# THE UPPER TRIBUNAL
# (ADMINISTRATIVE APPEALS CHAMBER)

## UPPER TRIBUNAL CASE NO: GIA/1940/2018
## [2020] UKUT 174 (AAC)

## INFORMATION COMMISSIONER V MOSS AND THE ROYAL BOROUGH OF KINGSTON UPON THAMES

Decided following an oral hearing by Skype for Business on 21 May 2020

**Representatives**

| | |
|---|---|
| Information Commissioner | Rupert Paines, of counsel, instructed by Richard Bailey, solicitor for the Information Commissioner's Office |
| Derek Moss | Nikolaus Grubeck, of counsel, instructed by ITN solicitors |
| Royal Borough of Kingston upon Thames | Did not take part |

## DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference: NJ.2018.0007
Decision date: 29 June 2018

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the tribunal had no jurisdiction to deal with Mr Moss's application of 28 February 2018 (the contempt application), but did have jurisdiction to deal with his application of 25 March 2018 (the certification application). The proceedings on the latter application are restored.

## REASONS FOR DECISION

1. This case concerns the enforcement of decisions made under the Freedom of Information Act 2000 (FOIA, from now on) by the First-tier Tribunal. I refer to enforcement, because that is the word that is used in FOIA and has been used by the Information Commissioner, the First-tier Tribunal, and the parties in this case. In fact, there is no power to force a public authority to comply with its duty. What there is, is a power to punish for not doing so, although that power may operate as an incentive to comply. That is what is meant by enforcement.

### A. What this case is about

2. The issue is this: when the First-tier Tribunal on appeal substitutes a decision notice for that of the Information Commissioner, who is responsible for (a) deciding whether the public authority has complied with that notice and (b) taking action to enforce it? The Commissioner says it is the tribunal. The tribunal says it is the Commissioner. I have decided that it is the tribunal.

3. The Commissioner accepts that she is responsible for enforcing a decision notice if the tribunal dismissed an appeal. That was not in issue on this appeal. I will, though, have something to say about it later.

### B. Who's who

4. The Information Commissioner needs no introduction. Mr Moss is the person who requested information from the Royal Borough of Kingston upon Thames, which is the public authority. The Borough was not a party to the proceedings at any stage before the First-tier Tribunal, but Upper Tribunal Judge Mitchell added them as a party in the Upper Tribunal. However, the Borough took no part after Judge Mitchell threatened to bar them from participating for failure to comply with his direction.

### C. What has happened so far

5. In short, Mr Moss won his case before the First-tier Tribunal, but says that the authority failed to comply with its decision. He asked the Information Commissioner to enforce the decision, but she refused. He took his case to the tribunal, but the Registrar of the General Regulatory Chamber struck out the proceedings on 8 June 2018 and the Chamber President confirmed that decision

on 29 June 2018. This is a fuller account of the history, taken from the Registrar's decision:

1. In 2016, Mr Moss lodged with the First-tier Tribunal General Regulatory Chamber ('GRC') an appeal against the Information Commissioner's Office decision notice FS50624045, a decision in which the Information Commissioner's Office found that the Royal Borough of Kingston upon Thames ('Kingston') had correctly relied upon section 12 of the Freedom of Information Act 2000 ('FOIA') when responding to a request Mr Moss made on 16 February 2016.

2. The GRC's decision, dated 20 March 2017, substituted the decision notice to the effect that, whilst Kingston had been justified in relying on section 12 FOIA, they were required to provide advice and assistance to Mr Moss (per section 16 FOIA) with a view to enabling him to bring his part of his request within the cost limit.

3. The GRC refused Mr Moss permission to appeal against the decision. There is some indication in the GRC's file that Mr Moss had made an application directly to the Upper Tribunal Administrative Appeals Chamber ('AAC') for permission to appeal (which he is able to do). As the GRC and the AAC are separate bodies, the GRC does not have (and does not need to have) full details about the progress of that appeal.

4. Mr Moss says that Kingston has failed to comply with the substituted decision notice; he asked the Information Commissioner's Office to enforce the notice. The Information Commissioner's Office has now said that it is their view that, whilst an un-appealed or unchanged notice is enforced by them, a substituted decision notice is not enforced by the Information Commissioner's Office but is enforced by the GRC via section 61 FOIA and Schedule 6 to the Data Protection Act 1998 ('DPA 1998').

5. In a document dated 28 February 2018 Mr Moss applied to the Tribunal for a contempt of court order to be issued against Kingston; by application dated 25 March 2018 Mr Moss has applied to the Tribunal to certify an offence of contempt of court as against Kingston and the Information Commissioner.

6. His applications have been consolidated and opened as this case – NJ.2018.0007 – to enable the GRC to consider the legal principles involved and to enable whichever party loses to consider whether to take this issue further or accept the ruling of the GRC.

7. Parties were invited to make submissions by 30 April 2018, at the Information Commissioner's Office request that date was extended to 9 May 2018. Due to that extension of time the submissions were received so close to a period when I had pre-booked leave that I did not have

time to complete my decision prior to today. I apologise to parties for any inconvenience incurred.

6. This appeal is against the Chamber President's decision. I have set out the relevant sections of the Registrar's decision in Appendix 1 and those of the Chamber President's decision in Appendix 2.

## D. Why the Information Commissioner is entitled to appeal to the Upper Tribunal

7. This is not an issue that would have troubled me, had it not been for the decision of the Court of Appeal in *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612. One of the issues before the Court was the scope and application of the slip rule, which allows a tribunal to correct mistakes or omissions in the way a decision was recorded. In the course of considering that issue, the Court said:

> 27. I start with the alleged failure by the Secretary of State herself to appeal. I agree with Mr Chapman that there was no such failure. In my view Mr Tufan was quite right in his submission to DUTJ Latter (see para. 16 above) that that course was not open to her because she was (ostensibly) the winning party. As appears from para. 17 of his decision, the Judge acknowledged that that had once been the law, but he said that the position was changed by section 11 (2) of the Tribunals, Courts and Enforcement Act 2007, which reads 'Any party has a right of appeal, subject to subsection (8).' Subsection (1) defines a right of appeal, so far as relevant, as a right of appeal to the UT on a point of law. I accept that on a literal reading subsection (2) could be construed as giving a right of appeal not only to a party against whom an order has been made but also to a party who has obtained, as regards that order, the exact outcome that they sought: although usually the winning party would have no wish to appeal, occasionally they may be dissatisfied with particular findings made by the Court or with aspects of its reasoning (the present case, if the slip rule were unavailable, would be an example albeit of a very specific kind). But for the winning party to have a right of appeal in such a case would be contrary to well-established case-law governing the position in the common law courts, which reflects important policy considerations; the authorities are well-known, and I need only refer to the commentary in para. 9A-59.3 of the White Book. It was not suggested to us that there was any reason why Parliament should have intended a different approach in the case of appeals to the Upper Tribunal. Ms Broadfoot sought to support DUTJ Latter's conclusion by reference to the decision of the UT in *EG and NG (Ethiopia)* [2013] UKUT 000143 (IAC), but that was not concerned with the present point at all. I am sure that section 11 (2) of the 2007 Act is intended to confer a right of appeal only against some aspect of the actual order of the

> FTT, and that the phrase 'any party' must be read as referring only to a party who has in that sense lost.

I drew that passage to the parties' attention in the week before the hearing, referring them to these cases:

- *Lake v Lake* [1955] P 336;
- *Secretary of State for Work and Pensions v Robertson* [2015] CSIH 82 at [42] and [45];
- *Secretary of State for Work and Pensions v Morina* [2007] 1 WLR 3033;
- *Office of Communications v Floe Telecom Ltd (in liquidation)* [2009] EWCA Civ 47; and
- *Bell v Information Commissioner and the Ministry of Justice* [2012] UKUT 433 (AAC).

8. I accept Mr Paines' argument that the Commissioner had a right of appeal to the Upper Tribunal against the decision to strike out Mr Moss's applications. Mr Grubeck did not object to the Upper Tribunal accepting this appeal, but otherwise had no submission to make.

9. Looked at apart from authority, the position was this. Mr Moss made his applications and the tribunal raised the issue whether it had jurisdiction. The Commissioner argued it did, but the tribunal rejected that argument and struck out the proceedings. Although the decision went against the appellant, Mr Moss, that does not mean that it went in favour of the respondent, the Commissioner. The tribunal's decision was worded in terms of the proceedings, following the language of rule 8. It did not expressly state that it had decided that the Commissioner was responsible for enforcing the tribunal's decision on Mr Moss's appeal, but that was its effect. The tribunal had rejected her argument, leaving Mr Moss in the position of having to rely on her to enforce the tribunal's decision on his appeal. Which was exactly the opposite of the case she had put to the tribunal.

10. Coming to the authorities, it may seem at first reading that the paragraph I have quoted from *Devani* is fatal to Mr Paines' argument. It appears to be an unequivocal statement that a winner has no right of appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007. On closer inspection, that cannot be right. For a start, there are authorities, some of them from the Court of Appeal itself, that allow a winner to bring an appeal. What's more, the Court referred to the paragraph of the White Book that discusses some of those authorities. There are two in particular that support Mr Paines' argument.

11. One of those authorities is *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2003] 1 WLR 307 at [27]. There, the trial judge had made a declaration and had included in it a statement of fact. The Court of Appeal decided that the formal order of the court was not necessarily conclusive on what could and could not be the subject of an appeal. It

was permissible to appeal without a formal order at all. It must follow that something that was decided by a Court, that would otherwise properly be the subject of an appeal, may found an appeal even if it is expressed in its judgment (reasons) rather than in its order (decision).

12. The other authority is *Morina*. The Social Security Commissioner had decided that he had jurisdiction over a particular class of decision, but had then dismissed the claimant's appeal. The Court of Appeal allowed the Secretary of State to appeal against the Commissioner's decision, holding that it could be analysed into two: (i) a decision that he had jurisdiction; and (ii) a decision that the appeal failed on the merits. This allowed the Secretary of State to challenge decision (i), on which it had lost. The same approach could be taken in this case. Maurice Kay LJ emphasised at [10] that the case raised 'a fundamental legal issue of jurisdiction'; the same is true here.

13. Whatever the Court meant in *Devani*, there is nothing to suggest that it intended to disapprove or cast doubt on those previous decisions of the Court. I accept Mr Paines' suggestion that the Court's words should be read as merely a statement of the application of the existing principles in a clear case where an appeal by the winner would not be allowed.

## E. FOIA – relevant provisions

14. These are the relevant provisions of Part IV on Enforcement.

> **50 Application for decision by Commissioner**
>
> (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.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a 'decision notice' ) on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

**52 Enforcement notices**

(1) If the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commissioner may serve the authority with a notice (in this Act referred to as 'an enforcement notice' ) requiring the authority to take, within such time as may be specified in the notice, such steps as may be so specified for complying with those requirements.

(2) An enforcement notice must contain—

(a) a statement of the requirement or requirements of Part I with which the Commissioner is satisfied that the public authority has failed to comply and his reasons for reaching that conclusion, and

(b) particulars of the right of appeal conferred by section 57.

(3) An enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

(4) The Commissioner may cancel an enforcement notice by written notice to the authority on which it was served.

(5) This section has effect subject to section 53.

**54 Failure to comply with notice**

(1) If a public authority has failed to comply with—

(a) so much of a decision notice as requires steps to be taken,

(b) an information notice, or

(c) an enforcement notice,

the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice.

(2) For the purposes of this section, a public authority which, in purported compliance with an information notice—

(a) makes a statement which it knows to be false in a material respect, or

(b) recklessly makes a statement which is false in a material respect,

is to be taken to have failed to comply with the notice.

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

(4) In this section 'the court' means the High Court or, in Scotland, the Court of Session.

15. These are the relevant provisions of Part V on Appeals.

**57 Appeal against notice served under Part IV**

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

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates—

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,

subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

**58 Determination of appeals**

(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.

16. Until 25 May 2018, section 61 provided:

**61 Appeal proceedings**

The provisions of Schedule 6 to the Data Protection Act 1998 have effect (so far as applicable) in relation to appeals under this Part.

The relevant provision of Schedule 6 to the 1998 Act was paragraph 8:

*Obstruction etc*

**8**(1) If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court or, in Scotland, the Court of Session.

(2) Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court.

These are the provisions that apply in this case, as Mr Moss made his applications before 25 May 2018. I do not accept, as the Registrar argued, that they became 'unnecessary' when the First-tier Tribunal came into existence. FOIA was amended to take account of the new tribunal structure and there is no proper basis for disregarding provisions that were retained.

17. From and including 25 May 2018, a new section 61 was substituted by paragraph 60 of Schedule 19 to the Data Protection Act 2018:

**61 Appeal proceedings**

(1) Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).

(2) In relation to appeals under those provisions, Tribunal Procedure Rules may make provision about—

(a) securing the production of material used for the processing of personal data, and

(b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.

(3) Subsection (4) applies where—

(a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and

(b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.

(5) Where an offence is certified under subsection (4), the Upper Tribunal may—

(a) inquire into the matter, and

(b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.

(6) Before exercising the power under subsection (5)(b), the Upper Tribunal must—

(a) hear any witness who may be produced against or on behalf of the person charged with the offence, and

(b) hear any statement that may be offered in defence.

(7) In this section, 'personal data' and 'processing' have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act).

These new provisions are to the same effect as the previous ones. They differ only in conferring the power to commit for contempt on the Upper Tribunal rather than the High Court. They are supplemented by rule 7A of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976).

## F. The two elements of the argument

18. The Information Commissioner's argument consists of two elements. First, the First-tier Tribunal has power to enforce its decision. Second, the Commissioner does not have that power. In order for her argument to succeed, she has to satisfy both elements. I accept that she has done so and will take the two elements in turn.

19. Before I do so, I will mention Mr Grubeck's argument. He did not take a position on who was responsible for enforcement. Mr Moss, he told me, did not mind who was responsible; he just wanted to know which it was. His only submission was that the procedure should be clear, accessible and effective. I am satisfied that my decision meets that test.

## G. Why the First-tier Tribunal has power to enforce its decision

20. The tribunal's power is conferred by section 61 of FOIA and, by adoption, paragraph 8 of Schedule 6 to the Data Protection Act 1998. This effectively gives the tribunal the same power as the Commissioner has under section 54(1) to send a case to the High Court.

21. There is no reason in principle why a power or even a jurisdiction cannot be conferred on a tribunal by this indirect method rather than by incorporating it in the tribunal's own dedicated legislation. That is especially so when it is a specific power that applies only to one area of the tribunal's jurisdiction rather than one that is generally applicable within its overall jurisdiction. And in so far as the power to certify is a jurisdictional matter, it could not be conferred by the tribunal's rules of procedure, because jurisdiction is not a matter of 'practice and procedure' within the meaning of section 22 of the Tribunals, Courts and Enforcement Act 2007 (Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356 at 395).

22. Given that paragraph 8 operates by reference to the law of contempt, it makes sense for 'proceedings' to take a meaning that is appropriate for the law of contempt and not to be linked to its meaning within the tribunal's rules of procedure. A tribunal's decision disposes of all or part of the proceedings before the tribunal and will usually be of ongoing effect. It is, therefore, no surprise that contempt, which is concerned (in part) to ensure that the decision is effective, applies to a breach of a court order or undertaking. As Lord Toulson SCJ explained in *Director of the Serious Fraud Office v O'Brien* [2014] AC 1246:

> 38. Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt. …

That passage uses the standard court terminology in which the judgment contains the court's reasoning and the order gives it legal effect. The 2007 Act and the rules of procedure under it generally refer to reasons and decisions, although there is reference to a consent order. I can see no significance in those differences. They reflect the establish linguistic practices of courts and tribunals. But there is no reason to attribute substantive significance to the difference in language, especially as section 19 of the Contempt of Court Act 1981 provides that the Act applies to tribunals as well as to courts.

23. Just for completeness, contempt does not apply to recitals, as McCloskey J explained in *R (MMK) v Secretary of State for the Home Department* [2017] UKUT 198 (IAC):

> 30. It is also appropriate to emphasise that by the terms of the Consent Order neither party made any undertakings to the UT. In particular, the characterisation of undertakings does not apply to the recitals. The correct analysis of the recitals is that they record the factual basis of the operative provisions of the order; they inform and illuminate such provisions; and they give expression to the parties' *bona fide* intentions. The interesting question of whether recitals of this kind operate to engender a substantive legitimate expectation is an issue which may fall to be determined in some future occasion. As a minimum they impose a burden of explanation on the defaulting party where a default eventuates. But they are neither undertakings to the Tribunal nor *inter-partes* contractual promises.

24. If section 61 does not cover failure to comply with a tribunal's decision, what is its function? The tribunal already has power to refer failures in respect of giving evidence and producing documents to the Upper Tribunal under rule 7(3) of the rules of procedure, and it has power to strike out proceedings or bar a respondent from taking part in the proceedings under rule 8 on account of failure to comply with its orders or to co-operate. That does not leave much else for section 61 to deal with, apart from the tribunal's decision.

25. In this case, the public authority was not a party before the First-tier Tribunal when it made its decision on Mr Moss's appeal. The tribunal's decision was nonetheless binding by virtue of its terms, which imposed a duty on the Borough, and its status as a decision notice under FOIA, albeit a 'substituted' one. And the power to punish for contempt is not limited to someone who was a party to proceedings, as CPR recognises:

> **70.4 Enforcement of judgment or order by or against non-party**
>
> If a judgment or order is given or made in favour of or against a person who is not a party to proceedings, it may be enforced by or against that person by the same methods as if he were a party.

## H. Why the Information Commissioner does not have power to enforce the tribunal's decision

26. Section 27 of the Tribunals, Courts and Enforcement Act 2007 provides for a sum payable under a decision of the First-tier Tribunal or Upper Tribunal to be enforceable by an order of the county court or High Court. Similar provision is made for the employment tribunal by section 15 of the Employment Tribunals Act 1996.

27. It is understandable why the legislation for tribunals should adopt the enforcement procedures available to the courts for money debts. It avoids

establishing a complex legal and administrative structure for a relatively small part of the work of tribunals. This is not to say that monetary orders are not an important part of the work of tribunals. They are, as the huge sums payable pursuant to the decisions of the First-tier Tribunal and Upper Tribunal in their social security jurisdiction testify. The point is that the decisions against a body like the Department for Work and Pensions are almost invariably implemented without the need for enforcement action.

28. The reason behind section 27 shows that it is not intended to be comprehensive on the powers of enforcement for a tribunal's decision. It deals with monetary decisions only and leaves open the possibility that the tribunals themselves may have power to enforce other types of decision. Whether a tribunal has power to enforce a particular form of decision will depend on the legislation relevant to that area of its jurisdiction. My concern is with the enforcement under FOIA.

29. The Commissioner has power to enforce her own notices under sections 52 and 54. Why can those powers not be used to enforce decisions of the First-tier Tribunal? Her objection is that those sections confer powers, not duties. Mr Paines called them discretions. I accept that there is an element of discretion in that there is no absolute duty on the Commissioner to exercise her powers if the conditions for doing so are satisfied. There may, though, as Mr Paines recognised, be circumstances in which that discretion could only be properly exercised by taking action under the relevant section. That duty would be enforceable by way of judicial review. But – and this is the point – the discretion would be entirely beyond the control of the First-tier Tribunal, even if the case involved a possible failure to comply with a decision notice substituted by that tribunal.

30. In *R (Evans) v Attorney General* [2015] AC 1787, the Upper Tribunal had substituted a decision notice for that of the Information Commissioner, requiring information to be provided by Government Departments, but the Attorney General issued a certificate under section 53 of FOIA to the effect that there had been no failure to comply with the relevant provisions of FOIA. The Supreme Court decided that the certificate was not valid. Lord Neuberger PSC set the Court's decision in the context of fundamental constitutional principles:

> *Validity under the FOIA 2000: the constitutional aspect*
>
> 51. When one considers the implications of section 53(2) in the context of a situation where a court, or indeed any judicial tribunal, has determined that information should be released, it is at once apparent that this argument has considerable force. A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut

> across two constitutional principles which are also fundamental components of the rule of law.
>
> 52. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.
>
> 53. In *M v Home Office* [1994] 1 AC 377, 395, Lord Templeman in characteristically colourful language criticised 'the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [as] a proposition which would reverse the result of the Civil War'. The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive's overruling can be judicially reviewed. Indeed, the notion of judicial review in such circumstances is a little quaint, as it can be said with some force that the rule of law would require a judge, almost as a matter of course, to quash the executive decision.

These were not new principles, as the reference to *M* shows; the Court cited authorities from as early as 1841.

31. This case is very different from *Evans*, but those principles were stated in the broadest terms within the context of FOIA and the authorities relied on show that it has been applied in a range of different circumstances for close to two centuries. When applied to statutes, the principles operate by governing the interpretation of the legislation and, ultimately, must give way to the clearest wording of the provisions. As the Court accepted, that could have happened in *Evans* if the Attorney General had complied with the requirements of section 53. But there is nothing similar to those requirements in the provisions relevant to

this case, and nothing else that overrides these basic principles of the constitution.

32. Lord Neuberger referred at [52] to a decision being binding on the parties. That was appropriate in that case. I have already explained why the First-tier Tribunal's substituted decision notice was binding on the Borough as the public authority to which the notice was directed under FOIA.

33. In summary, it would not be permissible for the Information Commissioner to use her powers of enforcement as that would, in the context of FOIA, be a breach of the fundamental constitutional principles set out by Lord Neuberger by allowing the Commissioner to control the enforcement of a tribunal's decision. That control would be subject to judicial review, but that would still leave open the possibility that the Commissioner might exercise her discretion against enforcement in a manner and on grounds that were beyond the control of review.

## I. What didn't impress me

34. I prefer to make clear whether I accept or reject an argument. This is one of those occasions when it is appropriate to be more circumspect. I say that because I have not had to decide who is responsible for enforcing a decision notice if the First-tier Tribunal dismisses an appeal against it. There is authority that, even if an appeal against a decision is dismissed, it thereafter derives its authority from the tribunal's decision; *R(I) 9/63* at [19]; *ED v Secretary of State for Work and Pensions* [2013] UKUT 583 (AAC) at [10]; *VW v London Borough of Hackney* [2014] UKUT 277 (AAC) at [25]; *HO v Her Majesty's Revenue and Customs* [2018] UKUT 105 (AAC) at [75]. The issue may arise in future whether this approach applies under FOIA and the points that I am about to mention *may* be relevant to the analysis of that issue.

35. The points that have not impressed me are Mr Paines' arguments based on the language of FOIA and in particular the use of the word 'substitute'. I will not set out his argument in full, but the essence was this. A decision notice substituted by the First-tier Tribunal is to be distinguished from the decision notice given by the Information Commissioner. It would make no sense if all the provisions of FOIA applied to it, such as the requirement for it to contain specified information and to be served by the Commissioner. I certainly accept that it would be inappropriate for those provisions to apply, but I am not impressed by the argument that this shows that a substitute decision notice is a different species from the Commissioner's decision notice. It is not unusual for legislation to provide for an appeal without providing in detail for the way in which the tribunal's decision fits into the statutory framework.

36. I will leave it at that, but not without paying tribute to the thoroughness of the Registrar's analysis on which the Chamber President relied. I refrain from engaging with much of it for the reason I have just given, having decided that her points are overridden by the reasons I have given.

## J. Human rights

37. I have not relied on any Convention right that Mr Moss may have under Article 6 of the European Convention on Human Rights by virtue of the Human Rights Act 1998. I understand that that issue is before Upper Tribunal Judge Wright in another case involving Mr Moss.

## K. Conclusion

38. The First-tier Tribunal was right to strike out that part of the proceedings relating to Mr Moss's application for a contempt of court order, because it had no jurisdiction to make one. To that extent, the tribunal's decision was not in error of law. It was, though, wrong to strike out the part of the proceedings relating to his application to certify an offence of contempt, because it had jurisdiction over that issue. To that extent, the tribunal's decision was in error of law and is set aside. The tribunal will now deal with that issue.

**Signed on original**
**on 30 May 2020**

**Edward Jacobs**
**Upper Tribunal Judge**

# APPENDIX 1

## Reasoning of the General Regulatory Chamber's Registrar

(Footnotes omitted)

### Discussion

*The Tribunals, Courts and Enforcement Act 2007 and the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009*

21. As the First-tier Tribunal is a creature of statute, it can only do what Parliament allows it to do. Schedule 6 of the DPA 1998 gives power to the Tribunal 'in relation to proceedings before the Tribunal'. Once 'proceedings' are ended, the Tribunal does not have the powers granted by Schedule 6.

22. The Tribunal, Courts and Enforcement Act 2007 ('TCEA') provides that, once a decision of the First-tier Tribunal has been issued, a First-tier Tribunal may review a decision made by it and may set a decision aside. As a person may only appeal the decision if the First-tier Tribunal or the Upper Tribunal grants permission a First-tier Tribunal can consider such application. The First-tier Tribunal also has power post-final decision to consider an application for costs.

23. If the Information Commissioner's argument is right and the proceedings remain in existence once the decision is promulgated then rule 10(4) which states that an application for costs 'may not be made later than 14 days after the date on which the Tribunal sends a decision notice…' would be a nullity because some proceedings may never 'end'.

24. The TCEA deals with enforcement of monetary penalties: section 27 provides that sums payable due to a decision of a First-tier Tribunal or Upper Tribunal is enforced via the county court or the High Court. The whole thrust of the TCEA and then of the GRC Rules is that, once the decision is issued, the Proceedings are at an end, except for the limited circumstances in which the TCEA permits a Tribunal to change its decision or for costs.

25. All the above matters support the view that Parliament did not intend the First-tier Tribunal (of which the GRC is a part) to enforce its own decisions, Parliament's intention was that the First-tier Tribunal decision would be issued, after which the First-tier Tribunal would only be further involved in very limited circumstances.

26. I believe that Parliament's intention and the effect of the TCEA is that, once the GRC's decision in EA.2016.0250 was promulgated, its functions were limited to considerations of set aside / review / permission to appeal and application for costs.

27. What is more likely is that s.61 FOIA, which was enacted in 2000 and therefore before the creation of the First-tier Tribunal, was intended to ensure that the Information Tribunal had power to refer matters to the High Court for contempt. The TCEA, which created the First-tier Tribunal allows Tribunal rules to make provision for contempt of court referral. When the Information Tribunal was transferred into the First-tier Tribunal s.61 FOIA became unnecessary.

*Other jurisdictions*

28. The Commissioner argues that Parliament could not have intended for the GRC to have no jurisdiction in relation to dealing with non-compliance of decisions; in arguing the merits of this point, they make comparisons with courts and general civil litigation enforcement.

29. The following is found in Edward Jacobs' book on Tribunal procedure:

> Tribunal is used in a general sense and in a specific sense. In its general sense, it covers all bodies, including courts, that determine the legal position of the parties before them. In its specific sense, it is used to distinguish one particular class of judicial body from the rest.
>
> Lord Dilhorne captured this distinction in Attorney-General v BBC when he said 'While every court is a tribunal, the converse is not true'. [[1981] AC 303 at 340]

30. Upper Tribunal Judge Wikeley in the case of Malnick said 'considerable caution needs to be exercised when seeking to make .. cross-jurisdictional comparisons when each different regime has its own very individual decision-making and appellant machinery' (paragraph 105).

31. I am not therefore going to engage with the question of what the position is in other jurisdictions (whether First-tier Tribunals, 'stand-alone' Tribunals or Courts).

32. It seems permissible to compare other appeal types within the GRC. Parliament sends numerous appeal rights to 'the First-tier Tribunal', some of that work is then allocated to this Chamber by the Senior President of Tribunals (in consultation with his Chamber Presidents). The GRC has allocated to it a variety of types of appeal, the common theme being that a person who would be the appellant is challenging a decision made by a Regulatory body. I do not have a comprehensive list of all the appeal rights allocated to the GRC, but there are over 80 individual appeal rights derived from provisions in various Acts of Parliament and Statutory Instruments. So far as I am aware, none of those appeal rights include Parliament saying that the GRC is to enforce its decision.

33. As above the TCEA at section 27 provides that sums payable due to a decision of a First-tier Tribunal or Upper Tribunal is enforced via the county court or the High Court.

34. The nature of regulatory work is that a person affected by a Regulator's decision can appeal to an independent judicial body; once the judicial determination is received, the Regulator is then required to follow that decision – unless it is amended by the same or another judicial body.

35. For the above reasons, I believe that – consistent with other appeal rights allocated to the GRC and aligning with Parliament's intention in setting up the First-tier Tribunal (of which the GRC is a Chamber) – Parliament did not intend for the GRC to enforce decisions made under FOIA.

*The 'Substitution' of the decision notice*

36. 'Substitution' does, I accept, mean that the original thing is replaced; in the overall context of FOIA and the statutory scheme it is not stretching the definition of 'decision notice' in s.54 FOIA to include one as substituted due to the Information Commissioner's Office error of law or discretion.

37. At paragraph 106 of Malnick (when quoting from a Court of Appeal decision) the Upper Tribunal found that a statutory Tribunal stands in the shoes of the decision maker. Applying that to enforcement: in a FOIA appeal which is allowed, the Tribunal replaces the Information Commissioner's Office decision notice with the decision notice that should have been issued (perhaps even that the Information Commissioner's Office says they would have issued if they had known some additional fact); the decision notice remains the Information Commissioner's Office decision notice.

*Practicalities of enforcement via Schedule 6 DPA 1998*

38. If enforcement of a substituted decision notice is under Schedule 6 DPA 1998, then enforcement is by the GRC making a finding of guilty because the schedule only applies (my emphasis) 'if any person is guilty of an act or omission', then certifying that offence to the High Court. The Commissioner argues that this is not very different from the section 54 regime whereby she 'may certify' that a public authority 'has failed to comply'. I reject that submission.

39. Whilst I accept that the GRC, as a judicial body, is in a different position about determining guilt of a civil contempt, the effect is that the enforcement regime is completely different. One arrives at the High Court with a couple of questions: 'Is this a contempt? If it should you administer punishment?', the other arrives at the High Court with an assertion: 'This is a contempt please punish the offender'. The public authority in the second scenario has been deprived of the Information Commissioner's Office's regulatory oversight which gives her discretion over enforcing decisions about information requests in light of her role as described in section 47 and with the protection of public law principles about a regulatory body's decision making.

40. The Commissioner also says that there is no problem with this being the enforcement regime when the Upper Tribunal makes a substituted decision (which, they say, that Tribunal would enforce). The Commissioner argues that

the Upper Tribunal has all the rights, etc., of the High Court and therefore there is no issue with the wording being a bit different. I reject that submission – the Upper Tribunal has the rights, etc., but does not become the High Court for the purposes of Schedule 6 DPA 1998. The effect would be that the Upper Tribunal would substitute a decision notice and then, if it dealt with enforcement, the Upper Tribunal would have to make a finding of guilt and could certify to the High Court.

41. Taking the argument further, appeals can make their way to the Court of Appeal and to the Supreme Court. Each of those Courts would be able to substitute the decision notice. If the Commissioner's argument is right, then the Court of Appeal or the Supreme Court would, on dealing with enforcement of its decision, have to make a finding of guilt and then certify to an inferior court: the High Court. It does not seem to me to be fair that a superior court certifies to a lower court – irrespective of the independence of the judiciary, a public authority may well feel that they would be unable to get a fair hearing at the High Court when a court of superior record had reported a contempt of court finding to the High Court.

42. Finally, the yet to come into force change to s.61 FOIA would replace the High Court with the Upper Tribunal for the actions currently under schedule 6 DPA 1998; no change is made to s.54 FOIA. This would mean that an Information Commissioner's Office decision notice could be enforced by proceedings in the High Court, but a substituted decision notice would be enforced by proceedings in the Upper Tribunal. This indicates to me that s.61 FOIA has a different purpose than enforcing a final decision under FOIA.

*The Information Commissioner's Office*

43. Parliament's description of the Information Commissioner's role and position is found in section 47 of FOIA (see above). In the case of Browning v Information Commissioner and The Department for Business, Innovation and Skills [2014] EWCA Civ 1050, this principle was underlined by the Court of Appeal who found, at paragraph 33 that the Information Commissioner's Office is the 'guardian of the Freedom of Information Act 2000'. The Information Commissioner's Office website reflects these principles in that it says it is 'The UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.'.

44. It is clear from the statutory scheme that the Information Commissioner's role is one of independence. They are the first respondent as it is their decision which is under appeal, the Commissioner's role, however, is to see that FOIA is properly applied to the situation under appeal; in that way they are not an 'advocate to a cause' but take a more neutral view of matters.

45. The Commissioner's independent, Regulatory, role would be undermined if the position is that the Information Commissioner's Office does not enforce

substituted decisions. The position would then be that the Information Commissioner's Office will uphold the rights of an individual to information which the Information Commissioner's Office say they should have but, if the GRC says the Information Commissioner's Office got it wrong and other information is disclosable then the Information Commissioner's Office is not going to uphold that individual's rights to information.

46. One could also argue that, if the Commissioner's argument is right, the statutory scheme would not support initial good decision making as the Information Commissioner's Office could avoid the burden of enforcing decisions if they always got it wrong and each decision notice was substituted by the GRC. Whilst professionalism may prevent that happening, Parliament cannot have intended to set up a scheme which could be manipulated in that way.

*Time limit for application?*

47. For Mr Moss to lodge an application in time, rule 22(1)(b) requires him to lodge his notice of appeal 'within 28 days of the date on which the notice of the act or decision to which the proceedings relate was sent to the appellant.'. The Commissioner argues that there is no issue with time limit as the 'proceedings' in which Kingston has failed to comply (a requirement of Schedule 6 DPA 1988) are the appeal proceedings for EA.2016.0250.

48. I am not persuaded that these applications can be said to be part of EA.2015.0260. Those proceedings ended when the decision was promulgated, except for applications for matters of set aside / review / permission to appeal and costs. These applications are new matters separate to EA.2016.0250.

49. This analysis then highlights another reason why Parliament cannot have meant for the GRC to enforce substituted decision notices: from what date does the appeal limit run? If there needs to be a notice of act or decision then a cunning public authority would ensure they did not send such notice out, thereby preventing the time limit from starting and preventing a successful requester from getting any enforcement of the substituted decision notice. In this matter, this situation is evidence: the Information Commissioner's Office has refused to enforce the substituted decision notice; Kingston has simply failed to act but not, it seems, issued any 'notice' or 'decision'.

50. To give Mr Moss and the Information Commissioner's Office a judicial decision which can be challenged through legal routes I do (if it is necessary) extend the time limit for Mr Moss to make his applications.

## Conclusions

*Kingston 'breaching its word to the Tribunal'*

51. The problem with Mr Moss's assertion is that Kingston did not promise the GRC anything at all. Kingston was not a party to the appeal and did not write

their email of 8 March 2017 at 17:26 to the GRC. All Kingston did was tell the ICO 'The Council will send Mr Moss the contracts, as requested.'.

52. Whether the GRC was right, or wrong, in law to not consider that part of the request based on Kingston's email to the ICO can only be determined by an appeal to the Upper Tribunal (and any onward appeals).

53. The fact remains that Kingston made no promise to the Tribunal and therefore cannot be said, as Mr Moss states, to have given 'a judicial body assurances that persuade it not to examine an issue'. Kingston wrote to the Information Commissioner's Office with, so far as I can tell, no direct knowledge that the email would be forwarded to the GRC.

54. For the above reasons I do not accept that Kingston made any promise to the GRC during its proceedings; therefore, the Tribunal does not have jurisdiction to consider an application for Kingston to be certified via s.61 FOIA.

*Failure to comply with substituted decision notice*

55. For the reasons given above, I find:

55.1 S.61 FOIA does not give the GRC power to enforce its final decisions; that section is about management of appeals prior to final decision. The proceedings known as EA.2016.0250 ended when the decision was sent to parties. There are, therefore, no 'proceedings' to which Mr Moss can attach a claim of contempt of court as needed by Schedule 6 DPA 1998.

55.2 The Information Commissioner has, under section 54(4) power to enforce a substituted decision notice in the same way that she has power to enforce a decision notice she issues which is either not challenged at all or challenged but not substituted.

56. If Mr Moss seeks to challenge the Information Commissioner's Office failure to enforce the decision notice he could avail himself of the public law provisions whereby a citizen can challenge a decision (or non-decision) of a body of state; that is how his right to obtain compliance with an order is preserved.

57. The Commissioner submitted that judicial review is not a satisfactory solution as it is 'expensive and potentially time-consuming'. GRC proceedings are not actually free; a party is not required to pay fees to pursue an appeal under FOIA, the taxpayer pays for the administrative office time and expenses; judicial time (Judge and Lay Members) is also met out of the public purse. All that can be said is that parties contribute to the taxpayer's costs of judicial review but the taxpayer fully funds GRC FOIA appeals.

**Decision**

58. For all the reasons above, I find that this Tribunal does not have jurisdiction to consider Mr Moss's applications. Therefore, and pursuant to rule 8(2)(a) the GRC has no option but to strike out his applications.

59. Mr Moss's applications are here by struck out.

# APPENDIX 2

## Reasoning of the General Regulatory Chamber's Chamber President

(Footnotes omitted)

### Decision

1. The Applicant's applications are struck out for lack of jurisdiction under rule 8 (2) (a) of the Tribunal's Rules.

### Reasons

1. I gratefully adopt the Registrar's comprehensive statement of the background to this matter and her synopsis of the parties' respective positions in her Decision of 8 June 2018. The Respondent has asked for a fresh consideration of her Decision by a Judge, pursuant to rule 4 (3) of the Tribunal's Rules. I have accordingly considered the matter afresh. Having done so, I conclude that I agree with the Registrar that the Applicant's applications for the Tribunal to take enforcement action against the public authority fall outside the Tribunal's jurisdiction and that it is therefore mandatory for them to be struck out. Whilst I agree with the Registrar's analysis of the issues, I wish to add some additional comments of my own.

2. It is unfortunate for the Applicant that there has been a disagreement between the Tribunal and the Information Commissioner's Office as to how a 'substituted Decision Notice' is to be enforced. I am grateful to Rupert Paines, counsel for the Information Commissioner, for his extensive submissions on that matter, dated 9 May 2018. Following a careful analysis of the competing arguments, his submission is that it is the Tribunal, rather than the Information Commissioner, which has jurisdiction to enforce a substituted Decision Notice.

3. I am grateful to the Applicant for his submissions (also dated 9 May 2018), which assert that the impasse between the Tribunal and the Information Commissioner infringes his rights under Article 6 of the ECHR. I sympathise with his strength of feeling but I make no finding on his submission other to observe that, if he is right, his remedy lies in an application to the Administrative Court rather than to this Tribunal.

4. The Appellant's appeal to the Tribunal under case number EN/2O16/0250 was concluded on 20 March 2017 with the promulgation of a Decision which (it is agreed) contained a substituted Decision Notice. I agree with the Registrar that the Tribunal's powers following the promulgation of a Decision which disposes of proceedings are limited to those contained within part 4 of the Rules. I also agree

with her that the Tribunal may only exercise the powers conferred on it by Parliament.

5. I note that the First-tier Tribunal has no inherent jurisdiction - see HMRC v Abdul Noor [2013] UKUT 071 (TCC). The Tribunal's statutory authority is derived from s. 3 of the Tribunals, Courts and Enforcement Act 2007 which provides that the First-tier Tribunal exercises the functions conferred on it by that Act or any other Act. I note that there is no express power for the First-tier Tribunal to enforce its Decisions under the 2007 Act. The First-tier Tribunal's Rules are made under s.22 of the 2007 Act. The contents of those Rules are as described in part 1 of schedule 5 to the Act. They do not refer to the First-tier Tribunal having enforcement powers and no rules governing enforcement action have been made by the Tribunal Procedure Committee.

6. I reject Mr Paines' submissions that the Tribunal may take enforcement action by certifying a contempt of court under s. 61 FOIA 2000 and Schedule 6 paragraph 8 to the DPA 1998. I conclude that the power he describes relates to the conduct of a party to 'proceedings' before the Tribunal and that it cannot be understood to confer on the Tribunal an additional power in relation to concluded matters which is not contained in part 4 of the Rules. I also consider that, had Parliament intended to confer on the First-tier Tribunal the power to enforce its Decisions, this would be an express power and not one inferred from other legislation.

7. The jurisdiction of the First-tier Tribunal hearing an appeal under s. 58 FOIA 2000 has been described as de novo, i.e. it 'stands in the shoes' of the Information Commissioner and can make any decision that she could have made. In particular, it may issue a fresh (substituted) Decision Notice. Recent support for this approach may be found in the Upper Tribunal's Decision in Malnick v IC and ACOBA [2018] UKUT 72 (AAC).

8. The nature of an appeal by rehearing is described in El Dupont v Nemours & Co v ST Dupont [2003] EWCA Civ 1368 by May LJ at [96]:

> 'On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves.'

9. In this way, it can be seen that the First-tier Tribunal, in allowing an appeal, does not issue a 'judgment' as to the merits of the parties' respective cases, as a court would do, but makes a 'fresh decision', which is substituted for that of the Information Commissioner.

10. Mr Paines' analysis here is that it must be seen as contrary to the intention of Parliament for the First-tier Tribunal to have no enforcement powers of its own. On the contrary, it seems to me that, once the nature of an appeal to the First-tier Tribunal is properly understood, the statutory scheme omitting such

power becomes clear and coherent. The intention of Parliament may perhaps be understood best by drawing a distinguishing line between the judgment of a Court - which is enforceable under the Court's own jurisdiction - and the Decision of a Tribunal, which is not a 'Judgment' as such, but replaces ('substitutes') the original decision with its own Decision. It seems to me misconceived to characterise this (as Mr Paines does) as creating an unacceptable situation in which an executive body must enforce the decision of a judicial body or where a party to litigation must enforce the decision of a judicial body. The Tribunal's Decision Notice becomes the Information Commissioner's Decision Notice by virtue of the Tribunal's power to 'substitute' its fresh Decision Notice for that of the Information Commissioner. Concomitantly, because the Tribunal's Decision Notice becomes the Information Commissioner's Decision Notice, it is not enforceable as the judgment of a judicial body, but falls to be enforced as though it were the Information Commissioner's own decision.

11. I note that s. 54 FOIA 2000 provides that it is the statutory function of the Information Commissioner to enforce 'his' Decision Notice. Notwithstanding the use of the possessive pronoun, s. 54(1)(a) of the 2000 Act makes no distinction between a Decision Notice requiring steps to be taken which is issued by the Information Commissioner, and one that has been substituted by the Tribunal. This approach is consistent with my analysis above.

12. For all these reasons, I find that the Tribunal has no jurisdiction to make the Orders requested by the Applicant and that they must be struck out. In view of the importance of these issues and the lack of direct precedent, I would be minded to grant permission to appeal to the Upper Tribunal if either party wishes to apply.