IN THE UPPER TRIBUNAL **Appeal No. GIA/428/2015**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal is dismissed.

Representation:

Appellant: Mr Ian Wise QC, Mr Michael Armitage (counsel)
1st Respondent: Ms Elisabeth Kelsey (counsel)
2nd Respondent: Mr Oliver Sanders (counsel)

REASONS FOR DECISION

1. This appeal relates to a request for disclosure of an unredacted version of the Minimising and Managing Physical Restraint training manual ("MMPR") which sets out the techniques of physical restraint used in Young Offender Institutions (YOIs) and Secure Training Centres (STCs). On 27 March 2014 the Information Commissioner decided that the redacted information was exempt from disclosure under section 31(1)(f) Freedom of Information Act 2000 (FOIA) and that the public interest favoured withholding it. On 1 December 2014 the First-tier Tribunal dismissed the Appellant's appeal.
2. I gave the Appellant permission to appeal following an oral hearing on 16 September 2015. An oral hearing of the appeal took place before me in London on 11 February 2016.
3. I have decided that there was no error of law by the First-tier Tribunal. The decision was not irrational and the reasons were adequate. Article 3.1 of the UN Convention on the Rights of the Child was not relevant to the decision.

Legislative framework

4. Section 1 FOIA requires public authorities to disclose information which they hold if it is requested. By section 2 the duty does not apply to "exempt information", either because an absolute exemption is conferred by section 2(3) or because "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information": section 2(2)(b).
5. Section 31 is not one of the provisions subject to absolute exemption. So where that section is engaged, information must be disclosed subject to the application of the public interest test in section 2(2)(b).
6. Section 31(1)(f) provides:

"(1) Information … is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

…(f) the maintenance of security and good order in prisons or in other institutions in where persons are lawfully detained, …"

Background

7. The Appellant is a qualified social worker and has considerable expertise in the area of children's rights. In particular, she has had a long-standing interest in and concern about use of restraint techniques on children in custody. She was a member of the expert panel for Lord Carlile QC's independent inquiry into the use of restraint and other measures in respect of children in custody. Between 2000 and 2012 the Appellant was National Co-ordinator of the Children's Rights Alliance for England. During that time she had made a request under FOIA for full disclosure of the Physical Control in Care (PCC) restraint manual which was then in use in STCs. The Youth Justice Board refused disclosure, relying on section 31(1)(f) FOIA. The Commissioner ordered disclosure on the ground of the public interest in disclosure, taking into account the level of debate and controversy surrounding the use of physical restraint and the evidence that those techniques can result in physical harm. In 2012 the Commissioner upheld an exemption under section 31(1)(f) in relation to a restraint manual for use in adult prisons ("The Use of Force"), on the basis that there was a distinction between the use of distraction techniques in STCs and restraint techniques used in prisons.

8. The MMPR was produced following an independent review of restraint procedures in secure settings for juveniles, which was conducted following the deaths of two children in STCs during or following physical restraint. It is used in STCs (which accommodate children aged between 12 and 17 years of age) and YOIs (which accommodate children and young people up to the age between 15 and 21 years). The publicly available copy of the MMPR contained extensive redactions, although it indicated the nature of the information which had been removed.

9. On 12 July 2012 the Appellant made a request of the Ministry of Justice ("MoJ" asking for a full, unredacted, copy of the MMPR. The MoJ refused, relying on section 31(1)(f) (law enforcement) and section 38(1)(a) and (b) (health and safety) FOIA. The Appellant complained to the Commissioner.

10. The MoJ's case to the Commissioner was that disclosure of the techniques in the MMPR could lead to some young people developing countermeasures to their application and that, since some of the techniques used in the MMPR were also used in adult prisons, countermeasures could also be developed by adult prisoners. The Appellant had disputed the MoJ's assertions, in particular that there was a risk of young people developing countermeasures. She said that, although the PCC manual had been in the public domain, there was no evidence of those detained in STCs developing countermeasures. The MoJ commented on this, explaining that there were fundamental differences between the two manuals and between the populations of SCTs and YOIs.

11. The Commissioner accepted the case put by the MoJ and decided that the information was likely to prejudice the maintenance of security and good order in

YOIs and adult prisons. He considered the public interest arguments for and against disclosure and decided that on balance the public interest favoured withholding the information. As a result he did not need to consider section 38, and that has not been in issue in the proceedings before the First-tier Tribunal or the Upper Tribunal.

12. Before the First-tier Tribunal the Appellant did not challenge the Commissioner's decision that section 31(1)(f) was engaged, but challenged his conclusion as to the public interest. The Appellant provided a witness statement in which she expressed her concerns about the risks of restraint, concerns about the deliberate infliction of pain on children and the importance of openness and transparency. She adduced three witness statements from individuals who were knowledgeable in issues relating to the detention of children and which explained the basis of their opinions, which were shared by other individuals and organisations concerned with the rights of detained children, that the MMPR should be fully disclosed. They raised a range of issues including the risks to children arising from secrecy and associated abuse of power, the vulnerability of detained children, the need for openness to enable effective monitoring and review of incidents, and that it was highly unlikely that detained children would use the manual to subvert discipline.

13. In its reasons the First-tier Tribunal summarised the respective positions of the Appellant, the MoJ and the Commissioner and also summarised the evidence of the Appellant and each of her witnesses. The tribunal's conclusions were as follows:

> '17. The Tribunal noted the considerable amount of information which had been placed in the public domain about MMPR. The online (redacted) version is 154 pages long; redactions occur on approximately 65 pages. For each redaction, this version sets out an indication of the nature of the information which has been removed For example on page 27 "1.4.2 Inverted wrist hold – thumb only" the first redaction has been replaced by the text:-
>
> > *"This sentence has been redacted. It describes how members of staff will take hold and control the young person's arm, hand and thumb without applying undue pressure or pain when employing the inverted wrist hold."*
>
> 18. The text of the manual then continues with the sentence:-
>
> > *"It must be noted that the technique applied in this format may raise the risk of fracture dislocation and ligament tendon damage to the thumb"*
>
> 19. Throughout the document as published there are similar warnings; at page 55 ("2.8 Thumb flexion prone, supine and on side"):-
>
> > *"However, the use of a pain inducing technique may be justifiable if that is the only viable and practical way of dealing with a violent incident which poses an* ***immediate risk of serious physical harm*** *to the young person, other young persons or staff."*
>
> 20. The Tribunal considered that given the extent and detail of what is already in the public domain the benefit in terms of transparency and of public confidence in the lawfulness and humanity of the system was limited. It noted the extent of supervision of the detention of young people and the need for recording of incidents. The Tribunal did not consider that the investigation of incidents would be obstructed by the protection of the contents of the MMPR and its non-disclosure to the world at large.

> 21. It acknowledged that there was some force in the argument that few young people were likely to consult the manual and seek to learn from it how to resist restraint. The Tribunal noted that MMPR had been developed for an older age group than those detained in STCs. The client group within YOIs was older and could demonstrate the capacity for a higher level of dangerous and violent conduct to staff and other clients than those within STCs. In developing the techniques to safely and humanely control such clients; techniques used for adult prisoners and set out in the "Use of Force" manual used in adult prisons had been considered and where appropriate adopted or adapted. The Tribunal considered that the relevance of the manual to the far larger numbers of potentially violent adults within the prison sector, some of whom would clearly be capable of learning from and applying the manual, was decisive (it may be noted that Ms Willow was of the view that there were considerable similarities between MMPR and "Use of Force"; paragraph 7 above). The Tribunal endorsed the conclusion of the ICO in his letter to Ms Willow of 11 July 2013:-
>
> > *"On balance, by quite a margin, the likely threat to the good order and security of YOIs and prisons and the safety implications of this for young people and staff in both YOIs and prisons favours non-disclosure of the withheld information."* '

Discussion

14. The Appellant appeals against the First-tier Tribunal's decision on two grounds: that the First-tier Tribunal failed to provide adequate reasons for its decision and/or that the decision was irrational; and that it failed properly to apprehend and discharge its obligation to treat the best interests of the child as a primary consideration pursuant to article 3 of the United Nations Convention on the Rights of the Child (UNCRC).

Inadequate reasons/ irrationality

15. In R (Iran) v Home Secretary [2005] EWCA Civ 982, at [9] – [15], the Court of Appeal gave guidance as to scope of an appeal for error of law including on grounds of irrationality or inadequate reasons. All parties are agreed that these principles apply here. The Court of Appeal said that "perversity" represents a high hurdle. In addition to decisions that are irrational or unreasonable, it includes making material findings of fact which are wholly unsupported by evidence. As for reasons, they need not be elaborate nor deal with every argument presented. The reasons must be sufficient to enable the parties and the appeal tribunal to understand why the decision was reached and "the issues the resolution of which were vital to the …. conclusion should be identified and the manner in which he resolved them explained." This is reinforced by Lord Hope's observation in Jones v First-tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19 at [25]:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

16. On behalf of the Appellant, Mr Wise QC submits that the First-tier Tribunal's decision as to public interest was irrational because it was not supported by evidence. He submits that it was based on speculation as to the respective

harms or benefits of disclosure rather than weighing *actual* harm and actual benefits based on evidence of *actual* harm. He relies on the decision of the three judge panel of the Upper Tribunal in APPGER v Information Commissioner and Foreign and Commonwealth Office [2013] UKUT 560 (AAC) addressing the nature of the public interest decision in relation to a qualified exemption (in that case, section 27 FOIA):

> "75. In our view correctly, it was accepted before us by the FCO and the IC that when assessing competing public interests under section 27 of FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote…
>
> 76. Such an approach requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice and (b) benefits that the proposed disclosure of the material in respect of which the … exemption is claimed would (or would be likely to or may) cause or promote. Plainly that includes an identification of the relevant material and the circumstances in which it was provided to or obtained by the body claiming the … exemption."

17. This does not mean, however, that there must be evidence of harm having occurred. The nature of the assessment is that it will often involve predictions as to what will or is likely to happen in the event of disclosure. "Actual harm" and "actual benefit" includes, respectively, *risk* of actual harm and *real chance* of benefit: Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC) at [25]. As Upper Tribunal Judge Jacobs said in London Borough of Camden v Information Commissioner and YY [2012] UKUT 190 (AAC) at [11], "the tribunal should take account of any consequences that can readily be anticipated as realistic possibilities."

18. In the present case, the Appellant had accepted the Commissioner's decision that prejudice was likely. I have summarised the basis of that decision. It is not now open to her to contend that there was not likely to be such prejudice nor that the tribunal should not have given weight to it. In the light of the agreed likely prejudice, the tribunal's task was to weigh the competing public interests for and against disclosure. There was little if anything that could be advanced by way of concrete evidence in that respect. It was a matter of judgment for the tribunal in the light of the facts.

19. The tribunal made clear findings as to the risks of disclosure and consequent public interest in withholding the information. These are at paragraph 21. The tribunal accepted that there was some force in the Appellant's argument that few young people were likely to consult the MMPR and seek to learn from it, but it found that the decisive risk was in relation to older detainees in YOIs and adult prisoners. It is clear that the tribunal considered the risk to be substantial with the potential for serious harm (the threat to good order and security, and the safety implications).

20. The tribunal's conclusion at paragraph 21 was consistent with the conceded position as to prejudice. Moreover, the finding of risk in relation to older detainees and adults was adequately supported by the evidence. The MoJ had explained that the MMPR was different from the PCC but that there were similarities with the Use of Force Manual which is in use in adult prisons. It had supported this with an explanation of the background to the development of the manuals, the

differences in the techniques and the characteristics of the different populations in the institutions. The Appellant's witness evidence was principally directed to the risk of children and young people learning from the MMPR, without distinguishing between different age groups. Insofar as she addressed issues relating to adult prisoners, the tribunal noted (paragraph 21) the Appellant's view that there were considerable similarities between the MMPR and the Use of Force manual.

21. Next, Mr Wise submits the tribunal gave inadequate weight to or explain how it had addressed the Appellant's evidence and arguments. He makes four specific challenges in this respect.

22. First, he says that there was significant unchallenged evidence put forward by the Appellant that there was a "vanishingly low" risk of detainees developing countermeasures. This challenge cannot stand in the light of the Appellant's acceptance of the prejudice to security and good order on the basis of this very risk. Moreover, the Appellant's evidence as to low risk largely focussed on children and young people. Mr Wise now seeks to persuade this tribunal that the same reasoning applies to older detainees and adults, but this is simply an attempt to reargue the facts.

23. Second Mr Wise says that the First-tier Tribunal failed to address the fact that the PCC Manual had been disclosed fully without the negative consequences identified by the MoJ. But the Commissioner had addressed this in deciding that section 31(1)(f) was engaged, and the Appellant had conceded that part of the decision. To the extent that this issue remained to be addressed as a matter of weight, in the public interest balancing exercise, the First-tier Tribunal had summarised the MoJ's and Commissioner's positions (paragraphs 6 and 8) and, at paragraph 21, it accepted that few young people were likely to learn from the manual but made a clear finding that different considerations applied to the older population.

24. Third, Mr Wise says the tribunal was mistaken in fact to find that the MMPR was developed for an older age group than those in STCs and points to the statement in the Manual that it was designed for use on young people between the ages of 12-17. It may be that the phraseology used by the First-tier Tribunal was not wholly accurate, but reading paragraph 21 along with the tribunal's summary of the evidence, what mattered was that the MMPR would be used in YOIs which had an older population than STCs, and the use of the MMPR was not limited to the younger age group. The First-tier Tribunal had been provided with evidence of the origins of the PCC for a younger age group and that the MMPR could be used more widely than under 18s (page 93). The Commissioner's decision at paragraph 23 summarised the evidence as to the development of the MMPR and the PCCP for different age groups and the First-tier Tribunal had this in mind (paragraph 8). The evidence that there was overlap between the techniques used in YOIs and STCs (eg page 197) is not inconsistent with the tribunal's decision.

25. Mr Wise also says that, even if those in YOIs have a greater capacity for dangerous or violent conduct than those in STCs, it does not follow that they will better able to develop countermeasures if they have access to the MMPR. He says that there was no evidence to support that conclusion. But as summarised in the Commissioner's decision notice at paragraph 24, the MoJ had explained that the older age group had capacity for more dangerous and violent behaviour.

This was plausible and the First-tier Tribunal was entitled to accept it. It was not irrational for the tribunal to accept that that age group would be better able to develop countermeasures in the light of that evidence. In any event, this was implicit in the conceded position as to likely prejudice.

26. Finally, Mr Wise submits that the Appellant had put forward copious evidence explaining why the public interest favoured disclosure which the tribunal failed to address. This submission is unsustainable. The tribunal's summary of the Appellant's evidence shows that it fully understood its import. The tribunal explained at paragraphs 17-20 why, nonetheless, it afforded limited weight to the benefits of disclosure. Its reasoning at paragraph 20 is a clear reference to the Appellant's case as to the public interest in favour of disclosure. Having previously summarised the matters which she relied on there was no need to repeat them. It was the tribunal's task to weight the competing factors and it did so.

27. Contrary to Mr Wise's submission, the tribunal's conclusion that the investigation of incidents would not be obstructed by non-disclosure is explained by reference to the preceding paragraphs where it addressed the extent of information already published. The conclusion at paragraph 20 was expressly reached "given the extent and detail of what is already in the public domain", the extent of supervision and the need for recording of incidents. The Appellant's case did not call for any more detailed explanation than this. The high point of her evidence as to the impact of non-disclosure on the investigation of incidents was in the witness statement of Mr Fayle but this provided little specific evidence as to the difficulties which are encountered particularly given what was in the public domain.

28. I reject the first ground of appeal.

UN Convention on the Rights of the Child

29. The Respondents do not dispute that the interests of children should be considered as part of the public interest balancing exercise. But they say that the tribunal did that. The appeal was very largely about the interests of children. The tribunal referred to submissions by all parties which related to the interests of children. The evidence and submissions to the First-tier Tribunal did not indicate that the interests of children lay all on one side of the balance. For instance the MoJ relied on children's interests in staff being able to use effective and safe restraint techniques and in there being good order in the institutions in which children are detained. I agree.

30. However, Mr Wise submits that Article 3.1 of the United Nations Convention on the Rights of the Child ("UNCRC"), required the tribunal to do more than that. Article 3.1 provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Mr Wise says that this required particularly close focus on the interests of children. He relies upon the statement by Baroness Hale in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 at [23] that Article 3.1 is a "binding obligation in international law", and her decision in Smith v Smith [2006] UKHL 35 that domestic legislation should be construed as far as possible so as to comply with the state's obligations under UNCRC. He

submits that, although Article 3.1 is not directly incorporated into English law, the obligation is applicable in the context of this decision and that FOIA should be construed as far as possible to comply with Article 3.1. Mr Wise relies on the judgments of Lord Carnwath in R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16 and Lord Wilson in Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47 at [41], along with guidance by the UN Committee on the Rights of the Child, as showing that Article 3.1 provides a substantive right, a fundamental interpretive legal principle and a rule of procedure requiring evaluation of the possible impact on the child or children concerned, and justification showing that the rights of the child or children have been taken into account.

31. The passages from the judgments upon which Mr Wise relies are concerned with the nature of the duty under Article 3.1 where it applies, but it is important first to identify whether Article 3.1 applies at all. The relevance in domestic law of Article 3.1 UNCRC was discussed by the Supreme Court in SG. Lord Hughes stated the position at [137]:

> "Article 3 UNCRC is contained in an international treaty ratified by the UK. It is binding on this country in international law. It is not, however, part of English law. Such a treaty may be relevant in English law in at least three ways. First, if the construction (ie meaning) of UK legislation is in doubt, the court may conclude that it should be construed, if otherwise possible, on the footing that this country meant to honour its international obligations. Second, international treaty obligations may guide the development of the common law…Neither has any application to this case. This case is concerned with legislation, not with the common law, and it is not suggested that there is any room for doubt about the meaning of the regulations. Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention on Human Rights ("ECHR") via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC…"

32. A similar approach was taken by Lord Reed at [82]-[83] and Baroness Hale at [211] and [217]-[218]. Lord Carnwath applied the same fundamental principles at [115] and [116], and he made it clear that he had regard to UNCRC because it was relevant to justification under Article 14 ECHR. Only Lord Kerr thought that the UNCRC might be directly enforceable in UK domestic law: see his discussion at [243]–[257]; but he recognised at [253] that this was a controversial position which was "unlikely to find favour in the courts of this country". In Mathieson Article 3.1 was relevant to the Court's consideration of Article 14 ECHR.

33. In ZH (Tanzania) Article 3.1 UNCRC was held to be relevant because of its incorporation into domestic law by section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009 and its consequent relevance to whether an act was "in accordance with the law" under Article 8(2) EHCR. The courts have not yet said that unambiguous legislation should be construed consistently with Article 3.1 even where no Convention right is involved, as to which see the comments of Baroness Hale in Nzolameso v Westminster City Council [2015] PTSR 549 at [29].

34. Nonetheless Mr Wise submits that the courts have said that it should be assumed that Parliament does not legislate for or maintain on the statute book a power which can be exercised in a manner which is inconsistent with the UK's treaty obligations under UNCRC. In this regard he relies on the judgment of Lord Browne-Wilkinson in R v Secretary of State for the Home Department ex p Venables [1998] AC 407 at 498-499. The House of Lords was there concerned with the exercise of the Home Secretary's discretion under section 53(1) of the Children and Young Person's Act 1933 as to the detention of young people during Her Majesty's Pleasure. The Home Secretary had accepted that 44(1) of the 1933 Act, which provided that in dealing with a child or young person the court shall have regard to the welfare of the child, should guide the exercise of his discretion under section 53 and it was in that context that the UNCRC was relevant to the Home Secretary's discretion. This decision was referred to in R (MP) v Secretary of State for Justice [2012] EWHC 214 (QB) to support the conclusion that Article 3.1 had to be considered as part of the application of Article 8: paragraph [175]. The above passage from Venables does not extend the principles affirmed by the Supreme Court in the more recent decisions to which I have referred.

35. Mr Wise also relies upon the *obiter* comment of Baroness Hale in Smith v Smith [2006] 1 WLR 2024 at [78], that where two interpretations of domestic legislation are possible then the one which better complies with Article 3.1 UNCRC should be chosen. This analysis has not been followed by the Supreme Court in the above cases save in cases of ambiguous domestic legislation. Baroness Hale's comments do not suggest that the court should depart from the clear meaning of a legislative provision.

36. The present case does not fall within the principles stated by the Supreme Court in the above decisions. The relevant provisions of FOIA are not ambiguous, there is no issue under ECHR and (even if this could in principle be relevant) FOIA does not incorporate or reflect the provisions of Article 3.1. Article 3.1 UNCRC has no application in this case.

37. It follows that ground 2 fails.

Conclusion

38. The First-tier Tribunal did not make any error of law and I dismiss the appeal.

Signed on the original
on 24 March 2016

Kate Markus QC
Judge of the Upper Tribunal