Expert comment

Estelle Dehon, Cornerstone Barristers, is a barrister specialising in public law

The Upper Tribunal has recently granted permission in an appeal in which it will look again at the question of what the correct 'temporal point' is for it to consider the public interest test. Should it consider the public interest at the time the decision was made by the public body, or at the time the Tribunal makes its decision on any appeal?

Given that the average time from the making of a request to the date of a decision by the First-tier Tribunal is approximately 1 year and 10 months (see the expert comment in Volume 14, Issue 3 of this journal), this question could have a significant impact. Often, the public interest considerations move on. The interests protected by an exemption may fade over time. Or the value of releasing the information may diminish as issues change or other information is put into the public domain.

Some may be surprised that the Upper Tribunal will consider the question at all. It is often assumed that the Tribunal must consider the public interest at the time the decision was made by the public body. It has become commonplace for public bodies to cite the Upper Tribunal decision in *APPGER v IC & FCO* [2015] UKUT 0377 (ACC) as establishing the practice of determining the public interest at the time of the original decision, and for the First-tier Tribunal to follow this without question.

However, there are decisions pulling in the opposite direction. In *DEFRA v IC and Badger Trust* [2014] UKUT 0526 (AAC), the Upper Tribunal observed that basing the determination of the public interest on the time of the public authority's final decision was "not entirely consistent with the development of the First-tier Tribunal's role of receiving new evidence and conducting what is now well-established as a full merits review".

Also, the Supreme Court in *R(Evans) v AG* [2015] UKSC 21 strikes a middle way as to the timing of consideration of the public interest. The parties in that case agreed that the Tribunal should assess the correctness of the public authority's refusal to disclose as at the date of the refusal.

However, the Supreme Court emphasised that "facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal" (paragraph 73).

The Supreme Court therefore made it clear that it is open to the parties before the Commissioner and the First-tier Tribunal to rely on factual evidence, expert evidence, or assessments of possible risks, which may not have been known to or in the mind of the person who was responsible for the original decision to refuse. The practical result of the Supreme Court's determination is that later evidence may throw so much light on the grounds for refusal that, in effect, the Commissioner or the Tribunal is considering the public interest factors at the time of its decision.

The provisions of section 58 of the Freedom of Information Act 2000, which set out the Tribunal's task, make it clear the Tribunal must consider the matter afresh on the evidence before it. The Tribunal is not judicially reviewing the decision-maker's determination. It can conduct its own fact-finding inquiry. That, in my view, has always sat very uneasily with the Tribunal limiting itself to assessing the public interest at the time of the original decision.

The Upper Tribunal will consider the question as part of an appeal brought the Italian investigative journalist Stefania Maurizi, who is currently working for la Repubblica newspaper. On 8th September 2015, she made a request to the Crown Prosecution Service ('CPS') for information relating to Julian Assange, held by the CPS in correspondence with the Swedish Prosecution Authority ('SPA'), with Ecuador and with the US Department of Justice or the US State Department. Ms Maurizi sought the information, amongst other reasons, in order to understand the SPA's approach to interviewing Assange in the UK; what the CPS and SPA's response was to the grant of 'political asylum' by Ecuador; whether the CPS and the SPA had considered concerns about Assange's onward extradition to the US and whether the US had made any request for extradition. The Swedish authorities had already confirmed that the US had not made any such request to them.

Initially, the CPS relied primarily on the exemption in section 27 FOIA: prejudice to international relations. By the time of the hearing, the CPS's focus was on the exemption in section 30 FOIA: information

Estelle is the trainer for PDP's practical training course, 'FOI — Level 1'. Information on the course is available at: www.pdptraining.com

held for the purpose of criminal proceedings. The Tribunal accepted that the public interest in the effective conduct of extradition proceedings, both in the Assange case and more broadly, outweighed what it accepted was a significant public interest in disclosure of the SPA correspondence. In relation to correspondence with the US and Ecuador, which the CPS had refused to confirm or deny was held, the Tribunal accepted that the public interest in not "tipping off" an individual outweighed the public interest in disclosure.

At the point Ms Maurizi's request was refused by the CPS, Assange had been in the Ecuadorian Embassy just over three years and was still the subject of an open investigation by the SPA into allegations of sexual assault, as a result of which the Swedish authorities had issued a European Arrest Warrant and requested his extradition in order for him to be questioned in Sweden. By the time of the First-tier Tribunal's decision on 12th December 2017, Assange had been interviewed by the SPA in the Ecuadorian Embassy and the SPA had revoked the European Arrest Warrant which was the basis of the request for extradition.

The Upper Tribunal, in granting permission to appeal, simply indicated that the question of the 'correct temporal reference point'merited consideration. Against the facts relevant to Ms Maurizi's request, and in light of the repeated reliance on APPGER as authority for the public interest being determined at the time of the public body's decision, it will be fascinating to see what the Upper Tribunal makes of the appeal. The ICO is due to respond in writing to the grant of permission in late November.

Estelle Dehon
Barrister
Cornerstone Barristers
estelled@cornerstonebarristers.com