



Appeal number: EA/2018/ 0264

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

TONY NEWBERY

Appellant

- and -

**THE INFORMATION COMMISSIONER
BRITISH BROADCASTING CORPORATION**

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
Mr. ROGER CREEDON
Dr. MALCOLM CLARKE**

**Determined in public, the Tribunal sitting at Field House, London
on 30 January 2020**

**The Appellant appeared in person
The Information Commissioner did not attend
Kate Gallafent QC and Jason Pobjoy counsel for the BBC**

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The Appellant made a request to the BBC on 3 April 2018 for a copy of the 2004 *Balen Report*, which concerned the BBC's coverage of the Israeli-Palestinian conflict.
3. The Appellant acknowledged that a similar request has been extensively litigated by others previously, culminating in the Supreme Court's judgment in *Sugar (Deceased) (Represented by Fiona Paveley) v BBC and Another* [2012] UKSC 4¹. In that case the Supreme Court considered the scope of the 'derogation' from the Freedom of Information Act 2000 ("FOIA") for the BBC in respect of material held for the purposes of "*journalism, art or literature,*" pursuant to Part VI of Schedule 1 to FOIA.
4. The BBC refused the Appellant's information request on 27 April 2018, relying on the derogation. The Appellant complained to the Information Commissioner.
5. The Information Commissioner issued Decision Notice FS50746198 on 30 October 2018. She concluded at paragraph 20 of the Decision Notice that "*the Balen Report remains of significant editorial value to the BBC. The author of the report, Mr Balen, is regularly asked to provide guidance and context on the Report. It is held by the BBC's News Division and continues to be used by members of the BBC's News and editorial teams*". The Information Commissioner reached this conclusion in reliance on a letter from the BBC dated 10 September 2018. That letter includes a number of assertions made by the BBC's Legal Department but provides no supporting evidence. The Tribunal's copy of that letter was redacted so that we could not identify the author of the letter or form any impression of their seniority within the BBC or whether their expressed views were authoritative.
6. The Appellant's Notice of Appeal dated 26 November 2018 relied on grounds that the BBC's submission to the Information Commissioner presented an inadequate response to the issues raised in his information request and that the Information Commissioner had made her decision on the basis of a simplistic and incomplete interpretation of the *Sugar* judgment. In his additional representations, the Appellant referred to the Supreme Court's distinction between a "*work in progress*" and material held merely for "*archival*" purposes. He submitted that, given the passage of time and subsequent work on the subject, the Balen Report should now be regarded as archival material falling outside the scope of the derogation. The Appellant also referred in his submissions of 17 October to the First-tier Tribunal's Decision in *Tomlinson v IC* (EA/2014/0298), in which the BBC had successfully relied on the same derogation from FOIA.

¹ <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

7. The Information Commissioner's Response dated 13 December 2018 maintained the analysis as set out in the Decision Notice and did not provide the Tribunal with any witness evidence from the BBC. The Appellant asked the Tribunal to join the BBC as a party to the appeal, but his application was refused by the Chamber's Registrar. There was no application for reconsideration of that decision by a Judge.

8. Having convened to determine the appeal on the papers on 22 May 2019, the Tribunal decided that it would need to consider witness evidence from the BBC in order to determine the appeal. The Tribunal adjourned part-heard, making directions for the filing of witness evidence. The Appellant then asked for an oral hearing so that he could cross examine the BBC's witness. The BBC was subsequently joined as a party to the appeal and the matter was listed for an oral hearing on 30 January 2020.

9. The Information Commissioner sent written submissions but did not attend the hearing. The Tribunal is grateful to Mr Newbery and to Ms Gallafent and Mr Pobjoy for their helpful written and oral submissions. We reserved our Decision, which we now provide.

Preliminary Issue

10. Shortly before the hearing, the BBC amended its position so that it sought to rely, firstly on the derogation from FOIA outlined in *Sugar*, but in the alternative on the qualified exemption contained in s. 36 FOIA. It filed submissions and evidence in support of this new approach. The Tribunal asked the other parties to comment on the BBC's request and indicated that it would rule on the issue at the oral hearing.

11. The Information Commissioner's written submissions were: (i) that the BBC was entitled to rely on this late exemption before the Tribunal; (ii) that she was satisfied that s. 36 was engaged by the information requested; and (iii) that she was satisfied that the public interest favoured maintaining the s.36 exemption.

12. The Appellant did not object to the BBC's reliance on a late exemption but made clear his opposition to the BBC's substantive case as to s. 36 FOIA.

13. At the hearing, the Tribunal explained to the Appellant and the BBC's representatives that it was unhappy with the BBC's approach and invited further submissions from those present. The Tribunal explained that, because the BBC had initially relied on the derogation from FOIA in response to the request and had not at that point relied on any exemptions, it did not appear to have passed through the first stage of the information rights process described at paragraph [74] of the Upper Tribunal's Decision in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)². This meant that it had not yet complied with ss. 1, 2 and 17 of FOIA in respect of the information request made to it. It seemed to us that it must comply with these provisions before being entitled to raise a late exemption at an appeal by way of re-hearing before the Tribunal. Secondly, the Tribunal explained that the applicable time for the BBC, the Information Commissioner, and the Tribunal itself to assess the public

² https://assets.publishing.service.gov.uk/media/5ac3336440f0b60a4be86c2f/GIA_0447_2017-02.pdf

interest balance test would be the date on which the BBC complied with s. 1, 2 and 17 of FOIA by claiming reliance on an exemption, following the Upper Tribunal's Decision at paragraphs [61] to [73] in *Maurizi v IC and CPS* [2019] UKUT 252 (AAC)³. This date had not yet occurred.

14. Mr Newbery indicated that he would be content if the Tribunal did not consider the s. 36 issue at this hearing.

15. Ms Gallafent responded to the Tribunal's expression of concern as follows: the BBC had hoped to save time for all concerned by making clear its reliance on the exemption as an alternative to its primary case as to the derogation. She also noted that the BBC's proposal had the Information Commissioner's express support.

16. The Tribunal explained that it was surprised that the Information Commissioner had not raised an objection to the claiming of a late exemption in the circumstances of this case. Furthermore, it did not appear appropriate for the Information Commissioner to have formed a concluded view of the evidence without having heard the BBC's witness cross examined at the oral hearing. Finally, it did not appear appropriate for the Information Commissioner yet to have formed a conclusion about the public interest balancing exercise in s. 36 FOIA, given that the time for making that assessment had not yet arisen.

17. The Tribunal additionally expressed concern about the fact that, if the appeal were to proceed to consider s. 36 FOIA, the material withheld in reliance on that exemption had not been provided to it. Ms Gallafent explained that she had copies of the Balen Report available for the Tribunal, which would be the subject of a rule 14 application if the application to rely on s. 36 FOIA succeeded. The Tribunal outlined some further concerns as follows. If it were to consider that evidence and submissions in closed session excluding Mr Newbery, it would have preferred for the Information Commissioner's representative to be present in order to raise any matters in the closed session which Mr Newbery could not. We noted the Court of Appeal's description of the Information Commissioner's special role in *Browning v IC and DBIS* [2014] EWCA Civ 1050⁴ and also the requirements of the overriding objective.

18. In all the circumstances, the Tribunal decided to refuse the BBC permission to rely on s. 36 FOIA as a late-claimed exemption at the hearing of this appeal. We noted that, in responding to Mr Newbery's information request on 27 April 2018, the BBC had stated clearly that the requested information was excluded from FOIA by the derogation and that, if the Information Commissioner disagreed, "*exemptions under the Act might then apply*". It does not seem to us that such a response satisfies the first stage of the statutory journey which would ultimately permit the Tribunal to determine whether a late exemption could be relied on before us. We also conclude that the date for assessing the public interest in disclosing the requested information will arise as at the date of a s.17 FOIA Notice being

³ https://assets.publishing.service.gov.uk/media/5d8dec7ce5274a2fb7408487/GIA_0973_2018-00.pdf

⁴ <https://www.bailii.org/ew/cases/EWCA/Civ/2014/1050.html>

issued by the BBC in which it claims reliance on an exemption. Accordingly, we could not determine the engagement of a qualified exemption requiring us to decide the balance of public interest in the continuing absence of a s.17 Notice.

19. The appeal therefore proceeded to consider the derogation issue only. The Tribunal explained to the parties that, if it were to find that the derogation did not apply to the requested information, then the BBC would be directed to respond to the request on the basis that the derogation did not apply. Its response might then claim reliance on a s. 36 FOIA exemption, following which Mr Newbery would be entitled to make a fresh complaint to the Information Commissioner.

20. Having ruled on the preliminary issue, the Tribunal asked Mr Newbury if he would like the Tribunal to read the Balen Report for itself. We noted that in the *Sugar* litigation, the First-tier Tribunal had summarised the contents of the Balen Report and that at each stage of the onward appeals that description had been relied upon. It seemed to us that we could take the same approach. However, as the BBC had offered to provide the Balen Report to the Tribunal on terms as to its confidentiality, we could also accept that offer and read it for ourselves. Mr Newbery confirmed that he would like us to read the report for ourselves before reaching our decision. We confirm that we have done so.

21. Accordingly, the BBC having made an application under rule 14 of the Tribunal's Rules⁵, the Tribunal accepted into evidence the copies of the Balen Report brought to the hearing by Ms Gallafent. These were immediately held as closed material pursuant to rule 14 (7) of the Tribunal's Rules pending our formal determination of the BBC's application under rule 14 (6).

22. The Tribunal now directs that the three copies of the Balen Report provided to us at the hearing and the further copy provided by e-mail to the Tribunal administration are to be held as closed material pursuant to rule 14 (6) and may not be disclosed to the Appellant or any other person without the Tribunal's further Order. They comprise the withheld material for the purposes of this appeal. We are satisfied that it is fair and just to make this direction as disclosure of this information prior to the Tribunal's final decision would defeat the purpose of these proceedings.

The Law

23. In the *Sugar* case referred to above, the Supreme Court confirmed that the BBC was under a duty to communicate information on request only if it was held for purposes other than those of journalism, art or literature, pursuant to the Freedom of Information Act 2000 ('FOIA') s.7 (1) and Part VI of Schedule 1. As Lord Wilson described it:

“Although the British Broadcasting Corporation ('the BBC') is listed as a public authority in the Freedom of Information Act 2000, the Act, as I will call it, applies to the BBC only to a limited extent. The words of limitation are found in Part VI of

⁵<https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

Schedule 1 to the Act: they provide that the Act applies only ‘in respect of information held for purposes other than those of journalism, art or literature’.”

24. Where, as in this case, the Information Commissioner has issued a Decision Notice under s. 50 FOIA in respect of a dispute about whether Part VI of Schedule 1 applies to any requested information, there is a right of appeal against that Decision Notice to this Tribunal under s. 57 FOIA. The powers of the Tribunal in determining an appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

Evidence

25. The Tribunal received a witness statement from Mr James Stephenson, who is the News Editor for BBC News and Current Affairs. He attended the hearing for cross examination by Mr Newbery and also answered some questions from the Tribunal. We are grateful to him for his assistance.

26. Mr Stephenson’s witness statement explained that he has been employed by the BBC for thirty years and has occupied his present role for five years. Previously, he was Head of BBC World News 2013-2014; editor of BBC News at Six and Ten from 2009-2013; Middle East Bureau Chief 2007-2009. He was Chairman of the Foreign Press Association for Israel and the Palestinian Territories in 2009.

27. Mr Stephenson described the Balen Report as follows:

10. The Balen Report was commissioned by Richard Sambrook in 2003 and as drafted in 2004....

11. The Report examined the BBC’s news coverage of the Middle East, including the Israeli-Palestinian conflict and made recommendations directed towards improving BBC journalism and programme content in this area. The Report includes information about complaints-handling, language, tone and context; all of which are important editorial considerations in reporting on the complex and sensitive on-going issues surrounding the Conflict. The Report is of continued relevance to BBC News as the

recommendations and lessons drawn from it continue to...form the basis for BBC News' approaches to reporting on the Middle East.

...

13. Malcolm Balen holds an electronic copy of the Report. When a member of the BBC News team who does not already have a copy of the Report wishes to review the Report, they contact him.....

...

15. In my view, the Report has continued relevance for newsgathering and reporting on the Middle East and the Conflict in two ways.

16. First, the essential nature and the parameters of the Conflict have not changed since the Report was authored. Key issues remain the same, for instance, how and when to report the causes of the Conflict when reporting on individual acts of violence and the journalistic issues raised by the asymmetry between the political and military position of Israel on one hand and the Palestinians in the West Bank and Gaza on the other.

17. Second, there continue to be lessons drawn from the Report that impact on how the BBC reports on the Conflict. These lessons about language, tone and context contribute to a shared understanding in BBC News of how current and future coverage of the Conflict should be presented.

...

21. In my view the Report is of continued editorial significance and is not held for 'purposes other than those of journalism, art or literature'.

28. Cross examined by Mr Newbery, Mr Stephenson's evidence was that he had first read the Balen Report on taking up his role as Middle East Bureau Chief in 2007. He said he remembered being advised to read it when he took up that post and that it was made available to him at that time, not previously. He said he did not know how many journalists and editors who were consulted by Malcolm Balen in writing the Report still worked at the BBC. He was not aware of any current guidelines for BBC staff which referred to the Balen Report. He thought that disclosure of the Report would cause embarrassment to the BBC and that the journalists referred to in the Report would feel undermined by its disclosure. Mr Stephenson said that he did not regard the Balen Report as a document only used to re-visit past events and that many dimensions of the Conflict remained the same, for example, the Report had been written at a time of tension between the Israeli Government and the BBC, and the Israeli Government had made a new complaint to the BBC about its reporting only last week.

29. In answer to questions from the Tribunal, Mr Stephenson said that Malcolm Balen holds the Report in electronic format and that if he is asked by someone sufficiently senior in the BBC, he will send them a copy. If he is asked by someone junior, he will ask why it is needed and check with senior staff before deciding whether they can see it. Mr

Stephenson said he could not say how many times Mr Balen has been asked for a copy of the Report, and no record of requests is kept.

30. Asked what criteria Mr Balen applied before deciding whether to disclose the Report to a requester, Mr Stephenson said that Mr Balen used his own judgement. Asked for an example of the circumstances which Mr Balen would find compelling, Mr Stephenson said that the appointment of new Bureau Chief would be an example. He said the Report was used internally on a “need to know” basis” in view of its sensitivity.

31. Asked by the Tribunal how BBC staff became aware of the Balen Report, Mr Stephenson said that he had become aware of it from the *Sugar* litigation. He said that BBC staff know that Malcom Balen is an authority on the issues in the Report and that he is still consulted, albeit infrequently. He thought that requests for the Report itself would be rare as staff would go directly to Mr Balen for advice. Asked what would happen when Malcolm Balen was no longer available, he said he didn’t know.

32. In re-examination, Mr Stephenson described the Balen Report as containing a level of candour that you would expect from an internal report examining journalistic practice. The publication of extracts from it taken out of context would cause embarrassment to the BBC in his opinion.

33. Asked about the BBC’s letter to the Information Commissioner, which said that Mr Balen was ‘regularly asked to provide guidance and context on the Report’, Mr Stephenson said that Mr Balen was regularly consulted about the context for Middle East reporting and that there was a ‘*very strong connection*’, or a ‘*straight line*’ between the Report and the advice given even today, as so many of the issues remained the same. He regarded the Balen Report as comprising a stand-alone document but also part of a body of work.

34. As an example, he said that the use of particular language can generate complaints. A guide to the use of language had been prepared subsequently. However, the Report itself considers this issue and Mr Balen’s advice draws on the Report’s findings. He said that, as an example of the Report’s continuing utility, the eventual successor to Jeremy Bowen (Middle East Editor) would want to read the Report and the BBC would want them to read it.

Submissions

35. Ms Gallafent reminded the Tribunal that the issue before the Supreme Court in *Sugar* was the question of whether there was a ‘dominant purpose’ test for the engagement of the derogation, so the distinction between current or archival value was not their Lordships’ main consideration. She submitted that Lord Phillips’ judgment at [67] referred to ‘*an immediate object*’ of holding the information in the sense of describing its directness of purpose and that he did not intend the temporal meaning for which Mr Newbery now contended. She compared it with describing one’s ‘immediate family’. She submitted that the Tribunal should not therefore ask itself whether the Balen Report would be consulted today, but rather whether it was immediately connected with the BBC’s journalistic purpose.

36. Ms Gallafent referred the Tribunal to Lord Wilson’s judgment at [39] in which he approved the Information Tribunal’s identification of three limbs of journalistic purpose for the purposes of the derogation thus:

“first, the collecting, writing, and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and third, the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists. In relation to the third type, the Tribunal added...

‘Self-critical review and analysis of output is a necessary part of safeguarding and enhancing quality. The necessary frankness of such internal analysis would be damaged if it were to be written in an anodyne fashion, as would be likely to be the case if it were potentially disclosable to a rival broadcaster’.”

37. She also pointed to Lord Brown’s endorsement of this approach in his judgment, having added at [102] *“...to a rival broadcaster (Or, one may add, to anyone else)”*.

38. Lord Wilson at [44] described the purpose of the Balen Report as to *“...enable the BBC to monitor its coverage of the conflict with a view to its making any and all such changes as might further secure its impartiality”* which, in Ms Gallafent’s submission, located the Balen Report firmly within the third limb of the three-part test.

39. Ms Gallafent submitted that the process of self-analysis and review was an important aspect of journalism and that, as the Supreme Court had recognised, frankness was an important part of that process. She submitted that it would be harmful to the broadcasting function of the BBC to disclose a report which served that function. In undertaking the necessary fact-sensitive analysis, she urged the Tribunal to accept Mr Stephenson’s evidence about the risks of the Report being quoted out of context in a situation where many of the issues considered in the Report remain of contemporary sensitivity and significance. She submitted that his evidence on this point provided a complete answer to Mr Newbery’s case.

40. Whilst Lord Phillips at [66] had quoted Lord Neuberger’s *“Today’s news, tomorrow’s archive”* phrase from the Court of Appeal’s consideration of the issue, Ms Gallafent submitted that he had there referred to the first limb of the tri-partite definition of journalism, and not to the third category in which the Balen Report undoubtedly lies. She described the nature of any third-limb output review as retrospective, but its purpose as prospective in improving standards going forward. She relied on Mr Stephenson’s evidence about the use to which the Balen Report would be put on the eventual appointment of a new Middle East Editor and submitted that this was far removed from Lord Mance’s reference at [112] to archival material being *“material not envisaged as having any current purpose, but stored for historical purposes or against the possibility of some unforeseen need to revisit, or produce evidence of, past events. A library maintained for current reference would in contrast contain material held for the purposes of journalism, art or literature”*.

41. Mr Newbery relied on Lord Phillips' judgment at [65], in which he referred to applying a purposive test of whether the BBC's broadcasting function would be affected by disclosure. In making his request fourteen years after the production of the Balen Report, Mr Newbery argued that an "*immediate object*" of holding the Report could no longer be journalistic. He understood the meaning of "*immediate*" in this context to be temporal, in view of the discussion of archival value elsewhere in the Supreme Court's decision.

42. In his submission, the Balen Report should be regarded as held for archival purposes within the definition of that term given by Lord Mance (see paragraph 40 above). He submitted that the Report deals with events as at 2004 so would not be relevant to the current situation in the Middle East. In view of the passage of time, Mr Newbery submitted that the Balen Report should no longer be regarded as held for journalistic purposes, in any sense, as subsequent reports have since replaced it. If, as he submitted, the Report was now held for archival purposes, then it did not fall within the derogation.

43. Mr Newbery did not agree with Mr Stephenson's evidence that the BBC's broadcasting function would be damaged by disclosure of the Report. He thought that journalists were more robust than Mr Stephenson had suggested and could not be described as 'shrinking violets'.

44. Mr Newbery was critical of the BBC's presentation of its case to the Tribunal. He submitted that it should have been able to produce evidence of the e mails requesting the Report, and minutes of meetings where it was discussed. He thought that Mr Balen himself should have given evidence. He said that he drew an adverse inference from the absence of such evidence, as ample examples of the Balen Report's relevance as at the time of his request should have been available. He argued that the BBC's broadcasting function included retaining the confidence and trust of the public and that it should promote transparency, openness and accountability, as required by its Charter, in disclosing the Report.

Conclusion

45. Lord Brown at [106] said that "*As for the point at which information will cease to be held to any significant degree for the purposes of journalism and become held instead, say, solely for archival purposes, that necessarily will depend on the facts of any particular case and involve a question of judgment....the central question to be asked...will be ...whether there remains any sufficiently direct link between the BBC's continuing holding of the information and the achievement of its journalistic purposes*".

46. Having now read the Balen Report for ourselves, we note that its content is consistent with Mr Balen's transcribed evidence about it to the original Information Tribunal as quoted at [54] of its 2006 Decision⁶, as follows:

⁶ EA/2005/0032

“I was concerned in my report to do two things: one was to examine the pattern of the complaints against the BBC and, if you like, examine the coverage of what I was reviewing through the filter of those complaints, to see whether I thought the complaints were justified or not, not individual complaints but the pattern of them. I was also examining, over time, a considerable amount of BBC output to see what it added up to over time, how those individual decisions, those journalistic decisions, on a daily basis, what they amounted to in their totality”.

47. This evidence, and our own reading of the Report, has satisfied us that it falls within the third limb of journalistic output as defined by the original Information Tribunal. The Supreme Court also made this finding. That being the case, a purposive construction of the derogation will, as Lord Phillips decided, protect from disclosure information which would risk interfering with the broadcasting function of the BBC.

48. We found Mr Stephenson to be a credible witness, especially in view of his long service in the BBC, his seniority, and his familiarity with the BBC’s reporting on the Middle East. Given that Mr Balen still works for the BBC and retains a central role in advising on Middle East reporting, providing copies of his Report to senior colleagues, we were surprised that we were not afforded the benefit of his own witness evidence. Nevertheless, we accept that Mr Stephenson’s role enabled him to give relevant evidence. We accept Mr Stephenson’s evidence that the Balen Report has a current value and utility in being consulted from time to time, albeit that, surprisingly, there is no system which allowed him to say how often it is consulted. This may explain the contradiction between the BBC’s written evidence which describes consultation as regular, and Mr Stephenson’s evidence that it is infrequent. However, we accept his evidence that it forms the basis for Malcolm Balen’s provision of advice to the BBC when necessary, and that it both stands alone and also forms part of a body of work reviewing and seeking to improve the BBC’s journalistic output. That being the case, it does not seem to us that it can be said to fall within Lord Mance’s definition of an archived document which exists for no current purpose but is stored against the possibility of some unforeseen reason to consult it. On the contrary, Mr Stephenson gave us an entirely foreseeable and persuasive example of the need to consult it in the future, when there will at some point be a new Middle East Editor.

49. Having read the Report for ourselves, we also accept Mr Stephenson’s evidence that it is expressed in candid terms which, if disclosed and taken out of context, would be likely to damage the BBC’s journalistic function.

50. We agree with Ms Gallafent that the Supreme Court was not primarily concerned in the *Sugar* litigation with the distinction between current and archival material but with the directness of the connection between the requested information and its journalistic purpose. For this reason, we have concentrated on its main analysis of the directness of purpose for which the Balen Report is held. Despite the passage of fourteen years between the preparation of the Balen Report and Mr Newbery’s request, we are satisfied that there was at the time of the request a sufficiently proximate relationship between the Balen Report and the BBC’s journalistic purpose that the derogation from FOIA applied to the requested information.

51. We make this finding on the basis of the evidence presented to us at the hearing of this appeal, taking into account the reliance on the Report by Mr Balen in giving advice and its utility for future senior staff. Whilst we doubt that the Information Commissioner had sufficient evidence before her to justify the conclusions reached in the Decision Notice, we nevertheless conclude that the Information Commissioner was correct to find in her Decision Notice that s. 7 (1) and Part VI of Schedule 1 to FOIA applied to the requested information.

52. Mr Newbery also relied in his grounds of appeal on the First-tier Tribunal's Decision in *Tomlinson*. We are not bound to follow decisions of differently constituted panels of the First-tier Tribunal and we did not find that argument persuasive. However, we noted that in *Tomlinson* the Tribunal heard witness evidence from the BBC before deciding that the derogation was engaged. We agreed with that approach and also took the view that that evidence should be provided to us in this case. In the words of Lord Walker at [84] of *Sugar*, there cannot be any unequivocal, bright-line test of these matters, so it seems likely that any Tribunal in future would need to consider evidence in order to make a determination in a case where the derogation is relied upon, given the importance and the highly fact-sensitive nature of the issues to be decided.

53. For all these reasons, we now dismiss this appeal.

(Signed)

ALISON MCKENNA

DATE: 10 March 2020

CHAMBER PRESIDENT

PROMULGATED: 12 March 2020