Hilary Term
[2014] UKSC 20
On appeal from: [2011] EWCA Civ 367; [2012] EWCA Civ 317

JUDGMENT

Kennedy (Appellant) *v* The Charity Commission (Respondent)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

26 March 2014

Heard on 29 and 31 October 2013

Appellant
Philip Coppel QC
Andrew Sharland

(Instructed by Bates Wells & Braithwaite LLP)

Respondent
James Eadie QC
Karen Steyn
Rachel Kamm
(Instructed by Charity Commission Legal Services)

1st Intervener
James Eadie QC
Karen Steyn
Rachel Kamm
(Instructed by Treasury Solicitors)

2nd Intervener
Ben Hooper
(Instructed by The Information Commissioner)

3rd Intervener
Richard Clayton QC
Christopher Knight
(Instructed by Media Legal Defence Initiative and Campaign for Freedom of Information)

LORD MANCE (with whom Lord Neuberger and Lord Clarke agree)

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Introduction

1. Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest. Unwillingness to disclose information may arise through habits of secrecy or reasons of self-protection. But information can be genuinely private, confidential or sensitive, and these interests merit respect in their own right and, in the case of those who depend on information to fulfil their functions, because this may not otherwise

be forthcoming. These competing considerations, and the balance between them, lie behind the issues on this appeal.

2. This appeal concerns the relationship between the Charity Commission, a public authority responsible for inquiries in relation to which it requires information from third parties, and the press, concerned to understand and report on the Charity Commission's performance of its role. It also concerns the relationship between the Freedom of Information Act 2000 ("the FOIA") and the statutory and common law position regarding the disclosure of information outside the scope of the FOIA.

3. The FOIA provides a framework within which there are rights to be informed, on request, about the existence of, and to have communicated, information held by any public authority. But the framework is not all-embracing. First, these rights do not apply at all in cases which are described as "absolute exemptions" (see sections 2(1)(a) and 2(1)(b)) and are subject to a large number of other carefully developed qualifications. Second, as the other side of this coin, section 78 of the FOIA specifies that nothing in it "is to be taken to limit the powers of a public authority to disclose information held by it".

4. In the present case, Mr Kennedy, an experienced journalist with The Times, has been long concerned to investigate and understand more about three inquiries conducted under the Charities Act 1993 by the Charity Commission in relation to an appeal ("The Mariam Appeal") founded by Mr George Galloway MP in 1998 and operated until 2003. He views the two brief reports by the Charity Commission on these inquiries as leaving significantly unclear the basis upon which the Commission conducted the inquiries, the information on which it acted, its communications with other public authorities and its conclusions. On 8 June 2007 he made corresponding requests for disclosure of documentation by the Charity Commission under the FOIA.

5. In response, the Charity Commission points to an absolute exemption contained in section 32(2) of the FOIA. This exempts the Charity Commission from any duty to disclose any document placed in its custody or created by it for the purposes of an inquiry which it has in the public interest conducted in the exercise of its functions. The Charity Commission submits that this exemption lasts until the document is destroyed - or, if the document is one that ought to be publicly preserved, that it lasts for up to 30 (or in future 20) years under the Public Records Act 1958, section 3 as amended for the future by the Constitutional Reform and Governance Act 2010, section 45(1).

6. Section 32 is a section dealing with information held by courts and persons conducting an inquiry or arbitration. Its intention was not that such information

should not be disclosed. Its intention was to take such information outside the FOIA. Any question as to its disclosure was to be addressed under the different and more specific schemes and mechanisms which govern the operations of and disclosure by courts, arbitrators or persons conducting inquiries. With regard to the Charity Commission the relevant scheme and mechanism is found in the Charities Act 1993, as amended by the Charities Act 2006 (since replaced by the Charities Act 2011), the construction of which is informed by a background of general common law principles. In the present case, the focus has, however, been on the FOIA as if it were an exhaustive scheme. The argument has been, in effect, that, unless a prima facie right to disclosure can be found in the FOIA, United Kingdom law must be defective, and in breach of what is said to be the true interpretation of article 10 of the European Convention on Human Rights. But that misreads the statutory scheme, and omits to take into account the statutory and common law position to which, in the light of sections 32 and 78 in particular, attention must be addressed.

7. The Court of Appeal thus correctly held in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420, [2013] QB 618 that it was "quite wrong to infer from the exclusion" by section 32 of court documents from the FOIA that "Parliament intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be appropriate under the open justice principle" (para 74). That was a case concerning court documents, but the same general point applies to inquiry documents: section 32 is no answer to any power which the holder of an inquiry may have to disclose, or which the court may have to order disclosure in respect of, inquiry documents outside section 32.

8. In the present case, Mr Kennedy's claim to disclosure by the Charity Commission has only ever been pursued by reference to the FOIA. At the outset, before it referred to section 32, the Charity Commission did on 4 July 2007 explain in a little detail the factors which it saw as relevant to any issue of disclosure. It said:

> "There is a strong public interest in the Commission being able to carry out its functions which is expressly recognised by the [FOIA] in section 31(2)(f)-(h). Section 31 exempts from disclosure information which, if released, would prejudice the Commission's functions in protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration, protecting the property of charities from loss or misapplication and recovering the property of charities. The Commission relies very much on the co-operation of and liaison with a variety of third parties in undertaking these functions and routine disclosure of regulatory communication between the Commission and these parties would adversely affect the Commission in its work.

> The competing public interest is for transparency of the decisions and reasons for them so as to promote public confidence in charities. This is tempered by the need for confidentiality in the exchange of information. In my view, at this time, balance of the public interest weighs more strongly with securing the Commission's ability to carry out its functions efficiently and therefore lies in withholding the information."

Outside the FOIA, and in particular if this had been the response given to a claim for disclosure under the Commission's Charities Act powers and duties, the response could have been tested by judicial review on ordinary public law principles. Instead, Mr Kennedy's claim was and has only ever been put on the basis that the FOIA must be construed or remodelled so as to give him a claim under that Act.

9. In these circumstances, the issues directly arising on this appeal are limited. The first is whether section 32(2) contains, as a matter of ordinary construction, an absolute exemption which continues after the end of an inquiry. Mr Philip Coppel QC representing Mr Kennedy submits that it does not. That failing, he relies, second, on what he describes as a current "direction of travel" of Strasbourg case law for a proposition that article 10 of the Convention imposes a positive duty of disclosure on public authorities, at least towards "public watchdogs" like the press, in respect of material of genuine public interest, subject to the exemptions permitted by article 10(2). On that basis, and in the light of the duty in section 3 of the Human Rights Act 1998 to interpret primary legislation "so far as it is possible to do so ….. in a way which is compatible with the Convention rights", he submits that section 32 should be read down so that the absolute exemption ceases with the end of the relevant inquiry. Alternatively, taking up a point put by the Court, he submits that the absolute exemption should from that moment be read as a qualified exemption (requiring a general balancing of the competing public interests), along the lines provided by section 2(2)(b) of the FOIA. Thirdly, all those submissions failing, he submits that the Court should make a declaration of incompatibility in respect of section 32(2). Fourthly, however, despite the limitations in the way in which the case has been presented, it will, for reasons already indicated, be appropriate and necessary to consider the statutory and common law position outside the scope of the FOIA. As I have stated, the effect of section 32 is not to close those off, but rather to require attention to be directed to them.

10. In a judgment dated 20 March 2012 differing from the First-tier Tribunal, the Court of Appeal accepted that section 32 applied and dismissed Mr Kennedy's claim accordingly. The present appeal is brought against that dismissal. For reasons contained in paras 24 to 42, Mr Kennedy's appeal falls in my opinion to be dismissed, even if Mr Kennedy's case on the scope of article 10 is to be accepted at its highest. But, for completeness, I consider article 10 in paras 43 to 100, while para 101 states my overall conclusions on the issues argued.

The background in more detail

11. The bulk of the information which Mr Kennedy seeks is to be found in documents prepared by other public authorities or private persons or bodies for the purposes of the Charity Commission inquiry. The information requested also includes some pre-existing documents and communications between the Charity Commission, other public authorities, other entities and Mr Galloway himself. The information is all of potential public interest. The First-tier Tribunal accepted this in a report dated 18 November 2011 made at the Court of Appeal's request in this case. The First-tier Tribunal was not however concerned with the question, which it left entirely open, whether the information should in the public interest be disclosed – it decided that section 32 should be read down so as to cease to apply after the end of the inquiry, *because* the rights and interests of the Charity Commission and others co-operating with it in the inquiry would be "fully protected by the suite of other exemptions in Part II of FOIA". The information also concerns a high-profile and, to use Mr Kennedy's word, controversial MP. It concerns a public appeal on behalf of an organisation which the Commission (confirming Mr Kennedy's prior suspicions) found to be a charity which should have been, but was not, registered and operated under the Charities Act 1993 as amended. Investigations by Mr Kennedy himself led to the first Charity Commission inquiry in June 2003. This was in turn followed by a second inquiry in November 2003 and (in the light of reports published by the UN Independent Inquiry Committee and US Senate Committee on Homeland Security and Governmental Affairs' Permanent Sub-committee on Investigations in October 2005) a third inquiry in December 2005.

12. The report on the first and second inquiries confirmed Mr Kennedy's belief that appeal monies had been used by Mr Galloway on travel and political campaigning to end the sanctions against Iraq and found that other monies had been received by other trustees as unauthorised benefits in the form of salary payments. Mr Kennedy maintains that these uses of funds were contrary to Mr Galloway's original stated aim that appeal funds would be used first to treat Miss Mariam Hamza and thereafter to treat other Iraqi children also suffering from leukaemia, and that the inquiries, when holding that such use fell within or advanced the charity's purposes, failed properly to address this aspect. He also maintains that, in closing the inquiries without taking or proposing further action, the Charity Commission showed a lack of interest in investigating what had become of the appeal funds.

13. The report on the third inquiry found that the source of some of the appeal funds consisted in monies paid in connection with contracts which breached the UN sanctions against Iraq. This occurred in circumstances where one trustee (Mr Zureikat) knew and "Mr Galloway may also have known of the connection", a statement which Mr Kennedy understandably wishes to probe. Mr Galloway denounced this report, as containing "sloppy, misleading and partial passages" which could have been cleared up, "if the Commission had bothered to interview

me during the course of its inquiry”. But a Commission spokesman subsequently informed Mr Kennedy that Mr Galloway, although giving written answers to questions posed, had failed to take up an offer of a meeting. Mr Kennedy wishes to follow up this discrepancy.

14. More generally, Mr Kennedy says that the very brief and unspecific nature of the two Commission reports and the conclusions reached, basically to leave matters as they were, raise questions about the manner in which the Charity Commission performed one of its central functions.

15. The Charity Commission, supported by the Secretary of State for Justice as well as by the Information Commissioner as interveners, maintains that Mr Kennedy’s requests relate to information which enjoys absolute exemption from disclosure under section 32 read with section 2(3) of the FOIA. Other possible heads (such as sections 27, 31, 40, 41 and 42: see paras 17 to 21 below), upon which the Charity Commission would, if necessary, have resisted disclosure of some or all of the material sought under the FOIA, have not therefore been adjudicated upon. As noted in para 11 above, the First-tier Tribunal was not instructed to, and did not, address the question whether the information should be disclosed on a balancing of the relevant public and private interests under such heads. Mr Kennedy has in fact refined his requests so as expressly to disclaim any wish to see information received from or given to a foreign state or international organisation as well as any information in respect of which the House of Commons claims exemption under section 34.

The statute law

16. Section 1 of the FOIA provides a general right to request, be informed of the existence of and have communicated information held by a public authority, but the right has effect subject to sections 2, 12 and 14. Section 2 provides:

> “2. 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.”

Section 12 enables limits to be set to the costs which public authorities are bound to incur in complying with any request for information, and different amounts may be set in relation to different cases. Section 19 requires every public authority to adopt, maintain, review and publish information about its scheme for the publication of information.

17. Part II (sections 21 to 44) lists a series of classes of exempt information, some absolute, some not. Section 2(3) lists the sections in Part II which are to be regarded as conferring absolute exemption. Among these is section 32:

> "32.-(l) Information held by a public authority is exempt information if it is held only by virtue of being contained in-
>
> (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
>
> (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
>
> (c) any document created by-
>
> (i) a court, or
>
> (ii) a member of the administrative staff of a court,
>
> for the purposes of proceedings in a particular cause or matter.
>
> (2) 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. …."

18. Other classes of absolutely exempt information include: under section 21, information reasonably accessible to the applicant otherwise than under the Act; under section 23, information directly or indirectly supplied by or relating to the Security and Secret Intelligence Services, the Government Communications Headquarters, the special forces and a list of tribunals and other authorities associated with security matters; under section 34, information where necessary to avoid an infringement of the privileges of either House of Parliament; and, under section 41, information obtained by the public authority from any other person (including another public authority), where the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.

19. Part II makes further provision for exempt (but not absolutely exempt) information, viz: under sections 24 to 26, information required for safeguarding national security and potentially prejudicial to the British Islands or any colony's defence; under sections 27 and 28, information potentially prejudicial to the United Kingdom's international relations, and relations between the devolved administrations; under section 29, for information potentially prejudicial to the United Kingdom's and any such administration's economic interests, and under section 35, information relating to the formulation of government policy and the effective conduct of public affairs.

20. Section 31 concerns information, not absolutely exempt, described as relating to law enforcement:

> "31.-(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
>
> (a) the prevention or detection of crime,
>
> (b) the apprehension or prosecution of offenders,
>
> (c) the administration of justice,
>
> (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
>
> (e) the operation of the immigration controls,

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are-

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

21. Sections 40 (a part absolute exemption under section 2(3)(f)) and 42 (a non-absolute exemption) provide:

"40 – (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (l), and

(b) either the first or the second condition below is satisfied. …..

42.-(l) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

22. The Charity Commission was at the material times subject to the Charities Act 1993 (since replaced by the Charities Act 2011). The 1993 Act, as amended, provided:

“1B - (1) The Commission has the objectives set out in subsection (2).
(2) The objectives are-
1 The public confidence objective.
2 The public benefit objective.
3 The compliance objective.
4 The charitable resources objective.
5 The accountability objective.

(3) Those objectives are defined as follows-

1 The public confidence objective is to increase public trust and confidence in charities.
2 The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
3 The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4 The charitable resources objective is to promote the effective use of charitable resources.
5 The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.

1C – (1) The Commission has the general functions set out in subsection (2).

(2) The general functions are-

1 Determining whether institutions are or are not charities.
2 Encouraging and facilitating the better administration of charities.
3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.
4 Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.
5 Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives.
6 Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives.

1D – (1) The Commission has the general duties set out in subsection (2).
(2) ….

> 4 In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).

1E - (1) The Commission has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties.
8 - (1) The Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes, but no such inquiry shall extend to any exempt charity except where this has been requested by its principal regulator.
(2) The Commission may either conduct such an inquiry itself or appoint a person to conduct it and make a report to the Commission.
…..
(6) Where an inquiry has been held under this section, [the Commission] may either-

> (a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as the Commission thinks fit, to be printed and published, or
>
> (b) publish any such report or statement in some other way which is calculated in the Commission's opinion to bring it to the attention of persons who may wish to make representations to the Commission about the action to be taken.

10A - (1) Subject to subsections (2) and (3) below, the Commission may disclose to any relevant public authority any information received by the Commission in connection with any of the Commission's functions-

> (a) if the disclosure is made for the purpose of enabling or assisting the relevant public authority to discharge any of its functions, or
>
> (b) if the information so disclosed is otherwise relevant to the discharge of any of the functions of the relevant public authority.

(2) In the case of information disclosed to the Commission under section 10(1) above, the Commission's power to disclose the

information under subsection (1) above is exercisable subject to any express restriction subject to which the information was disclosed to the Commission.
(3) Subsection (2) above does not apply in relation to Revenue and Customs information disclosed to the Commission under section 10(1) above; but any such information may not be further disclosed (whether under subsection (1) above or otherwise) except with the consent of the Commissioners for Her Majesty's Revenue and Customs.
(4) Any responsible person who discloses information in contravention of subsection (3) above is guilty of an offence …..
(5) lt is a defence for a responsible person charged with an offence under subsection (4) above of disclosing information to prove that he reasonably believed-
(a) that the disclosure was lawful, or
(b) that the information had already and lawfully been made available to the public. ….
(7) ln this section ‘responsible person’ means a person who is or was-

(a) a member of the Commission,

(b) a member of the staff of the Commission,

(c) a person acting on behalf of the Commission or a member of the staff of the Commission, or

(d) a member of a committee established by the Commission."

23. Article 10 (Freedom of expression) of the Human Rights Convention scheduled to the Human Rights Act 1998 reads:

"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."

The construction of section 32 of the FOIA

24. The first issue identified in para 9 above turns on whether the phrase in section 32(1) FOIA "for the purposes of proceedings in a particular cause or matter" and in section 32(2) "for the purposes of the inquiry or arbitration" represents a current or an historical condition for absolute exemption. More fully, do the relevant purposes relate to the time at which the request for disclosure is made and the document is held by the court or by the inquiry or arbitrator(s), as the case may be? Or do they relate to the earlier time at which the document was (in the case of a court) filed with or otherwise placed in its custody or served upon or by the relevant public authority or created by a member of the court's administrative staff or (in the case of an inquiry or arbitration) placed in the custody of, or created by, the person conducting the inquiry or arbitration? The Court of Appeal held the latter: the absolute exemption exists by reference to historical, rather than current, purposes.

25. Mr Coppel accepts that there can be no distinction in this respect between section 32(1) and section 32(2). The concession was in my opinion plainly correct. The phrases relating to the relevant purposes are similarly placed and must on the face of it have been intended to attach to the same point in time.

26. The practical impact of the phrases is, of course, somewhat different in each case. In the case of a court, the rules of court and (in the case of superior courts) the exercise of the court's inherent jurisdiction mean that the court can at any time during or after the conclusion of proceedings hear and adjudicate upon applications for the release or disclosure of documents held in court or by court staff. The court will undertake a broad exercise, balancing the factors for and against public disclosure of court documents. In the case of an arbitration, there is a strong contractual presumption in favour of confidentiality and against non-disclosure. But this may be overridden by a court where necessary to protect a party's rights against a third party or in other exceptional circumstances where justice requires: see e g *Ali Shipping Corpn v Shipyard Trogir* [1997] EWCA Civ 3054, [1999] 1 WLR 314; *Department of Economic Policy and Development of the City of Moscow v Bankers' Trust Co* [2004] EWCA Civ 314, [2005] QB 207.

27. In contrast, in the case of an inquiry by a public authority like the Charity Commission, the position depends upon the type of inquiry and the relevant statutory provisions under which it is held. A public authority which has held an inquiry may not of course continue to function or exist; the inquiry documents may then be held by a relevant Ministry within whose sphere the inquiry took place, and the relevant

ministerial powers would then arise for consideration. But it is unnecessary to consider this situation in this case. Here the Charity Commission continues to exist, and was at the relevant time subject to the Charities Act 1993 as amended (since replaced by the Charities Act 2011). I shall consider the implications of this below. For present purposes, however, what is important is that section 32 treats all such inquiries in similar fashion to court and arbitration proceedings; all are subject to the same absolute exemption from disclosure under the FOIA.

28. Coming therefore directly to the interpretation under ordinary principles of section 32, the critical phrase ("for the purposes of ….") is repeated in relation to and placed at the end of each head of documents identified. It follows and, read naturally, qualifies each such head: that is, in the case of a court, "any document filed … or otherwise placed …" or "served" or "created" and, in the case of an inquiry or arbitration, "any document placed …" or "created". To read the phrase as referring back to the initial words of each subsection "Information held …" is, literally, far-fetched. Had that been meant, the draftsman could and would surely have simplified each subsection, by inserting the phrase once only in each subsection, immediately after the words "Information held …." or, less neatly, after the words "if it is held ….". The comma which appears in each of subsections (2)(a) and (b) is explained by the interposition in those subsections of the words "conducting an inquiry or arbitration" between "placed in the custody of a person" and the phrase "for the purposes of the inquiry or arbitration". It makes clear that the last phrase qualifies "placed" or "created" and not "conducting". In the absence of any equivalent words to "conducting an inquiry or arbitration" in subsection (1), no such comma was necessary or appropriate.

29. As to the more general merits of the rival constructions, a conclusion that, immediately after the end of any court proceedings, arbitration or inquiry a previously absolute exemption ceases to have effect would, for the reason set out in para 6 above, run contrary to the general scheme of section 32, particularly obviously so in relation to court and arbitration proceedings, but also in relation to inquiries. It would furthermore create an evident internal anomaly within the FOIA. The information would cease to enjoy any form of exemption under section 32 as soon as the court proceedings, inquiry or arbitration ended. From that moment, the information would not even enjoy the benefit of a balancing of the public interest in disclosure against other interests provided by section 2(2)(b). Further, no ordinary principle of construction could lead to a reading whereby the continuing absolute exemption provided by section 32 was converted into an ordinary exemption within section 2(2)(b) with effect from the close of the relevant court proceedings, arbitration or inquiry. Other sections, notably section 31 (law enforcement), section 40 (personal information) and section 41 (information provided in confidence), would afford only limited grounds for refusing disclosure (in contrast to the general position otherwise applicable to, at least, court and arbitration documents: see para 26 above).

30. Some assistance, marginal rather than decisive, as to Parliament's likely understanding when it enacted section 32 is to be found in Part VI of the FOIA. Under section 62(1), a record becomes a "historical record" at the end of 30 years (or now by amendment 20 years) beginning with the year of its creation. Under section 63(1):

> "Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a), 42 or 43".

The natural inference is that it was contemplated that information falling within section 32 would continue to be exempt for 30 years. It is unlikely that the reference to section 32 was included simply to cover the possible existence of documents from court, arbitration or inquiry proceedings rivalling in length those in *Jarndyce v Jarndyce* or cases where a court, arbitration or inquiry considers documents themselves over 30 years old.

31. Attention was drawn to the Inquiries Act 2005, which has since 2005 modified the application of section 32 in relation to some inquiries, though not those of the type undertaken by the Charity Commission. It enables Ministers to set up formal, independent inquiries relating to particular events which have caused or have potential to cause public concern, or where there is public concern that particular events may have occurred. Not all inquiries fall into this category and there is no statutory requirement on a Minister to use the 2005 Act even if they do. Where it is used, section 41(1)(b) provides for rules dealing with "the return or keeping, after the end of an inquiry, of documents given to or created by the inquiry", while section 18(3) provides that section 32(2) of the FOIA does not apply in relation to information contained in documents passed to and held by a public authority pursuant to rules made under section 41(1)(b) of the 2005 Act. On this formulation section 32(2) would still apply to documents created by the person conducting the 2005 Act inquiry: see section 32(2)(b). But documents placed in the inquiry's custody for inquiry purposes would potentially be disclosable under the FOIA.

32. Section 19(1) and (3) of the 2005 Act contain the Act's own regime enabling restrictions to be imposed by the relevant Minister or the chairman of the inquiry on disclosure or publication of evidence or documents given, produced or provided to an inquiry, where conducive to the inquiry fulfilling its terms of reference or necessary in the public interest. Section 19(4) specifies particular matters which are to be taken into account when considering whether any and what restrictions should be imposed. They reflect potentially competing interests naturally relevant to any such decision: on the one hand, the allaying of public concern and, on the other, any risk of harm or damage, by disclosure or publication; confidentiality; impairment of

the efficiency or effectiveness of the inquiry; and cost. Restrictions so imposed may continue in force indefinitely: section 20(5), but this is subject to a provision that, "after the end of the inquiry, disclosure restrictions do not apply to a public authority … in relation to information held by the authority otherwise than as a result of the breach of any such restrictions": section 20(6).

33. The scheme of the Inquiries Act 2005 was therefore deliberately different from that which, as a matter of straightforward construction, applies under the FOIA in respect of a Charity Commission inquiry. As a matter of law, the position under the 2005 Act cannot affect the proper construction of the earlier FOIA in relation to Charity Commission inquiries. Nor, pace Lord Wilson's views in para 193, can Parliament's passing in 2005 of the Inquiries Act throw any light on what section 32 of the FOIA was intended to achieve regarding inquiries in 2000 – when the 2005 Act was never conceived, let alone enacted. But, even if this were not so, the contrast would reinforce, rather than undermine, the conclusion reached regarding Charity Commission inquiries. Further, the contrast does not of itself mean that the position in relation to Charity Commission inquiries is unsatisfactory. It is, I repeat, necessary to look at the entire picture, which means not looking only at section 32 of the FOIA, but looking also at the statutory and common law position in respect of Charity Commission inquiries apart from section 32.

34. In summary, as a matter of ordinary common law construction, the construction is clear: section 32 was intended to provide an absolute exemption which would not cease abruptly at the end of the court, arbitration or inquiry proceedings, but would continue until the relevant documents became historical records; that however does not mean that the information held by the Charity Commission as a result of its inquiries may not be required to be disclosed outside section 32 under other statutory and/or common law powers preserved by section 78 of the FOIA.

Is article 10 of the Convention relevant when construing section 32?

35. It is at this point that Mr Coppel, on behalf of Mr Kennedy, submits that, if the position on ordinary principles of construction is as stated in the previous paragraph, then section 32(2) must be read down to comply with article 10; in particular, that on that basis section 3 of the 1998 Act requires the exemption provided by section 32 to be read as ending at the same moment as the court, arbitration or inquiry proceedings, so that it only covers documentation held currently for the purposes of such proceedings. A possible variant of this submission (though not one which Mr Coppel actually explored) might be that the exemption should end at that moment only in the case of inquiry proceedings, while continuing thereafter in the case of court and arbitration proceedings. Further, if such reading down is not possible, Mr Coppel submits that a declaration of incompatibility is

called for. I cannot accept any of these submissions. First, to move directly to article 10 is, as I have already indicated, mistaken. Section 32 leaves open the statutory and common law position regarding disclosure outside the FOIA, and that directs attention to the Charities Act. If the Charities Act entitles Mr Kennedy to disclosure or puts him in a position no less favourable regarding disclosure than that which should, in Mr Coppel's submission, be provided under article 10, then there can be no basis for submissions that section 32 requires reading down in the light of or is inconsistent with article 10.

36. Second, even if the Charities Act, read by itself, appeared on its face not fully to satisfy any rights to information which Mr Kennedy may enjoy under article 10, it does not follow that the fault lies in section 32, or that section 32 can or should be remoulded by the courts to provide such rights. On the contrary, in view of the clarity of the absolute exemption in section 32, the focus would be on the Charities Act and it would be necessary to read it as catering for the relevant article 10 rights. As will appear from what I say later (in paras 43-56 below) about the language of the Charities Act, there would be no difficulty about doing this. Lord Wilson doubts whether such a scheme would even comply with the Convention, going so far as to suggest that it would not be "prescribed by law" (para 199). I cannot accept this, and it would I believe have some remarkable (and far-reaching) consequences.

37. One obvious problem about Lord Wilson's approach is that his treatment of the Charities Act scheme is inconsistent with his treatment of court documents. In his paras 175 and 192, Lord Wilson holds up the position regarding court documents as a model. On his own analysis of the Charities Act position, the scheme regarding disclosure of court documents ought to be regarded as even less compliant with the principle that any such scheme must be "in accordance with law". The court's discretion regarding documents not on the court file is not channelled by any published objectives, functions and duties comparable to those present in the Charities Act. The court is simply guided by the general principle of open justice and must act in accordance with any applicable Convention rights.

38. This inconsistency leads into another more basic objection to Lord Wilson's approach, one of general importance to the role of the Convention rights in the United Kingdom. The development of common law discretions, to meet Convention requirements and subject to control by judicial review, has become a fruitful feature of United Kingdom jurisprudence. It is illustrated at the highest level by cases like *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] AC 367, paras 55, 70, 84-84 and 133-135 - welcomed by the European Court of Human Rights in *Kay v United Kingdom* [2011] HLR 13, para 73 - and by *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, para 73. In those cases the House of Lords and Supreme Court modelled a common law discretion to meet the needs of article 8. No distinction can be drawn in the present context between the general nature of articles 8 and 10, each specifying prima facie rights in substantially over-

lapping terms in their respective paragraphs 1 subject to qualifications identified in their paragraphs 2. On Lord Wilson's approach this development of common law discretions to meet Convention requirements would be vulnerable to the reproach that there was no specific scheme - nothing which could count as "prescribed by law". There are, of course, situations in which, for reasons of consistency or accountability, the manner in which a discretion will be exercised needs to be spelled out in some form. But that is not so in the present context, as Lord Wilson's own endorsement of the position regarding court and arbitration documents indicates.

39. Third, Mr Coppel seeks to meet the points made in paras 35 and 36 above by a submission that the FOIA must be regarded as the means by which the United Kingdom gives effect to any article 10 right which Mr Kennedy has; that it covers the field and confers a general entitlement to access to recorded information held by public authorities, while preserving limited other statutory rights under sections 21, 39 and 40 through which access is also routed; and that, if the FOIA fails in this way to give effect to any article 10 right or does so inappropriately, it interferes with the right and must be read down. But there is no basis for this submission – there is no reason why any article 10 rights which Mr Kennedy may have need to be protected by any particular statute or route. Far from the FOIA being the route by which the United Kingdom has chosen to give effect to any rights to receive information which Mr Kennedy may have, it is clear that the United Kingdom Parliament has determined that any such rights should be located and enforced elsewhere. That is the intended effect of section 32, read with section 78. To recapitulate: in view of the clarity of the absolute exemption in section 32 and the provisions of section 78, the focus must be on the Charities Act; and if (contrary to conclusion in paras 57-100 below) Mr Kennedy has prima facie rights which are engaged under article 10(1), then it would be necessary to read the Charities Act compatibly with and as giving effect to such rights; and, further, there would be no difficulty about doing this. As I read his judgment (paras 225 to 233, especially para 229), Lord Carnwath does not disagree with any of these points. The difficulty he identifies is not that for which Mr Coppel argued (as set out in para 227 of Lord Carnwath's judgment) and not that the Charities Act cannot be read to give effect to any article 10 rights. It is that this appears to him a less advantageous approach than one which re-writes the FOIA, section 32 in particular (see his paras 231 to 233). However, it is not a court's role to discard the scheme established by Parliament, simply because it may (in Lord Carnwath's view) involve a "more cumbersome" means of enforcing Convention rights than Parliament has established elsewhere.

40. Fourth, I do not consider that article 10 would prove to add anything or anything significant to such rights to disclosure as could be enforced under the Charities Act without reference to article 10. I explain why below (in paras 43-56). I also note in this connection (para 49) that Lord Carnwath himself is influenced in his interpretation of the scope of article 10 by the view that it "accords with recognised principles of domestic law" (his para 218).

41. Fifth, and for good measure, even if all these points are put on one side, I would not have accepted Mr Coppel's submission that section 32 could or should in some way be read down in the light of article 10. Reading down section 32(2) so that it ceased to apply at the end of any inquiry would mean that the public interest test applicable under section 2(2)(b) of the FOIA would not apply. Section 2(2) as a whole only applies to information which is exempt. If article 10 were to mean that section 32(2) should be read down so as to cease to apply after an inquiry closes, then section 2(2) would at that point also cease to apply to the relevant information. A belated submission was made (after a post-hearing question from the Court raised the point) that both sections 2(2) and 32(2) might be manipulated, so that after the close of an inquiry the previous absolute exemption provided by section 32 would become a qualified exemption within section 2(2)(b). That too would depart from the statutory scheme, and run contrary to the grain of the legislation. It follows that, even if it were to be held (contrary to my conclusions) that Mr Kennedy has article 10 rights which are not catered for in any way, the most that could be contemplated would be a general declaration of incompatibility.

Conclusion

42. It follows from the above that Mr Kennedy's claim, which has been made and argued on the basis that section 32 of the FOIA can and should be read down to have a meaning contrary to that which Parliament clearly intended, must fail. It also follows from the above that no basis exists for any declaration of incompatibility with article 10 of the Convention. In the succeeding paragraphs I will however consider, obiter though it may be, the position regarding Mr Kennedy's actual remedies with regard to first the Charities Act and then article 10.

The Charities Act 1993

43. The provisions of the Charities Act 1993, set out in para 22 above, identify the Charity Commission's objectives, functions and duties in terms which make clear the importance of the public interest in the operations of both the Commission and the charities which it regulates. The first ("public confidence") objective given to the Commission is "to increase public trust and confidence in charities", while the fifth and last is "to enhance the accountability of charities" to, inter alia, the general public. The Commission's general functions include "obtaining, evaluating and disseminating information in connection with the performance of any of its functions or meeting any of its objectives". As its first general duty, "the Commission must, in performing its functions, act in a way (a) which is compatible with its objectives, and (b) which it considers most appropriate for the purpose of meeting those objectives"; and, as its fourth such duty, "in performing its functions, [it] must, so far as relevant, have regard to the principles of best regulatory practice

(including the principles under which regulatory activities should be …. accountable, …. [and] transparent ….)".

44. The significance of these objectives, functions and duties is not affected by the specific provision in section 8(6), whereby the Commission has a choice in which of two ways it publishes the report of the person conducting an inquiry or a statement of the results of the inquiry. The choice must be made in the light of the Commission's objectives, functions and duties. Similarly, the significance of those objectives, functions and duties is not affected by the power given in section 10A(1) to disclose to any other public authority information received in connection with the Commission's performance of its functions. Section 10A addresses situations in which disclosure is made for purposes not in the performance of the Commission's own functions. It does not touch the breadth of the Commission's own objectives, functions and duties.

45. The Charity Commission's objectives of increasing public trust and confidence in charities and enhancing the accountability of charities to the general public link directly into its function of disseminating information in connection with the performance of its functions and its duty to have regard to the principle that regulatory activities should be "proportionate, accountable, consistent and transparent". Its objectives, functions and duties are in their scope and practical application in my view comparable to any that might arise under article 10, taking Mr Coppel's most expansive interpretation of the scope of that article. Mr Coppel recognises that, if article 10 is engaged and imposes on public authorities, at least towards "public watchdogs", a duty of disclosure in respect of information over which such public authorities have an "information monopoly", the duty involved is no more than a prima facie duty, subject to qualifications as envisaged by article 10(2). In fulfilling its objectives, functions and duties under the 1993 Act, including by conducting and publicising the outcome of any inquiry it holds, the Commission must in my opinion direct itself along lines which are no less favourable to someone in Mr Kennedy's position seeking information in order to scrutinise and report on the Commission's performance. On either basis, the real issue will be whether the public interests in disclosure are outweighed by public or private interests mirroring those identified in article 10(2). This is reinforced by the importance attaching to openness of proceedings and reasoning under general common law principles in the present area, which constitutes background to the correct interpretation and application of the Charities Act.

46. Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law. Not

surprisingly, therefore, Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282-284 and the House in *Derbyshire County Council v The Times Newspapers Ltd* [1993] AC 534, 551E both expressed the view that in the field of freedom of speech there was no difference in principle between English law and article 10. In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene. As Toulson LJ also said in the *Guardian News and Media* case, para 88: "The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition". Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.

47. In the present case, the meaning and significance which I attach to the provisions of the Charities Act is in my view underpinned by a common law presumption in favour of openness in a context such as the present. In this respect, court proceedings and inquiries have more in common with each other than they do with arbitration proceedings between parties who have contracted to resolve issues between them on the well-understood assumption that their proceedings will be private and confidential. Starting with court proceedings, common law principles of open justice have been held to require the disclosure to a newspaper for serious journalistic purposes of documents placed before a judge and referred to in open court, absent good reasons to the contrary: see *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2013] EWCA Civ 420, [2013] QB 618. The proceedings in issue there were for extradition to the United States of two British citizens on corruption charges, the documents were affidavits, witness statements and correspondence, and the newspaper wanted to see them in order to understand the full course of the proceedings, and to report on them in order to stimulate "informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA" (para 76). The Court of Appeal held that the principle of open justice applicable to court proceedings required disclosure of the documents sought, unless outweighed by strong countervailing arguments, which, in the event, it also held was not the case.

48. The present appeal concerns not proceedings before a court, but an inquiry conducted by the Charity Commission in relation to a charity, and the inquiry

proceedings were not conducted in public. We are not being asked to say that that was wrong, or that court and inquiry proceedings are subject to the same principles of open justice. I agree with Lord Carnwath (paras 243 and 244) that court and inquiry proceedings cannot automatically be assimilated in this connection. Had the issue been whether the inquiry proceedings should be conducted in public, we would have had to look at cases such as *Crampton v Secretary of State for Health* (9 July 1993) (Court of Appeal (Civil Division) Transcript No 824 of 1993), *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 and *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2003] QB 794; [2002] EWHC 371 (Admin), which suggest that it is always very much a matter of context. At one end of the spectrum are inquiries aimed at establishing the truth and maintaining or restoring public confidence on matters of great public importance, factors militating in favour of a public inquiry. But many inquiries lie elsewhere on the spectrum. The present appeal concerns a different issue: to what extent should the Commission disclose further information concerning inquiries on which it has already published reports under section 8(6) of the Charities Act, and in relation to which Mr Kennedy has raised significant unanswered questions of real public interest? We are concerned with a situation where both the Charities Act and the Charity Commission in publishing its report under the Act recognise that the public has a legitimate interest in being informed about the relevant inquiries. That must mean "properly informed". The Charity Commission recognised that this was a case for public reports, and such reports must account properly to the public for the conduct and outcome of the inquiries.

49. Here, Mr Kennedy has shown that important questions arise from the inquiries and reports relating not only to the subject matter and outcome of the inquiries, but also to the Charity Commission's conduct of the inquiries. The proper functioning and regulation of charities is a matter of great public importance and legitimate interest. The public interest in openness in relation to these questions is demonstrated positively by the objectives, the functions and, importantly, the duties given to and imposed on the Charity Commission under the Charities Act. The present request for further disclosure is made by a journalist in the light of the powerful public interest in the subject matter to enable there to be appropriate public scrutiny and awareness of the adequacy of the functioning and regulation of a particular charity. It is in these circumstances a request to which the Charity Commission should in my opinion accede in the public interest, except so far as the public interest in disclosure is demonstrably outweighed by any countervailing arguments that may be advanced. I do not read Lord Carnwath's and my judgments as differing in any essential respect on these points. Although (for reasons given in the next section of this judgment: paras 57-96 below) I cannot share his conclusion that the "direction of travel" of Strasbourg case law has now reached its destination, I do however note his view that "no reason has been put forward for regarding that approach as involving any fundamental departure from domestic law principles" (para 219).

50. The countervailing arguments that can be envisaged against disclosure of particular information will of course differ in nature and weight, according to whether one is considering court or inquiry documents, and in the latter case according to the nature of the inquiry. A Charity Commission inquiry is likely to depend upon information being provided by third parties. The Commission has powers to require the provision of accounts, statements, copies of documents and the attendance of persons to give evidence or produce such documents: section 8(3) of the Charities Act. But it may depend upon co-operation and liaison with third parties and the gathering of confidential information. In the present case, some of the information sought may also be sensitive information bearing on matters of national security or international affairs, although Mr Kennedy has restricted his request in this respect (para 15 above). All such considerations can and would need to be taken into account, as the Charity Commission in its letter dated 4 July 2007 (para 8 above) identified, but they are no reason why the balancing exercise should not be undertaken. Again, if one makes an assumption that disclosure could in principle be required under article 10, there is no reason to think that it would be on any basis or be likely to lead to any outcome more favourable from Mr Kennedy's viewpoint. The same considerations would fall to be taken into account, the same balancing exercise performed and there is no basis for thinking that the outcome should or would differ.

51. I do not therefore agree with Jacob LJ's comment in the Court of Appeal (para 48) that Parliament must "simply [have] overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not" and that that "may well have been a blunder which needs looking at". That overlooks the statutory scheme of the FOIA and the Charities Act. It also fails to give due weight to the courts' power to ensure disclosure by the Charity Commission in accordance with its duties of openness and transparency. Again, I find it difficult to think that there would be any significant difference in the nature or outcome of a court's scrutiny of any decision by the Commission to withhold disclosure of information needed in order properly to understand a report issued after a Charities Act inquiry, whether such scrutiny be based solely on the Charity Commission's objectives, functions and duties under the Charities Act or whether it can also be based on article 10, read in the width that Mr Coppel invites. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context. The change in this respect was heralded by Lord Bridge of Harwich said in *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531 where he indicated that, subject to the weight to be given to a primary decision-maker's findings of fact and exercise of discretion, "the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".

52. This was taken up by Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554, a pre-Human Rights Act case, where Sir Thomas Bingham MR accepted counsel's proposition that "The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above" (viz, within the range of responses open to a reasonable decision-maker). The European Court of Human Rights still concluded that the courts had in that case set the level of scrutiny too low on the particular facts: *Smith and Grady v United Kingdom* (2000) 31 EHRR 620. The common law has however continued to evolve. As Lord Phillips of Worth Matravers MR said in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, para 112:"The common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors set out by Lord Diplock in the *CCSU* case [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them."

53. In *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142, [2004] ICR 1364, in a judgment with which I agreed, Carnwath LJ said (at paras 90-92):

> "90. ….the CAT [Competition Appeal Tribunal] was right to observe that their approach should reflect the 'specific context' in which they had been created as a specialised tribunal (paras 220); but they were wrong to suggest that this permitted them to discard established case law relating to 'reasonableness' in administrative law, in favour of the 'ordinary and natural meaning' of that word (para 225). Their instinctive wish for a more flexible approach than *Wednesbury* would have found more solid support in the textbook discussions of the subject, which emphasise the flexibility of the legal concept of 'reasonableness' dependent on the statutory context (see *de Smith* para 13-055ff 'The intensity of review'; cf *Wade and Forsyth*, p 364ff 'The standard of reasonableness', and the comments of Lord Lowry in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 765ff).
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> 91.Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (*de Smith* para 13-056-7). Examples are *R v Secretary of State, Ex p Nottinghamshire County Council* [1986] AC 240, and *R v Secretary of State, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, where the decisions related to a matter of

national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1 AC, per Lord Bridge of Harwich, at pp 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:

> "Review is stricter and the courts ask the question posed by the majority in *Brind*, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (*de Smith* para 13-060, citing *Ex p Brind* [1991] 1 AC 696, 751, per Lord Ackner)."

92.A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment: see *Ex p Brind* [1991] 1 AC at 767, per Lord Lowry. On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene: such questions are to be answered not by reference to *Wednesbury* unreasonableness, but "in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge"' (*R v Panel on Take-overs and Mergers, Ex p Guinness plc* [1990] 1 QB 146, 184, per Lloyd LJ)."

54. More recently, the same process was carried further by emphasising that the remedy of judicial review is in appropriate cases apt to cover issues of fact as well as law – see the cases referred to in para 38 above. As Professor Paul Craig has shown (see e.g. "The Nature of Reasonableness" (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are

involved. But that proportionality itself is not always equated with intense scrutiny was clearly identified by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, Ex p Eastside Cheese Co* [1999] 3 CMLR 123, paras 41-49, which Laws and Arden LJJ and Lord Neuberger MR cited and discussed at paras 21, 133 and 196-200 in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394, a case in which the general considerations governing proportionality were treated as relevantly identical under EU and Convention law (paras 54, 147 and 192-194). As Lord Bingham explained, at para 47, proportionality review may itself be limited in context to examining whether the exercise of a power involved some manifest error or a clear excess of the bounds of discretion – a point taken up and amplified in the *Sinclair Collis* case, at paras 126-134 and 203 by Arden LJ and by Lord Neuberger; see also *Edward and Lane on European Union Law* (2013), para 2.32.

55. Speaking generally, it may be true (as Laws J said in a passage also quoted by Lord Bingham from *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading* [1997] 1 CMLR 250, 278-279) that "*Wednesbury* and European review are two different models – one looser, one tighter –of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power". But the right approach is now surely to recognise, as *de Smith's Judicial Review*,7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories of situation identified in *de Smith* are those where a common law right or constitutional principle is in issue. In the present case, the issue concerns the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations and which have particular relevance in relation to a report by which the Charity Commission makes to explain to the public its conduct and the outcome of an inquiry undertaken in the public interest.

56. The Charity Commission's response to a request for disclosure of information is in the light of the above circumscribed by its statutory objectives, functions and duties. If, as here, the information is of genuine public interest and is requested for important journalistic purposes, the Charity Commission must show some persuasive countervailing considerations to outweigh the strong prima facie case that the information should be disclosed. In any proceedings for judicial review of a refusal by the Charity Commission to give effect to such a request, it would be necessary for the court to place itself so far as possible in the same position as the Charity Commission, including perhaps by inspecting the material sought. Only in that way could it undertake any review to ascertain whether the relevant interests had been properly balanced. The interests involved and the balancing exercise would be of a nature with which the court is familiar and accustomed to evaluate and

undertake. The Charity Commission's own evaluation would have weight, as it would under article 10. But the Charity Commission's objectives, functions and duties under the Charities Act and the nature and importance of the interests involved limit the scope of the response open to the Charity Commission in respect of any particular request. I therefore doubt whether there could or would be any real difference in the outcome of any judicial review of a Charity Commission refusal to disclose information, whether this was conducted under article 10, as Mr Coppel submits that it should be, or not.

Article 10 in detail

57. In the light of the conclusions which I have already expressed, the answer to the question whether or not Mr Kennedy's claim to disclosure by the Charity Commission engages article 10 cannot affect the outcome of this appeal. But I shall consider this question (I fear at some length) for completeness and in deference to the detailed citation of authority and submissions we have heard upon it.

58. On its face, article 10 is concerned with the receipt, holding, expression or imparting of thoughts, opinions, information, ideas, beliefs. It is concerned with freedom to receive information, freedom of thought and freedom of expression. It does not impose on anyone an obligation to express him- or itself or to impart information. The Charity Commission submits that this represents the correct analysis. Mr Kennedy submits that the Strasbourg case law has taken a direction of travel, towards a destination which should now be regarded as reached. Mr Kennedy's case is that article 10(1) confers a positive right to receive information from public authorities, and, it follows, a correlative obligation on public authorities to impart information, unless the withholding of the information can be and is justified under article 10(2). If this right and obligation is not general, then (he submits) it is at least a right and obligation which arises or exists in any sphere which a state has chosen to regulate by a Freedom of Information Act.

59. The Strasbourg jurisprudence is neither clear nor easy to reconcile. In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 Lord Rodger said famously: "*Argentoratum locutum: iudicium finitum* – Strasbourg has spoken, the case is closed". In the present case, Strasbourg has spoken on a number of occasions to apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that at least some members of the Court disagree with and wish to move on from the Grand Chamber statements of principle. If that is a correct reading, then it may be unfortunate that the relevant sections did not prefer to release the matter before them to a Grand Chamber. It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human

Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation.

60. Whatever the reason for the present state of authority in Strasbourg, we have, without over-concentrating on individual decisions, to do our best to understand the underlying principles, as we have done in previous cases: see, for instance, in relation to the meaning of jurisdiction under article 1: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153, *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29, [2011] 1 AC 1 and *Smith v Ministry of Defence (JUSTICE intervening)* [2013] UKSC 41, [2014] 1 AC 52; to the scope of the operational duty to safeguard life under article 2: *Rabone v Pennine Care NHS Trust (INQUEST intervening)* [2012] UKSC 2, [2012] 2 AC 72; and to the circumstances in which and basis on which damages should be awarded to prisoners the need for whose further detention was not promptly reviewed following the expiry of their tariff period: *R (Sturnham) v Parole Board* [2013] UKSC 23, [2013] 2 AC 254.

The early Strasbourg case-law

61. The present appeal in fact represents the second time in two years that this Court has had to consider Strasbourg jurisprudence in this area. The first was in *British Broadcasting Corpn v Sugar (decd) (No 2)* [2012] UKSC 4, [2012] 1 WLR 439 decided on 15 February 2012. However Mr Coppel submits that Strasbourg case law has further developed, even since then.

62. *Sugar* was a case where it could be said that Mr Sugar's claim to access BBC information was potentially in conflict with the BBC's own freedom of journalistic expression. But that is not material when considering whether Mr Sugar's claim even engaged article 10. Lord Brown gave his reason for a negative answer on that point in some detail in paras 86 to 102, with which I expressly agreed in para 113. (Lord Wilson, while not disagreeing, was less categorical on the point in para 58, so that the reasoning on it cannot be regarded as part of the ratio.)

63. Lord Brown identified four Strasbourg cases as establishing that, in the circumstances before the Strasbourg Court in each of such cases, article 10 involved no positive right of access to information, nor any obligation on the State to impart such information. The four cases were *Leander v Sweden* (1987) 9 EHRR 433, *Gaskin v United Kingdom* (1989) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2005) 42 EHRR 599. In *Leander* Mr Leander sought information about national security concerns about him which had led to him being refused a permanent position in a naval museum. The claim was addressed primarily

to article 8 (right to personal life), under which the withholding of information was held justified. Under article 10 the Court said simply:

> "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."

I do not subscribe to the view taken by Lord Wilson (para 178) that this was the answer to "a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face". The Grand Chamber did not see the matter in such terms. It was giving a serious answer to an important question, which defines the role of the Convention in this area. The Convention establishes fundamental standards, but there are limits to the ideal systems upon which it insists, and the Grand Chamber was making clear that article 10 does not go so far as to impose a positive duty of disclosure on Member States at the European level.

64. In *Gaskin* the Court held a refusal of access to personal information about a person's childhood as a foster child unjustified under article 8, and rejected any claim under article 10 "in the circumstances of the [present] case" for essentially the same reason as it had in *Leander*, which it followed.

65. In *Guerra* the Grand Chamber consisting of 20 judges (including the present President) held that it was a breach of article 8 to fail to supply the applicants with environmental information (even though this had not been requested) relating to their exposure to chemical emissions from a nearby factory. But it said of article 10:

> "The Court reiterates that freedom to receive information, referred to in para 2 of article l0 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' (see the *Leander v Sweden* judgment …..) 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."

Only a minority of 7 of the 20 judges added as a coda that there might under some different circumstances prove to be a positive obligation on a state to make available information to the public.

66. In *Roche* the claimant sought disclosure of records of gas tests at Porton Down in which he had participated 20 years before and to which he now attributed certain medical conditions. The Grand Chamber held that article 8 gave him a positive right to such information, but said of article 10:

> "172. The Court reiterates its conclusion in *Leander v Sweden* … para 74 and in *Gaskin* … para 52 and, more recently, confirmed in *Guerra* … para 53, 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."

67. Thus far, the Strasbourg case law supports the Charity Commission's submission that article 10 does not give positive rights to require, or positive obligations to make, disclosure of information. Three of the cases (*Leander*, *Gaskin* and *Roche*) concerned private information, in respect of which the Court held that such a right could arise under article 8. In all these cases, the Court did not go on to leave open the position under article 10 or to say that it raised no separate question. Rather, it made clear that no right arose in the circumstances under article 10.

68. A claim for disclosure by a defendant of private information held regarding the claimant starts from a strong basis. If such a claim can only be put under article 8, there is no obvious reason to suppose that a claim for other non-private information is generally possible under article 10.

69. As to the fourth case, *Guerra*, the emissions were toxic in a manner breaching article 8, the information about them was not itself private or personal, and the complaint about non-disclosure was initially only made under article 10. The case is therefore direct authority as to the continuing application of the principle stated in *Leander* to non-personal information under that article. The applicants' successful claim under article 8 was added before the Court (paras 41 and 46), and was not made on the basis that the environmental information in question was private or personal, but on the basis that withholding it from the applicants prevented them from assessing the risks they ran by continuing to live where they did (para 60)

70. It is also of particular interest to note that in summarising the legal position under article 10 in *Roche*, quoted in para 66 above, the Grand Chamber deliberately omitted the word "collect" which was present in the original of the passage which it cited from its prior decision in *Guerra*. The Grand Chamber was thus making clear that, even where the information was readily available for disclosure, there was no general duty to disclose.

71. Mr Kennedy relies however on a number of subsequent cases as establishing, first, a different direction of travel, and, now, he submits, a different end point. The first three, *Matky v Czech Republic* (Application No 19101/03) (unreported) given 10 July 2006, *Társaság a Szabadsagjogokert v Hungary* (2009) 53 EHRR 130, *Kenedi v Hungary* (2009) 27 BHRC 335, were considered by Lord Brown in *Sugar* and I can do no better than quote his analysis of them, with which I agreed in that case, at para 113. He said:

> "90. I come then to the first of the trilogy of cases on which the appellant so strongly relies: the *Matky* case. 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.The *Matky* case 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 *Társaság* (the second in the appellant's trilogy of cases) it was to the *Matky* case 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 *Társaság* 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 *Társaság*, also by the Second Section of the Court (including six of the same seven judges who had decided *Társaság*). 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 27 BHRC 335, para 45, 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.'

The conclusion in BBC v Sugar

72. Lord Brown's conclusion in relation to the impact of the trio of cases relied upon by the claimant in *Sugar* was that:

> "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 applicant'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 applicant'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."

73. Some points are worth underlining in relation to *Társaság*. First, the Second Section's reference to the Court having "recently advanced towards a broader interpretation of the notion of 'freedom to receive information'" was, firstly, weakly based: see Lord Brown's analysis at para 91, secondly, clearly aspirational and tentative and, thirdly, not part of the essential reasoning for the Court's decision – this is evident from the fact that the Court began its next para 36 with the words "In any event, …".

74. Second, in point of fact, the Hungarian Government accepted in *Társaság* that article 10 was engaged (para 18), and it was on that basis that the Court went straight to the question "whether there has been an interference" and in that connection said that "even measures which merely make access to information more cumbersome" may amount to interference (para 26). Third, in introducing its decision on the question which thus arose whether the interference with this admitted right was justified, the Second Section used the dramatic metaphor of "the censorial power of an information monopoly" (para 36). The context helps understand why such dramatic language was appropriate. Disclosure of the information requested had been refused by the domestic courts on the ground that this was essential to protect "personal data". But, as the Court noted, the claimant had expressly restricted his application to "information …. without the personal data of its author" (para 37). In addition, the Court found, it was "quite implausible that any reference to the private life of the MP, hence to a protected private sphere, could be discerned from his constitutional complaint". In short, the domestic courts had

arrived at a decision to refuse disclosure which was not sustainable under domestic law. The breach of article 10 followed this.

75. *Kenedi* was also a case where there had been a breach of a domestic law duty of disclosure, in that case by the executive failing to give effect to court orders. Again, the breach of article 10 followed.

Further Strasbourg case law

76. Since the Supreme Court's decision in *Sugar*, there have been four further Strasbourg decisions upon which Mr Kennedy relies as requiring a different analysis to that adopted in Lord Brown's judgment. They are *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) given 31 July 2012, *Youth Initiative for Human Rights v Serbia* (Application No 48135/06) (unreported) given 25 June 2013 and, finally, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* (Application No 39534/07) (unreported) given 28 November 2013. The last (for economy, "the *Österreichische* case") was decided after the oral hearing of the present appeal and the Court received written submissions upon it. All four cases were concerned with information which was not personal.

77. *Gillberg* was an unusual case. Under the Swedish equivalent of the FOIA, Professor Gillberg was ordered by the Administrative Court of Appeal to allow the claimants (K, a sociologist, and E, a paediatrician) to have access for research purposes to a file belonging to Gothenburg University but held by Professor Gillberg. He refused such access, the file was instead destroyed by three of his colleagues, and he was prosecuted. He claimed that the Administrative Court and criminal proceedings breached his rights under articles 8 and 10. The Grand Chamber repeated that:

> "83. The right to receive and impart information explicitly forms part of the right to freedom of expression under article 10. That right basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see, for example, *Leander v Sweden* …., para 74, and *Gaskin v United Kingdom* ….para 52)
>
> 84. In the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his 'positive' right to freedom of expression. He argued that he had a 'negative' right within the meaning of article l0 to refuse to

make the disputed research material available, and that consequently his conviction was in violation of article l0 of the Convention."

78. As to this suggested negative right, the Court expressed no view, saying merely:

> "86. The Court does not rule out that a negative right to freedom of expression is protected under article 10 of the Convention, but finds that this issue should be properly addressed in the circumstances of a given case."

Turning on this basis to the actual issue and circumstances, the Court said:

> "92. …. the Court considers that the crucial question can be narrowed down to whether the applicant, as a public employee, had an independent negative right within the meaning of article l0 of the Convention not to make the research material available, although the material did not belong to him but to his public employer, the University of Gothenburg, and despite the fact that his public employer - the university - actually intended to comply with the final judgments of the Administrative Court of Appeal granting K and E access to its research material on various conditions, but was prevented from so doing because the applicant refused to make it available."
>
> 93. In the Court's view, finding that the applicant had such a right under article l0 of the Convention would run counter to the property rights of the University of Gothenburg. It would also impinge on K's and E's rights under article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned, and on their rights under article 6 to have the final judgments of the Administrative Court of Appeal implemented."

79. *Gillberg* is therefore a case in which the Court reiterated with approval the general principle identified in *Leander*. At the same time, however, it suggested in the second sentence of para 93 that domestic rights to receive information could give rise to an entitlement under article 10.

80. *Shapovalov* is to like effect. A Ukrainian journalist claimed that he had (contrary to the Ukranian Information Act 1992) been refused access by administrative authorities during the 2004 elections to certain information and

meetings. He relied on article 6 because the Ukrainian courts had wrongly failed on procedural grounds to consider the merits of his complaints. The Court upheld that complaint. He also relied on article 10 because of the administrative authorities' interference with his access. The Government made no submissions on the merits of this complaint, but the Court rejected it on the ground that there was no evidence of interference with his performance of his journalistic activity. Again, the case was one where there was a domestic right to information.

81. In *Youth Initiative* the complaint concerned a refusal by the Serbian intelligence agency to provide the complainant with information as to how many people had been the subject of electronic surveillance by the agency. The Serbian Information Commissioner – whose role was to ensure the observance of the Serbian Freedom of Information Act 2004: para 25 - had decided that this should be disclosed. The Serbian Government objected that article 10 did not guarantee a general right of access to information and the applicant did not anyway need the information. The Second Section rejected these objections with references to *Társaság*, "recalling" "that the notion of 'freedom of information' embraces a right of access to information" (para 20), and stating that the applicant NGO was "exercising a role as a public watchdog of similar importance to that of the press" and warranted "similar Convention protection to that afforded to the press" (para 20).

82. On the merits, after referring to the Serbian Information Commissioner's order, the Second Section held that there had been an interference, analogous to that in *Társaság* (para 24). In para 25 the Court noted that the Information Commissioner had decided that the information should be provided and found the intelligence agency's assertion that it did not hold the information "unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response" (viz, to rely on a public interest exception in the Serbian Act of 2004, which the Information Commissioner had not accepted as justifying non-disclosure).

83. The *Youth Initiative* case is, therefore, another in a line of cases where the European Court of Human Rights has recognised a complaint under article 10 of the Convention following from a failure to give effect to a domestic right to disclosure of information. In the context of EU law, we were also referred to a comparable complaint in *Thesing, Bloomberg Finance Ltd v European Central Bank (ECB)* (Case T-590/10) (unreported) 29 November 2012. There the General Court was concerned with the right to access ECB documents provided by article 1 of Decision 2004/258/EC. The applicant sought to rely on article 11 of the Charter of Fundamental Rights (mirroring in this respect article 10 of the Convention) and on the Strasbourg case-law, including *Társaság*, *Kenedi* and *Gillberg*. They failed because the General Court held that the ECB had been entitled to invoke an

exception contained in article 4 of Decision 2004/258/EC. The decision therefore adds nothing of present relevance.

84. Finally, in the *Österreichische* case, all agricultural and forest land transactions in Austria required approval by local and regional authorities (in the Tyrol, the Tyrol Real Property Transactions Commission), the aim being to preserve land for agriculture and forestry and avoid the proliferation of second homes. The application association was formed to promote sound agricultural and forest property ownership and sought from the Tyrol Commission (in anonymised form and against reimbursement of costs) all decisions it had issued since 1 January 2000. It relied upon the Tyrol Access to Information Act and submitted that the Commission's decisions concerned civil rights within article 6 of the Convention, and should therefore be made public (para 8). The Commission based its refusal on submissions that the decisions were not information within the Act, but decisions on the basis of legal arguments, comparable to giving legal advice, as well as on an exemption in the Act for situations where excessive resources would be required to provide the information sought.

85. The Austrian Constitutional Court rejected the association's complaint. It held first that neither under article 10 nor under Austrian law was there any positive duty of states to collect and disseminate information of their own motion. Secondly, it accepted the Commission's case that the compilation, anonymisation and disclosure of paper copies of decisions over a period of some years fell outside any duty to disclose information under the Act and would excessively impinge on the Commission's performance of its duties. Thirdly, it added that, in so far as the applicant might "implicitly" be relying on article 6, the Strasbourg case law did not guarantee the right to obtain anonymised decisions over a lengthy period, and Austrian law only required access to the judgments delivered by the highest courts which dealt with important legal issues.

86. Before the European Court of Human Rights, First Section, the application was addressed under the heading of article 10. But the applicant's case was that "decisions of judicial bodies such as the Commission should be publicly accessible" (para 28) and that "interests in the rule of law and due process argued in favour of making decisions by judicial authorities available to the public" (para 29). The Austrian Government's case was, first, that article 10 imposes no positive obligation on a state to collect and disseminate information itself, second, that a refusal to provide anonymised copies of all decisions over a lengthy period did not in any event constitute an interference with rights under article 10, and, third, that a right to be provided with such decisions could not be inferred from article 6 (para 31). Finally, it also argued that, if article 10 was engaged, the refusal was justified, as serving legitimate aims (protection of confidential information and preservation of the Commission's proper functioning).

87. The First Section's judgment is surprising in the nature and brevity of its treatment of the issue whether there was an interference under article 10(1). Essentially, the First Section did no more than cite previous jurisprudence (including *Társaság)* establishing the social "watchdog" role of the press and other non-governmental organisations like the applicant gathering information, and then added: "Consequently, there has been an interference with the applicant association's right to receive and to impart information as enshrined in article 10(1) of the Convention (see *Társaság* …., para 28; see also *Kenedi* …., para 43)". This reasoning fails to address any of the statements of general principle found in *Leander*, *Guerra*, *Roche* and *Gillberg*. It does not indicate why the First Section thought those statements inapplicable, whether it was suggesting some alternative general principle applicable to social watchdogs, or whether (perhaps) it was acting on the basis that, despite the Austrian Constitutional Court's contrary view, there was a domestic right to the information which it was entitled to recognise, even though the Austrian Constitutional Court had wrongly failed to do so (see e.g. the Grand Chamber's apparent reasoning in *Gillberg*: paras 75-76 above).

88. The First Section's silence when considering article 10(1) is the more surprising when one comes to its reasoning under article 10(2). Here (in para 41) the First Section does refer expressly to the principle in *Leander* that "In the specific context of access to information, the Court has held that the right to receive information basically prohibits a Government from preventing a person from receiving information that others wished or were willing to impart", as well as to the principle in *Guerra* that "the right to receive information cannot be construed as imposing on a state positive obligations to collect and disseminate information of its own motion". But those were decisions under article 10(1). Yet the First Section deals with them only under article 10(2), and goes on to say that in *Társaság* "the Court noted that it had recently advanced towards a broader interpretation of the notion of the 'freedom to receive information' and thereby towards the recognition of a right of access to information". Quite apart from the fact that "advances" do not always achieve their goal, the First Section did not address the weakness of the basis and reasoning of the statement in *Társaság* (para 69 above), or the fact that it was no more than a Section decision to be compared with a considerable number of weighty Grand Chamber decisions, or any way in which the general Grand Chamber statements might be reconciled with *Társaság*.

89. Later in its reasoning on justification, the First Section (in para 46) said that "Given that the Commission is a public authority deciding disputes over 'civil rights' within the meaning of article 6 of the Convention …. which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form", and that consequently much of the Commission's anticipated difficulty in providing copies of numerous decisions over a lengthy period was generated by its own choice. On that basis, it concluded that the Commission's "complete refusal

to give [the applicant] access to any of its decisions was disproportionate" (para 47), and held that there had been a violation of article 10. So one explanation of the *Ősterreichische* case may be that the implicit finding of violation of article 6 was critical.

Analysis of position under article 10

90. What to make of the Strasbourg case law in the light of the above is not easy. One possible view is the various Section decisions open a way around the Grand Chamber statements of principle in circumstances where domestic law recognises or the European Court of Human Rights concludes that it should, if properly applied, have recognised, a domestic duty on the public authority to disclose the information. The *Ősterreichische* case might perhaps be suggested to fit into this pattern, though it does not appear to have represented any part of the First Section's thinking. Alternatively, the *Ősterreichische* case may be regarded as a special case, influenced by what were, on the First Section's reasoning, the Commission's clear breaches of article 6.

91. That said, the logic is not very apparent of a principle according to which the engagement of article 10(1) depends upon whether domestic law happens to recognise a duty on the relevant public authority to provide the information. To deal at this point with an argument raised by Mr Clayton, it is in procedural law entirely understandable that, even though the Convention confers no right to have a domestic appeal, where a domestic right of appeal is in law provided, then it must comply with article 6. But that is because the existence of the domestic right of appeal necessarily means that there are further proceedings to which article 6 applies. Here, if article 10 involves no duty on a public authority to disclose information, no reason appears why the existence of a domestic duty should mean any more than that the domestic legislator has chosen to go further than the Convention. No reason appears why the additional duty which the domestic legislator chose to introduce should necessarily become or engage an article 10(1) duty of disclosure.

92. However, putting aside the point made in para 90, if the explanation of the Section decisions is that they turn on the existence of a domestic duty to disclose, then I think it unlikely that they could affect the outcome of any request addressed by Mr Kennedy to the Charity Commission under the Charities Act. Either there is no domestic duty of this nature, in which case article 10(1) does not, on the basis of the Grand Chamber decisions, give rise to one. Or there is a domestic duty of this nature, in which case article 10(1) seems to me unlikely to add anything to it in the present case – since I have already concluded that the Charity Commission's domestic statutory duties should offer a path to disclosure no less favourable to a journalist such as Mr Kennedy than any available under article 10. If, alternatively, the explanation of the *Ősterreichische* case is that it turned on the existence of

breaches of article 6, no such breaches have been relied on in this case, but, for reasons already indicated, I do attach significance to the importance of the principles of accountability and transparency as they apply to reports of inquiries under the Charities Act, and I consider that the Act, read in the light of these principles, is likely to go at least as far as any reliance which could have been placed by Mr Kennedy on article 6, or article 10 as informed by article 6, could have taken him.

93. Mr Coppel argues for a more radical analysis than I have discussed in paras 88 to 90. He argues that the Section decisions show that a right to receive information can arise under article 10, without any domestic right to the information. If necessary, he accepts a restriction of the right to a member of the press like Mr Kennedy or any other social watchdog. It is true that, in *Társaság* and *Youth Initiative*, where the complainants were interested NGOs, the Court used language stressing the vital role of such social watchdogs, likening them to the press. But, as Lord Brown noted in *Sugar* at para 94, the occupation of such a role cannot sensibly represent any sort of formal pre-condition, before breach of a domestic duty of disclosure engages article 10(1). Many organisations and individuals, including those seeking information for research or historical or personal or family purposes, may have legitimate and understandable interests in enforcing a domestic right to information. In reality, therefore, Mr Coppel's more radical argument resolves itself into a submission that a general duty to disclose is engaged under article 10(1) by any claim based on public interest. On that basis, however, the statements of principle in the Grand Chamber decisions are history.

94. Had it been decisive for the outcome of this appeal, I would have considered that, in the present unsatisfactory state of the Strasbourg case law, the Grand Chamber statements on article 10 should continue to be regarded as reflecting a valid general principle, applicable at least in cases where the relevant public authority is under no domestic duty of disclosure. The Grand Chamber statements are underpinned not only by the way in which article 10(1) is worded, but by the consideration that the contrary view - that article 10(1) contains a prima facie duty of disclosure of all matters of public interest – leads to a proposition that no national regulation of such disclosure is required at all, before such a duty arises. Article 10 would itself become a European-wide Freedom of Information law. But it would be a law lacking the specific provisions and qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes.

95. Mr Coppel recognised that the logic of his case is that article 10 must involve a general duty of disclosure such as mentioned in paras 93-94, irrespective of the existence of any freedom of information legislation. But he contends that, where such legislation exists, it should be the vehicle for any rights contained in article 10. The Media Legal Defence Initiative and the Campaign for Freedom of Information, interveners before the Supreme Court, suggest a more nuanced analysis, according

to which article 10 should only be treated as engaged once a state has enacted a domestic freedom of information statute providing a general right of access to information and so "occupied the field". Then and only then could article 10 be deployed to check and control whether the right of access corresponded with that which, they submit, is required by article 10.

96. I see no basis for either Mr Coppel's or the interveners' half-way approach. I start from the position that there is no reason why any article 10 rights must be found and satisfied in and only in the FOIA. They may be satisfied by a scheme which operates in some situations under the FOIA and in others under the principles which govern the conduct of courts, arbitration tribunals and those holding inquiries outside the FOIA. Secondly, and for similar reasons, references to a "general right of access" and to "occupying the field" are unhelpful metaphors in relation to areas which the FOIA deliberately exempts. The only relevant sense in which the exemptions provided by the FOIA are touched by that Act is that they are exempted from its operation. It would be no different if the Act had been framed to cover specific situations which did not cover the present. I would add that, on either approach, it would seem that article 10 would operate as a general control on the appropriateness of exemptions in the FOIA. This becomes even more striking once one realises that it would also extend to other absolute exemptions provided by the FOIA. These include information directly or indirectly supplied by or relating to the Security and Secret Intelligence Services, the Government Communications Headquarters, the special forces and a list of tribunals and other authorities associated with security matters: see para 18 above.

General international legal principles

97. Mr Coppel also submitted that general international legal principles and other instruments supported an interpretation of article 10 as introducing a positive right to receive and a correlative duty to impart information. He referred, inter alia, to:

i) article 19 of the Universal Declaration of Human Rights, 1948, providing:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers";

ii) article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), adopted 1966 and in force in 1976, providing:

> "1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice";

iii) article 13(1) of the Inter-American Convention on Human Rights ("IACHR"), adopted 1969 and in force 1978, providing:

> "Everyone has the right of freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice".

98. The Inter-American Court of Human Rights has in its jurisprudence interpreted article 13(1) as conferring a positive right to receive and a positive duty to impart information: *Reyes v Chile* (2006) IACHR, 19 September 2006, followed in *Lund v Brazil* (2010) IACHR, 24 November 2010. There is a particularly full examination of this aspect in paras 75 to 107 of *Reyes v Chile*. At para 77, the Court found that "by expressly stipulating the right to 'seek' and 'receive' 'information,' article 13 of the Convention protects the right of all individuals to request access to state-held information, with the exceptions permitted by the restrictions established in the Convention". The word 'seek' is one which appears in all three international instruments cited in the preceding paragraph, and not in article 10 of the European Convention on Human Rights agreed in 1950. As Clayton and Tomlinson note in their work *The Law of Human Rights*, 2nd ed (2009), para 15.03, article 10 "defines the right in language which is weaker than that of article 19" of the ICCPR. Various academic commentators have suggested that the difference should not be regarded as material. But it is worth noting that the original draft of article 10 prepared by the Committee of Experts provided a right "to seek, receive and impart information ideas", and that, in the light of its presence in the prior Universal Declaration of Human Rights, some significance must attach to the subsequent omission of the word from article 10.

99. The IACHR in *Reyes v Chile*, para 81, also referred to prior recommendations of the Council of Europe's Parliamentary Assembly and Committee dating back to 1970, 1982 and 1998, advocating, for example, a duty on public authorities to "make available information on matters of public interest within reasonable limits" and expressing "the goal of the pursuit of an open information policy". But the present issue is not whether these are appropriate general aspirations, but whether article 10

contains a concrete decision to give general effect to them at an international level enforceable without any more specific measure and without any controlling qualifications and limitations at that level. The European Court of Human Rights' case law, analysed above, does not to my mind support this.

Ullah – "no more, but certainly no less"

100. Against the possibility of the Supreme Court concluding that the Strasbourg case law does not clearly or sufficiently lead in the direction invited by Mr Kennedy's case, Mr Richard Clayton QC for The Media Legal Defence Initiative and The Campaign for Freedom of Information invited us to strike out alone. He submitted that the case could be a suitable one in which to revisit the approach associated with the words "no more, but certainly no less" used by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 in relation to national courts' duty to keep pace with Strasbourg case law. I would decline that invitation. I see no basis for differing domestically from the Grand Chamber statements about the scope of article 10 and no need to expand the domestic article 10 rights, having regard to the domestic scheme of the Charities Act.

Overall Conclusions

101. The only claim that Mr Kennedy has made is for disclosure under section 32. He has pursued this claim as a matter of common law interpretation and, in the alternative, on the basis that section 32 must be read down in the light of article 10 of the Convention. Alternatively, he has claimed a declaration that section 32 is incompatible with article 10. My conclusions are in summary that:

> i) Mr Kennedy's case is not entitled to succeed on the claims he has pursued by reference to section 32 of the FOIA: see in particular paras 34, 35-41 and 42 above.
>
> ii) But that is not because of any conclusion that he has no right to the disclosure sought: see paras 35-41.
>
> iii) He fails in the claims he had up to this point made because
>
>> a) the scheme of section 32 read in this case with the Charities Act 1993 is clear (paras 34 and 35-40), and

b) the route by which he may, after an appropriate balancing exercise, be entitled to disclosure, is not under or by virtue of some process of remodelling of section 32, but is under the Charities Act construed in the light of common law principles (paras 40 and 43-52) and/or in the light of article 10 of the Human Rights Convention (paras 36-39), if and so far as that article may be engaged (as to which see paras 55-98).

iv) Construed without reference to article 10, the Charities Act should be read as putting Mr Kennedy in no less favourable position regarding the obtaining of such disclosure than he would be in on his case that article 10 by itself imposes on public authorities a general duty of disclosure of information (paras 40 and 43-52).

v) I do not consider that article 10 does contain so general a duty (paras 97-98), but, in the circumstances, that conclusion is academic.

LORD TOULSON (with whom Lord Neuberger and Lord Clarke agree)

102. The first issue concerns the construction of section 32(2) of FOIA, leaving aside the Human Rights Act 1998 and the European Convention. The section has been set out by Lord Mance at para 17. The issue was succinctly summarised by Mr Philip Coppel QC in his written case as being whether the phrase "for the purposes of the inquiry or arbitration" in section 32(2)(a) is to be interpreted as linked to the immediately preceding words "placed in the custody of a person conducting an inquiry or arbitration" or as linked to the opening words of the subsection "information held by a public authority." Whichever construction is right, the same must apply to section 32(1) and to section 32(2)(b). I agree with Lord Mance and the courts below that the first interpretation is right.

103. As Lord Mance says, it is the more natural reading. If the alternative construction were right, most of the language of paragraphs (a) and (b) would be otiose. The drafter could have stated much more simply that information held by a public authority is exempt information if it is held only for the purposes of an inquiry or arbitration.

104. I agree also that this conclusion is reinforced by the provision in section 63(1), set out by Lord Mance at para 30, that information contained in a "historical record" cannot be exempt information by virtue of section 32. A document does not become a historical record until 20 years (originally 30 years) have passed from the year of its creation; section 62(1). It is unreal to suppose that this provision was

aimed at the remote possibility of an inquiry continuing for more than 30 years or involving documents more than 30 years old. The strong inference is that a document provided to or created by a person conducting an inquiry or arbitration is to remain within the section 32 exemption until the end of the specified period.

105. If his argument on the first issue failed, Mr Coppel submitted that section 32(2) should be "read down" so as to cease to apply on the conclusion of the inquiry or arbitration, pursuant to the requirements of the Human Rights Act and article 10 of the European Convention.

106. This is a more difficult issue. The difficulty arises in part because the argument for Mr Kennedy began on a wrong footing by Mr Coppel submitting that without FOIA the Charity Commission would have no power to provide Mr Kennedy with information of the kind which he seeks. The Charity Commission and the Secretary of State disagree and draw attention to the statement in section 78 that nothing in the Act is to be taken to limit the powers of a public authority to disclose information held by it. I am clear that they are right on this point.

107. Every public body exists for the service of the public, notwithstanding that it may owe particular duties to individual members of the public which may limit what it can properly make public. The duties of a hospital trust to a patient are an obvious example. There may also be other reasons, apart from duties of confidentiality, why it would not be in the public interest or would be unduly burdensome for a public body to disclose matters to the public, but the idea that, as a general proposition, a public body needs particular authority to provide information about its activities to the public is misconceived.

108. In this case there is an important additional dimension. We are concerned with a public body carrying out a statutory inquiry into matters of legitimate public concern. Over several decades it has become increasingly common for public bodies or sometimes individuals to be given statutory responsibility for conducting such inquiries. They are part of the constitutional landscape.

109. Subject to any relevant statutory provisions, a judicial body has an inherent jurisdiction to determine its own procedures (*Attorney General v Leveller Magazine Ltd* [1979] AC 440). The same applies to a public body carrying out a statutory inquiry.

110. It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions.

Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence: *Scott v Scott* [1913] AC 417; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)*[2012] EWCA Civ 420; [2013] QB 618.

111. Before discussing the question whether and to what extent the same principle is applicable in relation to statutory inquiries, it is relevant to understand the reasoning in *Guardian News* (about which Lord Carnwath has made some observations in para 235 of his judgment), particularly since one of the arguments concerned section 32 of FOIA. The case concerned documents which were provided to a district judge before the hearing of extradition proceedings, but which were not read out in court although some of them were referred to by counsel. The Divisional Court held that the judge had no power to allow the press to have access to the documents: [2010] EWHC 3376 (Admin), [2011] 1 WLR 1173. Part of its reasoning (at paras 53-54) was that FOIA had put in place a regime for obtaining access to documents held by public authorities and that it would be strange if a request for information which was specifically exempted under the Act could be made at common law or under article 10.

112. The Court of Appeal took a different approach. It started with the proposition that open justice is a principle at the heart of our system of justice and vital to the rule of law. It explained why it is a necessary accompaniment of the rule of law (at para 1). Society depends on the judges to act as guardians of the rule of law, but who is to guard the guardians and how can the public have confidence in them? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.

113. For that proposition the court cited *Scott v Scott* and other authority. The principle has never been absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be. The court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others. (See *Guardian News* at para 85.)

114. There may be many reasons why public access to certain information about the court proceedings should be denied, limited or postponed. The information may be confidential; it may relate to a person with a particular vulnerability; its disclosure might impede the judicial process; it may concern allegations against other persons

which have not been explored and could be potentially damaging to them; it may be of such peripheral, if any, relevance to the judicial process that it would be disproportionate to require its disclosure; and these are only a few examples.

115. The court held in *Guardian News* that the open justice principle applies, broadly speaking, to all tribunals exercising the judicial power of the State. (The same expression is used in section 32(4)(a) of FOIA, which defines a court as including "any tribunal or body exercising the judicial power of the State".) The fundamental reasons for the open justice principle are of general application to any such body, although its practical operation may vary according to the nature of the work of a particular judicial body.

116. In contrast with the view expressed by the Divisional Court about the exemption of court documents from the provisions of FOIA, the Court of Appeal considered that the exclusion was both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to the possibility of further appeals to the Upper Tribunal and on to the Court of Appeal. It would be odd if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way. However, there was a more fundamental objection to the Divisional Court's approach, which is relevant also in the present case.

117. As the Court of Appeal said (at paras 73-74), although the sovereignty of Parliament means that the responsibility of the courts for determining the scope of the open justice principle may be affected by an Act of Parliament, Parliament should not be taken to have legislated so as to limit or control the way in which the court decides such a question unless the language of the statute makes it plain beyond possible doubt that this was Parliament's intention.

118. It would therefore be quite wrong to infer from the exclusion of court documents from FOIA that Parliament intended to preclude the court from permitting a non-party to have access to such documents, if the court considered such access to be proper under the open justice principle. The Administrative Court's observation that no good reason had been shown why the checks and balances contained in the Act should be overridden by the common law was to approach the matter from the wrong direction. The question, rather, was whether the Act demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied.

119. In the present case we have been referred to Hansard, which shows that the Government positively intended not to interfere with the court's exercise of the power to determine what information should be made available to the public about judicial proceedings, and that it viewed statutory inquiries in the same way as judicial proceedings. I do not consider this to be relevant or admissible for the purposes of construing section 32, which is unambiguous; but it is relevant background material when considering whether questions of disclosure of information about statutory inquiries are properly a matter for the courts, applying the common law.

120. During the Committee stage in the House of Commons, amendments were moved which would have converted the blanket exemptions in section 32(1) and (2) into qualified exemptions (applicable if disclosure under the Act would be likely to cause prejudice to the judicial proceedings, inquiry or arbitration), but they were withdrawn after the Minister, Mr David Lock MP, explained the Government's objection to them (Hansard, (HC Debs Standing Committee B), 25 January 2000, cols 281-282):

> "Essentially this is an issue of separation of powers. The courts control the documents that are before them and it is right that our judges should decide what should be disclosed.
>
> …
>
> Although the courts are not covered by the Bill, according to it court records may be held on a court's behalf by public authorities… Statutory inquiries have a status similar to courts, and their records are usually held by the Department that established the inquiry.
>
> The clause therefore ensures that the courts can continue to determine what information is to be disclosed, and that such matters are decided by the courts and fall within their jurisdiction, rather than the jurisdiction of this legislation. Of course, it is not to be assumed that such information will not be disclosed merely because the Bill will not require it to be disclosed. Such information is controlled by the courts, which constitute a separate regime. The courts have their own rules, and they will decide if and when court records are to be disclosed. The Government do not believe that the Freedom of Information Bill should circumvent the power of the courts to determine their disclosure policy. The issue is the separation of powers, and the jurisdiction to determine the information the court should provide will be left to the courts themselves. In a court case, it is for judges and

> courts to determine when it is appropriate for court records to be disclosed."

121. Should the principle of openness as a general matter be held to apply to statutory inquiries? This involves two linked considerations: whether it is right that judicial proceedings and statutory inquiries should be regarded as analogous for this purpose or, to put it another way, whether the reasons for the judicial process to be open to public scrutiny apply similarly to statutory inquiries; and whether the court in answering that question would be crossing onto territory which should be left to Parliament.

122. An "inquiry" is defined for the purposes of section 32 by subsection (4)(c) as meaning any inquiry or hearing held under any provision contained in, or made under, an enactment. Although such inquiries and hearings may vary considerably in nature and scope, it is fair to describe the conduct of them as a quasi-judicial function. That doubtless explains why Parliament considered their status to be similar, as the Minister stated in the passage cited above, and the treatment of the records of judicial proceedings and records of statutory inquiries in section 32(1) and (2) is materially identical.

123. Just as Parliament by excluding courts and court records from the provisions of the Act did not intend that such records should be shrouded in secrecy, but left it to the courts to rule on what should be disclosed, so in the case of a statutory inquiry Parliament decided to leave it to the public body to rule on what should be disclosed, balancing the public interest in its decision being open to proper public scrutiny against any countervailing factors, but the exercise of such power must be amenable to review by the court.

124. The considerations which underlie the open justice principle in relation to judicial proceedings apply also to those charged by Parliament with responsibility for conducting quasi-judicial inquiries and hearings. How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?

125. The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle.

126. In each case it is necessary to have close regard to the purpose and provisions of the relevant statute. Lord Mance is therefore right to place the emphasis which he has on the provisions of the Charities Act, particularly in paras 43 to 45 of his judgment. No useful purpose would be served by my repeating or paraphrasing his analysis of those provisions. As he says at the end of para 45 and the beginning of para 47, the meaning and significance which he attaches to those provisions (and with which I agree) are consistent with and indeed underpinned by common law principles.

127. Lord Carnwath has drawn attention to the absence of direct authority for applying common law principles to a body like the Charity Commission which "is the creature of a modern statute, by which its functions and powers are precisely defined"; but the supervision of inquiries by the courts is a product of the common law, except insofar as there is a relevant statutory provision.

128. Such enactments may go into greater or less detail about how an inquiry is to be conducted. The Inquiries Act 2005 contains detailed provisions about the conduct of an inquiry under that Act. Other Acts which provide for inquiries may be less detailed. To the extent that an enactment contains provisions about the disclosure of documents or information, such provisions have the force of law. But to the extent that Parliament has not done so, it must be for the statutory body to decide questions of disclosure, subject to the supervision of the court. I do not see the absence of a prior statement by the courts that in general the principle of openness should apply, subject to any statutory provisions and subject to any countervailing reasons, as a convincing reason for not saying so now. Principles of natural justice have been developed by the courts as a matter of common law and do not depend on being contained in a statutory code. As with natural justice, so with open justice.

129. The power of disclosure of information about a statutory inquiry by the responsible public authority must be exercised in the public interest. It is not therefore necessary to look for a particular statutory requirement of disclosure. Rather, the question in any particular case is whether there is good reason for not allowing public access to information which would provide enlightenment about the process of the inquiry and reasons for the outcome of the inquiry.

130. I do not understand there to be any disagreement between the members of the court about the desirability that information about statutory inquiries should be available to the public, unless there are reasons to the contrary. The disagreement is about the proper means of achieving that result. Lord Carnwath would achieve it by reference to article 10 and by reading section 32(2) in a manner contrary to Parliament's intention. For my part, I see no reason why the courts should not regard inquiry documents as having similar status to court documents, as Parliament

intended, and applying similar principles. That approach is not undemocratic and does not usurp the function of Parliament.

131. Lord Wilson considers that Parliament cannot have thought about what it was doing in enacting section 32(2) and that the subsection needs to be read down in order for the UK to be in compliance with article 10. It sometimes happens that the only sensible inference to be drawn regarding a legislative provision is that there was an oversight in the drafting process, but that is not the case here (as Hansard confirms). Parliament could, if it chose, have dealt with the question of access to inquiry documents in a different way, but in my judgment we should respect the fact that it chose to deal with them in the same way as court documents. The result is entirely workable; the common law is fully capable of protecting sufficiently whatever rights under article 10 Mr Kennedy may have.

132. Given that a decision by a public authority about disclosure of information or documents regarding a statutory inquiry is capable of judicial review, what should be the standard of review? The normal standard applied by a court reviewing a decision of a statutory body is whether it was unreasonable in the *Wednesbury* sense (ie beyond rational justification), but we are not here concerned with a decision as to the outcome of the inquiry. We are concerned with its transparency. If there is a challenge to the High Court against a refusal of disclosure by a lower court or tribunal, the High Court would decide for itself the question whether the open justice principle required disclosure. *Guardian News* provides an example. I do not see a good reason for adopting a different approach in the case of a statutory inquiry, but the court should give due weight to the decision and, more particularly, the reasons given by the public authority (in the same way that it would to the decision and reasons of a lower court or tribunal). The reason for the High Court deciding itself whether the open justice principle requires disclosure of the relevant information is linked to the reason for the principle. It is in the interests of public confidence that the higher court should exercise its own judgment in the matter and that information which it considers ought to be disclosed is disclosed.

133. The analysis set out above is based on common law principles and not on article 10, which in my view adds nothing to the common law in the present context. This is not surprising. What we now term human rights law and public law has developed through our common law over a long period of time. The process has quickened since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen's daily life. The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law.

It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.

134. In the present case the inquiries which the Charity Commission conducted, under section 8 of the Charities Act 1993, into the operations of a charity formed by Mr George Galloway MP were of significant public interest. At the end of the inquiries the Commission published its conclusions, but the information provided as to its reasons for the findings which it made and, more particularly, did not make, was sparse. As a journalist, Mr Kennedy had good cause to want to probe further. It is possible that the Charity Commission may have had reasons for not wishing to divulge any further information, but such is the course which the proceedings have taken that it is impossible to tell at this stage.

135. I regard it as unfortunate that Mr Kennedy's request for further information was based solely on FOIA. I have considerable disquiet that Mr Kennedy has been unable to learn more about the Charity Commission's inquiries and reasons for its conclusions, and I should like, if possible, for there to be a proper exploration whether the Charity Commission should provide more. I am clear that this could be done through the common law, but it cannot be done through FOIA unless section 32(2) can properly be circumvented. I agree with Lord Mance that if article 10 applies in the present case, it is fulfilled by the domestic law. (It should generally not be difficult to tell whether the information sought is within section 32(2) because the statutory definition of an inquiry is clear. However, if for any reason the applicant was in doubt, he could ask the public authority to say whether it contended that the information was within section 32(2) and to explain its reason for saying so. If so, the public authority could not then complain about the applicant following the route of judicial review.)

136. Lord Carnwath considers that article 10 would afford the advantage to Mr Kennedy that article 32(2) could be read down and Mr Kennedy would then have a simpler and cheaper mechanism for trying to obtain the information which he seeks. That supposes that judicial review is not an adequate remedy. In my view it is. It was the remedy used in *Guardian News* and would be the remedy in any case where there is a challenge to a refusal of disclosure of information by a court below the level of the High Court or by a tribunal. I do not see it as inappropriate for the same remedy to be available in relation to a statutory inquiry.

137. There are other reasons why I consider that it would be wrong to read down section 32(2) in the way for which Mr Kennedy contends. First, it would go against the grain of FOIA to override section 32(2) in circumstances which Parliament considered the matter should be for the courts and where there is a remedy through the courts. Secondly, to read down section 32(2) in the manner proposed would have other undesirable consequences. Mr James Eadie QC rightly pointed out that

under the construction proposed section 32(2) would not be reduced from an absolute exemption to a qualified exception, subject to a general public interest test (such as would be applied by a court), but would cease to have effect altogether at the end of the inquiry. Section 2 brings in a public interest test where there is a relevant exemption, but it is not a ground of exemption in itself. The only exemptions which would apply would be other specific exemptions in the Act but they do not cover all the ground which would be covered by a public interest test.

138. For example, inquiry records or court records may include material detrimental to a person's reputation which the court or inquiry did not investigate on grounds of relevance. A court would have an obvious discretion not to order the disclosure of such material. In *Guardian News* the court referred in paras 65 to 66 to a decision of the Court of Appeals for the Second Circuit (Winter, Calabresi and Cabranes CJJ) in *United States v Amodeo* (1995) 71 F 3d 1044 in which this point was discussed. The approach of the US court was summarised by the Court of Appeal at para 66:

> "The court commented that many statements and documents generated in federal litigation actually have little or no bearing on the exercise of judicial power because 'the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material'. Unlimited access to every item turned up in the course of litigation could cause serious harm to innocent people. The court conclude that the weight to be given to the presumption of access must be governed by the role of the material at issue in the exercise of judicial power and the resultant value of such information to those monitoring the federal courts."

139. An English court would be expected to perform a similar exercise, but I cannot see how the Information Commissioner would be able to do so if section 32(2) were read down in the way for which Mr Coppel contends. That is because the specific exemptions in FOIA do not give the Information Commissioner such a broad power.

140. In short, the common law approach, which I consider to be sound in principle, runs with the grain of FOIA; it does not involve countermanding Parliament's decision to exclude inquiry documents from the scope of the Act; and it is consistent with the judgment of Parliament that in this context statutory inquiries should be viewed in the same way as judicial proceedings. It also produces a more just result, because a court is able to exercise a broad judgment about where the public interest lies in infinitely variable circumstances whereas the Information Commissioner would not have such a power.

141. On a point of detail, the parallel which Mr Coppel drew with inquiries under the Inquiries Act 2005 does not assist him. He pointed out that under section 18(3) of the Inquiries Act, the exemption from FOIA under section 32(2) ceases to apply when the chairman at the end of the inquiry passes the inquiry documents to the relevant public department under the Inquiry Rules 2006, rule 18(1)(b).

142. Mr Coppel argued that it was an unjustifiable anomaly that section 32(2) of FOIA should remain in force after the conclusion of other public inquiries. This argument seemed attractive at first, but it fails to take account of other relevant provisions of the Inquiries Act. Under section 19 the chairman may impose a restriction order on the disclosure or publication of any evidence or documents given to an inquiry. The section sets out the matters to which the chairman must have regard in deciding whether to make such an order, including any risk of harm or damage which may be avoided or reduced by the order. Under section 20, such a restriction continues in force indefinitely, subject to provisions of that section which include a power given to the relevant minister to revoke or vary the order after the end of the inquiry. In short, full provision is made for public interest considerations.

143. In view of the approach which I have taken, I can deal shortly with the Strasbourg decisions on which Mr Coppel has relied. They have been comprehensively analysed by Lord Mance.

144. Since this court reviewed the Strasbourg jurisprudence on article 10 in *British Broadcasting Corpn v Sugar (No 2)* [2012] UKSC 4; [2012] 1 WLR 439, there have been four further Strasbourg decisions on which Mr Coppel relies: *Gillberg v Sweden* (2012) 34 BHRC 247, *Shapovalov v Ukraine* (Application No 45835/05) (unreported) given 31 July 2012, *Youth Initiative for Human Rights v Serbia* (Application No 48135/06) (unreported), given 25 June 2013 and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* (Application No 39534/07) (unreported) given 28 November 2013. In the last of those cases, the First Section (at paragraph 41) highlighted among the court's earlier decisions the case of *Társaság v Hungary* (2009) 53 EHRR 130, observing that the court had advanced from cases like *Leander v Sweden* (1987) 9 EHRR 433 "towards a broader interpretation of the notion of the 'freedom to receive information' and thereby towards a recognition of a right of access to information". It drew a parallel in this context with the case law on the freedom of the press and the need for "the most careful scrutiny…when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog."

145. What is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the "right to receive and impart information" within the meaning of article 10, particularly in the light of the earlier Grand Chamber decisions. Mr Coppel submits that the court's "direction of

travel" is clear, but the metaphor suggests that the route and destination are undetermined. If article 10 is to be understood as founding a right of access to information held by a public body, which the public body is neither required to provide under its domestic law nor is willing to provide, there is a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits.

146. To take the latest case, *Osterreichische Vereinigung* concerned information about decisions of a commission described as a judicial body (at para 28). In considering whether there had been an interference with the applicant's rights under article 10, the court said that the applicant association had a watchdog role similar to that of the press, that it was involved in the legitimate gathering of information of public interest and that there had consequently been an interference with its right to receive and impart information under article 10 (paras 34 to 36). In considering whether the interference was justified, the court considered it striking that the commission was a public authority deciding disputes over civil rights but that none of its decisions was published in any form. The court concluded that its complete refusal to give access to any of its decisions was disproportionate (paras 46 to 47). On one interpretation the scope of the decision is extremely broad. Most information held by a public authority will be of some public interest, and article 10 would apply to any of it if a journalist, researcher or public interest group wanted access in order to generate a public debate, unless the authority could justify withholding it under the imprecise language of article 10.2. Alternatively, the case could be seen more narrowly as essentially a case about open justice.

147. Like Lord Mance (at para 88) I cannot see the logic of using the existence of a duty of disclosure in domestic law as a platform on which to erect a duty under article 10, as distinct from article 6. As to the more radical suggestion that article 10 gives rise to a prima facie duty of disclosure of any information held by a public body which the applicant seeks in order to promote a public debate, this is flatly contradictory to the Grand Chamber decision in *Leander*. As Lord Mance has commented, it would amount to a European freedom of information law established on an undefined basis without the normal checks and balances to be expected in the case of freedom of information legislation introduced by a State after public consultation and debate.

148. If the *Leander* principle is to be abrogated, or modified, in favour of an interpretation of article 10 which makes disclosure of information by a public body in some circumstances obligatory, it seems to me with respect that what the new interpretation would require is a clear, high level exegesis of the salient principle and its essential components.

149. It is, however, unnecessary to say more in this case, because I see nothing in the Strasbourg jurisprudence which is inconsistent with what I have said regarding English domestic law.

150. I agree with the conclusions of Lord Mance and I would dismiss this appeal for the same reasons. Like him, I emphasise that this conclusion does not mean that English courts lack the power to order a public body which has carried out a statutory inquiry into matters of public interest to provide such access to a journalist as may be proper for the exercise of their "watchdog" function, taking into account the relevant circumstances.

151. It would be open to Mr Kennedy now to make a fresh request to the Charity Commission on the basis of this judgment. It would then be for the Administrative Court to consider any objection by the Charity Commission based on delay, but in considering such objection the court would need to take into account all the circumstances. Mention was briefly made in argument about the three month time limit imposed under CPR 54.5(1), but that is after the grounds for the application have arisen, which would be after any refusal of Mr Kennedy's request. There could of course be argument that he should have made his first request on a different basis (as I would hold). Whether that should bar the claim from proceeding would be a matter for the court considering the application, but on the facts as they presently appear it would seem harsh that the claim should be barred not because of any delay on Mr Kennedy's part in seeking the information but because of legal uncertainty about the correct route.

LORD SUMPTION (with whom Lord Neuberger and Lord Clarke agree)

152. I agree that this appeal should be dismissed, for the reasons given by Lord Mance and Lord Toulson.

153. The Freedom of Information Act 2000 was a landmark enactment of great constitutional significance for the United Kingdom. It introduced a new regime governing the disclosure of information held by public authorities. It created a prima facie right to the disclosure of all such information, save insofar as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals.

154. The right to receive information under article 10 of the Human Rights Convention has generated a number of decisions of the European Court of Human Rights, which take a variety of inconsistent positions for reasons that are not always apparent from the judgments. The more authoritative of these decisions, and the ones more consonant with the scheme and language of the Convention, are authority for the proposition that article 10 recognises a right in the citizen not to be impeded by the state in the exercise of such right of access to information as he may already have under domestic law. It does not itself create such a right of access. Other decisions, while ostensibly acknowledging the authority of the principle set out in these cases, appear to point towards a different and inconsistent view, namely that there may be a positive obligation on the part of the state to impart information under article 10, and a corresponding right in the citizen to receive it. However if (contrary to my view) there is a Convention right to receive information from public authorities which would not otherwise be available, no decision of the European Court of Human Rights suggests that it can be absolute or exercisable irrespective of the public interest. Accordingly, since disclosure under the Freedom of Information Act depends upon an assessment of the public interest, it is difficult to discern any basis on which the scheme as such can be regarded incompatible with the Convention, whichever of the two approaches is correct. Of course, the Strasbourg court may decide that the statutory scheme is compatible, but that particular decisions under it are not. But this case is concerned with the compatibility of the scheme, not the particular decision.

155. The basis on which it is suggested that the scheme may not be compatible is that section 32, if it is to be construed as applying beyond the duration of the inquiry, is an absolute exemption more extensive than anything required to avoid disrupting the actual conduct of the inquiry. If this criticism is to carry any weight, what the critics have to say is that the application of section 32 forecloses any examination of the public interest in disclosure. But such a criticism would plainly be misconceived. The exemptions in the Act are of two kinds. There are, first of all, exemptions which reflect Parliament's judgment that the public interest requires information in some categories never to be disclosable under the Act. Exemptions of this kind include those under section 23 (information supplied by or relating to bodies dealing with national security), section 34 (information whose disclosure would infringe Parliamentary privilege) and section 41 (information received by a public authority under a legally enforceable confidence). The second category of exemption in the Act comprises cases where the Act does not need to provide for access to the information because there are other means of obtaining it on appropriate conditions for the protection of the public interest. Such exemptions include those in section 21 (information available by other means) and the section with which we are presently concerned, section 32, dealing with information held by a court or by virtue of having been supplied to an inquiry or arbitration,

156. The point about section 32 is that it deals with a category of information which did not need to be covered by the Act, because it was already the law that information in this category was information for which there was an entitlement if the public interest required it. Leaving aside the rather special (and for present purposes irrelevant) case of documents held by virtue of having been supplied to an arbitration, the relevant principles of law are to be found in rules of court and in the powers and duties of public authorities holding documents supplied to an inquiry, as those powers and duties have been interpreted by the Courts and applied in accordance with general principles of public law. It cannot plausibly be suggested that this corpus of law fails to meet the requirements of article 10 of the Convention that any restrictions on the right recognised in article 10(1) should be "prescribed by law". Its continued operation side by side with the statutory scheme under the Freedom of Information Act is expressly preserved by section 78 of that Act. This section overtly recognises that the Act is not a complete code but applies in conjunction with other rules of English law dealing with disclosure.

157. Much of the forensic force of the Appellant's argument arises from the implicit (and occasionally explicit) assumption that there could be no proper reason in the public interest for denying Mr Kennedy the information that he seeks. Therefore, it is suggested, the law is not giving proper effect to the public interest because it is putting unnecessary legal or procedural obstacles in Mr Kennedy's way. I reject this suggestion. It is true that there is a legitimate public interest in the disclosure of information relevant to the performance of the Charity Commission's inquiry functions, and to this inquiry in particular. But the Charity Commission has never been asked to disclose the information under its general powers. It has only been asked to disclose it under a particular statute from which the information in question is absolutely exempt. This is not just a procedural nicety. If the Commission had been asked to disclose under its general powers, it would have had to consider the public interest considerations for and against disclosure which were relevant to the performance of its statutory functions under the Charities Act. Its assessment of these matters would in principle have been reviewable by the court. In fact, it has never been called upon to carry out this assessment, because Mr Kennedy chose to call for the information under an enactment which did not apply to the information which he wanted.

158. We cannot know what the decision of the Charity Commission would have been if they had been required to exercise their powers under the Charities Act. We know nothing about the contents or the source of the information in the documents held by the Commission, or the basis on which it was obtained, apart from the limited facts which can be inferred from its report, the schedule of documents and the evidence in these proceedings. Because this appeal is concerned only with the effect of section 32, and the Convention so far as it bears on section 32, none of this material has been relevant and we have not seen it.

159. It cannot necessarily be assumed that if Mr Kennedy had asked for disclosure under the Charity Commission's general powers, the resulting decision would have been favourable to him. It might or might not have been. No one has disputed that section 32 applies in this case if the exemption for which it provides extends beyond the duration of the inquiry. We are therefore presumably concerned with information which the Commission holds only by virtue of its having been given to the Charity Commission for the purposes of the inquiry. That information presumably emanates from persons or bodies who are not themselves public authorities. Otherwise it would have been disclosable by those authorities under other provisions of the Freedom of Information Act. While other statutory qualifications or exemptions might have in that event been relevant, section 32 would not have been. The information is therefore likely to have been supplied to the Commission by private entities or possibly by foreign public authorities, and supplied "only" for the inquiry, not for any other purpose. The inference from the Commission's report is that a significant part of it came from foreign entities, and therefore could not have been obtained under the Commission's power to requisition information under section 9 of the Charities Act. In its letter of 4 July 2007, the Commission showed that it was well aware of the "public interest… for transparency of the decisions and reasons for them, so as to promote public confidence in charities." But it considered at that time that its dependence on the co-operation of third parties in carrying out its inquiry meant that that particular public interest was outweighed by the competing public interest in its being able to discover the relevant facts. The importance of encouraging voluntary co-operation with an inquiry by those possessing relevant information is a recognised public interest which may be highly relevant to the question whether it should be further disclosed: see *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, 637-638 (Lord Diplock). The statements made in the Commission's letter may or may not prove to be its final position. But the point made there cannot be brushed aside.

LORD WILSON

160. In April 2003, shortly before he became its Investigations Editor, Mr Kennedy wrote an article for The Times about the Mariam Appeal ("the appeal") which had been founded in 1998 by Mr George Galloway and which had recently closed down. In 2003 Mr Galloway was a high-profile Member of Parliament, as he is again today. He had for many years been an outspoken critic of the economic sanctions imposed by the United Nations upon the regime of Saddam Hussein in Iraq. He had contended that one of their consequences had been to deprive Iraqi citizens of necessary medical treatment. The objects of the appeal, as stated in its constitution, had been to provide medical assistance to the Iraqi people, to highlight the causes of an epidemic of cancer in Iraq and to arrange for the medical treatment outside Iraq of certain Iraqi children. The appeal had been named after Mariam Hamza, a young Iraqi girl who was suffering from leukaemia.

161. In his article in April 2003 Mr Kennedy alleged that money donated by the public to the appeal had been improperly used to fund visits by Mr Galloway to Iraq and elsewhere and to support political campaigns against the UN sanctions and against Israel. A reader of the article seems to have referred it to the Attorney General, who, as an officer of the Crown, has a long-standing role as the protector of charities. The Attorney referred it on to the Charity Commission ("the Commission").

162. In 2003 the Commission was governed by the Charities Act 1993 ("the 1993 Act"), which was later amended by the Charities Act 2006 and which has now been replaced by the Charities Act 2011. The Commission has five *objectives*, of which the first is to increase public trust and confidence in charities, the third is to promote compliance by charity trustees with their legal obligations of control and management and the fifth is to enhance the accountability of charities to donors, beneficiaries and the general public (section 1B(2) of the 1993 Act, as amended). The Commission has five general *functions*, of which the third includes the investigation of apparent misconduct in the administration of charities and the fifth includes the dissemination of information in connection with the performance of its other functions and the pursuit of its objectives (section 1C(2)). The Commission has six general *duties*, of which the fourth is that, in performing its functions, it should have regard to the principles of best regulatory practice, including those of accountability and transparency (section 1D(2)).

163. The Commission also has power to institute an inquiry with regard to a particular charity: section 8 of the 1993 Act. In June 2003 it instituted an inquiry into the application of the money raised by the appeal between March 1998 and April 1999. In November 2003 it instituted a second inquiry into the application of the money raised by the appeal throughout its years of operation. The two inquiries were combined.

164. In June 2004, pursuant to its power under section 8(6)(a) of the 1993 Act, the Commission published its statement of the results of the two inquiries. In the statement, which was very short, it expressed the following conclusions:

(a) that the objects of the appeal had been charitable and that, in the light of the size of its income, it should have been registered with the Commission as a charity but that the founders of the appeal had acted on legal advice to the contrary and so were unaware that they had created a charity;

(b) that, apart from members of the public, the major donors to the appeal had been the United Arab Emirates, someone in Saudi Arabia and a Jordanian citizen, namely Mr Zureikat;

(c) that Mr Galloway had confirmed that the appeal did not produce profit and loss accounts or balance sheets;

(d) that the Commission had been unable to obtain all the financial records of the appeal;

(e) that Mr Galloway had explained that, when in 2001 the chairmanship of the appeal had been transferred from himself to Mr Zureikat, he had sent the records to him in Jordan and Iraq and was unable to retrieve them;

(f) that Mr Galloway had assured it that all monies received by him out of the funds of the appeal had related to expenses incurred by him when he had been chairman of it;

(g) that two of the trustees had received salaries out of appeal funds in breach of trust but that their work had been of value to the appeal and no one had acted in bad faith in that regard, with the result that the Commission would not be taking steps to recover the salaries;

(h) that funds had been used to further political activities, in particular the campaign against the sanctions, but that the activities had been ancillary to the purposes of the appeal in that the trustees might reasonably have considered that they might secure treatment for sick children; and

(i) that, not only because the appeal had closed down but also because the political activities had been ancillary to its purposes and its records had been difficult to obtain, it was not proportionate for the Commission to pursue its inquiries further.

165. Mr Kennedy did not immediately seek information about the statement published in June 2004. Later, however, he sought information designed to elucidate issues, raised by the statement, in relation to the way in which the funds of the appeal had been deployed (with particular reference to para 5(d), (e), (g) and (h)

above) and to the way in which the Commission had conducted its inquiries (with particular reference to para 5(h) and (i) above).

166. The UN Oil-for-Food Programme, which ran from 1996 to 2003, enabled the Iraqi state to sell oil in return for payments made into an account controlled by the UN from which Iraq was entitled to draw only for the purchase of food and other humanitarian-related goods. In 2005 reports by the UN and by the US Senate concluded that the programme had attracted improper payments of commissions to, or at the direction of, members of the Iraqi government by Iraqi companies keen to be allowed to participate in sales either of the oil or of the humanitarian-related goods; and that the appeal had received donations which represented some of these improper payments. Thus in December 2005 the Commission instituted a third inquiry into the appeal under section 8 of the 1993 Act. In June 2007 it published a statement of the results of this inquiry under section 8(6). In the statement, which was even shorter than the first, the Commission said that it had examined a large body of sensitive evidence obtained from international sources. It added that it had directed the five known members of the executive committee of the appeal, whom it took to be its trustees, to answer questions and that, while the three members resident in the UK (including Mr Galloway) had done so, the two resident abroad (including Mr Zureikat) had not done so. The Commission then proceeded to express the following conclusions:

(a) that the funds known to have been paid into the appeal totalled £1,468,000, of which Mr Zureikat had donated over £448,000;

(b) that, of the funds donated by Mr Zureikat, about £300,000 represented his improper receipt of commissions referable to the Oil-for-Food programme;

(c) that Mr Galloway and the other trustees resident in the UK denied all knowledge of the source of Mr Zureikat's donations;

(d) that, although unaware that they had created a charity, the trustees should have been aware that they had created a trust, which required them to be vigilant in accepting large donations, particularly from overseas;

(e) that, in breach of their duty of care, the trustees had failed to make sufficient inquiries into the source of Mr Zureikat's donations;

(f) that Mr Galloway himself, however, "may have known of the connection between the appeal and the programme" (by which the Commission appears to have meant that, despite his denial, he may have known the source of Mr Zureikat's donations); and

(g) that the Commission had liaised with other agencies in relation to possible illegality surrounding Mr Zureikat's donations but, in the light of the closure of the appeal in 2003 and the distribution of all its funds, it proposed to take no further action.

167. On the date of publication of this second statement Mr Kennedy made his request for information to the Commission under the Freedom of Information Act 2000 ("the FOIA"). He considered that the statement was surprisingly short and extremely unsatisfactory. He took the view that Mr Galloway's possible misconduct in relation to the appeal was a matter of considerable public importance and that the material said to justify the serious allegations made against him had not been identified. Mr Galloway, for his part, was equally critical of the statement. He announced that its conclusion that the appeal had received improper funds was palpably false and that parts of it were sloppy, misleading and partial and would have been corrected if the Commission had bothered to interview him. The Commission later responded that Mr Galloway had declined its invitation to interview him.

168. At an early stage of the protracted litigation to which it has given rise, Mr Kennedy confined his request for information to the following four classes of documents:

(a) those which explained the Commission's conclusion that Mr Galloway may have known that Iraqi bodies were funding the appeal;
(b) those by which it had invited Mr Galloway to explain his position and by which he had responded;
(c) those which had passed between it and other public authorities; and
(d) those which cast light on the reason for the institution and continuation of each of the three inquiries.

169. All members of this court agree that, in principle, the Commission's two statements raise questions of considerable public importance and that Mr Kennedy's confined request would assist in answering them. What was the extent of the breach of duty on the part of Mr Galloway, a public figure and a Member of Parliament, in relation to the well-publicised appeal? Could the doubt about his knowledge of the source of Mr Zureikat's donations reasonably have been resolved in one way or the other? What was the reason for the Commission's apparent failure to interview Mr

Galloway? Did the Commission conduct the inquiries with sufficient rigour? Were other parts of the statements, for example their treatment of his expenses and of the funding of political activities, unduly indulgent towards Mr Galloway? To the extent that they were unduly indulgent, why so?

170. In making his confined request Mr Kennedy was careful to acknowledge, first, that parts of the information sought might attract absolute exemption under the FOIA (for example to the extent that it was covered by Parliamentary privilege under section 34 or represented either personal information under parts of section 40 or information provided in confidence under section 41); and, second, that other parts of it might fall within some of the qualified exemptions set out in the FOIA and, if so, would require the weighing of the rival public interests pursuant to section 2(2). Indeed, when the Commission came to prepare a schedule of the documents held in connection with the inquiries (which it said were held in 25 lever-arch files, as well, in part, as electronically), it indicated, in relation to each document, the exemption or exemptions prescribed by the FOIA on which it proposed, if necessary, to rely. Among the indicated exemptions was one which it ascribed to every document, namely that provided by section 31 of the FOIA. The effect of section 31(1)(g), read together with section 31(2)(b), (c) and (f), is to raise a qualified exemption in relation to information of which disclosure would be likely to prejudice the Commission's exercise of its functions for the purpose of ascertaining whether anyone has been guilty of improper conduct in relation to a charity or whether the circumstances justify regulatory action or for the purpose of protecting the administration of charities from mismanagement. So it is an important exemption reflective of the public interest that the Commission should function effectively. In its evidence the Commission argued that substantial disclosure to Mr Kennedy would forfeit the confidence of those who had cooperated, or might otherwise cooperate, with its inquiries and so would prejudice the future exercise of its functions for the specified purposes. One might have anticipated lively argument on behalf of the Commission in that respect, as in others, had it to date been necessary to proceed to consider the qualified exemptions.

171. But the argument which finds favour with the majority of the members of this court is that section 32(2) of the FOIA provides an absolute exemption from disclosure – at any rate under the FOIA - of any of the information in any of the documents held in the lever-arch files, apart from that contained in about seven documents which the Commission received or created following the end of the third inquiry and which have therefore already been disclosed. The four steps in the argument are (1) that all the other information is contained in documents placed in the Commission's custody, or created by it, for the purposes of the three inquiries; (2) that the Commission holds the information only by virtue of its being so contained; (3) that, on the application to section 32(2) of conventional canons of construction, facts (1) and (2) satisfy its requirements; and (4) that the rights of Mr Kennedy under article 10 of the European Convention on Human Rights ("the

ECHR") are not such as, under section 3(1) of the Human Rights Act 1998 ("the 1998 Act"), to require that, so far as possible, section 32(2) be construed differently so as to be compatible with them.

172. In my view the closest scrutiny needs to be given to the only debateable step in the argument, which is step (4). Were that step valid, the result would be that, instead of a document-by-document inquiry into the applicability of other absolute exemptions, or of qualified exemptions followed (if applicable) by the weighing of public interests under section 2(2), a blanket exemption from disclosure – under the FOIA – is thrown over the entire information. Every part of it would be exempt from disclosure – under the FOIA – irrespective of its nature; of the degree of legitimate public interest which its disclosure might generate or help to satisfy; and of the degree of harm (if any) which its disclosure might precipitate.

173. The Commission stresses that the information would not be exempt from disclosure under the FOIA for ever. Following 30 years (reduced to 20 years but not in respect of a record created prior to 2013) from the year in which it was created, a record becomes a historical record, information in which is not exempt under section 32 of the FOIA: see sections 62(1) and 63(1). But, in this regard, one must also have an eye to the Public Records Act 1958. The effect of section 3(4) of the 1958 Act is that, by the end of that period of 30 years, such documents relating to the inquiries as still exist will have been transferred by the Commission to The National Archives. But not all the documents currently in the 25 lever-arch files will then still exist: for, pursuant to section 3(1) of the 1958 Act, the Commission will have arranged for the selection of the documents which in its view merit permanent preservation in The National Archives and, pursuant to section 3(6), it will have caused the remainder to be destroyed. It is unreal to suggest that, subject to any continuing exemptions, likely access to some of the information after 30 years would satisfactorily meet the public interest, which Mr Kennedy aspires to satisfy, in the conduct of a public figure in relation to a charity and in the quality of the Commission's supervision of it.

174. The suggested exemption from disclosure – at any rate under the FOIA - of the information in the Commission's documents for a generation is even more startling when attention is paid to the law's treatment of disclosure of two other classes of documents addressed by section 32.

175. First, court records. A court is not a public authority for the purposes of the Act. But, particularly if it is or has been a party to court proceedings, a public authority is likely to hold copies of documents filed with the court, or created by the court, for the purposes of such proceedings. Information thus held by a public authority enjoys absolute exemption from disclosure: section 32(1). But the court itself will also hold copies of those documents. Thus, by way of counter-balance to

the exemption from disclosure of such information if held by a public authority, there is the *right* of the citizen to obtain copies of specified documents from the court file (rule 5.4C(1), Civil Procedure Rules 1998) and the *power* of the court to permit him to obtain copies of, in effect, all other documents on the file (rule 5.4C(2)). The citizen's right and the court's power are each exercisable at any stage, whether while the proceedings are pending or following their conclusion.

176. Second, records of inquiries held under the Inquiries Act 2005 ("the 2005 Act"). Section 32(2) of the FOIA applies to information contained in documents placed in the custody of, or created by, a person conducting an inquiry held under any statutory provision: section 32(4)(c). By contrast with the Commission's inquiries, held under section 8 of the 1993 Act, inquiries are sometimes held at the direction of a minister, within terms of reference set out by him, under the 2005 Act. At the end of such an inquiry, its chairman must cause documents given to, or created by, the inquiry to be passed to, and held by, the minister: see rule 18(1)(b), Inquiry Rules 2006 (SI 2006/1838). Section 18(3) of the 2005 Act provides that section 32(2) of the FOIA does not apply in relation to information contained in documents thus passed to, and held by, the minister (being a public authority). It is true that, under section 19 of the 2005 Act, the minister and the chairman may each, prior to the end of the inquiry, impose restrictions on the disclosure of material provided to it if they consider them conducive to the fulfilment of the inquiry's terms of reference or necessary in the public interest: subsections (1), (2) and 3(b). Importantly, however, the restrictions do not, subject to an irrelevant exception, apply to disclosure by the minister himself (or by any other public authority holding any of the material) following the end of the inquiry: section 20(6). Parliament has therefore seen fit to remove the absolute exemption under section 32(2) of the FOIA from material created or produced for an inquiry held under the 2005 Act once it has come to an end and to allow disclosure of it thereafter to be governed by the suite of qualified exemptions and of the other absolute exemptions set out in the FOIA. In opposing Mr Kennedy's appeal, the Commission has been unable to explain why the disclosure of material referable to statutory inquiries held otherwise than under the 2005 Act should apparently be governed so differently.

177. In my view the difficult question is whether Mr Kennedy has human rights apt enough and strong enough to repel the apparent obstruction of him, and therefore of his readers, by section 32(2) of the FOIA from addressing the concerns which I have identified through disclosure under that Act.

178. The right under article 10 of the ECHR is to "freedom of expression", including "freedom to hold opinions and to receive and impart information and ideas without interference by public authority". So the receipt of information is expressly included within the right. The right has to be "without interference by public authority". These words have given rise to a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face: is the public

authority basically restrained from interfering only with a person's receipt of information from another private person willing to impart it (the *Leander* approach) or does the restraint extend to interference with, in other words to obstruction of, a person's receipt of information from the public authority itself (the wider approach)? A purely textual answer, with particular concentration on the word "freedom", might favour the narrow approach. That answer would also respect the negative phraseology of the public authority's obligation, whereas the opposite answer would give rise to a positive obligation of what, subject to whatever interpretation may be placed upon paragraph 2 of the article, might prove to be of substantial proportions. Nevertheless a brief reflection on the nature of freedom of expression suggests difficulties with the narrow approach. Without freedom to receive certain information, there is no freedom to proceed to express it; and a person's freedom to express the information is likely to carry much greater value for the public if the person holding the information is unwilling to impart it to him. In his illuminating and appropriately cautious discussion of these tensions in *Freedom of Speech*, 2nd ed (2005), Professor Barendt states, at p 110, that the link between freedom of expression and freedom of information is undeniable. Indeed, if efficacy is to be given to the right to freedom of expression, there is no reason to consider that information held by a public authority (whether relevant to itself or to a private person or, as in the present case, to both) is of lesser significance to it than information held by a private person. On the contrary.

179. It is with these difficulties that the European Court of Human Rights ("the ECtHR") has recently been required to wrestle.

180. Lord Mance has charted the iteration by the ECtHR in 1987 of what it described as the "basic" scope of the right to receive information under article 10 in the *Leander* case and of its reiteration in the *Gaskin, Guerra* and *Roche* cases (all cited by him in para 63 above). The trouble is that, apart from that of *Guerra,* the cases were all – in some quarters controversially – subjected to principal analysis under article 8 instead of under article 10, with the result that the treatment of article 10 was extremely short. Even in the *Guerra* case it was article 8 which won the day for those living under the polluted Italian skies who had complained that their right to receive information about the attendant risks had been violated. They had however cast their claim primarily under article 10 and so in their case there was fuller treatment of article 10 than in the other cases. It is within that fuller treatment that the first straws in the wind can be discerned. First, a majority of the Commission of the ECtHR had considered that a positive obligation on the state under article 10 to ensure a right to receive information could not be excluded in principle and, in the light of the environmental dangers, had arisen in the present case (paras 42 and 47 of the Commission's opinion, set out in para 36 of the ECtHR's judgment). Indeed that majority had gone further by suggesting that the state's obligation under article 10 was to *collect* relevant information as well as to *impart* what it already held (para 49 of its opinion). As a preface to its rejection of that opinion the ECtHR,

by a majority, recognised – but of course distinguished – cases in which the general public had a right to receive information as a corollary of the specific journalistic function of imparting information on matters of public interest; then, prior to turning to article 8, it explained its disagreement with the Commission but specifically with regard to the suggested obligation "to collect and disseminate" information (para 53). In separate opinions one judge of the ECtHR agreed with the Commission's analysis of the scope of article 10 and six others explained that their disagreement with it applied only to the authority's suggested obligation to *collect* information rather than to *impart* what it already held. All this was being said back in 1998.

181. From these early straws it is necessary to chart the ECtHR's incremental development of the wider approach in no less than six decisions over the last five years.

182. First, the *Társaság* case, cited by Lord Mance in para 71 above. I agree with him at para 74 that its significance is lessened by Hungary's concession that article 10 was engaged. I cannot accept however that the ECtHR was setting itself up as some further Hungarian appellate court and holding only that the court of appeal there had misapplied its Data Act. The ECtHR, at paras 35 to 38:

(a) cited the *Leander* case;

(b) asserted, albeit without much basis, that the court had recently advanced towards a broader interpretation of article 10;

(c) distinguished the *Guerra* case on the basis that there the request had been for the state to collect information rather than to disclose what it already held;

(d) held that, in requesting the constitutional court to disclose the MP's complaint, the civil liberties union was acting, like the media, as a social watchdog seeking to generate informed public debate; and

(e) concluded that, in refusing the request, the constitutional court, which had a monopoly over the information, had unnecessarily obstructed that debate.

183. Second, the *Kenedi* case, also cited in para 71 above. The historian's complaint under Article 10 was upheld on the basis that Hungary's protracted obstruction of his request for information about the functioning of its security service in the 1960s had not been prescribed by law. For present purposes the significance of the case lies in the ECtHR's statement, at para 43, that access to original documentary sources for legitimate historical research was an essential element of the right to freedom of expression, for which it cited the *Társaság* case.

184. Third, the *Gillberg* case, cited in para 76 above. The applicant complained that his criminal conviction for misuse of public office, namely for disobeying court orders that the material collected by his university in its study of a mental disorder should be disclosed to K and E, somehow violated his rights under article 10. The complaint was so bizarre that, in rejecting it, the Grand Chamber had no need to attend to the recent widening of the ambit of the article in aid of the generation of important debate by social watchdogs. At para 83 it set out the *Leander* approach but more significantly noted at para 93 that K and E had rights to receive the material under article 10 upon which the applicant's suggested right would impinge.

185. Fourth, the *Shapovalov* case, also cited in para 76 above. The journalist complained that his rights under article 10 had been violated by Ukraine's refusal to disclose the arrangements made by its electoral commission for the controversial elections in 2004. The ECtHR rejected his complaint on the basis that, in one way and another, he had already been given access to information about the arrangements. The significance of the decision, made by a different section of the court (over which, as it happens, the current president of the entire court was then presiding), lies in its citation (at para 68) of the *Társaság* case for the proposition that the nondisclosure of information of public interest might disable public watchdogs from playing their vital role.

186. Fifth, the *Youth Initiative* case, also cited in para 76 above. The complaint under article 10 was upheld on the basis that, in defying a domestic order to inform the applicant of the number of people subjected to electronic surveillance in 2005, Serbia's interference with its rights had not been in accordance with law. The residual significance of the ECtHR's decision lies in the attention which, underlined in a concurring opinion, it gave at para 13 to a statement in 2011, entitled General Comment No 34, of the UN Human Rights Committee that a parallel article (article 19 of the International Covenant on Civil and Political Rights) included a right of access by the media to information of public interest held by public bodies; and in the approval which, at para 20, the court gave to the assertion in the *Társaság* case of that same principle in favour of public watchdogs for the purposes of article 10.

187. And sixth, and most importantly, the *Österreichische* case, also cited in para 76 above. There, four months ago, the ECtHR reminded itself of the *Leander* approach; noted however the recognition in the *Társaság* case of the court's recent advancement towards the broader approach; observed that information could not be imparted unless it had been gathered; accepted that the purpose behind transfers of land in the Tyrol was a subject of general interest; described the applicant as a social watchdog in that regard; held that the applicant had rights under article 10 with which the refusal of the Regional Tyrol Commission to disclose its decisions on appeal from the local commissions had interfered; and concluded that, although it was prescribed by Austrian law, the interference was unnecessary in that it was a blanket refusal to disclose any of the regional commission's decisions.

188. I cannot subscribe to the view that the development of article 10 which was in effect initiated in the *Társaság* case has somehow been irregular. The wider approach is not in conflict with the "basic" *Leander* approach: it is a dynamic extension of it. The judgment in the *Társaság* case is not some arguably rogue decision which, unless and until squarely validated by the Grand Chamber, should be put to one side. Its importance was quickly and generally recognised. Within a year of its delivery the European Commission For Democracy Through Law ("the Venice Commission") had hailed it as a "landmark decision on the relation between freedom to information and the … Convention" (Opinion No 548/2009, 14 December 2009); and, in giving the judgment of the Court of Appeal in *Independent News and Media Ltd v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262, Lord Judge CJ had, at para 42, specifically endorsed that description of it. In his judgment in the *Sugar* case, cited by Lord Mance at para 61 above, Lord Brown of Eaton-under-Heywood, with whom Lord Mance had agreed at para 113, had rejected at para 94 the proposition that, in the light in particular of the *Társaság* case, Mr Sugar had had any right under article 10 to disclosure by the BBC of a report held by it for journalistic purposes. But, as Lord Brown had proceeded to demonstrate at paras 98 to 102, interference by the BBC with any possible right of Mr Sugar under article 10 had clearly been justified; and that was the basis on which, at para 58, I had associated myself with the rejection of Mr Sugar's invocation of article 10.

189. In the light of the judgments of the ECtHR delivered following this court's decision in the *Sugar* case, in particular in the *Österreichische* case, this court should now in my view confidently conclude that a right to require an unwilling public authority to disclose information can arise under article 10. In no sense does this betoken some indiscriminate exposure of sensitive information held by public authorities to general scrutiny. The jurisprudence of the ECtHR, of which this court must always take account and which in my view it should in this instance adopt, is no more than that in some circumstances article 10 requires disclosure. In what circumstances? These will fall to be more clearly identified in the time-honoured way as, in both courts, the contours of the right are tested within particular proceedings. The evolution of the right out of "freedom of expression" clearly justifies the stress laid by the ECtHR on the need for the subject-matter of the request to be of public importance. No doubt it also explains the importance attached by that court to the status of the applicant as a social watchdog; whether that status should be a pre-requisite of the engagement of the right or whether it should fall to be weighed in assessing the proportionality of any restriction of it remains to be seen. Equally references in the ECtHR to the monopoly of the public authority over the information may need to find their logical place within the analysis: thus, in the absence of a monopoly, an authority's non-disclosure may not amount to an interference. Where the article is engaged and where interference is established, the inquiry will turn to justification under para 2. If refusal of disclosure has been made in accordance with an elaborate statutory scheme, such as the FOIA, the public authority will have no difficulty in establishing that the restriction has been prescribed by law; and the live argument will surround its necessity in a democratic

society, in relation to which the line drawn by Parliament, if susceptible of coherent explanation, will command a substantial margin of appreciation in the ECtHR and considerable respect in the domestic courts.

190. Irrespective of its precise contours, the right to require a public authority to disclose information under article 10 applies to Mr Kennedy's claim against the Commission. Mr Kennedy can tick all the boxes to which I have referred. I will spend no time before concluding that a blanket prohibition on his receipt of any of the information for 30 years would be disproportionate to any legitimate aim; and, but for the argument to which I must now turn, this court should proceed to consider whether, pursuant to section 3 of the 1998 Act, it is "possible" to read section 32(2) of the FOIA so as to escape any such blanket prohibition.

191. I confess to some surprise at the solution to this appeal which the majority of the members of this court now devise. As Lord Mance explains in para 6 above, their solution lies in interpreting the intention of Parliament in including the 30-year prohibition within section 32 of the FOIA as being not that the documents should necessarily be exempt from disclosure for 30 years but that their disclosure should be regulated, otherwise than under the FOIA, by the "different and more specific schemes and mechanisms" which govern the operations of, and disclosure by, *courts*, *arbitrators* and *persons conducting inquiries.*

192. In relation to documents filed in, or created by, *courts,* or served in connection with proceedings in *courts*, there is no difficulty in subscribing to Lord Mance's interpretation. In that, as I have explained in para 175 above, courts are not subject to the FOIA and naturally have their own system for regulating disclosure of documents on their files, it is clearly undesirable that those seeking court documents of which copies happen to have come into the possession of public authorities should be entitled to require the latter to make disclosure under a different regime, namely the FOIA, which might prove less restrictive, or for that matter more restrictive, than it would be if made pursuant to a determination of the court. Hence subsection (1) of section 32 of the FOIA. But what was the Parliamentary intention behind subsection (2)? How much thought can have gone into its conclusion that, in the words of the Minister quoted by Lord Toulson at para 120 above, "statutory inquiries have a status similar to courts" and therefore that information in inquiry documents should, by subsection (2), be swept into the exemption aptly made in subsection (1) in respect of information in court documents?

193. In searching for what are said to be the more specific schemes and mechanisms which govern disclosure by *persons conducting inquiries* (for in the present case we can ignore *arbitrators*), let me first address inquiries under the 2005 Act. In relation to them, there is no scheme, apart from the FOIA, which governs disclosure following the end of an inquiry. What governs their disclosure is the

FOIA. In providing in section 18(3) of the 2005 Act that, when, following the end of an inquiry, the chairman passes the documents to the minister who established it, the 30-year prohibition ceases to apply, Parliament was not recognising that the FOIA did not apply to disclosure of them. On the contrary, it was recognising that the FOIA *did* apply to them in every respect until that point and that, save in respect of the 30-year prohibition which beyond that point could not be justified, it should continue to apply to them. The analogous provision in section 20(6) of the 2005 Act, namely that restrictions on disclosure imposed by the minister or the chairman prior to the end of the inquiry should not thereafter have effect, reflects the same thinking: namely that, in the absence of justification for non-disclosure under the specific provisions of the FOIA, the documents then fell to be disclosed thereunder. So the regime for disclosure in respect of inquiries conducted under the 2005 Act entirely undermines the conclusion that disclosure referable to inquiries is not to be governed by the FOIA; and of course the regime is precisely that for which Mr Kennedy contends in relation to inquiries conducted otherwise than under the 2005 Act. In para 33 above Lord Mance responds that Parliament's perception in 2005 of a need to disapply the 30-year prohibition in relation to disclosure of documents following the end of inquiries conducted under the new Act sheds no light on its perception in 2000. But his observation raises two linked questions. If Parliament had addressed the point in 2000, on what basis might its perception have been different? And, if in 2005 some other adequate scheme for disclosure was available, why did it perceive a need to disapply the prohibition and to cause disclosure to be governed by the other, specific provisions of the FOIA?

194. What, then, is suggested to be the more specific scheme and mechanism which governs disclosure by persons, such as the Commission, who conduct inquiries otherwise than under the 2005 Act? In respect of the Commission the scheme is said to lie within the 1993 Act, augmented by the common law. If so, one might expect to find it in section 8 of the 1993 Act, which defines the powers of the Commission in its conduct of inquiries and which does, at subsection (6), address a degree of publication in that regard. But it is only a report, or another statement of the results, of the inquiry which the subsection permits – or possibly obliges – the Commission to publish. The subsection does not address the disclosure of documents held by the Commission for the purpose of the inquiry. Section 10A provides for disclosure of a broader category of information by the Commission, which would no doubt include information obtained for the purposes of an inquiry; but that section provides for disclosure only to public authorities. The result is that there is no specific scheme for disclosure of such information to private citizens at all. The scheme is instead said to lie in the overall definitions of the Commission's *objectives*, *functions* and *duties* in sections 1B, 1C and 1D of the 1993 Act: in particular in its *objective* of increasing public confidence in charities (section 1B(3)1); in its general *function* of disseminating information in connection with the performance of its functions (section 1C(2)5); and in its *duty* to have regard to the need for transparency of regulatory activities in the performance of its functions (section 1D (2) (4)).

195. It has never been suggested to Mr Kennedy, whether by the Commission itself in its initial responses to his request for information under the FOIA in 2007 or later through solicitors, that his request should be made otherwise than under the FOIA. On the contrary the stance of the Commission has been that the FOIA indeed governed his request and that its terms precluded accession to it. There did come a time, apparently in the Court of Appeal, when counsel for the Commission began to argue, as they have continued to argue in this court, that, when read with section 78 of the FOIA, sections IC and ID of the 1993 Act conferred a residual power on the Commission to disclose documents. But counsel have never accepted that the Commission was under any duty in this regard or that the circumstances of Mr Kennedy's request might be such as to attract exercise of the suggested power in his favour.

196. The majority of my colleagues in this court proceed to introduce the suggestion that the scheme for disclosure which they discern in sections 1C and 1D of the 1993 Act is underpinned by the common law principle of open justice which, in an eloquent judgment delivered when he was a member of the Court of Appeal, Lord Toulson invoked in explaining why journalists were entitled to disclosure by a magistrates' court of witness statements and correspondence to which reference had been made at a hearing of applications for extradition orders: see *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* cited in para 47 above.

197. The result, according to the majority, is that, confronted with a request such as that of Mr Kennedy for disclosure of the material in the exercise of its functions and in the performance of its duties under sections 1C and 1D of the 1993 Act, the Commission has a duty to accede to it in the absence of persuasive countervailing considerations (Lord Mance, at paras 49 and 56); and that a refusal to disclose could be the subject of challenge in the form of judicial review by a High Court judge, who should adjust the level of his scrutiny so as to accord with the principles of accountability and transparency contained in the 1993 Act (Lord Mance, at para 55).

198. In my view the scheme identified by the majority for disclosure by the commission outside the FOIA is profoundly unsatisfactory. With respect, it can scarcely be described as a scheme at all and there is certainly no example of its prior operation or other recognition of its existence. Compare it with the scheme under the FOIA which, apart from the apparent prohibition for 30 years, identifies an elaborate raft of prescribed situations in which the Commission is entitled, or subject to the weighing of rival interests may be entitled, to refuse disclosure; and under which a refusal can be countered by application to an expert, namely the Information Commissioner, who takes the decision for himself (section 50(1)) and whose decision can be challenged on points of law or even of fact by an expert tribunal (section 58(1)) and in effect without risk as to costs.

199. Although the majority of my colleagues reject Mr Kennedy's assertion that he has rights under article 10 which are engaged by his request for disclosure by the Commission, they proceed to suggest that his entitlement to disclosure otherwise than under the FOIA would be likely to be as extensive as any entitlement under article 10 (Lord Mance, paras 45, 50, 56, 92 and 101(iv)). The suggested scheme otherwise than under the FOIA is so vague and generalised that I regard the determination thereunder of any request for disclosure as impossible to predict. It may be that, in practice, the Commission and, on judicial review, the High Court judge would reach for the helpful prescriptions in the FOIA and, in effect, work in its shadow. But if, as I consider, Mr Kennedy's rights under article 10 are engaged by his request, I even have doubts whether any refusal to disclose a document otherwise than under the FOIA could be justified under para 2 of the article. For restrictions on the exercise of his rights under article 10 must be "prescribed by law", which in the words of the ECtHR, "must… be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct" (*Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105). It is possible that the so-called scheme for disclosure otherwise than under the FOIA might fail that test. Lord Mance suggests at para 37 that, if that scheme failed the test, so would the scheme for disclosure of court documents at the direction of a judge: but the adequacy of a broadly discretionary power may be very different when exercised by a judge with no axe to grind rather than, albeit subject at any rate in theory to judicial review, by an executive authority requested to disclose documents which may justify criticism of it. Although on the majority's analysis of the reach of article 10 this problem does not arise, on my analysis it does arise. My doubts in this regard fortify my firm conclusion that, including in the interests of the Commission, it is important that, if possible, requests for disclosure of information obtained for the purposes of an inquiry should be determined under the FOIA, subject of course to the overarching requirement in para 2 of the article that any refusal should be "necessary in a democratic society".

200. The problem is, of course, the absolute exemption from disclosure apparently cast over such information by section 32(2) until, at the expiry of 30 years, it becomes a historical record. I agree with Lord Mance, for the reasons which he gives at para 28 above, that the natural construction of the subsection is to that effect. The alternative construction is that the subsection governs only "information held… for the purposes of the inquiry" with the result that, once the inquiry has been concluded, the subsection no longer governs it. The alternative construction is wrong. But it is arguable. The Court of Appeal considered that, as a matter of grammar, the subsection was at least ambiguous and the alternative construction of it might even be preferable (Ward LJ, para 21, [2011] EWCA Civ 367, [2012] 1 WLR 3524). In granting permission for the alternative construction to be argued in the present appeal, this court provisionally endorsed its arguability. In paras 223 to 233 below Lord Carnwath stresses the muscularity of the power given to courts under section 3 of the 1998 Act to read primary legislation in a way which is

compatible with rights under the ECHR. For the reasons which he there gives, I would read the subsection in accordance with the unnatural, alternative, construction with the result that, following the end of the Commission's inquiries, it had no effect and that, at long last, Mr Kennedy's request should begin to be appraised by reference to the application to the Commission's documents of the other, elaborate, provisions set out by Parliament in the FOIA.

201. So I would have allowed the appeal.

LORD CARNWATH

Summary

202. In agreement with Lord Wilson, I would allow the appeal. I would uphold the view of the Information Tribunal, supported by recent Strasbourg cases, that section 32(2) as interpreted by the Charity Commission involved a disproportionate interference with Mr Kennedy's rights under article 10; but that the section can and should be "read down" under section 3 of the Human Rights Act 1998 ("HRA") to avoid that effect. I shall comment also on the alternative "common law" or "open justice" approach, which, though now adopted by the majority, was unsupported by any of the parties before us, in my view for good reasons.

The course of the case

203. The case has had a tortuous history. It began with Mr Kennedy's request to the Charity Commission as long ago as 8 June 2007. It has arrived at the Supreme Court more than six years later, after detailed consideration by the Information Commissioner, the Information Tribunal (twice), the High Court, and the Court of Appeal (twice). During that time the parties have had to adapt their arguments to a frequently changing legal landscape. Important court decisions here and in Strasbourg have opened up new directions of thought or closed off others. These changes have continued up to and beyond the hearing in this court. After the close of the hearing, a new decision of the Strasbourg court (the *Austrian* case) has led to the need for further submissions to add to the voluminous bundles already before the court.

204. Against that difficult background, it is particularly important for us not to lose sight of what the case is about in terms of "merits". The public interest of the information sought by Mr Kennedy, and the legitimacy of his reasons as a journalist for seeking it, are not in dispute. Nor in my view has any convincing policy reason

been put forward for a blanket exemption, as contended for by the Charity Commission. In the first Court of Appeal judgment (12 May 2011) [2012] 1 WLR 3524, para 47, Jacob LJ spoke of his reluctance to adopt the Commission's construction which

> "allows all information deployed in the inquiry to be kept secret for 30 years after the end of the inquiry, regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure."

Although like his colleagues he felt constrained by what he called "the identity of section 32(1) and section 32(2)", he commented:

> "Clearly and obviously Parliament was treating documents deployed in legal proceedings before a court in exactly the same way as those deployed in an inquiry. It simply overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not. That may well have been a blunder which needs looking at" (para 48).

205. At that stage the judgment had been restricted to interpretation of FOIA itself, and the arguments that had been advanced under article 10 of the Convention the Court considered could not be decided on the material before it. The court took the very unusual step of remitting the case to the tribunal to report on the article 10 issue, more particularly whether section 32(2) should be read down under HRA section 3 "so that the exemption that it provides from disclosure of information ends upon the termination of the relevant statutory inquiry". The court accepted that the failure to take the point at the previous tribunal had been understandable, given that the judgments of the Strasbourg Court upon which Mr Coppel now relied (*Társaság a Szabadsagjogokert v Hungary* (2009) 53 EHRR 130 and *Kenedi v Hungary* (2009) 27 BHRC 335) had been delivered only at or about the time of the tribunal hearing and not reported until later. Further, the point was one of general public interest and the present case was an ideal one for it to be tested (per Ward LJ para 45).

206. By that time strong encouragement had been given in the Court of Appeal for the view that *Társaság* represented a significant change of direction in the Strasbourg jurisprudence. In *Independent News and Media Ltd v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262, Lord Judge CJ noted that the decision appeared to point the way to a wider scope for article 10, at least "where the media are involved and genuine public interest is raised" (para 41). In *British Broadcasting Corpn v Sugar (No 2)* Moses LJ described the case as "a landmark decision on freedom *to* information" (his emphasis), showing that article 10 may be invoked "not only by

those who seek to give information but also by those who seek to receive it" (para 76).

207. That view of the recent Strasbourg case law was followed after full argument by the very experienced tribunal in its report to the Court of Appeal (fairly described by Etherton LJ as an "excellent, clear and comprehensive analysis"). It followed a two day hearing in October 2011, including both evidence and legal submissions. Echoing Jacob LJ they concluded that a construction of section 32(2), which in effect allowed the state to prevent the disclosure of information for 30 years or more regardless of the nature of the information or the public interest in disclosure, amounted in the circumstances to an interference with Mr Kennedy's right to freedom of expression. That conclusion was reinforced by a detailed consideration of the classes of documents which were in issue, and the evidence they had heard on them (paras 47-54). They also held that such interference could not be justified under article 10(2). They accepted Mr Coppel's arguments that the Charity Commission's construction of section 32 produced "a paradigm of a disproportionate measure", which failed adequately to "balance the interests of society with those of individuals and groups"; that the interests of those affected were adequately protected by "the suite of exemptions in Part II of FOIA"; and that the public interest in disclosure of such information "clearly outweighs any interest in it being withheld" (paras 56-64), and that it was possible without "strained construction" to read the words of section 32(2) so that the exemption ends upon the termination of the statutory inquiry (paras 71-72).

208. By the time that report had reached the Court of Appeal, it had been overtaken by the decision of this court in *BBC v Sugar*, handed down only a few days before the restored hearing. The Court of Appeal held that they were bound by that decision to conclude that article 10 had no application. It followed that the Convention issues on which the tribunal had been asked to report were no longer open to Mr Kennedy. It was unnecessary therefore for the Court of Appeal to consider the tribunal's conclusions on the merits of the case, assuming article 10 had applied. It is against that background that the appeal has come before this court on the issues of principle under FOIA and article 10, one issue being whether we should revisit the reasoning in *BBC v Sugar* in the light of later developments.

209. Notwithstanding the position forced on the Court of Appeal by the Supreme Court decision, the conclusions of the tribunal remain in my view of considerable importance to the present appeal. If we were to hold that the tribunal had been right in its conclusion that article 10 applied, its view that section 32(2) involved a disproportionate interference with that right under article 10(2) should carry great weight. In principle that was a matter of factual judgment for the expert tribunal, from which appeal to the courts lies only on grounds of illegality or irrationality. Subject to the legal issues now before us, we have heard no argument that the tribunal's conclusions on article 10(2) were not soundly based on the material before

them. At the lowest they establish a strong prima facie case that, for the purposes of the Human Rights Act, the Charity Commission's approach involved a breach of Mr Kennedy's Convention rights.

The Human Rights Act 1998

210. The arguments about the scope of article 10 must be seen in their correct legal context. It is not our task to determine that issue authoritatively as a matter of Convention law. That is for the Strasbourg court. Our role is one of domestic law, as defined by the Human Rights Act. Under the Act "Convention rights", as defined by reference to articles of the Convention (section 1(1)), are to be given effect for certain specific purposes. They include:

i) *Interpretation (section 3(1))* Legislation must "so far as it is possible to do so" be "read and given effect" in a way compatible with Convention rights.

ii) *Incompatibility (section 4)* If a court is satisfied that a provision of primary legislation is incompatible with a Convention right it may make a declaration to that effect. Further action is then a matter for Ministers and Parliament (section 10).

iii) *Acts of public authorities (section 6(1))* It is unlawful for a public authority to act in a way which is incompatible with a Convention right. If the court finds that a public authority has so acted, it has wide powers to provide an appropriate remedy (section 8).

The relevance of the Strasbourg cases

211. In deciding the scope of Convention rights for these purposes we are not bound by Strasbourg decisions. Our duty is simply to "take (them) into account" (section 2(1)). The same duty applies to decisions of the former Commission and of the Committee of Ministers. The Act does not distinguish for this purpose between decisions at different levels of the hierarchy. It is left to the domestic court to determine the weight to be given to any particular decision. How to do so, as Lord Mance explains in para 60, has been discussed in a number of recent judgments of this court, most recently in *R (Sturnham) v Parole Board* [2013] UKSC 23, [2013] 2 AC 254). Grand Chamber decisions, of course, generally carry greater weight, but so may a consistent sequence of decisions at section level, or decisions which show a clear "direction of travel".

212. There is a continuing debate as to what "taking account" means in practical terms. Under the so-called *Ullah* principle (in the words of Lord Bingham: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20):

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

That formulation does not purport to offer any guidance as to how to determine the position under the Strasbourg jurisprudence, where the particular issue before the domestic courts has not been the subject of direct decision. *Ullah* itself was such a case. It concerned the court's approach to a so-called "foreign case", that is one where it was claimed

> "that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory (would) lead to a violation of the person's Convention rights in that other territory" (per Lord Bingham, para 9).

In *Ullah* the right in question was article 9 (right to religion), which had not in that context been the subject of a decision of the Strasbourg court. But the House felt able to determine that question by reference to principles derived from decisions relating to other Convention rights. (see E Bjorge, "The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence" (2013) 72(2) CLJ 289, for a useful discussion of Lord Bingham's formulation in the context of the findings in the case, and of later statements by Lord Bingham, judicial and extra-judicial.)

213. In *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356, paras 56-57, Lady Hale was guided by what she could "reasonably foresee" would be decided by the Strasbourg court. Similarly, in *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435, para 88, Lord Dyson looked for a "sufficiently clear indication in [the] Strasbourg jurisprudence of how the European court would resolve the question". There can, however, be no single working rule, since the nature of cases and the state of the relevant jurisprudence may vary greatly. In any event, the flexibility implied by the "taking into account" formula absolves the domestic court of the need to arrive at a definitive view of how the matter would be decided in Europe, where the current state of the jurisprudence makes that unrealistic. Other policy factors may also come into play.

214. In the present case we are faced with a novel state of affairs. Until the decision in *Társaság* (2009) there was an apparently settled position, confirmed by a series of Grand Chamber decision including *Leander v Sweden* (1987) 9 EHRR 433 and

culminating in *Roche v United Kingdom* (2005) 42 EHRR 600, that article 10 imposed no positive obligation on the state to disclose information not otherwise available. That was hardly surprising. As Lord Mance pointed out (para 98), article 10 is on its face drafted in narrower terms than the corresponding article 19 of the Universal Declaration, and other comparable provisions, which include a specific right to "seek" rather than merely "impart and receive" information.

215. Against that background *Társaság* at first sight represents an unexpected departure. It begins with a powerful affirmation of the importance of the rights of the press, but which is said to be based on the court's "consistent" practice:

> "26. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters… In this connection, the most careful scrutiny on the part of the Court is called for *when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of legitimate public concern…, even measures which merely make access to information more cumbersome.*
>
> 27 . In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom…" (emphasis added, citations omitted).

Having referred to the restrictive view of article 10 taken in earlier case such as *Leander v Sweden*, it continued:

> "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" (para 35).

216. Depending on one's point of view, *Társaság* could have been seen as a "landmark decision", or as an aberration by a single section of the court. In any event, it is difficult to see how on its own it could have led a domestic court, applying any of the tests outlined above, to adopt a different approach from that apparently

established by the Grand Chamber decisions. By the time of this court's consideration of *Sugar*, notwithstanding a further decision to like effect of the same section (*Kenedi*), the position in the view of the majority had not changed.

217. However, as explained by Lord Mance, matters have now moved on. *Társaság* has been treated as authoritative in three further decisions, culminating in the very recent *Austrian* case. Admittedly they remain decisions at section level, which have not yet been reviewed by the Grand Chamber. But Mr Coppel can rely on them as indicating a general "direction of travel" away from a strict application of article 10, at least in cases involving journalists or other "watchdogs" seeking information of genuine public interest. He can also point to the fact that this line of approach has now been adopted by three sections (First, Second and Fifth) involving more than 20 judges, including (in *Shapovalov*) the current President (Judge Spielmann). Headcounts can be misleading. But they appear to imply a substantial body of opinion within the court prepared to depart from the narrow principle apparently established by the Grand Chamber cases. I do not dissent from Lord Mance's criticisms of some of the reasoning in these cases, but the general direction of travel, pending a contrary decision of the Grand Chamber, in my view is clear.

218. In these circumstances the domestic court has two options. It can either stand by the earlier Grand Chamber jurisprudence pending reconsideration at that level, or it can decide to follow the new approach indicated by the section decisions. In choosing between them it will bear in mind that the latter course will deprive the government itself of the chance of seeking to have the issue tested before the Grand Chamber, since the government has no separate right of petition in Strasbourg. In some cases this will be a good reason for taking the more conservative approach. However, it is not the only factor in play. Account must also be taken of the unfairness to the claimant and the interests he represents of denying or delaying an immediate domestic remedy to which he is apparently entitled under the most recent Strasbourg case law. In my view, the court may also take account of how far the new approach accords with recognised principles of domestic law. The government's wish to challenge a new direction of travel in the Grand Chamber carries less weight if that direction is one which has already been taken by domestic law.

219. In the present case, the balance in my view strongly favours the claimant. I respectfully agree with Lord Wilson's analysis of the Strasbourg cases and the confident conclusions he draws from them. But even if I were not able to go so far, we can in my view "reasonably foresee" (in Lady Hale's words) how the case would be decided in Strasbourg at least at section level. It is enough for this purpose that the direction of travel of the recent cases gives clear support to the general approach of the First-tier Tribunal, and certainly that there is nothing in them to indicate that Strasbourg would adopt a narrower view. Further, no reason has been put forward for regarding that approach as involving any fundamental departure from domestic law principles. Indeed, on the majority's view of the "open justice" principle, it is

not a matter of "keeping pace" with Strasbourg; rather the reverse. Finally, given the importance of the case to Mr Kennedy and the public interest which he represents, it would be wrong to delay yet further the resolution of this issue to enable the case to move through the Strasbourg system, with no certainty as to whether or when it might find its way to the Grand Chamber.

220. I therefore approach the other issues in the case on the basis that the decision of the First-tier Tribunal is in accordance with the relevant Strasbourg jurisprudence; and that there is therefore at least a strong prima facie case that, for the purposes of the Human Rights Act, the Charity Commission's decision was in breach of Mr Kennedy's Convention rights.

Construction of section 32

221. Can section 32 be construed so as to give effect to Mr Kennedy's article 10 rights, either (i) on ordinary principles of statutory construction or (ii) by "reading down" under HRA section 3? On (i) I have nothing to add to what Lord Mance has said (paras 24-34). I agree with him, and with the Court of Appeal, that this ground of appeal must fail. On ordinary principles, having regard to the structure and context of section 32, subsections (1) and (2) must be read consistently with each other.

222. Once section 3 is brought into play, Mr Coppel's case is more persuasive. He is right, in my view, to say that it is "possible" to read the exemption in section 32(2) itself as limited to the period of the inquiry, as indeed the tribunal held. Indeed, if one takes subsection (2) on its own, that is arguably the more natural reading. The use of the present tense appears to direct attention at the holding of documents in the custody of, or created by, the person conducting the inquiry, for that limited purpose, rather than for longer term retention once the purposes of the inquiry have ceased. That reading involves no undue violence to the wording of that subsection taken on its own. It is only when the subsection is read in the context of the section as a whole, and of its place in the legislative scheme, that conventional principles require a different view to be taken. But "possibility" is all that section 3 requires.

223. One suggested reason for rejecting Mr Coppel's submission is because of its effect on the relationship of section 32 with section 2. That section provides a general public interest exception to the rights of disclosure under section 1, save in the case of "absolute exemptions", in relation to which section 1 rights are excluded altogether. If section 32(2) is read down in the way proposed, it would remain a provision conferring an "absolute exemption", albeit severely limited in time, and therefore the public interest defence would have no application even after the exemption had ceased to apply.

224. I am not convinced that this by itself is a sufficient answer under section 3. What is required is a "possible" construction. I accept that it must be "reasonably possible", so that the scheme of the legislation remains workable. But that does not necessarily require a construction which would achieve the most coherent legislative scheme, or indeed the one which the legislature intended. As the tribunal noted, section 3 is far-reaching (see the valuable summary of the principles proposed by counsel in *Vodafone 2 v Revenue and Customs* [2010] Ch 77, paras 37-38). Furthermore there is no reason to think that the absence of a public interest defence under section 2 would upset the balance of the statute. The tribunal was evidently satisfied that even apart from section 2 there were sufficient safeguards under the other more specific exemptions. The result would in my view be consistent with the fundamental features, or "the grain" of the legislative scheme: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, 572, per Lord Nicholls. As I said in *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862, [2012] QB 512, in relation to the operation of section 3 in the context of the Land Compensation Act 1973:

> "The precise form of wording required to give effect to the claimants' rights is not critical: *Ghaidan v Godin-Mendoza* …para 35, per Lord Nicholls,). The court is not required to redraft the statute with the precision of a parliamentary draftsman, nor to solve all the problems which it may create in other factual situations…" (para 68)

225. The respondents have a more fundamental response to Mr Coppel's argument. Section 3 does not come into play unless the "legislation" requires adjustment to make it compatible with Convention rights. They rely on the words of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, para 75:

> "Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention)."

In principle with respect that seems to me correct. There is no need to read down a single provision, if the legislation as a whole can be read and applied in a compatible way.

226. In the present statutory context, they argue, there is no need to depart from the ordinary construction of section 32. It provides an absolute exemption only to the duty to disclose under FOIA, but it does not constrain any right to information under article 10. Assuming such a right is established, it gives rise to an independent

duty enforceable under HRA section 6. FOIA section 78 in terms provides that nothing in the Act is to be taken as limiting "the powers of a public authority to disclose information held by it". Thus, in the absence of anything in the Charity Commission's own legislation which limits their power to comply with article 10, section 6 requires them to do so. They point to the Commission's general functions which include "disseminating information in connection with the performance of any of [their] functions" (1993 Act section 1C); their regulatory activities must be "accountable" and "transparent" (section 1D), and they have a general power to do anything "calculated to facilitate" or "conducive or incidental to" the performance of their functions (section 1E). These general provisions, it is said, are amply sufficient to provide a legislative basis for compliance with any disclosure obligations imposed on them under the HRA.

227. Mr Coppel's answer, as I understand it, is that general statutory powers of this kind cannot be relied on to supplant the detailed and restrictive legislative scheme of "information powers" conferred by Part II of the Act. This (by section 8) implicitly limits their power of disclosure in relation to inquiries to the making of reports under that section. He points by analogy to cases such as *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, where it was held that the incidental powers conferred by section 111 of the Local Government Act 1972 could not be used to override a specific set of statutory provisions dealing with the same subject matter.

228. Mr Clayton, for the first interveners, submits that the respondent's approach is highly artificial, since there had never been any suggestion that an application under other powers would have been treated differently, and such an argument if accepted would severely limit the scope of HRA section 3. He makes the further point that, according to *Társaság* (see above), interference with article 10 may be established by measures which "merely make access to information more cumbersome". A solution which depends on enforcement through the ordinary courts is clearly "more cumbersome" than the simple, cost-free right to recourse to the Information Commissioner.

229. I have found this a difficult issue to resolve. Section 32(2) exempts the Charity Commission from duties of disclosure under FOIA, but does not exclude any obligations they may have had under other legislation. To the extent that refusal of information resulted in a breach of article 10, Mr Kennedy had his remedy by action under HRA section 6. This would not have been restricted to ordinary judicial review principles. The court would have had power to investigate the facts, to the same extent as the tribunal, and would have been able to adapt its ordinary procedures for that purpose: see *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, para 28. On one view, there is no need to adapt section 32(2) when a comparable remedy was and is available to Mr Kennedy under other legislation.

230. I have come to the conclusion, however, that this is too narrow a view. It seems to me clear that the scheme established by FOIA was intended to be a comprehensive, albeit not necessarily exhaustive, legislative code governing duties of disclosure by the public authorities to which it applied. It is entitled: "An Act to make provision for the disclosure of information held by public authorities…" The preceding White Paper (Your Right to Know: The Government's Proposals for a Freedom of Information Act (Cm 3818)(1997)) stated that its purpose was to create "a general statutory right of access to official records and information" (para 1.2) and that it should have "very wide application" applying "across the public sector as a whole, at national, regional and local level" (para 2.1).

231. Further it was designed to create "rights" for the public, enforceable by a simple, specialist and generally cost-free procedure, rather than simply discretionary powers enforceable by the ordinary courts only on conventional public law principles. In considering whether the "legislation" is compatible with the Convention rights for the purpose of section 3, we should direct attention to the legislative code as so established by the Act, rather than to powers or remedies which may be available from other legal sources. Furthermore, I agree with Mr Clayton that recourse to the courts, even given the flexibility allowed by the developing principles to which Lord Mance refers, remains more cumbersome (and more costly) than the specialised procedures provided by the Act.

232. In so far as it is permissible to take policy considerations into account, I see advantage in an interpretation which allows such cases to be dealt with through the specialist bodies established by the Act, rather than the ordinary courts. I am impressed also by the lack of any apparent policy reason for extending the full exemption under section 32 to public inquiries of this kind. Lord Toulson (para 120) has quoted the statement made to Parliament by David Lock MP, Parliamentary Secretary, (Hansard, (HC Debs) Standing Committee B 25, January 2000, cols 281-282). To my mind this provides no support for the majority's approach. The passage provides a readily understandable explanation of the exemption provided for court records, based on the separation of powers, and the acknowledged jurisdiction of the courts to determine what documents should be disclosed. But not so for statutory inquiries. The only explanation given is that they "have a status similar to courts, and their records are usually held by the Department that established the inquiry". The first part of that sentence begs the relevant question and the second involves a non-sequitur. It certainly gives no indication of what powers it was thought the courts would have to direct disclosure, or indeed how "separation of powers" comes into it. The Minister's statement seems to me if anything to confirm Jacob LJ's view, at [2012] 1 WLR 3524, 3541, that no account had been taken of the lack of any formal machinery for the release of inquiry documents comparable to that of the courts.

233. Accordingly, I would decide this issue in favour of the claimant, and uphold the decision of the tribunal. It follows that, on the issues which have been argued before us, the appeal should succeed.

The "common law" alternative

234. On the basis of my conclusion on the points raised by the parties, the alternative approach becomes redundant. I approach it with caution, conscious that, because it is not before us for decision and was not supported by any of the parties, we have not had the advantage of full argument.

235. The foundation of this approach (and the stimulus for its introduction into the arguments before this court) lay in the judgments of the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420, [2013] QB 618, in which the exemption for court documents under FOIA section 32 was held not to preclude the court from permitting a non-party to have access to such documents if the court considered access appropriate under "the open justice principle" (para 74).

236. I have no reason to doubt the authority of the *Guardian News* case itself as applied to the ordinary courts, with which it was concerned, although I would not wish to pre-judge any counter-arguments which may be raised in a future case in this court. (The Court of Appeal reversed the decision of a strong Divisional Court). The cases to which Toulson LJ referred were about courts. Although he treated the same principle as applying "broadly speaking… to all tribunals exercising the judicial power of the state" (para 70), he gave no authority for that extension. Even assuming that wider proposition is correct, the Charity Commission cannot in my view be said to be "exercising the judicial functions of the state". Indeed as Lord Toulson points out, FOIA itself draws a distinction between tribunals or bodies "exercising judicial power of the State" and statutory inquiries (section 32(4)(a)(c)) Although he categorises the latter as involving a "quasi-judicial" function, he gives no further authority or explanation for the use of that somewhat imprecise and outmoded expression: see *Wade and Forsyth, Administrative Law*, 10th ed (2009), pp 35, 407; *R v Commission for Racial Equality, Ex p Hillingdon London Borough Council* [1982] AC 779, 787 F-G, per Lord Diplock.

237. The Charity Commission is the creation of a modern statute, by which its functions and powers are precisely defined. As the heading to the relevant group of sections indicates, section 8 is part of the Charity Commission's "information powers", the primary purpose of which is to enable it to carry out its responsibilities for the supervision of charities. Its role is administrative, rather than judicial, albeit subject to ordinary public law principles of fairness and due process.

238. Furthermore, such authority as there is points against any general presumption that "open justice" principles applicable to the courts apply also to the various forms of statutory or non-statutory inquiry. The issues in an analogous context were discussed in detail by the Divisional Court in *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [2003] QB 794. The court upheld the Secretary of State's decision that the inquiries into the 2001 outbreaks of foot and mouth disease should be held in private. Applying the approach of Sir Thomas Bingham MR in *Crampton v Secretary of State* (unreported) 9 July 1993, CAT no 824 of 1993, and distinguishing *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, the court held that there was no legal presumption that such an inquiry should be held in public (see also *de Smith's Judicial Review*, 7th ed (2013), para 1-104). As Simon Brown LJ said:

> "Inquiries… come in all shapes and sizes and it would be wrong to suppose that a single model – a full-scale public inquiry – should be seen as the invariable panacea for all ills" (para 42).

239. The Charity Commission's powers similarly allow for inquiries "in all shapes and sizes"; they may be inquiries "with regard to charities or a particular charity or class of charities, either generally or for particular purposes…" (1993 Act section 8(1)). The Act lays down no relevant requirements as to the form of the inquiries, or as to the involvement of the public. It has not been suggested that open justice principles require the inquiries themselves to be held in public, as would be the normal rule for courts.

240. Indeed this comparison, with respect, discloses a basic fallacy in the alternative approach. The foundation of the *Guardian News* decision lies in the strong constitutional principle that courts sit in public. It is no surprise that the starting point of Toulson LJ's judgment is a quotation from the great case of *Scott v Scott* [1913] AC 417, in which that principle was set in stone. It is not a large step from that principle to hold that papers supplied to the judge for the purpose of an open hearing should in principle be made available to the public, absent good reasons to the contrary. For statutory inquiries, such as those conducted by the Charity Commission, there is no such underlying principle that they should sit in public. The essential foundation that is needed for application of the *Guardian News* approach is wholly absent. This is not to say that the courts might not in due course develop a more general principle of openness, applicable also to different forms of statutory inquiry. But that would involve a significant extension to the existing law – arguably a bolder leap into the unknown than the modest step we are being asked to take (after full argument) in relation to article 10.

241. In my view there is nothing in the *Guardian News* case, or any other existing authority to support the view that common law principles relating to disclosure of documents in the courts can be transferred directly to inquiries. It must depend on the statutory or other legal framework within which the particular inquiry is established. In the context of the Charities Act, the particular form of publicity envisaged by the Act is the publication of a report under section 8, but the Commission is given a discretion as to its form.

242. As has been seen, I agree that the functions conferred by 1993 Act, sections 1B-1E, not only give the Charity Commission powers to provide information of the kind sought by Mr Kennedy, but also give effect to a general principle of "transparency". However, principles of transparency need to be balanced against other policy issues peculiarly within the competence of the Commission, rather than the courts. For example, the Commission was clearly entitled in my view (in their letter of 4 July 2007) to give weight to the need to protect its relations with third parties on whose co-operation it relies. I find it difficult to accept the proposition that these general powers are comparable to "Mr Coppel's most expansive interpretation" of article 10. I see no fair comparison between the broad set of powers conferred by those sections, and the specific and enforceable "rights" conferred by FOIA or article 10.

243. Finally, I turn to Lord Mance's discussion (para 51ff) of the principles which a judicial review court would apply to an application for disclosure of inquiry documents. It appears to be an important part of his reasoning that these could give a claimant in the position of Mr Kennedy remedies at least comparable to those available, on Mr Coppel's argument, under FOIA. On this topic, anything we say must be provisional, pending an appropriate application for judicial review coming before the courts. The limits of the court's powers in such circumstances are best determined in the context of an actual case where the issue arises for decision after full argument. However, it is appropriate that I should make some comment.

244. First, it is important to be clear as to the nature of the alternative procedures which are under comparison. On the view I take of article 10 and HRA section 3, the applicant would have a right under FOIA to a two stage process of independent, cost-free, specialist review of the Charity Commission's decision, on fact and law, first by the Information Commissioner, and then by the First-tier Tribunal (FOIA sections 50, 58). If on the other hand I am wrong about the ability of the court to read down section 32, so that remedies under FOIA are excluded, Mr Kennedy's article 10 rights could be asserted in court by an application for judicial review under the HRA. Under the HRA, as I have said, the claimant would have a right to full merits review by the court, again on fact and law. The court's function in such a case is to decide for itself whether the decision was in accordance with Convention rights; it is not a purely reviewing function (see *Huang v Secretary of State for Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 11, per Lord Bingham). Such

proceedings for judicial review would incidentally provide an opportunity to test the scope of any related common law rights.

245. By contrast, under the alternative "common law" approach, which eschews reliance on article 10, the applicant would be entitled only to judicial review on conventional administrative law principles, subject to the ordinary incidents as respects fees and costs. As Lord Mance points out, there is authority for a closer or more "intense" form of review (or "anxious scrutiny") in some contexts, particularly where fundamental human rights (such as the right to life) or constitutional principles are at stake. However, even in cases to which it applies, as appears from the words of Lord Phillips MR, (*R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 26, para 112) cited by Lord Mance (para 52), the role of the courts is often more about process than merits.

246. Lord Mance also quotes my own discussion of the developing principles as I saw them in 2004, in *IBA Health Ltd* v *Office of Fair Trading* [2004] EWCA Civ 142 [2004] ICR 1364, para 88ff. Ten years on that statement holds good in my view, but the jurisprudential basis for the more flexible approach, and its practical consequences in different legal and factual contexts, remain uncertain and open to debate (see *de Smith op cit* paras 11-086ff and the many authorities and academic texts there cited). In particular, it is at best uncertain to what extent the proportionality test, which is an essential feature of article 10(2) as interpreted by the Strasbourg court, has become part of domestic public law (see *de Smith* paras 11-073ff).

247. For the moment, and pending more detailed argument in a case where the issue arises directly for decision, I remain unpersuaded that domestic judicial review, even adopting the most flexible view of the developing jurisprudence, can achieve the same practical effect in a case such as the present as full merits review under FOIA or the HRA.

248. In conclusion, for the reasons stated above, and in respectful disagreement with the majority, I would have allowed the appeal.