Recent decisions of the Information Commissioner and Tribunals

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highlight points of interest from decisions of the Upper Tribunal and First-Tier Tribunal from August and September 2020

Derek Moss v Information Commissioner and the Cabinet Office www.pdpjournals.com/docs/888094

Montague v Information Commissioner and Department for International Trade www.pdpjournals.com/docs/888095

Derek Moss v Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC), 30th July 2020

Summary

The Upper Tribunal ('UT') considered whether in UK domestic law, Article 10 of the European Convention on Human Rights includes a right to request information from a public authority such that a refusal to disclose information would amount to an interference with the right. The UT concluded that it was bound by domestic precedent and that as such, following *Kennedy and Sugar No.2*, Article 10 does not include a right to request information from a public authority in UK domestic law.

Facts

Mr Moss made a FOI request to the Royal Borough of Kingston upon Thames ('the Council') in February 2016. Mr Moss sought information in relation to the selection and appointment by the Council of various consultants for its regeneration programme as well as other information relating to that programme.

The Council refused his request on section 12 FOIA grounds, namely that the costs of complying with the request exceeded the appropriate limit. The review decision requested by Mr Moss reached the same conclusion.

Mr Moss complained to the Information Commissioner ('ICO') and after some back and forth between Mr Moss, the Council and the ICO, the ICO dismissed Mr Moss' complaint. It considered that the Council had correctly applied section 12 FOIA.

The First-Tier Tribunal decision

Mr Moss complained to the First-tier Tribunal ('FTT'). In March 2017, the FTT dismissed his appeal about section 12, but allowed it in respect of section 16 FOIA (duty to provide advice and assistance). As a result of the decision, the FTT required the Council "to provide advice and assistance to enable a reformulation of the request that falls within the appropriate limit." Mr Moss has separately litigated about enforcing this part of FTT's decision (in *Information Commissioner v Moss and the Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC)).

Mr Moss had also argued before the FTT that Article 10 ECHR confers a right of access to information in light of the ECtHR decision in *Magyar Helsinki Bixottsag v Hungary* [2016] ECHR 975 ('Magyar'). Magyar interpreted the Article 10 right to freedom of expression as a right of access to information in certain circumstances depending on the role of the applicant, purpose of the request, and nature and ready availability of the requested information.

Mr Moss contended that the UK Supreme Court decision in *Kennedy v Charity Commission* [2014] UKSC 20 must be read in light of the more recent decision in *Magyar*. However, the FTT noted that:

"While 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 section 58 FOIA is the limit of our remit."

The FTT further noted that even if it was wrong about this, the *Magyar* case does not assist Mr Moss because in its view, any Article 10 right to access information was not engaged on the facts of the case. It concluded by noting that "we do not consider that Article 10 of the European Convention of [sic] Human Rights alters our decision."

The Upper Tribunal decision

Mr Moss sought to challenge the FTT's decision in respect of section 12. One of Mr Moss' five grounds focused on whether the costs exemp-

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tions 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*. The Cabinet Office was thus joined as a second respondent, its concern being the applicability and reach of the *Magyar* decision in domestic law.

Article 8 ECHR

The UT noted that in order for Mr Moss to show that the FTT made a material error of law under *Magyar*, he needed to establish the following:

- that it is open to the UT to apply *Magyar* in domestic law;
- if *Magyar* may be applied, Mr Moss meets the criteria set down in it for Article 10(1) to be engaged;
- if Article 10(1) is engaged, Mr Moss's right under Article 10 has been breached by FOIA; and
- if Mr Moss's Article 10 rights have been breached by FOIA, the UT can afford him an effective remedy for that breach.

Taking each of those points in turn, the UT embarked on a detailed account of 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. In analysing *Magyar*, the UT noted that "*Magyar* is, and was intended to be, a watershed case in terms of the reach of Article 10…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."

Turning to domestic authorities on the issue, the UT considered *BBC v Sugar* (No.2) [2012] UKSC 4 and *Kennedy v Charity Commission* [2014] UKSC 20, noting that those authorities provide a basis for concluding that in domestic law, Article 10 does not disclose of a right to access information from public authorities. In light of this domestic case law, the respondents thus argued that any subsequent ECtHR case law (such as *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. They argued that 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. It amounts to an obligation to take into account *Magyar* but not to follow it where it conflicts with the binding superior domestic authority (albeit *Kennedy* was obiter on Article 10(1)). The UT agreed.

This in effect dealt with the ground, but for completeness the UT also noted that having looked at *Magyar*, even if it were to apply in the domestic law context, its detailed criteria (each of which the UT said needed to be satisfied) did not apply to the facts of this case. In particular, the UT noted that the FTT had not committed any error of law in concluding that the over 18 hours of time it would take for the Council to compile the information Mr Moss had requested meant that it was not "ready and available" and so Article 10(1) was not engaged.

The UT continued its analysis by noting that even if *Magyar* applied domestically and even if Mr Moss could show the material in question was "ready and available", it is not FOIA that breaches his Article 10 rights. Mr Moss sought to argue that section 12 FOIA causes the interference with this right. However, the respondents submitted that section 12 does not have such a role, as FOIA is not the exclusive manifestation in domestic law of a right to access information. As an example, the respondents referred to the Localism Act 2011 as a source of legal power under which the public authority could have been asked to disclose the information.

The UT observed that the central ratio of *Kennedy* included the fact 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. Put more simply, section 12 FOIA did not as a matter of domestic law prohibit the information being provided to Mr Moss (it merely removed any obligation for it to be provided under FOIA). As such, the UT concluded that it cannot be said to be the source or cause of the interference with any Article 10(1) rights of Mr Moss.

Finally, the UT explained that even if Mr Moss could surmount the above three issues under the first ground of appeal, the ground must still fail because the FTT and UT cannot provide him with an effective remedy. In particular, the UT noted that the 'appropriate limit' requirement of section 12 is so fundamental to the operation of FOIA as enacted, that it cannot be read down or interpreted away along the lines of the approach in *Ghaidan v Godin-Mendoza* [2004] UKHL 30. Further, a declaration of incompatibility, which the UT has no power to grant, would not provide an effective remedy, as it would change nothing in terms of the operative effect of section 12 FOIA.

Other grounds

There were four further grounds raised by Mr Moss. The first of these was that by concluding that the Council had aggregated all parts of his request, the FTT had misunderstood or misapplied the law, taken into account immaterial evidence and enabled a procedural irregularity.

This led the UT to look at Regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Mr Moss accepted 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 (Regulation 5(2)(a)). However, he argued that the FTT misunderstood or misapplied this test by taking too broad an approach, and accepting that there only needed to be a 'common theme' linking the requests.

The UT disagreed. It noted that the wording in Regulation 5 of requests relating 'to any extent' to either the same or similar information is very

wide. By using the term 'common theme', the UT did not consider that the FTT lost sight of, or applied a different test to, the 'relating to any extent to the same or similar information' test. Mr Moss's other grounds of appeal were that (1) it was irrational for the FTT to have held that there was no compelling reason to doubt the other part of the Council's costs estimate; (2) it was irrational and legally wrong to conclude that the internal review did not clarify the original request; and (3) there had been a breach of Article 6(1) ECHR along with procedural impropriety. All of these were dealt with shortly by the UT, who dismissed the grounds and thus dismissed the appeal.

Points to note

There are two standout points that can be taken from this very long 169 paragraph judgment.

The first is that the UT has provided a clear answer to the question of whether Article 10 ECHR creates a right in UK domestic law to request information from a public authority. The answer is that it does not. The UT found itself constrained by domestic precedent, concluding that Article 10 should have no bearing on FOIA disputes. Subject to any appeal, this judgment should thus act as a bulwark for those resisting any remaining Article 10 arguments raised in the context of FOIA appeals.

Second, the case is also useful to public bodies from a practical perspective. Public bodies will be aware that when a requester makes multiple requests that "relate, to any extent, to the same or similar information" (see Regulation 5(2)(a)), they are permitted to refuse the requests on the basis of the aggregated cost of complying with them. The UT has now indicated that it is appropriate for public bodies to take a broad approach to this question, because of the wording "to any extent." So long as public bodies can satisfy a relational test in terms of the similarity of the information requested, the judgment makes clear that it should be appropriate for them to rely on Regulation 5(2)(a).

"The UT has provided a clear answer to the question of whether Article 10 ECHR creates a right in UK domestic law to request information from a public authority. The answer is that it does not. The UT found itself constrained by domestic precedent, concluding that Article 10 should have no bearing on FOIA disputes."

Montague v Information Commissioner and Department for International Trade (EA/2019/0154), September 2020

Summary

The FTT ruled that, subject to certain exceptions, the UK government was permitted to withhold certain information about its post-Brexit trade talks with other countries as a result of its reliance on sections 27, 35 and 40(2) FOIA.

Facts

Shortly after the 2016 Brexit referendum, the Department for International Trade ('DIT') was established. One of its primary tasks was to implement the government's intention of securing trading arrangements with priority countries (including the US, Australia, and New Zealand). It was also tasked with ensuring that trade agreements that the EU has in place with nearly 40 countries were continued as far as possible with the UK on exiting the EU.

The UK was not legally entitled to start negotiations for trade deals until the expiry of the notice period for exiting the EU. However, in the meantime, DIT established 'trade working groups' with non-EU foreign states. According to DIT, these were to discuss trade issues like market access but not with any particular view to making an agreement.

On 15th November 2017, Mr Montague, an investigative journalist, made his FOI request on behalf of a social justice organisation called Global Justice Now. Global Justice Now is concerned about the wide potential effects of trade deals on society, and advocates for greater transparency and accountability in relation to trade negotiations. Mr Montague's request sought confirmation of the existence of various workings groups, their names, the dates of their meetings, lists of invitees and attendees, the 'agenda' and 'minutes' for each meeting and 'any schedule for forthcoming meetings of the working groups.' He also asked for information about any existing 'work streams' or plans for the establishment of further working groups.

DIT's response to the request supplied lists of countries, and lists of senior government ministers and officials who attended at least one meeting of various working groups. The rest of the information was withheld in reliance on sections 27 ('international relations') and 35 ('formulation of government policy') of FOIA. The Department also sought to avoid naming junior UK officials and foreign officials and relied on section 40(2) FOIA ('personal data') for this. The decision was upheld following an internal review.

Mr Montague complained to the ICO. In the course of the ICO's investigation, DIT supplied Mr Montague with a further 69 redacted documents which, broadly speaking, included agendas and minutes relating to meetings concerning trade with various countries. The redactions again relied upon sections 27, 35 and/or 40 FOIA. The ICO upheld DIT's approach.

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The First-tier Tribunal decision

By appeal to the FTT, Mr Montague explained that he was still seeking the release of four categories of information. These were namely (1) information about plans for the establishment of new working groups in the run up to Brexit; (2) lists of invitees and attendees at meetings of working groups; (3) agendas and minutes of meetings; and (4) any schedule of forthcoming meetings of working groups.

From the outset, the FTT noted that categories (1) and (4) were not really addressed by DIT, and so concluded that there was no basis for such information to be withheld. The main focus of the dispute was about the agendas and minutes of the meetings, as well as the section 40(2) exemption in respect of invitees and attendees.

Procedural issues

The material for the FTT to consider was contained in a Closed Bundle and amounted to around 70 documents running to some 800 pages. The FTT began by observing that the Closed Bundle supplied to it was accompanied by tracked comments along the side identifying in almost all cases a very generic, standard form and non-specific reason for redaction. No relevant context was given and no particularly sensitive parts of the documents were identified. The FTT thus felt bound to observe that:

"…this does not indicate that the process of considering the applicability of the exemptions and the public interest balance was generally conducted in a detailed and rigorous way or that really focussed thought was given to the issues by the teams at the DIT carrying out the initial task (or indeed the subsequent reviews)."

The FTT went further by observing that "the Commissioner's acceptance that the DIT 'went through the requested information line by line and marked it to show that the exemptions had been applied to specific information, rather than whole documents' was somewhat generous." The FTT explained that:

"It would have been much more helpful to us (and indeed the Commissioner) if there had been a short document (of probably less than a page in most cases) produced by each relevant team giving some context and explaining briefly anything said or expected about confidentiality, what was covered during any discussions and what was particularly sensitive."

The FTT had further criticisms about the approach taken by DIT. First, its main witness, who in effect spoke for the Department, was a senior civil servant just below the level of a Permanent Secretary. The FTT noted that the force of his evidence was reduced by "his clear inability to provide answers on many points of detail about the withheld material" and expressed its surprise that "he did not come to the Tribunal equipped with a bit more by way of briefing…or provide more in the way of concrete examples of potential prejudice."

The FTT's criticisms did not stop there. It also expressed concern about some indications of DIT's general approach to freedom of information, which it said were exemplified in witness evidence. Such evidence argued that "transparency is about sharing documentation where there has been a commitment to share and where that sharing does not introduce a risk to a sensitive situation" and transparency "does not and must not be assumed to include releasing inter alia minutes written for an internal audience."

In response, the FTT explained in its judgment that:

"anyone in government involved in responding to FOIA requests should be aware, and it is axiomatic, that the right to information is not contingent on a 'commitment to share' being made by the public authority and that the fact that a document is 'written for an internal audience' does not per se exempt it from disclosure under FOIA."

The FTT added that DIT had a tendency through its lead witness to exaggerate the case it was being asked to meet in order to strengthen its own case.

Section 27 (prejudice to international relations)

Turning to the substance of the matter, the FTT explained that it did not think that it would be reasonable (or indeed practicable) to consider the withheld material 'line-by-line' in deciding what should or should not have been disclosed. Instead, it broadly considered the Closed Bundle document by document. An important issue for the FTT was the timing of the FOIA request. It was made in November 2017 just eight months after the UK had given notice to leave the EU when DIT had been in existence for less than 18 months and its expertise and policy approach was still being developed.

DIT's case was that at that time, it had established about 26 trade working groups. Its evidence was that in some cases, the parties to these working groups had made formal commitments to maintain confidentiality and in others, there was an understanding of the need to do so. The FTT accepted that the general understanding among the states participating in the working groups would have been that discussions were to be considered confidential, and that their content would not be disclosed without agreement from the other party.

However, the FTT also noted that it did not consider that a high degree of confidentiality attached to the working group meetings. In the case of the US, for example, they were attended by many officials and the requirements as to security markings on documents were not the highest by any means. It further noted that all the States that the UK was dealing with would have been well aware in broad terms of FOIA, and that no guarantee of absolute confidentiality could be given.

However, the FTT could accept that the minutes would have been considered confidential, and were at least

likely to cause prejudice to the UK's relations with other States if disclosed. On the other hand, this likelihood of prejudice was said to apply to a much lesser extent in relation to agendas for such meetings. The FTT explained:

"Although we cannot say on the basis of the evidence we have received that the risk and level of any prejudice were very great, we bear in mind that this would have arisen in the context of high-level international relations and the establishment of new trading relationships around the world at a time shortly after a decision representing a step into the unknown for the UK."

Section 35 (formulation of government policy)

On this question, DIT sought to argue that the working groups inform trade policy development and that policy positions must remain confidential at whatever stage of development, requiring a safe space for officials in this process. DIT also cited the risk of undermining tactics, strategy and ultimately potential success if disclosure were to take place. The FTT accepted that the information exchanged at the meetings 'relates to' the formulation of government policy, but it did not accept the nature of the damage which DIT suggested would flow from disclosure.

However, the FTT alighted upon other reasons why the public interests underlying section 35 may be damaged by disclosure of agendas and minutes. This was the fact that officials could be inhibited in the way they collect and record information from foreign states in the working group process. Further, the FTT acknowledged that it may well be that foreign states would have become less willing to share information and views in the context of these meetings if the content of discussions was likely to be published; this could lead to non-participation and ultimately have a damaging effect on the process of policy formulation. It followed that on this narrow basis, the FTT accepted that section 35 applied and that disclosure may have damaged the public interest in maintaining the exemption, although it noted that "the extent of such damage is somewhat speculative and difficult to pin down."

"Public bodies should bear in mind when preparing Closed Bundles that the FTT may find it helpful to be supplied with a short document (of probably less than a page in most cases) produced by each relevant team giving some context and explaining briefly anything said or expected about confidentiality, what was covered during any discussions and what was particularly sensitive."

Public interest in disclosure

Having concluded that sections 27 and 35 apply and that there was a public interest in maintaining the exemptions, the FTT then turned to consider the public interest in disclosure. It noted that the withheld material related to the all-important issue of the UK's future trading arrangements with the rest of the world following Brexit and the need for transparency and openness in relation to the making of trade agreements. The FTT accepted that, in practice, once a free trade agreement has been finalised with a foreign state, Parliament and the government are likely to follow it and the law of the UK is likely to be amended accordingly. It was also accepted by DIT that at the relevant time, there was no process for scrutinising the work of the working groups.

In short, the FTT formed the view that there was a weighty public interest in disclosure of information about trade talks in general terms. However, there were a number of factors reducing the public interest in disclosure of the withheld material in this particular case. These included the fact that:

- the whole process was at a very early stage and the UK was nowhere near to actually negotiating;
- while there were no arrangements in place for the scrutiny of the working groups, the government was aware of the need for transparency and accountability and consideration was being given to how this should be addressed;
- there was nothing in the withheld material which amounted to a 'smoking gun' or that obviously cried out to be put into the public arena;
- the material that was disclosed (or should have been disclosed) following Mr Montague's FOIA request was of some substance itself and the public was thus not wholly in the dark; and
- it was plain that the agendas and minutes were not put together with any view to publication and while this does not mean they are not disclosable, it is an indication of the nature of the work and the mindset of the officials.

The FTT thus concluded that the public interest in disclosure was not as weighty as Mr Montague had contended. It noted that the claim that the government "currently seeks to, in effect, create backdoor legislation under a veil of secrecy which goes well beyond international norms" was hyperbole.

It followed that on balance, the FTT concluded that the public interest in maintaining the exemptions in respect of minutes narrowly outweighed the public interest in disclosure. However, in respect of bare agendas, the FTT suggested that the public interest in disclosure outweighed the minimal prejudice to

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confidentiality/foreign relations and policy formulation.

Section 27(4) (international relations — duty to confirm or deny)

The FTT was told that certain countries specifically requested that the very existence of working groups should be confidential. This evidence was accepted, and it followed that all relevant documents in respect of such groups were not disclosed by virtue of section 27(4).

Section 40(2) (personal data)

On this question, the FTT stated that it could see no reasonable necessity for the public to know the names of any foreign officials, and it followed that disclosure in respect of names and invitees was not necessary for the purposes of the legitimate interests pursued by Mr Montague.

Outcome

The FTT thus decided the appeal against Mr Montague, save that it allowed his appeal in respect of dates of all meetings, the bare agendas of such meetings, information about plans for the establishment of such meetings and schedule(s) of forthcoming meetings. DIT did not have to release minutes or lists of invitees and attendees.

Points to note

This case provides a salient lesson for all public bodies about how not to approach information rights appeals. As discussed above, DIT came in for serious criticism about (1) its very generic, standard form approach to redactions in the Closed Bundle; (2) its main witness, who demonstrated a clear inability to provide answers on many points of detail about the withheld material, and who did not appear to be properly briefed; (3) its general approach to freedom of information law which appeared to simply misunderstand its scope; and (4) a tendency to exaggerate its case. Public bodies should also bear in mind that, when preparing Closed Bundles, the FTT may find it helpful to be supplied with a short document (of probably less than a page in most cases) produced by each relevant team giving some context and explaining briefly anything said or expected about confidentiality, what was covered during any discussions and what was particularly sensitive.

This case is also interesting because of the exemptions in play. We do not often see reliance on section 27, and the FTT's probing approach to the evidence of whether there genuinely would be prejudice to international relations must be welcomed in light of the traditional deference that courts and tribunals show to such matters.

Finally, and thinking about issues broader than simply information law, the judgment appears to accept that in practice, once a free trade agreement has been finalised with a foreign state, Parliament and the government are likely to follow it and the law of the UK is likely to be amended accordingly. This finding of fact raises questions about the extent of parliamentary sovereignty and extent to which Parliament can, in practice, scrutinise international negotiations and agreements. It implicitly acknowledges that the balance of power lies primarily with the executive in this domain.

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