

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
[2015] UKUT 393 (AAC)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Date: 27 October 2016

Before:
LORD JUSTICE SIMON

Between:

ROBERT BROWN

Appellant

- v -

THE INFORMATION COMMISSIONER
THE ATTORNEY GENERAL

Respondents

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Mr G Robertson QC (instructed by **Richard Buxton Solicitors**) appeared on behalf
of the **Applicant**

The Respondents did not appear and were not represented

Judgment Approved

1. **LORD JUSTICE SIMON:** This is a renewed application for permission to appeal from a decision of Charles J sitting as the president of the Upper Tribunal (Administrative Appeals Chamber) reported at [2015] UKUT 393 (AAC). That decision was in respect of a freedom of information request made by the applicant, Mr Brown, under section 1 of the Freedom of Information Act 2000 in relation to the practice of sealing royal wills.
2. The issue by the time it reached Charles J in July 2015 had narrowed from the very broad attack on what the applicant considered to be the objectionable secrecy surrounding the sealing of royal wills. Disclosure had been sought at an early stage of a number of documents which recorded discussions between the Attorney General's office and Messrs Farrer & Co on behalf of the Queen, the Royal Household and the President of the Family Division. These discussions had been reduced in writing to three documents, a confidential note on royal wills dated March 2002 and two annexes which were referred to in the confidential note, annex A, dealing with the principles relevant to the application to seal a will made by a member of the royal family, and annex B, dealing with the practice to be followed when an application to seal was made.
3. The request was narrowed because in April 2015, as a result of a review, and no doubt as a result of the exertions of Mr Brown and those acting on behalf of him, the Attorney General decided to disclose all of annex A and B and all of the confidential note other than paragraph 10, of which a gisted version was disclosed. Apart from this gisting of paragraph 10, all 14 paragraphs of the confidential note were made available.
4. Charles J set out in paragraph 36 of his judgment what he described as the very powerful public interest, one, against the creation of undisclosed principles and procedures applied on an application to seal any will, and two, in favour of publication of any such principles and procedures. He found that the disclosure of most of the confidential note and its annexes promoted that strong public interest (see paragraph 37). Thus the only matter with which he was concerned was whether the full version of paragraph 10 should be disclosed or whether disclosure of the gisted version was lawful (see paragraph 39).
5. The judge referred to the terms of section 37(1)(a) of the Freedom of Information Act 2000 and its subsequent amendment by the Constitutional Reform and Governance Act 2010. However, he did not base his decision on the partial, now absolute, statutory exemption from information insofar as it related to communications with the Queen or the Royal Household. He proceeded on the basis that it was necessary to balance competing public interests.
6. His decision proceeded as follows: first, the applicant was entitled to information, and not documents (see *IPSA v Information Commissioner & Leapman* [2015] EWCA Civ 388 at paragraph 43); second, from a comparison which he made - but which this court and indeed Mr Robertson is not able to make - of the rewritten or gisted paragraph 10 with paragraph 1 of the annex A, it appeared that the essential gist of paragraph 10 had been conveyed; third, in the balancing of the public interest which he had identified at paragraph 36 of his judgment, when deciding whether the precise words in paragraph 10 should be disclosed, the balance came down decisively in favour of excluding the omitted words from the information provided to the applicant (see paragraph 46).
7. Mr Robertson concedes, realistically, that paragraph 46(2) indicates the nature of the omission, and he crossrefers to the witness statement of Mr Allan of the Cabinet Office and suggests that what is omitted is in fact clear. In some ways, as I suggested in

argument, this undercuts his main submission which is that the applicant does not know what is omitted by the gisting in paragraph 10.

8. But on a broader front, Mr Robertson takes issue with the judge's findings. He submitted that the background to the case was a consideration of the lawfulness of a secret practice or process whose effect, if not intent, is to circumvent section 124 of the Supreme Court Act 1981 and Rule 58 of the 1989 Probate Rules which direct that wills admitted to probate should be open for inspection unless inspection would be "undesirable or otherwise inappropriate".
9. He reminds the court of the views expressed by the Court of Appeal in the earlier case of *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother & Ors* [2008] EWCA Civ 56 at paragraph 46 when considering whether Mr Brown was entitled to an opportunity to challenge the practices and the processes at a time before they had been voluntarily disclosed. He reminds me that in paragraph 39 the court, presided over by the Lord Chief Justice, giving a single judgment, referred to a number of issues that were raised by the application, enumerated at 1 to 5, of which 5 is "What, if any, information about that practice should be made public?" It was the question "What, if any," that initially arose under the Freedom of Information Act application, and it was narrowed in the way that I have indicated.
10. Mr Robertson submits that the secret agreements were unconstitutional when made, and therefore there can be no countervailing public interest in nondisclosure of even a few words, and that unless there is a verbatim disclosure, the practices and procedures cannot be properly understood. On this basis, he submits that the applicant is entitled to the exact words of paragraph 10 and not a gisting thereof.
11. It seems to me that these points, well made as they are, and as one would expect from Mr Robertson, do not overcome the point made by the judge that what is in issue here is the disclosure of information and not the disclosure of documents or the precise wording of documents. The information in issue here has been disclosed. It has been disclosed in a gisted form, as will frequently happen where requests are made under the Act.
12. Furthermore, this is a second appeal, so permission will not be given unless the appeal would raise an important point of principle or practice or there is some other compelling reason for the Court of Appeal to hear it. While it is clear that the case did at one time raise important points of principle, in my view the present application does not. The judge considered that the gisted text properly conveyed the information to which the applicant was entitled. He referred to the relevant law and he applied it, and he came to a view which was plainly open to him.
13. I should add that I have not overlooked the points made in Mr Robertson's written outline submissions at paragraphs 17(3), (4) and (6), but in my view they add nothing to the force of his oral argument on the application.
14. It follows that the renewed application is refused.