JUDICIARY OF
ENGLAND AND WALES

Rob Evans v Information Commissioner

Upper Tribunal (Administrative Appeals Chamber)

18 September 2012

SUMMARY TO ASSIST THE MEDIA

This summary is provided to assist in understanding the tribunal's decision. It does not form part of the reasons for the decision. The full judgment of the tribunal is the only authoritative document.

The Upper Tribunal (Mr Justice Walker, Judge John Angel and Ms Suzanne Cosgrave) has today allowed 7 appeals by Rob Evans of the *Guardian*, who challenged decision notices of the Information Commissioner upholding refusals by 7 government departments to grant Mr Evans's freedom of information requests for correspondence between Prince Charles and ministers in the departments.

In the judgment published today the tribunal upholds Mr Evans's contentions that the Commissioner applied the wrong principles, gave insufficient weight to the public interest in disclosure, and gave too much weight to public interest factors in favour of non-disclosure.

What is published today comprises the tribunal's main judgment and 3 open annexes: OA1 (an explanatory guide to terms used), OA2 (a chronology) and OA3 (supplementary material).

The main judgment and annexes run to over 200 pages. The tribunal has given directions so that a decision can be made identifying information to be disclosed to Mr Evans. When that decision is made the tribunal will publish a further open annex on the principles governing redaction of personal details of individuals other than Prince Charles. Publication of the tribunal's further decision identifying the information to be disclosed must be deferred until the time for appealing the tribunal's decision has expired or any appeal has been dealt with.

Introduction

The tribunal describes Mr Evans's requests to the 7 government departments (DBIS, DH, DCSF, DEFRA, DCMS, the Northern Ireland Office and the Cabinet Office), and the tribunal's conclusion (paras 1 – 9):
"… under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of 'advocacy correspondence' falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government." (paragraph 4)

Limitations on the tribunal's ruling

The tribunal ruling is of limited scope, and will not apply to future requests (paras 3, 5 and 8)

"We stress at the outset what we are not concerned with. We do not define what Prince Charles is entitled to say to government. We neither criticise nor praise what he has said or may have said. We do not seek to weigh the benefits of a constitutional monarchy over those of a republic. Our task is simply to determine whether the law requires the Departments to provide Mr Evans with the 'advocacy correspondence' falling within his requests." (para 3)

"It is important to understand the limits of this ruling. It does not entitle Mr Evans to disclosure of purely social or personal correspondence passing between Prince Charles and government ministers. It does not entitle Mr Evans to correspondence within the established constitutional convention that the heir to the throne is to be instructed in the business of government. Nor does it involve ruling on matters which do not arise in the present case." (para 5)

"… since these requests were made the legislation has changed. In future cases, in particular in relation to requests received on and after 19 January 2011, there will be severe limitations on the ability to obtain from public authorities information relating to communications with the heir to the throne." (para 8)

<u>What is covered by the tribunal's ruling</u>

The tribunal explains that its ruling concerns 'advocacy correspondence' i.e. correspondence in a context where Prince Charles is seeking to advance the work of charities or to promote views (paras 6 and 7):

"In the absence of any … established constitutional role, [Prince Charles] has chosen a role of seeking to make a difference – not as king, but as Prince of Wales." (para 6)

"As part of this role [Prince Charles] explained in his *Annual Review …* that he has been 'identifying charitable need and setting up and driving forward charities to meet it', and has also been promoting views of various kinds. It is those two features of Prince Charles's activities which in our view provide a touchstone for identifying 'advocacy correspondence'. It will not usually be difficult to identify whether a context for correspondence, or parts of correspondence, involves either or both of these features. When it does, then in our view it will generally be right to characterise this material as 'advocacy correspondence'." (para 7)

<u>How the tribunal went about its task; the Act and the Regulations</u>

The distinction between "open" and "closed" material is explained at para 2. Background aspects, the time spent on the case, and relevant legislative provisions, are dealt with in paragraphs 10 – 63.
"For the most part the evidence and submissions have been "open" and Mr Evans has been able to play a full part in that process. Of necessity, however, evidence about the correspondence falling within Mr Evans's original requests ("the disputed information") and the private background to that correspondence has been dealt with on a "closed" basis." (para 2)

"The present case … concerns information about correspondence which took place some years ago. It raises complex questions which received initial attention from the Commissioner in 2005 and required more than 2 years intensive investigation and consideration by the Commissioner between February 2007 and December 2009. The parties have not sought any special direction as to urgency. It is nevertheless regrettable that the case has occupied the Upper Tribunal for two years. In large part this has been because at relevant stages we have found there to be a need for work that had not previously been envisaged." (para 16)

"Mr Evans relies on two linked legislative provisions … the Freedom of Information Act 2000 ("the Act") and the Environmental Information Regulations 2004 ("the Regulations")." (para 17)
The parties agreed that under both the Act and the Regulations the tribunal must decide "whether the decisions of the Commissioner were right." (para 20)

More detail is given on the requests, refusals and decision notices at paras 10 to 13, on the appeals and the legislation at paras 14 to 18, on how the tribunal went about its task at paras 19 to 24, on the Act, the Regulations and the decisions at paras 25 to 45, and on the date at which the position must be tested at paras 46 to 63.

Constitutional conventions

The tribunal explains that constitutional conventions are not law: they are not enforced by the courts. Two of them are of fundamental importance: the first requiring the monarch to act on ministerial advice, and the second entitling the monarch to be consulted, to encourage and to warn. The departments rely on a convention for the heir to the throne to be instructed in the business of government ("the education convention"). The tribunal agrees with Mr Evans that the education convention is limited in scope. While Prince Charles's advocacy correspondence is not unconstitutional, it cannot have the status of being within a constitutional convention. (paras 64 to 112)

"Our constitution reconciles monarchy and democracy through fundamental constitutional mechanisms under which (1) state power is exercised by and in the name of the monarch in accordance with the advice of ministers, and (2) the monarch is entitled to be consulted, to encourage, and to warn, but so long as ministers are in office their advice must be followed. In order to ensure that these fundamental mechanisms are not put in doubt, it is not until a long time has passed that details of how they operated in any particular instance can be revealed." (para 87)

"… the traditional education convention involved informing Prince Charles about governmental matters and responding to queries from him about that information. … Published advocacy correspondence shows Prince Charles using his access to government ministers … in order to set up and drive forward charities and to promote views – but not as part of his preparation for kingship. … Prince Charles himself accepts, and government acknowledges, that his role as king would be very different. The inevitable conclusion is that while correspondence going beyond the traditional education convention … is not … said by Mr Evans in these proceedings to be unconstitutional, it does not have the special status of correspondence falling within a constitutional convention." (para 105)

"… it is the constitutional role of the monarch, not the heir to the throne, to encourage or warn government. Accordingly it is fundamental that advocacy by Prince Charles cannot have constitutional status. … It would be inconsistent with the … convention [as to the role of the monarch] to afford constitutional status to the communication by Prince Charles, rather than the Queen, of encouragement or warning which ministers might then take account of." (para 106)

Evidence of factual witnesses and findings of fact

These matters are dealt with at paras 113 to 122.

Analysis of the public interest: factors favouring disclosure

The tribunal describes the public interest factors relied on by each side and goes through them, starting with factors relied on by Mr Evans: (paras 123 to 160)

"… promotion of good governance through accountability and transparency … is strongly in the public interest" (para 131)

"… debate about the extent and nature of interaction between government and the royal family, and how the monarchy fits in to our constitution, goes to the heart of understanding the constitutional underpinning of our current system of government. We conclude that these are all important and weighty considerations in favour of disclosure." (para 142)

"An important feature when Prince Charles is seeking to promote a charity or to promote a view on policy is that he has an ability to use privileged access to ministers. … correspondence from him … will quickly come to the attention of the minister, who is likely to take a personal interest … ." (para 156)

"The media interest in all this is substantial. … What is relevant is that there is a real debate, generating widespread public interest, on a matter which goes to the heart of our constitution. … For the most part … the media reporting is of a kind which has focused on the substance. It is relevant when assessing the public interest to note the extent to which, over the relevant period, there have been media reports of this kind." (para 157)

"Those who seek to influence government policy must understand that the public has a legitimate interest in knowing what they have been doing and what government has been doing in response, and thus being in a position to hold government to account. That public interest is, in our view, a very strong one, and in relation to the activities of charities established or supported by Prince Charles it is particularly strong." (para 160)

Analysis of the public interest: factors favouring non-disclosure

The tribunal describes the public interest factors relied on by the Commissioner and the Departments and goes through them: (paras 161 to 203)

"… suggestions that disclosure of advocacy communications, even though they fell outside the narrow education convention, would undermine the narrow education convention … lack practical substance. ... To our mind recognition that advocacy communications will generally be disclosable if requested will benefit the operation of the education convention. It will focus the minds of the parties on the important principle that the education convention does not give constitutional status to advocacy communications." (para 165)

"If it were possible to identify in the disputed information anything on a topic which attracted party-political controversy either at the time it was written or now, just as *The Times* in 1985 thought the public interest permitted public statements on such a topic, we consider that in the 21st century "our language is not so deformed and our politics are not so penetrating" as to make it in the public interest not to disclose advocacy communications on such topics." (para 187)

"There is, as it seems to us, a short answer to all the various ways in which the Departments have sought to rely on dangers of "misperception" on the part of the public. It is this: the essence of our

democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be." (para 188)

"[As to the Departments' concern that disclosure would have a chilling effect on frankness] … there is good reason to think that Prince Charles will not, as a result of liability to disclosure, cease to make points to government that in his view need to be made. … these are things that he feels strongly cannot be left unsaid … the high degree of publicity afforded to Prince Charles's dealings with government in the past has not prevented his being educated in the ways and workings of government, nor has it deterred him from corresponding frankly with ministers." (para 196)

"There is … in our view a strong air of unreality about [the] contention that [Prince Charles's] birth gave him no choice as to whether to engage in advocacy correspondence. The analogy … with a hereditary peer was in that regard compelling: some may feel impelled to intervene for the public good as they see it, either publicly or behind the scenes. Others may not. … we see no basis for saying that when Prince Charles does so his actions must be characterised as "truly personal." On the contrary they are, on his own description, all motivated by a desire to put the "Great" back in Great Britain." (para 202)

Analysis of the public interest: general aspects of the overall balance

The tribunal analyses general aspects of the overall balance of public interests (paras 203 to 214):
"…the assertion that Prince Charles should be in a different position [from those with a commercial interest, whose correspondence would normally be disclosable] because he does not have a commercial interest in the outcomes that he seeks to promote is, in our view, an assertion which lacks a sound basis. Advocacy correspondence will in general be likely to concern matters which affect either or both of public policy and the public purse. As regards such matters the public interest in knowing what views have been urged upon government, and what interests of charitable enterprises have been promoted, is likely to be at least as great as it would be in a commercial context. Indeed it may be even greater in a context where the advocacy seeks to drive forward a charitable purpose, for charities may receive major fiscal benefits. It is in our view unlikely to be significantly less where the motivation for promoting a particular view is altruistic, and indeed may well be significantly greater where the altruism forms part of a concerted campaign." (para 209)

"… none of the Departments' contentions persuades us that, in the absence of special circumstances, as regards advocacy correspondence it is appropriate to give correspondence between ministers and Prince Charles greater protection from disclosure than would be afforded to correspondence with others who have dealings with government in a context where those others are seeking to advance the work of charities or to promote views." (para 211)

"In our view there are factors associated with Prince Charles which strongly tilt the balance even further in favour of disclosure. One group of factors concerns the importance of his charitable enterprises … Their range of activities is so widespread that they may potentially affect many aspects of the work of the Departments. Similarly Prince Charles's non-charitable advocacy activities – limiting ourselves in this judgment to those which are public – have the potential to affect many aspects of the work of the Departments. Important constitutional issues are raised by his advocacy activities … Those issues have the potential to arise in relation to all advocacy correspondence. We do not seek to place these factors in order of importance. Each adds significantly to the balance in favour of disclosure. They lead us to conclude that in general terms the balance is likely to be not only clearly but also strongly, and sometimes very strongly, in favour of disclosure." (para 214)

Entitlement, exemptions and exceptions

The tribunal analyses particular aspects of the legislation at paras 215 to 243.

Scope of the requests

An issue which emerged during the hearings concerned the scope of Mr Evans's requests; specifically, whether they should be taken to include correspondence written by and sent in the name of a Private Secretary (or Assistant Private Secretary), and correspondence sent to a Private Secretary (or Assistant). The tribunal applies the principle that it should look at the substance (paras 244 to 249).

Analysis of the disputed information

The tribunal explains at para 250 that this is set out separately.

Conclusion

The tribunal explains at para 251 that the appeals have been allowed unanimously, and that it has given directions so that a decision can be made identifying information to be disclosed to Mr Evans.

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