EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 17 March 2015

FOURTH SECTION

Application no. 64367/14
TIMES NEWSPAPERS LIMITED and Dominic KENNEDY
against the United Kingdom
lodged on 19 September 2014

STATEMENT OF FACTS

The first applicant, Times Newspapers Ltd, is the proprietor and publisher of *The Times* newspaper and is registered in England. The second applicant, Mr Dominic Kennedy, is a senior investigative journalist employed by *The Times* who was born in 1963. They are represented before the Court by Ms P. Sarma, a lawyer practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The background facts

(a) The "Mariam Appeal" and Charity Commission inquiries

The Mariam Appeal was a fund launched in 1998 by Mr George Galloway, a Member of Parliament, to enable a young Iraqi leukaemia sufferer (Mariam) to receive treatment in the United Kingdom, to arrange treatment for other Iraqi children suffering from leukaemia and to provide medical supplies to Iraq. Although its objects were charitable, it was not formally registered as a charity. It continued in operation until 2003 and raised a total of almost 1.5 million pounds sterling.

Following the publication in *The Times* of an article written by the second applicant, Mr Kennedy, in which he alleged that funds collected under the auspices of the Mariam Appeal had been misused, the Charity Commission for England and Wales opened an evaluation into the use of the Mariam Appeal's funds for non-charitable purposes. It subsequently launched an inquiry under section 8 of the Charities Act 1993 (see "Relevant domestic law and practice", below) to investigate how the monies

raised between March 1998 and April 1999 had been spent. Meanwhile, the Charity Commission continued to evaluate the use of funds obtained after April 1999. A second inquiry was later opened to investigate how monies raised throughout the lifetime of the Mariam Appeal had been spent. Both inquiries were closed in March 2004. On 28 June 2004 the Charity Commission published a two-and-a-half-page statement of the results of the inquiries setting out its findings. It found that the Mariam Appeal was charitable and ought to have been registered with it, although its founders were unaware that they had created a charity; and it decided that although some payments made to trustees of the Mariam Appeal had been in breach of trust, there had been no bad faith, so that recovery of the sums would not be pursued.

On 9 December 2005 the Charity Commission opened a third inquiry as a result of allegations that the Mariam Appeal had received donations from contracts made under the United Nations Oil-for-Food Programme for Iraq. The inquiry closed in April 2007 and the statement of the results of the inquiry, running to eight pages, was published on 8 June 2007. The Charity Commission concluded that some donations to the Mariam Appeal had come from improper sources, namely contracts made under the UN Programme, and that the trustees had failed to inquire sufficiently into the source of the donations. Accordingly, they had not discharged their duty of care as trustees in respect of these donations. The Charity Commission decided not to take any action, since it was a civil regulator and did not have powers of criminal prosecution and, in any case, the Mariam Appeal had not operated since 2003 and held no assets requiring protection.

(b) The request for information

On 8 June 2007 Mr Kennedy sought information from the Charity Commission concerning the latter's inquiry into the "Mariam Appeal" between December 2005 and April 2007. The request was presented in an email as follows:

> "Application under the Freedom of Information Act
>
> Please would you let me know in writing if you hold information of the following description:
>
> Information concerning:
>
> The inquiry into the Mariam Appeal which took place between December 2005 and April 2007, the results published on June 8, 2007.
>
> If any part of the information requested is covered by one or more of the absolute exemptions in the Act please treat this request as a request for that part of the information which is not covered by the absolute exemption.
>
> If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible.
>
> If you are of the view that there may be further information of the kind requested but it is held by another public authority please let me know as soon as possible. Please continue with this application as soon as possible.
>
> I believe that the information requested is required in the public interest for the following reasons:
>
> 1. To uphold public confidence that the Charity Commission conducts its inquiries in a spirit of fairness to all parties;

2. To provide assurance that the Charity Commission liaises fully with all relevant authorities so its inquiries are as thorough as possible;

3. To ensure that the Charity Commission spends money correctly when making inquiries into charities and their trustees."

(c) The Charity Commission refusal

By letter dated 4 July 2007 the Charity Commission, via its Compliance and Support division, refused to provide the information requested. The letter confirmed that the Charity Commission held the information but relied on both qualified and absolute exemptions under the Freedom of Information Act 2000 ("FOIA" – see "Relevant domestic law and practice", below). Invoking first a qualified exemption available under section 31 FOIA (information related to law enforcement), the letter explained that since that exemption was not absolute it was necessary to consider under section 2 FOIA whether the public interest in withholding the information was outweighed by the public interest in its disclosure. It continued:

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

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

The letter also indicated that the Charity Commission considered the absolute exemption in section 32 FOIA (information held in court records or by a person conducting an inquiry or arbitration) to be engaged, as well as a number of other exemptions in the FOIA.

Mr Kennedy invited the Charity Commission to reconsider its decision, arguing that the exemptions had been misapplied. On 3 August 2007 the Charity Commission confirmed that an internal review had been conducted and that the original decision to withhold the information had been upheld.

(d) The complaint to the Information Commissioner

On 1 November 2007 Mr Kennedy complained, under section 50 FOIA, to the Information Commissioner about the refusal to disclose the information.

On 9 September 2008 the Commissioner published his decision notice. He found that all the information requested was exempt under the absolute exemption contained in section 32(2) (documents obtained or created in connection with an inquiry). He therefore upheld the Charity Commission's decision to refuse to disclose the information. Since an absolute exemption applied, he explained, there was no need for him to consider the public interest set out in section 2 FOIA. In light of his conclusion, he also saw no need to consider whether other exemptions applied.

2. The domestic proceedings

(a) The Information Tribunal

Mr Kennedy appealed under section 57 FOIA to the Information Tribunal ("the Tribunal") requesting it to consider afresh whether the information was exempt under section 32 FOIA. The Charity Commission applied to be joined as an interested party and the application was granted. It subsequently lodged a schedule of the information falling within the scope of the information request.

Following receipt of the schedule, Mr Kennedy identified more precisely the classes of documents, within the terms of his request, to which he sought access. He identified the following four categories:

(i) documents containing information explaining the Charity Commission's conclusion that Mr Galloway may have known that Iraqi bodies were funding the Mariam Appeal;

(ii) documents from the Charity Commission inviting Mr Galloway to set out his position or speak to the Charity Commission and documents containing his response;

(iii) documents received by the Charity Commission from other public authorities and sent by the Charity Commission to them; and

(iv) documents containing information explaining why the Charity Commission had decided to start and continue the second inquiry.

Mr Kennedy excluded from his request information to or from a foreign State or an international organisation and any document for which a claim of parliamentary privilege was asserted. He did this in order to ensure that his request did not interfere with interests protected by the FOIA and to keep the proceedings proportionate.

On 14 June 2009 the Tribunal upheld the decision of the Information Commissioner that section 32 FOIA applied and was an absolute exemption in respect of the bulk of the requested material. It ordered that a small number of documents be disclosed unless another exemption applied.

(b) The High Court

Mr Kennedy appealed to the High Court. He relied on arguments concerning the statutory interpretation of the Charities Act 1993 (see "Relevant domestic law and practice", below) and the FOIA.

The appeal was refused on 19 January 2010 with the judge preferring the arguments of the Information Commissioner and the Charity Commission. He noted that it was agreed between the parties that section 32 created an absolute exemption and that it was the only one of all the exemptions in the FOIA which did not concern itself with the content of the information, the consequences of the disclosure or the public interest in disclosure.

(c) The Court of Appeal

Mr Kennedy sought permission to appeal to the Court of Appeal. Permission was granted on one ground, namely that the judge had wrongly interpreted section 32(2) as conferring (i) a blanket exemption from disclosure that continued for thirty years after the conclusion of an inquiry regardless of the content, the harmlessness of the disclosure and the public interest of disclosure; and (ii) an exemption in respect of documents held by

a public authority prior to the start of an inquiry. In light of recent decisions of this Court, namely *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, and *Kenedi v. Hungary*, no. 31475/05, 26 May 2009, Mr Kennedy argued in particular that pursuant to section 3 of the Human Rights Act 1998 (see "Relevant domestic law and practice", below), section 32(2) FOIA should be interpreted in a way compatible with the Convention, including in particular the right to freedom of expression guaranteed by Article 10.

On 12 May 2011 the Court of Appeal delivered a judgment. Lord Justice Ward, giving the lead judgment, noted that, applying conventional principles of statutory construction, the Charity Commission's interpretation of section 32(2) was to be preferred. However, he explained that the court had decided to refer the human rights issue to the Information Tribunal and to stay the appeal pending its determination.

Lord Justice Jacob added:

> "47. But for the question of whether it is necessary to read s.32(2) down so as to comply with the ECHR I would with reluctance dismiss the appeal. My reluctance stems from the absurdity which may arise from the conclusion. Mr Coppel [for the applicant] ... pointed out that the construction favoured by the Judge ... allows all information deployed in the inquiry to be kept secret for 30 years after the end of the inquiry, regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure. The blanket ban would apply to each and every document deployed in the inquiry, even if those who deployed it were entirely content that it should be published. It means that the operation of the inquiry will not be open or fully open to public scrutiny for no apparent reason.
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> 48. My reason for being forced to this conclusion is the identity of s.32(1) and s.32(2). Clearly and obviously Parliament was treating documents deployed in legal proceedings before a court in exactly the same way as those deployed in an inquiry. It simply overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not. That may well have been a blunder which needs looking at."

(d) Hearing before the First-tier Tribunal General Regulatory Chamber (Information Rights)

Meanwhile, on 18 January 2010, the functions of the Information Tribunal were transferred to the First-tier Tribunal General Regulatory Chamber (Information Rights).

A hearing before the First-tier Tribunal took place in October 2011. The applicant argued that a right of access to information could be derived from Article 10 of the Convention and that the refusal to disclose information amounted to an interference with freedom of expression. The Charity Commission, relying on *Társaság*, cited above, argued that there had to be an "information monopoly" (a term used in the *Társaság* judgment) before there could be an interference with freedom of expression by a refusal to provide access to documents, and that there was none in the present case. The applicant contended that an "information monopoly" was not necessary; and even if it was, there was such a monopoly in his case.

On 18 November 2011 the Tribunal published its report to the Court of Appeal. It gave detailed and careful consideration to this Court's case-law on Article 10 of the Convention. It concluded:

> "42. As best we can the [Tribunal] considers that this developing jurisprudence is not necessarily granting a general right to receive information under Article 10. Such

a general right of access still only exists as set out under *Leander*. It has advanced, however, towards a broader interpretation of the notion of freedom of information which has recognised an individual right of access conferred by Article 10(1) but which is subject to certain 'formalities, conditions, restrictions or penalties' described in Article 10(2). This may be where a social watchdog is involved and there is a genuine public interest as in *Társaság* or where historical research is being hindered on a matter of public importance as in *Kenedi*. It appears to us that this extension of scope of Article 10(1) is now being consistently applied and recognised by a number of chambers of the ECtHR. Our Court of Appeal has also recognised this as a clear development. In our view this has not led to a general right to receive information as that would be going too far. However it is now clear that the ECtHR has developed a wider approach from that first established in 1978 to the notion of 'freedom to receive information'. There is now recognition of an individual right of access to information in certain circumstances.

43. We try to explain this by reference to what the ECtHR says in *Tarsasag* which seem[s] to us to establish, particular[ly] in relation to social and media watchdogs, that:

i) Where a State makes no provision for a right of access to official information (at least so far as the right is needed to help inform public debate), that absence will itself constitute an interference with the right to freedom of expression which is protected by Article 10(1);

ii) Where a State does confer such a right of access but the right is shaped (i.e. so that there is no right of access outside its bounds), then for information falling outside the bounds of the right:

(a) there is an interference with the right to freedom of expression which is protected by Article 10(1); and

(b) that interference falls to be addressed by Article 10(2)."

The Tribunal considered that Mr Kennedy was seeking to gather information on matters of public concern; that the Charity Commission, by refusal to disclose, was imposing a form of censorship; and that Mr Kennedy's right to impart information was also impaired. After examining the other individuals and bodies who potentially held the information, the Tribunal found that, whether or not an "information monopoly" was a necessary prerequisite for an interference with Article 10, there was such a monopoly in the applicant's case.

In view of the above, the Tribunal concluded that the conventional meaning of section 32(2) FIOA constituted an interference with Mr Kennedy's Article 10 rights. Turning to consider whether the interference was justified, the Tribunal accepted that the aim of the legislation was to protect information lodged with, or created during the course of, the inquiry and that this aim was legitimate. However, it found that the absolute exemption afforded by section 32(2) did not adequately balance the interests of society with those of individuals and groups, and concluded that the public interest in disclosure of information that was not properly withheld under other qualified exemptions available in the FOIA clearly outweighed any interest in its being withheld. The interference was therefore not "necessary in a democratic society". In the view of the Tribunal, section 32(2) therefore had to be interpreted in a manner consistent with Article 10 by limiting the exemption from disclosure so that it ended upon the termination of the third inquiry in the present case.

(e) Restored hearing before the Court of Appeal

On 20 March 2012 the Court of Appeal handed down its judgment in the restored appeal after hearing arguments from the parties. It referred to a recent judgment of the Supreme Court in *Sugar v. British Broadcasting Corporation* (see "Relevant domestic law and practice", below), delivered after the Tribunal's report, where that court had concluded that Article 10 did not apply to a request to the British Broadcasting Corporation, a public authority for the purposes of FOIA, for disclosure of a document. Considering itself bound by that judgment, the Court of Appeal held that Article 10 was not engaged on the facts of the case. Given this conclusion, the court declined to carry out an analysis of whether, if Article 10 had been engaged, the interference would have been justified pursuant to Article 10 § 2.

The Court of Appeal granted leave to appeal to the Supreme Court since the issues raised on the appeal were important ones and in order to allow that court to consider the precise boundaries of Article 10.

(f) The Supreme Court

Three issues were argued before the Supreme Court. First, whether as a matter of ordinary statutory construction, section 32(2) FOIA contained an absolute exemption which continued after the end of an inquiry; second, if so, whether that was compatible with Mr Kennedy's rights under Article 10 of the Convention; and, third, if not, whether section 32(2) could be "read down" pursuant to the Human Rights Act 1998 (see "Relevant domestic law and practice", below). The appeal was heard by a panel of seven justices.

(i) The court's decision on the disposal of the appeal

On 26 March 2014 the Supreme Court handed down its judgment. It dismissed Mr Kennedy's appeal by a majority of five justices. All the justices agreed that Mr Kennedy's request for information pertained to a matter of considerable public importance and that there was a public interest in the information he sought. However, the majority declined to analyse the case in the manner presented by Mr Kennedy.

Lord Mance explained at the outset:

> "6. Section 32 is a section dealing with information held by courts and persons conducting an inquiry or arbitration. Its intention was not that such information should not be disclosed. Its intention was to take such information outside the FOIA. Any question as to its disclosure was to be addressed under the different and more specific schemes and mechanisms which govern the operations of and disclosure by courts, arbitrators or persons conducting inquiries. With regard to the Charity Commission the relevant scheme and mechanism is found in the Charities Act 1993, as amended by the Charities Act 2006 (since replaced by the Charities Act 2011), the construction of which is informed by a background of general common law principles. In the present case, the focus has, however, been on the FOIA as if it were an exhaustive scheme. The argument has been, in effect, that, unless a *prima facie* right to disclosure can be found in the FOIA, United Kingdom law must be defective, and in breach of what is said to be the true interpretation of article 10 of the European Convention on Human Rights. But that misreads the statutory scheme, and omits to take into account the statutory and common law position to which, in the light of sections 32 and 78 in particular, attention must be addressed."

In respect of the first issue argued, the majority held that section 32(2) FOIA had to be construed as providing an absolute exemption from disclosure which did not cease upon the conclusion on the inquiry but continued until the information sought became "historical records" within the meaning of section 63 FOIA (see "Relevant domestic law and practice", below).

However, before turning to the second issue, i.e. the applicability and requirements of Article 10 of the Convention, the majority considered it necessary to examine whether the Charity Commission might be required to disclose information under other statutory or common law powers preserved by section 78 FOIA (see "Relevant domestic law and practice", below). They agreed that the Charity Commission had the power to disclose information to the public concerning its inquiries both in pursuit of its statutory objectives under the Charities Act 1993 of increasing public trust in and accountability of charities, as well as under the general common law duties of openness and transparency incumbent on public authorities. The exercise of that power was subject to judicial review by the courts. They explained that since the Charities Act, bolstered by the common law principle of open justice, put Mr Kennedy in a no-less-favourable position regarding disclosure than he would have under Article 10, there was no question of "reading down" section 32(2) or finding it to be inconsistent with Article 10. Lord Mance said:

> "51. I do not therefore agree with Jacob LJ's comment in the Court of Appeal (para 48) that Parliament must 'simply [have] overlooked that a court has machinery for the release of documents subsequent to (or indeed during) legal proceedings whereas an inquiry or arbitration does not' and that that 'may well have been a blunder which needs looking at'. That overlooks the statutory scheme of the FOIA and the Charities Act. It also fails to give due weight to the courts' power to ensure disclosure by the Charity Commission in accordance with its duties of openness and transparency. Again, I find it difficult to think that there would be any significant difference in the nature or outcome of a court's scrutiny of any decision by the Commission to withhold disclosure of information needed in order properly to understand a report issued after a Charities Act inquiry, whether such scrutiny be based solely on the Charity Commission's objectives, functions and duties under the Charities Act or whether it can also be based on article 10, read in the width that [counsel for Mr Kennedy] invites. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context ..."

As to the operation of the alternative remedy in the applicant's case and the scope of judicial review, Lord Mance said:

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

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

Concerning the ability of a public body to disclose information it holds, Lord Toulson said:

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

On the specific issues raised by the case, he said:

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

135. I regard it as unfortunate that Mr Kennedy's request for further information was based solely on FOIA. I have considerable disquiet that Mr Kennedy has been unable to learn more about the Charity Commission's inquiries and reasons for its conclusions, and I should like, if possible, for there to be a proper exploration whether the Charity Commission should provide more. I am clear that this could be done through the common law, but it cannot be done through FOIA unless section 32(2) can properly be circumvented. I agree with Lord Mance that if article 10 applies in the present case, it is fulfilled by the domestic law ..."

He concluded that the common law approach was

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

Lord Sumption commented:

"156. The point about section 32 is that it deals with a category of information which did not need to be covered by the Act, because it was already the law that information in this category was information for which there was an entitlement if the public interest required it ... [T]he relevant principles of law are to be found in rules of court and in the powers and duties of public authorities holding documents supplied to an inquiry, as those powers and duties have been interpreted by the Courts and applied in accordance with general principles of public law. It cannot plausibly be suggested that this corpus of law fails to meet the requirements of article 10 of the Convention that any restrictions on the right recognised in article 10(1) should be 'prescribed by law'. Its continued operation side by side with the statutory scheme under the Freedom of Information Act is expressly preserved by section 78 of that Act. This

section overtly recognises that the Act is not a complete code but applies in conjunction with other rules of English law dealing with disclosure.

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

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

In short, the majority held that the correct reading of section 32 was not that information pertaining to inquiries benefitted from a blanket exemption from disclosure but that such information was taken outside the framework of FOIA since an alternative means of obtaining disclosure already existed. It was therefore for Mr Kennedy to make a request to the Charity Commission under its general powers of disclosure and for the Charity Commission to consider the public interest in disclosure and weigh any competing private or public interests in the balance.

Lords Wilson and Carnwath dissented, holding that Article 10 did give rise to a general right of access to information and that section 32(2) should be read down so that the exemption it afforded ended with the conclusion of the inquiry. To hold otherwise would amount to a disproportionate interference with Mr Kennedy's Article 10 rights. The two justices expressed disquiet at the common law remedy relied upon by the majority. Lord Wilson pointed out that it had never been suggested to Mr Kennedy that his request should be made otherwise that under the FOIA. He continued:

"198. In my view the scheme identified by the majority for disclosure by the commission outside the FOIA is profoundly unsatisfactory. With respect, it can scarcely be described as a scheme at all and there is certainly no example of its prior operation or other recognition of its existence. Compare it with the scheme under the FOIA which, apart from the apparent prohibition for 30 years, identifies an elaborate raft of prescribed situations in which the Commission is entitled, or subject to the weighing of rival interests may be entitled, to refuse disclosure; and under which a refusal can be countered by application to an expert, namely the Information Commissioner, who takes the decision for himself (section 50(1)) and whose decision

can be challenged on points of law or even of fact by an expert tribunal (section 58(1)) and in effect without risk as to costs.

199. Although the majority of my colleagues reject Mr Kennedy's assertion that he has rights under article 10 which are engaged by his request for disclosure by the Commission, they proceed to suggest that his entitlement to disclosure otherwise than under the FOIA would be likely to be as extensive as any entitlement under article 10 ... The suggested scheme otherwise than under the FOIA is so vague and generalised that I regard the determination thereunder of any request for disclosure as impossible to predict. It may be that, in practice, the Commission and, on judicial review, the High Court judge would reach for the helpful prescriptions in the FOIA and, in effect, work in its shadow. But if, as I consider, Mr Kennedy's rights under article 10 are engaged by his request, I even have doubts whether any refusal to disclose a document otherwise than under the FOIA could be justified under para 2 of the article. For restrictions on the exercise of his rights under article 10 must be 'prescribed by law', which in the words of the ECtHR, 'must... be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct' ... It is possible that the so-called scheme for disclosure otherwise than under the FOIA might fail that test ..."

Lord Carnwath said:

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

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

232. In so far as it is permissible to take policy considerations into account, I see advantage in an interpretation which allows such cases to be dealt with through the specialist bodies established by the Act, rather than the ordinary courts. I am impressed also by the lack of any apparent policy reason for extending the full exemption under section 32 to public inquiries of this kind ..."

He was not persuaded that the "open justice" principle applied to inquiries and found it hard to accept that any general powers of disclosure were comparable to the scope of disclosure from which Mr Kennedy would benefit under Article 10 of the Convention. He added:

"247. ... I remain unpersuaded that domestic judicial review, even adopting the most flexible view of the developing jurisprudence, can achieve the same practical effect in a case such as the present as full merits review under FOIA or the HRA."

(ii) The discussion of the applicability and scope of Article 10

Notwithstanding the majority view that Article 10 was not relevant to the outcome of the appeal, there was detailed discussion by the justices of this Court's case-law.

The majority referred to the Court's inconsistency as regards the extent to which a general right of access to information arose under Article 10. They pointed out that older judgements, a number of which had been adopted by the full plenary Court or the Grand Chamber, indicated that Article 10 only protected the right to receive information which others wished or were willing to impart and did not give rise to a general right of access to information (citing, for example, *Leander v. Sweden*, 26 March 1987, Series A no. 116; *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160; *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I; and *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X). Although a number of recent Chamber judgments had departed from this position, the majority justices were of the view that they had failed to give a clearly reasoned analysis of the matter or to explain why they had departed from earlier authority (citing *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; *Kenedi v. Hungary*, no. 31475/05, 26 May 2009; *Shapovalov v. Ukraine,* no. 45835/05, 31 July 2012; *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, 28 November 2013). The majority also referred to the fact that the new approach that these recent Chamber judgments appeared to follow had not been endorsed by the Grand Chamber.

Lord Mance said:

> "59. The Strasbourg jurisprudence is neither clear nor easy to reconcile. In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 Lord Rodger said famously: 'Argentoratum locutum: iudicium finitum – Strasbourg has spoken, the case is closed'. In the present case, Strasbourg has spoken on a number of occasions to apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that at least some members of the Court disagree with and wish to move on from the Grand Chamber statements of principle. If that is a correct reading, then it may be unfortunate that the relevant sections did not prefer to release the matter before them to a Grand Chamber. It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation."

After a detailed examination of this Court's case-law, he concluded:

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

specific provisions and qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes."

Lord Toulson said:

"145. What is so far lacking from the more recent Strasbourg decisions, with respect, is a consistent and clearly reasoned analysis of the 'right to receive and impart information' within the meaning of article 10, particularly in the light of the earlier Grand Chamber decisions. [Counsel for Mr Kennedy] submits that the court's 'direction of travel' is clear, but the metaphor suggests that the route and destination are undetermined. If article 10 is to be understood as founding a right of access to information held by a public body, which the public body is neither required to provide under its domestic law nor is willing to provide, there is a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits."

Lord Sumption said:

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

As noted above, the minority were satisfied that a right to require an unwilling public authority to disclose information could arise under Article 10 of the Convention. Lord Wilson said:

"188. I cannot subscribe to the view that the development of article 10 which was in effect initiated in the *Társaság* case has somehow been irregular. The wider approach is not in conflict with the 'basic' *Leander* approach: it is a dynamic extension of it. The judgment in the *Társaság* case is not some arguably rogue decision which, unless and until squarely validated by the Grand Chamber, should be put to one side. Its importance was quickly and generally recognized ...

189. In the light of the judgments of the ECtHR ... this court should now in my view confidently conclude that a right to require an unwilling public authority to disclose information can arise under article 10. In no sense does this betoken some indiscriminate exposure of sensitive information held by public authorities to general scrutiny. The jurisprudence of the ECtHR, of which this court must always take account and which in my view it should in this instance adopt, is no more than that in some circumstances article 10 requires disclosure. In what circumstances? These will fall to be more clearly identified in the time-honoured way as, in both courts, the contours of the right are tested within particular proceedings. The evolution of the right out of 'freedom of expression' clearly justifies the stress laid by the ECtHR on the need for the subject-matter of the request to be of public importance. No doubt it

also explains the importance attached by that court to the status of the applicant as a social watchdog; whether that status should be a pre-requisite of the engagement of the right or whether it should fall to be weighed in assessing the proportionality of any restriction of it remains to be seen. Equally references in the ECtHR to the monopoly of the public authority over the information may need to find their logical place within the analysis: thus, in the absence of a monopoly, an authority's non-disclosure may not amount to an interference. Where the article is engaged and where interference is established, the inquiry will turn to justification under para 2. If refusal of disclosure has been made in accordance with an elaborate statutory scheme, such as the FOIA, the public authority will have no difficulty in establishing that the restriction has been prescribed by law; and the live argument will surround its necessity in a democratic society, in relation to which the line drawn by Parliament, if susceptible of coherent explanation, will command a substantial margin of appreciation in the ECtHR and considerable respect in the domestic courts.

190. Irrespective of its precise contours, the right to require a public authority to disclose information under article 10 applies to Mr Kennedy's claim against the Commission. Mr Kennedy can tick all the boxes to which I have referred ..."

Lord Carnwath said:

"214. In the present case we are faced with a novel state of affairs. Until the decision in *Társaság* (2009) there was an apparently settled position, confirmed by a series of Grand Chamber decision including *Leander v Sweden* (1987) 9 EHRR 433 and culminating in *Roche v United Kingdom* (2005) 42 EHRR 600, that article 10 imposed no positive obligation on the state to disclose information not otherwise available. That was hardly surprising. As Lord Mance pointed out ..., article 10 is on its face drafted in narrower terms than the corresponding article 19 of the Universal Declaration, and other comparable provisions, which include a specific right to 'seek' rather than merely 'impart and receive' information.

...

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

3. The subsequent request for access to information

On 1 May 2014 Mr Kennedy submitted a request for information in relation to the Mariam Appeal inquiries to the Charity Commission citing his common law right of access, as identified by the Supreme Court. He explained that disclosure would be in furtherance of the Charity Commission's duties and was required under the open justice principle.

On 11 July 2014 the Charity Commission disclosed some relevant documents under the Charities Act 2011 (which had meanwhile replaced the Charities Act 1993). The letter set out the following reasons for withholding the remaining information:

(a) legal professional privilege;

(b) confidentiality ("[t]he Commission considers that the public interest in respecting the obligations of confidentiality outweighs the public interest in transparency and openness in this context. Withholding the information is necessary to prevent the disclosure of information received in confidence.");

(c) communications between Mr Galloway and the Charity Commission had not been released because the Charity Commission had requested Mr Galloway's consent to disclosure and had not yet received a reply;

(d) communications with public authorities had not been provided where the Charity Commission considered that disclosure would interfere with the "free and frank exchange of views and sharing other information with other public authorities, including the Attorney General" and "to ensure the proper workings of Government, including the prevention of disorder and crime and the protection of the rights of others";

(e) correspondence between the Charity Commission and the sanctions unit at the Bank of England, the Foreign and Commonwealth Office, Her Majesty's Revenue and Customs and the Financial Services Authority had been withheld because it was necessary for the prevention of disorder and crime and the protection of the rights of others;

(f) communications with other third parties, including the Parliamentary Standards Commissioner, had not been disclosed pending receipt of their consent.

Mr Kennedy did not seek judicial review of the refusal to disclose the information. In his application form to this Court, he explained that an application for judicial review would add to the unreasonable delay that had occurred and to the enormous legal costs already incurred. He added that he was now out of time to apply for disclosure via the alternative remedy identified and that it was accordingly not effective. To require him to pursue judicial review would constitute and excessive and disproportionate burden on the applicants' enjoyment of the right to freedom of expression and, having regard to liability for legal costs already incurred and at stake in further litigation, would also amount to a violation of Articles 6, 10 and 13 of the Convention.

B. Relevant domestic law and practice

1. The Freedom of Information Act 2000

(a) The duty to disclose

Section 1 FOIA creates a general right of access to information held by public authorities. It provides:

> "(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 ["the duty to confirm or deny"], and
>
> (b) if that is the case, to have that information communicated to him."

Section 2(2) provides that in respect of any information which is "exempt information" under the Act, there is no duty to disclose information if it benefits from an "absolute exemption" or, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public

interest in disclosing the information. Section 2(3) clarifies that section 32 is to be regarded as conferring an absolute exemption.

(b) Exemptions

Section 32 is headed "Court records, etc." and provides in so far as relevant:

> "(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
>
> (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
>
> (c) any document created by—
>
> (i) a court, or
>
> (ii) a member of the administrative staff of a court,
>
> for the purposes of proceedings in a particular cause or matter.
>
> (2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration."

Section 32(4)(c) explains that "inquiry" means "any inquiry or hearing held under any provision contained in, or made under, an enactment".

Section 21(1) states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. Section 21(2)(b) clarifies that information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by law to communicate to members of the public on request. According to section 21(3), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 63 removes a number of exemptions, including the section 32 exemption, in the case of "historical records". Section 62(1) provided at the relevant time that a record became a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.

(c) Preservation of other powers of disclosure

Section 78 FOIA provides that nothing in the Act is to be taken to limit the powers of a public authority to disclose information held by it.

(d) The pre-enactment history

Prior to the publication of the bill that was to lead to FOIA, the Government published a white paper called "Your Right to Know: the Government's Proposals for a Freedom of Information Act" (December 1997). The white paper explained that the traditional culture of secrecy would only be broken down by giving people in the United Kingdom the legal right to know. The "fundamental and vital change" in the relationship between government and governed was "at the heart" of the white paper.

A report called "Freedom of Information: Consultation on Draft Legislation" presented to Parliament by the Secretary of State for the Home Department in May 1999 stated:

> "2. 'Freedom of Information' is an essential component of the Government's programme to modernise British politics. This programme of constitutional reform aims to involve people more closely in the decisions which affect their lives. Giving people greater access to information is essential to that aim. The effect of Freedom of Information legislation will be that, for the first time, everyone will have the right of access to information held by bodies across the public sector. This will radically transform the relationship between government and citizen."

During the Committee stage in the House of Commons, the Minister explained the purpose of section 32 as follows:

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

2. The Charities Act 1993

The Charity Commission was at the relevant time subject to the Charities Act 1993. It was replaced by the Charities Act 2006 and, subsequently, the Charities Act 2011.

(a) The objectives

Section 1B set out the Charity Commission's objectives. These included a "public confidence objective", a "compliance objective" and an

"accountability objective". Section 1B(3) defined these objectives as follows:

> "1. The public confidence objective is to increase public trust and confidence in charities.
>
> ...
>
> 3. The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
>
> ...
>
> 5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public."

(b) The general functions

Section 1C set out the Charity Commission's general functions. They included obtaining, evaluating and disseminating information in connection with the performance of any of the Charity Commission's functions or meeting any of its objectives.

(c) The general duties

Section 1D dealt with the Charity Commission's general duties, detailed in section 1D(2). The duties included the following:

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

(d) Powers

Section 1E(1) provided that the Charity Commission had power to do anything which was calculated to facilitate, or was conducive or incidental to, the performance of any of its functions or general duties.

Section 8 of the Act provides for a general power to institute inquiries into charities. Section 8(6) provided:

> "Where an inquiry has been held under this section, the Commissioners may either—
>
> (a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as they think fit, to be printed and published, or
>
> (b) publish any such report or statement in some other way which is calculated in their opinion to bring it to the attention of persons who may wish to make representations to them about the action to be taken."

Section 10A(1) of the Act contained an express power, subject to conditions set out in section 10(2) and (3), for the Charity Commission to disclose to any relevant public authority any information received by the former in connection with any of its functions, provided that the disclosure was made for the purpose of enabling or assisting the relevant public authority to discharge any of its functions, or that the information so disclosed was otherwise relevant to the discharge of any of the functions of the relevant public authority.

3. The Inquiries Act 2005

The Inquiries Act 2005 enables Ministers to set up formal, independent inquiries relating to particular events of public concern.

Section 18 of the Act provides that documents provided to the inquiry are to be publicly available, subject to any specific restrictions imposed. Section 19 of the Inquiries Act allows the inquiry chairman or the Minister to impose restrictions on disclosure of documents provided to an inquiry. Pursuant to section 20(5), and subject to section 20(6), restrictions continue in force indefinitely unless otherwise stated in the notice imposing the restrictions.

The Inquiry Rules 2006 oblige the chairman of any inquiry set up under the 2005 Act to transfer custody of the inquiry record to the relevant Government department or public records office at the end of the inquiry. The absolute exemption from disclosure in section 32(2) FOIA does not apply in relation to such transferred information (see sections 18(3) and 41(1)(b) of the 2005 Act and the Inquiry Rules 2006). Pursuant to section 20(6), after the end of an inquiry any disclosure restrictions imposed during the inquiry do not apply to a public authority in relation to information it holds unless that information is held as a result of a breach of the disclosure requirements.

4. Relevant case-law

(a) Disclosure by courts

(i) A. v. Independent News and Media Ltd *[2010] EWCA Civ 343*

A. v. Independent News and Media Ltd concerned an application by various media organisations to attend a hearing in the Court of Protection, where proceedings are usually conducted in private. The application was granted by the High Court but A. appealed. In its judgment of 31 March 2010, the Court of Appeal noted that the question of applicability of Article 10 of the Conventions in such circumstances had been considered by the Commission in its inadmissibility decision in *Atkinson and Others v. the United Kingdom*, no. 13366/87, Commission decision of 3 December 1990, Decisions and Reports 67, p. 244. There, the Commission had indicated that the general principle stated by the Court in *Leander* and *Gaskin*, both cited above, to the effect that the right to freedom to receive information basically prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart to him, might not apply with the same force in the context of court proceedings. The Court of Appeal continued:

> "41. There have also been two more recent decisions of the Strasbourg Court which appear to provide support for the notion that article 10 is engaged in a case such as this, essentially for two reasons. First, the Strasbourg jurisprudence seems to have developed since the *Leander* case ... so that article 10 seems to have a somewhat wider scope; secondly, where the media is involved and genuine public interest is raised, it may well be that, at least in some circumstances, one is anyway outside the general principle laid down in the *Leander* case, at para 74.
>
> 42. ... [*Társaság*] was seen as a new development, and described as 'a landmark decision on the relation between freedom of information and the ... Convention', by the European Commission for Democracy through Law (the Venice Commission) ..."

It concluded:

> "44. *Tarsasag* and *Leander* were decisions involving access to records kept by the executive arm of the government, whereas the present case concerns access to what goes on in court, which renders the case for saying article 10 is engaged stronger, as the Commission acknowledged in *Atkinson*, even before *Matky* and *Tarsasag*. Further, the complaint in this case is that of the media who want the information for public purposes, as in *Atkinson* and *Tarsasag*, rather than being a complaint of an individual as in *Leander* and *Gaskin*. In addition, the basis of the media interest is what is lawfully and appropriately already in the public domain. For those reasons, we consider that article 10 was engaged on the making of the instant application by the media."

(ii) R (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court (Article 19 intervening) *[2012] EWCA Civ 420*

The case of *R (Guardian News and Media Ltd)* concerned a request by the *Guardian* newspaper for access to documents produced to the District Court during an extradition hearing. The *Guardian* invoked its rights under Article 10 of the Convention. The judge refused to order access on the basis that she had no power to allow access. The Guardian appealed and at the same time sought judicial review of the refusal. The judge's decision was upheld by the Divisional Court. Part of the court's reasoning was that FOIA had put in place a regime for obtaining access to documents held by public authorities which specifically exempted information held by a court, and that it would be strange if a request for information which was exempted under the Act could be made at common law or under Article 10.

Lord Justice Toulson, delivering the lead judgment for the Court of Appeal of 3 April 2012, explained that the "open justice principle" was a constitutional principle, to be found in the common law, which applied to all tribunals exercising the judicial power of the state. He said that it was for the courts to determine its requirements, subject to any statutory provision, and that, accordingly, the courts had an inherent jurisdiction to determine how the principle should be applied. He continued:

> "72. The exclusion of court documents from the provisions of the Freedom of Information Act is in my view both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to judicial review by the courts. It would be odd indeed if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way.
>
> ...
>
> 74. It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle ..."

The court found that the *Guardian* had put forward good reasons for having access to the documents and that there had been no suggestion that allowing access would give rise to any risk of harm to any other party or place any great burden on the court. It therefore found in favour of the *Guardian*. Toulson LJ added:

> "88. I base my decision on the common law principle of open justice...

89. The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in *Tarsasag* and *Kenedi*), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (*Leander*), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on article 10."

(b) Disclosure by other public authorities

(i) Sugar v. British Broadcasting Corporation *[2012] UKSC 4*

The appellant in *Sugar v. British Broadcasting Corporation* made a request under the FOIA for access to an internal briefing document prepared for the British Broadcasting Corporation ("BBC") on the quality and impartiality of its coverage of Middle Eastern affairs. The BBC is designated as a public authority in FOIA only "in respect of information held for purposes other than those of journalism, art or literature". The BBC refused the disclosure request on the basis that it held the document for the purposes of journalism and so it was outside the scope of FOIA.

In its judgment of 15 February 2012 the Supreme Court agreed with the Court of Appeal that if the information was held to any significant degree for the purposes of journalism then it was exempt from production under the FOIA. As to the appellant's claim that such an approach violated his rights under Article 10 of the Convention, having considered in some details this Court's findings in *Roche*, *Matky*, *Társaság* and *Kenedi*, Lord Brown noted:

"94. In my judgment these three cases, [*Matky*, *Társaság* and *Kenedi*] fall far short of establishing that an individual's article 10(1) freedom to receive information is interfered with whenever, as in the present case, a public authority, acting consistently with the domestic legislation governing the nature and extent of its obligations to disclose information, refuses access to documents. Of course, every public authority has in one sense 'the censorial power of an information monopoly' in respect of its own internal documents. But that consideration alone cannot give rise to an interference with article 10 rights whenever the disclosure of such documents is refused. Such a view would conflict squarely with the *Roche* approach ... The appellant's difficulty to my mind is rather that article 10 creates no general right to freedom of information and where, as here, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with when access is refused to documents which are held for journalistic purposes.

He therefore considered that there was no interference with Mr Sugar's freedom to receive information, explaining:

"97. ... The Act not having conferred upon him any relevant right of access to information, he had no such freedom."

5. The Human Rights Act 1998

Section 3(1) of the Human Rights Act 1998 ("the Human Rights Act") requires legislation to be "read down" so far as possible in order to be interpreted compatibly with the Convention.

C. Relevant Council of Europe texts

On 23 January 1970 the Parliamentary Assembly of the Council of Europe ("the Assembly") adopted Recommendation No. 582 on mass communication media and human rights. It recommended that the Committee of Ministers, *inter alia*, instruct the Committee of Experts on Human Rights Experts to consider and make recommendations on whether the right of freedom of information provided for in Article 10 of the Convention should be extended, by the conclusion of a protocol or otherwise, so as to include the freedom to seek information; and whether there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations.

On the same day it adopted Resolution No. 428 containing a declaration on mass communication media and human rights. The declaration included the following:

> "2. The right to freedom of expression shall apply to mass communication media.
>
> 3. This right shall include freedom to seek, receive, impart, publish and distribute information and ideas. There shall be a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits and a duty for mass communication media to give complete and general information on public affairs."

In 1976 the Committee of Ministers, after examining a report by the Committee of Experts on Human Rights, decided to agree that the "freedom to seek information" be included in Article 10 § 1 of the Convention when a new protocol to the Convention was prepared (see Statutory Report *Communication on the activities of the Committee of Ministers* submitted to the Assembly, Doc. 3651, 9 September 1975). However, the proposed modification was not included in the subsequent report on widening the scope of the Convention prepared by the Assembly's Legal Affairs Committee (Doc. 4213, 27 September 1978).

On 1 February 1979 the Assembly adopted Recommendation No. 854 on access by the public to government records and freedom of information. It recommended the Committee of Ministers to invite member States which had not yet done so to introduce a system of freedom of information, enabling access to Government files and comprising the right to seek and receive information from Government agencies and departments; and to implement its decision of 1976 to insert a provision on the right to seek information in the Convention.

The Assembly adopted Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information held by Public Authorities on 25 November 1981. It sets out a number of principles to guide member States' law and practice in this area, including the following:

> "I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities.
>
> II. Effective and appropriate means shall be provided to ensure access to information.
>
> ...

VI. Any request for information shall be decided upon within a reasonable time.

VII. A public authority refusing access to information shall give the reasons on which the refusal is based, according to law or practice.

VIII. Any refusal of information shall be subject to review on request."

In its Declaration on the Freedom of Expression and Information, adopted on 29 April 1982, the Committee of Ministers declared as an objective the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.

Recommendation No. R (2002) 2 of the Committee of Ministers to member States on access to official documents provides that member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. Although member States can limit the right of access to official documents, limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting one or more of the following interests:

"i. national security, defence and international relations;

ii. public safety;

iii. the prevention, investigation and prosecution of criminal activities;

iv. privacy and other legitimate private interests;

v. commercial and other economic interests, be they private or public;

vi. the equality of parties concerning court proceedings;

vii. nature;

viii. inspection, control and supervision by public authorities;

ix. the economic, monetary and exchange rate policies of the state;

x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter."

Even so, access to a document should not be refused if there is an overriding public interest in disclosure.

The Recommendation also addresses the procedure for access to information. Among other things, it says that formalities for requests should be kept to a minimum and that requests should be dealt with promptly. There should be an expeditious and inexpensive review procedure in the event of a refusal to disclose, involving either reconsideration by a public authority or review by an independent and impartial body.

D. Relevant international law and materials

1. The International Covenant on Civil and Political Rights 1966

The International Covenant on Civil and Political Rights was ratified by the United Kingdom on 20 May 1976. Article 19(2) of the Covenant guarantees freedom of expression in the following terms:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

> frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Article 17 of the Covenant guarantees provides, *inter alia*, that no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.

Article 25 sets out the right of every citizen to take part in the conduct of public affairs, to vote and to be elected and to have access to public service in his country.

Article 27 provides that in States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

On 12 September 2011 the Human Rights Committee, the body of independent experts set up to monitor the implementation of the Covenant, published its General Comment No. 34 (CCPR/C/GC/34). It addressed the question of a right of access to information under Article 19 of the Covenant as follows:

> "18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production ... As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output. Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes ... Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.
>
> 19. To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests."

2. The American Convention on Human Rights 1969

Article 13(1) of the American Convention provides:

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

In *Reyes v. Chile* (2006) IACHR, 19 September 2006, the applicants complained about the refusal of the Foreign Investment Committee to disclose certain information requested regarding a forestry company and a

deforestation project that was being carried out in Chile. In its judgment, the Inter-American Court recognised that the right to access to information was a human right protected under Article 13 of the American Convention. It explained its reasons in some detail:

> "77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to 'seek' and 'receive' 'information', Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.
>
> 78. In this regard, it is important to emphasize that there is a regional consensus among the States that are members of the Organization of American States (hereinafter "the OAS") about the importance of access to public information and the need to protect it ...
>
> ...
>
> 84. The Court has stated that '[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part', and 'a "principle" reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system'. In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information...
>
> 86. In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.
>
> 87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society."

This judgment was applied in *Lund v. Brazil* (2010) IACHR, 24 November 2010, concerning a request for access to information about the disappearance of the applicants' family members as the result of operations of the Brazilian army between 1972 and 1975.

3. Joint Declarations

A Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe ("OSCE") Representative on Freedom of the Media and the Organization of American States ("OAS") Special Rapporteur on Freedom of Expression of December 2004 reads, in so far as relevant, as follows:

> "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.
>
> ...
>
> Access to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost.
>
> The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.
>
> Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.
>
> The access to information law should, to the extent of any inconsistency, prevail over other legislation.

The Joint Declaration also explains that those requesting information should have the possibility to appeal any refusals to disclose information to an independent body with full powers to investigate and resolve such complaints. It callson national authorities to take active steps to address the culture of secrecy within the public sector that still prevails in many countries. Such steps should, it says, include sanctions for those who wilfully obstruct access to information as well as the allocation of necessary resources and attention to ensure effective implementation of access to information legislation.

The Joint Declaration recognises that there may be circumstances where access to information can be restricted:

> "Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate."

A Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression of December 2006 reads, in so far as relevant, as follows:

> "Public bodies, whether national or international, hold information not for themselves but on behalf of the public and they should, subject only to limited exceptions, provide access to that information."

COMPLAINT

The applicants complain of a violation of Article 10 of the Convention by reason of the application of the absolute exemption under section 32(2) of the 2000 Act which did not require an assessment of whether denial of access to information was appropriate and necessary; and the Charity Commission's decision to rely on the absolute exemption and refuse access to the information sought. They allege that the common law remedy outlined by the majority of the Supreme Court did not satisfy Article 10, in particular the requirements of legal certainty and proportionality.

QUESTIONS TO THE PARTIES

1. Has the applicant exhausted all effective domestic remedies, as required by Article 35 § 1 of the Convention? In particular, can the legal means of obtaining disclosure relied on by the Supreme Court be regarded as an effective remedy within the meaning of this provision; and if so, given that Mr Kennedy had already pursued (under the Freedom of Information Act 2000) as far as the Supreme Court another, albeit inapplicable, legal avenue for obtaining disclosure of the specific category of information that he was seeking, was it a remedy which he was required to exhaust?

2. Has there been an interference with the applicants' freedom of expression, in particular their right to receive and impart information, within the meaning of Article 10 § 1 of the Convention (see, *inter alia*, *Leander v. Sweden*, 26 March 1987, Series A no. 116; *Gaskin v. the United Kingdom,* 7 July 1989, Series A no. 160; *Guerra and Others v. Italy* [GC], 19 February 1998, Reports 1998-I; *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X; *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, no. 39534/07, 28 November 2013) ?

3. If so, was that interference justified under Article 10 § 2?