NCN: [2022] UKUT 60 (AAC)
IN THE UPPER TRIBUNAL **Appeal No. GIA/51/2021**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Tribunal: First-tier Tribunal (Information Rights) – General Regulatory Chamber

Tribunal Case No: EA/2019/0275
Tribunal Venue: CVP video hearing on 23 September 2020

FTT Decision Date: 21 October 2020

Between:

ROBIN CALLENDER SMITH

Appellant

- v –

(1) THE INFORMATION COMMISSIONER

(2) THE CROWN PROSECUTION SERVICE

Respondents

Before: Upper Tribunal Judge Jones

Hearing date: 12 January 2022
Decision date: 18 January 2022

Representation:

Appellant: Appeared in person
First Respondent: Did not appear nor participate
Second Respondent: Mr Adam Heppinstall QC, instructed by Government Legal Department on behalf of the Crown Prosecution Service

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 21 October 2020 under number EA/2019/0275 was not made in error of law and is confirmed.

REASONS FOR DECISION

Introduction

1. The Appellant (Professor Robin Callender Smith) appeals the decision of the First-tier Tribunal (General Regulatory Chamber) – Information Rights - ("the FTT") dated 21 October 2020.

2. The FTT (Judge Stephen Cragg QC) allowed an appeal by the Crown Prosecution Service (the 'CPS', the Second Respondent to this appeal) against a decision of the Information Commissioner (the First Respondent to this appeal) dated 4 July 2019.

3. The Information Commissioner had decided that the CPS should disclose to the Appellant information he had requested in October and November 2018 relating to the discontinuance of the trial of Paul Burrell. Mr Burrell had been acquitted at the Central Criminal Court in 2002 on three charges of alleged theft of items from estate of the late Princess Diana. Specifically, the Appellant sought the legal advice relating to the competence and, as a separate matter, the compellability of the Sovereign (in this case the Queen) to give evidence at the trial.

4. The Information Commissioner accepted that the exemption for Legal Professional Privilege ('LPP') under section 42 of the Freedom of Information Act ('FOIA') was engaged in relation to the requested information because it was legal advice. However, she decided that 'there was a 'stronger public interest in the public knowing about the competency and compellability regarding whether the Sovereign can be called as a witness in court proceedings (paragraph 45 of the Decision Notice), then the public interest in withholding the information.'

5. The FTT allowed the appeal and decided that the CPS was not required to disclose the advice (the requested information) because, while the exemption for LPP under section 42(1) of FOIA was engaged, the public interest did not favour disclosure. It held that 'the Commissioner erred in finding that the public interest in disclosure outweighed the significant in built' public interest in non-disclosure demanded by the case in-law in s.42 FOIA cases' [48]. The FTT decided that the 'public interest in disclosure, based largely on transparency, accountability, lack of prejudice, and the constitutional importance of the issue, was not strong enough to equal or override that significant in built public interest [against disclosure of LPP], even in a case where [the FTT was] prepared to accept that little or no prejudice would have been caused by disclosure'.

6. The Appellant appeals to the Upper Tribunal, with permission, arguing that the FTT erred in law in striking the balance of competing public interests and failed to give sufficient weight to the public interest factors in favour of disclosure.

The hearing

7. On 12 January 2022, I held an oral hearing of the Appellant 's appeal using the online video platform, CVP. The parties had consented to this form of hearing and I was satisfied that it was in accordance with the overriding objective, just and fair, to proceed in this manner. The parties were able to participate fully in the hearing and make oral submissions in addition to the written arguments they had previously lodged.

8. The Appellant appeared in person. The Second Respondent, the Crown Prosecution Service, was represented by Mr Adam Heppinstall QC. The First Respondent, the Commissioner, did not participate in the hearing or proceedings but had not been required to do so. She filed no written submissions in respect of the appeal.

9. I am grateful to both Mr Heppinstall QC and the Appellant for the quality of their written arguments and the skill with which they made their oral submissions.

The Request for information

10. On 12 October 2018 the Appellant wrote to the Crown Prosecution Service (the CPS) and requested information in the following terms:

"*This FOIA request is for the legal grounds - redacting any personal or sensitive personal data - contained within any Treasury Counsel's Opinion on the discontinuance of the trial of Paul Burrell at the Central Criminal Court in 2002."*

11. On 2 November 2018 the CPS contacted the Appellant and asked him to clarify whether he was asking for Treasury Counsel's opinion or advice regarding the discontinuance. The complainant responded on the same day, providing the following clarification:

"The narrow issue of interest in this FOIA request - and this may be reflected in both Treasury Counsel's Opinion as well as the advice given on discontinuance - is the law relating to the competence and, as a separate matter, the compellability of the Sovereign (in this case The Queen) to give evidence at the trial. The leading case on this issue - which may or may not have been considered in the Opinion and/or advice on discontinuance, is R v Mylius (1911). This issue, which arose during the course of the case, may not have been part of Treasury Counsel's original opinion. It is likely, however to have been part of the advice given on discontinuance."

12. The CPS provided its full response on 12 November 2018. It explained that it was withholding the information, citing the exemption under section 42(1) of FOIA (for LPP).

13. Following an internal review, the CPS wrote to the Appellant on 20 November 2018, upholding it original decision.

The Information Commissioner's Decision

14. In its Decision Notice Reference (FS50803813 dated 4 July 2019), the Information Commissioner decided that although the LPP exemption under section 42(1) of FOIA was engaged, the public interest favoured disclosure of the requested information. She considered that the balance of public interest factors weighed in favour of disclosure, concluding the Decision Notice at [35]-[46] as follows:

'Balance of the public interest arguments
35. The Commissioner considers that the public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice which is turn fundamental to the administration of justice.
36. However, the Commissioner does not consider that the public interest considerations need to be exceptional in order to overturn the strong public interest in maintaining the exemption. She notes that in the information tribunal decision of *Crawford v Information*

Commissioner & Lincolnshire County Council (EA/2011/0145) it was held that there must be *"clear, compelling and specific justification that at least equals the public interest in [maintaining the exemption]…"* and in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* (EA/2005/0023) it was held that *"….At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."*

37. The Commissioner has therefore attached appropriate weight to the view that there is a significant public interest in not undermining the ability of a public authority to freely seek and receive frank legal advice in future. She considers that freely seeking and obtaining frank legal advice is crucial to a public authority's ability to make informed and legally supported decisions.

38. The Commissioner also accepts that there is a need for confidentiality between lawyers and their clients so that advice can be given freely without fear of intrusion.

39. Having considered the legal advice, she notes that it relates to what the CPS can and cannot compel the Sovereign to do in terms of calling her as a witness in court proceedings. She accepts that the CPS has the right to take legal advice on this issue.

40. Additionally, the Commissioner notes that the CPS has confirmed that it considers that the legal note is still current. She considers that this is a strong argument in favour of maintaining the exemption.

41. However, the Commissioner notes that the legal note is 17 years old. In addition, she notes that it is general in nature and does not make any direct reference to the court proceedings in question.

42. The Commissioner also gives weight to the fact that the CPS is the public authority entrusted with the prosecution of criminal offences. She considers that there is a strong public interest in understanding the advice which the CPS received in relation to compelling the Sovereign to appear as a witness in criminal proceedings which is still considered current. The Commissioner is not aware that the CPS has published a policy or any guidance on this issue.

43. Furthermore, the Commissioner the notes the CPS' points about transparency. She considers that the CPS is expected to be transparent about in its approach to criminal proceedings.

44. The Commissioner also notes that the request is asking for information about the competency and compellability of the Sovereign to give evidence in court proceedings as opposed to asking for information about the Queen as an individual. The Commissioner considers that there is a strong public interest in this issue.

45. As explained in paragraph 35, the Commissioner considers that the public interest inherent in this exemption will always be strong. However, she considers that in the circumstances this particular case,

there is a stronger public interest in the public knowing about the competency and compellability regarding whether the Sovereign can be called as a witness in court proceedings.

Conclusion

46. Taking all of the above into account, the Commissioner is satisfied that section 42(1) is engaged in this case. However, she considers that the public interest in maintaining the exemption is outweighed by the public interest in disclosure.'

The FTT Decision

15. In its decision dated 21 October 2020, the FTT allowed the CPS's appeal from the Information Commissioner's decision and decided that the requested information should not be disclosed. It decided that the exemption under section 42(1) FOIA was engaged and the public interest balance did not favour disclosure. The operative parts of the FTT's decision are as follows:

‘22. It was argued that the advice note was not general as it was obtained specifically in relation to the case referred to in the request, and that the age of the advice was not a relevant circumstance. The CPS argued that Halsbury’s Laws of England set out the legal position on the specific question on the compellability of the Sovereign, and so the public interest in the advice received by the CPS is lessened as a result. It is said that the withheld information ‘does not advance the learning of the law’ beyond what can be gleaned from the textbooks, and that the issue about the compellability of the Sovereign is very rarely raised in any event.

…..

29. Mr McGill also gave evidence in open session in the case which supported the contents of his witness statement. He confirmed that the advice in question was, in fact, from senior treasury counsel and had been requested by the then Director of Public Prosecutions (DPP). This detail had previously been redacted from the documentation and so the information was opened to Prof Callender Smith, together with the CPS concern, expressed in the redacted part of paragraph 2 of the CPS skeleton argument that ‘at the heart of this appeal’ was the question ‘if Senior Treasury Counsel’s Advice on a matter such as the present cannot be kept out of the public domain – what hope is there for a Prosecuting Advocate’s Advice in a ‘run of the mill’ prosecution in a local crown court?’.

SUBMISSIONS AND DISCUSSION

32. Mr Heppinstall for the CPS emphasized the test set out in paragraph 53 of the *DBERR* case (see paragraph 12 above) and supported the evidence of Mr McGill.

33. Mr Perry, for the Commissioner, emphasized the main public interest arguments relied upon by the Commissioner in the decision notice (see paragraph 16 above). These can be summarized as relating to accountability and transparency in decision making, especially where the advice in question has been obtained with public funds. Mr Perry augmented these reasons on behalf of the Commissioner by referring to the constitutional importance of the issue, the passage of time since the advice was provided, the fact that the advice provides something akin to the CPS policy on the issue in question, and that no prejudice, in his submission, would be caused by disclosure.

34. Mr Perry accepted the formulation of the test to be applied in s42 FOIA cases, as set out in the *DBERR* case, but also argued that the ‘in-built’ significant weight to be given to LPP could change depending on the particular circumstances in which the advice was given.

35. However, in my view there is nothing in the case law to which I have been taken which indicates that the ‘in-built’ significant weight can vary from case to case. The approach I have to take is to recognize that there is a significant in-built public interest in non-disclosure in LPP cases under s42 FOIA, as the court said in *DBERR* paragraph 53, ‘in any event’. As the court indicated in paragraph 51 of that case it is ‘not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question’.

36. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then consider whether the public interest in disclosure is equal to or outweighs those combined factors.

37. In relation to other factors which support non-disclosure, it seems to me that the CPS has overegged its position in this appeal. It is argued that extra weight should be given to the public interest in non-disclosure because this was advice sought by the DPP from senior treasury counsel. It is also argued that the particular nature of advice from prosecuting advocates in criminal proceedings should provide additional weight.

38. These factors may be worthy of a degree of additional weight, but the answer to the CPS question in its skeleton argument, set out above ('what hope is there for a Prosecuting Advocate's Advice in a 'run of the mill' prosecution in a local crown court' if this advice from senior treasury counsel cannot be kept out of the public domain) is, in my view, straightforward. Each case has to be considered on its own merits where a request for disclosure is made, and the public interest for and against disclosure also considered in each case. As in this case, those issues can then be considered by the Commissioner and this Tribunal, and no absolute guarantee can be given to any prosecuting advocate that the public interest would not lead to disclosure. The fact that there may be particular factors in a case which leads to disclosure under FOIA does not undermine the principle of LPP in other cases where different factors may be important.

39. As well as possible disclosure under FOIA Mr McGill explained, there are times when the CPS discloses advice from prosecuting advocates in the context of civil litigation or a public inquiry. Prosecuting advocates, therefore, are also at risk that advice from a particular case might be disclosed by the CPS for those purposes. An example in the case of *Mouncher v South Wales Police* [2016] EWHC 1367 (QB) was given by Mr McGill, and it can be seen in section 4 of the long judgment in that case that extensive reference is made to prosecuting counsel's written advice as well as advice provided in face to face meetings with the CPS. This example was presented to illustrate that the CPS does not advocate a blanket ban on disclosure of advice from prosecuting counsel, but it also illustrates that prosecuting advocates will be aware that there are indeed other occasions apart from the FOIA scheme where the contents of advice might be disclosed.

40. In my view if the advice in this particular case were disclosed it would have very little or no chilling effect on prosecuting advocates advising on cases in 2020, 'run of the mill' or otherwise, even on the basis that this was advice sought by the DPP from senior treasury counsel in a case of significant interest. This is a very specific advice on a point of law from many years ago and it has been acknowledged that no reference in it is made to any particular prosecution or defendant (although I accept that it was obtained with a particular prosecution in mind). Prosecuting advocates in live cases today would, in my view, recognize the special factors in this case and would continue to provide robust and independent advice in accordance with their professional duties and the Faquharson guidelines.

41. However, the fact that I am sceptical about the strength of the CPS claimed additional factors in support of the public interest in non-disclosure, does not necessarily lead to a conclusion that the advice should be disclosed. Indeed, it is my view that the public interest in disclosure is not at least equal to or greater than the 'in-built' public interest in non-disclosure. I accept the submission made by the CPS that the public interest factors in favour of disclosure raised by the Commissioner do not, in fact, add up to very much.

42. In relation to the constitutional importance of the case as emphasized by Mr Perry, it should be noted that in *Corderoy* the Upper Tribunal at paragraph 76 found that: -
'The importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on the one hand and the arguments in favour of transparency and fully informed debate on the other'.

43. Thus, the fact that the advice sought was on an issue of constitutional importance, can provide an additional public interest reason for non-disclosure as well as a reason for disclosure.

44. Mr Perry also relied on the fact that no prejudice would be caused if there were disclosure of this document, as an issue which added to the public interest in favour of disclosure. He referred as a summary of the factors supporting this to paragraph 41 of

Commissioner's decision which states that '…the legal note is 17 years old…it is general in nature and does not make any direct reference to the court proceedings in question'.

45. As indicated above, I largely accept that argument that no prejudice will be cause by disclosure of the advice, and I think that the possibility of disclosure in this case leading to any kind of opening of floodgates would be very unlikely, or that disclosure in this case would risk a miscarriage of justice. However, I also note, as explained above, that no prejudice has to be identified for the 'in-built' public interest in non-disclosure in LPP cases to apply.

46. I accept that the length of time since the advice was provided is also a factor which could be of some importance. However, there is nothing in the case law which suggests that the age of the advice lessens the 'in-built' public interest in non-disclosure. It might be that the age of the advice would lessen the 'additional factors' relied upon by the CPS but, as set out above, I have given those little weight in any event. I also accept that if the advice provided is still current (as it is said to be in this case) and about an issue that is still said to be live, then the fact that the advice was provided some years ago is not a factor which would point towards disclosure.

47. I also do not agree that the advice, even if it is current, amounts to a CPS 'policy' on the issue in question which elevates the public interest in disclosure. It remains legal advice (albeit paid for by the public purse) and, as the CPS argue, anyone is entitled to obtain their own advice on the issue, taking into account, if thought relevant, the additional Article 6 issues raised by Prof Callender Smith.

48. In the end, despite Mr Perry's best efforts on behalf of the Commissioner, it is my view that the Commissioner erred in finding that the public interest in disclosure outweighed the significant 'in-built' public interest in non-disclosure demanded by the case-law in s42 FOIA cases. For the reasons set out above the public interest in disclosure, based largely on transparency, accountability, lack of prejudice and the constitutional importance of the issue, was not strong enough to equal or override that significant 'in-built' public interest, even in a case where I am prepared to accept that little or no prejudice would have been caused by disclosure.

49. That finding is sufficient to dispose of the appeal in favour of the CPS…'

The Law

The exemption under Section 42 of FOIA for LPP material

16. Section 42 FOIA states that information in respect of which a claim to legal professional privilege (LPP) could be maintained in legal proceedings is exempt information. Section 42(1)(a) FOIA reads, materially, as follows: -

42.— Legal professional privilege.
(1) Information in respect of which a claim to legal professional privilege… could be maintained in legal proceedings is exempt information.

17. In this case it is not in dispute that s42 FOIA applies to the requested information. The Commissioner addressed the issue in the decision notice at [18]-[23] as follows: -

18. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for

litigation. It covers communications between lawyers and third parties, as long as they are made for the purposes of the litigation. Litigation privilege applies to a wide variety of information, including advice, correspondence, notes, evidence or reports.
…
21. The CPS explained that the withheld information was provided for the purposes of litigation, including communications with third parties, as the dominant purpose of the communication was to assist in the preparation of litigation.
22. The Commissioner has reviewed the withheld information which is a legal note about the competency and compellability of the Sovereign to be called as a witness in court proceedings. She is satisfied that the information is held for the dominant purpose of assisting in proposed litigation and therefore attracts legal professional privilege.
23. Taking everything into account, the Commissioner considers that section 42(1) is engaged.

18. However, s.42 is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.

The public interest test

19. Wyn Williams J gave the following guidance in relation to the application of the public interest test in s42 FOIA cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, [41 & 53]:

'41. … it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.
…
53 In my judgment that paragraph is a clear indicator that the Tribunal failed to attach appropriate weight to the exemption. The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, 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.'

20. Further, in *O'Brien* at [51], Wyn Williams J made clear that the "significant weight" inherent in section 42 is to be taken into account in addition to any case-specific factors, and that general factor arises without the need "*to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question."*.

21. As the FTT noted in this case at [35], citing [53] of Wyn Williams J's judgment in *O'Brien*, the inherit weight is to be taken into account "in any event", it "*will always*

have to be considered in the balancing exercise". Indeed, as in *O'Brien,* a failure to put it on the side of the scales against disclosure, would be an error of law.

22. In *DCLG v IC & WR [2012] UKUT 103 (AAC) ('DCLG')* at [36-41], a three judge panel of the Upper Tribunal (including Judge Turnbull and Carnworth LJ, SPT) set out the fundamental principles surrounding legal advice privilege, which is the species of LPP which applies in the present case (which also applies to legal advice given to public bodies, see [40], with which this case is concerned – the advice of Senior Treasury Counsel to the Director of Public Prosecutions).

23. The Panel, in *DCLG*, quoted from the well-known judgment of Lord Taylor CJ in *R v Derby Mags Court ex parte B* [1996] AC 487 at 507Dff in relation to LPP:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

24. The Panel continued:

'Lord Taylor went on (at p. 508C) to reject a submission that, by analogy with the doctrine of public interest immunity, there might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance:

"But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."

As Lord Lloyd said in the Derby case (at p.509D):

"….the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege, unless, of course, the privilege has been waived."'

25. It is due to the fact that legal professional privilege is a fundamental condition on which the administration of justice as a whole rests, that it is afforded an "inherent weight" when it arises in Environmental Information Rights ('EIR') (the *DCLG* case was a EIR case) and FOIA cases.

26. The panel in *DCLG* went on to consider how privilege is dealt with in FOIA cases, citing Wyn Williams J in the *O'Brien* case (and thereby giving that judgment three-judge panel approval). In *O'Brien*, Wyn Williams J, made clear that whilst *"the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise"* this must not cause section 42 *"to be elevated "by the back-door" to an absolute exemption"*. The panel itself noted that *"although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption"* [44].

27. The panel went on to give further guidance [45/46]:

'Mr Bates accepted that the weight which should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of LPP, may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to matters still current. We consider that he was right so to accept.

The jurisprudence of the FTT further indicates that the factors in favour of maintaining the exemption are not necessarily limited to the general one just indicated, but may include the effect which disclosure would have in the individual case. For example, if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the authority's advice, without affording the authority the same advantage: West EA/2010/0120 (15 October 2010), at [13(5)].'

28. When considering "inherent weight", in *Cabinet Office v Information Commissioner* [2014] UKUT 461 (AAC) at [50] Judge Turnbull said that:

"Usually, if not always, the contention that an exemption carries "inherent weight" involves the contention that, regardless of whether there is any prejudice to the public interest as regards the particular policy or matter to which the information relates, disclosure must necessarily result in some prejudice by reason of a general impact on the public interest factor which the exemption is designed to protect."

29. Judge Turnbull noted in that case, that the section 42 exemption does carry such inherent weight (unlike section 35(1)(c), the exemption at issue in that case, which he decided did not necessarily carry such inherent weight). He found that section 42 of FOIA was different from section 35(1)(c) in two different ways [62/63]:

"The first is because it exempts "information in respect of which a claim to legal professional privilege ..... could be maintained in legal proceedings". The exemption is coterminous with the doctrine of legal professional privilege, which the exemption is designed to protect. The "relates to" complication is not present.
The second reason is that it has been accepted in case law under s.42 that any compulsory disclosure of legally privileged information will to some extent weaken the important doctrine of legal professional privilege in relation to future cases, with detrimental consequences to the ability of persons to obtain legal advice on a full and frank basis: see DCLG v IC & WR [2012] UKUT 103 (AAC) at [42] to [46]."

30. These points are also echoed further, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC)), where the Upper Tribunal also noted as follows and emphasised that the s. 42 exemption is not a blanket exemption: -

'68. The powerful public interest against disclosure … is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. 6 However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

…

76. The importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on the one hand and the arguments in favour of transparency and fully informed debate on the other'.

The jurisdiction of the FTT on an appeal from the Information Commissioner

31. On appeal to the FTT it must decide if the Information Commissioner's decision notice is in accordance with the law (s.58 FOIA). The FTT exercises a full merits jurisdiction over the Commissioner's judgment as to where the public interest balancing test is to be struck. It is for the FTT, if necessary, to restrike that balance afresh - see the decision of a panel of three UT Judges in *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC), [45]:

"In considering whether the Commissioner's notice is in accordance with the law, the Tribunal must consider whether (in the present context) the provisions of FOIA have been correctly applied. The Tribunal is not bound by the Commissioner's views or findings but will arrive at its own view. In doing so it will give such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances….Adjudging the balance of public interest involves a question of mixed law and fact, not the exercise of discretion by the Commissioner. If based either on the Commissioner's original findings of fact or on findings made by the Tribunal on fresh evidence, the Tribunal comes to a different conclusion from the Commissioner concerning the balance of public interest, that will involve a finding that the Commissioner's notice was not in accordance with the law and should be corrected".

The Upper Tribunal's jurisdiction on appeal from the FTT

32. The FTT in this case exercised its jurisdiction by setting aside the Decision Notice and re-striking the public interest balancing test against disclosure of the requested information.

33. The Upper Tribunal may only set aside that decision if it concludes that the FTT erred in law (as provided by section 11 of the Tribunals Courts and Enforcement Act 2007). That means the Upper Tribunal is not engaged in re-performing the balancing of public interests itself but only determining if there was an error of law in the way in which the FTT struck the balance, for example by failing to take into account material matters, coming to an irrational conclusion or misinterpreting or misapplying the legislation and authorities on how to conduct the public interest balancing exercise.

34. As it was stated by the Upper Tribunal in *Cabinet Office v IC and Aitchison* [2013] UKUT 0275 (AAC) at [4]: "*my task in this appeal is not to re-evaluate the policy decisions of the Commissioner and the Tribunal. It is to ensure that the Tribunal did not err in law in its detailed consideration of the policy issues it considered relevant in assessing the public interests for and against requiring* [disclosure]".

The Appellant's submissions

35. The Appellant's grounds of appeal were enclosed with an application for permission to appeal and Notice of Appeal dated 20 March 2021 (form UT13). The Applicant was granted permission to appeal on two grounds, his first and third grounds of appeal:

> '(1) The decision fails to recognise the weight of the public interest factors detailed in the original decision by the Information Commissioner requiring the CPS to disclose the requested information.
>
> …

> (3) Despite Judge Cragg QC's comments detailed below, he ultimately failed to reach the correct public interest balance in s.42 FOIA and – in doing so – reinforced the perception that in terms of LLP it is, in all but name, an absolute exemption.'

36. The Appellant submitted that the FTT erred at [48] of its decision in finding that the general in-built public interest in non-disclosure of the requested LPP opinion, pursuant to section 42 of the Act as interpreted by the case-law, outweighed the specific public interest factors supporting disclosure.

37. He submitted that the FTT, having rejected the additional specific factors relied upon by the Second Respondent (the CPS) in support of non-disclosure at [36]-[41] of its decision, placed disproportionate weight on or gave more than 'significant weight' to the in-built public interest in non-disclosure of LPP. He argued that the FTT started from a presumption of non-disclosure rather than disclosure.

38. The Appellant submitted that the FTT failed to have sufficient regard to the specific factors in support of disclosure relied on by the First Respondent (Information Commissioner) in its decision notice and as addressed at [33], [42] - [46] of the FTT's decision. He argued therefore that the FTT erred by almost entirely relying on the general principle in support of non-disclosure of LPP as the determinative factor and failing to give sufficient weight to the specific factors supporting the public interest in disclosure, particularly in light of finding an absence of specific factors supporting non-disclosure.

39. He submitted that the FTT erred at [42] of the decision (relying on [76] of *Corderoy* as support for the proposition) in finding that the constitutional importance of the requested LPP was neutral. He argued that it erred in finding that the age of the requested material was not a factor in support of disclosure at [46] when it is arguable that its 'currency' was not clearly defined.

The Second Respondent's submissions

40. Mr Heppinstall QC, on behalf of the CPS, made submissions on behalf of the Second Respondent arguing that the FTT did not err in deciding that the public interest weighed against disclosure. I agree with and have adopted much of his argument in making my decision as set out below.

Discussion and analysis – section 42 FOIA and the public interest balancing exercise

41. I am satisfied that the FTT did not err in law in finding that the requested information was exempt from disclosure pursuant to section 42 of FOIA having performed the public interest balancing exercise.

42. The FTT properly cited, considered and applied the legal principles I have set out above. The FTT both considered the general in-built inherent weight against disclosure which arises for the LPP in any event (see [35] of its decision) and the other case specific additional factors, which the FTT thought the CPS had "overegged", and which were only worth a degree of additional weight ([38]).

43. The FTT "largely" accepted the argument that no prejudice will be caused by the disclosure of the advice, but also correctly noted that prejudice was not necessary to engage the inherent weight ([45]). At [46] of the decision, the FTT noted

the effect of the passage of time but also noted that an additional factor against disclosure was that the advice was current and was in relation to a live issue. The FTT found that the advice was true legal advice and did not amount to policy (para 47).

44. The final conclusion is at [48] where the FTT weighed the significant in-built general factor against disclosing LPP material on one side of the scales, and the transparency, accountability, lack of prejudice and constitutional importance factors in favour of disclosure on the other side of the scales. The FTT found at [41] that the pro-disclosure factors *"do not, in fact, add up to very much"*. It found that the pro-disclosure factors *"were not strong enough to equal or override that significant 'in-built' prejudice, even in a case where I am prepared to accept that little or no prejudice would have been caused by disclosure"*.

45. I am satisfied that the FTT properly directed itself as to the legal principles, properly applied the public interest test balancing exercise, and came to its own mixed decision of fact and law. It made an evaluative conclusion which it was entitled to reach on the evidence before it and for the reasons it gave. This conclusion discloses no error of law which might enable this Tribunal to intervene.

46. The Appellant's Grounds of appeal largely rely on the same point, that the FTT erred in *"almost entirely relying on the general principle in support of non-disclosure of LPP as the determinative factor and failing to give sufficient weight to the specific factors supporting the public interest in disclosure, particularly in light of the finding an absence of specific factors supporting non-disclosure"* (para 5). Or put in other ways: having largely rejected the additional specific factors against disclosure, that the FTT placed too much weight (i.e. more than significant weight) on the inbuilt factor; or that the FTT erred in law because the in-built weight was not capable, on its own, of outweighing the specific public interest factors supporting disclosure.

47. I reject each of these grounds of appeal.

48. The FTT was entitled to decide for itself how much weight to apply to the individual factors (*"the public interest is a matter of judgment of the Commissioner or a tribunal in the light of the background facts."* [75] *Aitchison*). It is not for the Upper Tribunal to second-guess or redecide those evaluations. Had the FTT fallen into the trap of treating the inherent weight as determinative or absolute (without consideration of any other factors) in the manner of an absolute exemption, then there would have been an error. Had the FTT failed to put the in-built weight on the non-disclosure side of the scales, then there would have been an error. Had the FTT, despite finding the pro-disclosure public interest factors did not *"add up to very much"* (para 41) nevertheless held that they weighed heavier in the balance than the inbuilt weight, then there would have been a legal error of a perverse outcome. The FTT noted the unchallenged evidence before it was that the advice in issue was only of *"esoteric interest"* (para 30 – also see para 22).

49. The FTT was entitled to reject many of the CPS's additional factors (those addressed by the FTT at [41]-[47]) so as to, essentially, only leave the inherent weight in the "non-disclosure" side of the scales. There is no error of law in so doing – the authorities cited permit that the inherent weight afforded to non-disclosure of LPP material alone may outweigh the pro-disclosure factors.

50. The fact that the CPS did not prove any prejudice, chilling effect or other factor against disclosure, did not mean that the inherent weight should not sit on the scales

"in any event". Whilst it is true that a decision maker should never ignore all other factors and only consider an inherent factor (as this might create an impermissible presumption of non-disclosure or would elevate the qualified exemption into an absolute exemption – see the approach of the FTT in *Bellamy v IC and DBIS* [2010] UKFTT EA_2009_0070 [38]) this is not what happened here. All factors were considered (including those put forward by the CPS) but, largely, on consideration of those factors by the FTT, only the inherent factor remained on the non-disclosure side of the scales. The question is then whether it outweighed the reasons in favour of disclosure. The FTT found, as it was entitled to do for the reasons it gave, that it did.

51. The FTT rejected the balance struck by the Information Commissioner who considered that the public interest in knowing what advice Senior Treasury Counsel had given the Director of Public Prosecutions in relation to the exceptionally rarely occurring question of whether the Sovereign is competent and compellable in her own courts outweighed the in-built weight in favour of not undermining the privilege which must subsist between those two key public officeholders (see para 48). The FTT was entitled to restrike that balance and come to its own conclusion, and it did so without any error of law.

52. By discharging its duty to put the inherent weight on one side of the scales, the FTT did not thereby start from a presumption of non-disclosure (as argued by the Appellant). The key is to start with an empty set of scales and a presumption of disclosure (again, see the approach of the FTT in *Bellamy* [38]). If however, once the scales are full of the relevant factors on both sides, the weight is greater on the non-disclosure side (regardless of the number of factors on each side) then that provides the answer. The weight to be attached to each factor is a matter solely for the FTT.

53. Further the FTT, at [48], recognised that if the weights were equal, and the scales perfectly balanced, the presumption in favour of disclosure, would carry the day (*"were not strong enough to equal or override that significant 'in-built' prejudice"*; see in relation to that principle, *DH v IC and Lewis*, [2017] EWCA Civ 374, [2017] 1 WLR 3330 at [46]).

54. In his oral argument, the Appellant relied on the argument that the FTT erred in finding that the constitutional importance of the advice was effectively cancelled out as a pro-disclosure factor, by the fact that advice of such importance ought to be withheld from disclosure.

55. However, the FTT did not err in finding that the constitutional importance of the advice "works both ways", even though the CPS did not accept that the advice deserved such elevated status. The FTT's conclusion that the constitutional importance of the legal advice is neutral and not simply a pro-disclosure factor is supported by the decision in *Corderoy* at [76]. However, in any event, as can be seen from the FTT's decision at [48[, it is by far and away the inherent weight attached to LPP material, and not any additional factors which caused the balance to tip in favour of non-disclosure in this case.

56. The same point applies to age of the material, as age of the advice did not materially affect the balancing exercise undertaken by the FTT (see [46]– *"I have given those little weight in any event"*). In any event, the FTT found as a fact, by accepting the CPS's evidence on the point, that the advice was still current and is about an issue which is still live ([46] based on evidence recorded at [30] – *"He confirmed that the advice in this case still represented the CPS view of the law"*). Put

another way, if the issue of the competence or compellability of the monarch arose again, the advice would represent the CPS's view of the law on that issue.

57. Even were I, as a judge of the Upper Tribunal, to disagree with the FTT's findings of fact, characterisations of the evidence, or with its evaluative conclusions, unless any of them were reached as a result of an error of law, I may not interfere with the FTT's decision. Even if I may have struck a different balancing exercise in evaluating the competing public interest factors, this alone would not be sufficient to demonstrate an error of law by the FTT.

58. In this case there was a sensitive balancing exercise to perform between the pro-disclosure public interest in the public discovering what advice the CPS has received on the rare but constitutionally significant issue of the compellability and competence of the monarch, and the non-disclosure public interest in securing and maintaining legal advice privilege between two of the most senior prosecuting lawyers in the UK. The FTT performed its task skilfully. It weighed up the factors carefully and its reasoning was logical and well expressed. In conducting that exercise the FTT interpreted and applied the proper principles of law and reached evaluative conclusions it was entitled to reach applying on the evidence before it.

59. The public interest balance struck by the FTT was not the product of any error of law. Therefore, its decision must stand that the requested information should not be disclosed being exempt LPP material for the purposes of section 42 of FOIA.

Conclusion

60. For the reasons set out above I dismiss the Appellant's appeal. I am satisfied that there was no error of law in the FTT's decision. I repeat my thanks to both parties for their assistance in deciding this appeal.

Rupert Jones
Judge of the Upper Tribunal
Signed on the original on 18 January 2022