



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2010/0107

BETWEEN:

Mr Julian Todd

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

British Broadcasting Corporation

Additional Party

RULING ON PUBLISHING RESPONSES

Representation

The Appellant in person (with an observer)

For the Respondent: Mark Thorogood

For the Additional Party: Nicola Cain

The Issue

1. The Appellant has sought permission to publish on the internet the responses to his Notice of Appeal by Information Commissioner (7 July) and the BBC (10 August). His stated reason is to "*recruit advice and assistance from other members of a wide community of on-line democratic activists who may have a relevant and informal contributions to make to my case*".

Submissions

Appellant

2. The Appellant states he should be entitled to publish the documents because (1) he is not legally represented and therefore considers himself at a disadvantage in presenting his case; and (2) there are no reasons why his proposed action would hinder justice.

The Information Commissioner

3. The Commissioner states that there is no guidance in the practice rules governing this matter. (The rules are the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("The Rules")).
4. The previous rules did provided that: "*it shall be a condition of the supply of any information or material provided under this rule that any recipient of that information or material may use it only for the purposes of the appeal*". (Rule 14(6) of the Information Tribunal (Enforcement Appeals) Rules 2005).
5. In general civil litigation, the issue of whether pleadings are disclosed to non-parties is a matter for the court directing the parties on a case-by-case basis.

The Tribunal should adopt the same approach and the “default” position should not be to allow parties to publish pleadings, which in some cases may include confidential annexes.

6. In this case, he does not object to the Appellant publishing his response:

BBC

7. The BBC agrees with paragraph 3 above. It interprets the previous rules as stating that information provided to parties to an appeal could only be used for the purposes of that appeal.
8. As a comparison it points to the civil proceedings in the High Court, which are governed by the Civil Procedure Rules (CPR). Under rule 5.4C, only certain documents may be disclosed to non-parties as of right once a certain stage of proceedings has been reached. Other documents may only be obtained by application to the court.
9. It seems to suggest that the issue of whether the parties may publish documents obtained in the course of proceedings is not within the case management powers of the Tribunal, because it does not relate to the “conduct” of the proceedings.
 - a. “Indeed, having regard to the Tribunal’s case management powers at Rules 5(2), which provide that “*The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction*”, the BBC would suggest that the issue of whether the parties may publish documents obtained in the course of proceedings does not relate to the conduct of the proceedings themselves.”
10. In the absence of any specific provision, the BBC considers that the status quo should apply, i.e. such documents are only to be used for the purposes of proceedings.
11. However, the BBC states that if they are wrong on this point, and the Tribunal does have the power in the absence of any specific provision to permit the publication of documents disclosed in the course of proceedings, then they concur with the Information Commissioner that the Tribunal must consider any application for permission to publish documents provided in the proceedings on its own facts. The BBC has no specific objection to its Response to the Notice and Grounds of Appeal being published in this particular case.
12. (However, it notes that on the Appellant’s blog, where the Appellant has published his own Reply to the Information Commissioner’s Response there does not appear to be any mechanism by which comment could be made and therefore advice provided by members of the online community.)

Ruling

13. In summary, for the reasons set out below, the Tribunal does have the power to rule on this point. The issue is not one that is governed by the current procedural rules and therefore it falls within the broad rule that we must regulate our own procedure. In this case, the Appellant may publish the particular pleadings.

Reasons

14. The BBC has questioned whether it is within the Tribunal powers to rule or direct

upon the publication of pleadings.

Interpretation

"The Tribunal must seek to give effect to the overriding objective when it (a) exercises any power under these Rules; or (b) interprets any rule or practice direction. R. 2(3) of the Rules

Overriding objective

2.(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. (2) Dealing with a case fairly and justly includes—...

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.." R.2(3).

Case management powers

"5.(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may ... (e) deal with an issue in the proceedings as a preliminary issue;" R.5.

15. In other words, the Tribunal has broad powers to regulate its procedures for an appeal (r.5.(1)), including making orders, directions, decisions and rulings on preliminary matters so as to ensure the case is dealt with fairly and justly avoiding unnecessary formality. Given that there is no particular rule addressing the point that has been raised, the Tribunal is not restricted in its approach and decides it on a case by case basis in accordance with its power to regulate its own proceedings and the overriding objective and factors such as stated in rule 2(1)(b) and (c).
16. In this case, ruling on whether the Appellant may publish the pleadings whilst the appeal is ongoing is within the conduct of the appeal because the Appellant has raised it as an issue in this appeal and he requests it as part of his approach in the conduct of his appeal and aims for it to assist his appeal (which would be relevant to 2(1)(c)). In any event, as publishing documents during the course of an appeal may conceivably affect the conduct of proceedings, it is proper for the Appellant to seek a direction from the Tribunal before taking such action.
17. The Tribunal does not find any guidance in how to approach this matter from reviewing the previous rules, and they do not set out the "status quo", contrary to what the BBC seems to have argued. They appear to have required that material provided under the previous rule 14 could only be used for the purposes of the appeal. However, the reply from the Commissioner was provided for under rule 8, and so arguably was not so restricted.
18. Neither is Rule 5.4C of CPR of assistance. This broadly allows the court to make such order as it seeks fit, when a "non-party" applies for copies of documents from the court. (*See Addendum*). However, this is not strictly the point raised by

the Appellant, which concerns how he uses material already provided to him.

19. In this case, the Tribunal notes that no parties have presented any compelling reasons for not allowing the Appellant his request.
20. It is conceivable that publishing pleadings or related documents whilst an appeal is ongoing may detract from the informality of the proceedings. For instance, it may attract attention and thus cause parties (in particular unrepresented parties) or witnesses to be inhibited from freely making representations or presenting their case. However, this is not a factor relevant to this case.
21. The Tribunal notes that the Appellant has argued that his request is to help him to be on an equal footing. The Tribunal does not find this compelling because it is not convinced that publishing material on the internet will necessarily assist the Appellant, who must ultimately choose how to sift and present his own case. In any event, this Tribunal adopts an “inquisitorial process” and goes to extensive efforts to ensure that parties not legally represented are not thereby disadvantaged. Accordingly, throughout the appeal process, the Tribunal will ask those questions of all parties that it needs to pose to ensure the right decision is made. Where relevant, the Tribunal will also seek to put to the other parties those questions that a legal representative might have posed on behalf of the Appellant.

Signed

Tribunal Judge: Claire Taylor

6 September 2010

Addendum: Extract from Rule 5.4C Civil Procedure Rules

“Supply of documents to a non-party from court records

5.4C (1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –

- (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
- (b) a judgment or order given or made in public (whether made at a hearing or without a hearing).

...

(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.

(3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –

- (a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
- (b) where there is more than one defendant, either –
 - (i) all the defendants have filed an acknowledgment of service or a defence;
 - (ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;
- (c) the claim has been listed for a hearing; or
- (d) judgment has been entered in the claim.

(4) The court may, on the application of a party or of any person identified in a statement of case –

- (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
- (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
- (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
- (d) make such other order as it thinks fit.

(5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.

(6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission.”