WHEELER v INFORMATION COMMISSIONER
[2016] UKUT 0052 (AAC)
UPPER TRIBUNAL CASE NO: GIA/2999/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 31 August 2015 under reference EA/2014/0224) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal.

B. The tribunal will need to consider whether to invite the Ministry of Defence to join as a party.

REASONS FOR DECISION

A. Background

1. This case arises from a request made by Mr Wheeler to the Ministry of Defence:

> Please could I receive a copy of the following report under the FOI Act?
>
> *ABB Redcliffe Bay Fire Risk Assessment, Report 300039088 Draft 4, 9 December 2011* (or a later draft?)

Although the application was made under the Freedom of Information Act 2000, the relevant legislation is the Environmental Information Regulations 2004. In order to make the request a little easier to understand, Redcliffe Bay is a petroleum storage depot and ABB was retained by the Oil and Pipelines Agency to carry out a fire risk assessment on the depot. Mr Wheeler wanted a copy of the report.

2. The Ministry refused to provide the information and, on complaint by Mr Wheeler, the Information Commissioner decided that the Ministry was entitled to withhold the information sought. Mr Wheeler exercised his right of appeal to the First-tier Tribunal.

3. The tribunal met on 25 February 2015. It consisted of a judge and two members. It made a decision to dismiss the appeal, which was put into writing by the judge on 8 April 2015.

4. The judge then became aware that Mr Wheeler's comments had not been considered by the tribunal when it made its decision. Accordingly, the judge decided to set aside the decision. He did so under rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No

1976). That is clear both from his express reference to that rule and from the terms of his decision.

5. The same panel then reassembled on 27 August 2015 and carried out what the decision called a 'review'. Again, it dismissed the appeal, for reasons given on 31 August 2015.

6. The presiding judge refused Mr Wheeler permission to appeal, but I gave him permission. I am grateful to Julianne Kerr Morrison of counsel who has provided a written response on behalf of the Information Commissioner. I am also grateful to Mr Wheeler for his written reply. I have not referred to it in this decision, because it concentrates on the substantive issues that interest him rather than on the procedural problems that arose in the First-tier Tribunal. Likewise, I have not referred to the Information Commissioner's arguments on the substantive issues. The parties' submissions on the substantive issues can be renewed to the First-tier Tribunal for the rehearing.

B. Why the First-tier Tribunal's decision was in error of law

7. The tribunal was properly composed for the first hearing of the appeal. When it was discovered that the tribunal had failed to consider Mr Wheeler's submission, it was right to set aside the decision under rule 41. The presiding judge from the first hearing was entitled to make the decision. But how should the tribunal have been composed for the second hearing? In particular, was the same panel entitled to sit?

8. The composition of the First-tier Tribunal is governed by a series of practice statements issued by the Senior President of Tribunals. In this case, the relevant practice statement is headed **Practice Statement – Composition of tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015**. Paragraph 11 governs information rights cases and provides for the tribunal to be composed of

> one judge and two other members, where each other member has substantial experience of data protection or of freedom of information (including environmental information) rights.

So far, so good. But that paragraph deals only with the number and qualifications of the panel members. It does not deal with the particular individuals who may or may not sit. That is governed by general principles of natural justice. It does not authorise *any* members to sit. It cannot override, for example, the principle of natural justice that prevents a member sitting to decide a case who has some personal bias against one of the parties or who has a financial interest in the outcome of a case.

9. Whilst I have no reason to doubt the personal integrity of any of the members of the panel who sat at the second hearing, the appearance of the matter has to be considered. I accept the Information Commissioner's submission to that effect and that it was not appropriate for the same panel to sit. There is

always a suspicion that the same people may not approach the issues with the same objectivity that they decided the case originally. However hard they may try to avoid it, there is also confirmation bias by which decision-makers look for reasons to confirm a decision that was previously made rather than consider the matter truly afresh. That was the first error.

10. There is also a doubt about the procedure that the tribunal followed at the second hearing. Regardless of how the tribunal was composed, it was obliged to consider the case completely afresh, taking account of the whole of the evidence and all of the submissions, including the one that had been overlooked before. I cannot be sure that the tribunal approached the case in that way. The judge described the process followed as a review, an opaque term that is not apt to describe a hearing afresh.

C. Why I have remitted the case for rehearing by the First-tier Tribunal

11. In my grant of permission to appeal, I suggested that in view of the procedural issues it might be best to treat the appeal to the Upper Tribunal as a rehearing of the issues before the First-tier Tribunal. This would have the advantage of avoiding the need for another hearing before the First-tier Tribunal, with the attendant risk of an appeal to the Upper Tribunal. The Information Commissioner has opposed that suggestion on two grounds. One is the importance of specialist members in information rights case. That is clear from the passage that I have quoted in paragraph 8 from the Senior President's practice statement. The other ground is that, in view of Mr Wheeler's comments, the hearing would benefit from submissions by the Ministry of Defence. The Ministry was not a party before the First-tier Tribunal and is not a party to these proceedings.

12. I accept those arguments, especially the importance of hearing from the Ministry of Defence, and have remitted the case for rehearing.

Signed on original
on 1 February 2016

Edward Jacobs
Upper Tribunal Judge