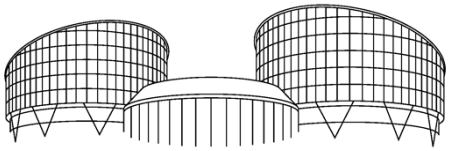

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 64367/14
TIMES NEWSPAPERS LIMITED and Dominic KENNEDY
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 13 November 2018 as a Committee composed of:

Aleš Pejchal, *President,*
Tim Eicke,
Gilberto Felici, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 19 September 2014,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants, and

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Times Newspapers Ltd, is the proprietor and publisher of The Times newspaper and is registered in England. The second applicant, Mr Dominic Kennedy, an Irish national, is a senior investigative journalist employed by The Times who was born in 1963. They are represented before the Court by Ms P. Sarma, a lawyer practising in London.

2. Article 19, the Campaign for Freedom of Information, the Citizen Network Watchdog Poland, the Media Legal Defence Initiative, and the Helsinki Foundation for Human Rights were all granted leave to intervene as third parties. The Government of Ireland did not seek to exercise its right to intervene (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court).

A. The circumstances of the case

3. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The background facts

(a) The "Mariam Appeal" and Charity Commission inquiries

4. The Mariam Appeal was a fund launched in 1998 by Mr George Galloway, a Member of Parliament, to enable a young Iraqi leukaemia sufferer (Mariam) to receive treatment in the United Kingdom, to arrange treatment for other Iraqi children suffering from leukaemia and to provide medical supplies to Iraq. Although its objects were charitable, it was not formally registered as a charity. It continued in operation until 2003 and raised a total of almost 1.5 million pounds sterling.

5. Following the publication in The Times of an article written by the second applicant, Mr Kennedy, in which he alleged that funds collected under the auspices of the Mariam Appeal had been misused, the Charity Commission for England and Wales opened an evaluation into the use of the Mariam Appeal's funds for non-charitable purposes. It subsequently launched an inquiry under section 8 of the Charities Act 1993 (see paragraph 63 below) to investigate how the monies raised between March 1998 and April 1999 had been spent. Meanwhile, the Charity Commission continued to evaluate the use of funds obtained after April 1999. A second inquiry was later opened to investigate how monies raised throughout the lifetime of the Mariam Appeal had been spent. Both inquiries were closed in March 2004. On 28 June 2004 the Charity Commission published a two-and-a-half-page statement of the results of the inquiries setting out its findings. It found that, although its founders were unaware that they had created a charity, the Mariam Appeal was charitable and ought to have been registered with it; and that, although some payments made to trustees of the Mariam Appeal had been in breach of trust, there had been no bad faith, with the consequence that recovery of the sums would not be pursued.

6. On 9 December 2005 the Charity Commission opened a third inquiry as a result of allegations that the Mariam Appeal had received donations from contracts made under the United Nations Oil-for-Food Programme, which had been established by the United Nations in 1995 to allow Iraq to sell oil on the world market in exchange for food, medicine, and other humanitarian needs for ordinary Iraqi citizens. The inquiry closed in April 2007 and the statement of the results of the inquiry, running to eight pages, was published on 8 June 2007. The Charity Commission concluded that some donations to the Mariam Appeal had come from improper sources, namely contracts made under the UN Programme, and that the trustees had failed to inquire sufficiently into the source of the donations. Accordingly,

they had not discharged their duty of care as trustees in respect of these donations. The Charity Commission decided not to take any action, since it was a civil regulator and did not have powers of criminal prosecution and, in any case, the Mariam Appeal had not operated since 2003 and held no assets requiring protection.

(b) The request for information

7. On 8 June 2007 Mr Kennedy sought information from the Charity Commission concerning the latter's inquiry into the Mariam Appeal between December 2005 and April 2007.

(c) The Charity Commission refusal

8. By letter dated 4 July 2007 the Charity Commission, via its Compliance and Support division, refused to provide the information requested. The letter confirmed that the Charity Commission held the information sought but relied on both qualified and absolute exemptions under the Freedom of Information Act 2000 ("FOIA" – see paragraphs 48-57 below). Invoking first a qualified exemption available under section 31 FOIA (information related to law enforcement), the letter explained that since that exemption was not absolute it was necessary to consider under section 2 of the FOIA whether the public interest in withholding the information was outweighed by the public interest in its disclosure. It concluded that, at the relevant time, the balance of the public interest weighed more strongly with securing the Commission's ability to carry out its functions efficiently and therefore lay in withholding the information.

9. The letter also indicated that the Charity Commission considered the absolute exemption in section 32 of the FOIA (information held in court records or by a person conducting an inquiry or arbitration) to be engaged, as well as a number of other exemptions in the FOIA.

10. Mr Kennedy invited the Charity Commission to reconsider its decision, arguing that the exemptions had been misapplied. On 3 August 2007 the Charity Commission confirmed that an internal review had been conducted and that the original decision to withhold the information had been upheld.

(d) The complaint to the Information Commissioner

11. On 1 November 2007 Mr Kennedy complained, under section 50 of the FOIA, to the Information Commissioner about the refusal to disclose the information.

12. On 9 September 2008 the Commissioner published his decision notice. He found that all the information requested was exempt under the absolute exemption contained in section 32(2) (documents obtained or created in connection with an inquiry). He therefore upheld the Charity

Commission's decision to refuse to disclose the information. Since an absolute exemption applied, he explained, there was no need for him to consider the public interest set out in section 2 of the FOIA. In light of his conclusion, he also saw no need to consider whether other exemptions applied.

2. The domestic proceedings

(a) The Information Tribunal

13. Mr Kennedy appealed under section 57 of the FOIA to the Information Tribunal ("the Tribunal") requesting it to consider afresh whether the information was exempt under section 32 of the FOIA. The Charity Commission applied to be joined as an interested party and the application was granted. It subsequently lodged a schedule of the information falling within the scope of the information request.

14. Following receipt of the schedule, Mr Kennedy identified more precisely the classes of documents, within the terms of his request, to which he sought access. He identified the following four categories:

(i) documents containing information explaining the Charity Commission's conclusion that Mr Galloway may have known that Iraqi bodies were funding the Mariam Appeal;

(ii) documents from the Charity Commission inviting Mr Galloway to set out his position or speak to the Charity Commission and documents containing his response;

(iii) documents received by the Charity Commission from other public authorities and sent by the Charity Commission to them; and

(iv) documents containing information explaining why the Charity Commission had decided to start and continue the second inquiry.

15. Mr Kennedy subsequently refined his request so as to exclude information to or from a foreign State or an international organisation and any document for which a claim of parliamentary privilege was asserted. He did this in order to ensure that his request did not interfere with interests protected by the FOIA and to reduce the scope of his request in the interests of proportionality.

16. On 14 June 2009 the Tribunal upheld the decision of the Information Commissioner that section 32 of the FOIA applied and was an absolute exemption in respect of the bulk of the requested material. It ordered that a small number of documents be disclosed unless another exemption applied. Those documents were subsequently disclosed.

(b) The High Court

17. Mr Kennedy appealed to the High Court. He relied on arguments concerning the statutory interpretation of the Charities Act 1993 (see paragraphs 58-64 below) and the FOIA.

18. The appeal was refused on 19 January 2010 with the judge preferring the arguments of the Information Commissioner and the Charity Commission.

(c) The Court of Appeal

19. Mr Kennedy sought permission to appeal to the Court of Appeal. Permission was granted on one ground, namely that the judge had wrongly interpreted section 32(2) as conferring (i) a blanket exemption from disclosure that continued for thirty years after the conclusion of an inquiry regardless of the content, the harmlessness of the disclosure and the public interest of disclosure; and (ii) an exemption in respect of documents held by a public authority prior to the start of an inquiry. In light of recent decisions of this Court, namely *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, and *Kenedi v. Hungary*, no. 31475/05, 26 May 2009, Mr Kennedy argued in particular that pursuant to section 3 of the Human Rights Act 1998 (see paragraph 77 below), section 32(2) of the FOIA should be interpreted in a way compatible with the Convention, including in particular the right to freedom of expression guaranteed by Article 10.

20. On 12 May 2011 the Court of Appeal delivered a judgment. Lord Justice Ward, giving the lead judgment, noted that, applying conventional principles of statutory construction, the Charity Commission's interpretation of section 32(2) was to be preferred. The Article 10 issue had not been raised before the Tribunal or the High Court, which in the normal course of events would have prevented it from being raised before the Court of Appeal. However, Lord Justice Ward indicated that he was nevertheless prepared to refer the human rights issue to the Information Tribunal, to be considered for the first time, and to stay the appeal pending its determination.

(d) Hearing before the First-tier Tribunal General Regulatory Chamber (Information Rights)

21. Meanwhile, on 18 January 2010, the functions of the Information Tribunal were transferred to the First-tier Tribunal General Regulatory Chamber (Information Rights).

22. A hearing before the First-tier Tribunal took place in October 2011. The applicant argued that a right of access to information could be derived from Article 10 of the Convention and that the refusal to disclose information amounted to an interference with freedom of expression. The Charity Commission's position was that the applicant did not have a right to receive the information and, in any event, that section 32(2) of the FOIA did not interfere with any such right because it did not prohibit its disclosure or otherwise create an information monopoly. Furthermore, section 32(2) did not prevent a public authority from disclosing information to an individual

outside of the FOIA, but instead simply set the limits on the statutory right to receive information under it. Before the FOIA had come into force journalists such as the second applicant could request information from public authorities, which may or may not have provided it. If a journalist considered that the public authority had violated Article 10 by failing to provide him with any information, he could have brought proceedings on that basis. The introduction of the FOIA did not limit the right to bring a claim under the Human Rights Act; rather, it introduced an additional statutory right to receive information in specified circumstances. The Charity Commission therefore contended that section 32(2) of the FOIA reflected a fair balance between the rights of the applicant and the rights of society as a whole.

23. Similarly, the Information Commissioner, who had been invited to intervene, argued that: there was no general right to information under Article 10 and, as such, the refusal to disclose the material could not have interfered with that right; if there was such a breach, it would not be caused by section 32(2) of the FOIA but rather by the Charity Commissioner's failure to discharge its duty under the Human Rights Act to provide the information in question. The Secretary of State for Justice, who was also granted permission to intervene, submitted that there was no Article 10 right at play; and, in any event, section 32(2) would not interfere with any such right. The FOIA provided the public with an *enhanced* statutory right to information which supplemented, but did not supplant, other regimes for access to or control of information.

24. On 18 November 2011 the Tribunal published its report to the Court of Appeal. It gave detailed and careful consideration to this Court's case-law on Article 10 of the Convention. It concluded:

> "42. As best we can the [Tribunal] considers that this developing jurisprudence is not necessarily granting a general right to receive information under Article 10. Such a general right of access still only exists as set out under Leander. It has advanced, however, towards a broader interpretation of the notion of freedom of information which has recognised an individual right of access conferred by Article 10(1) but which is subject to certain 'formalities, conditions, restrictions or penalties' described in Article 10(2). This may be where a social watchdog is involved and there is a genuine public interest as in *Társaság* or where historical research is being hindered on a matter of public importance as in *Kenedi.* It appears to us that this extension of scope of Article 10(1) is now being consistently applied and recognised by a number of chambers of the ECtHR. Our Court of Appeal has also recognised this as a clear development. In our view this has not led to a general right to receive information as that would be going too far. However it is now clear that the ECtHR has developed a wider approach from that first established in 1978 to the notion of 'freedom to receive information'. There is now recognition of an individual right of access to information in certain circumstances.
>
> 43. We try to explain this by reference to what the ECtHR says in *Tarsasag* which seem[s] to us to establish, particular[ly] in relation to social and media watchdogs, that:

i) Where a State makes no provision for a right of access to official information (at least so far as the right is needed to help inform public debate), that absence will itself constitute an interference with the right to freedom of expression which is protected by Article 10(1);

ii) Where a State does confer such a right of access but the right is shaped (i.e. so that there is no right of access outside its bounds), then for information falling outside the bounds of the right:

(a) there is an interference with the right to freedom of expression which is protected by Article 10(1); and

(b) that interference falls to be addressed by Article 10(2).”

25. The Tribunal considered that Mr Kennedy was seeking to gather information on matters of public concern; that the Charity Commission, by its refusal to disclose, was imposing a form of censorship; and that Mr Kennedy’s right to impart information was also impaired. After examining the other individuals and bodies who potentially held the information, the Tribunal found that, whether or not an “information monopoly” was a necessary prerequisite for an interference with Article 10, there was such a monopoly in the applicant’s case.

26. In view of the above, the Tribunal concluded that the conventional meaning of section 32(2) of the FIOA constituted an interference with Mr Kennedy’s Article 10 rights. Turning to consider whether the interference was justified, the Tribunal accepted that the aim of the legislation was to protect information lodged with, or created during the course of, the inquiry and that this aim was legitimate. However, it found that the absolute exemption afforded by section 32(2) did not adequately balance the interests of society with those of individuals and groups, and concluded that the public interest in disclosure of information that was not properly withheld under other qualified exemptions available in the FOIA clearly outweighed any interest in its being withheld. The interference was therefore not “necessary in a democratic society”. In the view of the Tribunal, section 32(2) therefore had to be interpreted in a manner consistent with Article 10 by limiting the exemption from disclosure so that it ended upon the termination of the third inquiry in the present case.

(e) Restored hearing before the Court of Appeal

27. On 20 March 2012 the Court of Appeal handed down its judgment in the restored appeal after hearing arguments from the parties. It referred to a recent judgment of the Supreme Court in *Sugar v. British Broadcasting Corporation* (see paragraphs 71-73 below), delivered after the Tribunal’s report, where that court had concluded that Article 10 did not apply to a request to the British Broadcasting Corporation, a public authority for the purposes of the FOIA, for disclosure of a document. Considering itself bound by that judgment, the Court of Appeal held that Article 10 was not engaged on the facts of the case. Given this conclusion, the court declined to

carry out an analysis of whether, if Article 10 had been engaged, the interference would have been justified pursuant to Article 10 § 2.

28. The Court of Appeal granted leave to appeal to the Supreme Court since the issues raised on the appeal were important ones and in order to allow that court to consider the precise boundaries of Article 10.

(f) The Supreme Court

29. Three issues were argued before the Supreme Court. First, whether as a matter of ordinary statutory construction, section 32(2) FOIA contained an absolute exemption which continued after the end of an inquiry; secondly, if so, whether that was compatible with Mr Kennedy's rights under Article 10 of the Convention; and, thirdly, if not, whether section 32(2) could be "read down" pursuant to the Human Rights Act 1998 (see paragraph 77 below). The appeal was heard by a panel of seven Justices.

(i) The court's decision on the disposal of the appeal

30. On 26 March 2014 the Supreme Court handed down its judgment. All seven Justices agreed that Mr Kennedy's request for information pertained to a matter of considerable public importance and that there was a public interest in the information he sought. They also unanimously concluded that section 32(2) of the FOIA contained an absolute exemption which continued after the end of an inquiry. However, the court dismissed Mr Kennedy's appeal by a majority of five Justices, with the majority declining to analyse the case in the manner presented by Mr Kennedy.

31. In respect of the first issue argued, the majority held that section 32(2) of the FOIA had to be construed as providing an absolute exemption from disclosure which did not cease upon the conclusion of the inquiry but continued until the information sought became "historical records" within the meaning of section 63 FOIA (see paragraph 53 below).

32. Before turning to consider the applicability of Article 10 of the Convention, the majority considered it necessary to examine whether the Charity Commission might be required to disclose information under other statutory or common law powers preserved by section 78 FOIA (see paragraph 54 below). They agreed that the Charity Commission had the power to disclose information to the public concerning its inquiries both in pursuit of its statutory objectives under the Charities Act 1993 of increasing public trust in and accountability of charities, as well as under the general common law duties of openness and transparency incumbent on public authorities. The exercise of that power was subject to judicial review by the courts. They explained that since the Charities Act, bolstered by the common law principle of open justice, put Mr Kennedy in a no-less-favourable position regarding disclosure than he would have under Article 10, there was no question of "reading down" section 32(2) or finding

it to be inconsistent with Article 10. In other words, the correct reading of section 32 was not that information pertaining to inquiries benefitted from a blanket exemption from disclosure but that such information was taken outside the framework of the FOIA since an alternative means of obtaining disclosure already existed.

33. Lord Mance said:

> "... I find it difficult to think that there would be any significant difference in the nature or outcome of a court's scrutiny of any decision by the Commission to withhold disclosure of information needed in order properly to understand a report issued after a Charities Act inquiry, whether such scrutiny be based solely on the Charity Commission's objectives, functions and duties under the Charities Act or whether it can also be based on article 10, read in the width that [counsel for Mr Kennedy] invites. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context ..."

34. As to the operation of the alternative remedy in the applicant's case and the scope of judicial review, Lord Mance said:

> "56. The Charity Commission's response to a request for disclosure of information is in the light of the above circumscribed by its statutory objectives, functions and duties. If, as here, the information is of genuine public interest and is requested for important journalistic purposes, the Charity Commission must show some persuasive countervailing considerations to outweigh the strong *prima facie* case that the information should be disclosed. In any proceedings for judicial review of a refusal by the Charity Commission to give effect to such a request, it would be necessary for the court to place itself so far as possible in the same position as the Charity Commission, including perhaps by inspecting the material sought. Only in that way could it undertake any review to ascertain whether the relevant interests had been properly balanced. The interests involved and the balancing exercise would be of a nature with which the court is familiar and accustomed to evaluate and undertake. The Charity Commission's own evaluation would have weight, as it would under article 10. But the Charity Commission's objectives, functions and duties under the Charities Act and the nature and importance of the interests involved limit the scope of the response open to the Charity Commission in respect of any particular request. I therefore doubt whether there could or would be any real difference in the outcome of any judicial review of a Charity Commission refusal to disclose information, whether this was conducted under article 10, as [counsel for Mr Kennedy] submits that it should be, or not."

35. Lord Toulson agreed with Lord Mance that if Article 10 applied in the present case, it was fulfilled by the domestic law. As to the application of the common law approach in Mr Kennedy's case, he considered that it was for Mr Kennedy to make a request to the Charity Commission under its general powers of disclosure and for the Charity Commission to consider the public interest in disclosure and weigh any competing private or public interests in the balance. He indicated that

> "151. It would be open to Mr Kennedy now to make a fresh request to the Charity Commission on the basis of this judgment. It would then be for the Administrative Court to consider any objection by the Charity Commission based on delay, but in

considering such objection the court would need to take into account all the circumstances. Mention was briefly made in argument about the three month time limit imposed under CPR 54.5(1), but that is after the grounds for the application have arisen, which would be after any refusal of Mr Kennedy's request. There could of course be argument that he should have made his first request on a different basis (as I would hold). Whether that should bar the claim from proceeding would be a matter for the court considering the application, but on the facts as they presently appear it would seem harsh that the claim should be barred not because of any delay on Mr Kennedy's part in seeking the information but because of legal uncertainty about the correct route."

36. Lords Wilson and Carnwath dissented, holding that Article 10 did give rise to a general right of access to information and that section 32(2) should be read down so that the exemption it afforded ended with the conclusion of the inquiry. To hold otherwise would amount to a disproportionate interference with Mr Kennedy's Article 10 rights. The two Justices expressed disquiet at the common law remedy relied upon by the majority. Lord Wilson pointed out that it had never been suggested to Mr Kennedy that his request should be made otherwise that under the FOIA. He continued:

"198. In my view the scheme identified by the majority for disclosure by the commission outside the FOIA is profoundly unsatisfactory. With respect, it can scarcely be described as a scheme at all and there is certainly no example of its prior operation or other recognition of its existence. Compare it with the scheme under the FOIA which, apart from the apparent prohibition for 30 years, identifies an elaborate raft of prescribed situations in which the Commission is entitled, or subject to the weighing of rival interests may be entitled, to refuse disclosure; and under which a refusal can be countered by application to an expert, namely the Information Commissioner, who takes the decision for himself (section 50(1)) and whose decision can be challenged on points of law or even of fact by an expert tribunal (section 58(1)) and in effect without risk as to costs.

199. ... The suggested scheme otherwise than under the FOIA is so vague and generalised that I regard the determination thereunder of any request for disclosure as impossible to predict. It may be that, in practice, the Commission and, on judicial review, the High Court judge would reach for the helpful prescriptions in the FOIA and, in effect, work in its shadow. But if, as I consider, Mr Kennedy's rights under article 10 are engaged by his request, I even have doubts whether any refusal to disclose a document otherwise than under the FOIA could be justified under para 2 of the article. For restrictions on the exercise of his rights under article 10 must be 'prescribed by law', which in the words of the ECtHR, 'must... be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct' ... It is possible that the so-called scheme for disclosure otherwise than under the FOIA might fail that test ..."

37. Lord Carnwath said:

"230. ... It seems to me clear that the scheme established by FOIA was intended to be a comprehensive, albeit not necessarily exhaustive, legislative code governing duties of disclosure by the public authorities to which it applied. ...

> 231. Further it was designed to create 'rights' for the public, enforceable by a simple, specialist and generally cost-free procedure, rather than simply discretionary powers enforceable by the ordinary courts only on conventional public law principles. ... recourse to the courts, even given the flexibility allowed by the developing principles ..., remains more cumbersome (and more costly) than the specialised procedures provided by the Act."

38. He was not persuaded that the "open justice" principle applied to inquiries and found it hard to accept that any general powers of disclosure were comparable to the scope of disclosure from which Mr Kennedy would benefit under Article 10 of the Convention. He added:

> "247. ... I remain unpersuaded that domestic judicial review, even adopting the most flexible view of the developing jurisprudence, can achieve the same practical effect in a case such as the present as full merits review under FOIA or the HRA."

(ii) The discussion of the applicability and scope of Article 10

39. Notwithstanding the majority view that Article 10 was not relevant to the outcome of the appeal, there was detailed discussion by the Justices of this Court's case-law.

40. The majority referred to the Court's inconsistency as regards the extent to which a general right of access to information arose under Article 10. They pointed out that older judgments, a number of which had been adopted by the full plenary Court or the Grand Chamber, indicated that Article 10 only protected the right to receive information which others wished or were willing to impart and did not give rise to a general right of access to information (citing, for example, *Leander v. Sweden*, 26 March 1987, Series A no. 116; *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160; *Guerra and Others v. Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I; and *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X). Although a number of recent Chamber judgments had departed from this position, the majority Justices were of the view that they had failed to give a clearly reasoned analysis of the matter or to explain why they had departed from earlier authority (citing *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; *Kenedi v. Hungary*, no. 31475/05, 26 May 2009; *Shapovalov v. Ukraine*, no. 45835/05, 31 July 2012; *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,* no. 39534/07, 28 November 2013). The majority also referred to the fact that the new approach that these recent Chamber judgments appeared to follow had not been endorsed by the Grand Chamber. Therefore, while they accepted that Article 10 recognised a right in the citizen not to be impeded by the State in the exercise of such right of access to information as he might already have under domestic law, they considered that it did not itself create such a right of access.

41. The minority, on the other hand, considered that in light of the aforementioned case-law of this Court, a right to require an unwilling public authority to disclose information could arise under Article 10 of the Convention.

3. The subsequent request for access to information

42. On 1 May 2014 Mr Kennedy submitted a request for information in relation to the Mariam Appeal inquiries to the Charity Commission citing his common law right of access, as identified by the Supreme Court. He explained that disclosure would be in furtherance of the Charity Commission's duties and was required under the open justice principle.

43. The Charity Commission holds over 1,000 documents, running to over 10,000 pages of information, in relation to the Mariam Appeal inquiries. Following receipt of Mr Kennedy's request, it identified 775 documents that fell within the terms of the request.

44. As Mr Kennedy had expressed a wish to receive whatever information was disclosable to him at that stage and receive further information once the Commission had conducted a full analysis, on 11 July 2014 the Charity Commission disclosed some relevant documents under the Charities Act 2011 (which had meanwhile replaced the Charities Act 1993). The letter made it clear that the Commission anticipated making further disclosure following a further analysis of the information held. Consequently, on 17 October 2014 the Charity Commission provided further disclosure to Mr Kennedy. The ommission confirmed in its covering letter they it was actively considering whether there was additional information that could be provided. Further disclosure was subsequently provided to Mr Kennedy on 26 February 2016. The letter set out the following reasons for withholding the remaining information:

(a) The information is covered by Legal Professional Privilege and it is not in the public interest to disclose it.

(b) The information is covered by Parliamentary Privilege and it is not in the public interest to disclose it.

(c) The information is personal information within the meaning of the Data Protection Act 1988, the subject has not consented to the information being disclosed, and it would not be in the public interest to disclose it.

(d) The Commission has a duty of confidence in respect of the specific information and it would not be in the public interest to disclose it.

(e) Disclosure of the information would not be in the public interest because it would prejudice the Commission's ongoing ability to perform its statutory functions, objectives and duties; in particular its ability to promote legal compliance by charity trustees, to identify and investigate misconduct or mismanagement in the administration of charities; and/or

to exercise our power to take remedial or protective action in connection with mismanagement or misconduct.

(f) The information has been withheld for one of the reasons set out at (a)-(e) above, but disclosing that reason would not be in the public interest.

45. In total, 624 documents were disclosed, although some were redacted. In its letter of 26 February 2016 the Charity Commission advised Mr Kennedy that if he required further clarification in respect of any matter arising from the contents of the letter or the documents disclosed to him, he should contact the Commission, which would be happy to assist.

46. On 11 July and 17 October 2014 Mr Kennedy published two articles based on information disclosed by the Charity Commission.

47. Mr Kennedy did not seek judicial review of the refusal to disclose the remaining information. In his application form to this Court, he explained that an application for judicial review would have added to the unreasonable delay that had occurred and to the enormous legal costs already incurred. He added that he was now out of time to pursue judicial review proceedings. Moreover, to require him to pursue judicial review would constitute an excessive and disproportionate burden on the applicants' enjoyment of the right to freedom of expression and, having regard to liability for legal costs already incurred and at stake in further litigation, would also amount to a violation of Articles 6, 10 and 13 of the Convention.

B. Relevant domestic law and practice

1. The Freedom of Information Act 2000

(a) The duty to disclose

48. Section 1 FOIA creates a general right of access to information held by public authorities. It provides:

"(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request ["the duty to confirm or deny"], and

(b) if that is the case, to have that information communicated to him."

49. Section 2(2) provides that in respect of any information which is "exempt information" under the Act, there is no duty to disclose information if it benefits from an "absolute exemption" or, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Section 2(3) clarifies that section 32 is to be regarded as conferring an absolute exemption.

(b) Exemptions

50. Section 32 is headed "Court records, etc." and provides in so far as relevant:

> "(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
>
> (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
>
> (c) any document created by—
>
> (i) a court, or
>
> (ii) a member of the administrative staff of a court,
>
> for the purposes of proceedings in a particular cause or matter.
>
> (2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—
>
> (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
>
> (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration."

51. Section 32(4)(c) explains that "inquiry" means "any inquiry or hearing held under any provision contained in, or made under, an enactment".

52. Section 21(1) states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information. Section 21(2)(b) clarifies that information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by law to communicate to members of the public on request. According to section 21(3), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

53. Section 63 removes a number of exemptions, including the section 32 exemption, in the case of "historical records". Section 62(1) provided at the relevant time that a record became a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.

(c) Preservation of other powers of disclosure

54. Section 78 FOIA provides that nothing in the Act is to be taken to limit the powers of a public authority to disclose information held by it.

(d) The pre-enactment history

55. Prior to the publication of the bill that was to lead to FOIA, the Government published a white paper called "Your Right to Know: the Government's Proposals for a Freedom of Information Act" (December 1997). The white paper explained that the traditional culture of secrecy would only be broken down by giving people in the United Kingdom the legal right to know. The "fundamental and vital change" in the relationship between government and governed was "at the heart" of the white paper.

56. A report called "Freedom of Information: Consultation on Draft Legislation" presented to Parliament by the Secretary of State for the Home Department in May 1999 stated:

> "2. 'Freedom of Information' is an essential component of the Government's programme to modernise British politics. This programme of constitutional reform aims to involve people more closely in the decisions which affect their lives. Giving people greater access to information is essential to that aim. The effect of Freedom of Information legislation will be that, for the first time, everyone will have the right of access to information held by bodies across the public sector. This will radically transform the relationship between government and citizen."

57. During the Committee stage in the House of Commons, the Minister explained the purpose of section 32 as follows:

> "Essentially this is an issue of separation of powers. The courts control the documents that are before them and it is right that our judges should decide what should be disclosed.
>
> ...
>
> Although the courts are not covered by the Bill, according to it court records may be held on a court's behalf by public authorities... Statutory inquiries have a status similar to courts, and their records are usually held by the Department that established the inquiry.
>
> The clause therefore ensures that the courts can continue to determine what information is to be disclosed, and that such matters are decided by the courts and fall within their jurisdiction, rather than the jurisdiction of this legislation. Of course, it is not to be assumed that such information will not be disclosed merely because the Bill will not require it to be disclosed. Such information is controlled by the courts, which constitute a separate regime. The courts have their own rules, and they will decide if and when court records are to be disclosed. The Government do not believe that the Freedom of Information Bill should circumvent the power of the courts to determine their disclosure policy. The issue is the separation of powers, and the jurisdiction to determine the information the court should provide will be left to the courts themselves. In a court case, it is for judges and courts to determine when it is appropriate for court records to be disclosed."

2. The Charities Act 1993

58. The Charity Commission was at the relevant time subject to the Charities Act 1993. It was replaced by the Charities Act 2006 and, subsequently, the Charities Act 2011.

(a) The objectives

59. Section 1B set out the Charity Commission's objectives. These included a "public confidence objective", a "compliance objective" and an "accountability objective". Section 1B(3) defined these objectives as follows:

> "1. The public confidence objective is to increase public trust and confidence in charities.
>
> ...
>
> 3. The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
>
> ...
>
> 5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public."

(b) The general functions

60. Section 1C set out the Charity Commission's general functions. They included obtaining, evaluating and disseminating information in connection with the performance of any of the Charity Commission's functions or meeting any of its objectives.

(c) The general duties

61. Section 1D dealt with the Charity Commission's general duties, detailed in section 1D(2). The duties included the following:

> "4. In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)."

(d) Powers

62. Section 1E(1) provided that the Charity Commission had power to do anything which was calculated to facilitate, or was conducive or incidental to, the performance of any of its functions or general duties.

63. Section 8 of the Act provides for a general power to institute inquiries into charities. Section 8(6) provided:

> "Where an inquiry has been held under this section, the Commissioners may either—

(a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as they think fit, to be printed and published, or

(b) publish any such report or statement in some other way which is calculated in their opinion to bring it to the attention of persons who may wish to make representations to them about the action to be taken."

64. Section 10A(1) of the Act contained an express power, subject to conditions set out in section 10(2) and (3), for the Charity Commission to disclose to any relevant public authority any information received by the former in connection with any of its functions, provided that the disclosure was made for the purpose of enabling or assisting the relevant public authority to discharge any of its functions, or that the information so disclosed was otherwise relevant to the discharge of any of the functions of the relevant public authority.

3. The Inquiries Act 2005

65. The Inquiries Act 2005 enables Ministers to set up formal, independent inquiries relating to particular events of public concern.

66. Section 18 of the Act provides that documents provided to the inquiry are to be publicly available, subject to any specific restrictions imposed. Section 19 of the Inquiries Act allows the inquiry chairman or the Minister to impose restrictions on disclosure of documents provided to an inquiry. Pursuant to section 20(5), and subject to section 20(6), restrictions continue in force indefinitely unless otherwise stated in the notice imposing the restrictions.

67. The Inquiry Rules 2006 oblige the chairman of any inquiry set up under the 2005 Act to transfer custody of the inquiry record to the relevant Government department or public records office at the end of the inquiry. The absolute exemption from disclosure in section 32(2) FOIA does not apply in relation to such transferred information (see sections 18(3) and 41(1)(b) of the 2005 Act and the Inquiry Rules 2006). Pursuant to section 20(6), after the end of an inquiry any disclosure restrictions imposed during the inquiry do not apply to a public authority in relation to information it holds unless that information is held as a result of a breach of the disclosure requirements.

4. Relevant case-law

(a) Disclosure by courts

68. The case of *R (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420 concerned a request by the Guardian newspaper for access to documents produced to the District Court during an extradition hearing. The Guardian invoked its rights under Article 10 of the Convention. The judge refused to order access on the basis that she had no power to allow access.

The Guardian appealed and at the same time sought judicial review of the refusal. The judge's decision was upheld by the Divisional Court. Part of the court's reasoning was that FOIA had put in place a regime for obtaining access to documents held by public authorities which specifically exempted information held by a court, and that it would be strange if a request for information which was exempted under the Act could be made at common law or under Article 10.

69. Lord Justice Toulson, delivering the lead judgment for the Court of Appeal of 3 April 2012, explained that the "open justice principle" was a constitutional principle, to be found in the common law, which applied to all tribunals exercising the judicial power of the state. He said that it was for the courts to determine its requirements, subject to any statutory provision, and that, accordingly, the courts had an inherent jurisdiction to determine how the principle should be applied. He continued:

> "72. The exclusion of court documents from the provisions of the Freedom of Information Act is in my view both unsurprising and irrelevant. Under the Act the Information Commissioner is made responsible for taking decisions about whether a public body should be ordered to produce a document to a party requesting it. The Information Commissioner's decision is subject to appeal to a tribunal, whose decision is then subject to judicial review by the courts. It would be odd indeed if the question whether a court should allow access to a document lodged with the court should be determined in such a roundabout way.
>
> ...
>
> 74. It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle ..."

70. The court found that the Guardian had put forward good reasons for having access to the documents and that there had been no suggestion that allowing access would give rise to any risk of harm to any other party or place any great burden on the court. It therefore found in favour of the Guardian. Toulson LJ added:

> "88. I base my decision on the common law principle of open justice...
>
> 89. The Strasbourg jurisprudence may be seen as leading in the same direction, but it is not entirely clear cut because this is not a case in which the court can be said to have had a monopoly of information (as it did in *Tarsasag* and *Kenedi*), so as to justify regarding the court's refusal of access as tantamount to censorship. There is significance in the question whether the refusal of access to the Guardian amounted to covert censorship, because there is force in the argument that article 10 is essentially a protection of freedom of speech and not freedom of information (*Leander*), although in exceptional cases infringement of the latter may be regarded as a covert form of infringement of the former. Some of the observations by the Strasbourg court may be said to support the reasoning behind my decision, but I base the decision on the common law and not on article 10."

(b) Disclosure by other public authorities

(i) Sugar v. British Broadcasting Corporation [2012] UKSC 4

71. The appellant in *Sugar v. British Broadcasting Corporation* made a request under the FOIA for access to an internal briefing document prepared for the British Broadcasting Corporation ("BBC") on the quality and impartiality of its coverage of Middle Eastern affairs. The BBC is designated as a public authority in FOIA only "in respect of information held for purposes other than those of journalism, art or literature". The BBC refused the disclosure request on the basis that it held the document for the purposes of journalism and so it was outside the scope of FOIA.

72. In its judgment of 15 February 2012 the Supreme Court agreed with the Court of Appeal that if the information was held to any significant degree for the purposes of journalism then it was exempt from production under the FOIA. As to the appellant's claim that such an approach violated his rights under Article 10 of the Convention, having considered in some details this Court's findings in *Roche*, *Matky*, *Társaság* and *Kenedi*, Lord Brown noted:

> "94. In my judgment these three cases, [*Matky*, *Társaság* and *Kenedi*] fall far short of establishing that an individual's article 10(1) freedom to receive information is interfered with whenever, as in the present case, a public authority, acting consistently with the domestic legislation governing the nature and extent of its obligations to disclose information, refuses access to documents. Of course, every public authority has in one sense 'the censorial power of an information monopoly' in respect of its own internal documents. But that consideration alone cannot give rise to an interference with article 10 rights whenever the disclosure of such documents is refused. Such a view would conflict squarely with the *Roche* approach ... The appellant's difficulty to my mind is rather that article 10 creates no general right to freedom of information and where, as here, the legislation expressly limits such right to information held otherwise than for the purposes of journalism, it is not interfered with when access is refused to documents which are held for journalistic purposes."

73. He therefore considered that there was no interference with Mr Sugar's freedom to receive information, explaining:

> "97. ... The Act not having conferred upon him any relevant right of access to information, he had no such freedom."

(ii) R (on the application of Privacy International) v. The Commissioner for HM Revenue and Customs *[2014] EWHC 1475 (Admin)*

74. Privacy International brought a claim for judicial review of a decision of the Revenue and Customs Commissioners refusing to disclose information about their export control functions. Mr Justice Green observed that the information sought was absolutely exempt from disclosure under the FOIA, but not under section 18(2) of the Commissioners for Revenue and Customs Act 2005 ("CRCA"). Therefore, whether disclosure was to be made was governed by the CRCA and not the FOIA. He concluded that the

Commissioners decision was unlawful and quashed it, remitting it to the Commissioners to make a fresh decision in accordance with guidance provided in the court's judgment.

75. In considering the balance to be struck between disclosure and non-disclosure the judge had regard to the Supreme Court judgment in *Kennedy v. the Charity Commissioners*. Although he accepted that different considerations applied to inquiries conducted by the Charity Commissioners and investigations carried out by HM Revenue and Customs, he nevertheless consider that the common law treated "openness" as very important, and that message could carry through to section 18 of the CRCA.

76. Although Article 10 was argued the judge did not give any definitive view on whether there had been an interference with the applicant's rights as it was "of no practical relevance". This was because HM Revenue and Customs no longer sought to argue that section 18 barred it from acting as it might wish. Consequently, the judge considered that common law principles governing the operation of section 18 were capable of "striking the balance".

5. The Human Rights Act 1998

77. Section 3(1) of the Human Rights Act 1998 ("the Human Rights Act") requires legislation to be read and given effect in a way that is compatible with Convention rights, so far as it possible to do so. This provision is only applicable if the impugned legislation itself would otherwise be in breach of the Convention.

6. The Civil Procedure Rules ("the CPR")

78. Rule 54.5(1) of the CPR provides that in a claim for judicial review, the claim form must be filed (a) promptly; and (b) in any event not later than three months after the grounds to make the claim first arose.

79. Rule 3.1(2)(a) gives the court the general power to extend the time for compliance with any Rule, including Rule 54.5(1), even if the application for an extension is made after the time for compliance has expired.

COMPLAINT

80. The applicants complain that the United Kingdom was in violation of Article 10 of the Convention because the absolute exemption under section 32(2) of the FOIA did not require an assessment of whether denial of access to information was appropriate and necessary; and because the Charity Commission relied on the absolute exemption and refused access to the information sought. They allege that the common law remedy outlined

by the majority of the Supreme Court did not satisfy Article 10, in particular the requirements of legal certainty and proportionality.

THE LAW

81. The applicants complained that the absolute exemption under section 32(2) of the FOIA – both in general and as applied in their case – was in breach of Article 10 of the Convention. Article 10 provides as follows:

> "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."

82. Although the applicants have focussed their complaints on the Article 10 compliance of the "absolute exemption" under section 32(2) of the FOIA, in examining their complaints the Court will have regard to the domestic legal framework as a whole and not simply the FOIA. While the Court has now recognised that Article 10 § 1 of the Convention might, under certain conditions, include a right of access to information (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 149, 8 November 2016), it does not include a right of access to information by a particular legislative scheme. What matters, therefore, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence.

A. The parties' submissions

1. The Government

83. The Government submitted that the applicants had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention as they did not seek to judicially review the Charity Commissioner's decision to withhold some of the requested information. There was no basis for the applicants' claim that judicial review would not have provided them with an effective remedy. First, when they lodged their application with the

Court on 19 September 2014 the availability of judicial review was certain, the Supreme Court having held that that in respect of their request it was the proper legal route to follow.

84. Secondly, the Government contended that the effectiveness of judicial review proceedings before the Administrative Court could not seriously be doubted. If the applicants had made such a claim, the court would have had the power to scrutinise the Charity Commission's reasons for withholding information; to assess the public interests in favour of disclosing and withholding the information; to determine the lawfulness of the Charity Commission's decision to withhold information; and, if appropriate, to grant a suitable remedy. Indeed, more than four months before the applicants lodged their application, the Administrative Court had applied the Supreme Court judgment in *Kennedy v. the Charity Commissioners* in the case of *R (Privacy International) v. Revenue and Customs Commissioners*, quashing the public authority's decision and requiring it to re-consider the extent to which disclosure should be given. There was no basis on which the applicants could properly contend that judicial review proceedings would not have provided the level of protection required by Article 10; in this regard, the Supreme Court's conclusions as to the scope of Article 10 were expressly stated by Lord Mance to be *obiter*, and it would now be open to the High Court and Court of Appeal to revisit the question in light of *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016.

85. The Government further contended that the applicants should not be relieved of the obligation to pursue judicial review. First of all, they would have been in time to do so. In accordance with Rule 54.5(1) of the Civil Procedure Rules, any judicial review claim would have to be brought promptly and in any event within three months of the date on which the grounds for the application have arisen (in this case the Charity Commission provided Mr Kennedy with its final disclosure decision on 26 February 2016). While Lord Toulson had acknowledged that the Charity Commission could potentially argue that the claim was out of time as the request ought to have been made sooner, any decision on delay would be a matter for the court considering the application, and on the facts he considered that the refusal of permission on that ground would seem "harsh". In any event, the applicants could have tested whether the Charity Commission would have taken a delay point by writing a letter before claim in accordance with the judicial review pre-action protocol – at no cost other than that involved in writing a letter.

86. With regard to financing, the Government observed that the first applicant was a very substantial company which published The Times and The Sunday Times newspapers. Although they had lost on every point before the domestic courts, they did not have to bear their own costs, save for disbursements, as they had a conditional fee agreement, and they were

only ordered to pay fifty percent of the Charity Commission's costs (a total of GBP 54,000). The Secretary of State and the Information Commissioner bore their own costs. Having regard to these factors, and the relatively low cost of judicial review proceedings, it was wholly unreasonable for the applicants to choose not to judicially review the Charity Commission's disclosure decision.

87. The Government further submitted that this was not a case where the applicants had pursued one of two parallel legal remedies and should not be required to pursue the second because it would not have a better prospect of success. On the contrary, judicial review would have enabled the substance of their complaint (namely, whether the Charity Commission should have found that the public interest favoured disclosure) to be tested, and by choosing the wrong route the applicants prevented that from happening. In this regard, it was clear on the face of the FOIA that it did not provide a means for obtaining information in respect of Charity Commission inquiries; and that it did not bar disclosure outside of the FOIA. Moreover, the Secretary of State for Justice, the Information Commissioner and the Charity Commission each, independently, made clear from the point when Mr Kennedy first raised Article 10 that he was pursuing the wrong route: that it would be open to him to seek the information outside of the FOIA; and that he could challenge any refusal by way of judicial review.

88. Finally, the Government submitted that the consequence of the applicants' decision not to issue a claim for judicial review of the Charity Commission's decision was that the question of justification had not been considered by the domestic courts. If the Court were to consider the merits of the Article 10 complaint, it would be doing so as a court of first instance.

2. The applicants

89. The applicants contended that they had exhausted all effective remedies within the meaning of Article 35 § 1 of the Convention, and there is no available domestic remedy for the violations of their rights protected by Article 10 of the Convention. The central purpose of the domestic remedies rule was to afford States the opportunity to prevent or put right the violations alleged against them before those allegations were submitted to the Court. It also enabled the Court to have the views of the national court before it ruled on the matter. In the present case, the United Kingdom authorities had ample opportunity to put right the violations alleged against them and to prevent such violations occurring again; and the Court has had the benefit of the views of the United Kingdom courts.

90. Moreover, the applicants asked the Court to note that the alternative remedy proposed by the Supreme Court lacked certainty. Further, and in any event, judicial review would not have provided an effective remedy for any of the alleged interferences with the applicants' right of access to the information held by the Charity Commission.

91. First of all, the applicants would have been unable to challenge the Supreme Court's decision that section 32(2) operated as a complete ban on their claim under the FOIA and that Article 10 did not protect a public right of access to information held by the Charity Commission. Secondly, the applicants had been obstructed in their journalistic activities because information in the public interest was not disclosed to them at the time it was newsworthy and of political relevance. Judicial review could not remedy the adverse consequences of the Charity Commission's denial of access to the information sought. Thirdly, judicial review would not have been an effective remedy enabling Mr Kennedy to challenge the Charity Commission's continuing refusal to disclose some of the information requested since – having been unable to access the information sought – he would have had to bring the proceedings, and argue his case, completely blind to its merits. By contrast, under the Freedom of Information regime he only had to ask the Commissioner to investigate, without giving any reasons for believing the decision to be wrong. Finally, the principle of proportionality was not recognised as a general principle of English Administrative law.

92. In conclusion, the applicants submitted that the case had a "tortuous history" and that the suggested common law alternative was not reasonably foreseeable and lacked certainty. Moreover, the Government was wrong to suggest that Mr Kennedy ignored the efforts of the Government, the Information Commissioner and the Charity Commission to inform him of the availability of this alternative remedy, since, in the domestic proceedings, they contested his entitlement to the information sought but did not recognise that he had the right to receive the information, whether under Article 10 or under the common law. As such, the applicants could not fairly be criticised for attempting to rely on the FOIA read with the Human Rights Act.

B. The Court's assessment

1. General principles

93. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level (*Vučković and Others v. Serbia (preliminary objection)* [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014). However, the application of the rule must make due allowance for the fact that it is being applied in the context of

machinery for the protection of human rights that the Contracting Parties have agreed to set up and it must therefore be applied with some degree of flexibility and without excessive formalism (see *Vučković and Others*, cited above, § 76; see also *Akdivar and Others v. Turkey*, 16 September 1996, § 69, Reports of Judgments and Decisions 1996 IV).

94. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among many authorities, *Vučković and Others*, cited above, § 70, and *Akdivar and Others*, cited above, § 65). The Court is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on cases which require the finding of basic facts, which should, as a matter of principle and effective practice, be the domain of domestic jurisdiction (see *Demopoulos and Others v. Turkey (dec.)* [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 69, ECHR 2010).

95. The obligation to exhaust domestic remedies therefore requires an applicant to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vučković and Others*, cited above, § 71, and *Akdivar and Others*, cited above, § 66).

96. There is, however, no obligation to have recourse to remedies which are inadequate or ineffective. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Vučković and Others*, cited above, § 73, and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006‑II). The existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Vučković and Others*, cited above, § 74 and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009).

97. An applicant who has exhausted a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III; see also *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V (extracts); *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII (extracts); and *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009). When a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef v. Malta* [GC], no. 17056/06, § 58, 15 October 2009, and *T.W. v. Malta* [GC], no. 25644/94, § 34,

29 April 1999; see also *Moreira Barbosa* and *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005).

98. As regards the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Vučković and Others*, cited above, § 77; *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010; *Demopoulos and Others*, cited above, § 69; and *Akdivar and Others*, cited above, § 68).

2. Application of the general principles to the present case

(a) Was the alternative remedy, on which the majority of Supreme Court Justices relied, effective?

99. Where a right of access to information arises, any interference (in other words, a refusal to disclose the information), must be in accordance with the law, in pursuit of a legitimate aim and proportionate to the aim pursued (see *Magyar Helsinki Bizottság*, cited above, §§ 181-200). In order to be effective, a domestic remedy must therefore be capable of assessing the lawfulness and proportionality of any interference, and of remedying any breach.

100. In the present case the Supreme Court held, by a majority, that a request for disclosure under the Charities Act was the proper legal route to follow. If information of genuine public interest was requested for important journalistic purposes, the Charity Commission would have to show "persuasive countervailing considerations to outweigh the strong *prima facie* case that the information should be disclosed" (see paragraph 34 above). If the request was refused, the decision would be susceptible to judicial review, and in any judicial review proceedings it would be necessary for the court to place itself, insofar as possible, in the same position as the Charity Commission, including perhaps by inspecting the material sought. According to Lord Mance, this was the only way that the court could undertake any review to ascertain whether the relevant interests had been properly balanced (see paragraph 34 above). Furthermore, the majority considered that the Charities Act, bolstered by the common law principle of open justice, would put the applicants in a no-less-favourable position regarding disclosure than they would have under Article 10 (see paragraphs 33-34 above).

101. It is generally unsatisfactory for the Court to find itself in the position of being asked to pronounce on the correct interpretation of

domestic law. Therefore, it is in principle for the national courts to determine questions relating to the appropriateness of domestic remedies, and the finding of an independent and impartial superior court that a remedy is available will generally constitute *prima facie* evidence of the existence of that remedy (see *Sher and Others v. the United Kingdom*, no. 5201/11, § 136, ECHR 2015 (extracts)). In *Sher*, the Court accepted that the finding of the Divisional Court was *prima facie* evidence of the availability of a remedy; in the present case, the finding was made by the Supreme Court, the highest and most authoritative court in the land.

102. Moreover, the position taken by the majority of Supreme Court Justices has been consolidated in practice. It appears to have been employed for the first time by the Court of Appeal in *R (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court*. Lord Justice Toulson, as he then was, delivering the lead judgment of the Court Of Appeal, held that it would be wrong to infer from the exclusion of court documents under the FOIA that Parliament thereby intended to preclude the courts from granting access to them where it would be proper under the open justice principle. In that case The Guardian Newspaper had sought access to the documents invoking Article 10 of the Convention. The judge refused to order access, believing she had no power to do so, and the Divisional Court dismissed The Guardian's appeal on the basis that it would be "strange" if a request for material exempted under the FOIA could be made at common law (see paragraphs 68-70 below)

103. Following the Supreme Court judgment Mr Kennedy went back to the Charity Commission and requested the information sought, citing the right of access identified by the Supreme Court. In the months that followed, the Charity Commission disclosed 624 documents out of a total of 775 documents which it considered to be within the scope of the request for disclosure. Reasons were given for the withholding of the remaining documents (see paragraphs 44-45 above).

104. Although Mr Kennedy did not attempt to judicially review the decision to withhold the remaining documents, in the case of *R (on the application of Privacy International) v. The Commissioner for HM Revenue and Customs*, Privacy International brought a claim for judicial review of a decision of the Revenue and Customs Commissioners refusing to disclose information about their export control functions. In a judgment handed down shortly after the Supreme Court's judgment in Mr Kennedy's case, Mr Justice Green held that, while the information sought was absolutely exempt from disclosure under the FOIA, disclosure could instead be governed by the Commissioners for Revenue and Customs Act 2005. He concluded that the Commissioners decision had been unlawful and quashed it, remitting it to the Commissioners to make a fresh decision in accordance with the court's guidance (see paragraphs 74-76 above).

105. Nevertheless, the applicants make two general criticisms of the Charities Act remedy. First of all, they contend that a person challenging a decision of the Charity Commission refusing to disclose information would have to apply for judicial review while completely blind to the merits of the application. By contrast, under the FOIA regime he or she would only have to ask the Information Commissioner to investigate. Secondly, the applicants contend that proportionality was not recognised as a general principle of English Administrative law.

106. It is true that the FOIA is part of a special FOI regime and persons unhappy with a public authority's response to an FOIA request may ask the Information Commissioner to investigate, without paying a fee or advancing any grounds for their complaints. The Commissioner may, in turn, publish a decision notice, providing reasons for her decision. Any party unhappy with that decision may appeal to the First-Tier Tribunal. There is no fee for appealing to the Tribunal, although appellants are required to explain clearly why they think the Commissioner's decision was wrong, giving as much detail as possible. On the other hand, there is a court fee for starting judicial review proceedings (currently GBP 154), and grounds for review must be advanced before permission will be granted. That being said, the advantages of the FOIA regime are only apparent at the early stages of review: as already noted, grounds must be invoked in order to appeal to the Tribunal, despite the complainant not having seen the withheld documents, and in respect on any onward appeal (to the High Court and then the Court of Appeal) complainants will have to pay court fees and legal costs. In any case, the fact that the legislature has chosen to create a more favourable scheme under the FOIA would not automatically render an application for judicial review following a request under the Charities Act either "inaccessible" or "ineffective" (see *Vučković and Others*, cited above, § 71 and *Akdivar and Others*, cited above, § 66).

107. Moreover, Lord Mance made it clear that the Charity Commission, upon receiving a request for information, would have to balance the interests involved; and, following an application for judicial review, the Administrative Court would, insofar as possible, have to place itself in the position of the Charity Commissioners, by reviewing the withheld material, if necessary, in order to ascertain whether the relevant interests had been balanced properly (see paragraph 34 above). He further confirmed that the Administrative Court's scrutiny could be based on Article 10, since the common law no longer insisted on "the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle" (see paragraph 33 above). In conducting such scrutiny, the Administrative Court would not be precluded from interpreting Article 10 as including, under certain conditions, a right of access to information. Insofar as the majority in Mr Kennedy's case held that Article 10 did not include such a right of access, these comments were expressly stated to be

obiter. Moreover, the Supreme Court judgments in *Sugar* (see paragraphs 71-73 above) and in Mr Kennedy's case were based firmly on its interpretation of this Court's developing case-law, which has since been clarified by the Grand Chamber in *Magyar Helsinki Bizottság* (cited above). While, as a matter of domestic law, that judgment is not strictly binding on the national courts, they should, in the absence of special circumstances, follow any clear and constant jurisprudence of this Court and should not, without strong reason, dilute or weaken the effect of this Court's case-law (see, for example, *R (Ullah) v Special Adjudicator* [2004] UKHL 26, per Lord Bingham, and *Manchester City Council v Pinnock* [2011] UKSC 6 & [2010] UKSC 45, per Lord Neuberger).

108. Accordingly, there is no reason to suppose that a request for disclosure under the Charities Act would not, in principle, satisfy the requirements of Article 10 of the Convention, or that judicial review would not provide an effective remedy for any person who considers that he or she has been denied access to information in breach of Article 10, despite having formulated the request in this way. In light of the foregoing, the Court is satisfied that the Charities Act remedy is an effective one, available both in theory and in practice, and capable of providing redress for the applicants' Convention complaint.

(b) Was the applicant required to exhaust this remedy before introducing his application before this Court?

109. Having established that a request for disclosure pursuant to the Charities Act is an effective remedy for the purposes of Article 35 § 1 of the Convention, it now falls to the Court to consider whether Mr Kennedy, having made such a request, was required to exhaust it by seeking judicial review of the Charity Commission's decision to withhold certain documents.

110. The Court has repeatedly held that when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *Micallef*, cited above, § 58, and *T.W.*, cited above, § 34; see also *Moreira Barbosa* and *Jeličić*). The Government, for their part, contend that this is not a case where two equally effective remedies existed and Mr Kennedy, having exhausted one, should be absolved from pursuing the other. Rather, they argue that at the time he sought the information, the Charities Act was the correct means of accessing it since the FOIA did not apply to material created or held by a public authority for the purposes of an inquiry it was or had been conducting.

111. Although the Court has accepted that the Charities Act remedy should now be considered effective, it is not satisfied that when Mr Kennedy first sought disclosure from the Charity Commission in June 2007, the existence of this remedy was sufficiently certain in theory and in practice so as to satisfy the requirements of accessibility and effectiveness

under Article 35 § 1 of the Convention (see *Vučković and Others*, cited above, § 71, and *Akdivar and Others*, cited above, § 66).

112. Despite the Information Commissioner, the Charity Commission and the Minister of Justice having alluded to the possibility of such a remedy in the proceedings before the First-Tier Tribunal, neither the Tribunal, nor the High Court, nor the Court of Appeal suggested that he should have sought access to the information in this way. In addition, the Government have not pointed the Court to any instances in which the remedy was used successfully prior to 2007. Indeed, it appears to have been "judicially signposted" for the first time in 2012. Consequently, the two dissenting Supreme Court Justices expressed disquiet about the remedy (see paragraphs 36-37 above). Lord Wilson, in particular, was concerned about the lack of previous recognition of its existence (see paragraph 36 above). On the other hand, while it is clear that in light of the exemption in section 32(2), the FOIA was not a particularly promising remedy, the fact that Mr Kennedy's complaint reached the Supreme Court, and the Supreme Court was not unanimous in its conclusion on the issue, would indicate that his argument that section 32(2) should be "read down" in order to comply with Article 10 of the Convention was not entirely without merit.

113. For these reasons, rather than those advanced by the Government, the Court would agree that this is not a case where two sufficiently certain remedies existed side by side, with similar objectives and similar prospects of success.

114. While at first blush it might seem unreasonable to have expected Mr Kennedy to embark upon a new remedy when he had, through no fault of his own, already exhausted domestic remedies in respect of his FOIA complaint, on a closer examination it is clear that following the Supreme Court judgment he was not in a more disadvantageous position to the one he would have found himself in had his appeal been allowed. If the majority had held that section 32(2) had to be read down in order to be compatible with Article 10 of the Convention, he would still have had to make a further request to the Charity Commission for disclosure of the documents containing the information sought, and there is no reason to suppose that any more documents would have been disclosed than in fact were. If he was unhappy with the extent of the disclosure, he would then have been required to challenge it first before the Information Commissioner, and thereafter on appeal to the First-Tier Tribunal (and after that, to the High Court and Court of Appeal).

115. In any case, following the Supreme Court judgment Mr Kennedy did request disclosure from the Charity Commission under the Charities Act. He therefore decided to avail himself of the alternative remedy relied on by the majority of Supreme Court Justices. In the months following this request, the Charity Commission disclosed the vast majority of documents which it considered to be within the scope of the request for disclosure

(624 documents out of a total of 775) and provided Mr Kennedy with reasons for not disclosing the remainder (see paragraphs 44-45 above). Following the disclosure, he published two articles about the Charity Commission's inquiries into the Mariam Appeal (see paragraph 46 above). However, despite the Supreme Court having clearly indicated that there was a significant public interest in favour of disclosure of the information he sought (see paragraph 30 above), he did not seek to judicially review the decision to withhold the remaining documents; nor did he seek any further clarification from the Charity Commission (see paragraph 47 above).

116. This would strongly suggest that Mr Kennedy has in fact obtained redress for both his general and specific Convention complaints. Not only has the Supreme Court identified a means of accessing information held by the Charity Commission, which would have been exempt from disclosure under the FOIA, but he has now obtained most of the information sought and used it to exercise his freedom of expression. Consequently, the applicants would only continue to be "victims" within the meaning of Article 34 of the Convention if the decision to withhold the remaining documents hindered or impaired the exercise of their right to freedom of expression (see *Magyar Helsinki Bizottság*, cited above, § 159). However, that is a factual question which can only be answered following an assessment of the documents that were withheld; an assessment which only the Administrative Court could have made. If the Court were to find that the applicants, having made a request under the Charities Act without seeking judicial review of the Commission's decision, had nevertheless exhausted domestic remedies, it would then have to address the question of their continuing victim status (whether the failure to disclose those specific documents hindered their freedom of expression) – and, if admissible, the merits of their complaints (namely, the proportionality of the decision to withhold those documents) – in a factual vacuum. For this reason, the Court not only considers that the Charities Act remedy would have been effective in the applicants' case, but also, in the particular circumstances of this case, that it was a remedy which they were required to exhaust fully before introducing their complaints before it.

117. In reaching this conclusion, the Court has taken note of the applicants' objections. However, it does not accept that an application for judicial review would have been prohibitively expensive. Not only are the costs incurred in judicial review proceedings comparatively low, but in any case, had the Supreme Court allowed Mr Kennedy's appeal, he would have had to make a fresh FOIA request. Had he been dissatisfied with the decision he would have had to challenge it before the Information Commissioner and possibly also the First-Tier Tribunal (and thereafter before the High Court and the Court of Appeal). Additional legal costs were therefore likely to be incurred in any event. Moreover, while it would have been open to the Charity Commission to raise the issue of delay in any

judicial review proceedings, in the opinion of Lord Toulson, the refusal of permission on this ground would, in all the circumstances, have been "harsh" (see paragraph 35 above).

118. Finally, the applicants contend that judicial review could not have provided them with a remedy for any obstruction they faced in their journalistic activities due to the failure to disclose the material to them at the time it was newsworthy and of political relevance; and that it would not have enabled them to challenge the Supreme Court's decision that section 32(2) operated as a complete ban on their claim under the FOIA and that Article 10 did not protect a right of access to information. However, at no point in the protracted domestic proceedings did Mr Kennedy seek any redress before the national courts for the Charity Commission's failure to disclose the information sooner. Furthermore, any further challenge to section 32(2) would have been beside the point, since the Supreme Court had directed the applicants to an alternative means of accessing the information. In respect of their final objection, it has already been noted that the national courts would not be precluded from interpreting the scope of Article 10 of the Convention consistently with the judgment of this Court in *Magyar Helsinki Bizottság* (see paragraph 107 above).

(c) Conclusion

119. Therefore, while the applicants cannot be criticised for initially seeking access to the relevant information under the FOIA, the Court nevertheless considers that, having set out on the path provided by the alternative remedy, they should have seen it through to its conclusion. Having failed to do so, the Court finds that the present application must be declared inadmissible as the applicants have failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 6 December 2018.

Abel Campos
Registrar

Aleš Pejchal
President