



Neutral citation number: [2024] UKFTT 336 (GRC)

Case Reference: EA/2024/0005

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Determined, by consent, on written evidence and submissions.

Considered on the papers on 16 April 2024.

Decision given on: 25 April 2024

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Dr Aimée Gasston
TRIBUNAL MEMBER Kerry Pepperell**

Between

ALUN DAVIS

Appellant

And

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed.

Substituted Decision Notice: No substituted decision notice.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
2. The Tribunal considered an agreed open bundle of evidence of 78 pages and a CLOSED bundle of 16 pages.

BACKGROUND

3. The Appellant made the following information request, on 13 June 2023, to the HM Revenue and Customs (HMRC) relating to legal advice sought by HMRC:-

Under the Freedom of Information Act (FOI) I request copies of the minutes to all meetings held and all legal advice in preparing the following 4 letter(s) sent by HMRC to Michelle Donelan MP. Firstly the letters from Angela MacDonald dated 4 January 2023 and 3 May and also the letters sent by Jim Harra dated 10 March and 1 June.

4. HMRC responded on 6 July 2023. It stated that it held some of the information but refused to provide it citing section 42 of the Freedom of Information Act 2000 (FOIA)(legal professional privilege) as the basis for doing so. HMRC stated that the remainder of the information was not held, specifically, minutes in relation to meetings held in preparing for the letters sent by HMRC to Michelle Donelan MP. Following an internal review HMRC confirmed to the Appellant on 10 August 2023 that it upheld its

decision to refuse the request. The Appellant contacted the Commissioner on 21 August 2023 to complain about the way HMRC handled his request for information.

LEGAL FRAMEWORK

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

42.— Legal professional privilege.

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

6. There are two types of LPP – litigation privilege and advice privilege. In the current case HMRC has claimed that the withheld information is subject to advice privilege, as it is a confidential communication between client (HMRC) and a legal adviser, made for the dominant purpose of seeking and giving legal advice.
7. The development of the doctrine of privilege in relation to legal advice, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates Court, ex p B*, [1996] AC 487, and then summarised by him as follows at 507D:

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

8. The exemption in s42(1) FOIA is a qualified exemption which means that in addition to demonstrating that the requested information falls within the definition of the exemption, there must be consideration of the public interest arguments for and against disclosure to demonstrate in a given case that the public interest rests in maintaining the exemption or disclosing the information. When applying the public interest test the approach to be taken is whether in all the circumstances of the case,

the public interest in maintaining the exemption outweighs the public interest in disclosing the information: s2(2)(b) FOIA.

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

41. ... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA . Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

53.....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

10. Further, in *Corderoy and Ahmed v Information Commissioner, A-G and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted as follows in emphasising that the s42 FOIA exemption is not a blanket exemption:-

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

THE DECISION NOTICE

11. The Commissioner issued a decision notice dated 11 December 2023. The Commissioner explained that he:-

...considers the scope of his investigation is to determine whether or not HMRC are correct in their application of section 42(1) of FOIA to the held information within scope. The complainant has not raised issue with HMRC's response that

it did not hold some of the requested information. Accordingly the Commissioner has not investigated that aspect of the response.

12. The Commissioner said he had reviewed the withheld information and was ‘satisfied that it comprises of communications between client and legal adviser for the dominant purpose of seeking and giving legal advice’. Therefore, the Commissioner found that ‘it falls within the definition of advice privilege and is therefore subject to LPP’. On that basis the Commissioner found that the exemption was engaged: paragraph 11 of the decision notice.

13. In relation to the public interest the Commissioner noted that the Appellant argued that there is a public interest in ‘understanding how HMRC have come to the decision about how to classify a mastectomy bra for the purposes of Customs classification legislation’ and that in the Appellant’s opinion ‘HMRC has adopted an incorrect classification and is wrongly charging 6% duty on mastectomy bras which has the potential to affect a large number of people’. The Commissioner said that:-

14. Whilst this is primarily a tax issue, the Commissioner recognises that it could also have the potential to be quite an emotive topic given the type of person who would be likely to require a mastectomy bra (e.g. women following cancer treatment.)

15. HMRC has acknowledged that the general public interest in transparency counts in favour of disclosure. It also acknowledges that there will be public interest in Customs duties applicable to the classification of mastectomy bras.

14. The Commissioner also noted that:-

17. HMRC argued that whilst it recognises the public interest in disclosure, this particular issue relates to a legal interpretation on how to apply Customs classification legislation. It involves a specific company and a limited number of individuals who consider HMRC is not applying Customs legislation correctly. As such, the information relates to the requester’s own specific interests rather than those of the general public.

18. HMRC further argued that there is a strong public interest in a person seeking access to legal advice being able to communicate freely with their legal advisers in confidence, and in being able to receive advice from those legal advisers in confidence.

19. It went on to say that ‘an important factor which underlies the general rationale for legal professional privilege and its particular application in the case of governmental decisions, is that the rule against disclosure should be known

to operate with reasonable certainty in advance, since if its application was uncertain and too readily displaced, it would undermine the very public interest in encouraging full and frank exchanges which the rule is supposed to promote.’

15. The Commissioner concluded as follows:-

22. The public interest here, then, is in ensuring that HMRC is able to obtain and use legal advice without its position being prejudiced by the disclosure of information. Whilst the Commissioner recognises that there is a general public interest in understanding how HMRC came to the conclusion to classify mastectomy bras in the way it did, he considers that disclosure would, in this case, undermine HMRC’s ability to have full and frank exchanges with its legal advisers.

23. The general public interest inherent in section 42 will generally be strong owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.

...

24. ...in this case, having regard to the content of the withheld information, it is the Commissioner’s opinion that disclosure would do little to explain how HMRC reached its decision. It would simply confirm that HMRC sought legal advice prior to formulating a response to correspondence.

26. Although the Commissioner accepts that disclosure may provide some insight into how HMRC reached the decision it did, he also notes that some or all of the advice could be relevant when corresponding on the same issue in the future.

16. The Commissioner concluded that the public interest in maintaining the exemption in section 42(1) FOIA outweighed the public interest in disclosure, and therefore, that HMRC had correctly applied section 42(1) FOIA.

THE APPEAL AND THE HEARING

17. The Appellant’s appeal is dated 21 December 2023. The Appellant says that:-

...the decision is unsustainable because there is an overriding need to ensure the general public have confidence that the machinery of Government has due regard for the rule of law.

That is currently impossible because the reasons provided by HMRC in support of a Chapter 6212 import classification for a mastectomy bra stand no legal scrutiny. As a consequence the public would be unable to understand how such a decision could be made if the UK is being governed under the rule of law.

There can surely be no greater justification for disclosing the legal advice HMRC received. The alternative to legal governance is that the “Governments position as quoted by Mr Harra in his letter dated 10 March (shown below), is illegal and pursuing political objectives.

Thus, in the interests of public faith in the machinery of Government, Section 42(1) does not outweigh the need for full disclosure of the legal advice received by HMRC regarding the classification of the mastectomy bra.

18. The letter referred to from Mr Harra refers to a previous letter from HMRC about the tax codification for mastectomy bras. There is a letter in the bundle dated 4 January 2023 from HMRC to the Appellant’s MP in which an explanation of HMRC’s legal approach is set out. This letter also sets out the steps that a person can take if there is a disagreement about a tax classification (which we will return to).
19. The majority of the grounds of appeal set out why, in the Appellant’s view, the tax classification by HMRC is wrong, citing domestic and European legal provisions and case law, including a Supreme Court decision. On that basis, the Appellant concludes that:-

In summary of the position there have been no reasons advanced by HMRC for a Chapter 6212 classification of a mastectomy bra which have any semblance of legal accuracy or cohesion.

That being the case the public are entitled to wonder why they are attempting to justify a position that cannot be legally sustained, and indeed on which the actual legal position points unerringly in the opposite direction.

Therefore because the classification of a product, although commercially described as a mastectomy bra, is so clearly intended by the governing HS rules to be classified for customs purposes as an accessory to an artificial part of the body (a point confirmed by the UKSC), the classification advice received by HMRC from their lawyers must become available for public scrutiny.

It is then for the public to decide if the legal advice received by HMRC is reflected in the actions of HMRC.

For the reasons stated the expectation must be that HMRC received legal advice confirming Chapter 9021 as the appropriate classification, yet the Government's position is to classify in Chapter 6212. The alternative possibility is that HMRC and the Government ARE following the advice of their lawyers in which case, without further explanation, the competence of those lawyers is called into question.

Assuming that the first possibility applies then a Chapter 6212 classification can only have been confirmed because of political objectives, but that is not an acceptable basis for operating outside of a UK international treaty obligation to follow the HS system of classification with due regard to Article 3 of that treaty.

Assuming the second possibility then a reason, not previously advanced, is needed to explain why HMRC lawyers feel a Chapter 6212 classification can be justified under the HS classification rules.

Thus the public interest in maintaining the exemption at section 42(1) does not outweigh the public interest in disclosure.

20. The Commissioner responded to the appeal and stood by the decision notice that had been issued. The Commissioner notes that the Appellant does not appear to challenge the Commissioner's finding that s.42(1) FOIA is engaged in this case, but rather engages with the public interest balance in favour of disclosure.
21. The Commissioner says that the decision notice engages with the public interest in transparency (as the Appellant puts it the 'overriding need to ensure the general public have confidence that the machinery of government has due regard for the rule of law'). The Commissioner says that this 'ground can be dismissed as it did not tip the balance in favour of disclosure at the time of drafting the DN, and it does not do so now'.
22. In relation to the Appellant's concern about the quality and accuracy of the legal advice, and the motives for HMRC presenting a legal position which the Appellant thinks is clearly wrong, the Commissioner says 'they are more concerned with the dissatisfaction of HMRC's classification and the possible contents of the advice rather than the fact that s42 is engaged and the public interest favours disclosure'.
23. The Appellant's subsequent submissions set out his detailed legal arguments on classification again and states:-

It is unarguably 100% sophistry for HMRC to seek justification of a continuing Chapter 6212 classification for a mastectomy bra as a bra, on the basis of a CJEU decision taken outside of the parameters of the HS. No other reason worthy of any sort of consideration has been offered to support their position and nothing has, or can, affect the HS wording.

Therefore in consequence of the applicable law it is very hard to believe that reputable lawyers would advise HMRC to maintain a Chapter 6212 classification. The public at large would be unable to understand how that could possibly be the situation.

Accordingly a Section 42(1) claim cannot withstand the glare of public scrutiny.

DISCUSSION

24. The Tribunal has seen the relevant withheld information and can confirm the Commissioner's view that it comprises of communications between client and legal adviser for the dominant purpose of seeking and giving legal advice, and that it falls within the definition of advice privilege and is therefore subject to LPP. It consists of information to which the exemption in s42 FOIA applies. We note that that has not been disputed in the Appellant's appeal.

25. In relation to the application of the public interest test in s42 FOIA cases we repeat what was said in the *DBERR* case as set out above and that the 'proper approach for the Tribunal' is to :-

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

26. Thus, we recognise the significant in-built weight to be given to the exemption in considering the public interest balance. It is then necessary to assess whether there are other factors to be taken into account which support non-disclosure, and then consider whether the public interest in disclosure is equal to or outweighs those combined factors.

27. No specific additional factors have been raised by the Commissioner which justified the decision that the public interest favoured non-disclosure.
28. In relation to public interest factors in favour of disclosure, there is a public interest in knowing the content of legal advice obtained by HMRC in relation to potentially controversial issues, and this would support transparency and accountability.
29. However, it is not the job of the Tribunal to form a view as to whether the publicly declared legal position of HMRC in relation to the tax classification of mastectomy bras is correct or not. The Appellant explains at some length why he thinks the advice must be wrong and goes so far as to question the competency of the lawyers who have provided it, and the political motivations behind the position.
30. The Appellant is entitled to his view on the legal position but the fact that he thinks HMRC's position is wrong, does not provide a strong public interest reason for disclosure (beyond the increase in transparency as explained above). We noted above that HMRC explained to the Appellant what he can do if he disagrees with HMRC's position in its letter of 4 January 2023 and it is worthwhile setting out the advice here. HMRC said:-

If your constituent continues to disagree with the classification of mastectomy bras for duty purposes and is importing the goods into the UK or exporting them, they have two options:

They may apply to us for a new legally binding classification decision and then challenge it through the UK Tribunal and Court process if they disagree with the decision. Your constituent can find out more about applying for a classification decision and the appeals process at [website address included].

They can also seek to influence the rate of tariff rather than the classification of their product. Classification Code 6212 10 90 adds 6% customs duty rate to mastectomy bras. It is the Department for International Trade (DIT) that is responsible for setting customs duty tariffs rather than HMRC. DIT are collecting feedback from businesses about UK tariff rates. If your constituent would like to propose a different tariff, they can submit their views at [website address included].

31. We recognise that there may be cases where the public interest in disclosure of legal advice will outweigh the in-built public interest in protecting LPP, and that s42 FOIA does not provide for a blanket exemption. However, in our view this is not one of those cases and the Commissioner was correct to find that the balance of public interest lies in withholding the information and protecting HMRC's ability to obtain legal advice without the fear of premature disclosure.
32. The public interest in disclosure is not strong enough to outweigh that built-in public interest against disclosure in legal professional privilege cases, and we agree that the public interest balance is in favour of non-disclosure. That is especially the case where there are identified legal routes for challenging a public authority's legal position where a person affected disagrees with it.

CONCLUSION

33. On the basis of the above, the Tribunal dismisses the appeal.

Recorder Stephen Cragg KC

Sitting as Judge of the First-tier Tribunal

Date: 24 April 2024

Date Promulgated: 25 April 2024