Rob Evans v Information Commissioner

Upper Tribunal (Administrative Appeals Chamber)

Decision and Reasons of the Upper Tribunal - [2013] UKUT 075 (AAC)

20 February 2013

SUMMARY TO ASSIST THE MEDIA

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

The Upper Tribunal (Mr Justice Walker, Judge John Angel and Ms Suzanne Cosgrave) today publishes a decision which requires 7 government departments to produce a schedule of "advocacy" correspondence between ministers and Prince Charles during the period between 1 September 2004 and 1 April 2005. The schedule must disclose the date of the document, the sender and recipient, whether the document is a letter or some other form of correspondence, and the subject matters covered by the advocacy parts of the document.

A. Introduction

The tribunal notes that on 18 September 2012 it made a decision ("the September Decision") which concerned correspondence between Prince Charles and government ministers during the period 1 September2004 to 1 April 2005. Mr Evans had asked the Commissioner to order disclosure of such correspondence, but the Commissioner issued decision notices refusing to do so. Mr Evans appealed. The September Decision allowed the appeal and said that the tribunal would issue a further decision identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices (i.e. decision notices replacing those issued by the Commissioner).

The tribunal has not, however, issued the further decision it contemplated in September 2012. Whether it has power to do so will depend upon the outcome of judicial review proceedings issued by Mr Evans on 9 January 2013, seeking to quash the "executive override" certificate issued by the Attorney General on 16 October 2012.

At paragraph 3 the tribunal explains:

> "What Mr Evans asks us to do is to issue a decision which will be separate from the "further decision" referred to in the September Decision. He says that the September Decision did not deal with the requests which he made to each

Department for lists and schedules ("the lists and schedules requests"), that we have power to make a decision dealing with those requests, and that we should exercise that power in his favour. The Commissioner and the Departments say that we have no power to issue such a decision. If we do have power to do so, then the Commissioner agrees with Mr Evans that we should exercise that power, and accepts that the September Reasons will make it appropriate for us to exercise that power in the manner sought by Mr Evans. The Departments, however, say that if we have such power, then we should not exercise it, or if we do so, we should hold that Mr Evans was not entitled to the lists and schedules that he sought."

B. Background

The tribunal examines the background in paragraphs 4 to 23. It notes, among other things, that the reasons for its September Decision ("the September Reasons) began by:

(a) describing Mr Evans's request to see correspondence;

(b) noting that in argument on his behalf it had been made plain that it was only "advocacy correspondence" that he sought; and

(c) recording the tribunal's conclusion that under relevant legislative provisions Mr Evans would, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests.

The September Reasons at paragraph 243 said:

> "243. … The closing skeleton argument for Mr Evans indicated that these requests [the requests for lists and schedules] will not need to be considered if we accepted his arguments on the substance of the correspondence. In the result we have in broad terms reached the conclusions sought by Mr Evans on the substance of the correspondence. Accordingly it is not necessary for us to discuss the parties' contentions as regards lists and schedules. We do not set them out here, or seek to analyse them: if we are wrong in our broad conclusions as to the arguments on the substance, then it seems to us that the correct conclusion as regards lists and schedules will depend upon the reasoning adopted in reaching a different conclusion on the substance of the correspondence."

On 12 October 2012 the tribunal issued to the Commissioner and the Departments a Closed Annex to the September Decision. The Closed Annex identified information to be disclosed to Mr Evans, subject only to provisional redactions sought by the Departments in order to protect third party personal data. It did not identify the terms of substituted decision notices.

The tribunal's October Procedural Decision, also on 12 October 2012, required information to be provided to Mr Evans so that such issues as arose in relation to third party personal data could be identified and directions given as to their resolution.

On 7 November 2012, following issue of the Attorney General's certificate on 16 October 2012, the tribunal's November interim order suspended all existing directions and orders for steps to be taken after 18 September 2012. In these circumstances:

(a) the obligation to provide the information required by the October Procedural Decision was suspended,

(b) the tribunal had not determined what, if any, information comprising third party personal data must be disclosed to Mr Evans, and
(c) the tribunal had not identified the terms of substituted decision notices, nor had it substituted any notices.

C. Power to rule on lists and schedules

In paragraphs 24 to 37 of its reasons the tribunal explains its approach to this aspect of the matter. After referring to a decision of the Court of Appeal relied on by Mr Evans, and to the general provisions in the Upper Tribunal Rules, the tribunal said at paragraph 37 of its reasons:

> "… we approach the matter on the footing that if the September Decision disposed of that part of the proceedings which was concerned with the lists and schedules requests, then we would have no power to consider the November application [for lists and schedules]."

However the tribunal's conclusion was that the September Decision had not disposed of that part of the proceedings which was concerned with the lists and schedules requests At paragraphs 38 to 42 the tribunal explained why:

> "38. Did the September Decision dispose of that part of the proceedings which was concerned with the lists and schedules requests? We think it abundantly clear that it did not.
> 39. Mr Swift [for the Departments] submitted that in order to identify what was disposed of one must read both the decision and the reasons. We agree. Paragraph 243 of the September Reasons, submitted Mr Swift, showed that what the tribunal did was not to put off a decision on lists and schedules but to say that they were not being dealt with. As to that, however, paragraph 243 must be read in context.
> 40. The lists and schedules requests were noted in paragraph 10, and not referred to again until paragraph 243. With those two exceptions, the whole of the September Reasons were concerned with Mr Evans's request for correspondence. Paragraph 243 explained why this was so. It was because of a concession by Mr Evans: if we accepted his arguments on the correspondence then he would not need us to deal with lists and schedules. Underlying that concession was the obvious point that if Mr Evans had the correspondence then he could make his own lists and schedules. What was being said was, "If I have a decision ordering disclosure of the correspondence, then I do not need to ask for lists and schedules."
> 41. In the September Reasons we were, as explained in paragraph 4, setting out why we had concluded, under relevant legislative provisions Mr Evans would, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. That conclusion meant that the appeal must be allowed. In paragraph 243 we said that our conclusion on the correspondence, in conjunction with Mr Evans's concession, meant that we did not need to discuss the parties' contentions as to lists and schedules.
> 42. It would in our view be manifestly unfair and unjust to read this as a disposal of the part of the case concerned with the lists and schedules requests. Our intention was that we would shortly issue substituted decision notices requiring disclosure of the advocacy correspondence sought by Mr Evans. When that happened there would

no longer be a need to deal with the lists and schedules requests. Until it happened, however, we were not disposing of those requests. We had no reason to do more than explain that in the light of the concession we did not need in the September Reasons to deal with the arguments about lists and schedules. Moreover it would have been inconsistent with Mr Evans's concession for us to proceed then and there to dispose of the lists and schedules requests at a stage when we had not yet issued substituted decision notices requiring disclosure of the correspondence."

D. Should the tribunal exercise the power to rule on lists and schedules?

The tribunal considered this question in paragraphs 44 to 46:

"44. If we have power to rule on Mr Evans's requests for lists and schedules, then both Mr Evans and the Commissioner agree that we should exercise it. Mr Pitt-Payne [for the Commissioner] identified an important factor which led the Commissioner to agree with Mr Evans on this aspect. It was this: if we did indeed have power to make a ruling, there was a part of the case which had not been the subject of the Attorney General's certificate and which we had not ruled on. It was undesirable that there should be part of the case left in limbo, and it should be put right.

45. Mr Swift urged that we should not exercise any such power. He submitted, first, that there would be no good reason to do so. That submission, however, is answered by the powerful point identified by Mr Pitt-Payne. A second submission by Mr Swift was that the truly exceptional circumstances in which discretion can be exercised to reopen appeals in the civil courts do not apply. As to that, however, for the reasons given in section C above, we are not re-opening anything.

46. The final submissions on this point made by Mr Swift relied on the Attorney General's certificate. Mr Swift submitted that the certificate was made on the basis that disclosure of the subject matter of the correspondence would damage Prince Charles's preparations to become king and that the public interest lay in not disclosing it. It would be wrong as a matter of discretion, submitted Mr Swift, to disclose information covered by reasoning in the certificate and thereby to bypass the certificate. In our view these points are more appositely made in relation to the next question, which concerns how we should exercise any power to rule on the lists and schedules requests. In any event the answer to them is that the certificate is concerned only with our decision about disclosure of correspondence. It has no wider effect."

E. What decision should be made?

At paragraphs 48 to 50 the tribunal considered submissions as to what its decision on lists and schedules should be. The tribunal explained its conclusion in paragraph 49:

"49. We are satisfied that in relation to those parts of the appeals which concern the lists and schedules requests we should substitute decision notices requiring disclosure of the information sought in those requests. The reasons for disclosure that we gave when considering disclosure of correspondence apply, albeit with lesser force, as regards lists and schedules. To the extent that they are of lesser force because the information to be provided will be limited, there will be a corresponding weakening effect on factors relied on in opposing the production of lists and

schedules. In particular as regards subject matter, information on which was expressly or implicitly sought in the lists and schedules requests, the public interest in disclosure remains strong. The reason is that disclosure of subject matter will enable the public to know the topics covered in advocacy correspondence. In so far as there is a particular concern that disclosure of subject matter will lead to inference, speculation, and misperception, we repeat what we said at paragraph 188 of the September Reasons:

> 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."

F. Conclusion

In paragraph 51 the tribunal sets out its conclusion:

> "51. For the reasons given above we unanimously allow these appeals in relation to the lists and schedules requests, and … substitute those parts of the Commissioner's decision notices which dealt with Mr Evans's requests for lists and schedules, replacing them with decisions requiring disclosure by each department of a schedule of information. The November interim order, issued so as to put on hold our directions concerning disclosure of correspondence following the Attorney General's certificate, remains in place in relation to matters other than the lists and schedules requests."

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