

REASONS FOR DECISION

A. The limited issue before the Upper Tribunal

1. This appeal demonstrates acutely the importance of information not being disclosed and of the problems that that presents in judicial proceedings. The requests in this case were made under the Freedom of Information Act 2000 (FOIA) to the BBC, which is not a public authority for the purposes of the Act insofar as it holds information for the purposes of journalism. That is the combined effect of sections 3(1)(a)(i) and 7(1) and Part VI of Schedule 1. So the issue is whether the information sought by Mr Ammann was held by the BBC for the purposes of journalism at the time when the requests were made and refused. I put it like that because (a) there is no dispute that the BBC holds the information or (b) that it originally held it for the purposes of journalism.

2. If the BBC is right that it is not a public authority in respect of this information, Mr Ammann has no right to it under FOIA. Whether he would have a right to the information if it were held other than for the purposes of journalism is beside the point, as it does not arise. Whether he has any right to it on any other basis is also beside the point, as the jurisdiction of the First-tier and Upper Tribunals is limited to his rights under FOIA. That is why it is important that the information should not be disclosed inadvertently through anything that is said by the Information Commissioner, the First-tier Tribunal or the Upper Tribunal. Doing so would exceed their jurisdiction.

3. Moreover, I have made an order under rule 14(8) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and rule 14(11) provides:

- (11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (8) or the duty imposed by paragraph (10).

B. The requests

4. Mr Ammann is concerned about the illegal sale and exportation of endangered great apes. In January and February 2017, he made two requests to the BBC relating to information it held relevant to the global illegal ape trade and its investigation. I do not need to set out the requests in more detail and it is preferable not to do so because they identify part of the information in question.

C. Challenges to the BBC's refusal

5. The BBC's response, as I have said, was that the information was not subject to FOIA. Mr Ammann complained to the Information Commissioner, who upheld the BBC's response. This led to an appeal to the First-tier Tribunal, which was dismissed, and a further appeal to the Upper Tribunal. This is my decision on that appeal. The BBC was not a party in either the First-tier Tribunal or the Upper Tribunal.

D. The appeal to the First-tier Tribunal

6. The issue was whether the information requested was held for the purposes of journalism. More precisely, it was whether it was still held for those purposes at the time of the requests. There was no dispute that it was originally so held. The BBC by email of 11 September 2019 told the tribunal that it did not want to be joined as a party; Mr Ammann and his representative did not apply for the organisation to be joined by the tribunal. The tribunal had the benefit of a letter from the BBC, part of which was not disclosed to Mr Ammann. His argument to the First-tier Tribunal was that the BBC had decided not to run with the story and should now provide the evidence it had of criminal and corrupt acts so that it would be in the public domain and available to the enforcement authorities. He relied on an email from the BBC in July 2018, which said in part that ‘we are currently in the midst of a completely different investigation so other than a Nepal follow-up on information we have already broadcast, we are for now not busy with any active investigation.’ And in November 2018, he was told that ‘this investigation was on a back burner as we were working on a different investigation.’

7. The tribunal followed the established case law on the scope of the journalism derogation, as it has been called. There is no dispute about what the cases decide, only their application. The tribunal rejected Mr Ammann’s argument that the information was no longer being held for the purposes of journalism. It did not accept that that was the import of the correspondence that I have just quoted, saying that it did not actually say what he claimed and at most conveyed that the investigation would come live again when resources were available; it was simply a matter of priority for the moment. It accepted the evidence that the information was still ‘held securely by a BBC journalist and their teaming working in BBC news investigations.’ That is what it says in the open reasons.

8. The tribunal also had evidence that was not disclosed to Mr Ammann or his representative, which gave more details. This evidence provided confirmation for the tribunal’s interpretation of the BBC correspondence. The tribunal gave closed reasons dealing with that evidence. It concluded that it supported its conclusion on the correspondence and was correct that it does so.

9. So, in short, there was no reason to doubt the BBC’s word about what it was doing, its correspondence with Mr Ammann did not cast doubt on its word, and the closed material positively confirmed it.

E. The appeal in the Upper Tribunal

10. That leaves Mr Ammann and his representative in the difficult and unenviable position of trying to undermine a decision that is based in part on evidence whose content is unknown to them. Without knowing the closed evidence, they are forced to rely on the way the First-tier Tribunal dealt with the case.

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11. I begin by saying, with the benefit of having read the BBC's letter in full, that the tribunal came to the only decision it could properly make on the evidence before it. I therefore approach the handling of the case with a view to trying to identify any way in which it could have handled the case differently that might have produced a different outcome. In particular, that means whether Mr Ammann might have been able to produce additional evidence or to obtain evidence to support his case from the BBC itself.

12. It is important that Mr Ammann was represented by a solicitor before the First-tier Tribunal, as he has been before the Upper Tribunal. That affects what can reasonably be expected of him in the conduct of the case.

13. The starting point is the decision to withhold the evidence. This was made under rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976):

(6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons.

Rules about non-disclosure are expressly authorised by paragraph 11 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007.

14. Rule 14(6) has to be interpreted and applied in accordance with the overriding objective under rule 2, which exists to enable the tribunal to deal with cases fairly and justly. This embodies the common law principle of procedural fairness and open justice: see Fordham J in *Joint Council for the Welfare of Immigrants v the President of the Upper Tribunal (Immigration and Asylum Chamber) and the Lord Chancellor* [2020] EWHC 3103 (Admin) at [2.6], [2.9] and [3.4]. That does not override the power in rule 14(6). It could not do so, as it was properly made and is authorised by statute. It only means that it has to be applied in a way that is fair and just.

15. Given the content of the closed evidence, the Registrar was entitled and right to give the direction she did under rule 14(6). If she had done otherwise, the effect would have been to subvert the appeal process and the operation of FOIA by disclosing information to Mr Ammann before the tribunal had had a chance to decide whether or not he was entitled to see it.

16. Mr Ammann was aware that information had been withheld. That was clear from the Registrar's order. She wrote:

I am satisfied that the nature/content of the disputed information would be revealed if the unedited letter was seen by Mr Ammann.

There was also a reference on the index to the tribunal papers saying: 'Redacted part contained within a closed bundle'. Mr Ammann says that he was not alerted to the fact that the closed bundle contained submissions as well as the information.

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17. I do not accept that Mr Ammann's criticism made any difference to the fairness of the hearing. The only issue was whether the information was held for the purpose of journalism. The information that it contained spoke for itself as evidence that it was still being held for that purpose. The BBC had told Mr Ammann and the Commissioner that the information was still held for that purpose and the correspondence that Mr Ammann produced was consistent with that. So the case as presented by Mr Ammann could not succeed. The tribunal was required to take account of the closed evidence as well and it found, rightly, that it provided clear confirmation for what the BBC said. To adopt Mr Ammann's words in his reply to this appeal, the information provided 'justification why the disputed information was still subject to the derogation at the time of the requests'.

18. Mr Ammann has also complained that the BBC was not joined as a party and that he was deprived for the chance to question anyone from the BBC. As to the BBC being a party, he was entitled to apply for the potential public authority to be joined as a party and his application would have been considered. This was not, to emphasise, a case in which Mr Ammann was acting on his own behalf with no experience of tribunal procedure. He was represented by a solicitor.

19. As to witnesses from the BBC, Mr Ammann could have invited them to attend and asked the tribunal to summon them if they refused. He did not do so, despite having a solicitor. Even if witnesses had attended, voluntarily or by summons, the issue would have remained the same. The tribunal would have limited any questioning to the issue it had to decide. It would not have allowed Mr Ammann to trespass beyond that and it might have decided that the answers would have to be given in closed session. Given the nature of the closed evidence, that would probably have been inevitable.

20. So far, I have taken the contents of the redacted evidence at face value. The only conceivable way that Mr Ammann could have challenged that evidence is if he could have showed that it was false. That seems highly improbable given the details that it contained.

21. So, my conclusion is that the presence of the BBC as a party or by witnesses would not have made any difference.

22. Finally, Mr Ammann put to the tribunal that the BBC had not answered some questions that he had put to it. He relied on that as evidence that the derogation was not satisfied. The tribunal did not refer to that evidence, but it is not required to refer to every piece of evidence or deal with every argument. The answer to the point that Mr Ammann wants to make is simply that it is refuted by the redacted evidence.

23. This, no doubt, leaves Mr Ammann unsatisfied. He has suspicions and the failure to disclose the information he wants will probably confirm or reinforce those suspicions. The only answer the law can properly give him is that there is no basis for those suspicions and that is the conclusions that has now been

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reached by three independent bodies, the Information Commissioner, the First-tier Tribunal and the Upper Tribunal.

Signed on original
on 02 December 2020

Edward Jacobs
Upper Tribunal Judge