Case No: C1/2007/1078

Neutral Citation Number: [2008] EWCA Civ 191
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
(MR JUSTICE DAVIS)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday, 25th January 2008

Before:

LORD JUSTICE BUXTON
LORD JUSTICE LLOYD
and
SIR PAUL KENNEDY

- -

Between:

SUGAR & ANOTHER **Appellants**

- and -

BBC **Respondent**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr T Eicke and Mr D Lightman (instructed by Forsters LLP) appeared on behalf of the first **Appellant**.

Mr B Hooper (instructed by The Information Commissioner) appeared on behalf of the second **Appellant**.

Miss M Carss-Frisk QC and Ms K Gallafeut (instructed by BBC Litigation & Intellectual Property Department) appeared on behalf of the **Respondent**.

- -

Judgment

(As Approved by the Court)

Lord Justice Buxton:

1. This is an appeal from a judgment of Davis J reported [2007] 1 WLR 2583. I set out only as much as is necessary to understand these issues in this appeal. The judgment below is, with respect, an impressive survey of the case as it stood before the judge, which can safely be referred to by anyone who wants to know more about the history of the matter.

2. The case concerns the procedures under the Freedom of Information Act 2000 ("the Act"). The Act, as its long title says, makes provision for disclosure of information held by public authorities, and by Part I gives persons generally rights to enquire of public authorities whether they hold information of the description specified in the request and, if so, to have the information communicated to them. That latter right is subject to certain limitations, none of which arise in our case.

3. The first stage in the enforcement of these rights is that a person who has unsuccessfully sought information from a public authority can apply to the Information Commissioner. The Information Commissioner is the officer originally known as the Data Protection Commissioner, a public official appointed by letters patent. The reach and terms of such an application are set out in section 50(1)-(3) of the Act:

> "50 Application for decision by Commissioner
>
> (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. Section 50 is contained within Part IV of the Act which is entitled "Enforcement". Part of that enforcement function is provided in section 50(4), relating to the serving of a decision notice, section 51 provides for the Information Commissioner to seek further information from the public authority. Section 52 enables the Information Commissioner to serve an enforcement notice on the public authority, requiring it to take specified steps to comply with its obligations under Part I of the Act, and section 54 provides that if the public authority fails to comply with any of a decision, information on enforcement notice, he may certify that lack of compliance to the High Court.

5. Section 57 then provides for appeals to the Information Tribunal, an independent judicial body. By section 57(2) the public authority may appeal against an information or enforcement notice. By section 57(1):

> "Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

6. It will be noted that the whole scheme depends on the body from which the complainant seeks information being a public authority. By section 31 (a)(1) a "public authority" is any body which is listed in schedule 1 to the Act. Schedule 1 relevantly contains the entry:

> "The BBC, in respect of information held for purposes other than those of journalism, art or literature"

7. I turn to the information the production of which was disputed in the exchanges that led up to these proceedings. That is, with respect, well set out in paragraphs 3-4 of Davis' J judgment;

> "A number of persons and lobby groups has in the past expressed the view that the reporting by and news coverage of the BBC in relation to the Middle East and in particular the conflict between Israel and the Palestinians was not even handed. Because of the concerns raised the BBC decided to ask Mr Malcolm Balen, a very experienced journalist, to advise on the coverage by the BBC of Middle Eastern matters. During 2004 Mr Balen produced an internal written report. This was eventually placed for consideration by the Journalism Board of the BBC on 9th November 2004. Subsequently in 2005 a panel, chaired by Sir Quentin Thomas, was appointed by the Board of Governors of the BBC to

> provide an external independent review of BBC reporting of Middle East affairs. That panel reported in April 2006. In the meantime the BBC had created the post of Middle East Editor, Mr Jeremy Bowen being appointed and taking up his post in June 2005.
>
> The Balen Report has never been published. Mr Sugar wished and wishes to see it. He has taken the view that he was entitled to see it under the provisions of the Freedom of Information Act 2000 ("the FOIA"). He made a written request to the BBC accordingly on 8th January 2005. The response of the BBC was to the effect that the Balen Report directly impacted on the BBC's reporting of crucial world events and that the FOIA did not apply."

8. Mr Sugar's reaction to that refusal, and the subsequent involvement of the Information Commissioner and the Information Tribunal, is set out paragraphs 5-9 of the judge's judgment:

> "By a detailed letter of 24th October 2005 the IC set out his provisional view that the Balen Report was held for the purposes of journalism, art and literature (what before me was, for shorthand convenience, called 'the derogation'); and that in the circumstances the BBC was not a public authority under the FOIA in respect of Mr Sugar's request and was not obliged to release the contents of the Balen Report. Mr Sugar did not seek to submit to the IC any further comments (although invited to do so); and on 2nd December 2005 the IC confirmed his final decision that the Balen Report was not disclosable, on the basis previously indicated in the provisional decision letter. The letter concluded with the words: 'I would also like to take this opportunity to inform you of your right to request a Judicial Review of our decision.
>
> Mr Sugar did not at that time seek a Judicial Review of that decision. Instead on 30th December 2005 he sought to appeal to the Information tribunal ('the Tribunal') invoking the provisions of s.50 of the FOIA for that purpose. The position of the IC at the time was that Mr Sugar had no right of appeal under s.50, that the IC had served no appealable decision notice and that the Tribunal had no jurisdiction to entertain such an appeal. That also was the view of the BBC.

A preliminary issue was directed by the Tribunal on the jurisdiction point, it having indicated an initial view that it did have jurisdiction. A hearing was then held on 14th June 2006 and a ruling given. It appears that the IC had by then had a change of mind and was not now disputing the jurisdiction of the Tribunal. The BBC, however, was.

By its decision dated 14th June 2006, and formally issued on 29th August 2006, the Tribunal ruled that it did have jurisdiction to entertain Mr Sugar's appeal. Having so ruled, the Tribunal then proceeded to deal with the substantive issue raised on the appeal (which in argument before me was called 'the journalism issue'). The hearing in total before the Tribunal lasted some 3 days. A good deal of evidence – both written and oral – was adduced, much of which had not been employed before the IC. Mr Sugar appeared in person at that hearing; the IC and the BBC was each represented by counsel. At the hearing the BBC was arguing for a broad approach to the phrase 'for the purposes of journalism' by reference to the provisions of the FOIA (to which I will come). Mr Sugar was arguing for a narrower approach.

The decision of the Tribunal on the journalism issue, also issued on 29th August 2006, set out a summary of the evidence and arguments deployed. The Tribunal indicated that, in effect, the Balen Report could indeed be said to have been *created* for the purposes of journalism. But it decided, on its view of the evidence, that by the time of Mr Sugar's request of 8th January 2005 the Balen Report was not *held* for the purposes of journalism. Perhaps the nub of the Tribunal's reasoning is to be found in paragraph 133 of its decision:

> 'The Tribunal is clear that, when originally commissioned, Mr Balen's work was for predominantly journalistic purposes. It formed a part of the third leg of the meaning of journalism that the Tribunal has adopted, in that it was primarily an output review intended to assure and enhance quality. However, when elevated to the Journalism Board on 9th November 2004, as a formal report, it was being used for, and hence was held for, wider purposes of strategic policy and resource allocation, which lie outside the scope of the derogation.'"

9. In order to meet the possibility that the court might hold that the Information Tribunal had had no jurisdiction to entertain this appeal, Mr Sugar sought alternatively to ventilate the journalism issue by seeking permission to apply for judicial review, challenging the original decision of the Information Commissioner that the Balen Report was held for the purposes of journalism, art or literature. Before the judge the BBC challenged the determination of the Information Tribunal on the journalism issue, but also submitted as a preliminary matter that the Information Tribunal had had no jurisdiction to entertain Mr Sugar's appeal.

10. Davis J upheld the BBC's case on the jurisdiction of the Information Tribunal and thus, in the BBC's appeal, did not need to address the journalism issue. That issue was, however, the subject of Mr Sugar's judicial review application. Davis J granted leave for that application to be pursued, but rejected it, holding that it was not possible to define the phrase "held for the purposes of journalism" *in vacuo*. The question was whether the decision of the Information Commissioner was, on the particular facts, rational and properly open to him. Davis J held that it had been.

11. The original form of the proceedings in this court was that Mr Sugar, supported in that regard by the Information Commissioner, appealed against the judge's decision on jurisdiction. Mr Sugar also appealed against the rejection of his judicial review application. He was, however, unwilling or unable to pursue either appeal without a protected costs order. In view of the public importance of the jurisdiction issue, we granted such an order in respect of his appeal on jurisdiction. We refused an order in respect of the judicial review appeal. That was because the judge had formed a clear view that, even if Mr Sugar were right on the substance of the judicial review application, the vehicle adopted by him was inappropriate and, in any event, no relief would have been granted. The judge's reasons to so thinking are set out in paragraph 70 of his judgment, which do not need to be repeated here. We considered with respect that the judge's analysis was entirely correct. In those circumstances it would have been quite inappropriate to have encouraged those proceedings further by means of a protected costs order.

12. In the light of that decision, Mr Sugar withdrew his appeal and the judicial review proceedings. We are therefore concerned only with Mr Sugar's jurisdiction appeal. In that appeal, Mr Sugar has the benefit of representation *pro bono* by Mr Eicke and Mr Lightman whom, together with their instructing solicitors, we thank for assisting the court in that respect. All parties have considered the issues in detail and with great care and, in particular, we received very substantial written submissions.

13. I should deal first with the argument raised in ground 1B of Mr Sugar's grounds, that Davis J had had no jurisdiction to hear the BBC's appeal from the Information Tribunal because that had been what the grounds described as a preliminary decision, and the right of appeal under section 59 of the Act applies only to final decisions. There were significant and substantial

complaints from the other parties that this issue was never raised before Davis J, and thus lengthy and expensive proceedings were allowed to go forward in circumstances in which, if Mr Sugar is right on this point, that exercise simply beat the air. However, the single lord justice gave permission for the issue to be pursued, and we did not exclude it from ambit of the protected costs order. But the point is very short and, I have to say, unimpressive. Mr Sugar advanced two arguments in support of this contention, the second only really emerging in oral submissions.

14. First, section 59 provides that:

> "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."

Mr Sugar concentrated on the use of the definite article "the" to say that the section thus addresses only one, the final, decision. That would produce a highly inconvenient and unlikely result, as indeed the application of that interpretation in the present case would demonstrate. If Mr Sugar is right on this point, a preliminary decision of the Information Tribunal on jurisdiction, if unfavourable to the BBC, could not be appealed by the BBC until the whole process had been completed. That would be the case in relation to an enforcement notice, as well as to an alleged decision notice. It may, in some cases, be the easier course to proceed nonetheless with the whole hearing without resort to the court, but the potential inconvenience and waste of that course in other cases makes it very unlikely that Parliament will have made it the universal rule. Parliament is said to have produced that result simply by employing the definite, rather than the indefinite, article when describing what can be appealed. That places far too much weight on the use of the definite article once one considers the results that Parliament is said to have intended to follow from it.

15. There is a further difficulty about Mr Sugar's interpretation. The right of appeal is given against "the decision of the tribunal on a point of law". The natural meaning of that phrase, taken as a whole, is that the party can appeal against any decision on a point of law, which the Information Tribunal's decision in this case clearly was. If the section had the limited meaning attributed by Mr Sugar, it would much more naturally have read, "may appeal on a point of law from the decision of the tribunal".

16. The second argument took us to the terms of section 58, which provides that:

> "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;"

17. Mr Eicke argued that the language and procedure was inappropriate to apply to interlocutory decisions. That may be so, but it is not correct to characterise the disputed decision in our case, which concerned whether the Information Tribunal had jurisdiction to entertain the appeal at all, as interlocutory in the usual sense of that term. The Information Tribunal had held that the notice was not in accordance with law. The BBC's complaint before Davis J was that that conclusion was not open to the Information Tribunal because it lacked jurisdiction. That was an appeal in respect of a final decision of the Information Tribunal, even though pursued on an issue of jurisdiction rather than of substance.

18. The major dispute between the parties concerns that jurisdiction issue: that is, whether the Information Tribunal should have entertained Mr Sugar's appeal at all. The dispute arises out of the exchanges that I have already set out from paragraphs 5-9 of the judgment. Davis J's conclusion that the Information Tribunal did not have jurisdiction to hear an appeal by Mr Sugar from the decision of the Information Commissioner is to be found in paragraphs 42 and 43 of his judgment:

> "42. Mr Hooper conceded that, for there to be an appeal to the Tribunal under s.57, there must first have been served a decision notice under s.50(3)(b). I am not sure if Mr Sugar himself accepted the point. But in any case it seems to me, for the reasons I have given, that the wording for s.50 and of s.57 show Mr Hooper's concession to be correct. In my view, the 'decision' referred to in s.50 (2) and s.50(3)(b) clearly is referring back to the 'decision' specified in s.50(1). So where then in this case is the decision notice to the effect that Mr Sugar's request had or had not been dealt with in accordance with Part I of the FOIA?
>
> 43. In my view there was no such decision notice here: just because the IC had taken the view that the BBC was not a public authority subject to Parts I-V of the FOIA for the purposes of Mr Sugar's request."

19. The point is straightforward. Section 57(1) provides that when a decision notice has been served the complainant or the public authority may appeal to the Information Tribunal against that notice; thus the serving of a decision notice is a condition precedent to the Information Tribunal doing anything, and it is the decision notice and nothing else that is appealed against. We

should remind ourselves in that context of the terms of section 50(3). That does not come into play unless the condition preliminary to the operation of the section is satisfied:

> "When the Commissioner has received an application under this section."

20. The first question for the Information Commissioner is therefore whether he has received such an application. That is, whether he has been asked for a decision as to the handling of a request for information made to a public authority.

21. By section 50(1), the issue before him will be whether a request to a public authority has been dealt with in accordance with the requirements of Part I of the Act. But if the Information Commissioner decides that the request was not made to a public authority, he does not and cannot make a decision as to whether the "public authority" has dealt with the request in accordance with Part I of the Act; and it is only the communication of that latter type decision that, by the specific wording of section 50(3)(b), is defined as a "decision notice" for the purposes of section 57. In the present case the Information Commissioner considered that, in respect of the Balen Report, the BBC was not a public authority and therefore the Balen Report and the BBC's handling of any request in relation to it did not fall under the statute at all.

22. Mr Sugar urges that the Information Commission was wrong in that conclusion on the journalism issue and should have issued a decision notice in respect of Mr Sugar's complaint. But that is what the Information Commissioner did not do. Rightly or wrongly, he failed to create the condition precedent for an appeal to the Information Tribunal. Mr Sugar's remedy for the Information Commissioner's alleged mistake is to seek judicial review in respect of it -- the application that failed before Davis J and which is not now before us.

23. Mr Sugar and the Information Commissioner sought to escape from that problem by advancing a different interpretation of the provisions of the Act with regard to the BBC, and also by advancing two arguments on the construction of the Information Commissioner's letter of 2 December 2005. Under the first of these heads Mr Sugar and the Information Commissioner repeated the argument that they had advanced unsuccessfully before Davis J, that a combination of section 7(1) and the entry in schedule 1 in regard to the BBC that is set out above means that the BBC is a public authority in all respects. The significance of the reference in schedule 1 to journalism, art or literature was that the provisions of the Act do not apply to such information when it is held by the BBC. Therefore, when Mr Sugar made his request to the Balen Report, he was making a request to a public authority. Then, if I understood the argument correctly, it was the duty of the Information Commissioner to make a decision as to whether the information sought fell within the description of journalism. That decision was necessarily contained in the decision notice, which therefore can found an appeal to the Information Tribunal.

24. For reasons that I will shortly set out, I very much doubt whether this construction, even if correct, would assist a claimant in this or in any other case. But the construction is not right, largely for the reasons given by the judge in his paragraphs 35 and 37. By section 3 a "public authority" is a body that is listed in schedule 1. We have seen how the BBC, and in what terms, is listed in schedule 1. The plain meaning of that listing is that the BBC is a public authority in respect of information not held for the purposes of journalism etcetera, but not otherwise. That is what the words mean, and there will be no reason to go behind them except for the forensic purposes deployed in this case.

25. But Mr Sugar and the Information Commissioner said that everything was changed by section 7(1) which provides that:

> "Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority."

26. Whether that provision was strictly necessary may be in doubt, but it may have been introduced as a precaution against attempts to apply administrative provisions relating to information, such as the duty to provide advice under section 16 or the duty to have a publication scheme under section 19, to information in respect of which the BBC and other similar organisations is not a public authority. But there is nothing in section 7 to bear the radical weight sought to be placed on it in this case, and nothing that would justify diverting from the plain meaning of the entry in section 1.

27. There are further difficulties about the construction sought by Mr Sugar and the Information Commissioner. First, Part II of the Act contains substantial provisions about exempt information. If the true meaning of the entry in schedule 1 is to remove information from the reach of the Act, rather than to delimit the respects in which the BBC is a public authority, then it is very difficult to see why the same structure as is used in Part II is not employed here. Second, as I have already said, it was very difficult to see how this construction, even if adopted, would assist the Information Commissioner or the complainant in this or in any other case. The Information Commissioner said that, for instance, his powers of investigation under section 51 were impeded by the view that the BBC as a public authority that was adopted by Davis J. But when the Information Commissioner seeks to investigate matters that do or may fall within the province of journalism, he will met by the same contention that he lacks *vires* whether that contention is based on the claim that the BBC is not, in the relevant respects, a public authority; or, as the Information Commissioner says it ought to be, on a claim that the information in question falls outside the reach of Parts I to IV of the Act. In either case, if he disagrees, he will serve the same decision notice.

28. That dilemma can be further illustrated from the facts of the present case. 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 has 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".

30. So, therefore, it would seem that the conclusion of the Information Commissioner on the journalism issue, right or wrong, would lead to his failing to issue a decision notice under section 50(3), whatever were the grounds on which he concluded that the Act simply did not apply to the request made by the complainant; and in the absence of such decision notice there is nothing to appeal against the Information Tribunal.

31. I have to say, therefore, that there is really no ground for adopting the strained construction sought to be placed on the entry in schedule 1 in relation to the BBC, save for the assistance that it is thought to provide in the particular circumstances of this case. The judge was, with respect, quite right to reject this part of the argument.

32. The problem for the appellants was, however, sought to be met by two further arguments that specifically address the letter that the Information Commissioner did, in fact, write on 2 December 2005. That said:

> (i). the Balen Report is held for the purpose of journalism, art or literature;
>
> (ii) the BBC has validly applied Part VI of Schedule 1 of the Act

33. That, said Mr Eicke, was in any event a decision letter. By subparagraph (ii) it approved the claim of the BBC that it was not a public authority, and therefore by so doing had made a determination about one of the requirements of Part I of the Act: which by section 50(1) can be, and in this case was, the content of a decision notice. Quite apart from the fact that the letter said nothing at all about information (which is the touchstone of Mr Sugar's argument) but referred only to Part VI of schedule 1, this construction of it (which, I think it is fair to say, only clearly emerged in the course of oral submissions) is in my view not possible. The question that the Information Commissioner has to answer, if he thinks that the case comes within his ambit at all, is whether the complaint has been dealt with in accordance with the requirements of Part I. "Requirements" are something directed to the public authority, that the public authority must obey rather than just think about. They are such as are to be found, for instance, in sections 10-14 of the Act. If section 50 had the meaning that Mr Eicke contends for, it would speak of the terms of Part I, rather than of the requirements of Part I.

34. Second, however, the Information Commissioner had another and, I have to say, remarkable string to his bow. He said that, contrary to the view that he had originally taken, he now thought that he had, without realising that he was doing so, served what amounts in law to a decision notice. That is, as I understood it, a decision on the substance of the case and not merely, as in the argument just referred to, on the status of the British Broadcasting Corporation. This submission moved uncomfortably between saying that the letter of 2 December 2005 had indeed been a decision notice, and saying that, even if that were not so, the court should so treat it as if it had been a decision notice. I will address those submissions in turn.

35. The first of these contentions is hopeless, as the judge held in his paragraph 43. The Information Commissioner will have been conscious of the courses open to him under section 50(3) when faced with the complaint as to whether the request had been dealt with in accordance with Part I of the Act. In the letter of 2 December 2005 he said in terms:

> "…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."

36. That, as already demonstrated, was plainly a statement that the Information Commissioner was not making a decision on Mr Sugar's complaint, rather than a decision notice under section 50(3)(b).

37. So far as the alternative argument is concerned, the Information Commissioner argued that no prejudice had been caused by his belated recognition that he had, in fact, served a decision notice on 2 December 2005 and the just course in order to enable Mr Sugar to appeal to the Information Tribunal would be to hold that, despite what were described as defects in form, that letter was capable of amounting to a decision notice so as to create jurisdiction under section 50. The Information Commissioner cited in support of that contention the observations of Lord Woolf MR in R v SSHD ex parte Jeyeanthan [2000] 1 WLR 354 at 358H and 359D. That case, as Lord Woolf made clear, did not address jurisdiction, but only the effect of procedural lapses in a case where jurisdiction was not in dispute. Our case is completely different. The Information Tribunal does not have jurisdiction unless a decision letter has been issued. There is no justification for our subverting that limiting statutory rule by treating a document that, on its face, was not a decision letter, and which was thought by its author at the time not to be a decision letter, as being counterfactually a decision letter after all.

38. Before the judge Mr Sugar, but not the Information Commissioner, sought to rely on the provisions of Article 6 of the European Convention on Human Rights. The judge dealt with that fairly shortly in his paragraph 45:

> "45. Mr Sugar, however, also sought to invoke the provisions of Article 6 of the Convention in support of his argument. He cited to me *Barry v France* (App No 14497/89) *Loiseau v France* (App No 46809/99); and *Donnadieu v France* (App No 19249/02). He submitted that a combination of the IC's procedures and Judicial Review (if available) was not sufficient to satisfy Article 6. Mr Hooper did not associate himself with the argument. I my view it is not tenable. Mr Sugar has no personal interest in the Balen Report, in the sense that it does not relate to him personally, and he has no obvious civil right or independent right of a private nature with regard to it. In any event, under the FOIA he has the right, as I have held, to seek to have an adverse jurisdictional decision of the IC on his initial complaint reviewed by the court. In such circumstances, the authorities cited by him do not assist him. Article 6 is not the point."

39. This issue rather disappeared from view in the numerous exchanges that followed the judgment, and was not pursued in the skeleton argument settled by Mr Eicke for this appeal. However, in a supplementary skeleton served shortly before the appeal opened, Mr Eicke sought to reopen the Article 6 point. We agreed to hear Mr Eicke on this issue, but the exact status of the argument was not easy to judge.

40. In section 30 of his new skeleton, Mr Eicke said:

> "While not a free-standing claim in the context of this appeal, it is respectfully submitted that consideration of the position under Article 6 further supports the Appellant's argument as to the jurisdiction of the Tribunal."

That I understand to assert that, while no positive case is made that the position as to jurisdiction found by Davis J and upheld in this judgment is in breach of Article 6, what is to be found in the convention should encourage the court to find the existence of jurisdiction for the Information Tribunal as a matter of domestic law. In other words, this is a case for attention to Convention values rather than to Convention rights. That view of the submission is reinforced by its not having been argued that section 57(1) could or should be read down under section 3 of the Human Rights Act in order to escape the need for a decision notice; and no application was made for a declaration of incompatibility.

41. All that said, the two bases of Mr Eicke's submission were as follows. First, the judge had been wrong to think that Mr Sugar had no civil right to see the Balen Report sufficient to engage Article 6; and that, including in excluding him from the ability to apply to the Information Tribunal and leaving him with only the possibility of applying for judicial review of the Information Commissioner's decision, the judge's decision deprived Mr Sugar of a hearing of the determination of those rights by a tribunal.

42. Under the first point, Mr Eicke referred as hot from the press to a dictum of the European Court of Human Rights in paragraph 39 of its judgment of 15 January 2008 in Micallef v. Malta (Application no. 17056/06) which spoke of Article 6 extending to "the right of access to administrative documents," and citing in the latter respect Loiseau v France, decision 4680999. That last decision was before the judge, and it is clear from the passage put to him and to us that a very strong consideration weighing upon the European Court of Human Rights in considering whether Article 6 extended to an applicant for a teaching post, seeking to see administrative documents relating to his recruitment was that, whilst it was difficult to derive from the Convention a general right of access to administrative data and documents, account would be taken of the importance in appropriate cases of disclosure for the applicant's personal situation. We have not seen the Balen Report, but there is no reason at all to think that it is anything at all to do with the applicant's personal situation. The judge was, with respect, quite right to hold that the appellant's interest in it did not generate a relevant Article 6 right.

43. As to the second of the complaints, Mr Eicke cited the requirement laid down in Terra Woningen v The Netherlands (1996) 24 EHRR 456 at paragraph 52, that a "tribunal" under Article 6 must have jurisdiction to examine all questions of fact in law relevant to the dispute before it. Judicial review of the Information Commissioner's determination did not qualify. That was a fairly bold submission, granted that the issue that Mr Sugar says that the Information Tribunal was prevented from considering in breach of Article 6

was considered, over eight pages of a judgment, by a High Court judge hearing judicial review proceedings, even if with an outcome that Mr Sugar does not approve of. That seems to me to demonstrate that the remedy of judicial review in respect of a decision that is one of statutory construction, and where the BBC will be at peril if they do not adequately deploy the facts, provides a fully adequate tribunal to determine Mr Sugar's Article 6 rights, if he has any such rights: which on current Convention jurisprudence he does not have.

44. The recourse to Article 6 was only one aspect of a more general submission: that it was anomalous or at least inconvenient that, on the view of the Information Tribunal's jurisdiction adopted in this judgment, the BBC could appeal to the Information Tribunal if the Information Commissioner served a decision notice requiring certain steps, and in the course of that appeal could raise the journalism issue as precluding any interference by the Information Commissioner; but that the person whose complaint had been rejected by the Information Commissioner on the basis of the journalism issue could not appeal to the Information Tribunal on that same point. Two things have to be said about that.

45. First, although this argument marched under the banner of purposive construction it is very difficult to draw from the statute any purpose that would serve to drive the construction in the direction sought. The purpose is plainly not that a complainant should have a right of recourse to the Information Tribunal in respect of each and every decision of the information provision. That is shown by the careful limitation of the powers of the Information Tribunal to consideration of a decision notice. If that is to be avoided, section 57(1) would have to be rewritten to substitute for the preliminary condition "where a decision notice has been served" some such phrase as "where the commissioner has made any communication in relation to an application under section 50(1)," and to substitute "that communication" for "the notice" at the end of the subsection. That would be legislation, not construction.

46. Second, the scheme, as interpreted by the judge, still confers very considerable rights on a person making a request for information. The Information Commissioner will only decline to make a decision in contestable circumstances in the rare cases under the Act where there can be an argument about whether a body is a public authority -- rare because, in the vast majority of cases, schedule 1 simply lists bodies and public authorities without qualification. In every other case, the issue of whether a public authority has complied with Part I will be the subject of a decision notice that can be appealed by both sides. It is quite unreasonable to think that the court is compelled to rewrite the whole scheme in order to create a right of appeal to the Information Tribunal in a very particular case that can, in any event, be the subject of a judicial review application.

47. I am therefore satisfied that the judge was correct in his conclusion on the jurisdiction of the Information Tribunal, the only matter that is now live before us. I may have found that conclusion easier to reach than did Davis J, but that

is in large part because of the great assistance in understanding the case that I have gained from his judgment. I would dismiss this appeal.

Lord Justice Lloyd:

48. I agree that the appeal should be dismissed. It seems to me that the best point deployed in support of this appeal is the argument from anomaly, which is treated in paragraphs 31 and following of the judgment of Davis J. I can see that it could be said to be odd and inconvenient to have a position in which there could be an appeal by, for example, the BBC against a direction notice which could raise the journalist issue; but that there could not be an appeal against a decision, which is not embraced in a decision notice by the Information Commissioner, that Part I of the Act does not apply in a case such as this because of the view being taken on the journalism issue. By comparison, if a public authority is subject to the requirements of Part I of the Act in respect of certain information but asserts that the information in question is exempt from either or both of the duties under section 1 by virtue of one or more provisions in Part II, then it seems to be common ground that an appeal may lie against a decision (if expressed in a decision notice, which it could be) that the public authority is correct and has proceeded correctly by refusing either to confirm or deny the existence or the holding of the information or, as the case may be, by refusing to disclose it. That situation could, in some respects, be said to be comparable with the present, at any rate on the view (as to which I say nothing more than that which has been said by Buxton LJ) that the BBC can properly be regarded as a public authority in all respects, but as being subject to the requirements of Parts I to V of the Act only in respect of certain information.

49. Parliament might have dealt with that case in a similar way to the case of exempt information under Part II of the Act, but it did not do so. The judge, as he says in paragraph 31 of his judgment, was at one stage attracted by this argument but found it impossible to read the Act in such a way as to eliminate the anomaly. In my judgment he was right in this, although I understand why he found the argument initially attractive. If Parliament had sought to produce a similar position in relation to information of the kind with which this case is concerned, to that which prevails in respect of exempt information, it would not have used the language that is used in the 2000 Act. In the case of exempt information held by a public authority, the authority and the information are plainly subject to the requirements of Part I of the Act. In the case of information in the rather special category at issue in the present case, section 7(1) provides that nothing in Part I applies to that information. Plainly that cannot be read as excluding the effect of section 7(1) itself, which is one of the provisions of Part I, but it does seem to me clear that the effect of that provision is that the BBC, in the present instance, assuming it is right on the journalism question (which does not arise for present purposes), is not subject to any requirements of Part I in respect of this information. It is therefore impossible to identify any requirement in Part I, in accordance with which the BBC would have to deal with a request for this information.

50. I can see that this is an odd result and it is possible that it was not consciously intended, in the sense that if attention had been focussed on the point when the Act was being drafted, a different technique might have been used. It is, however, to be noted that the number of examples of a body in relation to which this sort of point could arise is quite small. Most bodies listed in schedule 1 are public authorities in all respects and with reference to all information held by them. There are some in a position similar to that of the BBC. One example relied on in argument was the Bank of England; another (not relied on in argument, perhaps for understandable reasons) would be the authorities of the Inner and Middle Temples, which are only public authorities in respect of information held by them in their capacity as a local authority. But it is a small minority of the list of bodies. Accordingly, the oddity is a minor one, albeit inconvenient for someone such as Mr Sugar.

51. Like my Lord, I agree that the correct reading of the Act does not allow for a decision notice in the instant notice, and therefore does not allow for an appeal to the Information Tribunal, even if the letter of 2 December 2005 had been in other terms than it was. I agree that the suggested anomaly cannot justify giving the language an interpretation that it cannot properly bear, which is that for which the appellant and the Information Commissioner contended.

Sir Paul Kennedy:

52. I also agree that the appeal should be dismissed for the reasons given by Buxton LJ.

Order: Appeal dismissed