Neutral Citation Number: [2012] EWCA Civ 317

Case No: C1/2010/0283

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM (QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE CALVERT-SMITH
CO/7463/09

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2012

Before :

LORD JUSTICE WARD
LORD JUSTICE ETHERTON
and
SIR ROBIN JACOB

- -

Between :

	DOMINIC KENNEDY	**Appellant**
	- and -	
	CHARITY COMMISSION	**Respondent**
	-and-	
	(1) THE INFORMATION COMMISSIONER **(2) THE SECRETARY OF STATE FOR JUSTICE**	**Interveners**

- -

Philip Coppel QC and Andrew Sharland (instructed by **Bates, Wells & Braithwaite**) for the **Appellants**
Jason Beer QC and Rachel Kamm (instructed by **The Charity Commission**) for the **Respondent**
Ben Hooper (instructed by **The Information Commissioner**) for the **1st Intervener**
Karen Steyn (instructed by **the Treasury Solicitor**) for the **2nd Intervener**

Hearing date : 21st February 2012

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Judgment

Lord Justice Etherton :

Introduction

1. In this case Mr Dominic Kennedy, the appellant, a journalist with The Times newspaper, seeks disclosure of information from the Charity Commission under the Freedom of Information Act 2000 (the "FOIA") concerning three inquiries (together "the Inquiry") conducted by the Charity Commission into the Mariam Appeal launched by Mr George Galloway in 1998 following the imposition by the United Nations of sanctions against Iraq. The Inquiry took place between June 2003 and May 2004.

2. The Charity Commission has refused to disclose the information on the ground that it is exempt information within section 32(2) of the FOIA, which is as follows:

> "Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration."

3. Section 32(4) provides that "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment.

4. The effect of sections 62 and 63 of the FOIA is that information within section 32(2) of the FOIA remains exempt from disclosure under the FOIA for 30 years (which will be reduced for future FOIA requests to 20 years by amendment pursuant to the Constitutional Reform and Governance Act 2010 when brought into force).

5. Mr Kennedy contends that, on a conventional interpretation, the exemption in section 32(2) of the FOIA only subsists for the duration of the inquiry. He further contends that, if he is wrong, and the Charity Commission is correct that, on a conventional interpretation, the exemption continues after the inquiry has concluded, Article 10 of the European Convention on Human Rights ("Article 10") is engaged and, pursuant to section 3 of the Human Rights Act 1998 ("the HRA"), section 32(2) must be read and given effect so as to limit the exemption to the duration of the inquiry.

6. In our judgments handed down on 12 May 2011 ([2011] EWCA Civ 367), dismissing Mr Kennedy's appeal from the decision of Calvert-Smith J, on appeal from the Information Tribunal (Judge John Angel, Jacqueline Blake and Marion Saunders) ("the Tribunal"), we held that, on a conventional interpretation, the exemption in section 32(2) continues after the inquiry has concluded. Ward LJ, with whom I agreed, considered that section 32(1) and section 63(1) of the FOIA and section 18(3) of the Inquiries Act 2005 supported that conclusion. Jacob LJ rested his conclusion solely on the basis of section 32 itself.

7. In paragraph [47] Jacob LJ pointed out what he described as the absurdity arising from that interpretation of section 32(2), namely that it allows all information deployed in a statutory inquiry (other than one under the Inquiries Act 2005) to be kept secret for 30 years after the end of the inquiry, regardless of the contents of the information, the harmlessness of disclosure, the public interest in disclosure and the willingness of those who deployed the material in the inquiry that it should be published.

8. At the time we handed down those judgments neither the Tribunal nor Calvert-Smith J had been asked by Mr Kennedy to consider his Article 10 argument. We were nevertheless prepared to do so once the Tribunal had considered and reached a decision on it after having received such further evidence and heard such further argument as it thought appropriate, with a stay of the appeal in the meantime and the

appeal to be restored before us for further hearing in the light of the Tribunal's report. We therefore referred back to the same panel of the Tribunal (now the First Tier Tribunal (Information Rights)) the determination of the following issue on Article 10 ("the Article 10 issue"):

> "Whether s.32(2) of the Freedom of Information Act 2000 should in the circumstances be read down pursuant to s.3 of the Human Rights Act 1998 and Article 10 of the European convention on Human Rights, so that the exemption that it provides from disclosure of information ends upon the termination of the relevant statutory inquiry."

9. The Tribunal reported its conclusions in a decision dated 18 November 2011 ("the Tribunal's Decision"). It found in favour of Mr Kennedy on the Article 10 issue. The Charity Commission challenges that decision effectively by way of cross-appeal. It is supported by the Secretary of State for Justice as intervener and by the Information Commissioner ("the Commissioner"). The original appeal by Mr Kennedy was duly restored.

The factual setting

10. The factual background is set out in the judgment of Ward LJ in his judgment handed down in May 2011. In addition to what is stated there, it is material to note that Mr Kennedy's request to the Charity Commission was for the disclosure of information that fell within the following four classes:

> (1) Documents containing information that explains or evidences the Charity Commission's conclusion that George Galloway may have known that Iraqi bodies were funding the appeal;
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> (2) Documents from the Charity Commission to George Galloway inviting him to set out his position or speak to the Charity Commission and documents containing George Galloway's response to that/those invitation(s);
>
> (3) Documents received by the Charity Commission from other public authorities (as defined by the FOIA) and documents sent by the Charity Commission to other public authorities;
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> (4) Documents that contain information describing or revealing the reason that (or otherwise explaining why) the Charity Commission decided to commence and continue the Inquiry.

11. In making his request to the Charity Commission Mr Kennedy stated that he believed the requested information was in the public interest for the following reasons:

> "1. To uphold public confidence that the Charity Commission conducts its inquiries in a spirit of fairness to all parties;

> 2. To provide assurance that the Charity Commission liaises fully with all relevant authorities so its inquiries are as thorough as possible;
>
> 3. To ensure that the Charity Commission spends money correctly when making inquiries into charities and their trustees″

The jurisprudence

12. Article 10 provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

13. There is a well-established line of decisions of the European Court of Human Rights ("the ECtHR") that it is an infringement of Article 10 for a State to restrict a person from receiving information that others wish or may wish to impart to that person. What is in issue on this appeal is whether or not, as the Charity Commission contends, there is an equally well-established line of ECtHR decisions that Article 10(1) does not impose on the State or public bodies a positive obligation to provide access to information which they hold, or alternatively, as Mr Kennedy contends and the Tribunal held, Article 10 does impose such an obligation, at least on facts like those in the present case.

14. For the purpose of this appeal, it is sufficient to mention the following cases.

15. In *Leander v Sweden* (1987) 9 EHRR 433 Mr Leander had been refused employment at a museum located on a naval base, having been assessed as a security risk on the basis of information stored on a register maintained by State security services that had not been disclosed him. Mr Leander complained that he should have been provided with the information in question, and should have been given the chance to refute it. He submitted that Article 10 conferred a right of access to Government records and a positive obligation upon the State to disclose the contents of its file to him upon request. The ECtHR rejected that submission. It held at paragraphs 74 and 75 as follows:

> "74. The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.
>
> 75. There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10."

16. The reasoning and decision in *Leander* has been applied in a number of Strasbourg cases, including *Gaskin v United Kingdom* (1989) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2006) 42 EHRR 30. In *Gaskin* the ECtHR rejected the contention that Article 10 could provide the applicant with a right of access to social services care records concerning periods of his childhood spent in foster care. The Court stated as follows at paragraphs 52 and 53:

> "52. The Court holds, as it did in *Leander v. Sweden*, that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.' Also in the circumstances of this case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.
>
> 53. There has thus been no interference with Mr. Gaskin's right to receive information as protected by Article 10."

17. *Guerra* concerned claims arising from toxic emissions emanating from a chemicals factory in Italy. The emissions had caused serious harm to the health of local residents. The residents contended that Article 10 imposed a positive obligation on the State to provide access to Government documents relating to the risks posed by the factory. The ECtHR rejected that argument. It said as follows at paragraphs 53 and 54:

> "53. … The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him". That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."
>
> 54. In conclusion, Article 10 is not applicable in the instant case."

18. *Roche* concerned claims brought by a former soldier who had been affected by the Porton Down gas tests and had subsequently suffered severe health problems. He

sought access to state records concerning the tests. The Grand Chamber unanimously dismissed the submission that Article 10 could be interpreted to provide the applicant with any right of access to documents held in Government records. The Court said as follows at paragraphs 172 and 173:

> "172. The Court recalls its conclusion in the *Leander v Sweden* judgment and in the above-cited *Gaskin* case and, more recently, confirmed in the above-cited *Guerra* judgment, 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 sees no reason not to apply this established jurisprudence.
>
> 173. There has thus been no interference with the applicant's right to receive information as protected by Art.10."

19. *Leander*, *Gaskin*, *Guerra* and *Roche* pre-date the decisions of the ECtHR upon which Mr Kennedy relies. He places weight on, particularly, *Társaság a Szabadságjogokért v Hungary* [2009] ECHR 618 and *Kenedi v Hungary* [2009] ECHR 786. In *Társaság* the Hungarian Civil Liberties Union sought access to details of a legal challenge filed by a Hungarian parliamentarian in the Hungarian Constitutional Court concerning the constitutionality of legislative amendments to the Hungarian Criminal Code. The Union contended that the refusal of the Constitutional Court to grant it access to the documents was a violation of Article 10. The Government accepted that there had been an interference with the Union's Article 10 rights. The Second Chamber of the ECtHR said as follows at paragraphs 35 and 36:

> "35. The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" and that "it is difficult to derive from the Convention a general right of access to administrative data and documents". Nevertheless, 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.
>
> 36. In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him". It 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. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles

> created by the authorities in the way of press functions call for the most careful scrutiny. 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. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant."

20. In *Kenedi* the applicant was an historian specialising in the functioning of the secret services of dictatorships, comparative studies of the political police forces of totalitarian regimes and the functioning of Soviet-type States. The applicant requested the Hungarian Ministry of the Interior to grant him access to deposited documents. He obtained judgments of the Hungarian courts holding that he had been wrongly denied access to various documents. The Ministry offered him the documents (apart from one) in confidence provided he did not disclose them. The Hungarian Government conceded that there was an interference with the applicant's Article 10 rights. The Second Chamber of the ECtHR found a violation of Article 10. Under the heading "Alleged violation of Article 10 of the Convention" the Court said as follows at paragraph 43:

> "43. The Court observes that the Government have accepted that there has been an interference with the applicant's right to freedom of expression. The Court emphasises that access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression (see, *mutatis mutandis, Társaság a Szabadságjogokért v. Hungary…).*"

21. Mr Kennedy also relied before the Tribunal on the decision of the Fifth Chamber of the ECtHR in *Matky v Czech Republic* (App No. 1910/03) (unreported) 10 July 2006, and in this Court on the decision of the Fourth Chamber in *Wizerkaniuk v Poland* (App No. 18990/05) (unreported) 5 July 2011. It is not necessary to set out here the facts and findings in those cases.

22. So far as concerns domestic jurisprudence it is only necessary, for the purpose of this judgment, to refer to the following. In *Independent News and Media Ltd v A* [2010] EWCA Civ. 343, [2010] 1WLR 2262, Lord Judge CJ, delivering the judgment of the Court of Appeal, made the following reference to the Strasbourg cases:

> "41. There have also been two more recent decisions of the Strasbourg Court which appear to provide support for the notion that article 10 is engaged in a case such as this, essentially for two reasons. First, the Strasbourg jurisprudence seems to have developed since the *Leander* case….so that article 10 seems to have a somewhat wider scope; secondly, where the media is involved and genuine public interest is raised, it may well be that, at least in some circumstances, one

> is anyway outside the general principle laid down in the *Leander* case, at para 74."
>
> 42. … [*Társaság*] was seen as a new development, and described as "a landmark decision on the relation between freedom of information and the …Convention", by the European Commission for Democracy through Law (the Venice Commission) in its Opinion on the Draft Law about Obtaining Information of the Courts of Azerbaijan Opinion No 548/2009."

23. In *British Broadcasting Corporation v Sugar (No. 2)* [2010] EWCA Civ 715, [2010] 1 WLR 2278, Moses LJ described *Társaság* at paragraph [76] as:

> "a landmark decision on freedom to information which establishes that article 10 may be invoked not only by those who seek to give information but also by those who seek to receive it."

The Decision of the Tribunal

24. The Tribunal (Judge John Angel, Jacqueline Blake and Marion Saunders) held a hearing on the Article 10 issue on 26 and 27 October 2011. Written and oral evidence was adduced. In addition to submissions on behalf of Mr Kennedy and the Charity Commission written submission were made by the Commissioner and the Secretary of State for Justice. The Tribunal set out in paragraph [9] of its Decision the following four questions which the parties requested the Tribunal to answer in order to decide the Article 10 issue:

> "i) Does the refusal to disclose the information applying the s.32(2) FOIA exemption interfere with Mr Kennedy's right to freedom of expression under Article 10(1) ECHR?
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> ii) If yes, is such an interference justified under Article 10(2)?
>
> iii) If no, should s.32(2) be construed in a way which is consistent with Article 10?
>
> iv) If yes, does limiting s.32(2) to information held until the termination of the relevant statutory inquiry avoid the breach of Article 10."

25. Mr Kennedy contended before the Tribunal that the clear jurisprudence of the ECtHR in the decisions in *Társaság* and *Kenedi* was to recognise a right under Article 10 of access to information held by a public authority and the right to impart that information to others. Mr Kennedy asserted that Strasbourg jurisprudence had been foreshadowed in that respect by the Court of Appeal in *Independent News and Media Ltd v A.* He also relied on the observations of the Court of Appeal in *Sugar (No.2).*

26. In its excellent, clear and comprehensive analysis the Tribunal referred to a large number of authorities. The Tribunal identified a developing jurisprudence under Article 10 as follows:

> "42. As best we can the FTT considers that this developing jurisprudence is not necessarily granting a general right to receive information under Article 10. Such a general right of access still only exists as set out under *Leander*. It has advanced, however, towards a broader interpretation of the notion of freedom of information which has recognised an individual right of access conferred by Article 10(1) but which is subject to certain "formalities, conditions, restrictions or penalties" described in Article 10(2). This may be where a social watchdog is involved and there is a genuine public interest as in *Társaság* or where historical research is being hindered on a matter of public importance as in *Kenedi*. It appears to us that this extension of scope of Article 10(1) is now being consistently applied and recognised by a number of chambers of the ECtHR. Our Court of Appeal has also recognised this as a clear development. In our view this has not led to a general right to receive information as that would be going too far. However it is now clear that the ECtHR has developed a wider approach from that first established in 1978 to the notion of "freedom to receive information". There is now recognition of an individual right of access to information in certain circumstances.
>
> 43. We try to explain this by reference to what the ECtHR says in *Tarsasag* which seems to us to establish, particularly in relation to social and media watchdogs, that:
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> i) Where a State makes no provision for a right of access to official information (at least so far as the right is needed to help inform public debate), that absence will itself constitute an interference with the right to freedom of expression which is protected by Article 10(1);
>
> ii) Where a state does confer such a right of access but the right is shaped (i.e. so that there is no right of access outside its bounds), then for information falling outside the bounds of the right:
>
> (a) there is an interference with the right to freedom of expression which is protected by Article 10(1); and
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> (b) that interference falls to be addressed by Article 10(2)."

27. The Tribunal concluded that the Charity Commission's refusal to disclose the information requested by Mr Kennedy by applying an absolute exemption under the FOIA amounted to an interference with Mr Kennedy's right to freedom of expression. It said:

> "44. In Mr Kennedy's case the CC were able to refuse to disclose information to him by applying an absolute exemption under FOIA. The conventional construction of s.32(2) in effect allows

> the State to prevent the disclosure of information for 30 years or more. As Jacob LJ recognises this is "regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure". All members of the Court of Appeal in this case recognise difficulties with the conventional construction, hence asking the FTT to consider the effect of Article 10. This amounts to an interference with Mr Kennedy's right to freedom of expression in the circumstances of his appeal. The particular circumstances are that
>
> i) He is seeking to gather information on a matters of public concern – Mr Galloway and the Miriam Appeal and the way the CC conducted its inquiries into the Appeal;
>
> ii) The CC, by refusing to disclose such information, is imposing a form of censorship; and
>
> iii) Mr Kennedy's right to impart information is also impaired."

28. Without intending any disrespect to the Tribunal for its detailed analysis, it is sufficient for the purposes of this judgment to set out the Tribunal's conclusions in paragraph [73] of its Decision on the four questions it had been asked by the parties to decide:

> "73. We unanimously determine as follows:
>
> (1) The conventional construction of s 32(2) FOIA interferes with Mr Kennedy's right to freedom of expression.
>
> (2) This interference is not "necessary in a democratic society" because it is not proportionate to a legitimate aim.
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> (3) In the circumstances, s 32(2) FOIA should be construed in a manner that is consistent with Article 10 ECHR "so far as it is possible to do so."
>
> (4) By limiting s 32(2) to documents held by inquiries that have not concluded, Mr Kennedy's Article 10 rights will not be interfered with in a disproportionate way."

The restored hearing of Mr Kennedy's appeal

29. The Charity Commission has filed Grounds of Appeal from the Tribunal's Decision. They may be very simply summarised as follows. First, the Tribunal erred in law in finding that there was a clear and constant line of ECtHR jurisprudence that had developed the scope of the right to receive information beyond the decision in *Leander*. Secondly, in so far as there was any interference with Mr Kennedy's Article 10(2) rights, the interference was not section 32(2) of the FOIA but rather the Charity Commission's failure to disclose the information voluntarily to Mr Kennedy, the remedy for which is a claim under the HRA. Thirdly, the Tribunal erred in any

event in finding that any interference with Mr Kennedy's rights under Article 10(1) was not justified. Fourthly, the Tribunal erred in finding that s.32(2) of the FOIA should be "read down" so that it is limited to documents held by inquiries that have not concluded: either the Charity Commission could provide the information voluntarily so that it is not necessary to "read down" s.32(2), or alternatively any "read down" should be limited to that necessary to avoid a breach on the facts of the present case.

30. The Charity Commission's Grounds of Appeal were directed to stand as a cross-appeal, for which permission to appeal, if required, was given by Ward LJ on 23 December 2011.

31. By order of Ward LJ on 8 February 2012 it was ordered that the Commissioner be permitted to make written submissions, and that the Secretary of State for Justice be joined as intervener and be permitted to make oral and written submissions.

32. Substantial skeleton arguments for the restored hearing of the appeal were submitted by the Charity Commission, in support of its technical cross appeal, and by Mr Kennedy and the Secretary of State for Justice. The Information Commissioner submitted written submissions.

33. On the resumed hearing of the appeal Mr Jason Beer QC appeared with Ms Rachel Kamm for the Charity Commission, Ms Steyn appeared for the Secretary of State, and Mr Philip Coppel QC appeared with Mr Andrew Sharland for Mr Kennedy.

Discussion and decision

34. Following the Tribunal's Decision, the issue of the Charity Commission's cross-appeal and the substantial initial written submissions of the parties, the Supreme Court handed down its judgments in *Sugar (Deceased) (Represented by Fiona Paveley) v British Broadcasting Corporation* [2012] UKSC 4 ("*Sugar*") a few days before the hearing of the restored appeal before us. We have had extensive submissions on *Sugar*.

35. The Charity Commission and the Secretary of State take the position that the reasoning and decision of the Supreme Court in *Sugar* require us to hold that the Tribunal in the present case was incorrect in its characterisation of the jurisprudence of the ECtHR in relation to Article 10(1), and in particular the *Matky*, *Társaság*, and *Kenedi* cases. They contend that, as the Strasbourg jurisprudence has been interpreted in *Sugar*, it inevitably follows that Article 10(1) was simply never engaged by the refusal of the Charity Commission to supply the information and documentation requested by Mr Kennedy. They further submit that, even if the analysis and decision in *Sugar* are not strictly binding so as to be determinative of the present appeal, the analysis and decision should nevertheless be followed as a recent and highly authoritative statement by the Supreme Court. The Charity Commission prepared a Supplementary Note articulating those points, to which Mr Kennedy responded in substantial written Points of Reply.

36. I am satisfied that the analysis and decision of Lord Brown in *Sugar* are part of the ratio of that case, which is binding on this court, and that, in the light of that analysis

and decision, we must allow the cross-appeal of the Charity Commission on the Article 10 issue and dismiss Mr Kennedy's appeal.

37. The facts in *Sugar* were that Mr Sugar sought the disclosure from the BBC of a copy of a report, the Balen Report ("the Report"), on the quality (including the impartiality) of the BBC's coverage of Middle Eastern affairs in recent years and of the validity or otherwise of complaints about it, including practical suggestions for improving the quality of the coverage including its impartiality. Following the refusal of the BBC to disclose a copy of the Report, Mr Sugar applied to the Commissioner for a decision whether the BBC had determined his request in accordance with the requirements of the FOIA. The Commissioner decided that the Report fell outside the scope of the FOIA. Mr Sugar appealed to the Information Tribunal, which upheld Mr Sugar's contention that the Report was within the scope of the FOIA. There were related proceedings between the same parties concerning the Tribunal's jurisdiction on which Mr Sugar was ultimately successful (which are not relevant to the present appeal). Irwin J allowed the BBC's appeal from the decision of the Tribunal on disclosure. The Court of Appeal dismissed Mr Sugar's appeal. Mr Sugar appealed to the Supreme Court, but Mr Sugar sadly died in the meantime, and the Court appointed Ms Fiona Paveley to represent his estate in the appeal. The Supreme Court dismissed the appeal.

38. The relevant provisions of the FOIA were section 7 and Schedule 1. 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 FOIA is to apply to any other information held by the authority. Part VI of Schedule 1 lists the BBC "in respect of information held for purposes other than those of journalism, art or literature."

39. The Supreme Court approached the appeal on the factual basis that at the material time (the date of Mr Sugar's original request for disclosure of the Report) the Report was held by the BBC predominantly for journalistic purposes but partly also for purposes other than journalism, art or literature. All the members of the Supreme Court agreed that the appeal should be dismissed, but there was a difference in their reasoning. All of the Justices, other than Lord Wilson, considered that, on a conventional interpretation, if the BBC holds information for purposes of journalism, art or literature, it is exempt from disclosure even if those are not the predominant purposes for which it is held. Lord Wilson considered that, on a conventional interpretation, the test is whether the BBC holds information predominantly for purposes of journalism, art or literature or predominantly for other purposes. If that was not the test, he would have considered information disclosable if it is held for not insignificant purposes other than those of journalism, art or literature (which was what Lord Wilson called Mr Sugar's "polarised construction").

40. Accordingly, the Supreme Court concluded that, on a conventional interpretation, disclosure of the Report was not required under the FOIA.

41. Lord Brown, Lord Mance and Lord Wilson went on to consider whether, nevertheless, the BBC's refusal to disclose the Report infringed Mr Sugar's rights under Article 10. The principal judgment on that issue was delivered by Lord Brown.

42. In paragraph [88] Lord Brown summarised the argument of the appellant's counsel on the Article 10 issue as being essentially in two stages, namely (1) in reliance upon *Matky, Társaság* and *Kenedi* the ECtHR had recently moved towards the recognition of a right of access to information that, in the particular circumstances of the case, meant that an interpretation of the FOIA which withheld from disclosure a document such as the Report interfered with the right of access to information protected by Article 10 (1); and (2) such interference was not necessary in a democratic society so as to be justified under Article 10 (2).

43. Having referred to, and quoted from, *Roche, Matky, Társaság* and *Kenedi*, Lord Brown rejected the first stage of the appellant's argument as follows:

> "94 In my judgment these three cases, [viz *Matky, Társaság and Kenedi*] 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 Limited v A* [2010] 1 WLR 2262 (para 42), that the Venice Commission has described *Társaság* as "a landmark decision on the relation between freedom of information and the … Convention". Whatever else might be said about Mr Eicke's [counsel for the appellant'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.
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> 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 (No2)* [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."

44. Lord Brown went on to say (in [98]) that, in any event, he also rejected the second stage of the argument of the appellant's counsel. In short, Lord Brown was of the view that, even if one were 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, he considered that it was open to the State to legislate, as in the FOIA, a blanket exclusion of any requirement to disclose information held (whether predominantly or not) for the purposes of journalism.

45. Lord Mance said (in [113]) that he agreed with Lord Brown's analysis of the current state of Strasbourg authority.

46. Lord Wilson addressed the Article 10 issue in paragraphs [58] and [59] as follows:

> "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 and 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."

47. Neither Lord Phillips nor Lord Walker commented on the Article 10 issue.

48. The first issue on the present appeal is whether it was part of the ratio of the Supreme Court's decision in *Sugar* that Article 10(1) was not engaged. In my judgment, that was part of the ratio. In Mr Kennedy's Points of Reply it was suggested that Lord Brown stated in paragraph [86] that the Article 10 issue was irrelevant to the outcome of the appeal and he would address it only briefly. This is a plain misreading of what Lord Brown said. On the contrary, Lord Brown said that he was principally concerned to address the appellant's contention that the non-disclosure of the Report would violate Article 10, and so the Court was bound, consistently with HRA s.3, to read and give effect to the FOIA so as to require the Report's disclosure. What Lord Brown considered was irrelevant to the outcome of the appeal and so to be addressed by him only briefly was the difference of view between the other Justices as to the conventional interpretation of s.7 and Part VI of Schedule 1. Indeed, it was common ground on the hearing before us that the appellant in *Sugar* was relying in the Supreme Court on Article 10 if, on a conventional interpretation of the relevant provisions of the FOIA, he was not entitled to disclosure of the Report. That is indeed apparent both from the contents of the printed cases of the appellant and the BBC (of which Mr Coppel had procured copies) but also from the judgments of Lord Wilson, Lord Brown and Lord Mance.

49. Lord Brown stated expressly that Article 10(1) was not engaged and Lord Mance agreed (at [113]) with Lord Brown's analysis on that part of the case. There was much debate before us about the proper interpretation of Lord Wilson's judgment on the application of Article 10(1). Mr Coppel's submission was that Lord Wilson was, at best, "agnostic" about the engagement of Article 10 (1). Lord Wilson addressed the issue, as I have said, in paragraph [58] of his judgment which I have quoted above. Mr Coppel submitted that Lord Wilson's agreement "with the essence" of what Lord Brown said in paragraphs [86] to [102] is clarified by Lord Wilson's observation that he "would countenance somewhat more readily than does Lord Brown [the possibility that] the refusal to disclose the report did interfere with the freedom of Mr Sugar to receive information under [Article 10]".

50. I do not accept Mr Coppel's analysis of Lord Wilson's judgment on the Article 10(1) issue. Lord Wilson said that he agreed with the essence of paragraphs [86] to [102]. Those paragraphs embrace Lord Brown's rejection of the appellant's case that Article 10 (1) was engaged if his conventional interpretation was rejected by the Court (as it

was). It seems to me clear that, if Lord Wilson had disagreed with Lord Brown's analysis of the existing Strasbourg jurisprudence in relation to the application of Article 10(1), he would have said so clearly and expressly. Lord Wilson, in expressing the view that he would countenance rather more readily than did Lord Brown the possibility that the refusal to disclose the Report interfered with the freedom of Mr Sugar to receive information under Article 10(1), was referring to a possible extension of the current long-established jurisprudence of the ECtHR. That also explains his reference in paragraph [59] of his judgment to *Al-Skeini* and *Ullah*, and in particular the suggestion of Lord Bingham in the latter at paragraph [20] that it was the duty of the House of Lords to keep pace with the evolving jurisprudence of the ECtHR "no more, but certainly no less" and the suggestion of Lord Brown in the former that the duty of the House of Lords was to keep pace with it "no less, but certainly no more".

51. That interpretation of Lord Wilson's judgment on Article 10 (1) is further supported by the consideration that he did not express a view about whether, if the statutory restriction was not given his interpretation (viz whether or not the information was held predominantly for the purposes of journalism, art or literature), but rather the interpretation of the majority (viz whether or not an immediate object of holding the information was to use it for the purposes of journalism, art or literature), it would represent a legitimate restriction under Article 10(2). Accordingly, since neither Lord Phillips nor Lord Walker expressed any view on the Article 10 issue, the appeal could only have been dismissed on the basis that Lord Wilson, together with Lord Brown and Lord Mance, considered that Article 10(1) was not engaged.

52. As I understand his argument, Mr Coppel contended that it was not necessary for the Supreme Court to decide the Article 10 issue because the appellant accepted in *Sugar* that the statutory "carve out" for information held by the BBC for purposes of journalism was necessary under, and was intended to satisfy, Article 10(2). The difficulty with that argument is that the Supreme Court rejected the appellant's "polarised construction" (in Lord Wilson's language) and there was no acceptance by the appellant that Article 10(2) was satisfied in relation to the Court's preferred conventional interpretation. That was precisely why the appellant was relying on Article 10.

53. The next question is whether the ratio of *Sugar* on the Article 10(1) point is determinative of the present appeal. This turns on an analysis of paragraphs [94] to [97] of Lord Brown's judgment. Mr Coppel submitted that those paragraphs do not require a dismissal of Mr Kennedy's appeal even if they are ratio. He said that Lord Brown was clearly not saying that an individual could never rely upon Article 10(1) for the freedom to receive information where a public authority, acting consistently with domestic legislation governing the nature and extent of its obligations to disclose information, refuses access to the documents. He said that Lord Brown was careful to tie his decision on Article 10 (1) to the particular facts of *Sugar*. He pointed, in that connection, to the qualifying words at the end of paragraph [95] of Lord Brown's judgment -"having regard to the particular relationship between the parties in this case". He also referred to, and relied upon, Lord Brown's final sentence in paragraph [95], namely that the appellant's difficulty was that Article 10:

> "creates no general right to freedom of information and where, as here, the legislation expressly limits such rights of information held otherwise for the purposes of journalism it is

> not interfered with where access is refused to documents which *are* held for journalistic purposes".

54. Mr Coppel submitted that in the case of the legislative provisions in issue in *Sugar* there were competing policy considerations under Article 10. The object of the exemption in that case was, he said, to protect the confidentiality of the BBC's journalistic sources and, moreover, Mr Sugar was not a social watchdog or a member of the press. Mr Coppel emphasised that in the present case, by contrast, Mr Kennedy is a journalist who is seeking to act as a social watchdog and the Charity Commission has no journalistic functions.

55. Although I have not found the point entirely straightforward, I have reached the conclusion that the ratio on the Article 10(1) point in *Sugar* is determinative of the present appeal. It is quite clear that, so far as Lord Brown was concerned, it was irrelevant to the Article 10 issue whether or not Mr Sugar had been acting as a social watchdog and that he was not a member of the press. That is apparent from paragraph [94] in his judgment.

56. It seems to me that Lord Brown's conclusion in paragraphs [94] to [97] was that what he described in paragraph [89] as "the well-established body of Strasbourg jurisprudence" set out in *Roche, Leander, Gaskin* and *Guerra* was not extended or not materially extended by *Matky, Társaság* or *Kenedi.*

57. As I have said, one of the cases on which Mr Kennedy relies on this appeal is *Wizerkaniuk,* which was not the subject of any mention by the Supreme Court in *Sugar*. It is not necessary to examine the facts of that case. It is relied upon by Mr Kennedy for its reference to *Társaság* in paragraph [65] of the ECtHR's judgment. That, however, is only a reference in support of the proposition that "while it is true that Article 10… does not in terms prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints [on publications] call for most careful sanctioning on the Court's part". The reference to *Társaság* does not in any way endorse the extension of the Article 10(1) jurisprudence beyond the *Leander* line of cases in the manner for which Mr Kennedy contends.

58. It follows that Article 10(1) can have no application in the present case.

59. Even if I am wrong that the analysis and conclusion of Lord Brown on the Article 10(1) issue are part of the ratio of *Sugar* I would nevertheless follow them as a very recent authoritative pronouncement by the Supreme Court. It is more appropriate for the Supreme Court to decide whether or not the factual situation in the present case is sufficiently different in material respects from that under consideration in *Sugar* to fall within the ambit of Article 10(1) whether under existing Strasbourg jurisprudence or, in the light of policy considerations, a desirable and logical extension of the existing Strasbourg jurisprudence.

60. I have considered carefully whether, notwithstanding everything I have said, it would be desirable and helpful to consider whether, on the hypothesis (contrary to my conclusion) that Article 10(1) is engaged on the facts of the present case, the provisions of s.32(2) of the FOIA are nevertheless a legitimate restriction under Article 10(2). It seems to me that such a hypothetical exercise would be extremely difficult to carry out in the absence of clarity as to the proper ambit of Article 10(1)

and the policy considerations extending its ambit to the facts of the present case. For that reason, I have not carried out an Article 10(2) analysis.

Conclusion

61. I would, therefore, allow the Charity Commission's cross-appeal from the Tribunal's Article 10 Decision and dismiss Mr Kennedy's appeal.

62. The issues raised by Mr Kennedy's appeal are important ones. For reasons which Jacob LJ gave in his earlier judgment and were also given in the Tribunal's Article 10 Decision it appears difficult to justify the full extent of the restriction in s.32(2) after the conclusion of the inquiry. Lord Brown's qualification at the end of paragraph [95] of his judgment ("having regard to the particular relationship between the parties in this case") as well as Lord Wilson's more relaxed approach to the limits of Article 10(1) in paragraph [58] of his judgment make this a suitable case for the Supreme Court to consider the precise boundaries of Article 10(1), particularly in a case where the applicant is taking the journalistic role of a social watchdog and, unlike the position in *Sugar*, the authority refusing disclosure has no journalistic functions. In that regard, I also note that Lord Mance expressed agreement with Lord Wilson's stated desire in paragraph [59] of his judgment for an appeal in which it is appropriate for the Supreme Court to consider whether, without acting extravagantly, it might usefully do more than to shadow the ECtHR. For those reasons, I would grant permission to appeal to the Supreme Court.

63. In those circumstances I consider it would also be desirable for the Supreme Court to have before it the issue of the proper conventional interpretation of section 32(2), and so I would also grant permission to appeal our decision on that issue.

Sir Robin Jacob

64. I agree.

Lord Justice Ward

65. I also agree.