeal should be dismissed. However, there is a difference in the basis upon which different members of the Court would dismiss it. Lord Wilson would only dismiss it on the basis that the critical test is whether the BBC held the Report *predominantly* for the purposes of journalism. Were this not the test, he would have regarded the existence of other not insignificant purposes as sufficient to mean that the Report was held for purposes other than those of journalism, art or literature, and so disclosable. The other members of the Court take an opposite view: once it is established that the BBC held the Report for purposes of journalism, art or literature, the Report was exempt from disclosure, and would have been even had these not been the predominant purposes for which it was held.

110. The rival arguments on this point are finely balanced, and its resolution in the present appeal on the basis of sparse facts causes me a certain concern. However, after some hesitation, I have come to the conclusion that the test applied

by Lords Phillips, Walker and Brown is to be preferred. The Freedom of Information Act 2000 reflects the value to be attached to transparency and openness in the workings of public authorities in modern society, and its provisions should be construed “in as liberal a manner as possible”: *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, para 4 per Lord Hope. But, as Lord Walker notes (para 77), Lord Hope went on to add that “that proposition must not be applied too widely”, and “special considerations” may lead to restrictions.

111. In the present case, the special consideration to which the legislator gave effect was the freedom of the BBC as a public service broadcaster in relation to its journalistic, artistic and literary output. Information held for any such purposes of journalism, art or literature was absolutely exempt from disclosure. The legislator was not content with the more qualified protection from disclosure, often depending on a balancing exercise or evaluation, which would anyway have been available under section 2, read with sections 28, 29, 36, 41 and 43. To read into the words “information held for purposes other than those of journalism, art or literature” a need to evaluate whether such purposes were dominant seems to me unjustified. I share Lord Walker’s view (para 79) that the real emphasis of the words is on what is *not* disclosable, so that the exemption applies, without more, if the information is held for any journalistic, artistic or literary purpose. That conclusion is to my mind also fortified by consideration of the exemption relating to certain functions of the Bank of England.

112. Lord Phillips discusses the position regarding archived material. We were not given any clear picture when or on what basis archiving might occur. I assume that the reference is to material not envisaged as having any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit, or produce evidence of, past events. A library maintained for current reference would in contrast contain material held for the purposes of journalism, art or literature.

113. I agree with Lord Brown’s analysis of the current state of Strasbourg authority, and also with Lord Wilson’s comment in para 59 on the decisions (or dicta) in *Ullah* and *Al-Skeini*. Nothing in the Strasbourg jurisprudence calls us to do anything but give effect in this case to what we consider to be the proper construction of the 2000 Act under ordinary domestic principles. It is unnecessary to say more, or to add to recent debate about the nature of the Convention rights in the United Kingdom or the domestic courts’ role in interpreting and applying them taking into account any relevant Strasbourg case-law.