



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2013/0250**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50498344

Dated 22nd October 2013

BETWEEN

Rev Nicholas Mercer

And

The Information Commissioner

Respondent

And

The Ministry of Defence

Second Respondent

Determined on 19th May 2014 at Fleetbank House

Date of Decision 11th July 2014

BEFORE

Fiona Henderson (Judge)

Roger Creedon

And

Andrew Whetnall

Counsel for Rev Mercer – Ms Fiona Edington

Counsel for IC – Ms Laura John

Counsel for MOD – Ms Gemma White

Subject matter: FOIA– s42 (Legal Professional Privilege)

Williams v Quebrada Railway, Land and Copper Company [1985] 2 Ch 751

DGLG v Robinson [2012] UKAACR 43

DBERR v O'Brien and Information Commissioner [2009] EWHC 164 that there is

Three Rivers District Council v Governor & Company of the Bank of England [2004] UKHC 48

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50498344 dated 22nd October 2013 which concluded that the Ministry of Defence (MOD) had correctly applied s42(1) FOIA (legal professional privilege) to the disputed information.

The Information Request

2. In Cyprus UK Servicemen and their families¹ can be tried either under military law (by way of Courts Martial or Standing Civilian Court) or by the Courts of the Sovereign Base Area (SBA). The SBA Courts are Colonial Courts and have jurisdiction over the 99 Sq miles of territory which was retained by the United Kingdom under the Treaty of Establishment 1960. The SBA and its courts are administered by the MOD.
3. Concerns were raised by Service lawyers as to whether the SBA system was compatible with the ECHR. Counsel's advice was sought in 2000 and obtained in 2001. In 2007 Rev Mercer was Command Legal Adviser (Army) in Cyprus, his role was to advise Commander British Forces Cyprus (CBFC) as well as Servicemen and their families. His legal opinion was that the SBA judicial system was not compatible with the ECHR. He was vocal in this view and had asked to see a copy of the 2001 Opinion. This request had been refused. On 2nd April 2007 CBFC wrote a letter to Director Army Legal Services (DALs) which raised concerns about Rev Mercer's professional competence and conduct. The letter featured, among other matters, Rev Mercer's persistent belief that the SBA Courts were not ECHR compliant, his pursuit of this matter in the SBA Courts on behalf of defendants, and his request for sight of the 2001 opinion that he believed would throw light on the matter. The consequence of this letter was that Rev Mercer's career was damaged. Rev Mercer began Redress procedures against the Army in July 2007.
4. On 28th October 2012 Rev Mercer requested "*a copy of Counsel's opinion regarding the compatibility of SBA Courts with ECHR dated 2000/2001*". The MOD refused

¹And certain other UK civilians

this request relying upon s42(1) FOIA. They maintained this decision following a review in February 2013. The Appellant complained to the Commissioner who following an investigation upheld the use of this exemption.

The Appeal

5. Rev Mercer appealed against the Commissioner's decision on the grounds that the MOD were not entitled to rely upon privilege and the public interest was in favour of disclosure of the withheld information. The MOD was joined by the Tribunal on 14th March 2014. The evidence before the Tribunal consisted of an agreed open bundle of documentation including a witness statement from Mr Andrew Tranham (Deputy Head of Information Rights Team MOD). All parties made open submissions and the MOD and Commissioner also made some limited closed submissions. The Tribunal has had sight of the withheld information.

Legal Professional Privilege

6. S42(1) provides as follows:

Information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is exempt information.

7. This exemption is not absolute and is subject to the public interest test as set out in s 2(2) FOIA:

- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

8. The instructions to Counsel which formed part of the open bundle stated that:

“ the purpose of these instructions is to seek Counsel's advice on certain issues that have recently been raised by Service Lawyers based in the Sovereign Base Area.”

Rev Mercer's contention was that the legal advice was obtained by the MOD as an agent of the Army; the reference to the Service Lawyers was the MOD naming the person upon whose behalf they were professing to act. He argues that the Service Lawyers did not have a budget to seek such legal advice and if it was wanted they would have to go through the

MOD. On the basis that the advice was obtained to assist the Army who were operating the SBA system, he argues that it would be absurd if this advice was not made available to them. It is not the role of this Tribunal to determine whether having requested this information the MOD ought to have shown this to the Army and other Services.

9. In considering Rev Mercer's arguments the Tribunal also notes that in his letter of complaint to DAL5 dated 2nd April 2007 CBFC referred to:

"a UK Counsel, who is a specialist in ECHR matters and who was engaged by the SBA administration² to advise us on whether we are fully compliant".

10. We give greater weight to the wording of the instructions to Counsel than we do to the wording used by CBFC. The instructions are the primary document and state that Counsel is to advise the Ministry of Defence. Although CBFC's letter is consistent with the fact that Service lawyers had raised concerns which the 2001 Opinion was intended to address it was issued several years after the advice was sought and there was no evidence to suggest that he had seen the instructions.

11. We reject Rev Mercer's agency argument. The use of the words "Service lawyers" in the instructions implies that the issue was not just raised by the Army, but also the RAF and/or Navy. This is consistent with the MOD's contention that this issue went beyond the Army. The Tribunal accepts Mr Tranham's evidence that each of the 3 services has their own legal branch in addition to the MOD's Central Legal Services (CLS)³. Generally the service lawyers advise their own chain of command, however the practice has developed by agreement that when a cross-cutting issue arises affecting more than a single Service or raising wider issues for the MOD, it will be handled by CLS. The MOD argue that the issue affected all three Services and the wider MOD, as service personnel and their dependants as well as MOD civilians are all subject to the SBA Courts' jurisdiction. Consequently we accept that the advice was obtained by the MOD.

12. Whilst it might be argued that the Army (and other Services) have joint privilege since they raised the issue with the MOD, it was conceded on behalf of Rev Mercer that in these circumstances the MOD would still be entitled to exert privilege on their own behalf. Additionally we accept the Information Commissioner's argument that the terms

² Emphasis added

³ In 2000 -2001 CLS was known as MODLA (MOD legal advisors).

of s42(1) FOIA do not require the public authority to have the privilege themselves if they are holding the advice for another party in circumstances where confidentiality has not been lost. We are satisfied that the MOD have privilege and that even if privilege were held by the Army, the MOD would be entitled to rely on s42 in reliance upon the Army's right to claim LPP.

Waiver

13. Rev Mercer maintains that the MOD has waived privilege:

i. By discussing the 2001 Opinion with those outside an internal MOD audience e.g. the CBFC and the Chief Constable of the SBA.

We are satisfied that any such disclosure would have been for operational reasons and in circumstances of confidentiality. We are satisfied that this does not constitute waiver.

ii) By the letter to the Director of Army Legal Services from CBFC dated 2nd April 2007 in which CBFC states:

...[Rev Mercer] has written to DGLS, in effect demanding to see the opinion of a UK Counsel, who is a specialist in ECHR matters and who was engaged by the SBA administration to advise us on whether we are fully compliant. The opinion is that we are, and I am satisfied that the advice I have received from my AGLA and other professionals is correct and that we are compliant”.

He argues that this is a summary of Counsel's opinion and that in disclosing this, the confidentiality has been lost.

14. The MOD argue that it is unlikely that he would say “the opinion is that we are” when referring to a 2001 Opinion and that this must therefore be a reference to the consensus of opinion from CBFC's advisors. We disagree and consider that in the context of the sentence the natural meaning is that this is what CBFC understood the advice to say. However, from the evidence of Mr Tranham we accept that CBFC is unlikely to have seen the 2001 Opinion, the more normal practice would be that he had received a briefing. We also take into consideration that he is not a lawyer, the 2001 Opinion was by then 6 years old and the circumstances had changed since it was

obtained (there had been a review in 2002 and an audit in 2003 pursuant to which changes had been made to practice and a change in legislation in 2004).

15. Additionally the letter is headed “restricted-staff” and is from one serving officer to another. Its disclosure to Rev Mercer was in the context of his redress proceedings, themselves confidential, whilst he too was a serving officer. This has not been disseminated into the public domain. We agree for that reason that confidentiality has not been lost and privilege has not been waived.

Public Interest Balance

16. From DGLG v Robinson [2012] UKAACR 43 which reviewed the public interest rationale for protecting the confidentiality of legal advice, we accept that there is a strong public interest in non-disclosure of legally professionally privileged information. We adopt the approach as set out in DBERR v O’Brien and Information Commissioner [2009] EWHC 164 that there is an “in-built” public interest in withholding information to which LPP applies which commands significant weight:

“the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least”.

17. In addition to the significant public interest in favour of withholding the legal advice, we take into consideration the following:
- a) It is important that public authorities should be able to explore the parameters of a problem and the legal and policy implications of various solutions fully and candidly.
 - b) public authorities ought to be able to obtain legal advice from various sources and are not bound to accept legal advice they receive, if there are good reasons for not doing so.
 - c) Even if the legal advice is no longer sensitive at the date of disclosure e.g. because of the passage of time; any disclosure undermines the confidence that those seeking legal advice have in its confidentiality which is likely to impact upon the candidness

of instructions and the frequency that advice is sought, which is not in the public interest.

d) Disclosure would present an incomplete picture as it is not the total of the advice received, there has also been a review, an audit and subsequent advice given as referred to in the loose minute of 10th April 2007.

In favour of disclosure

18. Rev Mercer argues that the only issue between him and the Army in his redress proceedings was whether the SBA Courts were ECHR compliant. He maintains that obtaining the 2001 Opinion is essential to enable him to put his case because:
 - a) It will enable him to put his arguments from a position of knowledge,
 - b) If the 2001 Opinion shows that he was right, it strengthens his case,
 - c) The 2001 Opinion has been used against him and he needs sight of it to defend his case.

19. The MOD and Commissioner argue that this is a private interest rather than a public interest. Additionally at the date that the information request was being considered, the redress proceedings were concluded and following a Petition to the Queen she had chosen not to intervene. The Tribunal disagrees that this is solely a private interest, and take into consideration Three Rivers District Council v Governor and Company of the Bank of England [2004] UKHC 48 which stated:

“There is a strong public interest that... in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account...”

20. However, we have read the letter of complaint and the Army Board determination and the Report on the petition to the Queen and we are satisfied that the focus of the proceedings was not Rev Mercer’s view on ECHR compatibility (despite its relevance to the context and history of the dispute) but his conduct, judgment and management of professional relationships. We are supported in this conclusion by the fact that Rev Mercer’s RAF counterpart who apparently shared his legal opinion on this subject

was not subject to a similar letter of complaint. Although Rev Mercer argues inequality of arms, it is significant that the Army Board did not consider it necessary to (and therefore did not) see the 2001 Opinion⁴ as ECHR compliance of SBA Court proceedings was “*not [a matter] for determination by the Army Board*”.

21. It is unlawful for a public authority to act in a way which is incompatible with a Convention right. The argument is that disclosure is necessary to inform the public as to whether, and if so when, the SBA Courts became compliant. Whilst we agree that there is a strong public interest in the public knowing whether Courts are ECHR compliant, we are not satisfied that disclosure of the 2001 Opinion would fulfil this aim. This is Counsel’s opinion, it is not settled or binding law and hence not determinative. Additionally, at the date of the information request there had been a review and changes including legislative change in 2004 to incorporate the SBA into the ECHR and reforming the Court system in 2007. The Tribunal is satisfied that the facts and dates of amendments to practices and legislation go some way to meeting this transparency argument. A judgment in the Senior Judge’s Court of the SBA handed down on 27.11.2008 concluded that by that date the SBA arrangements were compatible with the ECHR, thus at the relevant date the settled law was that SBA Courts were compliant.
22. LPP cannot be used as an instrument of fraud⁵. Rev Mercer argues that there is an aura of suspicion around the 2001 Advice:

a) Although the advice was sought because of concerns raised by Service Lawyers, they were never allowed to see it, even though they were the ones who had to operate within the SBA system.

We have considerable sympathy with Rev Mercer and his fellow Service Lawyers who were seeking expert clarification in relation to concerns that they had raised about the SBA system. Having asked for this assistance, they were never given the answer that they had sought and it is clear from Rev Mercer’s submissions and actions at the time that he felt that he was having to operate in the dark. However, the transparency element of this argument is met because it is publicly known that the Service Lawyers were not shown the 2001 Opinion at the time it was obtained.

⁴ Paragraph 3 and 14 of the Army Board Decision and paragraph 26 of the report on the petition

⁵ *Williams v Quebrada Railway, Land and Copper Company* 1985 2 Ch 751

b) The MOD has stated that the advice is compliant but refused to disclose it⁶.

Whilst it is in the public interest that public authorities are transparent and the public are able to check the accuracy of their assertions, we repeat the arguments in paragraphs 13-15 above and in the closed annex as to waiver and the drafting of the letter of 2.4.07. In concluding that this is not a strong public interest in this case we take into consideration that legal advice is not determinative of the settled position in law, it can be expected to weigh the competing arguments and highlight the areas of vulnerability thus an Opinion is more than its conclusion.

c) Rev Mercer raises whether the information that has been disclosed (in the letter of 2.4.07) is misleading, asking why if the 2001 Opinion stated that everything was ECHR compliant why was there the need for a legal audit in 2003 and legislative change in 2004?

In assessing this argument the Tribunal has set out its reasons referring to the content of the withheld material in the closed annex. In assessing to what (if any) extent this is a factor in favour of disclosure on the facts of this case, it has applied the following general principles:

- i) that the Tribunal needs to consider the circumstances in which a statement is made,
- ii) its reliability,
- iii) the motivation for making it,
- iv) and the legal position at the date that the information request was being considered, at which time the settled case law was that the SBA was ECHR compliant (regardless of the contents of the 2001 Opinion).

23. Having regard to the open and closed material we are satisfied that there is no evidence of fraud. Having considered all the public interest arguments including the need to inform the public and the need for fairness to Rev Mercer, we are satisfied that the public interest in upholding LPP substantially outweighs the public interest in disclosure.

Conclusion

⁶ Rev Mercer is referring to the letter of 2.4.07

24. For the reasons set out above and in the closed annex we have determined that this appeal should be refused.

Dated this 11th day of July 2014

Fiona Henderson
Tribunal Judge