

IN THE UPPER TRIBUNAL

Appeal No: GIA/1028/2017

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal allows the appeal of Dr Ellis.

The decision of the First-tier Tribunal dated 11 December 2016 under reference EA/2016/0152 involved an error on a material point of law and is set aside.

The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided again by the same constituted First-tier Tribunal in accordance with the Directions set out below.

This decision is made under section 12(1) and 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

Subject to any later Directions by a Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:

- (1) There shall be an oral hearing before the First-tier Tribunal of the appeal. The appellant will be entitled to attend that hearing as will the Information Commissioner and Ryedale District Council.
- (2) The First-tier Tribunal should have the exact same constitution as decided the appeal on 11 December 2016.
- (3) There having been no permission given to cross-appeal that part of the First-tier Tribunal's decision of 11 December 2016 which addressed the first part of Dr Ellis's request of 5 January 2016 and in respect of which it was ordered that "the name/identify of the landowner as at the date of the request be disclosed to [Dr Ellis]", I direct the First-tier Tribunal to redecide this part of the appeal in identical terms. In other words, the only part of the remitted appeal which will call for substantial determination is that which relates to what is termed in the decision below the "second part" of Dr Ellis's request of 5 January 2016.

REASONS FOR DECISION

1. Despite the arguments made by the respondents to this appeal, I am satisfied on further consideration that the First-tier Tribunal's decision of 11 December 2016 ("the tribunal") should be set aside for material error of law on the one ground set out below and the appeal remitted to the same First-tier Tribunal to be re-decided.
2. I apologise for the time it has taken me to make this decision.
3. Dr Ellis applied for permission to appeal from either or both (i) the substantive decision made by the tribunal on 11 December 2016 allowing his appeal, and (ii) the decision of the tribunal dated 16 February 2017 refusing to set aside its earlier decision of 11 December 2016. I need not address the refusal to set aside decision as I am satisfied that the decision of 11 December 2016 ought to be set aside.
4. In my judgment this appeal turns on a simple point, namely that the tribunal erred in law in failing to address the second part of the request for information that Dr Ellis made to Ryedale District Council on 5 January 2016.
5. The relevant (email) request appears on page 77 of the bundle which was before the tribunal. What I will term "the first part of the request", related to the name(s) of the landowners under whose land the relevant water pipe had been laid. Dr Ellis was successful with his appeal to the tribunal in respect of Ryedale District Council's response to this request. However, what I will term "the second part of the request" (noticeably not set out in the tribunal's description of the request in paragraph 2 of its decision) was for "a copy of the letter or email sent to [DWH] by Ryedale District Council in which Ryedale District Council issues its approval, as stipulated in Paragraph 16 above, so that development can

begin". The second part of request is not addressed at all in the tribunal's consideration of the appeal.

6. It may be useful at this stage to set out the relevant provisions of the Environmental Regulations 2004 ("the 2004 Regs") and the Freedom of Information Act 2000 ("FOIA").
7. Regulation 5 of the 2004 Regs provides the general duty on a public authority which holds environmental information that it must make it available on request. Under regulation 18 of the 2004 Regs the enforcement and appeal provisions of FOIA (including sections 50, 57 and 58) are made to apply for the purposes of the 2004 Regs (subject to immaterial exceptions as far as this appeal is concerned). Sections 50, 57 and 58 of FOIA provide as follows.

"Section 50.—(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

Section 57.—(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

Section 58.—(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

8. Reverting to the facts of this case, it seems to me quite clear that there were two parts to Dr Ellis's request of 5 January 2016. In his complaint to the Information Commissioner under section 50 of FOIA it is equally clear in my judgment that he was complaining that both parts of his request had not been dealt with in accordance with Parts 2 and 3 of 2004 Regs. This follows it seems to me from the fact that his (email)

complaint both set out verbatim the two-part request of 5 January 2016 and framed the complaint in general terms of the refusal of Ryedale District Council in its response to “provide basic information”.

9. The second part of the 5 January 2016 request is not addressed in the *Decision Notice* of the Information Commissioner on the above complaint. Or at least it is not clearly addressed in that *Notice*, and the essential finding of that Notice that Ryedale District Council did not hold the requested information (which must include the information requested under the second part of the request) would sit oddly with it being a possible view of the Information Commissioner (see below) that the information sought under the second part of the request had in fact been provided to Dr Ellis on 1 February 2016.
10. I should add here that I accept for the purposes of this appeal that the wording “in any specified respect” in section 50 of FOIA refers not to what is specified in the complaint by the complainant but whether in the view of the Information Commissioner the request for information was dealt with by the public authority in accordance with Parts 2 and 3 of the 2004 Regs in any specified respect. However, there is nothing in the Information Commissioner’s *Decision Notice* in this case to indicate that she had limited her consideration to the first part of the request made by Dr Ellis on 5 January 2016.
11. I speculated when giving permission to appeal that it may have been that the tribunal considered that Dr Ellis was not pursuing the second request on the appeal (a) because of the focus of his grounds of his appeal to that tribunal and/or (b) because of the letter of 1 February 2016 (on page 112 of the First-tier Tribunal’s bundle) attached to Ryedale District Council’s letter to Dr Ellis of 1 February 2016 (at pages 78-79 of the First-tier Tribunal’s bundle), as further explained in the first “(ii)” on the fourth page (page 89 of First-tier Tribunal’s bundle) of Ryedale District Council’s letter of 16 March 2016 to Dr Ellis. (That is, because it considered the second request had been met by the council’s

later disclosure of the letter on page 112.) I also wondered whether the tribunal had considered – per regulation 12(4)(a) of the 2004 Regs – that the second request had rightly been refused as it was not information held by the council at the time of Dr Ellis’s request of 5 January 2016.

12. However the fundamental problem with these possible considerations is that if they were matters which the tribunal had taken into account, they are nowhere expressed in its reasoning of 11 December 2016.
13. Moreover, what is said by Judge Carter in her refusal to set aside decision of 16 February 2017 suggests clearly to my mind that the tribunal did misunderstand that there was a second request. In the refusal to set aside determination Judge Carter again omits the second part of the 5 January 2016 request from her quotation of that request, even though she predescribes the quotation she sets out as being what Dr Ellis had written on 5 January 2016 “asking for the following information”. As an accurate description of the whole of the 5 January 2016 request that is simply wrong. This error, and thus the original error of the tribunal in its understanding of the scope of what had been requested by Dr Ellis, is made plain by what is said in paragraph 7 of the refusal to set aside determination:

“Whilst I understand that the information which it now becomes clear the Appellant wants is not just the name/identity of the landowner but the date (and an actual copy) of any letter authorising the start of the development, that was not what was requested. The request was for the name/identify of the landowner.....” (my underlining added for emphasis).

14. The underlined words underscore in my judgment that the tribunal had a fundamentally wrong understanding of what was in the request of 5 January 2016. This fundamental misunderstanding in my judgment sufficiently undermines the tribunal’s understanding of the appeal before it as to render its decision making on the appeal materially in error of law.

15. I note here the argument made by the Information Commissioner on the appeal to the Upper Tribunal that Dr Ellis arguably did not raise the Information Commissioner's approach to the second part of his request for information as an issue on his appeal to the First-tier Tribunal. That argument may have some merit in terms of the diffuse nature of the nine pages and 31 paragraphs of the grounds of appeal submitted to the First-tier Tribunal by Dr Ellis, none of which grounds in any obvious sense addresses the second part of the information request. Moreover, the tendency in those grounds by Dr Ellis to refer to other requests for information did not assist in identifying what parts of the Information Commissioner's *Decision Notice* of 12 May 2016 he was seeking to challenge. To that extent it may be said that Dr Ellis did not help himself or the First-tier Tribunal.

16. However, Dr Ellis in his appeal grounds to the First-tier Tribunal was himself responding to a *Decision Notice* which had not clearly addressed the second part of the request (beyond perhaps saying it was not information held by Ryedale District Council). Moreover, and in my judgment more importantly, the confusing nature of the grounds ought to have been the catalyst for the tribunal to identify for itself what the grounds of appeal were exactly, as that is ultimately the tribunal's responsibility. However, its fundamental misunderstanding of the nature of the request, not the grounds of appeal, appears to lie behind the tribunal's failure to even enquire into whether the second part of the request was in issue on the appeal. Put another way, the tribunal's wrong view as to the single nature of the relevant request was in my judgment the cause for it limiting the issues it considered, not some view it took about the scope of the appeal. Had it realised there was a second part in the request, the tribunal may well have sought to identify whether it was also in issue on the appeal. The tribunal's fundamental misunderstanding of the request thus led it to fail to consider what was in issue on the appeal, and that failure renders the decision it then came to erroneous in law.

17. Had it addressed the second request the tribunal may still have needed to address what information the council held on 5 January 2016 of any approval letter sent to the developer on or before that date allowing the development to begin (and thus potentially arguments that the development had in fact begun in 2014), or whether Dr Ellis's framing the request in terms of the development beginning was consistent with condition 16 to the grant of planning permission (see page 49 of First-tier Tribunal papers). The same may then have required the tribunal to address (a) when the development began, and (b) whether the letter on page 112 constituted, per condition 16 to the grant of planning permission, the council's approval (as local planning authority) of the developer's programme for implementation of foul and surface water drainage. These are not matters it is appropriate for me to determine.
18. I should simply add finally that I have not found Ryedale District Council's submissions in response to Dr Ellis's appeal to the Upper Tribunal to be particularly helpful. I say this because on the one hand they say the appeal ought to be dismissed but on the other argue that "the First-tier Tribunal has erred in law in making its decision in failing to address the question of the Appellant's request for information...of 5 January 2016". In so far as this last argument is based on the next argument Ryedale District Council makes, that the tribunal was wrong to order the council to disclose the name/identity of the landowner, such an argument cannot be made in these proceedings as Ryedale District Council have never sought or been given permission to appeal this issue to the Upper Tribunal.
19. The rest of the arguments Ryedale District Council makes, and as far as I can identify the 18 pages of argument in response from Dr Ellis, all go to the factual merits of the case and/or the second request. None of them are error of law arguments.
20. For the reasons given above, the tribunal's decision dated 11 December 2016 must be set aside.

21. The appeal should be redecided by the same tribunal in accordance with the directions set out above. I direct that it should be the same tribunal because: (a) it is already familiar with the somewhat complicated background to this appeal, and the two parts of the request made by Dr Ellis on 5 January 2016 are not wholly divorced from one another; and (b) it appears to me the tribunal just missed the second part of the request, and so has done nothing to prejudice its consideration of that part of the request. If, however, any of the parties wishes to argue for a differently constituted First-tier Tribunal to redecide the appeal, they can do so by making a reasoned application, on notice to the other parties, to the First-tier Tribunal.
22. However, my direction that the tribunal should redecide the appeal in respect of the first part of the request in the exact same manner as it decided that issue on 11 December 2016 (as I am allowed to do under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 – see *Sarkar –v- SSHD* [2014] EWCA Civ 195) should not be subject to any variation by the First-tier Tribunal.
23. I must emphasise, however, that the appellant’s success on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about how the remitted appeal should fall to be decided on the second part of the 5 January 2016 request.

**Signed (on the original) Stewart Wright
Judge of the Upper Tribunal**

Dated 20th December 2017