



15 February 2012

PRESS SUMMARY

Sugar (Deceased) (Represented by Fiona Paveley) (Appellant) v British Broadcasting Corporation (Respondent) [2012] UKSC 4

On appeal from [2010] EWCA Civ 715

JUSTICES: Lord Phillips (President); Lord Walker; Lord Brown; Lord Mance; Lord Wilson.

BACKGROUND TO THE APPEALS

By October 2003 pressure groups had complained that coverage by the British Broadcasting Corporation [“BBC”] of the Israeli-Palestinian conflict was not impartial [6]. In November 2003 Mr Malcolm Balen was appointed by the BBC to produce a report on the quality and impartiality of its coverage of Middle Eastern affairs [“the Balen Report”], which was intended to be an internal briefing document [6 - 7]. In November 2004 the Balen Report was considered by the BBC’s Journalism Board, which consequently commissioned a paper called *“Taking Forward BBC Coverage of the Middle East”* [9]. A number of internal changes resulted, including development of training, auditing of on air use of experts and the creation of a post of Middle East Editor [10].

On 8 January 2005, the Appellant, Mr Steven Sugar, made a request pursuant to s.1 of the Freedom of Information Act 2000 [‘FOIA’] for disclosure of the Balen Report [12]. The BBC is made subject to FOIA only to a limited extent, namely *“in respect of information held for purposes other than those of journalism, art or literature”* [1]. The BBC refused the request on the basis that it held the Balen Report for purposes of journalism and thus it lay beyond the scope of FOIA [12]. In March 2005 Mr Sugar applied to the Information Commissioner pursuant to s.50(1) of FOIA for a decision whether the BBC had determined his request within the terms of FOIA. The Commissioner concluded that the BBC had lawfully rejected his request as, even if the Balen Report had also been held for non-journalistic purposes, it continued to lie beyond the scope of FOIA because the journalistic purpose was manifestly dominant [13]. The Commissioner also observed that BBC was not a *“public authority”* for the purposes of FOIA and thus Mr Sugar had no right of appeal under s.57 of FOIA to the Information Tribunal [15]. On 30 December 2005 Mr Sugar nevertheless appealed to the Tribunal, which determined it had jurisdiction. The House of Lords upheld its jurisdiction decision (in *Sugar v BBC* [2009] UKHL 9) since, even in relation to a request for information which was held to lie outside the designation, the BBC remained a public authority for the purposes of FOIA [20].

Before the Tribunal, Mr Sugar contended that even if the information is held only partly for purposes other than those of journalism, the information is within the scope of FOIA [4]. The BBC’s primary contention was that where information is held for the purposes of journalism, that information is beyond the scope of FOIA even if it is also held – even predominantly held - for purposes other than journalism [3]. The BBC’s secondary contention was that the information is within the scope of FOIA only if the purposes other than journalism are the *dominant* purpose for which it is held [5]. On 29 August 2006 the Tribunal accepted the BBC’s secondary contention but held that the Balen Report was within the scope of FOIA as, once the report had been placed before the Journalism Board, it was held predominantly for purposes other than journalism [21]. On 2 October 2009 Mr Justice Irwin allowed the BBC’s appeal on the basis that the BBC had no obligation to disclose information that the BBC held to any significant extent for the purposes of journalism and further that, even if the test was one of dominant purpose, the Tribunal had erred in finding that the Balen Report had been held predominantly for purposes other than those of journalism [22]. The Court of Appeal dismissed Mr Sugar’s appeal, rejecting the dominant purpose construction and approving the BBC’s primary construction of the designation [23]. Sadly Mr Sugar died in January 2011. The court appointed his widow, Ms Fiona Paveley, to represent his estate in this appeal [4].

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Phillips, Lord Walker, Lord Brown and Lord Mance dismiss the appeal on the basis that, even if information is held only *partly* for the purposes of journalism, art or literature, it is outside the scope of FOIA. Lord Wilson would have dismissed it on the basis that, if

information is held *predominantly* for the purposes of journalism, art or literature, it is outside the scope of FOIA and that the Balen Report was held predominantly for those purposes [57].

REASONS FOR THE JUDGMENT

Section 7(1) of FOIA provides that, where a public authority is listed in Schedule 1 of FOIA only in relation to information of a specified description, nothing in Parts I to V of FOIA is to apply to any other information held by the authority [31; 69]. Under Part VI of Schedule I to FOIA, the BBC is made subject to FOIA only “*in respect of information held for purposes other than those of journalism, art or literature*” [1]. At the material time BBC held the Balen Report for the purposes of journalism. The issue is therefore how the phrase “*purposes other than those of journalism*” should be construed [2].

Four possible categories of information held by the BBC exist: (1) information held exclusively for purposes other than those of journalism [or art or literature]; (2) information held predominantly, but not exclusively, for non-journalistic purposes; (3) information held predominantly, but not exclusively, for journalistic purposes and (4) information held exclusively for journalistic purposes [73]. The Appellant argued that the BBC’s immunity under Part VI of Schedule I to FOIA was limited to information in category (4). The BBC’s primary contention, upheld by Irwin J and the Court of Appeal, was that the BBC had to disclose information only in category (1) subject to particular exemptions under other provisions of FOIA [73]. The BBC’s secondary contention, adopting a dominant purpose construction, was that only information in categories (1) and (2) had to be disclosed, subject to the exemptions.

The court holds that the Court of Appeal was correct in deciding that once it is established that the information sought is held by the BBC to any significant degree for the purposes of journalism, it is exempt from production under FOIA, even if the information is also held for other purposes [67; 75; 104; 111]. The legislative purpose of FOIA is to promote an important public interest in access to information about public bodies [76]; but in this case there is a powerful public interest that the public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work [78]. The purpose of the designation would have failed if the coexistence of other non-journalistic purposes resulted in the loss of immunity [78]. The real emphasis of the words is on what is *not* disclosable, namely material held for the purposes of the BBC’s broadcasting output [79]. The Tribunal should have some regard to the *directness* of purpose, considering the proximity between the subject matter of the request and the BBC’s journalistic activities and output [83]. The purpose of the designation is to protect the BBC from interference with its functions in broadcasting journalism, art and literature [64] and consequently a purposive construction of it would prevent disclosure that would risk such interference [65]. Information should be found to be held for the purposes of journalism, art or literature only if an *immediate* object of holding the information is to use it for one of those purposes [67].

As to the contention on behalf of the Appellant that this approach would violate Article 10 of the European Convention on Human Rights [‘ECHR’], the Court noted the well-established body of jurisprudence of the European Court of Human Rights that defines the nature of the right under Article 10(1) as prohibiting a government from restricting a person from receiving information that others are willing to impart to him but does not construe the article as imposing positive obligations on a State to disseminate information of its own motion [89]. The jurisprudence relied upon by the Appellant falls far short of establishing that an individual’s freedom to receive information is interfered with whenever a public authority acting consistently with domestic legislation refuses access to documents [94]. Article 10 creates no general right to freedom of information [94] and consequently no interference with Mr Sugar’s ECHR rights [97]. Even if there had been such a right, it would be open to the State to legislate a blanket exclusion of any requirement to disclose information held for the purposes of journalism [98].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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