



**Appeal number: EA/2018/0163**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**BRITISH BROADCASTING CORPORATION**                      **Appellant**

**- and -**

**INDEPENDENT OFFICE FOR POLICE CONDUCT**                      **Respondent**

**TRIBUNAL:        JUDGE ALISON MCKENNA (CP)  
                          Dr HENRY FITZHUGH  
                          JEAN NELSON**

**The Tribunal sat in public at Field House London on 6 December 2018**

**Greg Callus, counsel, for the Appellant  
Christopher Knight, counsel, for the Respondent**

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## DECISION

1. This appeal is allowed.
2. The Information Notice dated 12 July 2018 is quashed.
3. The Tribunal issues no directions.

## REASONS

### *A: Background to Appeal*

4. This appeal concerns an Information Notice (“the Notice”) served by the Independent Office for Police Conduct (“IOPC”) on the BBC on 12 July 2018. The Notice concerned a BBC documentary “*The Met: Policing London*” which had been broadcast on 31 May 2017 and included two filmed interviews with a police officer. A complaint was made about the officer’s broadcast comments and IOPC was investigating the complaint.

5. The IOPC had obtained the broadcast footage but requested additional un-broadcast footage of the interviews with the officer concerned. There ensued some correspondence in which the BBC made clear that it would not provide the un-used footage to IOPC voluntarily, for reasons concerned with its right to freedom of expression as a journalistic organisation. IOPC then served it with the Notice which is the subject of this appeal.

6. This is the first appeal to this Tribunal concerning IOPC’s use of its powers under paragraph 19ZA of Schedule 3 to the Police Reform Act 2002.

### *B: The Information Notice*

7. The Information Notice with which we are concerned required the BBC to provide to IOPC the following material:

*“The full un-transmitted footage of any interview(s) with PS Steve Brown, recorded for the purpose of the BBC documentary “The Met: Policing London” that was broadcast on 31 May 2017 including any questions asked or comments made by the interviewers. In particular the IOPC requires any and all un-transmitted footage in which comments were made by or to PS Brown regarding the death of Henry Hicks or in relation to the Hicks family.*

*The information should be supplied on a DVD or USB device which can be played electronically.”*

8. The Notice explained that:

*“In the course of its investigation the IOPC is required to consider whether PS Brown may have behaved in a manner which would justify the bringing of disciplinary proceedings by breaching police Professional Standards of Behaviour. The material requested in this notice is reasonably required by the IOPC for the purposes of its investigation because, in its absence, the IOPC has only a partial*

*picture and is unable to properly evaluate PS Brown's comments objectively and in their full un-edited context".*

*C: Appeal to the Tribunal*

9. The Appellant's Notice of Appeal dated 9 August 2018 relied on two grounds, namely:

- a. That the information sought was not "reasonably required" within the meaning of paragraph 19ZA(1) of schedule 3 to the Police Reform Act 2002, so the power to issue the Information Notice did not arise; and
- b. The Information Notice was unlawful in that the nature and scope of the request represented a breach of the BBC's ECHR Article 10 rights to protect its un-broadcast journalistic material.

10. The Respondent's Response dated 13 September 2018 maintained that the requested material was reasonably required and that its Notice was consistent with the statutory power conferred by Parliament which itself respected the BBC's Article 10 rights. Contrary to the position taken in the earlier correspondence, IOPC accepted in the Response that the Notice represented a *prima facie* interference with the BBC's Article 10 rights as a journalistic organisation, but submitted that the interference was proportionate in circumstances where the degree of interference was low because the documentary had already been broadcast, there was no requirement to identify a source, the BBC had been asked to provide the information voluntarily, and that it enjoyed a right of appeal which suspends the obligation to comply with the Notice until determination of that appeal. It was further submitted that the independent investigation of complaints about police conduct was a matter of significant public interest, and that the information was reasonably required because it would be unfair to Mr Hicks and to PS Brown for IOPC not to consider the best evidence available.

11. The Appellant did not file a formal Reply, but sent IOPC a letter dated 26 September 2018, following receipt of its witness statement. This letter gave some context about the broadcast interviews as follows. First, it was confirmed that PS Brown had made his filmed comments on two occasions, with the first interview recorded immediately after the arrests and the second recorded one hour and twenty minutes later. Secondly, it was said that the second interview had also been conducted in the vicinity of the arrests and not in a studio setting. Thirdly, it is confirmed that PS Brown was not shown the footage of the arrests before he made his second set of comments. Fourthly, it is noted that PS Brown had indicated during the original Metropolitan Police investigation of the complaint that he stood by his comments, so that the witness Ms Bartup's concern to know whether they were made of his own volition is said not to be warranted or understood. Fifthly, it is stated that senior managers at the Metropolitan Police had been given the opportunity to comment on the documentary before it was broadcast, although editorial control had rested with the BBC. The BBC did not file a witness statement including the above, nor indeed any evidence in support of its appeal. It also did not provide the Tribunal with the un-broadcast footage as closed material.

12. The Tribunal sat in public to hear the appeal at Field House, London on 6 December 2018. We heard oral witness evidence from IOPC officer Chelsea Bartup, submissions from Mr Callus on behalf of the Appellant and from Mr Knight on behalf of the

Respondent. We are grateful to the witness for her assistance and to both counsel for their clear oral and written submissions.

*D: The Law*

13. This appeal is concerned with the power conferred on IOPC by Paragraph 19A of Schedule 3 to the Police Reform Act 2002<sup>1</sup>. That Schedule has, since it was originally enacted, been amended by no fewer than six subsequent statutes. It did not originally contain a power to serve an Information Notice, but the power was awarded to IOPC's predecessor body (IPCC) by s.137 of the Anti-Social Behaviour, Crime and Policing Act 2014<sup>2</sup>.

14. The relevant paragraphs of Schedule 3 are as follows:

*“Investigations by the Director General: Power to Serve Information Notice*

*19ZA (1) The Commission may serve upon any person an information notice requiring the person to provide it with information that it reasonably requires for the purposes of an investigation in accordance with paragraph 19.*

*(2) But an information notice must not require a person—*

*(a) to provide information that might incriminate the person;*

*(b) to provide an item subject to legal privilege within the meaning of the Police and Criminal Evidence Act 1984 (see section 10 of that Act);*

*(c) to make a disclosure that would be prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000;*

*(d) to provide information that was provided to the person by, or by an agency of, the government of a country or territory outside the United Kingdom where that government does not consent to the disclosure of the information.*

*(3) Neither must an information notice require a postal or telecommunications operator (within the meaning of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000) to provide communications data (within the meaning of that Chapter).*

*(4) An information notice must—*

*(a) specify or describe the information that is required by the Commission and the form in which it must be provided;*

*(b) specify the period within which the information must be provided;*

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/2002/30/schedule/3>

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2014/12/section/137>

*(c) give details of the right of appeal against the information notice under paragraph 19ZC.*

*(5) The period specified under sub-paragraph (4)(b) must not end before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be provided pending the determination or withdrawal of the appeal.*

*(6) The Commission may cancel an information notice by written notice to the person on whom it was served.*

#### *Failure to comply with information notice*

*19ZB (1) If a person who has received an information notice—*

*(a) fails or refuses to provide the information required by the notice, or*

*(b) knowingly or recklessly provides information in response to the notice that is false in a material respect,*

*the Commission may certify in writing to the High Court that the person has failed to comply with the information notice.*

*(2) The High Court may then inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person, and after hearing any statement offered in defence, deal with the person as if the person had committed a contempt of court.*

#### *Appeals against information notices*

*19Z C (1) A person on whom an information notice is served may appeal against the notice to the First-tier Tribunal on the ground that the notice is not in accordance with the law.*

*(2) If the Tribunal considers that the notice is not in accordance with the law—*

*(a) it must quash the notice, and*

*(b) it may give directions to the Commission in relation to the service of a further information notice.*

*...”*

15. The statutory provisions above are not explicit as to whether the nature of Tribunal’s jurisdiction in considering an appeal against a paragraph 19ZA Information Notice should proceed as an appeal by way of re-hearing or a procedural review. Mr Callus and Mr

Knight did not agree in their analysis on this point and their respective submissions are set out below.

16. It was accepted by IOPC that if the Notice represented a disproportionate interference with the BBC's Article 10 rights, then this would render the Notice "not in accordance with the law".

17. It was also submitted by Mr Callus that s. 12 (4) of the Human Rights Act was engaged by this appeal. This reads as follows:

*(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—*

*(a) the extent to which—*

*(i) the material has, or is about to, become available to the public; or*

*(ii) it is, or would be, in the public interest for the material to be published;*

*(b) any relevant privacy code.*

#### *E: The Evidence*

18. The Tribunal's bundle included a DVD of the BBC documentary, which we watched in full as part of our preparation for the hearing. It was agreed that we did not need to watch it during the hearing. There was an agreed transcript of the relevant part of the documentary in our bundle.

19. The documentary contains a segment about the theft of mobile phones by people on mopeds, who snatch them out of the hands of pedestrians as the moped passes by. Film of such robberies being committed is shown, and there is a discussion about the policing difficulties involved, including the risk of injury or death occurring when mopeds are pursued by police vehicles. There is film footage of an accident in which the motorcyclist crashes and breaks a leg and also film of an incident in which the police pursuit is halted due to the motorcyclist removing his helmet. There is reference to the case of Henry Hicks, a teenager who died after falling from a moped in 2014, and the on-going legal proceedings concerning the circumstances of his death. Members of the Hicks family are shown taking part in a public meeting at which questions about the case are asked of the former Metropolitan Police Commissioner.

20. Police Sergeant Steve Brown is then shown investigating a reported mobile phone theft. While being filmed apprehending two suspects, he is shown to be challenged by members of the public, including members of the Hicks family. Filmed whilst apparently walking away from the incident, he says "*It's to be expected. We've obviously chased two robbers through the estate. And then, out of the blue, the Hicks family, because they live nearby, come straight up to us trying to tell us to go after proper criminals, what are we doing harassing them – and turning it all about into their case they've got going on*".

21. He then speaks directly to the camera on a second occasion (apparently a short time later and at a different location), during which interview he says *“Basically, what they were trying to do, and I don’t mind it being on camera, the Hicks family there is protect criminals. That’s what they were trying to do, trying to stop us from doing our job from them two lads have been all over London robbing females of their phones - I’ll leave it up to you to decide”*.

22. The Tribunal received a witness statement from Ms Chelsea Bartup, who is IOPC’s lead investigator in this matter. She explained that after the documentary was broadcast, Mr David Hicks (father of Henry) made a formal complaint to the Metropolitan Police about PS Brown’s alleged misconduct in making those comments on camera. As the Metropolitan Police investigation cleared PS Brown of any misconduct, Mr Hicks escalated his complaint to IOPC which has statutory responsibility to consider whether the Metropolitan Police’s investigation outcome was appropriate. IOPC decided that the outcome of the Metropolitan Police’s investigation was not appropriate and decided to re-investigate the complaint itself. Its decision to open a fresh investigation engaged its paragraph 19ZA powers.

23. Ms Bartup explained in her witness statement that:

*“I considered it necessary to view the un-transmitted footage of PS Brown’s comments so that they could be considered in an unedited context to determine whether they were made of PS Brown’s own volition in an unprompted manner, or whether they were encouraged by questions asked or statements made to PS Brown. I also considered it necessary to view the unedited footage to ensure that the full wording used by PS Brown on this particular matter was precisely that contained in the broadcast footage”*.

24. Ms Bartup’s witness statement made clear that, during the Metropolitan Police investigation, PS Brown had stood by the comments he had made as broadcast. She explained that she had formulated terms of reference for her re-investigation but had not yet interviewed PS Brown pending a decision yet to be made about how any interview should be conducted. This decision would be made after receipt of the BBC’s un-transmitted footage. She exhibited to her witness statement correspondence with Mr Hicks, the Metropolitan Police investigation report (redacted) and the IOPC’s own terms of reference for her investigation. The relevant part of the terms of reference are as follows: *“To investigate with reference to local and national policies...(b) the comments made by PC Brown in the documentary ‘The Met: Policing London’ in relation to the Hicks family, aired on 31 May 2017”*.

25. Ms Bartup confirms in her witness statement that she has no grounds for believing that PS Brown has committed an indictable offence, so that the procedures for obtaining evidence under the Police and Criminal Evidence Act 1984 did not apply to this case.

26. Ms Bartup attended the hearing for cross examination. Asked about her investigation, she acknowledged that Mr Hicks’ complaint was about the broadcast comments only and that PS Brown had not suggested that he had been quoted out of context in the documentary. However, she explained that her role was to look at PS Brown’s conduct in a wider context and that she needed the requested information to make a fully-informed decision. Asked whether PS Brown’s conduct which fell outside the terms of reference was

relevant to her investigation, she said that his conduct was not limited to the broadcast footage and that she would be entitled to raise any other matters shown in the out-takes.

27. Asked about the wording of the Notice itself (see paragraph 7 above), Ms Bartup's own view was that the use of the words "*including*" and "*in particular*" had the effect of narrowing the scope of the information requested, but she accepted that the wording of the Notice might be "*wider than ideal*".

28. When asked about IOPC's internal process for deciding to serve the Notice on BBC, Ms Bartup's evidence was that she had not conducted an assessment of the proportionality of any interference with BBC's Article 10 rights, although she said she always kept proportionality in mind. Acknowledging that she is not a lawyer, she said that journalistic material should be investigated and that she believed the information requested to have been reasonably required for her investigation, so that it was a proportionate step to serve the Notice. She said that she had never served a Notice on a media organisation before but that she had taken legal advice before serving this Notice. She accepted that her witness statement did not set out any factors which she had taken into account in considering the proportionality of her decision to serve the Notice.

29. In answer to a question from the Tribunal, Ms Bartup confirmed that a redacted version of the information requested could appear in the final investigation report. A summary might be published. She didn't think that IOPC would disclose the footage it obtained under the Notice to any other person.

## *F: Submissions*

### *(i) Nature of Appeal*

30. As noted above, counsel did not agree between them as to the nature of an appeal to this Tribunal against a Notice served under paragraph 19ZA. Mr Callus's submission was that the appeal takes the form of a re-hearing and that the Tribunal must decide whether it would itself serve the Notice, taking into account the BBC's Convention rights. Mr Knight's submission was that Parliament had provided the Tribunal with the narrower task of conducting a review of IOPC's decision, considering only whether the Notice was in accordance with the law. This was not the same, in his submission, as the Tribunal deciding whether it would itself issue the Notice.

31. Mr Callus submitted that, for reasons of procedural fairness where the service of the Notice was permitted without prior judicial scrutiny, the Tribunal's role must be to make a fresh decision rather simply to review the IOPC's decision. He submitted that a review only jurisdiction did not meet the required procedural safeguards where there was a *prime facie* interference with Article 10 rights. In this case, because there was no evidence that a full proportionality assessment had been undertaken, he submitted that it was necessary for the Tribunal to conduct that assessment itself.

32. Mr Knight submitted here that there would be no need for the Tribunal to give directions about the service of a further Notice when quashing the Notice under appeal if this were to be a *de novo* appeal. He pointed to the absence of an express provision allowing the Tribunal to exercise its discretion differently to that of IOPC.



*(ii) Appellant's Ground One*

33. The BBC's ground one was that the information requested in the Notice was not "reasonably required" within the meaning of paragraph 19ZA(1) of schedule 3 to the Police Reform Act 2002.

34. Mr Callus' submission was that the evidence did not show that the information required under the Notice was reasonably required for IOPC's investigation. He referred the Tribunal to the evidence that IOPC already knew the identity of the officer concerned, that it already had the broadcast footage which was the subject-matter of the complaint, that IOPC knew that PS Brown had not suggested that he had been misrepresented and that the material requested went beyond the terms of reference for the inquiry. He submitted that "reasonably required" should not be interpreted as meaning "nice to have" in the context of an interference with journalistic rights and that there is no "best available evidence" test in the legislation. He submitted that, even after cross examination, it was not clear what material IOPC "reasonably required" for its investigation, as the scope of the Notice was extremely wide and, in his submission, the use of "including" and "in particular" did not narrow its scope. He submitted that it would have been possible for the Notice to refer specifically to the un-transmitted film taken in the minutes in between the two broadcast interviews, but it had not. He submitted that precision was important where a recipient could be sent to prison for non-compliance.

35. Further, Mr Callus' submission was that the Notice was not "in accordance with the law" because there was no evidence about the required balancing exercise having been carried out so as to reach a conclusion about proportionality before issuing the Notice. Further, that in the absence of such evidence, the Tribunal could not know the weight given to the relevant considerations by IOPC in any such exercise.

36. Mr Knight's submissions as to ground one commenced with an observation that the BBC had not advanced any positive case to show that the Notice would inhibit its journalistic work. This was not a "source" case, let alone a "confidential source" case, and so whilst he accepted in principle that Article 10 was engaged, the context of its claimed infringement should be relevant to the Tribunal's considerations. He noted that the context here involved investigation of a voluntary statement, there had been no search and seizure of material, there was no claimed risk to journalistic sources, a copy of the film had been requested and not the original, and there had already been a broadcast of the documentary. He submitted that this case was at the bottom of the scale of interference with journalistic rights and so the level of justification required was commensurately low. On the other side of the scales, he referred to the public interest in robust investigations of allegations of police misconduct. He also noted that it was the BBC itself which had linked a story about mobile phone theft with the Hicks family's case, thus creating a public interest in the resolution of the complaint.

37. Mr Knight submitted that "reasonably required" suggested an element of discretion on the part of the decision maker, as it would have to make a predictive judgment about the value of the information sought. The test is "reasonably" not "absolutely" required. Taking the example from the Explanatory Notes to the Schedule (see paragraph 54 below) whereby Oyster Card data might be directed to be disclosed so as to identify witnesses to a particular event, he submitted that the un-transmitted footage might have allowed IOPC to identify witnesses to the interviews with PS Brown.

38. Mr Knight submitted that the Tribunal would have to decide that IOPC's decision to issue the Notice was unreasonable in order to allow the appeal. However, he submitted that proportionality was an objective question for the Tribunal and referred us to Lord Sumption's judgment as to the relevant test in *R (Lord Carlisle of Berriew and others) v Secretary of State for the Home Department* [2014] UKSC 60.

39. Mr Knight invited the Tribunal to consider the importance of a fair investigation into Mr Hicks' complaint and noted that the un-transmitted footage might include inculpatory or exculpatory material about PS Brown's conduct. He also reminded the Tribunal of Ms Bartup's evidence that a decision about interviewing PS Brown would be taken after viewing the un-transmitted footage.

40. Mr Knight invited the Tribunal to read the Notice fairly and as a whole. The context of the informal requests for information was relevant in his submission, so that if one took the correspondence into account it could be understood what material IOPC was interested in obtaining, even if the Notice could have been more tightly drafted. He suggested that if one read the first sentence in the light of the second sentence it confirmed its scope.

*(iii) Appellant's Ground Two*

41. Turning to ground two of the Notice of appeal, the BBC's case was that the Information Notice was unlawful in that the nature and scope of the request represented a disproportionate breach of the BBC's ECHR Article 10 rights to protect its un-broadcast journalistic material. Mr Callus referred us to *Sanoma Uitgevers BV v Netherlands* (38224/03)[2011] EMLR 4, in which it is made clear that an interference with Article 10 rights occurs at the point where the information notice is made rather than at the point where it was enforced. This meant, in his submission, that even though the BBC's obligation to hand over the requested material was suspended pending determination of this appeal (see paragraph 19ZA (5)), the relevant interference with its Convention rights had occurred already.

42. Mr Callus' submission was that it was open to the Tribunal to conclude that there had been a drafting omission in failing to include in paragraph 19ZA (2) of schedule 3 to the 2002 Act specific safeguards in respect of journalistic material. He suggested that Parliament would not have anticipated that these particular powers would ever be used against journalists, so that explained the omission. He referred the Tribunal to *Inco Europe Ltd v First Choice (Distributors)* [2000] 1 WLR 586, for the relevant approach to legislative drafting omissions, whereby the Tribunal would have to be satisfied that there had been a clear intended purpose and an inadvertent failure to deliver it.

43. Mr Callus submitted that an appropriate legislative regime for the service of Information Notices on journalistic organisations should always include both substantive and procedural safeguards to protect Article 10 rights. He invited the Tribunal to conclude that the paragraph 19ZA regime was unlawful in the absence of such safeguards, which should be applied in practice notwithstanding their absence from the black letter law.

44. The procedural safeguards should, in his submission, include prior judicial scrutiny of the Notice, at an *inter partes* hearing on notice. He referred us to *R(B Sky B) v Central Criminal Court* [2014] AC 885 in support of this approach.

45. The required substantive safeguards should include a seriousness threshold test (such as the investigation of an indictable offence) and that the information required must be shown to be of substantial value to that investigation. He referred us to *R (British Sky Broadcasting Limited) v Chelmsford Crown Court* [2012] EMLR 30 and to *R(Bright) v Central Criminal Court* [2001] 1 WLR 662, which are cases about disclosure under the Police and Criminal Evidence Act 1984, but in which it was clear that the value of the information requested was to be assessed in relation to its value in addition to the information already held. He urged this approach on the Tribunal.

46. Mr Callus characterised this case as being one about IOPC's investigation into a complaint about an officer's rudeness on camera. He suggested that this involved a level of triviality which would not meet any reasonable seriousness threshold so as to justify the intrusion to the BBC's Article 10 rights which the Notice represented.

47. Shortly before the hearing, the Tribunal drew counsels' attention to the Court of Appeal's judgment in *Watch Tower Bible and Tract Society of Britain and Others v The Charity Commission* [2016] EWCA Civ 153<sup>3</sup>, which concerned a form of Information Notice available to the Charity Commission under s. 52 of the Charities Act 2011<sup>4</sup>. Counsels' skeleton arguments had not referred us to any analogous regimes whereby Parliament had conferred on civil regulators the power to compel a person to provide it with information in connection with its statutory functions. However, this case (well-known in the General Regulatory Chamber) was one in which the Master of the Rolls had considered such a power without balking at the absence of the procedural or substantive safeguards said to be essential by Mr Callus, so it seemed fair to bring it to counsels' attention.

48. Mr Callus's submission about the *Watch Tower* case was that the claimants had not relied on an infringement of their Article 10 rights and so it should be distinguished as Article 10 merits special consideration. Mr Knight agreed that Article 10 has a distinct line of authority.

49. Mr Knight's submission on ground two was that Parliament had seen fit to provide IOPC with a coercive information-gathering power which could be used against third parties and that this reflected the importance of its investigative role. He resisted Mr Callus' submission that there was a drafting omission in schedule 3 and submitted that the Tribunal should regard Parliament as having made a conscious legislative choice not to include provisions which it had included in other statutory frameworks. He submitted that this was not a case where the conditions for correcting a drafting error were available to the Tribunal.

50. Mr Knight referred to the procedural frameworks which do exist as a result of the inclusion by Parliament of a right of appeal to this Tribunal – independent judicial scrutiny which takes place prior to the obligation to disclose, no permission stage for bringing an appeal, no fees for bringing an appeal, and no costs-shifting. These were deliberate choices in his submission which established meaningful procedural and substantive safeguards. He

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<sup>3</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2016/154.html>

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2011/25/section/52>

noted that a paragraph 19ZA Notice was the only option open to IOPC as the Police and Criminal Evidence Act did not apply. He submitted that there was no authority for the proposition that a procedure which did not include the specific procedural and substantive safeguards referred to by Mr Callus automatically constituted a breach of Article 10, so the question for the Tribunal was whether the safeguards which Parliament had included were adequate, not which form they should take. He referred us to *Nagla v Latvia* (973469/10) in which there had not been prior judicial scrutiny of the order but in which it had nevertheless been upheld, and to other authorities which demonstrated that the test for proportionality was context-specific and not formulaic.

## *G: Conclusions*

### *(i) Nature of Appeal*

51. Judge McKenna explained that the usual approach to the multiplicity of appeals which come before the General Regulatory Chamber, unless Parliament has clearly indicated otherwise<sup>5</sup>, is that it conducts an appeal by way of re-hearing. This approach was described by Judge McKenna in a recent Charity appeal as follows:

*“20. The nature of the Tribunal’s jurisdiction<sup>6</sup> in this matter is de novo, i.e. we stand in the shoes of the Charity Commission and take a fresh decision on the evidence before us, giving appropriate weight to the Commission’s decision<sup>7</sup> as the body tasked by Parliament with making such decisions. The nature of an appeal by rehearing is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96]<sup>8</sup>.*

*21. In taking a fresh decision, the Tribunal is not required to undertake a reasonableness review of the Charity Commission’s decision-making. Any public law criticisms of the Commission’s conduct or conclusions is thus avoided by the Tribunal taking a fresh decision. The Tribunal also has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)<sup>9</sup>.*

*22. Pursuant to s. 319 (4) (b) of the Act and rule 15 (2) (a) (ii) of the Tribunal’s Rules, the Tribunal may when hearing an appeal admit evidence whether or not it was available to the previous decision maker. The burden of proof in a de novo appeal rests with the Appellant as the party seeking to disturb the status quo. The*

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<sup>5</sup> See, for example, the different approaches set out in sections 319 and 322 of the Charities Act 2011 - <http://www.legislation.gov.uk/ukpga/2011/25/part/17/chapter/2>

<sup>6</sup> Section 319 (4) (a) Charities Act 2011 <http://www.legislation.gov.uk/ukpga/2011/25/contents>

<sup>7</sup> See *R (Hope and Glory Public House Limited) v City of Westminster Magistrates’ Court* [2011] EWCA Civ 31. <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>. Approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 at paragraph 45 – see <https://www.supremecourt.uk/cases/docs/uksc-2015-0126-judgment.pdf>.

<sup>8</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html>

<sup>9</sup> [http://taxandchancery.ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC\\_v\\_Abdul\\_Noor.pdf](http://taxandchancery.ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf)

*standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities”.*<sup>10</sup>

52. We are aware of an interesting discussion of the General Regulatory Chamber’s approach to its work in chapter six of Simon Adamyk’s book *Assets of Community Value: Law and Practice*<sup>11</sup>, in which he doubts that the Tribunal’s jurisdiction when considering appeals under the Localism Act 2011 takes the form of a re-hearing, in the absence of an express statutory authority for the Tribunal to substitute its own decision for that of the original decision-maker. We were not referred to any other academic or judicial considerations of this particular question.

53. Mr Knight helpfully referred the Tribunal to the Explanatory Notes to the 2014 Act which inserted the paragraph 19ZA power into the 2002 Act. They describe “*...a broad power to serve an information notice on any person...where it is necessary and relevant to a matter under investigation...*” and give the example of the power being used “*to request passenger travel information (such as Oyster card data) which would reveal the identity of witnesses to an event or provide evidence of passenger movements, central to an investigation about a complaint...*”

54. In relation to the right of appeal to the Tribunal, the Explanatory Notes state as follows:

*388. A person has a right of appeal against the notice by virtue of new paragraph 19ZC to the First-tier Tribunal on the ground that the notice is not in accordance with the law. This reflects existing provision for appeals in the Data Protection Act 1998 and Freedom of Information Act 2000, which each relate to appeals against notices which may be given to a person against the disclosure (or non-disclosure) of information. In new paragraph 19ZC, the term ‘not in accordance with the law’ refers to an error of law which includes but is not limited to a breach of any specific right under the European Convention of Human Rights or otherwise. If the Tribunal consider that the notice is not in accordance with the law, it is required to quash the notice and may give direction to the IPCC so that it may serve a further notice. Given that the IPCC may only request information or serve a notice in accordance with the new paragraph 19ZA where it is reasonably required, this acts as a further safeguard to ensure all data requests are necessary, proportionate and justified”.*

55. We regard the Explanatory Notes as somewhat confusing here in referring to DPA and FOIA appeals which, in contrast to paragraph 19ZA, expressly allow the Tribunal to exercise its discretion differently to that of the primary decision maker. Such rights of appeal have therefore been categorised in a series of judicial decisions as constituting appeals by way of re-hearing.<sup>12</sup>

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<sup>10</sup>

[http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20\(23%20August%202018\).pdf](http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20(23%20August%202018).pdf)

<sup>11</sup> Published by Wildy, Simmonds and Hill in 2017.

<sup>12</sup> See *Guardian Newspapers Limited v IC and BBC*, IT, 8 January 2007 (referred to in *Coppell: Information Rights Law and Practice*, Fourth Edition, 28-020; see also the discussion of the First-tier Tribunal’s jurisdiction in the Upper Tribunal’s decision in *Birkett* [2011] UKUT 39 AAC

56. We do not consider this question free from doubt. However, on reflection, we favour Mr Knight’s analysis that our jurisdiction in respect of paragraph 19ZA is a narrow one involving a review of whether IOPC’s own decision is in accordance with the law and that it does not require the taking of a fresh decision by the Tribunal. In reaching that conclusion we note that, not only is paragraph 19ZA silent as to the any power for the Tribunal to substitute its own decision for that of IOPC, but that there is an express provision at paragraph 19ZC(2)(b) for the Tribunal to give directions to IOPC about the service of a further Notice. Construing the schedule as a whole, it seems to us that the legislative approach is not for the Tribunal to make a fresh decision itself, as this would render the power to give directions otiose. The drafting of the schedule, viewed as a whole, appears to us therefore to be inconsistent with the creation of an appeal by way of re-hearing and we must assume that Parliament made a conscious legislative choice to frame the appeal right in this way (notwithstanding the element of confusion in the Explanatory Notes). We have therefore confined ourselves to considering whether the Notice is “in accordance with the law” and have not asked ourselves whether we would ourselves issue such a Notice.

57. We recognise that our analysis of this point may have procedural implications, for example in relation to the ability of the Tribunal to consider evidence which post-dates the decision under review. Thankfully that does not appear to be a problem in this particular case, although it may arise in future cases.

(ii) *Appellant’s Ground One*

58. The Appellant’s ground one was that the information sought was not “reasonably required” within the meaning of paragraph 19ZA(1) of schedule 3 to the Police Reform Act 2002.

59. We have approached the concept of “reasonably required” as a context-specific test and conclude that Paragraph 19ZA permits IOPC lawfully to serve a Notice only in relation to information which it reasonably anticipates is relevant to and would advance the particular investigation to which it relates. We accept that there is an element of discretion available to IOPC in reaching that point of reasonable anticipation. However, we note that the complaint from David Hicks and the terms of reference of the investigation into PS Brown relate to his comments as broadcast and we conclude that the investigation could therefore proceed on the basis of the broadcast documentary footage. We also note Ms Bartup’s acceptance in her evidence before us that PS Brown has not raised an issue about misrepresentation of his views by the BBC (despite several opportunities) but has rather indicated that he stands by his comments as broadcast, so we find it difficult to conclude that the investigation would not be fair to him in the absence of the un-transmitted footage. Against that contextual background, we are not persuaded that the Notice requests only that information which is “reasonably required” in order to advance the specific investigation which is on foot or to address matters which are reasonably anticipated to arise in that investigation. We regard Mr Knight’s suggestion that the footage might reveal witnesses to

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<http://www.bailii.org/uk/cases/UKUT/AAC/2011/39.html> and in *IC v Bell* [2014] UKUT 0106 (AAC) at [22] and most recently *Malnick v IC and ACOBA* [2018]UKUT72(AAC)3[https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA\\_0447\\_2017-02.pdf](https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf)

the interviews as so speculative as to be readily distinguishable from the Oyster Card example in the Explanatory Notes.

60. Turning to the scope of the material required by the Notice, we note that it is not on a plain reading even limited to the part of the documentary to which the complaint relates, but requires the production of “*The full un-transmitted footage of any interview(s) with PS Steve Brown, recorded for the purpose of the BBC documentary “The Met: Policing London” that was broadcast on 31 May 2017*”. We are not persuaded that the sentences which follow serve to narrow the scope of that request or that it can properly be narrowed by placing it alongside the previous correspondence. It is trite law that a person should be able to understand the nature of legal obligations imposed on them, especially where that person’s liberty and livelihood are involved, and should not need to go searching for an explanation in earlier correspondence. We are not persuaded that a requirement that is so very broad in scope can be said to be relate only to information “reasonably required” in order to advance the investigation into PS Brown’s conduct which is, by its terms of reference, more narrowly focussed. We find that there is an insufficient connection between the scope of the investigation and the scope of the information required by the Notice.

61. We therefore conclude that the Notice in this case requires the production of information which is not “reasonably required” so that it is not “in accordance with the law” and should be quashed.

*(iii) Appellant’s Ground Two*

62. The Appellant’s ground two was that the Information Notice was unlawful in that the nature and scope of the request represented a breach of the BBC’s ECHR Article 10 rights to protect its un-broadcast journalistic material.

63. We are not persuaded that the drafting of paragraph 19ZA discloses a clear legislative intention to make provision for journalistic material but where that intention was inadvertently frustrated through the omission of a specific provision. We find it impermissible to read such a provision into paragraph 19ZA.

64. We accept that the Article 10 rights of journalistic organisations require particular consideration in the context of information notices but find that there is no absolute requirement for the particular procedural or substantive safeguards to which we were referred to by Mr Callus. We accept Mr Knight’s submission that certain key safeguards are implicitly included in providing a right of appeal to this Tribunal. We do not conclude that paragraph 19ZA is unlawful.

65. We have considered whether the Notice is not “in accordance with the law” in the sense that it represents a disproportionate interference with the BBC’s Article 10 rights. We accept that the actual interference in this case is at the lower end of the scale than in many of the authorities to which we were referred. Nevertheless, we are satisfied that IOPC was obliged by s. 3 of the Human Rights Act 1998 and the case law to conduct a balancing exercise whereby it considered whether the interference with the BBC’s Article 10 rights which the Notice inevitably involved was proportionate to the legitimate aim of discharging its important public duties and the progression of this investigation in particular. We note that the correspondence from IOPC which pre-dated the service of the Notice did not give the impression of accepting that Article 10 was even engaged by these circumstances of this case. We further note that Ms Bartup’s evidence both written and

oral failed to describe the appropriate balancing exercise actually being undertaken or to identify the factors relevant to any such consideration. Our inescapable conclusion on the evidence is that IOPC failed to give any or appropriate consideration to the relevant issues before issuing the Notice. We conclude that a Notice issued without such consideration is not one issued “in accordance with the law”.

66. We are mindful of our role in reviewing IOPC’s decision and not substituting our own view but given our conclusions above we cannot see how IOPC, even if it had undertaken the required balancing exercise, could have satisfied itself that this Notice represented a proportionate interference with BBC’s Article 10 rights.

*H: Disposal*

67. Accordingly, this appeal is allowed, and the Notice is hereby quashed. We do not consider it appropriate to give any directions as to the service of a further Notice.

**(Signed)**

**ALISON MCKENNA**

**CHAMBER PRESIDENT**

**DATE: 21 January 2019**

**Promulgation Date: 24 January 2019**