HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 9

on appeal from:[2008]EWCA Civ 191

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Sugar (Appellant) *v* British Broadcasting Corporation and another (Respondents)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

Introduction

1. The Freedom of Information Act 2000 ("the Act") provides for a general right of access to information held by public authorities. That right is subject to exceptions. The Act makes provision for its enforcement by the Information Commissioner ("the Commissioner") and for a right of appeal from a decision of the Commissioner to the Information Tribunal ("the Tribunal"). Schedule 1 to the Act lists the public authorities to which the Act applies. A small number of these are listed in respect only of certain specified information. One of these is the first respondent ("the BBC"), which is listed as "The British Broadcasting Corporation in respect of information held for purposes other than those of journalism, art or literature".

2. The BBC holds a report that it commissioned in respect of its coverage of the Middle East ("the Balen Report"). The appellant, Mr Sugar asked the BBC to provide him with a copy of this report. He contended that the report was held by the BBC for purposes other than journalism, art or literature and that, in consequence, the BBC held it as a public authority and was bound by the Act to communicate its contents to him. The BBC disagreed. It contended that it held the report for the purposes of journalism and not as a public authority and that, in consequence, the Act had no application. I shall call the issue of whether or not the BBC held the report for journalistic purposes "the journalism issue". Mr Sugar challenged the BBC's response before the Commissioner. The Commissioner upheld the BBC's contention. Mr

Sugar appealed to the Tribunal. The BBC and the Commissioner argued that the Tribunal had no jurisdiction. The Tribunal held that it had jurisdiction and purported to exercise this by reversing the Commissioner's decision on the journalism issue. The BBC then brought, simultaneously, an appeal under the provisions of the Act and a claim for judicial review. The claim succeeded [2007] EWHC 905 (Admin); [2007] 1 WLR 2583. Davis J held that the Commissioner had determined that he had no jurisdiction. He had made no decision that was susceptible to an appeal to the Tribunal under the Act. The Tribunal had acted without jurisdiction and its decision could not stand. I shall describe the issue of whether the Tribunal had jurisdiction as "the jurisdiction issue".

3. Mr Sugar had anticipated the possibility of this result by making a cross-application for judicial review, challenging the Commissioner's decision on the journalism issue. This challenge failed. Davis J upheld the Commissioner's finding that, for the purposes of Mr Sugar's application to it, the BCC was not a public authority. He held that the Commissioner had rightly held that he had no jurisdiction. He added that he would not have granted relief in any event, for further material events had occurred since the date of the Commissioner's decision.

4. Mr Sugar appealed to the Court of Appeal on the jurisdiction issue alone. His appeal failed. In the leading judgment Buxton LJ upheld Davis J's decision that neither the Commissioner nor the Tribunal had had any jurisdiction to entertain Mr Sugar's challenges. [2008] EWCA Civ 191; [2008] 1 WLR 2289.

5. This appeal raises two issues, one narrow and one broad. The broad issue is whether the Commissioner was correct, on his view of the merits of the journalism issue, to conclude that he had no jurisdiction under the Act. That is an issue of general importance. The narrow issue is whether the Commissioner made a decision that was susceptible to an appeal to the Tribunal. That issue turns on the particular facts of this case. It is necessary at the outset to refer to the Act in a little detail.

The Act

6. The Act is divided into eight parts. Those that are significant in the context of this appeal are the following.

i) Part I: This provides for the right to access to information held by public authorities;

ii) Part II: This sets out a large number of categories of 'exempt information';

iii) Part IV: This deals with enforcement;

iv) Part V: This deals with appeals;

7. The Act applies to public authorities. Section 3(1) in Part I provides that in the Act "public authority" means, among others, "any body which, any other person who, or the holder of any office which… is listed in Schedule 1". Schedule 1 is lengthy. Some public authorities are listed generically, others individually. Out of approximately 500 names in the list originally scheduled to the Act, nine were qualified by reference to the class of information held, of which one was the BBC. In all but one, the qualification was introduced by the words "in respect of". The exception was: "The Competition Commission in relation to information held by it otherwise than as a tribunal". I shall refer to this class of public authorities as "hybrid authorities". The information held by them in their capacity as public authorities I shall describe as "public information". The other information held by them I shall describe as "excluded information".

8. Section 7(1) in Part I provides:

> "Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority".
>
> The marginal note to this provision reads:
>
> "Public authorities to which Act has limited application."

It has to date been accepted, and I think rightly accepted, that section 7(1) refers to the hybrid authorities.

9. Section 1 deals with the initial obligations of a public authority when a person makes a request to it for information.

"1.—(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'."

Part I goes on to make very detailed provision for the response that a public authority has to give in relation to exempt information that it holds. Broadly speaking, depending upon the precise terms of Part II, there will in some cases, and may in other cases, be no obligation to communicate the information under section 1(1)(b). There may or may not, again depending upon the precise terms of Part II, be a duty to 'confirm or deny' under section 1(1)(a). Section 17 imposes requirements as to the explanation that must be given by a public authority to the maker of a request for information when the public authority claims that information is exempt information or exercises a right to decline to 'confirm or deny'.

10. The following provisions in Part IV and V in relation to enforcement are particularly material:

> "50.—(1) Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a 'decision notice') on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or. . .

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

. . .

51.—(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

. . .

57.—(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

58.—(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

59. Any party to an appeal to the Tribunal under section 57 may appeal from the decision of the Tribunal on a point of law to the appropriate court; and that court shall be—

(a) the High Court of Justice in England if the address of the public authority is in England or Wales…"

Mr Sugar's request and what followed

11. Mr Sugar's request for information, addressed to the British Broadcasting Corporation was sent on 8 January 2005. It began as follows:

"Dear Sirs,

Request under Section 1 of the Freedom of Information Act 2000 (the 'Act')

The Balen Report

Please provide me with a copy of the report by Mr Michael Balen regarding the BBC's news coverage of the

Middle East, in particular the conflict between Israel and the Palestinians. I understand from press comment about this report that it was provided to BBC management in the last few months of 2004.

I appreciate that the BBC's obligations under the Act do not apply to information 'held for the purpose of journalism'. This restriction must be carefully applied. It does mean that the public does not have a right of access to information obtained by the BBC's journalists for the purposes of their news reports. But it does not mean that anything to do with BBC journalism is not to be publicly available. In particular, information held for the purposes of developing policy in relation to the BBC's news function or the management of that function is not information held for the purposes of journalism. It is information held for the purposes of the management of the BBC's journalism."

12. The BBC replied as follows on 11 February:

"The information you requested is not covered by the Freedom of Information Act 2000 ('the Act').

Information about BBC programmes, content and their production is not covered by the Act. The impartiality of our journalism is an important part of that production. (Schedule 1 of the Act says that the BBC is covered in respect of information held for purposes other than those of journalism, art or literature).

. . .

If you are not satisfied with this decision that the information you requested is not covered by the Act you can apply for an internal review of our decision. To apply for internal review please email foi@bbc.co.uk or write to BBC Freedom of Information, PO BOX 48339, London, W12 7XH, UK, quoting the reference number at the top of this correspondence. If having completed the BBC's internal review process, you remain dissatisfied with the Corporation's decision on your information request, you can raise the issue with the Information Commissioner. Further details about the work of the Commissioner are available at www.informationcommissioner.gov.uk"

It is now the BBC's case that they made a mistake in referring Mr Sugar to the Commissioner because the Commissioner had no jurisdiction in this matter.

13. Mr Sugar replied immediately to the BBC asking them to review their decision. They did so and upheld their decision not to provide the information. On 18 March 2005 Mr Sugar wrote to the Commissioner, purporting to make a complaint under section 50 of the Act. He summarised his complaint as follows:

> "As I anticipated, the BBC is relying on the words in the Act which limit the BBC's disclosure obligations so that they do not apply to information 'held for the purposes of journalism'. I say that information held for the purposes of the review of the BBC's journalism is not per se information held for the purposes of journalism within the meaning of the Act. The BBC appears to deny this but has not provided any argument to the contrary. Instead the BBC seems to say that Mr Balen's view of the BBC's impartiality should be kept to itself. I consider this is contrary to the intention of the Act.
>
> My main complain is therefore that I have not been given a copy of the Balen Report to which I say I am entitled."

14. The Commissioner wrote to Mr Sugar on 24 October informing him of his current view of his complaint, after considering the Balen Report, submissions from the BBC, Mr Sugar's correspondence and extensive consultation with senior colleagues. That view he confirmed in a short letter of 2 December, as follows:

> "**Your request for information from the BBC under the Freedom of Information Act 2000 (the 'Act')**
>
> . . .
>
> The Commissioner's decision
>
> After a careful re-evaluation of: the Balen Report, the submissions received in respect of the report, and the

information on the file, it is the Commissioner's final decision that for the purposes of your request:

(i) the Balen Report is held for the purpose of journalism, art or literature; and

(ii) the BBC has correctly applied Part VI of Schedule 1 to the Act.

Consequently, and in the particular circumstances of this case, the BBC is not a public authority under the Act, and is therefore not under an obligation to release the contents of the Balen Report.

In the circumstances of the above, I confirm that this file will be closed because this Office is unable to take your complaint further. I appreciate that this letter may be a disappointment to you but I hope that the contents of my previous letter has helped to explain why this Office is unable to progress with your complaint.

I would also like to take this opportunity to inform you of your right to request a judicial review of our decision."

15. Mr Sugar did not at this stage apply for judicial review. Instead he wrote to the Tribunal on 30 December 2005, purporting to give a Notice of Appeal under section 57 of the Act. This asserted that the Commissioner had reached an erroneous view on the journalism issue. In accordance with the relevant Rule the Commissioner served a reply, which made the following submission

"21. The Information Tribunal does not have jurisdiction to hear this appeal.

22. Section 57(1) of the Act provides that a complainant or public authority may appeal to the Information Tribunal against a Decision Notice served under section 50.

23. The Commissioner has taken the view that the BBC is not a public authority in respect of the Balen Report. The Commissioner does not consider that he may issue a Decision Notice under section 50 in this case and has

not therefore done so.

24. If the Appellant wishes to challenge a decision of the Commissioner, other than one made by way of a Decision Notice under section 50, his route to do so is by way of judicial review."

16. The Tribunal held a preliminary hearing on the issue of jurisdiction. The BBC's argument can be summarised as follows. Mr Sugar's request for information had been made to the BBC as holder of the Balen Report. The Balen Report was held for the purposes of journalism. It followed that, in its capacity as holder of the Balen Report, the BBC was not a public authority. Mr Sugar's request had not been made to a public authority. The Act did not apply to it. The Commissioner had no jurisdiction under the Act to make a decision that could be appealed to the Tribunal. Nor had he done so. He had expressly found that the BBC was not a public authority.

17. The Tribunal published its decision on 29 August 2006. It held that the BBC's argument was fallacious. Whether or not the BBC held the Balen Report in its capacity as a public authority Mr Sugar's request for information had been made to it as a public authority and was covered by section 1 of the Act. The Commissioner had had jurisdiction to decide whether the BBC had complied with its obligations under section1. He had so decided, and his finding was, in effect, a decision notice under section 50(3). The Tribunal had jurisdiction to entertain Mr Sugar's appeal against the Commissioner's decision.

18. At the same time as it published its decision on jurisdiction the Tribunal published a decision on the journalism issue. This reversed the Commissioner's decision, ruling that at the time of Mr Sugar's request the BBC held the Balen Report for a purpose other than journalism.

The decisions of Davis J and the Court of Appeal

19. By the time that this matter came before Davis J the Commissioner had had a change of heart – indeed this had occurred before the Tribunal published its decision on jurisdiction. He now espoused the view that he had had jurisdiction under section 50 to entertain Mr Sugar's complaint, that he had done so and that he had in substance, if not in form, issued a decision notice, against which Mr

Sugar had been entitled to appeal to the Tribunal. Accordingly he supported Mr Sugar's submission that the Tribunal had correctly decided the jurisdiction issue. Davis J did not agree. He upheld the BBC's contention that, in its capacity as holder of journalistic material, it was not a public authority and not subject to the provisions of the Act, including section 1. The Commissioner's finding that the Balen Report was journalistic material meant that, in his eyes the BBC was not to be considered as a public authority, with the result that section 1 of the Act had no application. He so stated in a decision letter which did not constitute a "decision notice" and so no appeal lay to the Tribunal.

20. Davis J expressed the view that the result that he had reached had practical consequences that were unattractive. I share that view. Under the scheme of the Act an issue as to whether a public authority has complied with the requirements of Schedule 1 falls to be determined initially by the Commissioner, with an appeal to the Tribunal. In a case such as this, that issue turns on whether the information held is public or excluded information. If the Commissioner's jurisdiction turns on precisely the same question, how is he to set about resolving it if, as is likely to be the case, he lacks the necessary information? Section 51 is designed to enable him to require production of the information that he needs to perform his duties, but that section will not apply if the Commissioner has no jurisdiction. Quite apart from this practical problem, if the Commissioner's decision goes to his jurisdiction, whether the decision is positive or negative, the appropriate forum for a challenge will be the administrative court in judicial review proceedings. It is hard to believe that Parliament intended that the issue of the capacity in which a hybrid public authority holds information should have to come before a court rather than the Commissioner and the Tribunal, who would seem tailor made to resolve it.

21. Arguments of practicality cut little ice in the Court of Appeal. Nor did the arguments of construction, advanced on Mr Sugar's behalf by Mr Eicke and Mr Lightman, who had generously agreed to represent him *pro bono.* Davis J had accepted the argument that, because of the way that it was described in Schedule 1 to the Act, any reference in the Act to a public authority only applied to the BBC in its capacity as a holder of public information. If the Balen Report was excluded information, then the Act did not apply. Mr Eicke argued that this interpretation was erroneous. Whenever the Act referred to a public authority the reference embraced the BBC without limitation for all purposes. Where, however, Parts I to IV of the Act imposed obligations on the BBC in relation to information, those obligations did not apply in

the case of excluded information. The provisions of section 7 made this plain.

22. Buxton LJ rejected this construction, but he held that even if it had been correct it would not have left Mr Sugar any better off. His reasoning appears in the following passage of his judgment.

> "Let us suppose that when asked to revisit the Balen Report in a future case the Information Commissioner continues to assert, as he asserts before us, that the entry for the BBC in Schedule 1 does not mean:
>
> > '…the BBC as a "public authority" when holding information held for purposes other than those of journalism, art or literature.'
>
> but means:
>
> > 'The BBC as a "public authority" in all respects but its obligations as such public authority under this Act only apply in relation to information held for purposes other than those of journalism, art or literature.'
>
> 29. When he asked himself, under section 50(1), whether the BBC had dealt with Mr Sugar's request in accordance with the requirements of Part I, the Information Commissioner has under his new understanding of his duties to decide whether the BBC's Part I duties apply to the Balen Report viewed as information. Let us then assume that in the future case he will take the view of the journalism issue that he took in our case, and so will conclude the BBC did not have any duty to produce the Balen Report, not because (as he originally thought) the BBC is not a public authority in relation to the report; but because, as he now thinks, the Balen Report is not information of a category to which the BBC's duties as a public authority extend. He will therefore write to the complainant exactly the same kind of letter as he wrote in our case. That will say that he is not making a decision under the section as to whether the requests have been dealt with in accordance with the requirements of Part I

> because Part I does not apply to the case, and so in section 50(3) terms the application would still not have been one 'under this section'."

23. I agree with Buxton LJ that the result will be the same, whichever of the alternative approaches to construction of "public authority" that one adopts. I disagree, however, with his view of that result. The fallacy in his reasoning is the conclusion that, if the Balen Report was excluded information, Part 1 would not "apply to the case, *and so in section 50(3) terms the application would still not have been one 'under this section'*". The passage that I have emphasised is incorrect.

24. Section 1 of Part I applies whenever a request for information is made to a public authority, whatever the nature of the information sought, whether the public authority holds the information or not and, in the case of a hybrid authority, whether the information is public or excluded information. I shall consider a little later how a hybrid authority has to respond if it holds the information but the information is excluded information. But even if the consequence of section 7 is that the hybrid authority is not obliged to respond at all in such a situation (as Miss Carss-Frisk QC submitted), section 50 entitles the inquirer to complain to the Commissioner if he considers that the public authority has not dealt with his request in accordance with the requirements of Part I. He can make that complaint whether he is right or wrong as to the adequacy of the public authority's response. The appropriate response of the Commissioner in the situation postulated by Buxton LJ was that Part I did not apply to the Balen Report. Such a response would have been a "decision notice" under section 50(3), giving rise to a right of appeal to the Tribunal under section 57.

25. The seminal question is whether Mr Sugar made a request for information to a public authority under section 1 of the Act. Let us first assume, as Davis J and Buxton LJ held, that the BBC was to be considered as a public authority only in relation to public documents. It does not follow that, if the Balen report was an excluded document, the request for its disclosure made to the BBC by Mr Balen was not made to the BBC as a public authority.

26. When a request for information is specifically made under the Act to a hybrid authority it is axiomatic that the maker of the request is making it to the hybrid authority in its capacity as a public authority. That is because the obligations under the Act only apply to public

authorities. So far as Mr Sugar was concerned, the terms of his letter of request made it quite clear that he was asserting that the BBC owed him a duty to provide the Balen Report in its capacity as a holder of public documents. He was well aware that the BBC would be under no duty to provide him with the information if it did not hold it as a public document and thus in its capacity as a public authority.

27. It follows that, on the facts of this case, it was quite wrong to treat Mr Sugar as having made a request to the BBC other than in its capacity as a public authority simply because of the nature of the information that he was requesting. More generally, it would be quite impractical to adopt such an approach to a request for information made to a hybrid authority. What if the request was in generic terms and the authority purported to hold some information covered by the request for journalistic purposes and other such information as public information? This question was raised with Miss Carss-Frisk QC, who appeared for the BBC. She did not have a satisfactory answer. What if the BBC no longer held the information, or had never held it?

28. I now adopt the alternative approach to the construction of "public authority" as used in the Act, namely that it embraces hybrid authorities for all purposes. On that approach it is clear that Mr Sugar's request for information was made to a public authority within the terms of section 1.

29. Although it does not affect the result, I consider that the alternative approach to construction is correct. That construction accords with the wording of section 7, in that it refers to "any other information held by the authority", which in context implicitly means "held by the public authority". Should there be doubt about that implication there is no room for doubt in the case of section 68(3), which deals with an amendment to the Data Protection Act 1998, for this speaks expressly of a public authority holding excluded information. The section provides.

> "(6) Where section 7 of the Freedom of Information Act 2000 prevents Parts I to V of that Act from applying to certain information held by a public authority, that information is not to be treated for the purposes of paragraph (e) of the definition of 'data' in subsection (1) as held by a public authority."

30. Perhaps more significantly, this approach to the meaning of public authority explains why section 7 provides as it does. Neither Miss Carss-Frisk, nor indeed Buxton LJ, was able to postulate a meaningful role for that section.

31. Whichever approach to the construction of 'public authority' is correct, the request for information made by Mr Sugar to the BBC was made to a public authority and section 1 of the Act applied to it. What was the BBC's obligation on receipt of the request? That depends upon the answer to the journalism issue. If Mr Sugar is correct on this issue, the BBC was under an obligation under section 1(1)(b) to communicate the Balen Report to him. What if the BBC is correct, and the Balen Report was excluded information?

32. The duty of a public authority under section 1(1) is to inform the inquirer in writing whether or not it holds "information of the description specified in the request". That is "the duty to confirm or deny" – see section 1(6). How does this apply in the case of the hybrid authority which holds the information as excluded information. If the BBC's approach to the construction of "public authority" is adopted, the answer is easy. The application is made to the hybrid authority in its capacity as a holder of public information. Its reply is that, in that capacity, it does not hold the information.

33. What if one adopts the alternative approach to the construction of public authority? My initial reaction was that the appropriate response will be to say that it holds the information but does not have to communicate it because it is not information to which its obligations under the Act apply. This is not, however, a satisfactory solution. In the present case the BBC was well aware that it held the information requested. But a hybrid authority will not always know whether it holds information of the description requested. Considerable time, trouble and expense may be involved in ascertaining whether it does. The hybrid authority may have a separate system for filing public information and excluded information. A request under section 1(1) cannot require the hybrid authority to search through its excluded information, simply in order to be in a position to tell the inquirer that it holds the information but has no obligation to disclose it. Nor does it. Section 7 confines the hybrid authority's obligations to public information. Thus, its obligation under section 1 is to ascertain whether or not it holds information of the description requested as part of its public information, as specified in Schedule 1. If it does not, it is entitled to answer the inquirer "information of the description that you have requested does not form

part of the information that I hold in respect of…" followed by the description of public information specified in Schedule 1.

34. This response to an inquiry differs significantly from that required where a public authority is asked for information that it holds that is exempt information. This perhaps answers the question why the draftsman of the Act did not adopt the same approach to excluded information that he adopted to exempt information.

35. The response given by the BBC in this case was more detailed than necessary if, as it claimed, the Balen Report was excluded information. On that premise, the response more than satisfied the BBC's obligation under section 1 to "confirm or deny". The issue raised by Mr Sugar was, however, whether that premise was correct. That was an issue that he was entitled to raise by his complaint to the Commissioner under section 50 and the Commissioner had jurisdiction to entertain that complaint.

36. By way of summary I shall set out the three short paragraphs of the Tribunal's decision on jurisdiction that encapsulate lucidly, succinctly and correctly the conclusions that I have reached at rather greater length:

> "22. In our view Mr Sugar made an information request to the BBC, which is a public authority within the meaning of FOIA. There was nothing in the formulation of the request to take it outside the ambit of FOIA. It was a request for information that was properly made under s.1 of FOIA.
>
> 23. The basis for the BBC's rejection of his request was that, upon careful examination of the factual circumstances, the report which he asked for was (in the BBC's view) held for the purposes of journalism. If the BBC was right in taking this view, that did not mean that Mr Sugar had not made an information request to the BBC as a public authority. In our judgment when, following the rejection, Mr Sugar applied to the IC, his application was made under s.50(1).

> 24. We consider that the IC's duty under s.50(1) to consider whether a request has been dealt with in accordance with the requirements of Part I can include, in appropriate cases, consideration of whether Part I lays down any requirements for the particular information in question. The Commissioner was entitled to decide that failure to produce the report was not a contravention of the requirements of Part I. In the present case he effectively so decided. That was in substance a decision under s.50."

Did the Commissioner serve a Decision Notice?

37. The last two sentences quoted above answer this question. The issue that the Commissioner was asked to resolve by Mr Sugar by his letter of complaint was whether the BBC was correct to contend that the Balen Report was held "for the purpose of journalism". The Commissioner decided that question. He found that the BBC was not under an obligation to release the contents of the Report. This was a decision that Mr Sugar was entitled to challenge before the Tribunal, provided that the Commissioner had conveyed it to him in a "decision notice". Section 50 of the Act does not prescribe the form of a "decision notice". I consider that this phrase simply describes a letter setting out the Commissioner's decision. That is precisely the letter that the Commissioner wrote to Mr Sugar. His letter does not suggest that the request or the complaint was not within the Act, or that the Commissioner had no jurisdiction to make a decision or that he was not making a decision. On the contrary it opened by referring to "Your request for information from the BBC under the Freedom of Information Act 2000" and later stated that "it is the Commissioner's final decision …for the purposes of your request…". It is true that the Commissioner said that "the BBC is not a public authority under the Act" and that he referred to Mr Sugar's right to request a judicial review. These statements do not make his letter any the less a "decision notice". It is also true that the Commissioner subsequently asserted to the Tribunal that he had neither had jurisdiction to issue a decision notice nor done so, but that assertion cannot affect the question of whether his letter had in fact amounted to a "decision notice" any more than his subsequent *volte face* on that question.

38. For these reasons I am satisfied that the Tribunal had jurisdiction to make the decision that it did. I would allow this appeal. If the appeal is allowed it will follow that the governing decision on the journalism

issue is that of the Tribunal, and that the only possible appeal from that decision lies to the High Court on a point of law. The BBC's outstanding appeal should therefore be remitted to the Administrative Court for determination. Davis J has, of course, already ruled on the journalism issue, but he approached that issue as one raised in a judicial review challenge by Mr Sugar of the Commissioner's decision on the point. He applied the *Wednesbury* test, asking himself whether the decision of the Commissioner was "a lawful and rational one, properly open to him on the material before him", para 59. That is not the test that he should have applied had he concluded, as he should have done, that the Tribunal's decision was made with jurisdiction and that BBC's only right to challenge it was on the ground that it was wrong in law. It follows that the result of allowing this appeal will be to restore the Tribunal's decision.

LORD HOFFMANN

My Lords,

39. Part I of the Freedom of Information Act 2000 imposes duties on "public authorities". If someone asks a public authority for information, it is in principle obliged to say whether it holds the information and, if it does, to disclose it. There are however categories of information, which the Act calls exempt information, to which one or both of these duties do not apply. They are listed in Part II. A public authority which holds exempt information is in some cases obliged to say whether it holds it but not to disclose it. In other cases it is not obliged even to confirm or deny that it holds the information.

40. Section 50 of the Act confers upon the Information Commissioner jurisdiction to decide whether "a request for information…to a public authority has been dealt with in accordance with the requirements of Part I." The Commissioner therefore has jurisdiction to decide whether the information requested is exempt information. If it is, non-disclosure may have been in accordance with the requirements of Part I.

41. But what if the body from which information has been requested denies that it is a public authority as defined in the Act? In such a case, it is not saying that it has dealt with the request in accordance with the

requirements of Part I. It is saying that those requirements do not apply to it. In most cases, of course, the question of whether a body is a public authority could not be the subject of rational dispute. Public authorities are defined by section 3 (supplemented by sections 4 and 5), principally by reference to a list in Schedule 1. The list names of a large number of bodies, such as the House of Lords and the English Sports Council. For the most part, you are either on the list or you are not. But there are some generic descriptions which may have fuzzy edges over which there could be dispute. To take an example at random, under paragraph 53, the governing body of any college of a university which receives financial support under section 65 of the Further and Higher Education Act 1992 is a public authority and, by subparagraph (2)(d), "college" includes any institution "in the nature of a college". If some "institute" or "centre" connected with a university receiving support denies that it is an institution "in the nature of a college", does the Commissioner have jurisdiction to decide whether it is a public authority? I should have thought not. Jurisdiction under section 50 only exists if the request has been made to a public authority. That question is anterior to the power of the Commissioner to decide whether the requirements of Part I have been met.

42. Maybe it would have been better if Parliament had conferred upon the Commissioner a power to decide (subject to appeal) the limits of his own jurisdiction – what writers on international arbitration call *kompetenz kompetenz*, jurisdiction to decide jurisdiction. That would have given the parties, in cases in which jurisdiction was disputed, the advantages of one-stop adjudication, instead of having to go to court for a ruling on whether the Commissioner has jurisdiction and then, if successful, to the Commissioner for a ruling on the merits. But that is not what Parliament has done. There are of course many cases in which statutory tribunals have power to make findings as to the facts on which their jurisdiction depends: see for example *Watt (formerly Carter) v Ahsan* [2007] UKHL 51; [2008] 1 AC 696. But that is not the case here. Everyone agrees that section 50 does not allow the Commissioner to confer jurisdiction on himself by a finding that a body is a public authority: see, for example, Lord Neuberger of Abbotsbury, at para 82. It is either a public body or it is not. If that question is disputed, it must be decided by a court.

43. The disadvantages of not giving the Commissioner power to decide his own jurisdiction are particularly acute in cases like the present in which the statute defines a public authority by reference to the nature of the information which it holds. There are several such cases in Schedule 1: in some of them, a body is a public authority only in respect

of a particular class of information and in others it is a public authority in respect of everything except a particular class or classes of information. Thus, in the present case, the BBC is a public authority for all purposes except in respect of information which it holds for the purposes of "journalism, art or literature", while the Under-Treasurer of the Middle Temple is a public authority for no purposes except in respect of information which he holds in his capacity as a local authority. I do not think it matters whether the definition is inclusive or exclusive. What matters is that status as a public authority is defined by reference to the nature of the information held.

44. The question in the present case is whether the Commissioner has jurisdiction to decide whether or not the nature of the information held by the BBC (a report on its coverage of the Israel-Palestinian dispute) does or does not bring it, for the purposes of the Act, within the definition of a public authority. In my opinion he plainly does not. The question he is being asked to decide is whether the BBC is a public authority and this is not a question which he has jurisdiction to decide.

45. I would accept that since the question turns upon the nature of the information, and is very similar to the question of whether information held by a public authority is exempt or not, it may have been better if Parliament had conferred such jurisdiction upon the Commissioner. Not only would he provide one-stop adjudication but he would seem a more appropriate tribunal than the Queen's Bench judge exercising the traditional judicial review power to determine the jurisdiction of an inferior tribunal. But the Act does not do so and I do not think it is open to your Lordships to amend it.

46. I have read with attention and respect the draft speeches of Lord Phillips of Worth Matravers and Lord Neuberger of Abbotsbury, but both seem to me to be constructed upon premises which beg the question to be answered. Lord Phillips, for example, has invented a category of information which he calls "excluded information", for which there is no basis in the Act, for the purpose of an argument that the question of whether information is excluded information is really much the same as whether information is exempt information, the latter being a question which the Commissioner undoubtedly does have jurisdiction to decide. In fact, there is no such thing as excluded information. What the Act does is notionally divide a single person or body into two, one of which is a public authority and the other is not. In so far as it holds information in respect of certain activities, it is a public authority and subject to the Act. In respect of information held for other

activities, it is not. The Under-Treasurer of the Middle Temple is notionally two people, one of which is a public authority (when acting in the capacity of a local authority) and the other is not. That is not at all the same as being a single undivided public authority which is not obliged to disclose "excluded information".

47. Parliament could certainly have proceeded differently. If the intention was that the BBC should not have to disclose information relating to its journalistic activities, it could have achieved much the same result by saying without qualification that the BBC was a public authority but that such information should be exempt. It did not do so. Instead, it chose to limit the BBC's status as a public authority, and therefore its amenability to any of the provisions of the Act, by reference to whether the information was held for journalistic purposes or not. And it underlined this choice (perhaps unnecessarily) by providing in section 7(1) that when a public authority was listed in Schedule 1 only in relation to information of a specified description, "nothing in Parts I to V of the Act" should apply to any other information held by the authority. Section 50, which confers jurisdiction upon the Commissioner, is in Part IV.

48. Then it is said that the applicant Mr Sugar made his request to the BBC in its capacity as a public authority. But what does this mean? The question of whether the Commissioner has jurisdiction cannot turn upon Mr Sugar's subjective opinion as to whether he was addressing the BBC's public authority or non-public authority persona. The Commissioner cannot acquire jurisdiction to decide whether the Under-Treasurer of the Middle Temple is a public authority for the purpose of information about its benchers because the applicant intended to address the application to him in that capacity. The definition of a public authority is by reference to the purpose for which the information is held, not the purpose for which the inquirer may think it is held.

49. The contrary argument appears to assume that a body must be one and indivisible, either a public authority or not. This argument is supported by the invention of another new term, a "hybrid authority", which is intended to suggest that there is a single authority which can be characterised as a public authority. But this construction is contrary to the plain statutory intention to treat the body in question as if it were two bodies, one of which is a public authority and the other not. But once one accepts that this was the effect of the Act, there can be no distinction between a decision as to whether a body (such as an institution "in the nature of a college") is for all purposes a public

authority, and a decision as to whether a body's relevant persona is a public authority. In both cases the question is anterior to the jurisdiction of the Commissioner and in neither case does the Act confer upon him jurisdiction to decide it.

50. For these reasons, as well as those given by Davis J and the Court of Appeal, I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

51. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Phillips of Worth Matravers and Lord Neuberger of Abbotsbury. I agree with them that the Information Commissioner had jurisdiction to resolve the issue that Mr Sugar raised in his letter of complaint against the BBC, and I too would allow the appeal. Like Lord Neuberger, I should like to set out my own reasons for doing so.

52. It seems to me to be preferable to avoid using the expressions "excluded information" and "hybrid authority". The expressions which the Freedom of Information Act 2000 uses, like its counterpart in Scotland the Freedom of Information (Scotland) Act 2002, asp 13, are "information" and "public authority": see section 84 of the 2000 Act ("the Act"). The expression "excluded information" is used in section 7(8). But this is confined to cases where the Secretary of State wishes to exclude information of a particular description held by a publicly owned company from Parts I to V of the Act. Otherwise it is not used, as my noble and learned friend Lord Hoffmann points out. Nor is the expression "hybrid authority". I agree with him that a body is either a public authority or it is not, and that if that question is disputed that question must be decided by a court. But this assumes that the question whether the body is or is not a public authority is genuinely open to dispute. This depends on how one reads the Act. It is a question of construction which, in the case of the BBC at least, requires one to look no further than what the Act itself provides.

53. As I read the Act, the question whether the BBC is or is not a public authority admits of only one answer. The fact that it is listed by name in Schedule 1 tells one all that one needs to know to answer the question in the affirmative. Section 3(1)(a)(i) provides that in the Act "public authority" means any body which is listed in Schedule 1. Schedule 1 goes to elaborate lengths to list the bodies to which this definition applies. The BBC, along with many other public bodies, is listed by name in Part VI of the Schedule. Had it not been for the qualification that follows in its case, there would be no room for dispute on the question whether the Commissioner had jurisdiction to deal with Mr Sugar's complaint. The question is whether the fact that it is listed only in relation to information of a specified description ("in respect of information held for purposes other than those of journalism, art or literature") makes a difference. The answer, I think, is to be found in section 7.

54. Section 7(1) says that where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of the Act applies to any other information held by the authority. What it does not say is that, in that case, the authority is a hybrid – a "public authority" within the meaning of the Act for some of the information that it holds and not a "public authority" for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other "information" held by "the authority". This approach indicates that, despite the qualification that appears against its name in Schedule 1, the body is public authority within the meaning of the Act for all its purposes. That, in effect, is what section 3(1) of the Act provides when it says what "public authority" means "in this Act". The exception in section 7(1) does not qualify the meaning of "public authority" in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority.

55. Section 7(2) tends to confirm this approach. It refers to section 4, which enables the Secretary of State by order to amend Schedule 1 by adding to it a reference to any body or the holder of any office which is not for the time being listed in the Schedule. Although it does not say so in terms, the effect of doing this is to apply section 3(1) with the result that, by virtue of its having been listed, the body or office-holder becomes for the purposes of the Act a "public authority". This leaves open the question as to the effect of a listing which, as in the BBC's case, lists "the public authority" (as section 7(2) puts it) only in relation

to information of a specified description. If this is how it is listed, section 7(1) provides the answer. Nothing in Parts I to V applies to any other information held by the authority. Then there is section 7(3), which enables the Secretary of State to amend Schedule 1 by limiting the entry to "information" of a specified description or by removing or amending that limitation. Here again the mechanism is the same. The body that is listed is a public authority for the purposes of the Act. The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part I provides. But it is nevertheless, for all the purposes of the Act, a public authority.

56. I agree with Lord Hoffmann that there are some descriptions in Schedule 1 which have fuzzy edges over which there could be dispute. The example that he has given is to be found in para 53 of the Schedule. There may others. But there is nothing fuzzy-edged about the BBC. In common with all the other public bodies and offices listed in Part VI of the Schedule the name tells one all one needs to know. That, indeed, is the purpose of the listing. Its purpose is to enable people who wish to exercise the general right of access to exercise it without having to go to the courts to find out whether the body or office-holder to whom the request is directed is a public authority within the meaning of section 1(1). As the commentators on the Freedom of Information (Scotland) Act 2002 in *Current Law Statutes* explain in their general note on section 3 and Schedule 1, clarity of coverage in advance was understood by the legislature to be vital. It was appreciated that to replace the list in Schedule 1 with an omnibus provision that the Act applied to bodies that provided a public service could lead to endless litigation. This was contrary to the principle that the primary role in enforcing the Act should rest with the Commissioner and not the courts: section 47(1). The system of listing is elaborate and, as section 7 recognises, will require constant monitoring to ensure that it is kept up to date. Its value, however, is that it reduces to the minimum the scope for dispute about whether a particular body or office-holder is, or is not, a public authority.

57. I accept that if there is a genuine dispute as to whether a particular body or office-holder answers to a description that is set out in the Schedule it will have to be resolved by the courts. The Commissioner cannot determine his own jurisdiction. But I do not share

Lord Hoffmann's view that it was the intention of the statute to treat a public body or office-holder which is listed only in relation to information of a specified description as if it were two bodies, one of which is a public authority and the other not. Nor do I agree with the use of the expression "hybrid authority". Both approaches seem to me to be contrary to the system that sections 3, 4 and 7 have described.

58. There are other reasons for concluding that the Commissioner has jurisdiction under section 50 to determine the question that Mr Sugar has raised, as Lord Phillips and Lord Neuberger have explained. But I would base my agreement with their conclusion primarily on the way I think the Act should be read and, in particular, the effect of listing the BBC by name in the Schedule. In my opinion this is, in itself, a sufficient reason for allowing the appeal.

BARONESS HALE OF RICHMOND

My Lords,

59. I have the misfortune to agree with the five other judges who have concluded that the Information Tribunal did not have jurisdiction to entertain an appeal in this case and thus to disagree with the three of your lordships who have concluded that it did. I have the further misfortune to believe that the result which we favour is by no means as odd or inconvenient as might at first sight appear.

60. My reasons for concluding that the Tribunal did not have jurisdiction are essentially the same as those given by Davis J in the Administrative Court, by Buxton LJ in the Court of Appeal, and by my noble and learned friend Lord Hoffmann in this House. The Tribunal only has jurisdiction if the Commissioner has served a decision notice: see section 57(1). The only decision which the Commissioner is empowered to make by a formal decision notice is "whether … a request … to a public authority has been dealt with in accordance with the requirements of Part I": see section 50(1). This obviously does not include every conclusion reached by the Commissioner in the course of handling applications from complainants. He does not, for example, have to make a formal decision if he concludes that any of the four reasons for not doing so, specified in section 50(2), applies. Nor, in my view, does he have power to issue a formal decision if he concludes

either that the person or body to whom the request for information was made is not a public authority within the meaning of the Act or that Parts I to V of the Act do not apply to the information in question.

61. Section 3(1) defines a public authority in three ways: a body, person or holder of an office listed in Schedule 1 (which may be amended by order in the circumstances laid down in section 4); a body, person or holder of an office designated by order under section 5; and a publicly owned company as defined by section 6. Nowhere is the expression "hybrid authority" used. A body, person, office or company is either a public authority for the purpose of the Act or it is not.

62. A small number of the listings in Schedule 1 define the body, person or office by reference to a particular type of information. In some, the information in respect of which the body *is* a public authority is defined. Lord Hoffmann has already mentioned the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple (as members of Gray's Inn, which is not listed at all, we can make this point without embarrassment), who are public authorities only "in respect of information held in his capacity as a local authority". More strikingly, perhaps, general practitioners, dentists, opticians and pharmacists are public authorities only "in respect of information relating to the provision of . . . services" to the National Health Service. These are obvious example of people who wear two hats: one as a public authority and one as a private person or supplier of private services. In respect of what they do other than as a local authority or for the NHS such people are clearly not public authorities at all.

63. In other cases, the information in relation to which the body *is not* a public authority is defined. Bank of England is a public authority in respect of all the information it holds, other than the three categories of information listed in the Schedule. The other three such bodies are the BBC, the Channel Four Television Corporation, and Sianel Pedwar Cymru, which are public authorities "in respect of information held for purposes other than those of journalism, art or literature". I can well understand how tempting it is to say that these four bodies do not obviously wear two hats. They are simply excused from the Act's requirements in respect of a particular type of information which they hold in the course of the performance of their normal functions as a public authority.

64. However, I do not think that it is possible to take one approach to the construction of the list in respect of the inclusionary definitions and another approach in respect of the exclusionary ones. In both, the body, person or office holder is a public authority in some respects and not a public authority in others. This is if anything reinforced by section 7(1): "Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority". If "information of a specified description" applied only to the inclusionary definitions, then what would be the position? Bodies such as the BBC would be public authorities for all purposes but section 7(1) would not apply? Parts I to V of the Act would apply to them but with some sort of exception for the excluded information? No-one has argued for that construction. It is inconsistent with the whole scheme of the Act in relation to exemptions. Section 7(1) must apply to both types of definition in Schedule 1

65. It is of course arguable that section 7(1) is unnecessary if a body, person or office holder is not a public authority at all in respect of the excluded information. But such belt and braces provisions are not at all uncommon. They do not detract from the construction which appeared obvious both to Davis J and to Buxton LJ, with whom both Lloyd LJ and Sir Paul Kennedy agreed. Furthermore, I am inclined to agree with Buxton LJ that it makes no difference to the present issue. The Commissioner has to decide whether to proceed with an application. He may decline to do so on the ground that the body, person or office holder is not a public authority at all. Or he may decline to do so on the basis that section 7(1) provides that nothing in Parts I to V of the Act applies to the particular information requested from the body, person or office holder concerned. Either way, that is not "a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I" within the meaning of section 50(1).

66. I suspect, moreover, that had this question arisen in relation to a request for information about a dentist's private patients it would not have reached this House. The problem has arisen because the same legislative technique has been used in respect of two rather different types of exclusion, the "two hats" case and the "excluded information" case. Lloyd LJ could see that the result could be said to be "odd and inconvenient" (para 48) and agreed that it was "odd" (para 50). Davis J described it as "potentially inconvenient" (para 31) and "in some respects inconvenient" (para 38) and the contrary conclusion as "manifestly convenient" (para 44).

67. The oddity is that if the Commissioner concludes that the body, person or office holder concerned is a public authority and that the Act's requirements do apply to the information in question, then, whatever he decides about whether those requirements have been complied with, there will be a decision within the meaning of section 50(1) which can be appealed to the Tribunal. It would potentially also be susceptible to judicial review on the ground that the Commissioner had exceeded his jurisdiction.

68. The inconvenience is that Tribunals have many advantages which courts do not: their procedures are meant to be more informal and user friendly for unrepresented litigants; as a general rule, there is little or no risk of having to pay the other side's costs; and the panel contains particular expertise in both the factual subject matter and the law which is often complex. When compared with the alternative of judicial review in the administrative court, there are the additional advantages that there is no requirement for leave and the Tribunal has power to review questions of fact and discretion as well as law: see section 58(1) and (2).

69. But the underlying dispute in these proceedings is whether the Balen Report into the BBC's coverage of Middle Eastern issues was "information held for purposes other than those of journalism, art or literature". There is no issue of fact, in the sense that the content of the document is not in dispute. There is no exercise of discretion, in the sense that a decision maker has to balance different considerations in arriving at a choice between different outcomes. The question is whether the statutory language applies to the document in question. The meaning of the statutory language is a question of law; its application to the document in question, assuming a correct understanding of the law, is a question of fact: see *Edwards v Bairstow* [1956] AC 14. This means that a court with jurisdiction to determine only questions of law will not interfere with such a decision unless it falls outside the bounds of reasonable judgment. The distinction is not, however, clear cut. As Lord Hoffmann pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929, at para 26, "It may seem rather odd to say that something is a question of fact when there is no dispute whatever over the facts and the question is whether they fall within some legal category". He went on to comment, at para 27:

> " . . . it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to

> which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question."

70. In this particular case, the Act has not given the Commissioner an express power to decide whether a particular person, body or office holder is a public authority. In practice, he may occasionally have to do that in order to decide whether to proceed with an application. But there is nothing obviously inconvenient or unprincipled in leaving the matter to be resolved by him under the supervision of the courts, rather than introducing the Tribunal into the equation. It is a different type of question from the freedom of information questions over which the Tribunal does have jurisdiction. These may well involve questions of fact in the usual sense, or questions of what it is reasonable to expect of a public authority when faced with a particular request for information, or questions of balancing the public interest in disclosure against the public interest in maintaining an exemption. These are all matters in which the Commissioner and the Tribunal may be expected to build up a body of specialist knowledge and expertise. The question of whether a particular body, person or office holder is a public authority, which as Lloyd LJ pointed out will only rarely arise, does not depend upon the same sort of specialist knowledge and expertise.

71. For those reasons, in addition to those given by both the courts below and by Lord Hoffmann, I too would dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

72. The issue raised by this appeal concerns the powers of the Information Commissioner ("the Commissioner") and the Information Tribunal ("the Tribunal"), following a request under section 1 of the of the Freedom of Information Act 2000 ("the Act") to the British Broadcasting Corporation ("the BBC"), in respect of information which the BBC contends is "held for purposes … of journalism, art or literature" (and I shall refer to such information as "excluded").

73. The facts giving rise to the appeal and the relevant statutory provisions are fully set out by my noble and learned friend Lord Phillips of Worth Matravers in his opinion, which I have had the privilege of reading in draft. As he explains, the principal question to be decided is whether the Commissioner has jurisdiction to entertain an application under section 50 of the Act from an applicant who has made a request to a hybrid authority for information, which has been rejected on the ground that such information is excluded. I agree with his conclusion that the Commissioner has such jurisdiction, but would like to explain why in my own words, not least because I had initially been of the contrary view.

74. As a result of the provisions of section 3(1), Schedule 1 (insofar as it describes the BBC and other hybrid authorities), and section 7(1), it is clear that Parts I to V of the Act do not apply to excluded information held by the BBC or any other hybrid authority. The BBC's case, accepted by Davis J and the Court of Appeal, is that the Commissioner and the Information Tribunal therefore have no jurisdiction under section 50 and section 57 respectively, to rule on a contention raised by a hybrid authority that information requested from it is excluded. Mr Sugar, on the other hand, contends that the statutory jurisdiction of the Commissioner and the Tribunal does extend to determining the correctness of a hybrid authority's contention that the requested information is excluded.

75. In the light of the way that the Act is structured and expressed, there is a powerful case to be made out for the conclusion arrived at by the Court of Appeal, namely that the Commissioner has no such jurisdiction. In a nutshell, that case is as follows. By virtue of section 3(1)(a) and Part VI of Schedule 1, the Act applies to a hybrid authority, such as the BBC, only insofar as it holds information other than excluded information; accordingly, where a hybrid authority says that the information requested is excluded, the Commissioner has no jurisdiction under the Act to determine if the information is excluded, as, if it is excluded, the authority is not a public authority, and the Act does not apply. This conclusion is said to be reinforced by section 7(1), which provides that, where information is excluded, "nothing in Parts I to V of [the] Act applies to [such] information"; consequently, as sections 50 and 57 are in Parts IV and V of the Act, they cannot apply where a request is made for such information; accordingly, neither the Commissioner nor the Tribunal has jurisdiction to entertain any application under those sections in relation to such a request.

76. In my view, this argument is not merely inconvenient in its effect, as Davis J said at first instance ([2007] EWHC 905 (Admin); [2007] 1 WLR 2583, para 38) when accepting it. On closer analysis, it also suffers from a number of other, more fundamental, problems.

77. First, the argument effectively enables a hybrid authority, to which a request is made, to decide whether the information is excluded, and, therefore, whether the Commissioner has jurisdiction. That would mean that any hybrid authority had the power to determine whether or not a request made purportedly pursuant to the Act is for information which is or is not within the Act. In practice, therefore, a hybrid authority would be able to be the judge in its own cause, subject only to the risk of its decision being judicially reviewed.

78. However, the Act does not provide that it is the authority itself which has the right to decide whether a request made of it is for excluded information. Nor does section 7(1) state that information is outside the ambit of the Act if the hybrid authority claims that it is excluded information: it states that information is outside the ambit of the Act if it is actually excluded information. Further, as a matter of principle, it seems wrong (and unlikely to have been intended by the legislature) that a hybrid authority should be the statutory judge in its own cause, unless that were clearly spelt out in the Act.

79. It is noteworthy that the Act does provide for self-certification by a public authority, but only in relatively rare circumstances, and then in clear terms, and normally subject to heavy safeguards. Thus, by section 23, a Minister's certificate that information should not be released on grounds of national security is "conclusive", but even that is subject to an appeal direct to the Tribunal under section 60. Further, section 53 enables government departments (and other public authorities designated by the Secretary of State) to provide a certificate overriding an adverse decision by the Commissioner, but such a certificate has to be put before Parliament. Further, section 53 only applies after the Commissioner has made a decision under section 50. These sections sit somewhat unhappily with the BBC's case that self-certification is also permitted in relation to what a hybrid authority claims is excluded information, but without any express provision to that effect, and without any safeguards or statutory rights of appeal.

80. Ms Carss-Frisk QC, for the BBC, sought to avoid these difficulties, or at least to finesse them, by contending that the

Commissioner would have the power to investigate whether information claimed by hybrid authority to be excluded was in fact excluded, in order to decide whether he had jurisdiction to entertain a section 50 application. However, on analysis, that contention seems to me to be inconsistent with, and indeed effectively to undermine, the BBC's case.

81. The BBC's case is that, as a result of the way it is defined as a hybrid public authority in Part VI of Schedule 1, and as emphasised by section 7(1), the Commissioner does not have jurisdiction (under section 50) to make a decision about excluded information, or (under section 51) to require information from the BBC to enable him to make such a decision. That would appear to mean that the Commissioner had no power to determine whether information was excluded, because, if he did so determine, he would *ex hypothesi* have no jurisdiction to have done so, and if he wrongly held such information was not excluded his decision would be *ultra vires*. Yet, by investigating and deciding whether requested information is excluded to see if he had jurisdiction, as Ms Carss-Frisk says he can do, the Commissioner would effectively be doing precisely what, on the BBC's case, he was not entitled to do.

82. It is true that many tribunals have power to decide whether a claim is within their jurisdiction. However, that does not mean that the 2000 Act can be read, on the one hand, as providing specifically that the Commissioner has no jurisdiction whatever in relation to excluded information, while providing, on the other hand, that he can, indeed must, decide whether allegedly excluded information is in fact excluded under the Act. I accept that, for example, a rent officer can investigate whether a tenancy is protected by the Rent Act 1977 in order to decide whether he has jurisdiction to fix the rent (see e.g. *R v Kensington and Chelsea (Royal) London Borough Rent Officer, Ex p Noel* [1978] QB 1). However, there are two crucial differences. First, the rent officer's investigation would only go to jurisdiction and would have no influence on his determination of the application, which is to fix a rent, whereas the Commissioner's investigation would normally be determinative (and would certainly influence the resolution) of the application to him, as it will usually simply require him to decide whether the information should be disclosed. Secondly, there is no provision in the Rent Act equivalent to section 7(1) in this case (as interpreted by the BBC), which could be said specifically to deprive a rent officer of the power to decide the very issue which is said to go to his jurisdiction.

83. It is probably another way of making this point, but it seems to me that Ms Carss-Frisk's contention really sells the pass. To meet the

contention that the hybrid authority should not be the ultimate statutory decider as to whether the requested information is excluded, she says that, in order to see if he has jurisdiction under section 50, the Commissioner may, indeed must, resolve whether a hybrid authority was right to say that it need not comply with a request as the relevant information is excluded. However, in order to maintain its wider case, the BBC says that the Commissioner does not have jurisdiction to decide whether the authority should comply with the request if the information is excluded. But if the Commissioner decides the authority was right to say that the information was excluded, then he would effectively have carried out and concluded his section 50 role, whereas if he decides the authority was wrong, then, even on the BBC's case, he would then have full jurisdiction to proceed under section 50. The only practical difference would be that, on the BBC's case, any challenge to the Commissioner's decision would be by way of judicial review in court, whereas, on Mr Sugar's case, it would be by way of appeal to the Information Tribunal under section 57.

84. This leads me to the second problem if the BBC's case is correct. It is that, instead of the Information Tribunal or, subject to Ms Carss-Frisk's point, the Commissioner, deciding, under sections 57 and 50 respectively, whether a contention that information was excluded was justified, the issue would have to go before the court by way of judicial review. A court, acting under the judicial review procedure, would be a significantly less appropriate forum for such a determination than the Tribunal and the Commissioner, with all their accumulated expertise, their statutory powers to order disclosure, and their inquiries being essentially confidential in nature.

85. The third problem with the BBC's case is that, if it is correct, it is hard to see how the Act would work in many cases where there was a serious argument whether the material was excluded. If the authority believed the requested information was excluded, it would not even have to reveal whether it held the information (as section 1(1)(a) would not apply). Similarly, if the authority believed that a request for generic information applied to information only some of which was excluded, it would not have to inform the applicant of the existence of the excluded information. Ms Carss-Frisk says that the Commissioner could require the authority to provide him with information to decide whether he had jurisdiction in relation to such allegedly excluded information. However, that rather undermines the BBC's case: if the Commissioner could call for the information to decide if it was rightly withheld, it would remove most of the point of it being excluded from the ambit of the Act.

86. Further, it seems to me that there could be procedural problems where a hybrid authority contends that (a) information is excluded, but (b) if it is not, it nonetheless does not have to produced (or even, possibly, its existence revealed), for one of the statutory reasons – i.e. excessive cost of compliance (under section 12), vexatiousness (section 14), or the information is exempt under Part II. On the BBC's case, the issue whether the information was excluded would have to go to court (either directly, or, if Ms Carss-Frisk's point is right, after the Commissioner had declined jurisdiction), and the other reason would have to be decided by the Commissioner (or, on appeal, by the Tribunal). This is not merely inconvenient in terms of time and cost. It could also lead to rather an absurd result. If the same tribunal had to consider all the grounds, it could approach them on a practical and overall basis, often considering the second ground first. But, on the BBC's case, the question of exclusion would have to be determined first, so the hybrid authority might have to produce evidence to show that the information was excluded, where section 12 was being relied on (where the authority was contending that it was disproportionately expensive to search for the information in the first place), or where section 26 was being relied on (where the authority was contending that revelation of the information could damage the defence of the realm).

87. Fourthly, it seems unlikely that the legislature intended the Commissioner to have no statutory jurisdiction to decide that information held by a hybrid authority was excluded, given that he plainly has jurisdiction under section 50 to decide whether an authority's contention that information is exempt under any of the provisions in Part II of the Act. It would be odd if the Commissioner (and indeed, on appeal, the Tribunal) had the statutory power to consider whether information is exempt – e.g. because its communication would prejudice defence of the realm, international relations, formulation of government policy, or the conduct of public affairs (sections 26, 27, 35 and 36) – but not to consider whether information was excluded.

88. Finally, if the BBC is correct in its contention, it is hard to see what function section 7 has, a point that Buxton LJ seemed inclined to accept in the Court of Appeal – see [2008] EWCA Civ 191; [2008] 1 WLR 2289, para 26 .

89. The interpretation advanced by Mr Sugar leads to none of these problems of principle, logic and practice. However, it does attribute to section 7(1) a somewhat different, more nuanced, meaning than that which it would most naturally bear if read on its own. Nonetheless, in

my view, Mr Sugar's interpretation accords with the overall purpose of the Act, and it does no violence to any of its language, including the language of section 7(1) itself.

90. As I see it, Mr Sugar's contention involves accepting that, once a request for information is made under the Act to a hybrid authority, the fact that it claims that the information is excluded does not mean that the authority thereby ceases to be a public authority under the Act. The BBC, like every other hybrid authority, is listed in Schedule 1 as a public authority, and it does not seem to me to conflict with the wording of that Schedule or section 3(1) if a hybrid authority does not cease to be a public authority merely because it claims that the requested information is excluded. The applicant has treated it as a public authority by making a request under section 1 of the Act, and, at least until he accepts, or it is conclusively determined, that the information he seeks is excluded, it appears not only sensible, but not in conflict with those provisions, that the authority should be treated as a public authority subject to the provisions of the Act.

91. Once a hybrid authority honestly concludes that the requested information is excluded, then it would appear to follow that it should also be able to contend that it need not comply with the obligations in section 1. That seems to me to be consistent with the policy of the Act: a hybrid authority should not have to search for and give details of, information which it honestly believes is excluded, unless and until it is held not to be excluded. However, just as the authority can proceed on the basis that it is right in such a case, so can the applicant proceed on the basis that he is right. Accordingly, if the applicant considers that the information is not excluded, he can apply to the Commissioner for a decision under section 50. That is because he contends that he has made "a request for information … to a public authority" which has not "been dealt with in accordance with the requirements of Part 1". The Commissioner can then proceed to deal with the application under sections 50 to 53, and if either party is dissatisfied with his decision, they can appeal to the Tribunal under section 57.

92. Some support for the notion that information which turns out to be excluded may not initially be treated for all purposes as excluded under the Act, and in particular under section 7(1), is to be found in section 16. Section 16(1) obliges an authority "to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it". In many cases, the request or preliminary enquiry

may be framed in a general or imprecise way so that it is not clear whether the information is or will be excluded. In such cases, it appears to me that, even on the BBC's construction, the authority could not be expected to take a view one way or the other at once: that would be unrealistic, and it could be unfair on the applicant or the authority or on both. In such cases, it appears to me that, on any view, section 16 would apply and the authority would have to provide advice and assistance at least until it was in a position to decide whether, in its view, the information sought was excluded. This tends to support the notion, inherent in Mr Sugar's case, that exclusion is not necessarily a status imposed on information by the Act from the moment a request is made let alone from the moment the information comes into the authority's possession.

93. At first sight, this conclusion may appear to conflict with section 7(1), because, as discussed above, it appears to be so worded as to indicate that, if the Commissioner decides that the information is excluded, he would seem to have had no jurisdiction to consider an application in respect of it under section 50 in the first place. In my view, the answer to that point is that, as already explained, until it has been accepted by the applicant or determined by the statutorily designated person (i.e. the Commissioner or, on appeal, the Tribunal) that the information requested is excluded, it cannot be treated as excluded for the purposes of section 7(1). I accept that this is not stated in terms in the Act, and that it does not accord with the natural meaning of section 7(1), if read on its own. However, it does not seem to me to conflict with section 7(1), if, as it should be, it is read in its context, with a view to achieving a result which accords with the purpose of the Act and harmonises with all the other relevant provisions of the Act.

94. On that basis, I consider that it is permissible, indeed appropriate, to read "any other information" in section 7(1) as referring to information which has been (a) claimed by the authority to be excluded and (b) accepted by the applicant, or determined by the Commissioner (or, on appeal, by the Tribunal) to be excluded. In other words, where a hybrid authority is requested to give information which the applicant contends is not excluded and the authority contends is excluded, then, until such time as it is agreed by the applicant or determined in accordance with the statutory machinery that the information is excluded, it is not to be treated as excluded for the purposes of section 7(1). This involves placing a gloss on the meaning of the words of section 7(1) if it is read on its own, but it does not give those words a meaning they do not naturally bear. It avoids the problems of the BBC's

construction, and gives section 7(1) a meaning which harmonises with the other provisions of the Act, and with the overall purpose of the Act.

95. As already explained, in the event of a dispute as to whether information is excluded, unless the authority is to be the statutory judge in its own cause, it is necessary to find some mechanism in the Act for resolving the dispute, and for covering the period until the dispute is resolved. Until such resolution, the hybrid authority is to be treated as a public authority in relation to the information requested, and it is only when and if the information is agreed or determined to be excluded that it ceases to be a public authority in relation to the information requested, and section 7(1) applies.

96. Accordingly, for these reasons, I, too, would allow Mr Sugar's appeal.