In the First-Tier Tribunal
General Regulatory Chamber
Information Rights

EA/2021/0129

BETWEEN

MAYA FORSTATER

Appellant

and

INFORMATION COMMISSIONER (1)
MINISTRY OF JUSTICE (2)
JUDICIAL COLLEGE (3)

Respondents

APPELLANT'S SKELETON ARGUMENT

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1. The question raised by this appeal is a surprising one: does judicial independence require that judges may be given secret training by lobby groups?

The request and the IC's decision

2. The appellant has requested information about training provided to Employment Tribunal and Asylum and Immigration Tribunal judges by ***Gendered Intelligence***, a charity that describes its mission as being "*to increase understandings of gender diversity and improve trans people's quality of life*."

3. Initially the MOJ refused the request, saying that it didn't hold the information [70]. The appellant directed her request for a review of that refusal to the Judicial College. The JC's response asserted that any information held by it was held on behalf of the judiciary, and therefore exempt from disclosure. The JC directed the appellant to the annual report of the JC ("Review of Activities") , but this document does not refer to the training by Gendered Intelligence. The only reason there is any public knowledge of the involvement of this organisation in training judges is because one judge happened to reveal it in *Tribunals* magazine.

4. The appellant appealed to the IC. The IC considered that the correct question was whether the information was held by the MOJ for its own purposes, and, answering that question in the negative on the basis that it was held on behalf of the judiciary, dismissed the appeal. At that stage both the IC and the MOJ proceeded on the basis that the JC was a public authority for the purposes of FOIA 2005 ("the Act"): see ¶35 of the IC's decision notice [6-7].

5. The IC's original response to the appeal accepted at ¶29 [32] that the JC was a public authority subject to the Act, and therefore that the correct question was not whether the MOJ held the information for its own purposes, but whether the JC did; but maintained that the JC held the information on behalf of the judiciary. The MOJ and the JC argue in their response that the JC is not a public authority, because not named in schedule 1 to the Act; and that the IC was therefore correct to address the question whether the MOJ held the information on behalf of the judiciary. The IC in her amended response has adopted that position.

6. There are three grounds of appeal, but essentially two questions:

    1. Is the JC a public authority?
    2. If so, does it or the MOJ hold the information on behalf of the judiciary within section 3(2) of the Act?

7. This skeleton addresses those questions in turn, after some initial remarks about judicial independence.

Judicial independence

8. The response and evidence from the second and third respondents place judicial independence front and centre of their argument, opening with it at paragraphs 2 and 5, and then saying at ¶27 [55]:

> *The exclusion of information held by the judiciary is a conscious legislative choice which reflects the fundamental importance given to the independence of the judiciary from external, executive and/or legislative influence. As part of the constitutional arrangements under the CRA 2005 and TCEA 2007, which reinforce the important principle of judicial independence, the judiciary are given discretion and control over their own training.*

9. It's not clear what the basis is for the assertion that the exclusion of information held by the judiciary is a conscious legislative choice, but in any event this is nothing to the point. The request was not made of the judiciary, but of the JC.

10. More importantly, although the JC and the MOJ repeatedly appeal in their response to judicial independence, at no point is it explained by what mechanism judicial independence is supposed to be served by permitting the JC to withhold information

about the training of judges. The Annual Report of 2006-2007 for the JC's predecessor body, the Judicial Studies Board, explains its purpose on its first page [157]:

> *The JSB's purpose is to ensure that it delivers high-quality training to enable judicial office holders to discharge their duties effectively in a way that preserves judicial independence and supports public confidence in the judiciary.*

11. Its governance principles [159] include:

> *3 The JSB will promote and support judicial independence and operate in accordance with the seven principles established by the Committee on Standards in Public Life ('the Nolan Principles'), i.e. selflessness, integrity, objectivity, accountability, openness, honesty and leadership.*
> *4 The JSB will take informed, transparent decisions, clearly define levels of delegation and manage risk.... [emphasis supplied]*

12. The purpose of the JC appears to be identical, and it is difficult to imagine any official of the JC disavowing these governance principles as equally applicable to it; and yet it is - as it must be - common ground that the JSB was subject to the Act both before and after the coming into force of the Constitutional Reform Act 2005. Judicial independence has never required the JSB to be exempt from FOIA, and none of the respondents has explained why the position of the JC should be different in this respect. Ms Wright's statement glides over the question at ¶50 [92]:

> *The JSB was within the scope of FOIA before the CRA 2005, as at that time the JSB came under the remit of the Lord Chancellor. The JSB remains listed in Schedule 1 of the FOIA despite the fact that it no longer exists. The CRA 2005 reinforced the independence of the judiciary, transferring responsibility for the judiciary from the Lord*

> *Chancellor (a Cabinet Minister) to the Lord Chief Justice (the Head of the Judiciary); this included responsibility for judicial training. Changes were effected from April 2006 and from that time the JSB reported to the Lord Chief Justice rather than Lord Chancellor.*

13. There is no warrant for Ms Wright's "*as*" in the first line here. The JSB was within the scope of FOIA both before the CRA 2005, and for six years thereafter. Although the point is not made directly, the implication seems to be that the JSB remained on schedule 1 to FOIA after the CRA only by oversight; but since that implication is not spelled out, no justification for it is offered either.

14. The JC is described by Ms Wright at ¶15 of her statement [82]:

> *The Judicial College is not a body established by statute but is a constituent part of the Judicial Office, an administrative arms-length body of the Ministry of Justice.*

15. The IC's decision notice puts it more simply at ¶14 [3]: "*the Judicial College is part of the Judicial Office and... the Judicial Office is a department within the MoJ.*"

16. The appellant wholeheartedly agrees with the 2nd and 3rd respondents about "the fundamental importance of the independence of the judiciary from external, executive and/ or legislative influence" (¶27 of their response, quoted at ¶8 above). But judicial independence does not mean the independence of a department within the MOJ, even one staffed in part by judges; it means the independence of judges from interference in their performance of their judicial functions, that is to say, judging the cases that come

before them.

17. In particular, it is the independence of the judiciary from undue external influence that is at stake here. As the MOJ said in its letter of 11 December 2020 to the ICO, quoted in the second and third respondents' response, "*The materials also need to be free from influence from pressure groups to preserve judicial independence*." The appellant would agree; and yet the JC has arranged for training of judges by a charity with a highly ideological stance on matters of intense current public debate [369], and now seeks to hide the content, cost etc of that training on grounds of "judicial independence"; the irony is considerable. It is unknown - and if this appeal fails, will remain unknown - what other external pressure groups may have been invited to train judges. That state of affairs is calculated to undermine rather than bolster public confidence in judicial independence.

18. Of course, the particular training given on that occasion may or may not in itself pose a real threat to judicial independence, but it is at the very least not fanciful to think that it might; or even if this particular training does not, that training provided by a different group on a different occasion - perhaps not written up in *Tribunals* magazine - might be. The public should be entitled to know what judges have been told in the guise of training, whether by the MOJ itself or by its arms-length administrative bodies. The appellant submits that judicial independence is better served by subjecting the JC to the transparency exacted by the Act than by allowing it to do its work in secrecy.

19. Finally in relation to independence, it is important to note that judicial independence does not in general mean a lack of accountability or transparency. Judges are not

accountable to the legislature or the executive for their decisions, but a rigorous transparency and accountability are provided by the duty to give reasons, the principles and practice of "open justice" and the availability of appeals: there are clear mechanisms by which decision-making may be understood and wrong decisions may be corrected. That kind of accountability is not available in relation to the activities of the JC, so if the respondents are right that it is exempt from FOIA, the training decisions of the JC fall into a transparency and accountability black hole.

Is the JC a public authority?

20. The JC's predecessor, the Judicial Studies Board existed from 1979, and was included as a public authority in schedule 1 to the Act as originally enacted. According to Ms Wright's statement at ¶11 [81], the JC came into being on 1 April 2011. Ms Wright does not say by what mechanism that coming into being was effected, but she notes that the JSB declared in its 2009-11 Strategy that it intended to "evolve into a form of judicial college."

21. Paragraphs 5-14 of Ms Wright's statement describe the constitution and responsibilities of the JSB and then the JC, before and after transfer of responsibility for the judiciary from the Lord Chancellor to the Lord Chief Justice under the CRA 2005. The transition is described at ¶12:

> *The UJTAB was asked to advise them on unified judicial training and in its July 2010 report it recommended the establishment of a joint Judicial Training College. This would be a single judicial training organisation in England and Wales for judges, legal advisers, magistrates and non-legal members of tribunals.*

22. In essence, then, the old JSB, with responsibility for training judges and overseeing the training of magistrates, tribunal chairs and lay members was to give way to a new unified Judicial College with essentially the same functions and a strikingly similar governance structure, but with an extended reach. The JC's avowed intent to 'evolve into' a judicial college is telling: the JC is the JSB, with a new name and with extended responsibilities.

23. The JSB is still named at schedule 1 as a public authority. Ms Wright says at ¶50, "The JSB was within the scope of FOIA before the CRA 2005, as at that time the JSB came under the remit of the Lord Chancellor" [emphasis supplied]. But the changes effected by the CRA 2005 did not affect the position: the JSB remained within the scope of the Act until it evolved into the JC in 2011. As Ms Wright says, an order can be made under section 4(5) of the Act to remove or add public authorities as appropriate, and six such orders have been made, the most recent in 2018. The JSB, although replaced by the JC ten years ago, has never been removed.

24. Ms Wright says that an "administrative process" has now begun with a view to the removal of the JSB from the schedule; she cannot say why that was not done sooner, and she does not say who takes that decision, on what basis or subject to what controls - or indeed whether it is a foregone conclusion that what will occur is the removal of the JSB from the schedule rather than the substitution of its successor body. It seems unlikely that public authorities which find public accountability through FOIA irksome can simply ask the Cabinet Office to take them off the schedule 1 list; but in any event, that has not yet been done in the case of the JSB/JC, and what must be interpreted and

applied is the schedule as it now is, not the schedule as it may be at some date in the future.

25. The appellant's primary position on this is that it is clear enough from Ms Wright's statement (and their own materials) that the JC is the same body that is referred to in the schedule as the JSB, and the JC is therefore a public authority for the purposes of the Act. It is true that the position would have been even clearer if officials had got around to amending the schedule to substitute the words "Judicial College" for "Judicial Studies Board", but the purpose of statutory interpretation is to give effect to the will of Parliament as expressed in the statutory words, not to punish administrative oversight. It is certainly not the aim of statutory interpretation to give effect to the will of "officials within the MOJ" who, it is said, are working towards the removal of the JSB from the schedule in the next Order.

26. It is submitted that the will of parliament in this situation is clear. The JSB was a public authority. The JC is a body constituted in an almost identical manner with almost identical responsibilities. There is no discernible reason why, if parliament intended the JSB to be a public authority subject to the Act, it would not also have intended the almost identical body into which it evolved in 2011 also to be a public authority subject to the Act. The MOJ's implication that the reason is to be found in the CRA 2005 is untenable, given that the the JSB remained on the schedule for another 6 years after the enactment of the CRA 2005. It is submitted that by far the most plausible explanation is an inadvertent failure to update the schedule with this particular public body's change of name.

27. The IC's response says at ¶29 [42]:

> *The Commissioner considers that if a body is a different legal entity to the one it replaces, then even though it may have the same functions as the body it superseded, the new entity would still need to be designated as a public authority in its own right for it to be a public authority under FOIA,*

28. But she gives the answer to that in the immediately following paragraph: the JC is not a "legal entity" in its own right at all (and by clear implication, neither was the JSB):

> *The Commissioner understands that the College is an administrative arms-length body and part of the Judicial Office, which is a department of the MoJ.*

29. It is submitted that in the circumstances, to read "the Judicial Studies Board" in schedule 1 to mean "the Judicial College" is a conventional literal construction of the statutory words. The JSB having evolved into the JC, the words "The Judicial Studies Board" simply mean "The Judicial College." If a bystander were to ask a judge or an official of the MOJ the question "What's the Judicial Studies Board?" the natural answer would be something like "Oh, that's what the Judicial College used to be called," or "the body responsible for training judges - only it's called the Judicial College now."

30. That this is a natural interpretation of the words is underlined by the attitude of the JC itself until very recently, and the IC until even more recently. The JC has treated itself as a public authority for the purposes of the Act on the following occasions, evidenced in the bundle:

a. Its response of 6 March 2013 [290], accompanied by a note that states in terms "the Judicial College is a public body subject to Freedom of Information requests…" [295];
b. Its response of 15 April 2013 [296];
c. Its response of 1 May 2014 [299] (which refers at [300] to "public authorities such as the Ministry of Justice (MoJ) and the Judicial College" and is accompanied by notes acknowledging "The Judicial College is a public body for the purposes of Freedom of Information requests" [304]);
d. Its response of 14 October 2014 [305];
e. Its response of 24 June 2015 [310].
f. The JC's response to the appellant's request for a review of the initial refusal also proceeds on the footing that the JC is a public authority for the purposes of the Act; the assertion that it is not emerges for the first time in the MOJ and JC's response to the appeal, and is adopted by the IC - who originally accepted that the JC was a public authority - only in her amended response.

31. It is submitted that the assertion - now - by the MOJ and JC that the JC is not a schedule 1 public authority is opportunistic.

32. If the Tribunal does not accept that the interpretation urged by the appellant is a straightforward literal construction of the words of the schedule, it is in any event a properly purposive construction. The will of parliament should be given effect, not thwarted: and since the JSB was included on the schedule when the Act came into force in 2005, and parliament has not since then evinced any intention to remove it or to take a different view of the proper status of the JC, giving effect to the will of parliament

involves interpreting the words "Judicial Studies Board" to mean the JSB's successor body, the JC. If necessary, it is submitted that the conditions are met for a "rectifying construction" to substitute the words "Judicial College" for "Judicial Studies Board": see *Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others* [2000] 1 WLR 586.

Does the JC hold the information on behalf of the judiciary?

33. It is not, of course, in dispute that the judiciary is not a public authority for the purposes of FOIA. Nor is there any dispute about the correctness of the IC's guidance on the correct approach to the question whether a public authority holds information on behalf of another person within the meaning of section 3(2). In particular, the guidance acknowledges that "information will be held by the public authority if the information is held to any extent for its own purposes."

34. Is information about the training provided to judges held by the JC to any extent for its own purposes? At ¶36 of her amended response [43], the IC accepts that the purpose of the JC is the training of judges. The nearest the MOJ and JC's response comes to identifying the purposes of the JC is at ¶29 [56]:

> *a. Purely administrative information at an institutional level, such as total funding allocated to heads of costs (staff costs, training costs, etc.), is "held" by the MoJ for its (and the Judicial College's) own purposes as well as on behalf of the judiciary; and*
>
> *b. Information as to the detail and content of the administration of the judiciary, including its training and the specifics of individual training events, is not "held" on behalf of any authority other than the judiciary itself.*

35. It it is submitted that it is plain beyond any sensible doubt that the purpose (indeed the whole, and the only purpose) of the JC is the training of judges: its activities comprise either training judges, or doing other things wholly ancillary to the training of judges; see e.g. [108] [246],[350]. The answer to the question, of the JC, "What is it for?" is easy: "training judges."

36. Nevertheless, the respondents seek to paint a picture of the JC as a body whose own purposes are confined to ancillary matters, treating the training of judges as a separate responsibility of "the judiciary." This is at odds with the JC's (and before it the JSB's) own documented conception of its purpose, and with the realities of its structure and the manner in which it performs its functions. Training is overseen in the JC by its own Directors of Training; that those individuals are judges seconded from their judicial roles nearly full time for four year terms [246] does not mean that the training is overseen by "the judiciary" as something separate from the JC: it means that the ensures that judicial control and insight is brought to bear on its own training activities by employing judges to oversee it.

37. The MOJ said in answer to questions from the IC [328]:

> *Nearly all the materials held by the Judicial College are provided by judges in order to train their fellow judges. The important issue is that they were produced for the sole benefit of the judiciary at a judicial training event and the judiciary is in the possession of the materials, which are stored in the College's Learning Management System.*

38. If the training of judges were left to the judiciary to organise among themselves, and the JC's only function was providing administrative support for that training, it could fairly be said that the JC's own purposes were not the training of judges, but the provision of administrative support for training of judges by the judiciary as a whole. But the evidence of the JC and JSB's own documentation, and Ms Wright's witness statement, makes it clear that training judges is the task of the JC itself, albeit it does that it large part by drawing on the services of judges. As the MOJ said in the same letter:

> *"Ultimately it is the senior judiciary and the judicial Directors of Training at the Judicial College who determine the policy on access to judicial training material."*

39. The judicial Directors of Training within the JC are not something separate from the JC: they are an integral and crucial part of its structure, employed to oversee the carrying out of its core purposes.

Conclusion

40. Judicial independence does not require that if judges are given training by pressure groups, information about that training must be able to be kept away from the public eye. On the contrary: judicial independence from external influence means that – as recognised by the original inclusion of the JSB in the list of public authorities at schedule 1 to FOIA – it is important that there should be public scrutiny of the activities of the body charged with the responsibility to train judges. If that scrutiny is to provide a meaningful defence of judicial independence, it must extend to the core activities of that body, and not merely ancillary details of "administration, finances and general operations" [329].

41. Happily, the interpretation of FOIA that supports that conclusion is also the most natural one. The JSB is listed as a public authority for FOIA purposes, and for anyone who knows the organisational history of the JSB and the JC, where schedule 1 refers to "the Judicial Studies Board" it can only mean "the Judicial College." But an outcome in the appellant's favour is also available by alternative route, suggested by ¶33 of the IC's response, maintaining that the correct question was whether the MOJ holds the information for its own purposes [43], and ¶40 of Ms Wright's evidence [90]:

> *The practice of the Judicial College has been to release information relating to the administrative aspects of the College; however, it does so not as a public authority in its own right, but as an arm's length body of the Ministry of Justice.*

42. If the JC is in truth merely a part of the MOJ, then the MOJ's purposes must encompass the purposes of all its parts. To say that the MOJ does not hold the information because it only holds it on behalf of the JC would be akin to saying that Bristol University does not hold course materials for its philosophy courses because it only holds them on behalf of its philosophy department. If the information is held by the MOJ, then - for all the same reasons that it is argued above that training materials and the other information that is the subject of the request are held by the JC for its own purposes and not on behalf of another body – the MOJ holds the information for its own purposes, and the MOJ should disclose it under FOIA.

Naomi Cunningham
OUTER TEMPLE CHAMBERS
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