IN THE UPPER TRIBUNAL **Appeal No: GIA/1531/2017**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeal.

The decision of the First-tier Tribunal made on 20 March 2017 under reference EA/2016/0250 did not involve any error on a material point of law and is not therefore set aside.

Representation: Derek Moss represented himself.

Rupert Paines of Counsel represented the Information Commissioner.

Timothy Pitt-Payne QC and Christopher Knight, both of counsel, represented the Cabinet Office.

(The public authority took no active part in the Upper Tribunal appeal proceedings.)

Oral hearing: 10 January 2020

Further written submissions in April 2020 and June/July 2020

REASONS FOR DECISION

Introduction

1. The sole issue of wider importance arising on this appeal by Mr Moss concerns the application of the Grand Chamber of the European Court of Human Right's decision in *Magyar Helsinki Bizottság v Hungary* [2016] ECHR 975 in domestic law. Putting matters very broadly at this stage, the decision in *Magyar* holds that Article 10 of the European Convention on Human Rights ("ECHR"), which provides that "Everyone has a right to freedom of expression", can also in certain circumstances provide a right of access to information.

2. Two issues arise in respect of the decision in *Magyar* on this appeal. The first is whether the view of Article 10 in *Magyar* can apply at the level of the First-tier Tribunal and Upper Tribunal given what is said by the respondents to be contrary and effectively binding domestic court authority. The second issue is whether, even on the assumption or conclusion that *Magyar* ought to be followed by domestic courts and tribunals, its application can assist Mr Moss. There are then several separate grounds of appeal on which Mr Moss also relies.

3. It may assist if I say at the outset that in my judgment Mr Moss should not succeed on any of his grounds of appeal. In respect of *Magyar* in particular he fails on both of the aspects identified above. In short, and for the reasons explained below, I have concluded that:

   (i) I am bound by domestic court authority not to follow the expanded view as to the reach of Article 10 of the ECHR taken in *Magyar*; and

   (ii) even if *Magyar* does apply in domestic law, its application does not assist Mr Moss to obtain a result more beneficial to him than otherwise applies under the Freedom of Information Act 2000 ("FOIA") and accordingly the First-tier Tribunal made no material

error of law in the decision to which it came.

4. Given the wide-ranging nature of Mr Moss's grounds of appeal and given this may be a test case on Article 10 and the reach (if any) of *Magyar* in domestic law, this decision is long and detailed.

Relevant factual background

5. The above issues arise in the context of a request for information that Mr Moss made on 16 February 2016 to the Royal Borough of Kingston upon Thames under FOIA. His request was as follows:

> "I am writing to make a Freedom of Information request for the following information.
>
> 1. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of Renaisi as consultants for the regeneration programme and the work they have been, or are expected to be, instructed to do.
> 2. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of BNP Paribas as consultants for the regeneration programme they have been, or are expected to be, instructed to do.
> 3. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the decision to set up an Affordable Homes Working Group, the remit and intended purpose of said group, and plans of decisions made as to what it is going to do, when it will be meeting and whether those meetings will be open to the public.
> 4. Details of the "stakeholders" in the regeneration programme."

6. Kingston upon Thames refused the above request on 9 March 2016. In so doing it relied on section 12 of FOIA and said, insofar as is relevant, as follows:

> "As you may be aware under Section 12(4) of [FOIA] a public authority is not required to comply with a request for information if the authority considers that the costs of complying with the request would exceed the appropriate limit. The prescribed limit has been fixed by regulations at £450 or 18 hours. I regret to say that this request goes beyond this level. The Council does hold information relating to the

> regeneration consultants and the Affordable Homes Working Group; however, it is not possible to accurately forecast the true numbers of hours associated with responding to the request in its entirety as it covers different departments across the Council. In addition, the information is held on an individual basis."

By a response on the same day, Mr Moss sought a review of this decision.

7. The review decision of Kingston upon Thames was communicated to Mr Moss in a letter dated 13 July 2016 and refused to change the decision. The review decision stated, amongst other matters, that "in estimating the amount of staff time required the Council considered [that]…the single request relates to three separate issues – two procurement processes and the establishment of a Working Group".

8. During the time it took Kingston upon Thames to make its review decision Mr Moss had made a complaint to the Information Commissioner ("ICO") under section 50 of FOIA, on 7 April 2016. In the course of her investigation of that complaint the ICO was sent the above review decision and she then wrote to Mr Moss (and Kingston upon Thames) on 15 July 2016 to inform him that her preliminary conclusion on his complaint was "that the Council handled the request in accordance with FOIA. From the submissions provided it is apparent that section 12 of FOIA has been correctly applied to your request for information". It is worth noting, as it relates to one of Mr Moss's other grounds of appeal, the following parts of the 'preliminary conclusion' letter of the ICO.

> "……The Council had initially said that it is not possible to predict an accurate number of hours associated with responding to your request in its entirety, as it covers different departments across the Council and that the information is held on an individual basis.
>
> However, following our intervention, the Council revisited your request and reviewed the amount of the costs it reasonably expects to incur in conducting the relevant activities to comply with the request. I have considered the Council's response and its estimation on the time required in providing the information and I am satisfied with its explanation.

> I accept the Council's estimated time that it would be in excess of 18 hours to collate the information falling within the scope of your request, is a reasonable one…….
>
> The Council stated that the information would be held in electronic and paper records and it detailed this to you. It added that all of the listed paper and electronic records would need to be reviewed when searching the information requested. The Council provided a detailed estimation on the time it would take a staff member to review all emails, written notes and other information relating to the three separate issues. It also stated the number of staff involved for each of the separate issues.
>
> The Council supplied details about the sampling exercise conducted by four of its members of staff to provide an estimate for the time it would take to collate the information……."

9. Mr Moss responded to say that he did not agree with the ICO's preliminary conclusion. One of his points was that he had refined his request for information in his internal review request of 9 March 2016, in which he had said:

> "I do not accept that it would take more than 18 hours to provide information showing how and why the consultants Renaisi and BNP Paribas were selected/appointed and what they have been, or will be, instructed to do. Nor do I accept this as a valid reason to refuse to provide details of the 'stakeholders' in the regeneration programme."

Mr Moss concluded this response by saying he was willing to drop his request for information about the Affordable Homes Working Group.

10. In the light of Mr Moss's response, the ICI continued with her investigation of his complaint. In so doing she sought further information from Kingston upon Thames as to its estimate of costs under section 12 of FOIA. The ICO's particular concern was twofold: first, what was the estimated cost if the request did not involve, or no longer involved, information about the Affordable Homes Working Group; and, second, whether Mr Moss had notified Kingston upon Thames of his narrowing his request not to include the said Working Group.

11. Kingston upon Thames in its reply of 19 August 2016 stated that it had been informed by the ICO's office "that Mr Moss requested for Affordable Homes Working Group to be taken out of his initial request" and said that as a result its "calculation does not include [that Working Group]". The reply went on to say that Kingston had conducted a more thorough search in respect of Renaisi and BNP Paribas as a result of which the cost of time had gone up. Kingston's reply concluded on costs/time that "[i]n total the request for information on BNP Paribas would take an estimated **20 hours and 45 minutes**. For Renaisi's it is estimated to take **121 hours and 50 minutes**." It added that Mr Moss had not notified it that he had narrowed his request and clarified that the "total hours provided to Mr Moss in our internal review took into consideration all three aspects of his complaint. However, in this letter to the ICO we have not considered the "Affordable Homes Working Group" in our calculation". Finally, by this reply Kingston confirmed that the time estimates it had provided were based on searches of both manual and electronic records but if consideration was only given to electronic documents and information then the estimation totals would be 19 hours and 10 minutes for BNP Paribas and 73 hours and 20 minutes for Renaisi.

12. The ICO dismissed Mr Moss's complaint in a decision notice dated 21 September 2016. She considered that the scope of the complaint before her was to determine whether Kingston upon Thames correctly applied section 12(1) of FOIA to points 1, 2 and 4 in Mr Moss's request of 16 February 2016, as Mr Moss had removed point 3 (the Affordable Homes Working Group) from his complaint. Having reviewed the evidence that I have sought to summarise above, the ICO was satisfied with Kingston upon Thames's explanation as to why compliance with the request would exceed the appropriate limit of 18 hours effectively imposed by section 12 of FOIA. The ICO also considered that section 16 of FOIA had not been breached by

Kingston upon Thames in its dealings with Mr Moss over his request of February 2016.

13. An appeal was then brought by Mr Moss to the First-tier Tribunal against the ICO's decision notice. The grounds of appeal ranged over a number of the issues with which this appeal to the Upper Tribunal is concerned. The First-tier Tribunal dismissed Mr Moss's appeal on the section 12 point but allowed his appeal under section 16 of FOIA, in a decision dated 20 March 2017 ("the tribunal). Its decision read as follows:

> "We find that the Royal Borough of Kingston upon Thames Council was entitled to rely on s.12 FOIA but failed to comply with its duties under s.16 FOIA. As regards Part 4 of the request, it also failed to comply with its duty under s.1(1)(a) FOIA by not making clear whether it held this part of the requested information. We do not consider that Article 10 of the European Convention of Human Rights alters our decision."

14. As a result, the tribunal required Kingston upon Thames "to provide advice and assistance to enable a reformulation of the request that falls within the appropriate limit [which] must include provision of [the information requested under] Part 4 and be done within 30 working days". The reference to 'Part 4' is about the part of Mr Moss's request asking for "Details of the "stakeholders" in the regeneration programme". There has been further litigation concerning how Mr Moss could enforce this part of the tribunal's decision: see *Information Commissioner v Moss and the Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC).

15. In these Upper Tribunal proceedings Mr Moss seeks to challenge the tribunal's decision concerning section 12 of FOIA and its application to his request of 16 February 2016. The Upper Tribunal proceedings have, regrettably, a long history. Having been refused permission to appeal by the First-tier Tribunal on 30 May 2017, Mr Moss's renewed application for permission to appeal was initially stayed by the Upper Tribunal to await the Upper Tribunal's decision in *Cruelty Free International v Information Commissioner* [2017] UKUT 318 (AAC).

That stay was then lifted in September 2017 by Upper Tribunal Judge Mitchell. After a telephone hearing, on 30 July 2018 Judge Mitchell granted Mr Moss permission to appeal on two, but not all, of his grounds of appeal. One of the grounds on which permission was given included whether the costs exemptions provisions under section 12 of FOIA might be inconsistent with the scope of rights under Article 10 of the ECHR as set out in *Magyar*.

16. The Cabinet Offices was then joined as second respondent to the appeal. Its concern has only ever been about the applicability and reach of the *Magyar* decision in domestic law.

17. However, Mr Moss was aggrieved that he had not been given permission to appeal on his other grounds of appeal and so he sought judicial review of the decision refusing him permission to appeal on those other grounds. Permission for judicial review was granted by Mrs Justice Beverley Lang MBE on 16 April 2019. As the judicial review was not contested and no hearing of the substantive application was sought, by virtue of CPR 54.7A(9) a final order was made by the High Court on 14 May 2019 quashing the Upper Tribunal's refusal of permission to appeal on the other grounds. Although this did not mean that the Upper Tribunal had given, or was required to give, Mr Moss permission to appeal on those other grounds, I gave Mr Moss permission to appeal on all his remaining grounds on 20 June 2019 (my having taken over the conduct of the appeal from Judge Mitchell).

18. After the filing of written submissions on the other grounds on which I had given permission to appeal, the oral hearing of the appeal took place in public before me on 10 January 2020. The representation was as set above. Mr Moss appeared by way of telephone link at the hearing. Despite two occasions when the telephone line cut out unexpectedly, which resulted in counsel for the respondents having to rewind to the points in their oral presentations once the line was restored, Mr Moss's oral arguments were fully accessible to all in the

hearing room and he was able hear all that the respondents had to say. Despite my offering to do so, Mr Moss did not ask to be provided with any additional breaks during the hearing.

19. As is noted above, two exchanges of written submissions occurred after the oral hearing. In neither case had the submissions been sought by the Upper Tribunal. However, on both occasions the other parties were given the opportunity to comment on the written arguments that had been advanced unelicited.

Relevant legislation

20. Section 1 of FOIA contains its foundational duty and provides as follows:

> "**General right of access to information held by public authorities.**
>
> 1.:-(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
> (3) Where a public authority—
> (a) reasonably requires further information in order to identify and locate the information requested, and
> (b) has informed the applicant of that requirement,
> the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
> (4) The information—
> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
> (b) which is to be communicated under subsection (1)(b),
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
> (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
> (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"."

21. As can be seen by section 1(2), the right to information given by section 1(1) of FOIA is subject, amongst other matters, to section 12 of the same Act. Section 12 of FOIA removes the obligation created by section 1(1) by providing as follows:

> "**Exemption where cost of compliance exceeds appropriate limit.**
>
> 12.-: (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
> (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
> (3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.
> (4) The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—
> (a) by one person, or
> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
> the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.
> (5) The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated."

22. The relevant provisions of FOIA dealing with complaints to the ICO and appeals to the First-tier Tribunal are found in sections 50 and 57-58 of FOIA. These provide as follows:

> "**Application for decision by Commissioner.**
>
> 50.-:(1)Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
> (b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or
(d) that the application has been withdrawn or abandoned.
(3) Where the Commissioner has received an application under this section, he shall either—
(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
(4) Where the Commissioner decides that a public authority—
(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
(b) has failed to comply with any of the requirements of sections 11 and 17,
the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
(5) A decision notice must contain particulars of the right of appeal conferred by section 57.
(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
(7) This section has effect subject to section 53.

Appeal against notices served under Part IV.

57.-:(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.
(3) In relation to a decision notice or enforcement notice which relates—
(a) to information to which section 66 applies, and
(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,
subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

Determination of appeals.

58.-:(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

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

23. One final part of FOIA needs to be set out. This is section 78 which is in the following terms.

> "**Saving for existing powers**
>
> 78.-: Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it."

24. Lastly in terms of the legislative architecture are the regulations made under section 12 of FOIA. These are the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Insofar as is material to this appeal these provide as follows.

> "**The appropriate limit**
>
> 3.—(1) This regulation has effect to prescribe the appropriate limit referred to in section..... 12(1) and (2) of [FOIA].
> (2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.
> (3) In the case of any other public authority, the appropriate limit is £450.
>
> **Estimating the cost of complying with a request – general**
>
> 4.—(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.
> (2) A relevant request is any request to the extent that it is a request [for].....
> (b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.
> (3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in–
> (a) determining whether it holds the information,
> (b) locating the information, or a document which may contain the information,
> (c) retrieving the information, or a document which may contain the information, and
> (d) extracting the information from a document containing it.
> (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

> **Estimating the cost of complying with a request – aggregation of related requests**
>
> 5.—(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority—
> (a) by one person, or
> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
> the estimated cost of complying with any of the requests is to be taken under the be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.
> (2) This regulation applies in circumstances in which–
> (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
> (b) those requests are received by the public authority within any period of sixty consecutive working days.
> (3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

The grounds of appeal

25. Mr Moss puts forward five grounds of appeal which can be identified broadly as follows:

(a) the tribunal erred in law in its approach to the applicability of Article 10 of the ECHR and *Magyar* to Mr Moss's appeal;

(b) the tribunal erred in concluding that Kingston upon Thames had aggregated the costs of all parts of the request and had been justified in so doing;

(c) it had been irrational for the tribunal to conclude that there was no compelling reason to doubt the costs estimate made by Kingston upon Thames;

(d) it was irrational and legally incorrect for the tribunal to conclude that Mr Moss's internal review request to Kingston upon Thames was vague and had not clarified his original request; and

(e) the tribunal had failed to provide adequate reasons addressing Mr Moss's arguments. (Mr Moss later added to this an argument that his rights under Article 6(1) of the ECHR had been breached.)

26. Given the wide-ranging critique of the tribunal's decision raised by the above grounds of appeal, and given I do not consider that the tribunal fell into any material error of law, I consider I should set out the relevant parts of the tribunal's reasoning in full.

> "**Issues**
> 20. The issues in this appeal concern (a) Article 10 ECHR; (b) the scope of the request; (c) section 12; and (d) section 16. The Appellant raised many points within these. To the extent these pertain to why the request he has made should be responded to we address them below.
> **A. Article 10**
> 21. The Appellant argues that Article 10 ECHR confers a right of access to information. Article 10 confers a right to freedom of expression under the Convention. The European Court of Human Rights Grand Chamber decision in *Magyar*…. has interpreted the Article 10 right to freedom of expression a right of access to information in certain circumstances. The Appellant argues that it is for our court to apply Article 10…….
>
> 23. Under Magyar, the Article 10 information access regime seems to comprise of a two-stage process. First, it is necessary to consider whether a requester's right under Article 10 is engaged. The Court sets out four indicative criteria for this. Second, if engaged, it is then necessary to consider whether the interference is justified under Article 10(2).
> 24. However, drawing upon the Kennedy case, the Commissioner questions whether it is for our Tribunal to emancipate Article 10 rights conferred by the Magyar regime.
> 25. In the Kennedy case, the FOIA request sought disclosure of information from certain Charity Commission inquiries. The Commission relied on the s.32(2) FOIA to exempt it from providing the information. The Court decided that Article 10 ECHR did not make a difference in how to construe this exemption:
> a) It decided that section 32(2) was not inconsistent with Article 10 because it put the requester in no less favourable a position than he was in under general statute and common law to access the information. The FOIA is not the only way to access information. The exemption only took information outside the scope of that particular disclosure regime. This did not mean it could not otherwise be required to be disclosed by law. Other statute, or the common law, might require disclosure, even though FOIA did not.
> b) In Lord Mance's opinion, the Charity Commission had the power to disclose information to the public concerning inquiries under specific

charity legislation and under general common law duties of openness and transparency on public authorities.

c) Lord Toulson emphasised that the exercise of the power of disclosure pursuant to the open justice principle would be subject to judicial review. emphasised the fundamental principle of open justice: '*It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence'* (paragraph 110).

26. The second reason why the Supreme Court in Kennedy that the requester was not assisted by Article 10 was because they found that it was not engaged. Lord Mance noted that the jurisprudence from the European Court was 'neither clear nor easy to reconcile'. *(See para. 57.)*

27. The Appellant questions the status of the Kennedy Supreme Court judgment in the light of the Grand Chamber's more recent Magyar decision. He asserts that it impacts the FOIA regime where the Tribunal cannot act in a way that it is incompatible with the ECHR or Magyar. He presumably also considers the jurisprudence now to be more clearly imposing a duty of disclosure on public authorities.

28. He distinguishes this case from Kennedy by asserting that there is no alternative route to access the information such as the Charity legislation. Given they were not present at the hearing, we have no submissions by the Commissioner on the point. However, it is not clear to us why the general common law duties of openness and transparency on public authorities pursued through the judicial review process would not similarly apply to this case. In our view, whilst the Magyar case may indeed be framing a regime to access information that had not been previously revealed under Article 10, it does not affect the Kennedy judgment or the requirement upon us to follow it. This seems to us to require us to keep to the integrity of the FOIA regime, which under s.58 FOIA is the limit of our remit.

29. Even if we are wrong about this, we do not consider that the Magyar case assists the Appellant because we do not accept that any Article 10 right to access information has been engaged. The Court's four criteria for engaging the Article 10 right are:

a) **Purpose of request**. As a prerequisite, the purpose of the request must be to enable [the requester's] exercise of the freedom to receive and impart information and ideas to others. The information must be "necessary" for the exercise of freedom of expression;

b) **Nature of information sought**. The information must meet a legitimate public interest test to prompt a need for disclosure under the Convention.

c) **Role of requester.** The applicant must be in a privileged position, seeking the information with a view to informing the public in the capacity of a public watchdog. Such a privileged position should not be considered to constitute exclusive access.

d) **Information ready and available**. Weight should be given to the fact that the information requested is ready and available…..

30. The Commissioner asserts that it is not clear that disclosure is necessary for the Appellant's exercise of his ECHR rights, nor how the

reliance by the public authority upon section 12 interferes with the Appellant's fundamental rights.

31. The Appellant explains that he needs the information to alert Kingston residents to the Council's plans for estate regeneration and what it means for them. He asserts that these are matters of public interest and any information obtained would be published on social media including a campaign group's blog.

32. As the Appellant appeals a decision by the Commissioner, the burden is on him to show that the Commissioner erred in her decision. From the arguments we have received, we consider that to the extent that the Council were entitled to rely on section 12, it cannot be shown that the information is ready and available and in these circumstances do not consider Article 10 to have been engaged.

B. Scope of Request

33. It is the Respondent's case that the request was widely drafted. The Appellant considers that it was capable of more than one meaning and his intention had been for a more narrow request. The Appellant argues that as he inadvertently phrased his request in an ambiguous way it was incumbent on the Council to then clarify the meaning. The implication being that had they done so, the Appellant would have made clear that his request was not as onerous as they had thought.

34. In the Appellant view: "*Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment o*f", could be read in more than one way. His intention was not to ask for every single record however inconsequential or repetitive. He was looking for sufficient information regardless of what form it was held in, to show how and why the consultants were chosen and what the Council expected them to do on its behalf.

35. He explains that he had made another request in similar terms, and the Council had sought to clarify what information he was seeking.

36. We prefer the submissions of the Commissioner on the point. We consider the request was plainly clear, well drafted and unambiguous…. It is phrased carefully and widely, presumably to ensure he received all that was relevant to his needs.

37. We agree with the Commissioner that public authorities must interpret information requests objectively and answer a request based on what the requester has actually asked for. There is no requirement to go behind what is a clear and adequately specified request to contact the applicant for further clarification. Were it otherwise, the authority's task would seem to us to be relatively unworkable.

38. The request was clearly for "any information held…" Taking an objective interpretation, we do not accept that the Council unreasonably misread the request as being broader than the Appellant intended. The Commissioner considers that the Council reasonably interpreted the request to be for all recorded information held on the issue raised. The Appellant argues that 'any information held' does not mean 'all information held['']. When reading the words of the request, we do not think 'any information' means just one piece of information, or sufficient information. It is casting the net wide, to capture absolutely any information, that is, "all of it".

39. To conclude, there was no need to have clarified the unambiguous request.

Narrowed the request

40. Second, the Appellant argues that he clarified or refined his request on 9 March….We do not accept this. From a plain reading of what he wrote, the Appellant did not clarify, refine or narrow his request particularly because he did not state or give any indication that he was doing so. The drafting of an FOI request is extremely important in determining what information might then be received. It is clear that the Appellant appropriately had taken care in drafting a well-worded request of 16 February. The language used on 9 March is more vague, because the focus of the communication was instead to phrased to show his scepticism that section 12 was properly relied upon.

C. Section 12

Council's Estimate

41. The Appellant argues that the Council's estimate of costs did not consider the obvious and quick means of locating, retrieving or extracting the information. First, he argues that the lead officer should have been asked whether there was significant information that might have been enough to narrow the search. Whilst the Appellant has assumed that the Council "*must have had significant relevant information collated in a file already…*", the Council's estimate was reached by casting a broad net considering information held electronically and on paper in the files of the various officials involved. We accept that this was reasonable because the Appellant's request was very broad. It was not limited to the 'significant relevant information'.

42. The Appellant questioned the premise of needing to manually download individual emails. We do not accept that the FOIA require the Council to procure extra programmes to enable bulk downloads. However, in the absence of further information from the Council addressing the point, we find it highly unlikely that downloading emails from gmail would take 9 hours for the staff member 1 (the lead officer) concerned with BNP Paribas, and 49 hours 20 minutes for staff member 3 concerned with Renaisi. Further, the former estimates a rate for downloading one email of 2 minutes per an email and the latter estimates 4 minutes. In the absence of further information, this is incongruous. We find it would be extremely unusual not to be possible to download emails in bulk. In any event, we do not accept in that it would take such a vast amount of an individual's (as opposed to the computer's) time to download the material.

43. Notwithstanding the above, we have found no compelling reason to doubt the rest of the Council's thorough estimate…. Whilst we find it appropriate to discount the time allocated for retrieving emails, the estimate still falls far beyond the appropriate limit of 18 hours. (We were not persuaded by the Appellant's argument that the number of emails held by staff 2 seemed excessive or as regards the differences between the length of time for providing information on Renaisi and BNP Paribas. The Council provided a detailed analysis based on how their records were held, and on balance, we found no reason to doubt these aspects.)

Aggregation of Requests

44. The Appellant proffers that when estimating whether the cost limit would be exceeded, the Council should have considered each part of his request as a separate request. He explains that Renaisi and BNP

> Paribas took on very different roles acting as different kinds of consultant such that the requests are not related.
> 45. The Commissioner concedes that multiple requests within the same email can constitute separate requests for the purposes of section 12 such that we do not need to consider the point. However, she points to an overarching theme or common thread running between the requests being for information related to Council's regeneration programme. We find that what the Appellant expressly referred to at the hearing as 'parts' 1, 2, and 4 of the request are indeed linked as they all relate to the regeneration programme. Regulation 5 FIDP is drafted widely, such that requests that are related *"to any extent, to the same or similar information",* may be aggregated. Where other cases have found that only a very loose connection is needed to aggregate requests, we do not consider this to be a particularly loose connection because the regeneration programme is the overarching subject within which the parts of the requests are framed."

Discussion

Ground 1 - Article 10 ECHR and Magyar

27. As I indicated at the outset of this decision, the important issue that arises on this appeal is the applicability (or not) of the ECHR's decision in *Magyar* to the domestic regime for accessing information set out in FOIA.

28. Although I have characterised *Magyar* as giving rise to two main issues on this appeal, it is necessary for Mr Moss to establish four points in order to show that the tribunal made a material error of law under *Magyar*. The four points are:

    (i) that it is open to the Upper Tribunal to apply *Magyar* in domestic law; and
    (ii) if *Magyar* may be applied, Mr Moss meets the criteria set down in *Magyar* for Article 10(1) to be engaged[1]; and
    (iii) if Article 10(1) is engaged, Mr Moss's right under Article 10 has been breached by FOIA; and
    (iv) if Mr Moss's Article 10 rights have been breached by FOIA, the

[1] I use the word 'engaged' here to mean Mr Moss's right to freedom of expression under Article 10(1) was being interfered with in the sense adumbrated in *Magyar*. No argument was made before me concerning whether any such interference was justified under Article 10(2).

> Upper Tribunal can afford him an effective remedy for that breach.

Mr Moss's case fails on each of these four points.

29. The first argument to address, accordingly, is whether domestic binding authority prevents the Upper Tribunal from following *Magyar*. To navigate this argument it is necessary to understand what it is that *Magyar* decides about Article 10 of the ECHR and what the domestic courts have held about the reach of Article 10.

30. Article 10 of the ECHR is titled "Freedom of Expression". Under that heading it states:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

31. A right founded on an ability to "receive and impart information…without interference" does not at least as a matter of obvious language extend to a right to access information not held by the person in the first place. However, the decision of the Grand Chamber in *Magyar* changes this view of the scope of Article 10(1) and the right it protects, albeit within limits. To understand why this is the case requires a close examination of the Grand Chamber's decision in *Magyar*.

32. The applicant in *Magyar* was a non-governmental organisation ("NGO") that focused, inter alia, on access to justice and the effective enforcement of the right to a defence lawyer. Between 2005 and 2009 it had carried various research assessments in relation to the *ex officio* system for the appointment of defence counsel in Hungary. It concluded that the system did not operate adequately and lacked transparency. As a continuation of this project the NGO sought, on an experimental basis, to replace the system of discretionary appointments of defence counsel with a randomised computer-generated system. To do this it requested the names of the defence counsel selected for cases in 2008 and the number of assignments given to each of them from 28 police departments in Hungary. The aim of the request was to identify any discrepancies between the defence counsel appointed for cases by the police departments from the list provided by the bar associations. The NGO argued that this information was 'public interest data' subject to disclosure under domestic law.

33. Two police departments refused the request, with one arguing that the details of defence counsel who it had appointed were 'private data' and moreover the provision of that data would impose a disproportionate burden on it. Legal proceedings instituted by the NGO against the refusals were ultimately unsuccessful before the Hungarian domestic courts, the Supreme Court ruling that the names and number of appointments of defence counsel constituted 'personal data' and, accordingly, "the respondent police departments cannot be obliged to surrender such personal data". The NGO then applied to the European Court of Human Rights ("ECtHR") for a ruling under Article 10 of the ECHR that the Hungarian courts' refusal to order the disclosure of the information to which it had sought access amounted to a breach of its right to freedom of expression. The UK intervened in the ECtHR proceedings.

34. Without going into the full detail of the arguments of the parties and the interveners in *Magyar*, it is clear that all, to a greater or lesser

extent, were arguing about whether Article 10 should be extended by the Grand Chamber of the ECtHR to cover (or be found to now cover) a right of *access* to information. Thus, the NGO argued as follows:

> "86. The applicant NGO requested the Grand Chamber to confirm the applicability of Article 10 to the case. It contended that although the Convention used the specific terms "receive" and "impart", Article 10 also covered the right to seek information, as first acknowledged by the Court in the *Dammann v. Switzerland* case..... It referred to the Court's case-law in *Sdruženi Jihočeské Matky v. the Czech Republic*..., *Társaság*...., *Youth Initiative for Human Rights v. Serbia*..... and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* ..... to demonstrate that the Court had departed from its previous case-law in *Leander* ....and *Gaskin v. the United Kingdom* (7 July 1989, § 57, Series A no. 160), and had clearly taken the stance that the right of access to information held by public authorities fell within the ambit of Article 10.....
>
> 88. In *Guerra and Others v. Italy* and *Roche v. the United Kingdom,* the Court had held that the freedom to receive information could not be construed as imposing on a Contracting Party to the Convention positive obligations to collect and disseminate information of their own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I; and *Roche v. the United Kingdom* [GC] § 172, ECHR 2005-X).
>
> 89. However, in the present case the data requested were readily available to the authorities. This was demonstrated by the fact that seventeen police departments had provided the requested data without delay, apparently without having to make disproportionate efforts to obtain them.
>
> 90. The applicant NGO submitted that the Convention, as a "living instrument" should be interpreted in the light of present-day conditions, taking into account sociological, technological and scientific changes as well as evolving standards in the field of human rights.
>
> 91. The denial of access to the relevant information was, in the applicant NGO's opinion, to be analysed as an issue of failure to comply with the respondent State's negative obligation not to interfere without justification with the rights protected by Article 10. By denying access to the requested information, the domestic authorities had prevented the applicant NGO from exercising a fundamental freedom, which amounted to an unjustifiable interference with the right protected under Article 10."

35. By contrast, the UK Government's argued for the opposite conclusion.

> "99. Relying on Article 31 § 1 of the Vienna Convention on the Law of Treaties 1969, the Government of the United Kingdom argued that the

ordinary meaning of the language used by the Contracting States ought to be the principal means of interpreting the Convention. In their view the clear object of Article 10 was to impose negative obligations on organs of the State to refrain from interfering with the right of communication. A positive obligation of Contracting States to provide access to information was not warranted by the language of Article 10 § 1. This was confirmed by the *travaux préparatoires,* since the right to "*seek*" information had been deliberately omitted from the final text of Article 10.

100. Reading the right to freedom of information into Article 10 would amount to constructing a "European freedom of information law" in the absence of the normal consensus. In the understanding of the intervening Government, there was no European consensus as to whether there should be access to State-held information, demonstrated by the fact that the Council of Europe Convention on Access to Official Documents had only been ratified by seven member States.

101. They also referred to the Court's judgment in the *Leander* case, in which the Court had held that Article 10 did not "confer on the individual a right of access to a register containing information on his personal position, nor [did] it [embody] an obligation on the Government to impart such information to the individual" (see *Leander*... § 74). This ruling was subsequently confirmed by the Court in the case of *Guerra and Others*, where the information was not in itself private and individual (see *Guerra and Others*....§§ 53-54) and by the Grand Chamber in *Roche* (.....§§ 172-73). Finally, in the case of *Gillberg*, the Court reaffirmed that [the right to receive and impart information] basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see *Gillberg v. Sweden* [GC]..... § 83, 3 April 2012).

102. The intervening Government also maintained that in the recent cases of *Kenedi v. Hungary* ..... *Gillberg*, *Roşiianu v. Romania*..., *Shapovalov v. Ukraine* ....), *Youth Initiative for Human Rights* ...., and *Guseva v. Bulgaria* .... the Court had recognised that the applicants had had a right of access to information under Article 10 by virtue of domestic court orders. In their view the non-enforcement of domestic court orders fell more naturally to be considered in the context of Article 6. According to the intervening Government, the cases of *Társaság*, *Sdruženi Jihočeské Matky* and *Österreichische Vereinigung* (all cited above) were not explicable on the basis of a domestic-law right to information. In their view these judgments failed to provide a cogent basis for ignoring the previous line of case-law. The Grand Chamber should therefore find that Article 10 was not applicable and that there had been no violation of the applicant's right to freedom of expression.

103. At the hearing the intervening Government submitted that in previous cases where the Court had found it necessary to update its case-law, this had been to ensure that it reflected contemporary social attitudes. No such need existed in the case of freedom of information. If the Court were to recognise a right of access to information held by

> the State, this would far exceed the legitimate interpretation of the Convention and would amount to judicial legislation."

36. It is in this context that the Grand Chamber's analysis in *Magyar* must be set. It accepted (paragraph [117]) that Article 10 does not specify that it encompasses a freedom to *seek* information. However, the Grand Chamber went on in the same paragraph to say:

> "In order to determine whether the impugned refusal by the national authorities to grant the applicant organisation access to the requested information entailed an interference with its Article 10 rights, the Court must embark on a more general analysis of this provision in order to establish whether and to what extent it embodies a right of access to State-held information as claimed by the applicant NGO and the non-governmental third-party interveners, but which is disputed by the respondent and intervening third-party Governments."

37. This more general analysis led the ECtHR through its caselaw, which it said (paragraph [127]) had shown a gradual clarification in the caselaw of whether a right of access to information fell within the ambit of Article 10(1). It recognised (para. [127]) that paragraph 74 of its decision in *Leander* had set out the approach which had become the standard jurisprudential position on the matter in later years, namely:

> ""[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

38. However, the Grand Chamber in *Magyar* went on to note (in paragraph [132]):

> "132. Concurrently with the aforementioned line of case-law there emerged a closely related approach, namely that set out in the *Társaság* and *Österreichische Vereinigung* judgments (respectively of 14 April 2009 and 28 November 2013, both cited above). Here the

> Court recognised, subject to certain conditions - irrespective of the domestic-law considerations prevailing in *Kenedi, Youth Initiative for Human Rights, Roşiianu* and *Guseva* - the existence of a limited right of access to information, as part of the freedoms enshrined in Article 10 of the Convention. In *Társaság* the Court emphasised the social "watchdog" role of the applicant organisation and observed, using reasoning which was confirmed in *Kenedi, Youth Initiative for Human Rights, Roşiianu* and *Guseva*, that the applicant organisation had been involved in the legitimate gathering of information on a matter of public importance (a request by a politician for review of the constitutionality of criminal legislation concerning drug-related offences) and that the authorities had interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information had thus amounted to a form of censorship. Furthermore, given that the applicant organisation's intention had been to impart to the public the information gathered from the constitutional complaint, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information had been clearly impaired (see *Társaság*, §§ 26 to 28). Comparable conclusions were reached in *Österreichische Vereinigung* (see § 36 of that judgment)."

39. With this and other detailed considerations behind it, the Grand Chamber concluded as follows (the kernel of its conclusion being in paragraph [156], within which I have underlined the most relevant passages).

> "*(v) The Court's approach to the applicability of Article 10*
>
> 149. Against the above background, the Court does not consider that it is prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information.
>
> 150. The Court is aware of the importance of legal certainty in international law and of the argument that States cannot be expected to implement an international obligation to which they did not agree in the first place. It considers that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Mamatkulov and Askarov*, cited above, § 121, and *Chapman v. the United Kingdom* [GC], § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergence as to the standards to be achieved (see *Biao v. Denmark* [GC] § 131, 24 May 2016).
>
> 151. From the survey of the Convention institutions' case-law as outlined in paragraphs 127-132 above, it transpires that there has been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element

> of the freedom to receive and impart information enshrined in Article 10 of the Convention.
>
> 152. The Court further observes that this development is also reflected in the stance taken by international human-rights bodies, linking watchdogs' right of access to information to their right to impart information and to the general public's right to receive information and ideas (see paragraphs 39-42 and 143 above).
>
> 153. Moreover, it is of paramount importance that according to the information available to the Court nearly all of the thirty-one member States of the Council of Europe surveyed have enacted legislation on freedom of information. A further indicator of common ground in this context is the existence of the Convention on Access to Official Documents.
>
> 154. In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved, the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate.
>
> 155. The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Soering,* cited above, § 87). As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention.
>
> 156. In short, the time has come to clarify the classic principles. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her

> right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

40. It seems to me clear that *Magyar* is, and was intended to be, a watershed case in terms of the reach of Article 10 of the ECHR. That is what the Grand Chamber was referring to, in my view, when it said "the time has come to clarify the classic principles". That 'clarification' was to the effect that in certain circumstances the right guaranteed by Article 10 may cover a right of access to information held by a public authority.

41. What then is the position in domestic law in terms of the reach of Article 10 of the ECHR? There are two cases I need to consider.

42. The first is the Supreme Court's decision in *BBC v Sugar* (No.2) [2012] UKSC 4; [2012] 1 WLR 439. Mr Sugar sought disclosure of a BBC report under FOIA. The central issue in the case was whether the report was held by the BBC "for purposes other than those of journalism, art or literature" as FOIA only required information held for such purposes to be made available. The Supreme Court held by a majority, Lord Wilson JSC dissenting, that the report was not held by the BBC for such purposes and therefore the report was exempt from the requirement of disclosure under FOIA.

43. Mr Sugar also sought to rely on Article 10 of the ECHR. Lord Wilson said this about that argument:

> "58. The further submission on behalf of Mr Sugar is that his request for disclosure of the Balen report engaged his right to receive information under para 1 of article 10 of the ECHR and that such restrictions on the exercise of his right as are permitted by para 2 of the article extend no further than is reflected by the designation (when read in accordance with his polarised construction), together with the exemptions in Part II of the Act. To this submission Lord Brown devotes paras 86 to 102 of his judgment below; with the essence of them I respectfully agree. In short article 10 carries Mr Sugar's case no further. Even if (being a possibility which I would countenance somewhat more readily than does Lord Brown) the refusal to disclose the report did interfere with the freedom of Mr Sugar to receive information under the article, the words of the designation, when

> given the balanced interpretation which I favour, represent a restriction upon it which is legitimate under para 2 of the article in that it is necessary in a democratic society for the protection of the freedom to impart information enjoyed by the BBC under the same article. This conclusion becomes all the stronger when the court obeys the injunction cast upon it by section 12(4) of the Human Rights Act 1998 to have particular regard to the importance of freedom of expression and, in particular, to the extent to which it would be in the public interest for "journalistic, literary or artistic material...to be published".

44. Lord Brown of Eaton-under Heywood said the following in *Sugar (No.2)* about whether Article 10(1) covered a right of access to information:

> "85. All of us agree that on any conventional approach to the construction of the Freedom of Information Act 2000 (the Act) and in particular the expression "information held for purposes . . . of journalism" within the meaning of Schedule 1 to the Act, it clearly encompasses the Balen Report (the Report) throughout the whole period that the BBC has held it.
>
> 86. It is the appellant's contention, however, that this approach to the construction of the Act and the consequent non-disclosure of the Report would violate article 10 of the European Convention on Human Rights and that the Court is accordingly bound, consistently with section 3 of the Human Rights Act 1998, to read and give effect to the Act so as to require the Report's disclosure. It is this contention that I am here principally concerned to address.....
>
> 88. Before this Court Mr Eicke QC has vigorously returned to article 10 and advances what is essentially a two stage argument. First, he contends, in reliance principally upon a trilogy of Strasbourg decisions – *Matky v Czech Republic* (Application No 19101/03), *Tarsasag A Szabadsagjogokert v Hungary* (2011) 53 EHRR 3, and *Kenedi v Hungary* 2009 27 BHRC 335 – that the ECtHR has recently moved towards the recognition of a right of access to information and that in the particular circumstances of the present case an interpretation of the Act which withholds from disclosure a document such as the Report interferes with the right of access to information protected by article 10(1)....
>
> 89. Before turning to the trilogy of decisions upon which the appellant mainly relies it is helpful first to note the well-established body of Strasbourg jurisprudence which is recognised to define, generally speaking, the nature and extent of the right under article 10(1) "to receive . . . information and ideas without interference by public authority". It is sufficient for present purposes to cite a short passage from the unanimous Grand Chamber decision in *Roche v United Kingdom* (2006) 42 EHRR 30 at para 172:

> "The Court reiterates its conclusion in *Leander v Sweden* (1987) 9 EHRR 433 and in *Gaskin v United Kingdom* (1989) 12 EHRR 36 and, more recently, confirmed in *Guerra v Italy* (1998) 26 EHRR 357, that the freedom to receive information 'prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him' and that that freedom 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to . . . disseminate information of its own motion'."…..
>
> 94. In my judgment these three cases 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 a prima facie 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 here is not that Mr Sugar was not exercising "the functions of a social watchdog, like the press." (Perhaps he was.) The *Jewish Chronicle* would be in no different or better position. 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.
>
> 95. True it is, as Lord Judge CJ noted when giving the judgment of the Court in *Independent News and Media Ltd v A* [2010] 1 WLR 2262 (para 42), that the Venice Commission has described *Tarsasag* as "a landmark decision on the relation between freedom of information and the . . . Convention". Whatever else might be said about Mr Eicke's trilogy of cases, however, they cannot to my mind be said to support his first proposition having regard to the particular relationship between the parties in this case…….
>
> 97. It follows that for my part I would hold that the appellant's article 10 case fails at the first stage. There was no interference here with Mr Sugar's freedom to receive information. The Act not having conferred upon him any relevant right of access to information, he had no such freedom."

In paragraph 113 of *Sugar (No.2)* Lord Mance agreed with Lord Brown's "analysis of the current state of Strasbourg authority".

45. Lords Brown, Mance and Wilson would therefore all appear to have agreed that the second argument of Mr Sugar based on Article 10 of the ECHR could not succeed *because* Article 10(1) did not extend to

encompass a right of access to information. I struggle to see why that conclusion does not amount to the (binding) *ratio* of the Supreme Court on this second argument of Mr Sugar. It was certainly the view of the Court of Appeal in *Kennedy v Charity Commission and the Information Commissioner and Secretary of State for Justice* [2012] EWCA Civ 317; [2012] 1 WLR 3524 that it was part of the *ratio* of the decision. This is evident from the judgment of Lord Justice Etherton (as he then was), with whose judgment the other members of the Court of Appeal agreed. The relevant parts of the judgment are as follows:

> 35. The Charity Commission and the Secretary of State take the position that the reasoning and decision of the Supreme Court in *Sugar* require us to hold that the Tribunal in the present case was incorrect in its characterisation of the jurisprudence of the ECtHR in relation to Article 10(1), and in particular the *Matky*, *Társaság,* and *Kenedi* cases. They contend that, as the Strasbourg jurisprudence has been interpreted in *Sugar*, it inevitably follows that Article 10(1) was simply never engaged by the refusal of the Charity Commission to supply the information and documentation requested by Mr Kennedy. They further submit that, even if the analysis and decision in *Sugar* are not strictly binding so as to be determinative of the present appeal, the analysis and decision should nevertheless be followed as a recent and highly authoritative statement by the Supreme Court. The Charity Commission prepared a Supplementary Note articulating those points, to which Mr Kennedy responded in substantial written Points of Reply.
>
> 36. I am satisfied that the analysis and decision of Lord Brown in *Sugar* are part of the ratio of that case, which is binding on this court, and that, in the light of that analysis and decision, we must allow the cross-appeal of the Charity Commission on the Article 10 issue and dismiss Mr Kennedy's appeal.
>
> 48. The first issue on the present appeal is whether it was part of the ratio of the Supreme Court's decision in *Sugar* that Article 10(1) was not engaged. In my judgment, that was part of the ratio. In Mr Kennedy's Points of Reply it was suggested that Lord Brown stated in paragraph [86] that the Article 10 issue was irrelevant to the outcome of the appeal and he would address it only briefly. This is a plain misreading of what Lord Brown said. On the contrary, Lord Brown said that he was principally concerned to address the appellant's contention that the non-disclosure of the Report would violate Article 10, and so the Court was bound, consistently with HRA s.3, to read and give effect to the FOIA so as to require the Report's disclosure. What Lord Brown considered was irrelevant to the outcome of the appeal and so to be addressed by him only briefly was the difference of view between the other Justices as to the conventional interpretation of s.7 and Part VI of Schedule 1. Indeed, it was common ground on the

hearing before us that the appellant in *Sugar* was relying in the Supreme Court on Article 10 if, on a conventional interpretation of the relevant provisions of the FOIA, he was not entitled to disclosure of the Report. That is indeed apparent both from the contents of the printed cases of the appellant and the BBC (of which Mr Coppel had procured copies) but also from the judgments of Lord Wilson, Lord Brown and Lord Mance.

49. Lord Brown stated expressly that Article 10(1) was not engaged and Lord Mance agreed (at [113]) with Lord Brown's analysis on that part of the case. There was much debate before us about the proper interpretation of Lord Wilson's judgment on the application of Article 10(1). Mr Coppel's submission was that Lord Wilson was, at best, "agnostic" about the engagement of Article 10 (1). Lord Wilson addressed the issue, as I have said, in paragraph [58] of his judgment which I have quoted above. Mr Coppel submitted that Lord Wilson's agreement "with the essence" of what Lord Brown said in paragraphs [86] to [102] is clarified by Lord Wilson's observation that he "would countenance somewhat more readily than does Lord Brown [the possibility that] the refusal to disclose the report did interfere with the freedom of Mr Sugar to receive information under [Article 10]".

50. I do not accept Mr Coppel's analysis of Lord Wilson's judgment on the Article 10(1) issue. Lord Wilson said that he agreed with the essence of paragraphs [86] to [102]. Those paragraphs embrace Lord Brown's rejection of the appellant's case that Article 10 (1) was engaged if his conventional interpretation was rejected by the Court (as it was). It seems to me clear that, if Lord Wilson had disagreed with Lord Brown's analysis of the existing Strasbourg jurisprudence in relation to the application of Article 10(1), he would have said so clearly and expressly. Lord Wilson, in expressing the view that he would countenance rather more readily than did Lord Brown the possibility that the refusal to disclose the Report interfered with the freedom of Mr Sugar to receive information under Article 10(1), was referring to a possible extension of the current long-established jurisprudence of the ECtHR. That also explains his reference in paragraph [59] of his judgment to *Al-Skeini* and *Ullah,* and in particular the suggestion of Lord Bingham in the latter at paragraph [20] that it was the duty of the House of Lords to keep pace with the evolving jurisprudence of the ECtHR "no more, but certainly no less" and the suggestion of Lord Brown in the former that the duty of the House of Lords was to keep pace with it "no less, but certainly no more".

56. It seems to me that Lord Brown's conclusion in paragraphs [94] to [97] was that what he described in paragraph [89] as "the well-established body of Strasbourg jurisprudence" set out in *Roche*, *Leander, Gaskin* and *Guerra* was not extended or not materially extended by *Matky*, *Társaság* or *Kenedi.*

57. As I have said, one of the cases on which Mr Kennedy relies on this appeal is *Wizerkaniuk,* which was not the subject of any mention by the Supreme Court in *Sugar*. It is not necessary to examine the facts of that case. It is relied upon by Mr Kennedy for its reference to *Társaság* in paragraph [65] of the ECtHR's judgment. That, however, is only a

> reference in support of the proposition that "while it is true that Article 10… does not in terms prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints [on publications] call for most careful sanctioning on the Court's part". The reference to *Társaság* does not in any way endorse the extension of the Article 10(1) jurisprudence beyond the *Leander* line of cases in the manner for which Mr Kennedy contends.
>
> 58. It follows that Article 10(1) can have no application in the present case.
>
> 59. Even if I am wrong that the analysis and conclusion of Lord Brown on the Article 10(1) issue are part of the ratio of *Sugar* I would nevertheless follow them as a very recent authoritative pronouncement by the Supreme Court. It is more appropriate for the Supreme Court to decide whether or not the factual situation in the present case is sufficiently different in material respects from that under consideration in *Sugar* to fall within the ambit of Article 10(1) whether under existing Strasbourg jurisprudence or, in the light of policy considerations, a desirable and logical extension of the existing Strasbourg jurisprudence."

46. The *ratio* of the Court of Appeal in *Kennedy* is just as much binding on the Upper Tribunal as the ratio of the Supreme Court in *Sugar* (No.2).

47. However, neither of the respondents sought to rely on either *Sugar* (No.2) or *Kennedy* in the Court of Appeal. They argued that I should instead follow the decision of the Supreme Court on the appeal from the Court of Appeal in *Kennedy*, even though they both accepted that what was said by the Supreme Court in *Kennedy* was not part of the *ratio* of the Supreme Court's decision and was *obiter*. The Supreme Court's decision is *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2014] UKSC 20; [2015] A.C. 455.

48. The gist of the Supreme Court's decision (i.e. its *ratio*) and what it said about Article 10 of the ECHR can safely be taken from the headnote of decision as it appears in the official law reports.

> "Held….
> (2) Dismissing the appeal……, that [FOIA] did not provide an exhaustive scheme for disclosure; that the effect sections 32(2) and 78 was not that there was an absolute prohibition on disclosure of

> information held by person conducting an inquiry, but that any question of disclosure should be addressed outside [FOIA] and under other statutory rules and/or common law powers which were preserved by section 78.....
>
> (ii) Article 10 of the Convention does not contain a right to receive information from public authorities. The "direction of travel" identified in recent decisions of sections of the [ECtHR] in favour of a broader approach is not sufficient to justify departure from the principles established the Grand Chamber of that court in its decisions on that article...."

49. I do not want to add unnecessarily to this already long decision by citing extensively from the Supreme Court's decision in *Kennedy*, but it pays to have regard to some of what the Supreme Court said.

50. The leading judgment was given by Lord Mance, with whom Lords Neuberger and Clarke agreed. He identified the issues on the appeal as follows.

> "9.....the issues directly arising on this appeal are limited. The first is whether section 32(2) contains, as a matter of ordinary construction, an absolute exemption which continues after the end of an inquiry. Mr Philip Coppel QC representing Mr Kennedy submits that it does not. That failing, he relies, second, on what he describes as a current "direction of travel" of Strasbourg case law for a proposition that article 10 of the Convention imposes a positive duty of disclosure on public authorities, at least towards "public watchdogs" like the press, in respect of material of genuine public interest, subject to the exemptions permitted by article 10(2). On that basis, and in the light of the duty in section 3 of the Human Rights Act 1998 to interpret primary legislation "so far as it is possible to do so ..... in a way which is compatible with the Convention rights", he submits that section 32 should be read down so that the absolute exemption ceases with the end of the relevant inquiry. Alternatively, taking up a point put by the Court, he submits that the absolute exemption should from that moment be read as a qualified exemption (requiring a general balancing of the competing public interests), along the lines provided by section 2(2)(b) of the FOIA. Thirdly, all those submissions failing, he submits that the Court should make a declaration of incompatibility in respect of section 32(2). Fourthly, however, despite the limitations in the way in which the case has been presented, it will, for reasons already indicated, be appropriate and necessary to consider the statutory and common law position outside the scope of the FOIA. As I have stated, the effect of section 32 is not to close those off, but rather to require attention to be directed to them."

51. Lord Mance was clear (see paragraph [57]) that the "answer to the question whether or not Mr Kennedy's claim to disclosure by the Charity

Commission engages article 10 cannot affect the outcome of this appeal", but he would consider the reach of Article 10(1) in any event. His judgment on this point is plainly *obiter* (not necessary to the decision reached) but is detailed.

52. It is in this '*obiter* section' of his judgment that Lord Mance addressed the Supreme Court's decision in *Sugar (No.2)*. He said this:

> "62. *Sugar* was a case where it could be said that Mr Sugar's claim to access BBC information was potentially in conflict with the BBC's own freedom of journalistic expression. But that is not material when considering whether Mr Sugar's claim even engaged article 10. Lord Brown gave his reason for a negative answer on that point in some detail in paras 86 to 102, with which I expressly agreed in para 113. (Lord Wilson, while not disagreeing, was less categorical on the point in para 58, so that the reasoning on it cannot be regarded as part of the ratio.)"

53. It is the view stated by Lord Mance in brackets at the end of paragraph [62] in *Kennedy* that appeared to be the basis for the respondents' agnosticism about whether the Court of Appeal in *Kennedy* was binding on me[2]. However, this gives rise to a curiosity that an *obiter* statement of the Supreme Court can somehow overrule or overset the plain *ratio* of the Court of Appeal (in *Kennedy*), and in circumstances where the Supreme Court dismissed the appeal from the Court of Appeal in *Kennedy*.

54. Lord Mance's analysis of the Strasbourg caselaw took him to this point in *Kennedy*:

> "90.What to make of the Strasbourg case law in the light of the above is not easy. One possible view is the various Section decisions open a way around the Grand Chamber statements of principle in circumstances where domestic law recognises or the European Court of Human Rights concludes that it should, if properly applied, have

[2] In fairness, Lord Wilson (who was in the minority) suggested in *Kennedy* (at paragraph [188]) that his agreement with Lord Brown in *Sugar (No.2)* was limited to his agreeing that any interference with Mr Sugar's Article 10(1) right was justified under Article 10(2).

> recognised, a domestic duty on the public authority to disclose the information. The *Osterreichische* case might perhaps be suggested to fit into this pattern, though it does not appear to have represented any part of the First Section's thinking. Alternatively, the *Osterreichische* case may be regarded as a special case, influenced by what were, on the First Section's reasoning, the Commission's clear breaches of article 6……
>
> 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."

55. Lord Toulson agreed with Lord Mance and arrived at a similar conclusion in *Kennedy*:

> "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. Mr Coppel 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."

See further Lord Sumption (who also agreed with Lords Mance and Toulson) at paragraph [154] of *Kennedy*.

56. The respondents argue that although technically *obiter* I should follow the reasoning of Supreme Court in *Kennedy* on Article 10(1) of the ECHR on the basis that it was a point which was fully argued out before the Supreme Court and considered in great depth by it. In these circumstances the respondents argue that the Supreme Court's

view on Article 10(1) was at the "almost virtually binding" end of the spectrum of highly persuasive dicta: see *APPGER v ICO and FCO* [2015] UKUT 377 (AAC); [2016] AACR 5 at paragraph [49] and, to similar effect, *Brunner v Greenslade* [1971] Ch 993 at pages 1002-1003. They further relied on *R(Youngsam) v Parole Board* [2017] EWHC 729 Admin; [2017] 1 WLR 2848 at paragraphs [20]-[40] for the proposition that where the Supreme Court has articulated a statement of principle, including on the interpretation and application of Convention rights, which was intended to be followed by all courts and tribunals of an inferior jurisdiction, it ought to be so followed, regardless of whether it is technically *obiter*[3].

57. From this starting point the respondents argue that subsequent caselaw of the ECtHR (in this case *Magyar*) which is contrary or different in material effect to the clearly reasoned view of the Supreme Court in *Kennedy* cannot alter the approach to precedent. Section 2(1) of the Human Rights Act 2000 – with its requirement on all domestic courts and tribunals to "take into account" any decision of the ECtHR when deciding a question which has arisen in connection with a Convention right – is simply that, so the respondents argue. It amounts to an obligation to take into account the ECtHR's decision in *Magyar* but not to follow it where it conflicts with the (effectively) binding superior domestic court authority of *Kennedy*. The respondents relied for this aspect of their argument on *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465 and *R(RJM) v SSWP* [2008] UKHL 63; [2009] 1 AC 311. In the latter Lord Neuberger said this.

> "64. As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECtHR."

[3] The approach advocated by the High Court in *Youngsam* to what it considered was an *obiter* statement is not undermined by the Court of Appeal in that case deciding that the relevant statement was in fact part of the *ratio* of Supreme Court: see paragraph [25] of the Court of Appeal's judgment in *Youngsam* [2019] EWCA Civ 229; [2019] 3 WLR 33.

58. I agree with the respondents.

59. The case Mr Moss seeks to advance is one that depends on his Article 10(1) right being engaged precisely because he says that right includes the right of access to public information. He is not arguing for a right to receive or impart information but to gain access to information in order to receive and then impart it. As demonstrated above, *Magyar* has expanded the understanding of Article 10(1) so that as matter ECtHR law it now covers, albeit in limited circumstances, a right of access to information. This was not disputed before me. However, the view of five members the Supreme Court in *Kennedy*, as well as the Court of Appeal in *Kennedy* and two if not three members of the Supreme Court in *Sugar (No.2)*, in my judgment, is that domestic law does <u>not</u> consider Article 10(1) extends to include a right of access information, and I consider myself bound by the rules of precedent to follow this view.

60. The view that Article 10(1) does not include a right of access to information is explicit in Lord Brown's judgment in *Sugar (No.2)* at paragraph [97], a view with which Lord Mance agreed in that case (at para. [113]) and which he affirmed he had "expressly agreed" with at paragraph [62] of *Kennedy*. It is also the clear view of the Court of Appeal in *Kennedy*. It seems also to me to be the express view articulated by Lords Toulson and Sumption at paragraphs [145] and [154] respectively in *Kennedy*. It is also, in my judgment, the view of Lord Mance. This is not only because of his continuing to ally himself with Lord Brown's view in *Sugar (No.2)* but also through what he said in paragraphs [63] and [94] in *Kennedy*. In relation to the latter paragraph I accept Mr Pitt-Payne's argument that Lord Mance's concern about Article 10 becoming a European-wide freedom of information law is inconsistent with him agreeing that Article 10(1) included a right of access to information.

61. What Lord Mance said in paragraph [63] of *Kennedy* is also in my view to the same effect given the passages I have emphasised by

underlining in that paragraph when they are taken with his continued agreement with Lords Brown in *Sugar (No.2)* and when they are read with his reference back to "the Grand Chamber statements" in paragraph [94].

> "63. Lord Brown identified four Strasbourg cases as establishing that, in the circumstances before the Strasbourg Court in each of such cases, article 10 involved no positive right of access to information, nor any obligation on the State to impart such information. The four cases were *Leander v Sweden* (1987) 9 EHRR 433, *Gaskin v United Kingdom* (1990) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357 and *Roche v United Kingdom* (2006) 42 EHRR 30. In *Leander* Mr Leander sought information about national security concerns about him which had led to him being refused a permanent position in a naval museum. The claim was addressed primarily to article 8 (right to personal life), under which the withholding of information was held justified. Under article 10 the Court said simply:
>
> > "74. The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."
>
> I do not subscribe to the view taken by Lord Wilson (para 178) that this was the answer to "a narrow, ostensibly a pedantic, question of the sort against which the court in Strasbourg often sets its face". The Grand Chamber did not see the matter in such terms. It was giving a serious answer to an important question, which defines the role of the Convention in this area. The Convention establishes fundamental standards, but there are limits to the ideal systems upon which it insists, and the Grand Chamber was making clear that article 10 does not go so far as to impose a positive duty of disclosure on Member States at the European level."

62. I therefore reject Mr Moss's argument that the Supreme Court in *Kennedy* left open the space for the limited right of access to information that *Magyar* then clarifies and provides.

63. I also do not accept his argument that the *obiter* nature of the decision in *Kennedy* on Article 10(1) means I should not follow it and should instead "have regard to" and follow *Magyar* instead. It is not disputed that *Kennedy* is *obiter* on Article 10(1) and it does not seem

to me to really assist by referring to subsequent caselaw which recognises this. However, Mr Moss sought, latterly (in submissions dated 25 June 2020), to found an argument that the decision of the Court of Appeal in *Moss v ICO* [2020] EWCA Civ 580 "held that the [Supreme Court's] decision in *Kennedy,* that Article 10 does not give rise to a right to access to information, was obiter and thus it did not need to follow it and could instead follow its own authority".

64. I agree with the respondents that this is simply a misreading of what the Court of Appeal decided in *Moss*. The issue before that court was whether the Upper Tribunal had erred in law in not making an anonymity order and in not finding the First-tier Tribunal ought to have made an anonymity order. The ICO submitted in that case that:

> "*Kennedy* is an obiter authority for the proposition that Article 10 does not confer a free-standing right of access to information held by public authorities ([90-101]). However, the current case does not concern a party seeking access to private information held by a public authority. It is the opposite: the Appellant seeks to obstruct the release of normally public information held by the Tribunal." (my underlining added for emphasis)

65. The Court of Appeal agreed. It said:

> "44……the *obiter* proposition expounded in *Kennedy* at [90-101] - that Article 10 does not confer a free-standing right of access to information held by public authorities - is inapplicable to the present case. Here, no party is requesting the release of private information, rather, the Appellant is seeking to obstruct the release of normally public information held by a tribunal." (the underlining again is mine)

66. It is thus quite clear that the Court of Appeal's decision in *Moss* had nothing to do with the (accepted) *obiter* view as to the reach of Article 10(1) in *Kennedy*. As the Court of Appeal said, it was "inapplicable". It was therefore not a case, as Mr Moss argues, of the Court of Appeal in *Moss* 'choosing' not to follow *Kennedy* on Article 10(1) not covering a right of access to information. It simply had no need to follow or not

to follow *Kennedy* on that point because it was irrelevant to the anonymity issue before it.

67. Mr Moss had another argument based on the stance the United Kingdom Government had taken in the ECtHR in the proceedings Mr Kennedy had brought there after losing his case in the Supreme Court. This is the case of *Times Newspapers Limited and Kennedy v UK* (application no. 64367/14). In its decision in that case the ECtHR declared the application inadmissible because Mr Kennedy had not exhausted his domestic remedies. This was because he had not sought to judicially review the Charity Commission's decision refusing to provide him with all the information he had requested of that Commission after he had lost his case in the Supreme Court.

68. Mr Moss bases his argument here in particular on the following passage in the ECtHR's decision and most particularly on the concluding part of that passage (which I have underlined):

> "84.....the Government contended that the effectiveness of judicial review proceedings before the Administrative Court could not seriously be doubted. There was no basis on which the applicants could properly contend that judicial review proceedings would not have provided the level of protection required by Article 10; in this regard, the Supreme Court's conclusions as to the scope of Article 10 were expressly stated by Lord Mance to be *obiter*, and <u>it would now be open to the High Court and Court of Appeal to revisit the question in light of *Magyar Helsinki Bizottság v. Hungary*</u>."

69. However, this was just argument made by the UK Government as a party in those proceedings. Moreover, it is not an argument with which I agree. But the important point is that I cannot see on what basis what the Government thought was law in this iteration of the *Kennedy* litigation can require me to treat it as being the law, and notwithstanding the arguments I have accepted above (and below).

70. Mr Moss made a further argument relying on Article 46 of the ECHR. His argument was that as the UK had intervened in the *Magyar*

proceedings before the ECtHR, it was bound by Article 46(1) to accept the judgment in *Magyar*. Article 46(1) provides as follows:

> "
> **ARTICLE 46**
> **Binding force and execution of judgments**
> 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

71. This argument cannot succeed, however, for the simple reason that the UK Government was not a 'party' to the *Magyar* case. This is made clear from Article 36(2) of the ECHR. I set out the whole of Article 36 immediately below. The critical point is that the UK was not a party to the *Magyar* proceedings as instituted by the NGO as the NGO's complaint was against the Hungarian Government. However, Article 36(2) then allowed the UK, which was *not* a party, to be invited to take part in the proceedings. On this basis, and reading Articles 36 and 46 together, the UK was not bound by the decision in *Magyar* because it was not a party to that case.

> "
> **ARTICLE 36**
> **Third party intervention**
> 1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
> 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
> 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings."

72. There was one final argument Mr Moss made under this first point. This was that all that was binding on, or ought to be followed by, any inferior court or tribunal arising from the views of the Supreme Court in *Kennedy* was that at the time of the Supreme Court's judgment and in the uncertain state of ECtHR caselaw, Article 10(1) could not be said to cover a right of access to information. It followed from this, so his argument went, that my following the subsequent decision of the

Grand Chamber of the ECtHR in *Magyar* would neither be inconsistent with nor conflict with the Supreme Court's view in *Kennedy*. In effect, the argument here is that the Supreme Court was expressing a view it knew to be a 'holding' one or a temporary one and one which was conditional for its continuing application on no Grand Chamber decision of the ECtHR subsequently clarifying the law.

73. Although this argument has some superficial attraction, I do not accept it. On an overall point, a flaw in it is that it would endanger the rule of precedent as explained so clearly and carefully by Lord Bingham in *Kay* as it could mean litigants arguing that a subsequent decision of the ECtHR had shown the Court of Appeal or Supreme Court had only been correct at the time it made its decision. Further and more particularly, on this case and in respect of *Kennedy* it seems to me that Lord Mance was clear (in para. [94]) that as far as domestic law below the level of the Supreme Court was (and is) concerned "the Grand Chamber statements [as to the reach of Article 10(1) in *Leander*, *Guerra* and *Roche*] should continue to be regarded as reflecting a valid general principle" (my emphasis). In other words: ought to be followed.

74. Lastly on this point, I can find nothing in this case that merits the type of exceptionality for departing from precedent identified in *Kay* at para. [45] or *RJM* at para. [64], and I am well aware that even those discussions were concerned with the Court of Appeal and not the Upper Tribunal.

75. If *Kennedy* is to be overruled or modified to take account of *Magyar* in my judgment that should fall to the Supreme Court to do in a case where adoption of the expanded view of Article 10(1) as set out in *Magyar* might make a difference[4].

[4] The ICO relied to similar effect on the decision of Mr Justice Supperstone when refusing permission to appeal to the Upper Tribunal in *Kirkham v ICO and Judicial Appointments Commission*, dated 19 November 2019, in Upper Tribunal case reference GIA/516/2019. However, this adds nothing to my analysis and as a permission to appeal decision is very

76. This then brings me to the second point under *Magyar*, namely, if I am wrong in the above conclusion and *Magyar* ought to apply in domestic law, whether Mr Moss can show that he had a right of access to the information he had requested which was being interfered with under Article 10(1) on the basis of the criteria laid down in *Magyar*.

77. Those criteria are set in Magyar at paragraphs 157-170. Given their importance, I set them out in full.

> "(vi) *Threshold criteria for right of access to State-held information*
>
> 157. Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. In order to define further the scope of such a right, the Court considers that the recent case-law referred to above (see paragraphs 131-32 above) offers valuable illustrations of the criteria that ought to be relevant.
>
> (α) *The purpose of the information request*
>
> 158. First, it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to "receive and impart information and ideas" to others. Thus, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate (see, *mutatis mutandis*, *Társaság,* cited above, §§ 27-28; and *Österreichische Vereinigung,* cited above, § 3c6).
> 159. In this context, it may be reiterated that in the area of press freedom the Court has held that, "by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II; *Fressoz and Roire v. France* [GC] § 54, ECHR 1999-I; and Bladet Tromsø *and Stensaas v. Norway* [GC] § 65, ECHR 1999-III). The

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arguably not citeable as any form of either persuasive or binding authority: see, by analogy, *Practice Direction (Citation of Authorities) (Sup Ct)* [2001] 1 WLR 1001 as discussed in paragraph [87] of *R(SB) v First-tier Tribunal* [2015] AACR 16.

same considerations would apply to an NGO assuming a social watchdog function (see more on this aspect below).

Therefore, in order for Article 10 to come into play, it must be ascertained whether the information sought was in fact necessary for the exercise of freedom of expression (see *Roşiianu,* cited above, § 63). For the Court, obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression (see *Társaság,* cited above, § 28), including the freedom "to receive and impart information and ideas", in a manner consistent with such "duties and responsibilities" as may follow from paragraph 2 of Article 10.

(β) *The nature of the information sought*

160. The Court has previously found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was "factual information concerning the use of electronic surveillance measures" (see *Youth Initiative for Human Rights,* cited above, § 24), "information about a constitutional complaint" and "on a matter of public importance" (see *Társaság*, cited above, §§ 37-38), "original documentary sources for legitimate historical research" (see *Kenedi*¸ cited above, § 43), and decisions concerning real property transaction commissions (see *Österreichische Vereinigung,* cited above, § 42), attaching weighty consideration to the presence of particular categories of information considered to be in the public interest.

161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés v. France* [GC] §§ 97 to 103, ECHR 2015 (extracts), with further references).

163. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions (see

Lingens v. Austria, 8 July 1986, §§ 38 and 41, Series A no. 103, and *Sürek v. Turkey (no. 1)* [GC] § 61, ECHR 1999-IV), likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities.

(γ) *The role of the applicant*

164. A logical consequence of the two criteria set out above - one regarding the purpose of the information request and the other concerning the nature of the information requested - is that the particular role of the seeker of the information in "receiving and imparting" it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court has previously attached particular weight to the applicant's role as a journalist (see *Roşiianu*, cited above, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (see *Társaság,* § 36; *Österreichische Vereinigung*, § 35; *Youth Initiative for Human Rights,* § 20; and *Guseva*, § 41, all cited above).

165. While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I) and the special position of journalists in this context. It has held that the safeguards to be afforded to the press are of particular importance (see *Goodwin*, cited above, § 39, and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court, as follows:

> "The duty of the press is to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (see Bladet Tromsø *and Stensaas v. Norway* [GC] §§ 59 and 62, ECHR 1999-III)."

166. The Court has also acknowledged that the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC] § 103, ECHR 2013 (extracts)) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (ibid.; *Társaság*, cited above, § 27; and *Youth Initiative for Human Rights*, cited above, § 20). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris v. the United Kingdom* § 89, ECHR 2005-II; and *Társaság*, § 38, cited above).

> 167. The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern (see *Bladet Tromsø and Stensaas*, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their ability to provide accurate and reliable information may be adversely affected (see *Társaság,* cited above, § 38).
> 168. Thus, the Court considers that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog". This does not mean, however, that a right of access to information ought to apply exclusively to NGOs and the press. It reiterates that a high level of protection also extends to academic researchers (see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. and 24408/94, §§ 61-67, ECHR 1999-IV; *Kenedi*, cited above, § 42; and *Gillberg*, cited above, § 93) and authors of literature on matters of public concern (see *Chauvy and Others v. France* § 68, ECHR 2004-VI, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. and 36448/02, § 48, ECHR 2007-IV). The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC] § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned.
>
> (δ) *Ready and available information*
>
> 169. In reaching its conclusion that the refusal of access was in breach of Article 10, the Court has previously had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the Government (see *Társaság,* cited above, § 36, and, *a contrario*, *Weber v. Germany* (dec.), no. 70287/11, § 26, 6 January 2015). On the other hand, the Court dismissed a domestic authority's reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty was generated by the authority's own practice (see *Österreichische Vereinigung,* cited above, § 46).
> 170. In the light of the above-mentioned case-law, and bearing in mind also the wording of Article 10 § 1 (namely, the words "without interference by public authority"), the Court is of the view that the fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by that provision."

78. As a matter of approach, it must be remembered that the above criteria arose in the context the Grand Chamber had immediately previously described of the right under Article 10(1) applying "where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right". It is thus narrower than a general right of access to public information. Moreover, the right of access is one which provides the means of pursuing the right to receive and impart information. The criteria must be read in that context.

79. There was some argument before me about whether these four criteria are cumulative. I am not sure in the end whether any real argument existed between the parties on this point.

80. Mr Moss's argument both before and at the hearing was that he met all four of the criteria. He made no case that he could satisfy the *Magyar* test for Article 10(1) applying even if the information sought was not "ready and available". He argued, correctly in my judgment, that "the only criterion the [tribunal] found not to be satisfied was the "ready and available" one". His argument was that the *Magyar* 'ready and available' criterion imposes nothing like a hard costs limit of the one found under section 12 of FOIA, that where there is a lot of information it may take more than 18 hours to collate and provide it but that did not mean it was not 'ready and available', and that where the engagement of Article 10(1) is in issue "the public authority should make a proportionality assessment weighing the Article 10 rights against the estimated costs". His argument therefore proceeds, as I see it, on the premise that the four criteria are cumulative because failure to satisfy one of them (the 'ready and available' criterion) is sufficient to mean Article 10(1) does not apply.

81. The respondents argued that all four of the criteria had to be met and it was sufficient therefore, and for the purposes of this appeal, that Mr Moss did not meet the ready and available criterion for Article 10(1)

not to be engaged. The ICO argued further that nothing in *Magyar* suggested that a proportionality assessment is required in determining whether information is 'ready and available'. She argued that "[p]roportionality applies at the stage of justification [under Article 10(2)], not the stage of whether a right exists [under Article 10(1)]".

82. On one analysis, given the argument before me on this point was focused by all parties on the 'ready and available' criterion, and perhaps more accurately on whether the tribunal erred in law in finding that test was not met by Mr Moss, I do not need to determine whether it is necessary to meet all four of the *Magyar* criteria. Each of the parties' cases in this appeal proceeded on the basis that the criteria are cumulative or at least on an assumption that they are. On the other hand, if the criteria are not cumulative the tribunal may have erred in law in not examining the other criteria even if it was correct on the 'ready and available' criterion. I therefore consider I ought briefly to consider this point, albeit in the context of it not being the subject of any real contested argument before me.

83. The judgment in *Magyar* is not couched to an English lawyer's eyes in clear terms of it being necessary for each of the four criteria to be satisfied. However, properly analysed it seems to me that if not legally necessary each criterion is at a minimum of considerable importance in determining whether Article 10(1) is engaged and not satisfying one of them is very likely to mean Article 10(1) does not apply.

84. The language used in *Magyar* points to each criterion needing to be satisfied. Thus, in paragraph 158 it states that it must be a prerequisite that the purpose behind the request is to receive and then impart information to others, paragraph 161 is couched in terms that the information sought must generally meet a public interest test, and paragraph 164 states that the *logical consequence* (of the preceding two requirements) is that the role of the person receiving the information assumes a special importance. Given this use of language, it is difficult to see each of these criteria as being anything

other than necessary. Lastly, 'ready and available' is identified as an important criterion in the overall assessment.

85. It is also the case that the ECtHR in *Magyar* then considered each of four criteria in turn in its analysis of the facts of the particular case before it. If only one or less than four of the criteria would suffice for Article 10(1) to apply then the analysis of the facts did not need to extend as far as it did in *Magyar*. Moreover, in the subsequent ECtHR case of *Cangi v Turkey* (Application No. 24973/15), the translation to English from the French text of the judgment reveals that the court approached the scope of Article 10(1) after *Magyar* on the basis that the above four criteria were (paragraph [31]):

> "The list of relevant criteria for defining more precisely the scope of [the *Magyar* Article 10(1)] right",

and the court in *Cangi* went on consider the:

> "issue of interference [under Article 10(1)] in the case in the light of these [four] criteria."[5]

Such language sits more readily with each of the four criteria needing to be met.

86. Turning attention, therefore, to the 'ready and available' criterion, the tribunal at paragraph 32 of its decision tied the costs of compliance under section 12 of FOIA with whether the information sought by Mr Moss was 'ready and available' and found in that context that Mr Moss had not shown the information was ready and available, and in these circumstances it concluded that Article 10 did not apply. I do not consider the tribunal erred materially in law in so doing.

[5] I was referred to several other ECtHR cases which post-date the decision in *Magyar*, such as *Studio Monitori v Georgia* (application nos. 44920/09 and 8942/10) and *Tokarev v Ukraine* (application no. 44252/13), but in my view none of these other cases adds decisively one way or the other to whether the four criteria in *Magyar* must all be satisfied for Article 10(1) to be engaged. Having said this, none of the other ECtHR cases to which I was referred would support satisfaction of only one of the criteria as being sufficient for Article 10(1) to be engaged: see perhaps most obviously paragraph [25] of *Tokarev*.

87. It seems to me not really to matter for the purposes of this appeal whether the analysis is focused solely on the information requested being 'ready and available' under Article 10(1), such as to engage Article 10, or whether inquiry is about section 12 of FOIA's compatibility with Article 10, as both have the same object and neither can benefit Mr Moss unless Article 10(1) does apply on the facts of this case (that is, the information Mr Moss requested was 'ready and available').

88. At first blush the language of 'ready and available' may not seem to fit easily with there being any need to find, process or collate the information which has been requested. This reading of the criterion may also arguably be in accord with the Grand Chamber in *Magyar* expressly agreeing (in paragraphs [128] and [156]) that Article 10 "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion"; though the use of 'collect' in this passage may be indicating no more than that the information must already exist within (i.e. be held by) the public authority. If this reading of 'ready and available' applied then Mr Moss's case would end here (on this point) because it is not disputed that some form of record searching and collation was needed before the information he had requested could be made available to him. However, the caselaw of the ECtHR, in *Magyar* and elsewhere, shows that such a literal reading of 'ready and available' is not to be taken.

89. In *Magyar* itself the court (at paragraph [179]) noted that the information was ready and available and commented that, unlike in the case of *Weber v Germany* (application no. 70287/11), it had not been argued that "its disclosure would have been particularly burdensome for the authorities". In *Weber* the ECtHR declared the application inadmissible in a context where the applicant had requested the city authority in Germany "to compile for him a list of payments made from [its budget] to political parties, parliamentary groups and political

foundations in the years 2000, 2001 and 2002" and had "also requested information on payments made to political parties by holding companies owned by the city". The city authority refused his request "on the ground that filtering the data out of the existing balance sheets and compiling it would involve a considerable amount of work". In holding that there had been no interference with the applicant's right to receive and to impart information as enshrined in Article 10(1), the ECtHR founded on, inter alia, the following:

> "25……the Court does not consider that a general obligation on the State to provide information in a specific form can be inferred from its case-law under Article 10, particularly when, as in the present case, a considerable amount of work is involved.
>
> 26. The Court further observes that there are fundamental differences between the present case and *Tarsasag a Szabadsagjogokert*, a case which concerned a request to be given access to a particular document – a constitutional complaint for the review of certain provisions of the Criminal Code – lodged by a member of parliament. There, the court had regard to the fact that the information was "ready and available" and did not necessitate the collection of any data by the Government……".

90. It seems to me clear from these two decisions of the ECtHR that 'ready and available' is not intended to mean simply 'held by' the public authority (as contrasted with not held by it and thus needing to be collected by it from elsewhere). The phrase 'ready and available' means information held by the public authority, in the sense that it exists within the authority, but in addition denotes that it is information which the public authority will not have to engage in a considerable amount of work to search for and put it into the form requested. This reading of 'ready and available' is consistent with the court's reasoning in *Cangi,* where it was held (at para. [36] that communication of the single document requested would not place a "particularly heavy burden" on the authority. The decision of the ECtHR in *Bubon v Russia* (application no. 63898/09) [2017] ECHR 131, 7 May 2017, is to a similar effect.

> "39. With respect to the first three parts of the applicant's request, in particular information on the number of people found administratively liable for prostitution, the number of criminal cases instituted and the number of people found liable under Articles 241, 242, 242.1 and 127.1 of the Criminal Code....., the Court observes the following.
> 40. The fact that the information requested is ready and available constitutes an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by Article 10 of the Convention (see *Magyar Helsinki Bizottság*, ...§ 170).
> 41. Accordingly, the Court has to establish whether in the present case the relevant domestic authorities were in possession of the information asked for by the applicant.
> 42. It follows from the facts of the case.....and submissions of the parties that although the statistical data cards contained the parameters required by the applicant, only selected parameters were taken into account by the information centres and included in the publicly available crime statistics reports. Those reports, as confirmed by the parties, did not meet the requirements proposed by the applicant.
> 43. The Court notes that the applicant did not seek access to the statistical data cards or even final statistical reports, which were ready and available. Instead he essentially asked the domestic authorities to process and summarise information using specific parameters.
> 44. The Court therefore accepts the Government's arguments and concludes that the relevant authorities did not have information as specific as sought by the applicant. The information he was seeking was therefore not only not "ready and available", but did not exist in the form the applicant was looking for.
> 45. The Court further recalls that Article 10 of the Convention does not impose an obligation to collect information upon the applicant's request, particularly when, as in the present case, a considerable amount of work is involved (see *Weber v. Germany*....§§ 25-28...). The Court finds that there has been no interference with the applicant's right to receive information as regards the first three parts of the request."

91. I need, however, to address the ECtHR's decision in *Österreichische Vereinigung v Austria* (Application no. 39534/07), given it was cited by the Grand Chamber in *Magyar* (at paragraph [169]) in its discussion of the 'ready and available' criterion and relied on by Mr Moss. He sought to contrast the decision in *Österreichische Vereinigung* with that of the Upper Tribunal in the *Cruelty Free International* case cited in paragraph [15] above.

92. I approach the decision in *Österreichische Vereinigung*, however, with considerable caution[6]. This is for two reasons. The first reason is because there was clear no part of Mr Moss's case before the First-tier Tribunal (or before me) in which he relied on *Österreichische Vereinigung* to argue that it was only Kingston upon Thames's poor recording practices which meant the information he had requested was not 'ready and available'. (The focus of his argument before me on *Österreichische Vereinigung* was in respect of section 12 of FOIA and the lack of need under Article 10 for there to be fixed maximum costs/hours limit.)

93. The second reason is because it is not obvious how the part of the decision in *Österreichische Vereinigung* which was cited in *Magyar* fits with the Grand Chamber's consideration in *Magyar* of the reach of Article 10(1). To explain why this is the case I need to consider the decision in *Österreichische Vereinigung* in a little detail.

94. As the ECtHR set out, the aim of the applicant association in the case was "to research and study past and present transfers of ownership of agricultural and forest land in order to reach conclusions as to the impact of such transfers on society". The court went on to explain:

> "6. In essence, agricultural and forest land transactions require approval by local and regional authorities. The latter are called Regional Real Property Transactions Commissions (*Landes-Grundverkehrs-kommissionen*). The aim of this requirement, laid down in the Real Property Transactions Acts of the Länder, is to preserve land for agricultural use and forestry and, in some of the regions including Tyrol, to avoid the proliferation of second homes. The applicant association states that it is sent all decisions issued by the Regional Real Property Transactions Commissions with the exception of the one for Tyrol. In the decisions it receives, the names of parties and other sensitive data are usually anonymised.
> 7. On 26 April 2005 the association asked the Tyrol Real Property Transactions Commission ("the Commission") to provide, by mail, all decisions issued since 1 January 2005 in anonymised form, the costs thereof to be reimbursed. By letter of 12 July 2005 the Commission replied that it could not comply with the request owing to lack of time and personnel.

[6] As did the Supreme Court in *Kennedy*: see Lord Mance at paragraphs [87]-[89].

> 8. On 18 July 2005 the applicant association submitted a further request, this time requesting the provision, by mail, of all decisions issued since 1 January 2000 in anonymised form. In the event of refusal of the application, it demanded a formal decision in accordance with the Tyrol Access to Information Act (*Tiroler Auskunftspflichtgesetz* - "the Information Act"). The applicant association argued that since the Commission's decisions concerned "civil rights" within the meaning of Article 6 of the Convention, the decisions should be either publicly announced or made public by other appropriate means.
> 9. In its decision of 10 October 2005 the Commission rejected the request, holding that the transmission of anonymised copies of its decisions did not constitute information within the meaning of section 1(2) of the Information Act, which defines information as "existing knowledge on matters known to the authority at the time it provides the information". Moreover, even if the request were to fall within the scope of that provision, the Information Act stated that pursuant to section 3(1) subparagraph (c) there was no duty to provide the information if doing so would require so many resources that the functioning of the authority would be affected……."

95. Bearing in mind that the Grand Chamber in *Magyar* relied on paragraph [46] of the decision in *Österreichische Vereinigung* when discussing the 'ready and available' criterion under Article 10(1), it is important to note that the court's assessment in *Österreichische Vereinigung* of whether the applicant's complaint came within Article 10(1) only encompassed paragraphs [33]-[36] of its decision. In other words, what the court said in that case in paragraph [46] had nothing to do with whether Article 10(1) applied, but was instead to do with Article 10(2) and whether Article 10 had been breached. Indeed, it is noteworthy that the courts assessment of whether Article 10(1) applied in *Österreichische Vereinigung* did not touch at all on whether the information requested was 'ready and available'. Its concluding paragraph on this issue was as follows:

> "36. The applicant association was therefore involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant association's right to receive and to impart information as enshrined in Article 10 § 1 of the Convention (see *Társaság a Szabadságjogokért*, cited above, § 28; see also *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009)."

96. By contrast the discussion in paragraph [46] of the decision was squarely (and solely) within the court's assessment of whether the interference under Article 10(1) had been justified. The court there said:

> "46. Given that the Commission is a public authority deciding disputes over "civil rights" within the meaning of Article 6 of the Convention……., which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form. Consequently, much of the anticipated difficulty referred to by the Commission as a reason for its refusal to provide the applicant association with copies of numerous decisions given over a lengthy period was generated by its own choice not to publish any of its decisions. In this context the Court notes the applicant association's submission - which has not been disputed by the Government - that it receives anonymised copies of decisions from all other Regional Real Property Commissions without any particular difficulties.
> 47. In sum, the Court finds that the reasons relied on by the domestic authorities in refusing the applicant association's request for access to the Commission's decisions - though "relevant" - were not "sufficient". While it is not for the Court to establish in which manner the Commission could and should have granted the applicant association access to its decisions, it finds that a complete refusal to give it access to any of its decisions was disproportionate. The Commission, which, by its own choice, held an information monopoly in respect of its decisions, thus made it impossible for the applicant association to carry out its research in respect of one of the nine Austrian *Länder*, namely Tyrol, and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in Tyrol. The Court therefore concludes that the interference with the applicant association's right to freedom of expression cannot be regarded as having been necessary in a democratic society.
> 48. There has accordingly been a violation of Article 10 of the Convention."

97. Looking back then at paragraph [169] of *Magyar* and its reference to paragraph [46] of *Österreichische Vereinigung*, I struggle to see the juridical basis for a public authority's (poor) information storing and retrieval practices being relevant to whether information it holds is in fact 'ready and available'. It is possible, and I put it no higher than this, that the Grand Chamber's emphasis in the opening part of paragraph [170] of *Magyar* on 'without interference by a public authority' may have been a (very Delphic) attempt to make a public authority's information storing and retrieval practices relevant to

whether the information is 'ready and available'. However, even that may be at best tenuous speculation on my part as paragraph [170] goes on to talk in terms of it being an issue of fact whether information is 'ready and available', whereas poor storage and retrieval mechanisms would have more to do with whether information *ought* to be available than whether it is on fact available.

98. What is clear, in my judgment, however, is that the lack of any clear statement of principle from the ECtHR on this point means that what is said in paragraph [46] of *Österreichische Vereinigung* should be treated as being irrelevant to the *Magyar* 'ready and available' criterion under Article 10(1) of the ECHR.

99. Even if *Magyar* applies in domestic law, applying the above caselaw to this appeal I do not consider the tribunal committed any error of law in concluding that the over 18 hours of time it would take Kingston-on-Thames to compile the information Mr Moss had requested meant that it was not 'ready and available' and so Article 10(1) was not engaged. Whether the information Mr Moss had requested was 'ready and available' is a question of fact. Moreover, for the reasons I have sought to explain above, whether information which is held by a public authority meets the 'ready and available' criterion under Article 10(1) involves, by the nature of that criterion, consideration of the burden imposed on that authority in making that information available in the form requested. In this case, as matter of fact, the time it would have taken Kingston upon Thames to search for and compile the information requested by Mr Moss was, as the tribunal found, well in excess of 18 hours. On that finding the tribunal was entitled to conclude, pursuant to the above ECtHR caselaw (assuming it applied in domestic law) that the burden on the public authority was such that the information requested was not 'ready and available'.

100. I do not accept the argument suggested by Mr Moss that a distinction is to be drawn following *Magyar* between information of the type sought in this case by Mr Moss and that in play in *Bubon*, with only the latter being relevant to the issue of 'burden' under the 'ready and available' criterion. The argument, as I understood it, was that in *Bubon* the information did not exist in the form requested and so it needed to be processed and summarised to put it into that form, whereas in this case all that was required was the compilation of the different types of information already held. I do not consider this is a material distinction. The information sought in *Bubon* appears to me simply to go to *how* the burden arose on the facts in that case. I can find nothing in *Magyar* which limits the 'burden' to such a class of case. Indeed, the express concern in *Magyar* was simply with 'collecting' information and its reference to *Weber* in that regard shows that assessing the 'burden' or time may include the time taken to collate information already held by the public authority. *Magyar* therefore does not support the argument that 'burden' may only arise where the information has to be extracted and summarised into the form in which it has been requested.

101. In Mr Moss's cases it is not disputed, at least for the purposes of this ground of appeal (and the other grounds of appeal which may be relevant to this issue fail in any event, for the reasons given below), that identifying and compiling the information sought by Mr Moss (for example, the e-mails and other electronic records, and printed or handwritten notes relating to the selection and appointment of BNP Paribas as consultants and the work they have been, or are expected to be, instructed to do), would take well in excess of 18 hours. The tribunal in my judgment was entitled to hold that that burden was such that the information could not, in the *Magyar* sense, be considered 'ready and available'.

102. Furthermore, the determination of the factual question of whether information is 'ready and available' under Article 10(1) is not subject

to any proportionality assessment. As the above ECtHR caselaw shows, proportionality is relevant to whether any interference found under Article 10(1) can be justified under Article 10(2), but nothing in *Magyar* supports Mr Moss's argument that the factual issue of whether information is 'ready and available' is also subject to a proportionality assessment.

103. I have not found it necessary in determining this aspect of the first ground of appeal to decide whether section 12 of FOIA amounts to a lawful embodiment in all circumstances of the 'ready and available' criterion under Article 10(1) of the ECHR. To do so is unnecessary on this appeal. What I am satisfied of is that the application of section 12 to the facts of this case does not conflict with the 'ready and available' criterion under Article 10(1) as identified in *Magyar*.

104. I turn therefore to the third aspect of the first ground of appeal arising from *Magyar*. This aspect of the first ground of appeal assumes, contrary to the above, that *Magyar* does apply in domestic law and that Mr Moss's right to freedom of expression under Article 10(1) was engaged as that right had been interfered with because the information requested was 'ready and available'. The argument here is whether it is section 12 of FOIA which causes this interference and thus may breach Mr Moss's Article 10 rights (ignoring justification under Article 10(2)).

105. Both respondents argue section 12 does not have this role because FOIA is not the exclusive manifestation in domestic law of a right to access information. If Part 1 of FOIA is satisfied then it requires that the information be provided by the public authority. However, so the respondents argue, the dissatisfaction of Part 1 of FOIA because the exemption in section 12 of FOIA applies does not mean Kingston upon Thames was precluded as a matter of law, including under FOIA, from providing the information. Section 12 being satisfied

simply meant that the Kingston on Thames was not required to provide the information under FOIA but it did not prohibit Kingston on Thames from choosing to provide it.

106. Moreover, even this is only the position under FOIA and section 78 of that Act expressly provides that nothing in FOIA may limit the powers of a public authority to disclose information under any other legal powers vested in it. The respondents argue that the *ratio* of the Supreme Court's decision in *Kennedy* applies equally here and rely on the Localism Act 2011 as a source of a legal power under which the public authority could have been asked to disclose the information.

107. The headnote to *Kennedy* in the official law reports (see paragraph 48 above) supports the respondents' arguments on this point about FOIA not being an exhaustive scheme for disclosure of information: see further Lord Mance at paragraph [6]. It is further supported by Lord Mance's analysis at paragraph's [35] to [41] in *Kennedy*. The most relevant parts of those paragraphs read (I have underlined certain passages for emphasis):

> "35. It is at this point that Mr Coppel, on behalf of Mr Kennedy, submits that, if the position on ordinary principles of construction is as stated in the previous paragraph, then section 32(2) must be read down to comply with article 10;..... Further, if such reading down is not possible, Mr Coppel submits that a declaration of incompatibility is called for. I cannot accept any of these submissions. First, to move directly to article 10 is, as I have already indicated, mistaken. Section 32 leaves open the statutory and common law position regarding disclosure outside the FOIA, and that directs attention to the Charities Act. If the Charities Act entitles Mr Kennedy to disclosure or puts him in a position no less favourable regarding disclosure than that which should, in Mr Coppel's submission, be provided under article 10, then there can be no basis for submissions that section 32 requires reading down in the light of or is inconsistent with article 10.
> 36. Second, even if the Charities Act, read by itself, appeared on its face not fully to satisfy any rights to information which Mr Kennedy may enjoy under article 10, it does not follow that the fault lies in section 32, or that section 32 can or should be remoulded by the courts to provide such rights. On the contrary, in view of the clarity of the absolute exemption in section 32, the focus would be on the Charities Act and it would be necessary to read it as catering for the relevant article 10 rights.....
> 39. Third, Mr Coppel seeks to meet the points made in paras 35 and 36 above by a submission that the FOIA must be regarded as the

> means by which the United Kingdom gives effect to any article 10 right which Mr Kennedy has; that it covers the field and confers a general entitlement to access to recorded information held by public authorities, while preserving limited other statutory rights under sections 21, 39 and 40 through which access is also routed; and that, if the FOIA fails in this way to give effect to any article 10 right or does so inappropriately, it interferes with the right and must be read down. But there is no basis for this submission – there is no reason why any article 10 rights which Mr Kennedy may have need to be protected by any particular statute or route. Far from the FOIA being the route by which the United Kingdom has chosen to give effect to any rights to receive information which Mr Kennedy may have, it is clear that the United Kingdom Parliament has determined that any such rights should be located and enforced elsewhere. That is the intended effect of section 32, read with section 78……."

The judgments of Lords Toulson and Sumption are to similar effect in *Kennedy*: see, respectively, paragraphs [106]-[107] and [156]-[158].

108. It is of note, too, that the ECtHR in Strasbourg endorsed this approach when Mr Kennedy's case reached it. The court there said:

> "82. Although the applicants have focussed their complaints on the Article 10 compliance of the "absolute exemption" under section 32(2) of the FOIA, in examining their complaints the Court will have regard to the domestic legal framework as a whole and not simply the FOIA. While the Court has now recognised that Article 10 § 1 of the Convention might, under certain conditions, include a right of access to information (see Magyar……), it does not include a right of access to information by a particular legislative scheme. What matters, therefore, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence." (my underlining added for emphasis)

109. Although the issue in *Kennedy* was concerned with an absolute exemption under section 32 of FOIA, I do not read its *ratio* as being confined to such cases. At this stage in the analysis in Mr Moss's case (on the assumption it can be reached) his request for information under FOIA had been refused because of section 12 of FOIA and that was to the same effect as Mr Kennedy being denied information under section 32 of FOIA. The central *ratio* of *Kennedy* is that the structure of FOIA is not such that a refusal to provide information under it is exhaustively determinative of the right to the information

in domestic law. As such FOIA alone cannot necessarily be said to breach any Article 10 rights.

110. I broadly accept the respondents' arguments that this analysis applies in this case. It is for Mr Moss to show that it is section 12 of FOIA which interferes with his right under Article 10 of the ECHR. However, he is unable to do so because it has not been shown that FOIA provided Mr Moss with the sole legal basis for obtaining the information he was seeking. *Kennedy* is plainly authority that FOIA does not provide the exclusive and exhaustive legal means of accessing information in domestic law. Moreover, section 78 of FOIA makes clear that nothing in FOIA may limit a public authority from using other powers to disclose information held by it. Mr Moss's case on this statutory appeal brought under FOIA is, and must be, that it is section 12 of FOIA alone which causes the interference with his right under Article 10(1). However, following and applying *Kennedy*, the argument ends at this point because he has failed to establish that this is the case. Put another way, section 12 of FOIA did not as matter of domestic law prohibit the information being provided to Mr Moss (it merely removed any obligation for it to be provided under FOIA), and so cannot be said to be the source or cause of the interference with any Article 10(1) rights of Mr Moss.

111. The respondents referred to the Localism Act 2011 as being a source of a power under which Mr Moss could seek the information from Kingston on Thames, even though it was not required to provide that information under section 12 FOIA. Section 1(1) of the Localism Act 2011 is very widely worded and provides, so far as is material as follow:

> "**Local authority's general power of competence**
>
> (1) A local authority has power to do anything that individuals generally may do.
> (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—

> (a) unlike anything the authority may do apart from subsection (1), or
> (b)unlike anything that other public bodies may do……
>
> (4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—
>
> (a) power to do it anywhere in the United Kingdom or elsewhere,
>
> (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
>
> (c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
>
> (5) The generality of the power conferred by subsection (1) ("the general power") is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
>
> (6) Any such other power is not limited by the existence of the general power (but see section 5(2)).”

112. The language used in section 1 of the Localism Act appears broad enough to cover making requests to a local authority for information it holds. Nor can I identify anything in section 2 of that Act which would preclude the local authority from so doing. Section 2 sets out:

> “2 **Boundaries of the general power**
>
> (1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.
>
> (2) The general power does not enable a local authority to do—
>
> (a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or
>
> (b) anything which the authority is unable to do by virtue of a post-commencement limitation which is expressed to apply—
>
> (i) to the general power,
>
> (ii) to all of the authority's powers, or
>
> (iii) to all of the authority's powers but with exceptions that do not include the general power.”

113. I received no real argument on this point[7], but it seems to me that neither section 2(1) or 2(2)(a) of the Localism Act 2011 would prevent a local authority from disclosing information outside of FOIA. Applying section 12 of FOIA is about removing the duty under section 1 of FOIA and is therefore nothing to do with restricting the exercise of a power under (or outwith) FOIA (per s.2(1) of the Localism Act). Further, for the reasons given above (and per s.2(2)(a) of the Localism Act), a local authority is not unable to release information if section 12 of FOIA applies, section 12 merely removes the duty on the local authority to release the information.

114. Mr Moss in my judgment had no persuasive response to the arguments of the respondents here. Section 8 of FOIA does not, as he argued, require that all requests for information have to be treated as requests made under FOIA. All section 8 does is set out what is needed for a request to be a request under FOIA, it does not prescribe that any request made for information must be treated as made under FOIA. Nor is it tenable in the light of *Kennedy* to argue that FOIA is the domestic law's "chosen means of securing any rights to access information, including any arising under Article 10". And the argument that no alternative statutory framework has been provided in domestic law to enable requests to be made ignores the Localism Act 2011.

115. I need finally to address under this third aspect of the first ground of appeal the reliance Mr Moss sought to place on the High Court's decision refusing to grant permission for a judicial review in *R(Good Law Project and another) v Secretary of State for Exiting the*

[7] Nor was any issue raised by any party before me on whether the heading to section 78 of FOIA – which is "**Saving for existing powers**" (my underlining for emphasis) – may point to the words of section 78 being limited to those legal powers in place at the time FOIA was enacted, which was well before the Localism Act 2011 came into effect. Such headings may assist with issues of statutory interpretation: see *R v Montila* [2004] UKHL 50; [2004] 1 WLR 3141. However, given the wording of section 78 itself the more consistent reading of the heading to section 78 may be that it is ever speaking and pointing to the powers of the public authority in existence at any given time.

European Union and others [2018] EWHC 719 (Admin). There is little or no precedential value in such a decision: see footnote four, paragraph 75 above. However, Mr Moss sought to rely on what Mr Justice Supperstone said about FOIA and the right of appeal under it in the context of that case.

116. The issue in the *Good Law Project* case concerned a refusal by the Government to disclose two documents about the likely consequences of the UK's then proposed departure from the European Union. On the renewed application for permission to appeal (i.e. at an oral hearing) the sole issue was whether the statutory machinery under FOIA, including an appeal to the First-tier Tribunal, constituted a suitable alternative remedy to judicial review of the failure to disclose the information. In refusing permission the High Court ruled that it did.

117. The first point made by the claimants in the *Good Law Project* case was that the requests had been made on the basis of the common law and not under FOIA and the Government had been wrong to treat the requests as if made under FOIA. In rejecting that argument Mr Justice Supperstone said:

> "3……Parliament, by FOIA, has created a specialist statutory mechanism for addressing requests for information held by public authorities. The claimants cannot by framing their requests in the way they have done avoid the legal regime established by Parliament to deal with disputes arising from information requests….
>
> "4. The Supreme Court decision in [*Kennedy*] does not in my view assist the claimants. The information requested in that case was subject to an absolute exemption under FOIA. In that case Parliament intended that the disclosure of information should be addressed outside FOIA. In the present case FOIA provides, as the claimants acknowledge, an available route for disclosure of information. *Kennedy* recognises (which is not in issue) that the common law power of disclosure continues to exist."

118. Mr Moss seeks to rely on these passages as showing that judicial review would not be available to him to challenge any decision refusing his request for information made outwith FOIA and under

the Localism Act 2011. I do not accept this. Firstly, the availability of judicial review cannot of itself inform the scope of FOIA. Second, it is important to recognise the context in which the argument arose in the *Good Law Project* case. This was about which of two available forums the adjudication in respect of the requests should take place. Moreover, in terms of a discussion of 'suitable alternative remedy', which was the sole issue in play before Mr Justice Supperstone in this *Good Law Project* case, it seems to me obvious that an absolute exemption, which in effect takes the need for disclosure outside FOIA, is relevant to whether the FOIA route would be a suitable alternative remedy. And the thrust of the judge's reasoning is it would not, which would support judicial review being available to Mr Moss. Why judicial review was not the correct available route in this Good Law Project case was because FOIA could provide an available route for disclosure.

119. Nor, insofar as any such argument was made, does this refusal of permission ruling, whatever its status, mandate the conclusion that requests for information can only be made under FOIA. Such a conclusion would run contrary to *Kennedy* and the other points I have discussed above (for example, section 8 of FOIA). And it cannot in any sense, following *Kennedy*, be said to be authority for FOIA being the exclusive means in domestic law for addressing information requests.

120. However, even if Mr Moss can surmount the above three issues under this first ground appeal, that ground must still fail because the First-tier Tribunal and Upper Tribunal cannot provide him with any effective remedy. The assumptions here are that *Magyar* applies in domestic law, that the information was 'ready and available' and therefore Mr Moss's right to freedom of expression under Article 10(1) was interfered with, and that it is section 12 of FOIA which is the cause of that interference (and that interference cannot be

justified under Article 10(2) – a matter on which I heard no argument).

121. The nub of the problem for Mr Moss here is that sections 1(2) and 12 of FOIA requires that there be an "appropriate limit", which if exceeded removes the obligation on the public authority to disclose the information (assuming it is otherwise disclosable). That requirement cannot, in my judgment, be set aside or ignored as it is a fundamental aspect of FOIA as enacted by Parliament. The terms of sections 1(2) and 12 of FOIA make it clear, in my judgment, that Parliament intended public authorities should be relieved of the obligation to provide information if it would cost them too much to do so.

122. The language of section 12(1) may initially be thought to admit of some flexibility, per section 3(1) of the Human Rights Act 1998, as it merely removes the obligation to provide the information and does not prohibit its disclosure. However, this is ground already trodden under the third aspect of this ground of appeal and the assumption by this fourth stage is that section 12(1) does prohibit disclosure if the appropriate limit is exceeded and it is that which causes the breach of Article 10. The cause of the breach, and thus where the search for a remedy needs to be focused, is the provision in section 12(1) stopping disclosure of information if the appropriate limit is exceeded. However, in my judgment the appropriate limit is so central to operation of FOIA that it cannot be read down or interpreted away: see Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 at paragraph [33]. Put shortly, Parliament has legislated that there **has to be** an appropriate limit; it is fundamental to the operation of FOIA as enacted.

123. Nor, even if the Upper Tribunal had the power (it does not), would granting a declaration of incompatibility in respect of there being a need in FOIA for an 'appropriate limit' provide Mr Moss with any effective remedy as such a declaration would change nothing in terms

of the operative effect of this part FOIA: see section 4(6) of the Human Rights Act 1998 and *Re K (a child) (secure accommodation order: right to liberty)* [2001] 2 All ER 719 (CA) at paragraphs [122]-[123].

124. As for the regulations made under section 12, disapplying them would neither be lawful or appropriate because that would offend against the requirement under section FOIA for there to be an appropriate limit. Nor can I see how the Supreme Court's decision in *RR v SSWP* [2019] UKSC 32; [2019] 1 WLR 6430 can assist Mr Moss either because in *RR* the remedy was for the offending part of the secondary legislation to be ignored or disapplied. That cannot be a lawful remedy here for the reasons I have just given. That then leaves applying a different appropriate limit to that provided for under section 12 of FOIA, but I cannot see on what basis I could provide such a remedy as this would involve me in ignoring and then rewriting the legislation and I can see no proper basis for me so doing under the Human Rights Act: see further *RR* at paragraph [30].

Ground 2 – Aggregation of costs of all parts of request

125. Mr Moss's second ground of appeal argues that in concluding that Kingston on Thames had aggregated all parts of his request the tribunal had misunderstood or misapplied the law, taken into account immaterial evidence and had enabled a procedural irregularity to occur. I will deal with the last two aspects of this ground of appeal under the fifth ground of appeal as it is there that Mr Moss raises these points as an argument under Article 6 of the ECHR.

126. However, Mr Moss's first focus of attack under this second ground of appeal is on the tribunal having misdirected itself as to the law or that it misapplied that law. The law here is found in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (see paragraph 24 above). Mr Moss recognised (rightly) that regulation 5 allows for the aggregation of the

costs of requests where those requests relate, to any extent, to the same or similar information: see regulation 5(2)(a). However, his argument is that the tribunal misunderstood or misapplied this test by accepting that there only needed to be a "common theme" linking the requests.

127. I do not accept this argument. The wording in regulation 5 of requests relating *to any extent* to either the same or similar information is very wide. I can find no error of law in the tribunal's understanding of that wording or its application of that wording to the parts of the request before it. It squarely confronted Mr Moss's argument before it (see paragraph [44] of its decision set out in paragraph 26 above) that his request for information about Renaisi and BNP Paribas "[were] not related". The tribunal then (in paragraph [45] of its decision) set out the ICO's case that a common theme ran between the parts of the request, namely that they "were for information related to the Council's regeneration programme" (my underlining added for emphasis). I do not consider that in so doing the tribunal lost sight of, or applied a different test to, the 'relating to any extent to the same or similar information' test in the legislation. In its analysis the tribunal identified a link between the requests in terms of them *relating to* information about the Kingston on Thames regeneration programme. In my judgment, the tribunal was applying the statutory test and was entitled on the evidence before it to conclude that the parts of the requests did relate to an extent to similar information.

128. Mr Moss complains that the tribunal took too broad an approach to the test for aggregation under regulation 5 by applying a test of there either only needing to be a 'very loose connection' between the requests or a 'common theme' which links them. Given the wide language used in regulation 5, I am not sure that either use of language to gloss or explain the test is necessarily wrong (though doing so should usually be unnecessary), so long as it is borne in mind that the relational test is in terms of the similarity of the

information requested. However, the tribunal did not apply a test of 'a very loose connection' between the parts of the request made by Mr Moss, as it made clear in paragraph 45 of its decision, and its use of the phrase "overarching subject" was no more than framing the relationship between the parts of the information falling within Mr Moss's request.

Ground 3 – Irrational to hold no compelling reason to doubt the other part of council's costs estimate

129. The third ground of appeal put forward by Mr Moss is focused on paragraph 43 of the tribunal's decision and in particular the first sentence in that paragraph: "Notwithstanding the above, we have found no compelling reason to doubt the rest of the Council's thorough estimate….". The first part of this sentence links back to the immediately preceding paragraph in the tribunal's decision in which the tribunal explained why it was discounting from Kingston on Thames's time estimate the time it had estimated it would take two (out of five) staff members to *download* some of the information requested from Gmail.

130. The problem with this ground of appeal is that it is really no more than an argument about the evidence. As Mr Moss put it, his case here in essence was that if the tribunal doubted the evidence about the time taken for this aspect of the email retrieval then it should also have doubted the rest of Kingston's time estimate and it failed as a consequence to explore the facts properly given its doubts about the email evidence. However, this in my judgment is no more than an impermissible attempt by Mr Moss to reargue the factual merits on this point. The tribunal had explained why it found the specific parts of email retrieval time estimates relating to the download times in respect of two of the members of staff not made out on the evidence filed by Kingston on Thames. I can see no reason why that reasoning

for doubting that particular aspect of the evidence provided any necessary read across to the rest of Kingston's evidence.

131. Mr Moss made two other arguments under this third ground of appeal. The first was made for the first time in his skeleton argument for the Upper Tribunal hearing of his appeal and was the main focus of his argument at that hearing. The argument criticised the tribunal saying in paragraph 12 of its decision that "the reasonableness of the cost estimate is only undermined if an alternative method exists which is so obvious that disregarding it renders the estimate unreasonable". Mr Moss said that this approach to the application of section 12 of FOIA was too deferential and should be disapproved.

132. However, this part of the tribunal's decision was located in a part of the decision which was seeking to explain the law generally under section 12. Moreover, the above quoted statement needs to be read within the context in which it appears. That context was in particular the whole of paragraphs 11 and 12 of the decision, which read as follows:

> "11. A public authority does not have to make a precise calculation of the costs of complying with a request. Instead, only an estimate is required. However, it must be a reasonable estimate, which must be 'sensible, realistic, and supported by cogent evidence'.....
>
> 12. The estimate will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Our task is not to insist that a public authority considers each and every reasonable method of locating and extracting information. Rather, we adopt the [First-tier] Tribunal's reasoning in the case of *Roberts*, that "the reasonableness of the cost estimate is only undermined if an alternative method exists which is so obvious that disregarding it renders the estimate unreasonable."

133. I agree with the ICO that the closing sentence in paragraph 12 has to be read together with the immediately preceding sentence in that paragraph and within the context of what the tribunal set out in paragraph 11. So read, in my judgment the tribunal's overall approach to section 12 was neither too constrained nor otherwise wrong in law.

The tribunal in my view was not in its adoption of the language used by another First-tier Tribunal advocating in these paragraphs of its decision a rigid approach that amounted to unquestioningly accepting the public authority's estimate simply if it appeared reasonable.

134. Further and in any event, and more importantly, the tribunal demonstrated that it was not taking such any such approach when it came to apply the law under section 12 to the facts of the case before it in paragraphs 41 to 43 of its decision. This can be shown by the tribunal's critical appraisal, and then rejection, of Kingston on Thames's time estimate for downloading emails from Gmail. It is plain that it did so because the time estimate in this respect was not in the tribunal's view supported by cogent evidence. No part of the tribunal's reasoning here appears to me to turn on the application of the language of the First-tier Tribunal in the *Roberts* case.

135. The other argument Mr Moss made under this third ground of appeal was based on the second ground on which Judge Mitchell had given him permission to appeal. It was argued that the tribunal had given inadequate reasons for accepting the time estimate in respect of retrieving information located in hard copy documents. This argument focused on the apparent disparity in 'staff member 3' taking around 45 hours to retrieve information located in three notebooks whereas it only took 'staff member 2' around 45 minutes to retrieve information from fifteen notebooks.

136. This argument was not the subject of real any argument at the oral hearing before me, but it was not expressly abandoned either. Insofar as it remains an argument pursued by Mr Moss, I do not consider it has, in the final analysis, any substantive merit.

137. To start with, the disparity in my judgment is not necessarily obvious from the information provided by Kingston on Thames in its letter of 19 August 2016 to the ICO. The time of the relevant 'staff member 2' was to do with locating and retrieving some of the information

requested in respect of BNP Paribas. That staff member, the letter recorded, held in total 15 notebooks and 6 handouts and it was estimated it would take him or her approximately 50 minutes to search through the hard copies and a further 45 minutes to retrieve the requested information from them. The length of each notebook was not noted for 'staff member 2' but the implication (given (i) the average of 3 minutes retrieval time per notebook and (ii) what is said later in the same letter about staff number 3') is that either they were short notebooks or/and each notebook contained little within it concerning information relating to BNP Paribas.

138. By contrast, the relevant 'staff member 3' was concerned with information relating to the other consultants, Renaisi, and he or she held only 3 notebooks but also had 500 pages of draft documents. It was estimated it would take this member of staff 1 hour to search through the hard copies but 45 hours to retrieve the requested information from the hard copies. This is obviously a very large difference compared to staff member 2's retrieval time. However, importantly, and unlike 'staff member 2', Kingston on Thames set out why this time was estimated at 45 hours. It calculated that each notebook was 160 pages long and it estimated that each of these pages, together with the draft documents, would take 3 minutes for the information on it to be retrieved. The implication from this more detailed estimation is that each page was likely to have contained information relating to Renaisi but not all of it may have fallen within the terms of the request.

139. The second point which falls against Mr Moss's argument here is that if anything, given the greater detail given under the time estimate for 'staff member 3', any disparity would suggest that staff member 2's time had been underestimated in this respect.

140. The third and final point against this argument is that even if the tribunal's reasoning was inadequate in failing to address the alleged

disparity (which I do not accept), this does not amount to a material error of law in the tribunal's decision because even discounting completely the retrieval time estimate for information held under hard copy in respect of 'staff member 3' above, the aggregated time estimate is still well in excess of 18 hours. The total aggregated time estimate put forward by Kingston on Thames was 142 hours and 35 minutes. Ignoring the Gmail downloading time estimate, as the tribunal did, takes 66 hours and 50 minutes off this total figure, leaving a revised time estimate figure of just under 76 hours. But even if the total hard copy retrieval time of 45 hours is also removed from the time estimate, this still leaves the time estimate at around 30 hours. This sufficiently exceeds the 18 hours cut-off provided for under the legislation to render any error of law the tribunal may have made about the hard copy retrieval times immaterial to its decision that section 12 did apply.

Ground 4 - irrational and legally wrong to conclude internal review did not clarify the original request

141. The argument of Mr Moss under this ground in my judgment is doing no more than asking the Upper Tribunal to form its own view on the merits of the meaning of the language used by Mr Moss in his internal review request. He argues (correctly) that the tribunal had said that Kingston on Thames had been entitled to read his original request for "any" information as meaning "all information" held by Kingston on Thames about the matters covered in the rest of the request. Mr Moss argues from this that this meant his original request was wide in scope and he then narrowed this in his internal email review. However, this was not so obviously so as to render the tribunal's reading of the internal review as irrational. Indeed, it is Mr Moss's reading of the language he used in his internal review requests which appears to me to be strained. That this is no more than a merits challenge dressed up as an error of law argument is shown by Mr Moss arguing before me that what he was doing in the internal review

request was 'explaining' the focus of his original request, language which is absent from the internal review.

142. The relevant language from the 9 March internal review made by Mr Moss to Kingston on Thames was:

> "You refused my request on grounds that it would exceed the prescribed costs/time limit. I do not accept that it would take more than 18 hours to provide information showing how and why the consultants Renaisi and BNP Paribas were selected/appointed and what they have been, or will be, instructed to do."

143. In my judgment there is simply no good basis for holding that the tribunal was bound to find (in the sense that it was the only rational finding that could be made) that the internal review request clarified and refined the original review request. The internal review of 9 March 2016 did not say it was seeking to clarify or refine the original request and far more readily reads, in my judgment, as a disagreement about the time Kingston on Thames was estimating it would take for the information asked for in the original request to be provided.

144. More importantly, however, there is simply nothing in the argument that the tribunal had erred in law in its assessment of the above quoted review request language because the only rational reading of it was that it was clarifying and refining the original request. The tribunal in my view was well entitled to conclude that it was doing no such thing and its reasoning in paragraph 40 adequately explains why it came to this conclusion.

Ground 5 – breach of Article 6(1) of ECHR and procedural impropriety

145. Mr Moss substantially refocused his argument under his fifth ground of appeal by the time he compiled his skeleton argument for the hearing before me, though it is fair to say that his arguments under

this ground have always had as one focus what he alleges was procedural unfairness in the First-tier Tribunal appeal proceedings.

146. The argument of Mr Moss here was based on Article 6(1) of the ECHR applying because, he argued, his right to obtain information was a "civil right" for the purposes of Article 6(1) and that civil right was being determined by the ICO and the First-tier Tribunal. His human rights under Article 6(1) had, he argued, been breached because: (i) the tribunal had failed to properly review the lawfulness of the determination of his civil rights by the ICO; (ii) the tribunal had breached the 'equality of arms' principle under Article 6(1) by requiring Mr Moss to argue his case against legally represented parties and where 'late evidence' was allowed to be admitted; and (iii) admitting that late evidence was legally wrong and in so doing raised an issue about the impartiality of the tribunal.

147. At the heart of these arguments was a clear belief on Mr Moss's part that Kingston on Thames had never in its decision-making on his request mentioned or relied on aggregating the costs of the parts of his request and the ICO had wrongly sought it to do so in the course of the First-tier Tribunal proceedings in order to bolster her decision.

148. Save for the argument Mr Moss makes about a lack of 'equality of arms', I do not consider Article 6(1) adds anything to Mr Moss's arguments under this fifth ground of appeal. Those arguments can be made just as easily in terms of whether the First-tier Tribunal proceedings were fair and carried out in accordance with the law in FOIA and the relevant procedural rules for the First-tier Tribunal.

149. As for the 'equality of arms' argument, in my clear judgment there is no merit in it, even assuming Article 6(1) does apply. The starting point is that the 'equality of arms' test is a broad one which only requires that a litigant is not placed under a *substantial* disadvantage as compared to his or her opponent: see, for example, *De Haes and Gijsels v Belgium* (1997) 24 EHRR 1 and *Steel and Morris v UK*

(2005) 41 EHRR 22 at paragraph [62]. Moreover, it is not a matter of a disadvantage in theory arising but one which can be made out on the concrete facts of an individual case: *Steel and Morris* at paragraph [61]. I have borne these principles in mind when considering whether the proceedings before the First-tier Tribunal lacked 'equality of arms'.

150. It is quite obvious to me that despite his lack of legal training Mr Moss was well able to marshal and deploy the complex factual and legal arguments that arose on his appeal to the First-tier Tribunal (and on this appeal to the Upper Tribunal, though the primary focus must be on the First-tier Tribunal given Mr Moss needs to show it was that tribunal which erred materially in law in coming to its decision). Indeed, it is Mr Moss who has made the running with all the arguments raised below and on this appeal. The fact that none of those arguments has succeeded has nothing to do with Mr Moss's ability and skill in putting them forward. Nor was he at any disadvantage when arguing this appeal before me against leading practitioners in the field of information rights. In addition, save for the 'late aggregation evidence', which I deal with and reject below, Mr Moss did not identify any instances in the First-tier Tribunal where his circumstances meant that he was placed at a substantial disadvantage in the proceedings, and it is worth emphasising in this respect that Mr Moss was the only party who attended the hearing before the First-tier Tribunal.

151. Furthermore, it is an important feature of the First-tier Tribunal and the Upper Tribunal system generally, and in particular in this area of law, and one which informs why 'legal aid' has not generally been extended to cover tribunals, that the proceedings are not adversarial in nature but are enabling and inquisitorial, with the specialist expertise of the tribunals being used where necessary to assist litigants in person to advance the important points on their appeals.

152. In all these circumstances, I do not consider that Mr Moss was placed at any, or at least any substantial, disadvantage in the appeal proceedings below (or before me). Accordingly, there is no merit in this aspect of his argument that he was denied a fair trial contrary Article 6(1), even assuming in his favour that Article 6(1) does apply.

153. However, it appears at least very doubtful whether Article 6(1) does apply in the context of requests made under FOIA. The closest authority on the point comes from an earlier iteration of the *Sugar* litigation referred to above. In *Sugar v BBC (No.1)* [2008] EWCA Civ 191; [2008] 1 WLR 2289, the Court of Appeal rejected an argument that Mr Sugar's Article 6(1) rights were engaged in the consideration of his request for information. The court said the following of relevance on this point (the "Balen report" is the information Mr Sugar was seeking from the BBC):

> "41……the two bases of Mr Eicke's submission were as follows. First, the judge had been wrong to think that Mr Sugar had no civil right to see the Balen Report sufficient to engage Article 6; and that, including in excluding him from the ability to apply to the Information Tribunal and leaving him with only the possibility of applying for judicial review of the Information Commissioner's decision, the judge's decision deprived Mr Sugar of a hearing of the determination of those rights by a tribunal.
> 42. Under the first point, Mr Eicke referred as hot from the press to a dictum of the European Court of Human Rights in paragraph 39 of its judgment of 15 January 2008 in *Micallef v. Malta* (Application no. 17056/06) which spoke of Article 6 extending to "the right of access to administrative documents," and citing in the latter respect *Loiseau v France,* decision 4680999. That last decision was before the judge, and it is clear from the passage put to him and to us that a very strong consideration weighing upon the European Court of Human Rights in considering whether Article 6 extended to an applicant for a teaching post, seeking to see administrative documents relating to his recruitment was that, whilst it was difficult to derive from the Convention a general right of access to administrative data and documents, account would be taken of the importance in appropriate cases of disclosure for the applicant's personal situation. We have not seen the Balen Report, but there is no reason at all to think that it is anything at all to do with the applicant's personal situation. The judge was, with respect, quite right to hold that the appellant's interest in it did not generate a relevant Article 6 right."

154. The important point for present purposes from *Sugar (No.1)* is its focus on the need for disclosure of information relating to the requester's personal or private situation. Just as in *Sugar (No.1)*, there is nothing in the information Mr Moss requested that related to his personal or private situation. In the context of FOIA, *Sugar (No.1)* on its face limits 'civil rights' under Article 6(1) to the private or personal rights of individuals. However, as I have said the information sought by Mr Moss did not fall into this category, and the basis of his case founded on *Magyar* has to do with him requesting the information in order to be able to provide it to the public.

155. The root of the rest of Mr Moss's 'unfair proceedings' point lies in his concern about the basis on which the 'aggregation of costs' evidence came finally to be presented to the tribunal. It is also based on a fundamental misunderstanding on Mr Moss's part about the function of the First-tier Tribunal in deciding an appeal under section 58 of FOIA.

156. Taking the second point first, Mr Moss argued that the primary role of the First-tier Tribunal in appeals under sections 57-58 of FOIA was "to provide a judicial review of the lawfulness of the [ICO's] decision" and he further argued that the ICO's function under section 50 of FOIA was to carry out an administrative review of Kingston on Thames's decision. He relied on paragraph 48 of the Upper Tribunal's decision in *All Parliamentary Group on Extraordinary Rendition v ICO and the Ministry of Defence* [2011] UKUT 153 ("*APGER*") as supporting both propositions. It does not, and both propositions are incorrect.

157. The right of appeal to the First-tier Tribunal under FOIA involves a full merits consideration of whether, on the facts and the law, the public authority dealt with the request for information in accordance with Part I of FOIA. This is the plain effect of section 58(1)(a) of FOIA when read with section 50(1)(a) of the same Act and is the clear view of the three-judge panel of the Upper Tribunal in *ICO v Malnick and ACOBA* [2018] UKUT 72 (AAC); [2018] AACR 29 at paragraphs

[45]-[46] and [90]. Further, I can find nothing in section 50 of FOIA which circumscribes the ICO's function to one of administrative review.

158. Nor does *APGER* assist Mr Moss's argument here. The statement about 'judicial review' in paragraph [48] of *APGER* was directed to rejecting an argument that the Upper Tribunal, which was sitting in effect as the First-tier Tribunal, did not have a "general power of judicial review" over the exercise of discretion by the Ministry of Defence. It does not support the First-tier Tribunal having a limited judicial review function in respect of the ICO's section 50 decision notice, in any event such an argument is flatly contrary to *Malnick*.

159. Mr Moss sought to use the above (wrong) arguments to contend that the ICO's remit under section 50 was "to determine whether [Kingston on Thames] correctly dealt with the request in the time up to the conclusion of the internal review". As I understood it, this was to support his argument that the tribunal ought not to have admitted what Mr Moss submitted was late evidence from Kingston on Thames about aggregating the costs of meeting the parts of his request. In this respect he argued that the relevant date was the date of the request

160. None of these arguments are correct. A focus on the date of request does not mean the ICO or the First-tier Tribunal is legally required only to consider evidence (here about section 12) which existed at the date of the request or any later internal review date. Nor does the language of section 50 contain any temporal limitation of the kind contended for by Mr Moss. Applying the language of section 50(1) of FOIA, in this case the question for the ICO was whether Mr Moss's request for information had been dealt with in accordance with Part I of FOIA. That included whether the parts of the requests could be aggregated, not simply whether they had as a matter of fact been aggregated.

161. Nor can I find anything in law which, subject to considerations of fairness, would preclude the tribunal from taking into account evidence that was relevant to whether the request for information had been dealt with properly and lawfully under Part I. The analogy with *Birkett v DEFRA* [2011] EWCA Civ 1066 at paragraphs [27]-[28] put forward here by Mr Moss is not a good one. The issue in *Birkett* concerned relying on a *new* exemption. In Mr Moss's case aggregation had always been in issue. There was therefore nothing unlawful about the ICO submitting further evidence to the tribunal on the issue of aggregation and the tribunal acting improperly or in a biased manner in accepting that evidence. It was evidence that was relevant to whether the request for information had been dealt with in accordance with Part I of FOIA (including section 12).

162. The last point Mr Moss sought to argue here was, as I understood it, that he had been 'ambushed' or taken by surprise by aggregation being an issue on the appeal to the First-tier Tribunal. I am afraid I have to say that this argument was fanciful and not in any sense borne out by the evidence. There are two obvious ways of showing Mr Moss has no argument here. First, in his grounds of appeal to the First-tier Tribunal of 19 October 2016 he stated as one of his grounds that his "requests for information relating to a) Renaisi and b) BNP Paribas should not have been aggregated as they were unrelated and weren't made for the same or similar information". Second, in paragraph 40 of his reply to ICO's response on the appeal to the First-tier Tribunal Mr Moss refers to the ICO arguing on the appeal that Kingston on Thames had been correct to aggregate the costs. It is thus crystal clear that Mr Moss knew this was an issue on the appeal.

163. Nor is there any tenable case that aggregation was not an aspect of Kingston on Thames's consideration of Mr Moss's request. Its initial decision spoke in terms the cost of "this request" without distinguishing between the costs of complying with it in respect of Renaisi and BNP Paribas. By the time of review decision of 13 July 2016 Kingston on Thames stated that "[t]he single request relates to

three separate issues – two procurement processes and the establishment of a Working Group" and it is reasonably plain from the rest of that letter that it was approaching the issue of time/cost in respect of all three issues together. Moreover, in Kingston on Thames's letter to the ICO of 19 August 2016 it stated expressly that "The total hours provided to Mr Moss in our internal review took into consideration all three aspects of his complaint".

164. The above quotation from Kingston's 19 August 2016 letter refers to three aspects of the request/complaint. In context those three aspects covered the parts of Mr Moss's request asking for information about Renaisi, BNP Paribas and the Affordable Homes Working Group. However, his request also asked, fourthly, for "Details of the "stakeholders in the regeneration programme" ("Part 4 of the request"). I accept from the evidence put before me by the ICO of her email correspondence with Kingston on Thames that it was this 'missing' response to the fourth part of the request which led the ICO to make the enquiries of Kingston on Thames that have aroused Mr Moss's suspicion. The ICO had signposted she was making such enquiries in paragraph 13 of her final written submission to the First-tier Tribunal, dated 28 February 2017.

165. Having considered the emails and telephone notes disclosed voluntarily by the ICO in the course of these Upper Tribunal proceedings about her dealings with Kingston on Thames, I am satisfied that the communications were entirely properly motivated and conducted and were concerned only with seeking to establish whether Kingston on Thames had aggregated Part 4 of the request with the other parts of Mr Moss's request. No improper purpose was involved not can I identify any error of law committed by the tribunal in admitting the single email from Kingston on Thames to which it refers in paragraph 19 of its decision. As it is, the tribunal accepted (at paragraph 52 of its decision) Mr Moss's argument that Part 4 of the request had not been the subject of any costing under section 12 and so should be provided to him. And in any event, there was no

error of law in the tribunal concluding that Kingston on Thames had been entitled to aggregate the costs/time of dealing with the parts of the request relating to Renaisi and BNP Paribas and that time was well in excess of 18 hours.

166. Finally under this fifth ground of appeal, there is simply no merit in the argument that the tribunal erred in law by not addressing or determining Mr Moss's argument that the ICO should have issued a "practice recommendation" under sections 47 and 48 of FOIA. The short and complete answer to this is that the tribunal had no jurisdiction to do so. The First-tier Tribunal's jurisdiction is conferred by section 58 of FOIA and, in terms of applicants, arises only where "a decision notice has been served". In this appeal that 'decision notice' was one served under section 50(3)(b) of FOIA in respect of Mr Moss's complaint that his request for information had not "been dealt with in accordance with the requirements of Part I [of FOIA]": per section 50(1) of FOIA (underling added for emphasis). Sections 47 and 48 appear in Part III of FOIA and the First-tier Tribunal therefore has no jurisdiction over them or the ICO's use of them. Its jurisdiction depends on, and is limited to, 'the decision notice' and thus Part I of FOIA.

Conclusion

167. For all the reasons set out above, none of Mr Moss's grounds of appeal are made out and his appeal is accordingly dismissed.

Anonymity

168. Very late in the day, in the second set of post-hearing submissions which were made in June and July of this year, Mr Moss made an application for his name to be anonymised in these proceedings. This was after the oral hearing of the appeal had taken place in public. It is also in a context where the decision of the fact-finding First-tier

Tribunal under appeal in these proceedings remains publicly available and sets out Mr Moss's name.

169. I think I need say no more in refusing this request than that there is nothing in this appeal or in this decision which turns on or relates to any sensitive or personal information about Mr Moss. The practice of the Upper Tribunal in information rights cases is generally to name the parties and there is nothing on this appeal that merits departing from that practice and not identifying Mr Moss by name.

Approved for issue on Stewart Wright
Judge of the Upper Tribunal

Dated 30th July 2020