Neutral Citation Number: [2026] UKUT 328 (AAC)
Appeal No. UA-2025-000985-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

CRUELTY FREE INTERNATIONAL
Appellant

- v -

INFORMATION COMMISSIONER
First Respondent

and

HOME OFFICE
Second Respondent

Before:	The Honourable Lady Poole, Upper Tribunal Judge Citron and Upper Tribunal Judge Brewer
Hearing dates:	20-21 July 2026
Mode of hearing:	In person hearing, Royal Courts of Justice, London
Representation:	
Appellant:	Peter Lockley, Reuben Andrews; David Thomas, solicitor
First Respondent:	Rupert Paines
Second Respondent	Christopher Knight KC, Josephine Giliingwater; Government Legal Department
On appeal from:	
Tribunal:	The First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No:	FT/EA/2024/0288
Decision Date:	10 June 2025 and amended on 4 July 2025
NCN:	[2025] UKFTT 00676 (GRC)

SUMMARY OF DECISION

17 Human rights law
17.6 Article 10 (freedom of expression)
93 Information rights
93.4 Freedom of information - absolute exemptions

An organisation opposed to the testing of cosmetics on animals sought information about grants of licences by the Home Office for scientific testing involving animals. The Home Office declined to disclose certain information sought by the organisation, relying on an exemption in section 44 of the Freedom of Information Act 2000 in conjunction with section 24 of the Animals (Scientific Procedures) Act 1986. The Information Commissioner's decision that the Home Office was entitled to rely on that exemption was upheld by the First-tier Tribunal. The Upper Tribunal allowed the appeal, set aside the First-tier Tribunal's decision, and re-made it, again refusing the appeal but for different reasons, holding that:

(1) The Upper Tribunal and the First-tier Tribunal had jurisdiction to determine the issues raised in the appeal. The First-tier Tribunal had not concluded it lacked such jurisdiction, so had not materially erred in law;
(2) Tribunals were not precluded by precedent from recognising the limited right to receive information inherent in article 10 of the European Convention on Human Rights. The First-tier Tribunal's decision involved an error of law in that regard. The organisation's article 10 right to receive information had been violated in the circumstances of this case. However, on re-making the decision, the appeal still fell to be refused because it was not possible to read the legislation preventing disclosure compatibly with Convention rights, and the Upper Tribunal had no power to grant a declaration of incompatibility.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.

DECISION

The First-tier Tribunal erred on a point of law in its decision of 10 June 2025, as amended 4 July 2025. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the decision of the First-tier Tribunal is set aside. It is re-made, taking into account further findings and decisions made under section 12(4). The re-made decision is that the appeal is refused.

REASONS FOR DECISION

Background

1. The appellant, Cruelty Free International ("**CFI**"), is an organisation which campaigns against experiments on live animals causing pain, distress, suffering or lasting harm. The second respondent, the Home Office, is responsible for granting licences for scientific testing involving protected living animals.

2. On 17 May 2023, CFI requested information from the Home Office about licences it had granted authorising the testing of ingredients used in certain cosmetic products on animals. CFI wished among other things to understand how the "harm-benefit" test in section 5B(3)(d) of the Animals (Scientific Procedures) Act 1986 ("**ASPA**") had been applied by the Home Office when granting licences. The Home Office declined to disclose all of the information sought, redacting various parts of it. CFI applied to the Information Commissioner, the first respondent in this appeal (the "**Commissioner**"), for a decision whether the Home Office had dealt with its

information request in accordance with the requirements of the Freedom of Information Act 2000 ("**FOIA**"). The Home Office then provided limited further disclosure. Substantial redactions remained, which CFI considers prevent meaningful scrutiny of the basis on which the Home Office has evaluated and granted licences. In withholding information, the Home Office relies on an exemption under section 44(1)(a) FOIA (which provides information is exempt if its disclosure is prohibited by or under any enactment) in conjunction with section 24 ASPA (which, in short, makes it a criminal offence for a person to disclose information given in confidence and obtained in the exercise of functions under ASPA). The Commissioner, in a decision dated 2 July 2024, found that the Home Office was entitled to rely on that exemption to withhold information sought by CFI.

3. CFI appealed to the First-tier Tribunal ("**FtT**"). In a decision dated 10 June 2025 (as amended on 4 July 2025), the FtT upheld the Commissioner's decision. The FtT found that the redacted information was in effect reproducing the content of information provided to the Home Office in confidence. The FtT concluded that it was information given in confidence, the disclosure of which would be a criminal offence under section 24 ASPA. The absolute exemption under section 44 FOIA applied, and the information was exempt from disclosure. The FtT also found it was bound by authority to refuse a ground of appeal about the compatibility of the absolute exemption arising under section 44 FOIA together with section 24 ASPA with article 10 of the European Convention on Human Rights (the "**Convention**"). The FtT refused permission to appeal to the Upper Tribunal ("**UT**"). Permission to appeal to the UT was granted on 17 July 2025 by the UT.

4. CFI argues that the FtT erred in law in its answer to the second ground of appeal before it, which may be summarised as follows:

> "whether section 44 FOIA, operating as an absolute prohibition on disclosure in conjunction with section 24(1) ASPA, was incompatible with CFI's right under Article 10 of the Convention to receive information, and accordingly that section 24 ASPA (which applied in conjunction with section 44 FOIA) should be read down to permit a balancing of the competing rights and interests".

CFI points to a decision of the Grand Chamber of the European Court of Human Rights ("**ECtHR**"), *Magyar Helsinki Bizottság v Hungary* (2020) 71 EHRR 2 ("***Magyar***") about the right to receive information under article 10. CFI argues that section 3 of the Human Rights Act 1998 ("**HRA**") requires a reading down of the statutory provisions which operated to prevent it receiving information. Four further grounds were advanced in the application for permission to appeal to the UT, directly addressing the decision of the FtT. Some focussed on the FtT's refusal of permission to appeal, but that issue has been overtaken by the UT's grant of permission.

5. In broad terms, the grounds of appeal for determination by the UT concern first, whether the FtT erred in law in finding it lacked jurisdiction to determine whether section 24 of ASPA had been correctly applied, and second, whether the FtT erred in dismissing the ground of appeal based on Convention rights. CFI invites the UT to allow the appeal. The Commissioner and the Home Office invite the UT to refuse

the appeal. Parties produced lengthy skeleton arguments, supported by authorities and oral submissions, all of which were of assistance to the UT and have been taken into account by it.

6. The UT's decision commences below by setting out some of the legal provisions with a bearing on the determination of this appeal (paras 7-24). The decision then addresses issues of jurisdiction (paras 25-35), precedent (paras 36-84), Convention rights (paras 85-102), and section 3 HRA (paras 103-110). This decision does not address the question of a "leapfrog" certificate for an appeal directly to the UK Supreme Court under section 14A of the Tribunals, Courts and Enforcement Act 2007 ("**TCEA**"). That matter was raised in argument before the UT, but parties recognised that the appropriateness of an application may depend on the basis on which the UT determines this appeal. The UT considers that if the issue of a leapfrog certificate still arises, parties should address it at the time of any application for permission to appeal this decision.

Legislative framework and *Magyar*

FOIA

7. Section 1 FOIA enacts a general right of access to information held by public authorities, such as the Home Office. That right is subject to other sections of FOIA, including section 2 which makes provision for various exemptions. If exemptions apply, rights of access to information do not apply.

8. Some exemptions are qualified, and operate only if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b) FOIA). Examples are section 22A (research) and section 41 (information provided in confidence).

9. Other exemptions are absolute. The right to information will not apply if "the information is exempt information by virtue of a provision conferring absolute exemption" (section 2(2)(b) FOIA). Section 2(3)(h) provides that section 44 is an absolute exemption. Accordingly, if section 44 applies, the right to obtain the information under section 1(1)(b) does not apply (section 2(2)).

10. Section 44(1) FOIA provides, insofar as relevant:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment".

11. FOIA sets up a system for enforcement of its provisions. Any person may apply to the Commissioner for a decision whether an information request they have made has been dealt with in accordance with the requirements of Part I FOIA (section 50), which includes the right of access to information. Section 57 FOIA gives a right of appeal to the FtT against a decision notice served by the Commissioner. Section 58 provides:

"(1) 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.

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

12. The right of appeal from the FtT to the UT arises under section 11 of the TCEA; there is a right with permission to appeal on any point of law arising from the FtT's decision. If the UT is satisfied there is an error on a point of law, under section 12 the UT may set aside the decision of the FtT, and if it does must either remit for reconsideration or re-make the decision. If remaking the decision, the UT may make such findings of fact as it considers appropriate.

ASPA

13. ASPA is an enactment which establishes a system of licensing by the Secretary of State before certain procedures may be carried out on animals. It also creates various criminal offences.

14. Section 24(1) ASPA is entitled "Protection of confidential information" and provides:

> "A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence".

Accordingly, those determining licence applications under ASPA may be guilty of a criminal offence if they disclose confidential information in circumstances within section 24. A person guilty of an offence is liable, on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both; the maximum term on summary conviction is 6 months (section 24(2)). The consent of the Director of Public Prosecutions is required before proceedings for an offence under ASPA may be brought (section 26(1)).

15. As background context, ASPA was enacted, at least in part, to give effect to the requirements of the now repealed Directive 86/609/EEC regarding the protection of animals used for experimental and other scientific purposes (the "**1986 Directive**"); and amendments were later made to ASPA to give effect to more stringent measures in Directive 2010/63/EU (the "**2010 Directive**"). The European regulatory framework is based on principles of replacement, reduction and refinement (2010 Directive, recital (11), which describes those principles as "internationally established"). Section 24 of ASPA is in part an implementation of an obligation under the 1986 Directive "to ensure that the confidentiality of commercially sensitive information communicated pursuant to this Directive is protected" (article 13(2)). Section 24 was not amended following the 2010 Directive, but other parts of ASPA were, including the provisions earlier in ASPA concerning determination of project licences. Article 38 of the 2010 Directive

contained various provisions bearing on evaluation of projects when licences are granted. Article 38(4) provides that "the project evaluation process shall be transparent. Subject to safeguarding intellectual property and confidential information, the project evaluation shall be performed in an impartial manner and may integrate the opinion of independent parties". Transparency is also mentioned in some of the recitals to the 2010 Directive, including recitals (4), (22) and (36). Parties do not advance interpretative arguments based on the EU background to ASPA.

16. Section 24 ASPA was enacted in 1986, some time before the HRA and FOIA came into being. In 2008, in the case of *BUAV v Secretary of State for the Home Department* [2008] EWCA Civ 870 ("***BUAV***"), the Court of Appeal was informed that section 24 was being reviewed. In that context the court made comments about section 24 not fitting easily into the scheme of FOIA, and observed that it may not adequately reflect developments in human rights (paras [7] and [35]). On various occasions the government has said it will review section 24 ASPA. In 2014, the then government launched a public consultation, in the foreword of which it stated "Section 24 prevents openness on information we hold in connection with our regulatory activities under [ASPA]. It is incompatible with Coalition Government policy on openness and transparency, including the public right of access to information held by public authorities that is provided by [FOIA]". In an answer to a Parliamentary question of 23 June 2026, the government confirmed that section 24 remains under review. Section 24 not having been amended despite suggestions of review over a considerable period of time, it remains part of the law in the UK in the terms set out above.

<u>Convention Rights</u>

17. The HRA makes provision about Convention rights, which are defined by reference to rights set out in schedule 1 HRA, and include article 10. Under section 2 HRA, a court or tribunal determining a question which has arisen in connection with a Convention right must take into account, among other things, any judgment of the ECtHR. Section 3 HRA is headed "interpretation of legislation" and provides:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".
> (2) This section – (a) applies to primary legislation…whenever enacted".

Section 4 makes provision for declarations of incompatibility where a court is satisfied that the provision is incompatible with a Convention right. The UT is not a court for the purposes of section 4. Section 6(1) makes it unlawful for a public authority (which includes a court or tribunal) to act in a way which is incompatible with a Convention right. This, however, does not apply to an act if the public authority could not have acted differently as a result of provisions of primary legislation, or if the public authority was acting to give effect to or enforce provisions of primary legislation which cannot be read or given effect in a way compatible with Convention rights (section 6(2)). Section 7(1) provides:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
(b) rely on the Convention right or rights concerned in any legal proceedings".

18. Article 10 of the Convention provides:

"Freedom of expression
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Articles 10(1) and 10(2) of the Convention raise separate considerations. For article 10 to be violated there must first be a right protected by that article under article 10(1) which is interfered with, and second the interference must not be justified under article 10(2).

Magyar

19. *Magyar* is a decision of the Grand Chamber of the ECtHR in 2016. It was decided after two decisions of the UK Supreme Court, in which arguments had been made that article 10 of the Convention included a right to receive information in certain circumstances; *British Broadcasting Corporation v Sugar (No 2)* [2012] UKSC 4 ("***Sugar***") and *Kennedy v Charity Commission* [2014] UKSC 20 ("***Kennedy***"). The UK Supreme Court declined to decide those cases on the basis that article 10 rights had been violated. Both cases found there was no right to information sought under FOIA. In *Sugar* the information was not recoverable because the BBC was not a body from which information held for journalistic purposes could be obtained (section 7(1) with part VI FOIA). In *Kennedy* it was because of the operation of an exemption under section 32(2) FOIA, with the court finding that the information could be sought under a different regulatory regime.

20. It is generally accepted that *Magyar* is a "watershed" case, in which the Grand Chamber found that there is a limited right to receive information under article 10, where that is instrumental in the exercise of a right to freedom of expression. The UK government intervened in that case, and the Grand Chamber was aware of *Kennedy* when it made its decision by a majority of fifteen votes to two. Before *Magyar*, in many cases article 10 had been more closely associated with expressing information freely, rather than receiving it.

21. The limitations on the right to receive information found to be part of article 10 of the Convention in *Magyar* arise in two different ways. First, only persons meeting four criteria will have rights recognised by article 10(1) to receive information that has been requested (*Magyar* paras 158-169). These "gateway" criteria are, in summary (i) the purpose of the request must be to enable freedom of expression (ii) the nature of the information sought must provide transparency on the manner of conduct of public affairs and on matters of interest for society as a whole (iii) the requester must be a journalist or a person such as a non-governmental organisation acting as a "public watchdog" (iv) the information must be "ready and available" as opposed to requiring data collection by the holder. Second, even where there is interference with a recognised right to receive information under article 10(1), withholding information will not violate article 10 where the interference is justified under article 10(2).

22. Litigants have sought to rely in domestic courts and tribunals on the right recognised in *Magyar*. However, a single judge of the UT decided in *Moss v Information Commissioner* [2020] UKUT 242 (AAC) ("***Moss***") that tribunals were bound by precedent to find that domestic law does not recognise a right to receive information, and declined to follow *Magyar*. *FCDO v Information Commissioner* [2021] UKUT 248 [2022] 1 WL 1132 ("***FCDO***"), a three judge panel of the UT, contains *dicta* approving *Moss*. *Casey-Hulme v Information Commissioner and DEFRA* [2026] UKUT 119 ("***Casey-Hulme***") is a further single judge decision in the UT which also followed aspects of *Moss*. There are other cases in the UT where litigants have sought to rely on article 10 of the Convention and been met with arguments based on *Moss* that tribunals are bound to reject them (*Dransfield v Information Commissioner* [2020] UKUT 346 para 80 ("***Dransfield***"), *Lownie v Information Commissioner* [2024] UKUT 116 ("***Lownie***") (paras 3 and 29), *Greenwood v Information Commissioner* [2025] UKUT 76 (AAC) ("***Greenwood***") para 38). Further, in a decision refusing permission for judicial review on other grounds in Northern Ireland, a judge agreed with *Moss* (*Re Lavery's Application* [2022] NIQB 19 para [37] (**"*Lavery*"**).

23. In contrast, Fordham J indicated obiter in *R (Tortoise Media Ltd) v Conservative and Unionist Party* [2023] EWHC 3088 (Admin) ("***Tortoise***") that he would have granted permission for a judicial review on the "domestic precedent" point and *Magyar* (para 49). That point included the contention that *Moss* wrongly decided that domestic precedent stood in the way (para 31). Fordham J did not consider that the position was clear cut. Permission was nevertheless refused on another "knock-out" point. Although permission was ultimately granted by the Court of Appeal, that court decided the case on other grounds, finding it unnecessary to address the issue concerning article 10 of the Convention and the doctrine of precedent ([2025] EWCA Civ 673 para 51).

24. None of these cases suggest *Magyar* did not establish that article 10 of the Convention encompasses a limited right to receive information. Nor do they suggest that higher courts are prevented from recognising that such a right is now part of domestic law. CFI submits that *Moss* has created a "bottleneck" preventing exercise of the limited right to receive information, because at lower levels arguments are rejected on the basis of *Moss*, and so far the Court of Appeal has

refused permission for the point to be considered at a higher level (for example in *FCDO* and *Lownie*) or declined to decide it (*Tortoise*).

Jurisdiction

25. Against that legal background, the UT turns to the grounds of appeal before it. Ground 2 of the grounds on which the UT granted permission is that "the FtT erred in considering that it lacked jurisdiction to determine whether section 24 ASPA had been correctly applied".

26. A short summary of the parties' arguments on this ground of appeal is as follows. CFI argues that the FtT had jurisdiction to determine whether section 24 ASPA was correctly applied as part of the exercise in which it was engaged of determining whether section 44 FOIA was correctly applied, and the FtT was wrong in considering that it did not (at paragraphs 53 and 55). The Commissioner on the other hand argues that CFI is inappropriately trying to elide FOIA and ASPA. FOIA does not interfere with article 10 of the Convention, and the appropriate forum for any dispute about ASPA is judicial review. The Home Office adopts the submissions of the Commissioner, submitting that where there is a direct route of challenge in the administrative court, it is unsatisfactory to determine issues about section 24 of ASPA through a FOIA appeal. (CFI brought an application for judicial review on 25 April 2025, on a protective basis; it is currently stayed by consent pending the outcome of this appeal to the UT).

27. The FtT, in its decision, agreed with a submission that CFI's challenge was in effect to section 24 ASPA, and the correct route would be through judicial review proceedings (paras 53 and 55). However, that passage appears in the part of the FtT's decision about whether to grant permission to appeal to the UT or not (paras 43 to 58), an issue which was overtaken by the subsequent grant of permission by the UT. The FtT did not decline jurisdiction to determine the appeal before it. Rather, it decided the ground of appeal about whether section 24 ASPA was compatible with Convention rights on the basis of a concession by the appellant that it was bound to refuse it because there were decisions binding on it necessitating it doing so (para 42). The FtT was correct that *Moss,* as a decision of the UT, was binding on it (albeit this UT decision departs from *dicta* in *Moss* about domestic authority obliging it not to follow *Magyar*). The ground of appeal based on jurisdiction fails, because any error of the FtT when making comments in the context of whether it would grant permission for an onwards appeal was not material to the decision of the FtT on the grounds of appeal before it.

28. Nevertheless, as the Commissioner and Home Office continue to maintain that judicial review is the appropriate way of proceeding, it is appropriate that the UT explains the basis on which it has jurisdiction to determine the appeal before it.

<u>Scope of appeal</u>

29. Provisions in both FOIA and the TCEA have a bearing on jurisdiction in the appeal before the UT. Under FOIA, the first person who must decide whether a relevant exemption applies is the public authority to whom an information request is made (section 1). However, it is not the public authority's decision which is under appeal to the FtT, but that of the Commissioner. The Commissioner, if an application is

made to it, must decide whether an information request has been dealt with in accordance with the requirements of Part I FOIA (section 50). Those requirements include the right of access to information under section 1 FOIA, but also section 2, about the "effect of the exemptions in Part II". Section 44 appears in part II.

30. If a public authority relies on an absolute exemption in FOIA, the Commissioner has to decide whether the exemption applies, as part of the statutory function of deciding whether an information request has been dealt with in accordance with the requirements of part I FOIA. That will inevitably involve considering the scope of a relevant exemption, and whether the information requested falls within it. If the exemption in section 44 is invoked, the Commissioner will have to consider the "enactment" said to trigger the section 44 exemption, in order to decide whether the right of access does not apply (under sections 1 and 2 FOIA). It is part of the Commissioner's function under section 50 FOIA to consider the terms of the enactment relied on, and whether it prohibits disclosure of the information in question. That will involve a process of interpretation and application of the enactment involved.

31. The Commissioner's decision under section 50 FOIA is typically expressed in a decision notice (section 50(3)). The FtT's jurisdiction arises under section 57, which gives a right of appeal against the decision notice. The scope of the FtT's jurisdiction in such an appeal is specified in section 58. As well as the FtT being able to review findings of fact on which a decision notice is based, the FtT is concerned with questions of lawfulness, and exercises of discretion by the Commissioner. As far as lawfulness is concerned, the FtT must decide whether the decision notice is "in accordance with the law" (section 58(1)(a)). "The law" is a wider concept than "sections of FOIA". "The law" includes the law of statutory interpretation as it applies to the applicability of external enactments that the Commissioner must consider, where necessary to decide if information is exempt under sections 2 and 44 FOIA. The law of statutory interpretation will include common law principles, but also any relevant statutory provisions. Section 3 HRA is part of "the law" which governs statutory interpretation. If a decision of the Commissioner that the section 44 exemption applies is based on an erroneous statutory construction of the enactment said to prohibit disclosure, it will not be "in accordance with the law".

32. The jurisdiction of the UT under section 11 and 12 TCEA covers "points of law" arising from the FtT's decision. A question about whether the FtT was correct to find the Commissioner's decision notice was "in accordance with the law" may raise a point of law. The respondents analyse the interference complained of in this case as being concerned only with section 24 ASPA, not section 44 FOIA. That is too narrow an approach, because FOIA incorporates reference to other enactments, and the exemption in section 44 can only properly be applied in this case with reference also to section 24 ASPA. Questions about construction and applicability of enactments external to FOIA when applying sections 2 and 44 FOIA, such as section 24 ASPA, are points of law within the UT's jurisdiction. In construing and applying external enactments for the purposes of considering whether information is exempt under FOIA, ordinary legal principles of statutory interpretation will apply. In appropriate cases, those may include principles of interpretation in the HRA.

33. That conclusion is consistent with the case of *Ofcom v Morrissey and the Information Commissioner* [2011] UKUT 116, a decision of a three judge panel of the UT. The case involved questions of construction of provisions of the Communications Act 2003 in the context of a FOIA appeal. It was found that when applying FOIA it may be necessary for "a view to be taken on the construction of a potentially relevant statutory bar on disclosure in other legislation" (para 63). As a generality, it is not unusual when applying one statutory provision to have to take into account another enactment (an example is applying regulation 5(1) and (6) of the Environment Information Regulations 2004). In *BUAV* the Court of Appeal construed section 24 ASPA in the context of an information request under FOIA.

34. The UT acknowledges that the compatibility of section 24 ASPA with Convention rights may be a matter capable of being brought before the courts by way of an application for judicial review. It is for any court determining an application for judicial review to decide whether or not it has jurisdiction (judicial review ordinarily only being available where there is no adequate alternative remedy, such as a right of appeal). But the fact that there may be a different avenue of challenge CFI could seek to pursue, such as judicial review, does not deprive the FtT or UT of a jurisdiction conferred on it by FOIA and the TCEA. The protective raising of an application for judicial review likewise does not deprive tribunals of appellate jurisdiction conferred on them by statute.

35. Paragraph 4 above sets out the legal question at the heart of this appeal, which appears in paragraph 2(2) of CFI's application for permission to appeal to the UT. It falls into two separate parts. First, are CFI's article 10 rights violated by section 44 FOIA together with section 24 ASPA operating as an absolute exemption to disclosure of information? Second, and if so, does section 3 HRA require those provisions to be read and given effect to permit a balancing of competing rights and interests? The other grounds of appeal all have a bearing on whether the FtT erred in its approach to those core matters. The UT is satisfied that it has jurisdiction to consider the grounds before it, as part of the exercise of determining whether the FtT erred in finding the Commissioner's decision notice was in accordance with the law.

Precedent

36. Both respondents argue that the UT is bound by precedent which obliges it to refuse the appeal without considering issues of compatibility with Convention rights and the effect of section 3 HRA. They contend, in summary, that domestic authority establishes that the Convention right relied on by CFI, to receive information under article 10(1) of the Convention, is not recognised by domestic law. It follows that the UT is bound to decline to find that CFI's article 10(1) rights are violated by the effect of section 44 FOIA read with section 24 ASPA. CFI on the other hand argues that although there is authority, it is not binding on the UT, and as a result of the HRA the UT should follow *Magyar*, a decision of the Grand Chamber of the ECtHR in Strasbourg.

37. The UT finds, for reasons set out below, that it is not bound by precedent to conclude that CFI has no right, of the kind identified in *Magyar*, to receive information under article 10(1) of the Convention. The UT is entitled to consider

whether the operation of section 44 FOIA together with section 24 ASPA violates CFI's Convention rights.

Kay v Lambeth LBC

38. As a general principle, national courts, in applying section 2 HRA, will ordinarily follow Strasbourg authority at the Grand Chamber level of the ECtHR (*R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271 ("***Chester***") para 25-27). *Magyar* is a decision of the Grand Chamber and, as said in *Chester*, it would have to involve "some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for [the UK Supreme Court] to contemplate an outright refusal to follow Strasbourg authority" at that level.

39. Nevertheless, the effect of the domestic law of precedent may be that tribunals and courts lower in the hierarchy are obliged to follow binding decisions of higher tribunals or courts, even where they conflict with Grand Chamber decisions. That is what was decided in *Kay v Lambeth LBC* [2006] 2 AC 465 ("***Kay***"), in which the House of Lords considered the interrelationship of Convention rights arguments and precedent. It held that where there is a "binding precedent" in domestic law, then courts and tribunals bound by it should follow that precedent even if inconsistent with Convention rights authority, but they may grant leave to appeal to a superior court in order to comply with obligations under the HRA (for example to take account of decisions or act compatibly with Convention rights) (para 43).

40. The UT must follow binding precedent emanating from the Court of Appeal and the UK Supreme Court. It is clear that if such binding precedent exists, then even if it is inconsistent with *Magyar*, following *Kay* the UT must refuse the appeal, but may grant permission to appeal to the Court of Appeal. What is covered by the reference to "binding precedent" in *Kay* is more controversial. CFI argues that it covers only the *ratio decidendi* of a case (the reason for the decision, or rule or principle that actually decides the case). The Home Office on the other hand argues that the language of *Kay* is wide enough to cover situations in which lower courts and tribunals follow *obiter dicta* (incidental comments expressed on the way to the final ruling).

41. The UT considers that the reference to "binding precedent" in *Kay* (para 43) applies to *ratio decidendi* of higher courts and tribunals, not *obiter dicta*. The House of Lords deliberately chose to qualify the word "precedent" with the word "binding". At other points in its decision *Kay* also discusses decisions that other courts lower in the "domestic curial hierarchy" are "bound to follow" (para 40). The principle in *Kay* was later paraphrased in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 ("***RJM***") in a way which referred to an earlier decision of a superior court "which would otherwise be binding" on the lower court (para 64). *Kay* also talks about "the ordinary rules of precedent" (para 44). The distinction between *ratio* and *obiter* is longstanding and part of the ordinary law of precedent. It is generally recognised that lower courts and tribunals are bound by *ratio* of higher courts and tribunals. They are not bound by *obiter dicta*, which has only persuasive value (e.g. *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387 ("***Youngsam***") at [46]). Of course, a lower court or tribunal may elect to follow *obiter dicta* of a judicial body higher in the hierarchy, and frequently do, but there

may be good reason not to in a particular case. Whether or not to follow *obiter dicta* will depend on persuasiveness, for example the reasons given for views expressed and whether subsequent events have lessened their force.

42. If the principle in *Kay* is widened beyond binding *ratio* to include non-binding *obiter* which a lower court or tribunal elects to follow, as the Home Office argues, then *Kay* has a wide and uncertain reach. Does everything said *obiter* by a higher judicial body that may have any connection to the issue in a later case mean an appeal must be refused and permission to appeal granted? That seems unlikely, but then where is the line to be drawn, if it is not the distinction between *ratio* and *obiter*? The uncertain reach of *Kay*, if widened in this way, conflicts with one of the main reasons given in *Kay* for reaching the decision made; the value of certainty provided by the law of precedent, so that people can organise the conduct of their affairs accordingly (paras 42 to 43). There are other potential disadvantages of widening the application of the *Kay* principle in ways suggested by the respondents, such as finality and expense of litigation, if the law operates to require a higher number of cases to be appealed before final resolution. The UT considers it is preferable to preserve the time-honoured distinction between *ratio* and *obiter*, and read the principle in *Kay* as applying only to binding *ratio*, not non-binding *obiter*.

43. In considering whether there is authority binding on the UT to the effect that CFI has no right under article 10(1) of the Convention to receive information of the kind recognised in *Magyar*, there are two different strands of relevant authority. The first is *BUAV* in the Court of Appeal. The second strand concerns *Sugar* and *Kennedy* in the UK Supreme Court, and other cases following those decisions. All three cases pre-date *Magyar*.

<u>*BUAV*</u>

44. *BUAV* is a 2008 decision concerning the interpretation of section 24 ASPA in the context of FOIA. (BUAV is CFI's former name). In *BUAV*, it was argued that information should not be exempt by operation of section 24 unless it satisfied the requirements for an action of breach of confidence, as summarised in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47. No interpretative arguments based on Convention rights were advanced in *BUAV*.

45. In construing section 24 ASPA in *BUAV*, the Court of Appeal considered the provision in the context of the 1986 Act rather than "through the spectacles of the later FOIA". The court unanimously decided that a separate objective test derived from the law of confidentiality should not be read in to section 24. The court found (para 30) that section 24:

> "is couched in subjective terms, directed at the state of mind of the official or other person in possession of the information. It raises a simple question of fact: does he know or have reasonable grounds for believing that the information was "given in confidence". The latter words in turn direct attention to the position when the information was "given" and to the intentions of the giver at the time, either as expressed or as reasonably to be inferred from the circumstances".

46. The parties' submissions about *BUAV* in this appeal can be summarised briefly. CFI contends that *BUAV* is not determinative of the present appeal because the Court of Appeal was not asked to consider the impact of Convention rights on the exemption in section 44 FOIA with section 24 ASPA. The Commissioner, whose submissions on this issue were adopted by the Home Office, argues that permission to appeal has not been granted to enable CFI to make this argument about *BUAV*, and in any event that the proper construction of section 24 was settled by *BUAV*. The Commissioner submits that *BUAV*, a case post-dating the HRA in which CFI itself was a party, cannot be treated as *per incuriam* merely because Convention rights were not argued, relying on *Miliangos v George Frank (Textiles) Ltd* [1975] QB 487 at 503 ("***Miliangos***"). Further, following *RJM* paras 64–65, the UT should apply the Court of Appeal's interpretation in BUAV and leave any reconsideration of that authority to the Court of Appeal itself.

47. The UT decides ultimately that it must follow the interpretation of section 24 ASPA given in *BUAV*, but for different reasons to those advanced by the respondents. The UT is required to follow the ordinary interpretation of section 24 reached in *BUAV* because, as explained in the last part of this decision below, it is not possible to read and give effect to section 44 FOIA with section 24 ASPA compatibly with Convention rights, even though the effect of those provisions is to violate CFI's article 10 rights. The ordinary interpretation of section 24 ASPA given in *BUAV* therefore prevails, and the Court of Appeal decision on that matter is binding on the UT. But that is a conclusion reached having determined the Convention rights arguments advanced in this case, rather than the decision in *BUAV* precluding consideration of them.

48. The core issue in this appeal concerns Convention rights and the possible application of section 3 HRA to the exemption under section 44 FOIA with section 24 ASPA. That issue was not before the Court of Appeal in *BUAV*, which addressed only the ordinary meaning of section 24 ASPA applying domestic principles of statutory interpretation. As the UK Supreme Court explained in *R(Z)* v *Hackney London Borough Council and another* [2020] UKSC 40 ("***R(Z)***") at para 114:

> "The proper approach to construction is that legislation should be read and given effect in a particular case according to its ordinary meaning, unless the person who is affected by it can show that this would be incompatible with their Convention rights…only then do the special interpretive obligations under section 3(1) HRA …come into play to authorise the court to search for a conforming interpretation at variance with the ordinary meaning of the legislation. This means that the same legislative provision might be given a different interpretation in different cases, depending on whether Convention rights…are applicable in the case of not. Although at first glance this might seem odd, in fact it is not. It simply reflects the fact that in the one case circumstances are such that an additional interpretive obligation has to be taken into account, but in the other case no such obligation is in play…If the position were otherwise, Convention rights…would be given disproportionate effect in domestic law, and statutory interpretation would become an exercise in the imaginative construction of theoretical cases in

which such rights might be in issue in order to change the interpretation of legislation in cases where they are not".

BUAV is therefore authority on the ordinary meaning of section 24. It is not authority on whether section 3 HRA requires a different interpretation in circumstances in which Convention rights are applicable. In *Miliangos* in the Court of Appeal, Lord Denning MR said that a case "is not decided *per incuriam* because counsel have not cited all the relevant authorities or referred to this or that rule of court or statutory provision". That may be true as a general principle, but it cannot displace the unanimous decision in *R(Z)* that section 3 HRA, enacted some time after *Miliangos* was decided, may result in two different legal interpretations of the same legislative provision.

49. Had the Court of Appeal in *BUAV* considered Convention rights and their effect on the exemption in section 44 FOIA with section 24 ASPA, the UT would regard itself as bound by the *ratio* of the Court of Appeal decision on those matters. That would follow from *RJM* (paras 64–65), which emphasises the obligation of lower courts and tribunals to follow binding domestic authority even where subsequent Strasbourg jurisprudence may cast doubt upon it, applying principles established in *Kay*. *RJM* however (like *Kay*) concerned a situation in which Convention rights had been considered in earlier binding decisions of domestic courts, but there had been subsequent developments in Strasbourg jurisprudence. In contrast, *BUAV* did not consider the impact of Convention rights on the interpretation of section 24. The UT does not consider anything turns on whether *BUAV* was a case decided before or after the HRA. The point is that the Court of Appeal did not decide whether Convention rights were engaged, whether any interference was justified, or whether section 3 HRA required a different interpretation of section 24. The *ratio* of *BUAV* was confined to the conclusion that section 24 should be given its ordinary meaning under domestic principles of statutory interpretation. There is no *ratio* on the issue of a Convention compliant interpretation of section 44 FOIA with section 24 ASPA. The binding effect of *BUAV* does not extend to preventing the UT from determining the Convention rights arguments advanced in this case.

50. Before leaving *BUAV*, it is necessary to explain why the UT does not accept the respondents' technical argument that the permission granted for this appeal does not permit CFI to advance its contentions about *BUAV*. Permission was granted on the basis that "the grounds of appeal" are arguable (UT decision dated 10 June 2025, para 2), a reference to the grounds advanced in the application for permission. Paragraph 35 of that application set out four grounds, all of which related to ground 2 before the FtT (see para 4 above), which the FtT summarised in its headings as "the compatibility of section 24 ASPA with CFI's rights to receive information under article 10" of the Convention. Paragraphs 18–19 of the application for permission specifically addressed *BUAV*, including the fact that article 10 issues had not been argued before the Court of Appeal in *BUAV*. The FtT decision under appeal also referred to submissions concerning *BUAV* (para 17(d)(iv)) and discussed the case further (para 47), observing that CFI would "also need to overturn this decision". Dealing with *BUAV* has therefore been part of the argument advanced by CFI throughout, about whether section 44 FOIA with section 24 ASPA results in a breach of Convention rights, and a need to read in a balance of interests to section 24 ASPA. That issue was before the FtT and falls

within the scope of the grant of permission. In any event, had permission not already encompassed the point, the UT would grant it now: the issue has not taken any party by surprise, is integral to the principal ground of appeal, and has been fully addressed in the parties' submissions.

Sugar, Kennedy and related authority

51. Unlike *BUAV*, *Sugar* and *Kennedy* are previous cases of higher courts in which arguments based on article 10 of the Convention were considered in the context of FOIA. The next issue for determination is whether those decisions require the UT to decline to apply *Magyar* and dismiss this appeal. CFI's position is that neither *Sugar* nor *Kennedy*, properly analysed, contain binding *ratio* which prevents the UT from applying *Magyar*. CFI argues that the UT should apply the HRA and give effect to *Magyar*. Both the Commissioner and the Home Office disagree. They contend that *Sugar* contains binding *ratio* that article 10 does not give a right to receive information. Even if that is wrong, there is persuasive *dicta* in *Kennedy* and other cases that the UT should follow (*Brunner v Greenslade* [1971] Ch 993 ("***Brunner***") at 1002H to 1003A).

52. The UT decides that neither *Sugar* nor *Kennedy* bind it to find domestic law does not recognise that article 10(1) contains a limited right to receive information. Although other cases purport to follow *Sugar* and *Kennedy*, they contain a flaw, in that they proceed on the incorrect basis that there is binding authority precluding them from recognising a limited right to receive information under article 10(1). The UT declines to follow *obiter dicta* in those cases to the effect that domestic law does not recognise an article 10(1) right to receive information. They are in substance superseded by *Magyar*, a subsequent decision of the Grand Chamber which the UT must take into account under the HRA. To explain these conclusions it is necessary to look at the authorities in some detail.

The absence of binding domestic authority

53. *Sugar* is a case decided by the UK Supreme Court in 2012, in which an information request had been made under FOIA seeking to recover an internal report commissioned by the BBC about its Middle Eastern coverage. It was found that the BBC did not have to disclose the report; the BBC was not subject to duties under FOIA in respect of documents held for the purposes of journalism (section 7(1) and part VI of schedule 1 FOIA). *Sugar* therefore did not concern the operation of exemptions under part II FOIA. However, an argument was advanced in that case that the information request engaged Mr Sugar's right to receive information under article 10(1) of the Convention, and the refusal to disclose was not justified under article 10(2). Three of the five members of the court commented on that argument.

54. In *Sugar*, Lord Brown surveyed the jurisprudence of the ECtHR as it stood at that time, and came to the conclusion that it "fell far short of establishing that an individual's article 10(1) freedom to receive information is interfered with" by a refusal of access to documents consistent with domestic legislation (para 94). He concluded that article 10 contains no general right to freedom of information. The applicant's article 10 case fell at the first stage; FOIA had not conferred on him a relevant right of access to information, so he had no freedom to receive information

which could be interfered with (para 97). Lord Mance at para 113 agreed with Lord Brown's analysis of the current state of Strasbourg authority. Both Lord Brown and Lord Mance therefore found that article 10(1) did not include a relevant right to receive information. In contrast, neither Lord Phillips nor Lord Walker made a finding that article 10(1) did not recognise a right to receive information; they did not consider the matter.

55. Whether *Sugar* is binding that there is no interference with article 10(1) where there is a refusal of access to documents consistent with domestic legislation turns on the view taken of Lord Wilson's judgment. It is not in dispute that if only two Justices decided that domestic law did not recognise a right to receive information under article 10(1), it cannot be part of the *ratio* of *Sugar*. What Lord Wilson said was this (para 58, emphasis added):

> "The further submission on behalf of Mr Sugar is that his request for disclosure of the Balen report engaged his right to receive information under paragraph 1 of article 10 of the Convention and that such restrictions on the exercise of his right as are permitted by paragraph 2 of the article extend no further than is reflected by the designation (when read in accordance with his polarised construction), together with the exemptions in part II of the Act. To this submission Lord Brown of Eaton-under-Heywood JSC devotes paras 86 to 102 of his judgment below; **with the essence of them** I respectfully agree. In short article 10 carries Mr Sugar's case no further. **Even if** (**being a possibility which I would countenance somewhat more readily than does Lord Brown JSC**) **the refusal to disclose the report did interfere with the freedom of Mr Sugar to receive information under the article**, the words of the designation, when given the balanced interpretation which I favour, represent a restriction upon it which is legitimate under paragraph 2 of the article in that it is necessary in a democratic society for the protection of the freedom to impart information enjoyed by the BBC under the same article. This conclusion becomes all the stronger when the court obeys the injunction cast upon it by section 12(4) of the Human Rights Act 1998 to have particular regard to the importance of freedom of expression and, in particular, to the extent to which it would be in the public interest for journalistic, literary or artistic material . . . to be published".

56. In *Sugar,* Lord Wilson did not consider that there had been a violation of Convention rights. What is unclear is whether this finding was only on the basis that any interference was justified under article 10(2), or whether, as the Home Office contends, Lord Wilson also considered that article 10(1) was not engaged. The Home Office submits that the correct construction is that Lord Wilson agreed article 10(1) was not engaged, when the words are looked at objectively. The UT does not agree. Either meaning is possible, but the proper construction is that Lord Wilson did not find that domestic law does not recognise a relevant right to receive information under article 10(1), but rather that any interference with such a right was justified under article 10(2) in the circumstances of that case. The UT draws this conclusion from: the restriction of Lord Wilson's agreement with Lord Brown to "the essence" of what Lord Brown said, rather than everything he said; that Lord Wilson said that he "countenanced more readily" that there was an interference with article 10(1) rights; what Lord Mance, and Lord Wilson himself, said about

these *dicta* in the later case of *Kennedy* in which they also sat; and the general approach to *Sugar* in *Kennedy*.

57. In *Kennedy*, a 2014 decision, Lord Mance indicated that in *Sugar* he had agreed with Lord Brown that article 10(1) was not engaged, but:

> "Lord Wilson JSC, while not disagreeing, was less categorical on the point in para 58, so that the reasoning on it cannot be regarded as part of the *ratio*" (para 62).

Lord Wilson found that, in the light of judgments of the ECtHR subsequent to *Sugar*, the court should now confidently conclude that a right to require an unwilling public authority to disclose information can arise under article 10 of the Convention (para 189). Immediately before this, he stated that the basis on which he had associated himself with the rejection of article 10 in *Sugar* was that interference with any possible right under article 10 had clearly been justified (para 188). These are *obiter dicta* in a later case, and cannot be determinative of the meaning to be attributed to what Lord Wilson said in *Sugar*. But that does not mean they must be left completely out of account. Also of interest is the manner in which the other members of the Supreme Court approached the case in *Kennedy*. They undertook an extensive examination of Strasbourg jurisprudence for themselves, which would have been unnecessary if the issue had already been determined by binding *ratio* in *Sugar* (although the UT accepts that a larger court had been convened so that *Sugar* could have been overturned if necessary). The minority in *Kennedy*, Lords Wilson and Carnwath, who found that article 10 included rights to receive information from public authorities, did not approach the matter on the basis they were departing from previous binding authority to the contrary in *Sugar*.

58. The UT acknowledges that Etherton LJ in the Court of Appeal in *Kennedy* reached a different conclusion ([2012] EWCA Civ 317, [2012] 1 WLR 3524 paras 36, 46-51 and 55). He considered that Lord Brown's findings in *Sugar* were part of the *ratio* of that case and binding. But when making those findings the Court of Appeal did not have the benefit of what the UK Supreme Court said on the appeal from that decision. The comments of Lords Mance and Wilson in *Kennedy* were made in an appeal decision considering the Court of Appeal judgment, and are to be preferred to the comments of Etherton LJ in this regard. On that basis, only two Justices in *Sugar* found domestic law did not recognise a right to receive information as part of article 10 of the Convention. *Sugar* is not, therefore, binding authority on that point.

59. As far as *Kennedy* is concerned, all parties in this case accept as *obiter dicta* what is said about article 10(1) and the absence of a positive duty to impart information beyond that recognised in domestic law (*Kennedy* paras 10, 57, 101(v), 143, 150, 152), and as submitted by the UK Government to the ECtHR in *Times Newspapers Limited and Kennedy v UK* (application no. 64367/14 at para 84). It is also accepted that what was said in the Court of Appeal in *Kennedy* about article 10(1) not being engaged is not binding, because the UK Supreme Court decided the case on a different basis (*R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1989] 2 WLR 603 ("***Al-Mehdawi***") at para 608, a point on which the

House of Lords did not express a view, and *Balabel v Air-India* [1988] Ch 317 at 325 ("***Balabel***")).

60. Having analysed both *Sugar* and *Kennedy*, neither are binding authority that there is no right to receive information arising under article 10(1) of the Convention recognised by domestic law.

Persuasive authority

61. The UT acknowledges that in many cases it would be appropriate to follow persuasive *obiter dicta* from higher courts, even though not formally binding. It has considered whether it ought to follow *obiter dicta* of that nature in *Sugar* and *Kennedy*. However, the UT finds that *Magyar* (which, under section 2 HRA, must be taken into account) largely addressed the concerns on which earlier *dicta* about domestic law not recognising a right to receive information under article 10(1) were based. The consequence is that the persuasive effect of relevant *obiter dicta* on article 10(1) is weakened, and it is appropriate instead to follow the approach in *Magyar*, for reasons explained more fully below.

62. The UT first considers the reasons why higher courts declined to recognise a right to receive information under article 10(1). *Sugar* has been addressed above. The key reason for rejecting the argument based on article 10 was that the state of Strasbourg jurisprudence at that time did not clearly establish such a right (para 94). In *Kennedy*, the court looked again at Strasbourg authority about the remit of article 10(1) and whether it covered access to information from a public authority. The minority of two (Lords Wilson and Carnwath) thought that caselaw sufficient to establish a right to receive information, which should be given effect in domestic law (paras 189, 199 and 209). The majority, however, considered that the Strasbourg caselaw had not yet reached the stage of a clear authoritative statement, which also set out the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits.

63. Looking at the reasoning for the *obiter dicta* of the majority in more detail, Lord Mance considered Strasbourg caselaw as it stood then and found it was neither clear nor easy to reconcile (para 59). He was concerned that if article 10 was to include a right to receive information, article 10 would itself become a European-wide freedom of information law, but one lacking specific provisions and qualifications that are ordinarily set out by legislatures in statutes (para 94). Lord Toulson agreed with the conclusions of Lord Mance (para 150). He considered that the Strasbourg authority as it stood at that time lacked a consistent and clearly reasoned analysis of the right to receive and impart information. If article 10 was to recognise such a right, there was a clear need to determine the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits (para 145). Lord Sumption agreed with Lords Mance and Toulson. Lord Sumption considered that the more authoritative of the existing Strasbourg cases were authority that article 10 recognises a right in the citizen not to be impeded by the state in the exercise of such right of access to information as they may already have under domestic law, but did not itself create such a right of access. He acknowledged some cases pointed to a positive obligation giving rise to a right to receive information which would not otherwise be

available, but even if that were correct it was not an unqualified right (para 154). He considered that the various means of obtaining information available under domestic law meant article 10 rights were respected, and the public interest would be taken into account in assessing requests made under domestic law other than FOIA (para 156). Lord Neuberger and Lord Clarke agreed with Lords Mance, Toulson and Sumption.

64. In summary, the main concerns in both *Sugar* and *Kennedy* were the lack of a clear authoritative statement and the lack of detailed criteria or principles in the Strasbourg jurisprudence, and the undermining of a detailed domestic regime by a pan-European right to receive information. The *obiter dicta* in *Sugar* and *Kennedy* are entitled to considerable weight, having followed full argument and careful analysis of Strasbourg jurisprudence as it then stood, and being views of the House of Lords and UK Supreme Court (*Youngsam* at first instance para 26, citing *Brunner*; *Italmere Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1982] 1 WLR 158 at 165F). Nevertheless, in deciding whether *dicta* should be followed even though not binding, it is relevant to consider whether subsequent developments may have affected the force of the reasons not to recognise article 10 rights to receive information as part of domestic law, and other obligations incumbent on the UT.

65. *Magyar* is a significant subsequent development. It is an authoritative decision of the Grand Chamber. It considers article 10 in the context of freedom of information, and states “the time has come to clarify the classic principles” (para 156). The UK government intervened in that case, and made representations citing previous cases of the court. It submitted that article 10(1) imposed only negative obligations to refrain from interfering with the right of communication, and no positive obligations to provide access to information; to hold otherwise would amount to constructing a European freedom of information law (paras 99-100). Those submissions bear similarities to *obiter dicta* in *Sugar* and *Kennedy*. They were rejected by a 15:2 majority of the ECtHR, which carried out a detailed analysis (paras 117-170). Two judges issued a dissenting opinion, referring in terms to *dicta* in *Kennedy* (paras 24, 26, 36, 42, 45), which was therefore known to the ECtHR. It was not followed by the clear majority.

66. *Magyar* is a thorough and detailed decision of the ECtHR. The Grand Chamber looked at general principles, the Convention case-law, the travaux preparatoires, and comparative and international law. In looking at Convention jurisprudence, it looked at strands of previous jurisprudence that appeared to pull in different directions. It reconciled them, finding they were not contradictory or inconsistent (para 133). It concluded that it was not prevented from interpreting article 10(1) of the Convention as including a right of access to information (para 149). It found there had been evolution of a right of freedom of information as an inherent element of the freedom to receive and impart information enshrined in article 10 (para 151). That did not confer upon an individual a general right of access to information held by a public authority nor oblige governments to impart such information (para 156). However, in circumstances where access to information is instrumental for the exercise of the applicant’s right to receive and impart information, its denial may constitute an interference with that right (para 155).

67. The ECtHR also set out principles underlying and limits to the article 10(1) right to receive information. It set out the four criteria already referred to above (see para 21 above) in order to determine when a right of access to information protected by article 10 arose in a particular case (paras 158 to 170). It found the four criteria were met in that particular case. It made clear that was not all that needed to be considered, but applied a structured examination under article 10(2) which included balancing competing public and private interests. It found that the interference was not justified, and there had been a violation of article 10 (para 200). The ECtHR thus provided a structured framework governing the existence and operation of the right.

68. *Magyar* therefore largely addresses the reasons given in the *obiter dicta* in *Sugar* and *Kennedy* for domestic law not yet recognising a right to freedom of information in article 10(1). *Magyar* is a decision of the Grand Chamber, which provides a clear authoritative statement of the law. It surveyed and explained earlier jurisprudence. It sets out the principle or principles by reference to which a court is to decide whether such a right exists in a particular case and what are its limits. It did not recognise a general right to receive information which replaced domestic systems, but a limited right arising only in defined circumstances. The UT concludes that the level of persuasiveness of the *obiter dicta* in *Sugar* and *Kennedy* concerning article 10 Convention rights has been lowered to the degree that those *dicta* should not be followed, given the subsequent decision of the ECtHR in *Magyar.*

The authority of Magyar

69. Further arguments were advanced by the Home Office why the UT should not give effect to *Magyar*. The UT acknowledges that in principle, there may be good reason for not following Strasbourg authority, for example if it proceeds on insufficient appreciation of accommodation of domestic process, or if it is not clear (*R v Abdurahman* [2020] 4 WLR 6 paras 98-106). Nevertheless, if the Strasbourg authority is at Grand Chamber level, and involves a carefully considered decision reaching a clear conclusion, intended to be generally applied by national courts, in which the relevant authorities and principles were fully canvassed, it would require the most exceptional circumstances before any national court would refuse to apply the decision (*RJM* para 31). The UT is not persuaded there are any exceptional circumstances or adequate reasons why it should not follow Magyar, as explained further below.

70. It is true that the principles of application of article 10, read with *Magyar*, are not as detailed as domestic legislation such as FOIA, and do not contain the same calibrations as in FOIA (dissenting opinion of Judge Spano (joined by Judge Kjolbro) in *Magyar* paras 39-40). The bounds of the article 10(1) right recognised in *Magyar* are therefore less certain than FOIA and other domestic regimes. But that is not unusual when Convention rights are compared with domestic legislation, and this was not a consideration which dissuaded Parliament from passing the HRA, or has prevented the courts from giving effect to Convention rights. It is some time since *Magyar* was decided, and subsequent cases in Strasbourg and elsewhere, for example *Moss*, have in practice been able to apply the *Magyar* criteria, even if there has been scope for argument about whether those criteria are met or not in a particular case. The fact that rights will only arise in respect of

some litigants, not others, is consistent with the wider approach to Convention rights – that they may be universal but they are not found engaged in all circumstances. The approach set out in *Magyar* is not rendered impossible to apply by some of the same factors having a bearing on both engagement of the *Magyar* criteria and on justification.

71. The Home Office further argues that it would be constitutionally inappropriate for the UT to engage with whether section 44 FOIA with section 24 ASPA violates CFI's article 10 rights. The UT does not agree. Courts and tribunals apply the law Parliament has enacted. The UK Parliament chose to enact the HRA. The UT is subject to duties under sections 2 and 6 HRA in relation to Convention rights. The UT is aware of the constitutional boundaries for tribunals and courts in sections 3 and 4 HRA; those are applied when considering the remedies the UT can grant in this case. It does not follow that the UT should decline to consider the Convention rights claim advanced in the appeal before it.

72. The Commissioner also argues that the *Magyar* decision should not be given effect because the criteria are at odds with the system of recovery under FOIA, that system ordinarily being applicant and motive blind. That may be true as a general principle, but FOIA already contains recognition that the identity of the applicant can be relevant to requests under that regime. Examples are refusals to comply with vexatious or repeat requests by the same requester (section 14 FOIA) or the exemption of personal data of the applicant (section 40 FOIA). *Magyar* provides one further situation where the identity of the requester may be of relevance when considering information requests.

73. *Magyar* does not establish a general European freedom of information regime which in some way undermines the domestic law of the UK. Rather, the ECtHR recognised a positive obligation of limited scope. It arises only in defined circumstances, and is subject to four "gateway" criteria which are narrow. Further, even where article 10(1) is engaged, it is subject to the limitations in article 10(2). There will be no Convention based obligation to disclose information if the four *Magyar* entry criteria are not all met, or if withholding the information is justified under article 10(2). *Magyar* does not prevent member states operating exemptions from obligations to disclose information, provided they are compatible with article 10.

74. This is not a case where the UT considers there are exceptional circumstances justifying it not following *Magyar*, or even good reasons for not doing so. The UT considers that, in the absence of binding authority to the contrary, and given section 2 HRA, it should follow the approach suggested in *Chester* (paras 25-27) and *RJM* (para 31) and give effect to the decision of the Grand Chamber of the ECtHR in *Magyar*, in preference to *obiter dicta* pronounced some time before *Magyar* was decided.

Other cases

75. Before leaving the issue of precedent, it is appropriate to say something about the cases mentioned in paragraphs 22-23 above. None of the cases in paragraph 22 contain *ratio* binding on this UT panel. Nevertheless, they represent a body of authority in tribunals, and from a court in Northern Ireland refusing permission for

judicial review, which follows *Moss* and declines to apply *Magyar*. It is appropriate to explain why this three judge panel of the UT agrees with Fordham J in *Tortoise* that the position is not so clear cut, and indeed has come to a different view.

76. Despite there being a relatively lengthy list of cases in paragraph 22 above, *Moss* is the only one of those cases which looks in any detail at whether lower courts and tribunals are actually bound by a finding that domestic law does not recognise a right to receive information as part of article 10(1). Later cases follow *Moss* on the basis of the binding precedent point, effectively adopting its reasoning without carrying out their own detailed analysis (e.g. *Greenwood*, *Dransfield*, *Lownie*, *FCDO* and *Lavery*), or do so on that basis combined with other findings in *Moss* which the UT does not depart from (*Casey-Hulme*). In *FCDO*, the decision of the three judge panel adopts the reasoning in *Moss*, stating there would be no purpose in it revisiting the reasoning in *Kennedy* and *Sugar* (para 82). *Lavery* states that the scope of article 10 was part of the *ratio* of *Sugar* without explaining why, a conclusion which this UT does not consider is correct for reasons already explained. Possibly the lack of independent analysis is because most of the cases on the list appear to be decided on a number of grounds, and the article 10 arguments are not their main focus.

77. *Moss* therefore being the key case finding domestic law does not recognise a right to receive information as part of article 10(1), it requires to be addressed in more detail. There were two main bases on which *Moss* was decided (para 2). The first basis bears on the point in issue in this appeal. *Moss* decided that *Magyar* could not apply at the level of the FtT or the UT, because domestic court authority bound tribunals not to follow the expanded view as to the reach of article 10 of the Convention taken in *Magyar* (between paras 29 and 74). The second basis for the decision in *Moss* was a conclusion on the facts that even if *Magyar* applied, there was no violation of article 10. That was partly because the four *Magyar* gateway criteria giving rise to an article 10(1) right were not met (para 99), and partly because other mechanisms existed to obtain the relevant information that could satisfy any such right so that there was no violation (in contrast to the present case where release of information given in confidence under any scheme would be likely to be caught by section 24 ASPA). There is no reason to depart from that second basis for the decision in *Moss*, or the overall decision in *Moss* that the appeal ought to be dismissed. Nor does this decision of the UT undermine the outcome of the other cases decided in the UT raising article 10 and *Magyar,* all of which were also decided on other grounds (*FCDO, Casey-Hulme, Dransfield and Lownie*).

78. The UT does however depart from the reasoning in *Moss* on the first basis on which it was decided, and the parts of the reasoning in later cases following that aspect of *Moss*. First, the UT does not agree with the finding in *Moss* that the UT is bound by the rules of precedent to find that article 10(1) does not extend to include a limited right of access to information (para 3(i)), for the detailed reasons set out above. In particular, on the analysis already given, the finding in *Moss* that *Sugar* contains binding *ratio* that article 10(1) does not encompass a right of access to information (para 45) cannot be sustained. It is also not correct that the *ratio* of the Court of Appeal in *Kennedy* (rather than the UK Supreme Court) is binding on the UT (*Moss* paras 46 and 53); parties accept in this case that where the UK Supreme Court has decided an appeal on a particular basis, and did not

determine an issue ruled upon by the Court of Appeal, the Court of Appeal's judgment on that matter does not operate as binding precedent (*Al-Mehdawi* para 608, *Balabel* at 325).

79. Further, the UT departs from the *dicta* in *Moss* that it ought to follow persuasive *dicta* (para 58 onwards). There is no express recognition in *Moss* that whether to follow the *obiter dicta* in *Sugar* and *Kennedy* depended on how persuasive that *dicta* was in the light of competing obligations under section 2 and 6 HRA and subsequent Strasbourg authority (given that *Kay* only applies to binding authority). There is no identification of the concerns expressed in *Sugar* and *Kennedy* with recognising such a right, and analysis of whether those concerns had been addressed by *Magyar*.

80. For those reasons this panel of the UT has decided that the conclusion in *Moss* that the UT is bound by rules of precedent not to give effect to the right recognised in *Magyar* is unsafe, and ought not to be followed. Further, the UT considers that, on that limited point, *FCDO* and other Upper Tribunal cases were clearly wrong to follow *Moss* (*Police Authority for Huddersfield v Watson* [1947] KB 842 at 848), although it does not depart from them on other grounds on which they were decided.

Consequences of the rejection of the argument based on precedent for this appeal

81. The FtT dismissed the ground of appeal before it based on Convention rights. It did so because it found that domestic caselaw prohibiting recognition of an article 10 right to receive information meant this ground could not succeed (paras 44–49, 57). The FtT was technically correct, given *Moss* and *FCDO* which were binding on it. However, the UT has found that the reasoning in *Moss*, adopted in *FCDO*, that there was binding precedent of higher courts preventing recognition of *Magyar* in domestic law, was reached in error of law. The FtT decision having followed those decisions in that respect therefore also involves an error on a point of law within section 12(1) TCEA.

82. The UT has considered whether to remit to the FtT to make appropriate findings about the application of the article 10(1) right to the circumstances of the case so that the grounds of appeal before the FtT can be properly decided. However, it has decided not to do so. It is a matter of concession by the Home Office that the four gateway *Magyar* criteria are met in this case. The process of deciding whether any interference is justified is essentially evaluative against a factual background (*DPP v Ziegler* [2021] UKSC 23, [2022] AC 408 ("***Ziegler***"), paras 107-108), a background available to the UT.

83. The UT considers that it is in as good a position as the FtT to make relevant findings, which it is entitled to do when re-making a decision under section 12(4) TCEA. Before the FtT there were witness statements, from Ms Grange for CFI, and Mr Reynolds for the Home Office. The statement of Mr Reynolds exhibited various documents, including examples of non-technical summaries. At the hearing set down by the FtT, CFI and the Home Office, both witnesses were available, but both CFI and the Home Office elected not to cross examine. That was against a background of CFI having stated in its skeleton argument that

although parties differed in emphasis and their views on animal experimentation and transparency, there was no difference of fact between them that was material to the issues in the appeal. The Home Office recognised in the witness statement of Mr Reynolds lodged before the FtT that the application (or not) of article 10 was primarily a matter for legal submissions (para 5). The hearing proceeded on the basis that the content of the statements of Ms Grange and Mr Reynolds were broadly accepted and part of the evidential foundation of the case, and the FtT made findings on the basis of them (e.g. paras 37 and 40). Given that neither the Commissioner nor the Home Office challenged the factual evidence in the witness statements before the FtT, it is not now open to them to reject material evidence they did not challenge before the FtT. The UT has access to the open and closed bundles before the FtT, including those witness statements. The UT is in no different an evidential position from the FtT. Further, given that the UT finds that even though there is a violation of CFI's Convention rights it is obliged to refuse the appeal, and the FtT would be in the same position, there would be little practical utility but more expense in remitting back.

84. Accordingly, the UT sets aside the decision of the FtT, makes additional findings below, and then re-makes the decision of the FtT in accordance with those findings. The consequence is still that the appeal from the Commissioner's decision falls to be refused, but for different reasons.

Convention rights

85. There is a preliminary technical point raised by the respondents, which may be dealt with briefly. It was argued that it is not properly open to the UT to consider the substance of CFI's argument about violation of Convention rights, because it is not a ground of appeal on which permission was given. That argument is rejected, for similar reasons given in relation to an earlier argument based on the extent of the grounds of permission (see para 50 above). The permission covered the grounds of appeal in the application, in which the principal ground was set out in paras 2-3 (see para 4 above); four later grounds at para 35 all related to that principal ground. The grant of permission was based on "the grounds of appeal" being arguable, and thereby covered arguments about the compatibility of the effect of section 24 with CFI's rights under article 10 of the Convention. If that were to be wrong, the UT would in any event grant further permission. Following lodging of detailed skeleton arguments, there was a two day hearing before the UT. The issue of *Magyar* and whether there was a violation of article 10(1) Convention rights was fully argued before the UT, and no party was taken by surprise by this issue.

86. Turning to the substance of the ground of appeal based on Convention rights, a summary of the parties' arguments on whether CFI's Convention rights have been violated is as follows. CFI argues that the combined effect of section 44 FOIA and section 24 ASPA breaches its Convention rights; it submits it has rights under article 10(1) to receive information, those rights have been interfered with, and the interference is disproportionate. The Commissioner argues that there is no violation of article 10, because article 10 rights can be realised in ways other than under FOIA; the exemption in section 44 FOIA with section 24 ASPA is not therefore an interference with Convention rights. The Home Office agrees with the

Commissioner, and further submits that if there is an interference, it is proportionate. A bright line rule precluding an assessment of proportionality is permissible under the Convention (*Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 para 106-110 ("***Animal Defenders***"). Section 24 ASPA is a rule sourced in an EU directive in similarly absolute terms. It serves important public interests, including the protection of commercial confidentiality in a competitive market and the prevention of disruption to lawful business activities. The Home Office submits that significant weight should be given to Parliament's assessment of how those competing interests are to be balanced. Accordingly, section 24 ASPA does not give rise to a disproportionate interference with Convention rights.

87. CFI seeks an interpretation of section 24 ASPA which is read down to give effect to Convention rights under section 3 HRA, so that it can access information under FOIA without it being exempt. The obligation to read and give effect to legislation compatibly with Convention rights applies only where legislation would otherwise breach Convention rights (*Donoghue v Poplar Housing Association* [2002] QB 48 ("***Donoghue***") at 75(a)). The UT must decide whether, applying *Magyar*, CFI enjoys Convention rights which are interfered with, and if so whether any interference is justified.

The Magyar gateway criteria

88. Neither the Home Office nor the Commissioner dispute that the four *Magyar* gateway criteria are met in the circumstances of this case. It is sufficient therefore to state briefly the basis on which those criteria are met. In essence, the UT accepts the unchallenged evidence of Ms Grange on these issues.

89. First, the purpose of the request must be to enable freedom of expression. The evidence of Ms Grange in her witness statement of 6 December 2024 indicates that the purpose of the request is precisely so CFI can disseminate it to the public (paras 139-141). CFI needs the information to inform itself, the general public, politicians, and courts/tribunals in challenges, about the basis on which the harm/benefit test is applied in decisions about licences for testing on animals for cosmetic purposes. In essence, the purpose of the information request is to share information, to contribute to public debate regarding animal experimentation and the operation of the ASPA regulatory regime. It is not for private, commercial or personal reasons, but to support CFI's campaigning, educational and public interest functions.

90. Second, the nature of the information sought must provide transparency on the manner of conduct of public affairs and on matters of interest for society as a whole. Ms Grange submits that this test is met (paras 142- 149). Cosmetic testing has long been a matter of public concern, as reflected by polling. The information would provide transparency on how the harm/benefit test in ASPA is applied by the Home Office, including among other things whether societal utility of the substance or product to be tested on animals is considered. Transparency would also minimise unnecessary duplication of animal experiments, a matter of public interest. It would help in ensuring the principles of replacement, reduction and refinement, which are supposed to underpin the animal testing regime, are being

met. The UT accepts that the information concerns the Home Office's exercise of statutory powers in regulating animal experimentation and applying the statutory harm/benefit test in decisions about licences, which are matters of obvious public interest.

91. Third, the requester must be a journalist or a person such as a non-governmental organisation acting as a "public watchdog". Ms Grange argues that CFI is such an NGO (witness statement, para 150 and more generally). The UT accepts that CFI engages in investigation, public education, policy advocacy, regulatory engagement and litigation in relation to animal testing. Its ability to obtain and disseminate information is integral to those functions. It performs a public watchdog function analogous to that recognised in *Magyar*.

92. Fourth, the information must be "ready and available" as opposed to requiring data collection by the holder. The UT finds that condition is met. The information exists within the Home Office and formed part of the documentation generated during the statutory licensing process. It did not require creation of new material, the carrying out of further research, or the compilation of information not already available to the Home Office.

Are CFI's article 10(1) rights interfered with?

93. CFI submits that its freedom of expression has been interfered with, because it has *Magyar* rights and has not been able to obtain information and disseminate it. Both respondents argue that there is no interference with article 10(1) rights, relying on *Kennedy* (which was in turn relied on in *Moss* and *Casey-Hulme*). In those cases, it was found that FOIA and the Environmental Information Regulations 2004 respectively were not the only means of accessing information sought. Because of these other means of obtaining information, there was no unjustified interference with Convention rights.

94. The UT recognises that if information sought is in principle available by other means, being unable to obtain it under FOIA may not be a violation of article 10 rights. However, none of *Kennedy*, *Moss* and *Casey-Hulme* concerned the exemption under section 44 FOIA read with section 24 ASPA. In each of those three cases there was in principle some other way of obtaining disclosure of the requested information, by statute or at common law (avenues preserved under section 78 FOIA). In contrast, in the present case there is no other practical alternative route of access. In a sense, section 44 FOIA is the reverse of section 78 (the provision relied on in *Kennedy*); the former prohibits disclosure and the latter enables it. The effect of section 24 ASPA is that whatever information recovery regime a requester proceeds under, the disclosure of information sought, having been given in confidence, would be a criminal offence. The Convention seeks to guarantee rights which are practical and effective, not theoretical or illusory. The effect of section 44 with section 24 was to deny CFI access to information it sought, and in the absence of a practical alternative regime under which it might be accessed, the UT finds that was an interference with CFI's Convention rights.

Is the interference justified under article 10(2)?

95. Article 10(2) permits interferences which are prescribed by law and are necessary in a democratic society, to protect certain interests and values. The burden is on the party seeking to justify the interference to show that the tests under article 10(2) are met. There is no dispute that the interference in this case is prescribed by law, namely section 44 FOIA read with section 24 ASPA, but it is disputed whether the interference is necessary in a democratic society. That matter falls to be considered using the familiar analysis of proportionality derived from *Bank Mellat v HM Treasury* [2013] UKSC 39 (paras 20 and 68-74). As recognised in that case, there may be some overlap between factors relevant to different stages of the proportionality analysis (para 20).

96. The UT is satisfied on the basis of the evidence in the witness statement of Mr Reynolds (dated 9 December 2024) and the submissions of the Home Office that the interference pursues legitimate aims. The Home Office points to the need to secure the confidentiality of commercially sensitive information received in confidence, and protect intellectual property, the effective operation of the licensing regime, and the safety of those working in the industry. The UT is also satisfied that those objectives, pursued though the restriction on recovery of information under section 44 FOIA read with section 24 ASPA, are sufficiently important to justify the limitation of a fundamental right. The restriction is rationally connected to the objectives, and the first two limbs of the *Bank Mellat* proportionality assessment are satisfied.

97. The controversial issues in relation to justification are whether the interference under article 10(1) of the Convention is proportionate to those legitimate aims, in particular whether less intrusive measures could have been used or if a fair balance is struck. In considering those matters, although the Home Office points out that section 24 ASPA implements article 13(2) of the 1986 Directive, the UT does not consider that factor assists. The Directive required "all necessary steps to ensure the confidentiality of commercially sensitive information communicated pursuant to this Directive is protected". Steps taken must be "necessary", rather than "all possible steps", and the principle of proportionality is an integral part of EU law. The wording does not imply that interferences under article 10(1) in the context of section 24 ASPA are automatically justified under article 10(2); rather, it must be considered if they are "necessary".

98. Turning to the third limb of the *Bank Mellat* test, of whether a less intrusive measure could have been used, the UT recognises that bright line rules may be found to be proportionate, even if there are hard cases on either side of them (*Animal Defenders* paras 106-110). The UT also accepts that its task is not to assess proportionality on the basis of the impact in an individual case, but rather the proportionality of the overall categorisation (*In re Gallacher* [2019] UKSC 3, [2020] AC 185 para 50). Nevertheless, the area of discretion for national authorities when carrying out this generalised assessment is narrowed where a measure operates to restrict debate on matters of public interest and the ability of a public watchdog to perform its function, as the restriction in this case does (*Animal Defenders* paras 102, 104). The UT finds the blanket prohibition represented by section 44 FOIA with section 24 ASPA is more intrusive than necessary. All information given in confidence for the purposes of exercise of functions under ASPA is covered. There

are no exceptions, for example for trivial information or information that an applicant might later consent to being released. Every aspect of the information provided in confidence is given the same degree of protection, regardless of its sensitivity. While the provision only applies to information provided, not for example purely Home Office generated information, where the Home Office analysis is based on information given in confidence it is still apparently caught by section 24 ASPA. The blanket prohibition is at odds with section 41 FOIA, which although also an absolute exemption, incorporates a public interest test by virtue of its reference to disclosure constituting an actionable breach of confidence. No adequately principled justification for carving out confidential information under ASPA from other forms of confidential information, with only the latter being subject to the balance inherent in a public interest test, is advanced or evidenced. The absence of any proportionality analysis in a refusal to allow access to information is a factor recognised by the ECtHR to prevent a measure being justified under article 10(2) (*Khadhaghutyan Yerkkhosutyun v Armenia* Appl No 5947/17 paras 76-77).

99. The UT also finds that the prohibition on receipt of information resulting from the application of section 44 FOIA with section 24 ASPA fails to strike a fair balance and the fourth limb of the *Bank Mellat* proportionality assessment is not satisfied. The severity of the effects of the prohibition on the ability of press or public watchdogs to carry out their role, and the consequent adverse effect on public debate, outweighs the contribution of the absolute prohibition to the legitimate aims pursued.

100. On one side of the balance, the UT acknowledges that the licensing system for animal testing is part of a wider regulatory system directed towards advancing knowledge and innovation, and protecting human and animal health, all key public interests. The Home Office's role as statutory regulator is an important one. Treating information as confidential may help to encourage provision of full and candid information. Protecting sensitive information, intellectual property, and scientific methodologies is also important, and disclosing this type of information has the potential to confer competitive advantage on others. Further, protecting those involved in scientific experiments on animals from the risk of harm is clearly a worthy aim. The Home Office has tried to promote transparency in various ways while safeguarding other interests; Mr Reynolds in his statement points to information which is released by the Home Office such as guidance on the operation of ASPA, anonymised non-technical summaries of project licences granted, retrospective assessments required by the Regulator, annual statistics and annual reports that the Home Office chooses to publish (para 18). This can help to inform public watchdogs and the public.

101. On the other side of the balance, the information sought is about an exercise of public power at the core of the animal testing licensing regime. Information is not sought about project licence applicants, or private affairs of licence holders. (If that type of information were to be sought, that would be a legitimate concern due to the need to protect the safety of such people, although other exceptions under FOIA might protect their interests). Rather, information is sought by a long-established NGO performing a public-watchdog function, about the process by which a public authority determines whether activities Parliament has otherwise

prohibited should nevertheless be authorised. The information is sought from the public authority about how it evaluates, analyses and assesses applications for licences for animal testing, not from private individuals. The material sought is qualitatively different from material already available through information currently provided by the Home Office, which does not provide the Home Office's evaluative reasoning of an application, or explain how harm/benefit assessments under section 5B ASPA are conducted. The non-technical summaries which are published (available to the UT) contain information provided by applicants, including benefits, anticipated effects on animals and "application of the 3Rs [replacement, reduction and refinement]", but they do not contain the reasons for the Home Office's decision. Only the Home Office can explain how it approaches the statutory test, weighs considerations, and finds a licence ought to be granted. Without access to the material sought, meaningful scrutiny of whether ethical and legal safeguards are properly observed in a matter of considerable public interest is substantially impaired. Public scrutiny of whether the principles underlying scientific testing on animals, of replacement, reduction and refinement, are being observed by the Home Office when granting licences, is also impaired. The safeguarding of the rule of law, through scrutiny of the exercise of public power and holding decision-makers to account, is adversely affected.

102. While recognising the legitimacy of the interests relied on by the Home Office, the UT finds that the balance struck by section 44 FOIA with section 24 ASPA is not a fair one. Once information is characterised as having been given in confidence, or reasonably believed to have been given in confidence, the statutory prohibition applies irrespective of the purpose of the request, the public importance of the information sought, the identity of the requester, the absence of identifiable prejudice, the possibility of redaction, the existence of consent, or any change in circumstances after the information has been received. In effect, the balancing exercise inherent in article 10(2) is excluded from the outset. There is no room to take into account the strength of the article 10(1) interest, and the countervailing interests always prevail. The UT does not consider that the Home Office has shown that the foreclosure of any mechanism through which competing interests can be weighed, which is the effect of section 44 FOIA with section 24 ASPA, is necessary in a democratic society. The protection of commercial and sensitive information, intellectual property, the licensing regime and safety of people working in industry can still be highly protected without the ban on information recovery resulting from the operation of section 44 FOIA with section 24 ASPA. The present position is disproportionate because it is too intrusive and fails to strike a fair balance.

Section 3 HRA – should section 24 be read down to permit a balancing of the competing rights and interests?

103. The UT finds for the reasons above that there has been a breach of CFI's Convention rights. CFI meets the *Magyar* criteria; its resulting right to receive information is unjustifiably interfered with by the exemption in section 44 FOIA with section 24 ASPA. The next question is whether the relevant legislation can be read and given effect to compatibly with Convention rights, to provide a remedy.

104. CFI argues that under section 3 HRA section 24 ASPA should be read and given effect to enable it to receive information under FOIA compatibly with its Convention

rights. If that is not possible, CFI argues that there should be a declaration of incompatibility under section 4 HRA, although accepts that the UT has no power to make such a declaration. Both respondents do not agree that section 3 HRA entitles the UT to read and give effect to section 24 in a way which differs from the interpretation provided in *BUAV*. They argue that the reading suggested goes against the grain of the legislation and the exercise would require policy choices which are not for the court. It also goes against the principle of certainty of penal provisions.

105. Section 3 has been described as being of an unusual and far-reaching character, and there is no dispute that it creates a powerful interpretative obligation (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557 para 30). Legislation must be interpreted compatibly with Convention rights unless the legislation itself makes it impossible to do so. Section 3 can, in appropriate cases, enable courts to read in words which change the meaning of the enacted legislation, to make it Convention compliant (*Secretary of State for Business and Trade v Mercer* [2024] UKSC 12, [2024] ICR 814 ("***Mercer***") at [93]).

106. However, the obligation under section 3 also has limits. Section 3 only requires a change in the meaning of ordinary legislation "so far as is possible to do so". That is in part because of the impact that section 3 has on the stability of the meaning of legislative provisions, and the tension created with the usual expectation that it is for the democratically elected legislature to lay down the law in statutory provisions formulated by itself, with a meaning directly given by its own collective intention. Accordingly modification of the ordinary meaning under section 3 should only occur where there are clear and compelling reasons (*R(S) v Secretary of State for Justice* [2013] 1 WLR 3079 at [61]-[62]). Section 3 does not allow a court to legislate; its task is still one of interpretation in accordance with the direction in section 3 HRA. A radical alteration of the effect of legislation, or a change to the substance of a provision, is likely to be an indication that more than interpretation is required (*Donoghue* para 76, *Mercer* para 95). Another indicator is if a change would call for legislative deliberation, for example where there is more than one possible solution to the problem, and policy considerations may be involved in the choice between them (*Mercer* para 95-96, 102-105).

107. The reading down requested by CFI is of section 24 ASPA, which would have the effect that the absolute exemption in section 44 FOIA when read with ASPA would be less comprehensive. Section 24 ASPA is a penal provision. An individual's liberty is at stake if a breach is found. A Home Office official who discloses information given in confidence becomes liable to up to two years imprisonment. Given the importance of certainty and clarity in this context, it is of some concern that CFI's suggestion of a Convention compliant interpretation of section 24 ASPA has not always been in identical terms. In CFI's skeleton argument, the UT is requested to read and give effect to section 24 "such that the words "information […] given in confidence" import the public interest defence to an action for disclosure, for which the law of confidentiality provides. In the skeleton argument it is also suggested that section 24 is "to include a public interest test". In court it was submitted that section 24 should be read and given effect with additional wording. Instead of reading:

> "A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence"

section 24 would read (with the words in bold added in)

> "A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information **the disclosure of which would constitute an actionable breach of confidence** which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence".

108. It has already been observed that it is legally possible for the same statutory provision to have two interpretations; one ordinary interpretation and one where special interpretative obligations under section 3 HRA are in play (*R(Z)* and para 47 above). Nevertheless, context is everything. It would be highly undesirable for legal certainty if a penal provision were to contain words not ascertainable from the statute book. While it is true that in *Ziegler*, the court found that a criminal offence (wilful obstruction under section 137 of the Highways Act 1980) was affected by the section 3 interpretative obligation, what was done was to interpret a defence already in the offence of "without lawful authority or excuse", and decide how that should be given effect. There was no reading in a new defence that was not there. In section 24 ASPA there is no defence of lawful excuse, lawful authority, or public interest. Policy choices would be involved in what any defence to section 24 should be and how far it should extend.

109. The UT finds that the interpretation of section 24 ASPA sought by CFI goes beyond the scope of the interpretative obligation in section 3. Points made by Eady J in *BUAV* at [2009] 1 WLR 636 (at para 38-43) prior to the case proceeding to the Court of Appeal are pertinent. Section 24 is a penal provision and should be construed accordingly. It contains no defence, such as lawful excuse, public interest or any other such concept. Nothing is said expressly about public interest or who is responsible for deciding where it lies. The statutory wording contemplates a need to decide whether an individual "knows or has reasonable grounds for believing information to have been given in confidence". The wording focuses on a particular point in time by reason of the past tense. It is necessary to ask whether the person being prosecuted has a belief that the information "has been" given in confidence, which focuses on the state of affairs at the time the information was imparted. It does not focus on the time the information is requested, or suggest application of a public interest test at that (or any other) point in time. Eady J concluded that (para 51):

> "a judge (or a tribunal) would need to think long and hard before deciding to step in (where legislators have hitherto "feared to tread") in order to introduce, by supposedly necessary implication, a whole set of criteria such as "public interest"…to which the legislators have made no reference….".

The UT agrees. It concludes that to read and give effect to section 24 in the way CFI suggests would amount to impermissible judicial legislation, and finds that it is not "possible" within the meaning of section 3 to read and give effect to section 24 ASPA compatibly with Convention rights.

110. The consequence is that if there is to be any remedy for the breach of CFI's Convention rights in the domestic courts, it would have to be by way of declaration of incompatibility under section 4 HRA. That is not something the UT has power to do (section 4(5)). In any event any such a declaration would not affect the validity, continuing operation or enforcement of section 24 ASPA and is not binding on the parties to the proceedings in which it is made.

Conclusion

111. The UT finds that it is not bound by precedent to find that domestic law does not include the right under article 10(1) of the Convention recognised in *Magyar,* and nor should it follow persuasive *dicta* to that effect. The FtT's decision involved an error of law in not applying *Magyar*, and is set aside. The UT further finds that CFI's article 10 rights, interpreted in accordance with *Magyar*, are interfered with, due to the effect of the absolute exemption under section 44 FOIA read with section 24 ASPA in a situation in which there is no other information recovery regime practically capable of giving effect to those rights (because of the terms of section 24). The interference with CFI's article 10 rights is disproportionate and not justified under article 10(2). However, it is not possible to read and give effect to section 44 FOIA read with section 24 ASPA compatibly with Convention rights under section 3 HRA, because to do so would cross the line from interpretation to impermissible judicial legislation. Accordingly, the ordinary interpretation of section 24 ASPA established in *BUAV* applies. The decision of the FtT, despite the error of law found, must be remade in essentially the same terms; the appeal before the FtT is refused.

The Honourable Lady Poole
Upper Tribunal Judge Citron
Upper Tribunal Judge Brewer

Authorised for issue on 21 August 2026