IN THE UPPER TRIBUNAL **Appeal No.** GIA/399/2020
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Mr Alan Melville Dransfield

Appellant

- v –

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 10 December 2020
Decided on consideration of the papers

Representation:

Appellant:	In person
Respondent:	Mr Richard Bailey, Solicitor, ICO

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 13 November 2019 under file reference QJ/2019/0289 does not involve any material error on a point of law. The First-tier Tribunal's decision stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. Mr Alan Dransfield (self-proclaimed 'FOI Campaigner and Social Watchdog') has achieved some fame, or possibly in certain quarters some notoriety, in the world of information rights. For better or worse, his name has become inextricably associated with the eponymous legal test, namely the *Dransfield* test for assessing whether a freedom of information request is "vexatious" within the meaning of section 14(1) of the Freedom of Information Act 2000 (FOIA).

2. This fame is as a result of earlier legal proceedings involving Mr Dransfield. Those proceedings culminated in the Court of Appeal dismissing his FOIA section 14 appeal in May 2015. I refer to that precedent as "the *Dransfield* case". The present appeal involves a different but related issue arising from what might be described as the fall-out from that earlier litigation. The sole parties to this appeal are Mr Dransfield as the Appellant and the Information Commissioner (the Respondent).

A couple of preliminary observations

3. First, it is right to record that in the present proceedings Mr Dransfield has not (as has been his wont in the past) *repeatedly* peppered the Upper Tribunal e-mail in-box with intemperate messages making scurrilous (if not defamatory) allegations about the Respondent or members of the judiciary. He has only *occasionally* done so and in a way that is indicative of vexatious conduct (see e.g. paragraphs 87-91 below). Be that as it may, the question for me is not whether Mr Dransfield's conduct of the present case has been vexatious.

4. Second, Mr Dransfield now appears to have had the assistance of Dr Kirkham, who has extensive experience of litigating FOIA cases in his own right before both the First-tier and Upper Tribunals. Dr Kirkham has not at any time been formally nominated as Mr Dransfield's representative. However, the style, formatting and footnoting of Mr Dransfield's detailed written submissions in this appeal are identical to those adopted by Dr Kirkham in his own litigation. In addition, the relative sophistication of the arguments being advanced in these proceedings is at a level not previously attained by Mr Dransfield acting in person, whose usual method of communication is the terse, angry e-mail with typographical errors. Again, and be all that as it may, it makes no difference to the way this case has been handled. It is entirely a matter for Mr Dransfield as to whether he wishes to acknowledge the role played by Dr Kirkham in these proceedings. As Dr Kirkham is not 'on the record' and so has no formal role in the current appeal, I refer in this decision to the Appellant's submissions as being Mr Dransfield's submissions.

The central issue raised by this appeal

5. Notwithstanding Mr Dransfield's (or Dr Kirkham's) best efforts to complicate matters, at the root of this appeal is a single and relatively simple question. *If the Information Commissioner states to a FOIA requester that she is not going to make a decision on his complaint because it is vexatious, does that complainant have the right of appeal to the First-tier Tribunal to challenge that refusal?*

6. The short answer to that question is No. But in order to take the present appeal forward, it is first helpful to take a step back so as to understand its context.

The wider background to this appeal: the *Dransfield* case

7. Long ago (back in January 2013) I allowed an appeal by the Information Commissioner against a First-tier Tribunal decision which had found in Mr Dransfield's favour (i.e. that one of his FOIA requests was not vexatious). I summarised my decision in the following terms (see *Information Commissioner v Dransfield and Devon CC* [2012] UKUT 440 (AAC); [2015] AACR 34):

> "1. Mr Alan Dransfield made a short request to Devon County Council under the Freedom of Information Act 2000 (FOIA). He asked for "the approved design drawings for the Pedestrian Bridge [at the Exeter Chiefs' Rugby Ground] and LPS [lightning protection system] test results since Devon County Council adopted the Pedestrian Bridge". The council refused that request on the basis that it was vexatious, relying on section 14(1) of FOIA.
>
> 2. The Information Commissioner ("IC") issued a Decision Notice (FS50317322) following Mr Dransfield's complaint. The IC concluded that the Council had appropriately applied section 14(1) of FOIA, although he also found that the Council had failed to deal with the request within the stipulated time limit. No remedial steps were required of the public authority.
>
> 3. The First-tier Tribunal (FTT) allowed Mr Dransfield's appeal (EA/2011/0079) against the IC's Decision Notice. The FTT ruled that his request was not vexatious within section 14(1) and that the information in question should be disclosed to him by Devon CC. I subsequently gave the IC permission to appeal to the Upper Tribunal.
>
> 4. My conclusion, in summary, is that the FTT misapplied the proper legal text for establishing whether a request for information under FOIA is "vexatious" within section 14(1) of FOIA. I set aside the FTT's decision for that error of law. I also re-make the decision under appeal. My substituted decision is that Mr Dransfield's appeal against the IC's Decision Notice is dismissed as the request in issue was indeed vexatious within the proper meaning of that statutory term."

8. In the course of that decision I gave extensive guidance on how section 14(1) of FOIA should be interpreted and applied by public authorities and the Information Commissioner. Mr Dransfield, as was his right, then appealed to the Court of Appeal, which dismissed his appeal in *Dransfield v Information Commissioner & Devon CC* [2015] EWCA Civ 454; [2015] WLR 5316; [2015] AACR 34. In summary, the Court of Appeal approved the guidance in the Upper Tribunal's decision, albeit with some gloss.

9. The Supreme Court in turn subsequently refused Mr Dransfield permission to appeal (on which see https://panopticonblog.com/2015/12/17/dransfield-supreme-court-game/); according to the Supreme Court's website, this refusal was promulgated on 14 December 2015. The Supreme Court's ruling was simply that "Permission to appeal be refused because the application does not raise an arguable point of law."

10. It follows, as a matter of precedent, that the Court of Appeal's decision, approving the Upper Tribunal's decision in the *Dransfield* case, is binding on the Information Commissioner and the First-tier Tribunal (and indeed the Upper Tribunal) when seeking to apply section 14(1) of FOIA in assessing whether any given freedom of information request is vexatious. It is fair to say that Mr Dransfield has been consistent, and consistently vocal (in various public fora), in never accepting that proposition.

11. On 15 March 2018 – and so rather more than two years after the *Dransfield* case had hit the Supreme Court buffers – the Information Commissioner wrote to Mr Dransfield. She informed him that she was refusing to issue Decision Notices in respect of five further complaints he had lodged with her office about different public authorities' handling of several of his more recent FOIA requests. She took this approach, she said, because she considered that Mr Dransfield's complaints to her were frivolous or vexatious. In doing so, she was not relying on section 14(1) of FOIA (an exception which is available to public authorities when faced with a vexatious FOIA <u>request</u>) but rather on section 50(2)(c) of FOIA (a course of action open to the Commissioner when faced with what she determines to be a vexatious <u>complaint</u>). The relevant legislation is referred to in the next part of this decision. The text of the Information Commissioner's letter of 15 March 2018 to Mr Dransfield, signed off by Mr Sowerbutts, then of her legal department, is appended to this decision as Appendix A.

The immediate background to this appeal

12. A year later, on 13 March 2019, Mr Dransfield made another FOIA request, this time to Cheshire West and Chester Council ("the Council", also known as CWaC). Mr Dransfield's request was in the following terms:

    > "In July 2015 Helen Weltman privately sued Mr Robert Pickthall under the Protection from Harassment Act. I realise Helen Weltman is a Cheshire West and Chester Conservative Councillor and I know her Council funded her claim. I want to know how much Councillor Weltman's claim cost the taxpayers and I want to know if any of that money was returned and if not why not."

13. On 22 March 2019, the Council refused that request on the basis it was vexatious, applying section 14(1). This was not a 'one-off' refusal on its part; thus, it is right to observe that this was not the first occasion on which the Council had taken this stance in response to Mr Dransfield's FOIA requests. As the Council explained in its internal review letter:

    > "You have previously made similar requests for information in connection with Mr Pickthall, most recently under reference 0832 where you confirmed 'I act as agent, and Mckenzie Friend to Mr Robert A Pickthall'. That request was also refused as vexatious. I would remind you of the warnings under Section 17(6) FOIA that have been included in the Council's responses to you (under references 0858, 0832, 4764493 and 4767515), that the Council will not respond to requests about proceedings against Robert Pickthall, or any proceedings brought by the Council citing the Protection from Harassment Act 1997 or concerning the harassment of Council members and employees."

14. By way of context I note that, at least according to a local newspaper, Mr Pickthall had been sentenced “to serve a three month jail term following his long-running campaign of unlawful harassment against Cheshire West and Chester Council. Robert Pickthall, 61, broke an anti-harassment injunction imposed after bombarding CWaC with thousands of emails including allegations of criminality, corruption and dishonesty” (*Chester and Cheshire News*, 20 July 2016). It is right to say that the circumstances surrounding the subsequent death of Mr Pickthall in July 2019 are a matter of some controversy. However, none of this background is directly relevant to the present proceedings (see https://www.justicewatch.co.uk/robert-pickthall).

15. Following the Council’s notification of the outcome of its internal review, Mr Dransfield complained to the Information Commissioner. On 19 July 2019 she e-mailed (or, rather, one of her staff e-mailed) Mr Dransfield in the following terms:

> “19th July 2019
>
> **Case Reference Number FS50852952**
>
> Dear Mr Dransfield,
>
> **Your ref: Weltman**
>
> **Your information request to Cheshire West and Chester Council**
>
> With regards to the case above, the commissioner has considered your complaint.
>
> Please see our letter of 15/03/2018, in which we refer to section 50(2)(c) of the Freedom of Information Act. In this letter, we have outlined how the office will be dealing with your complaints going forward, unless circumstances have severely changed.
>
> As of today’s date (19/07/2019) the circumstances have not changed and our letter of 15/03/2019 still stands. The above case will now be closed.
>
> Regards,
>
> Information Commissioner’s Office”

16. Mr Dransfield replied as follows by return:

> “Information Commissioner’s Office
>
> Dear Sir
>
> I wish to point out a date error in your penultimate sentence in subject title letter of today.
>
> It should read 15/3/18 not 15/3/19.
>
> I really do believe such letters should carry the signature of the author.
>
> Please confirm correction.
>
> With Thanks

Alan M Dransfield

FOI Campaigner and Social Watchdog"

17. In August 2019 Mr Dransfield lodged an appeal with the First-tier Tribunal (the FTT). In short, the FTT decided it lacked jurisdiction to hear Mr Dransfield's appeal, which was accordingly struck out. Mr Dransfield now appeals to the Upper Tribunal with my permission. Mr Dransfield's grounds for appeal to the Upper Tribunal start by posing the following question about himself (phrased both in the third person and in somewhat tendentious terms):

> "Can the Information Commissioner completely ban someone from the Freedom of Information Act (2000) regime simply because she does not like them? This is what the Commissioner claims to have done in respect of Mr Alan Dransfield. In so doing, she has administratively removed a constitutional right from him, without Mr Dransfield having an effective right of appeal, at least according to a Judge of the First-tier Tribunal."

The relevant legislation

18. The material parts of section 1 of FOIA are as follows:

> "**General right of access to information held by public authorities.**
>
> **1.—**(1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

19. Thus, the general right of access to information is subject to section 14:

> "**Vexatious or repeated requests.**
>
> **14.—**(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
>
> (2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request."

20. Section 17 deals with refusals by public authorities of FOIA requests. Given the Council in this case relied upon the special rule in section 17(6), it is relevant to have regard to both the general rule in sub-section (5) and the exception in sub-section (6):

> "(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
>
> (6) Subsection (5) does not apply where—
>
> (a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

21. Section 50 of FOIA provides further as follows (with emphasis added in subs.(2) and (3)):

"Application for decision by Commissioner

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.
(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.
(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
(7) This section has effect subject to section 53."

22. Section 57 of FOIA provides as follows (again, emphasis added in subs.(1)):

“**Appeal against notices served under Part IV**

57.—*(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.”

The chronology of events in the present appeal in more detail

Mr Dransfield’s complaint to the Information Commissioner about the Council

23. In a ruling dated 17 January 2020, refusing Mr Dransfield permission to appeal to the Upper Tribunal, Judge Macmillan helpfully summarised the background to the present matter as follows:

“**Mr Dransfield’s appeal**

7. The background to this case is unusual. On 15 March 2018 the Information Commissioner sent Mr Dransfield a letter, informing him that she did not intend to make a decision in relation to a number of applications he had made under s.50(1) of the Freedom of Information Act 2000 (‘FOIA’). The Commissioner explained that she considered the applications to be frivolous and/or vexatious pursuant to s.50(2)(c) and would rely on that exemption in order to refuse to serve a decision, as allowed by s.50(3)(a). The Commissioner further explained that she had made this decision as a consequence of Mr Dransfield’s conduct during other FOIA processes, including during judicial proceedings. She informed Mr Dransfield that she would no longer accept applications from him under s.50(1) absent a significant change of circumstance.

8. On 13 March 2019 Mr Dransfield made a FOIA request to Cheshire West and Chester Council (‘the Council’) for information about the Council’s funding of legal action brought by a Councillor. The Council refused the request on the basis that it was vexatious pursuant to s.14.

9. Following an internal review, on 20 June 2019 Mr Dransfield applied to the Commissioner under s.50(1) for a decision in relation to the Council’s response. He did so in the following terms:

‘Please see the review decision from Cheshire West to their earlier vexatious decision. The case history is included in this email thread. I now wish to elevate this matter to the ICO because I believe the original decision ref GIA/3037/2011 is unlawful, hence my request for the ICO intervention is on that point of law’.

10. *'GIA/3037/2011'* is a reference from judicial proceedings that preceded the Commissioner's 15 March 2018 letter.

11. On 19 July 2019 the Information Commissioner sent Mr Dransfield an email in response to his application under reference FS50852952, which included the following:

    'Please see our letter of 15/03/18, in which we refer to section 50(2)(c) of the Freedom of Information Act. In this letter, we have outlined how the office will be dealing with your complaints going forward, unless circumstances have severely changed.

    As of today's date (19/07/2019) the circumstances have not changed and our letter of 15/03/2018 still stands. The above case will now be closed.'"

24. By way of further clarification, I should explain that *GIA/3037/2011* is the Upper Tribunal file reference number for the *Dransfield* case that went to the Court of Appeal, i.e. the appeal which was subsequently reported as *Information Commissioner v Dransfield and Devon CC*. It will be noted from the account above that Mr Dransfield again asserts his firm belief that "*the original decision ref GIA/3037/2011 is unlawful",* which can only mean that he does not accept the authority of the Court of Appeal's decision in the *Dransfield* case. One obvious and immediate difficulty with his position is that the Supreme Court has refused him permission to appeal on that very point.

Mr Dransfield's 'appeal' to the First-tier Tribunal

25. I use the term 'appeal' advisedly as a central issue in this case is whether Mr Dransfield's challenge is indeed an appeal properly so-called. Putting that jurisdictional nicety to one side for the present, the chronology of the relevant proceedings in the FTT can be summarised as follows.

26. On 14 August 2019, Mr Dransfield appealed to the FTT on basis that: (i) the Information Commissioner's e-mail of 19 July 2019 was a 'decision notice' under section 50(3)(b) of FOIA; (ii) the Commissioner's purported reliance on section 50(2)(c) was *ultra vires* and a nullity; and (iii) the Commissioner's purpose, namely to hinder Mr Dransfield's access to the FTT, amounted to a contempt of court.

27. On 1 October 2019, the FTT GRC Registrar, having considered written representations from both Mr Dransfield and the Information Commissioner, struck out the former's appeal under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; 'the GRC Rules 2009'). This was on the basis that the FTT had no jurisdiction to hear the purported appeal. This was because, according to the Registrar, the appeal was not against a decision notice, properly so called, and so the FTT had no power to consider it. The Registrar also decided the FTT had no power to transfer proceedings to the Upper Tribunal under rule 5(3)(k) of the GRC Rules 2009. She added that if Mr Dransfield wished to challenge the Commissioner's position under section 50(2)(c) then he could apply for judicial review. Mr Dransfield, however, instead applied to the FTT for a judge to

reconsider the matter, as indeed was his right (under rule 4(3) of the GRC Rules 2009).

28. On 13 November 2019, Judge Macmillan carried out the rule 4(3) review. Like the Registrar, she decided there was no decision notice, and so no jurisdiction, as the Commissioner had opted to proceed under sections 50(2) of FOIA and 50(3)(a) (and not FOIA section 50(3)(b)). The Judge also stated her view that the Commissioner was not in contempt of court and reiterated that Mr Dransfield had the judicial review route available as a remedy. The Judge accordingly concluded that the Registrar's strike out decision stood. Mr Dransfield applied to the FTT for permission to appeal.

29. On 17 January 2020, Judge Macmillan accepted that her original review decision of 13 November 2019 was insufficiently reasoned. She thereafter (i) reviewed her decision of 13 November 2019 and amended the reasons, but left the substantive decision (to strike out for want of jurisdiction) unchanged; (ii) refused permission to appeal; and (iii) stated that, as there were new reasons, Mr Dransfield could reapply afresh to the FTT for permission to appeal to the Upper Tribunal. In doing so, Judge Macmillan gave the following reasons (in summary):

    - the remedy to challenge the Information Commissioner's original letter of 15 March 2018 and the Commissioner's reliance on section 50(2)(c) was judicial review (see *Fish Legal v IC* [2015] UKUT 52 (AAC) at [25]);
    - the Commissioner's e-mail of 19 July 2019 did not contain any 'decision' about the Council's compliance with FOIA such as to amount to a decision notice;
    - the FTT had no jurisdiction to consider the lawfulness of the Commissioner's reliance on section 50(2)(c) or to refuse to serve a decision notice;
    - the ground of appeal that the Commissioner's e-mail of 19 July 2019 was itself a decision notice under FOIA had no realistic prospect of success;
    - as the FTT had no jurisdiction, it had no power to refer the Commissioner to the Upper Tribunal under rule 19.

30. On 27 January 2020, Mr Dransfield took up the Judge's suggestion that he could re-apply for permission to appeal. In doing so, he made three new points (at least as Judge Macmillan summarised in her later ruling):

> "a) He submits that it is wrong for the Tribunal to hold that it has no power to refer a contempt to the Upper Tribunal in these circumstances. Mr Dransfield relies on s.61 FOIA. He submits that the Tribunal has failed to recognise and deal with his appeal as an application under s.61.
> b) Mr Dransfield disagrees with the Tribunal's analysis of the law in support of its decision that the email is not a Decision Notice served under s.50. He contends that the authorities cited by the Tribunal are either incomplete, or non-binding, or are being misrepresented.
> c) Mr Dransfield submits that the overall effect of the Tribunal's approach is to undermine his rights under article 6 and 10 of ECHR (the rights to a fair hearing and to freedom of expression)."

31. Finally, on 21 February 2020, Judge Macmillan refused permission to appeal for a second time. In doing so, she decided that the FTT's power to refer a contempt to the Upper Tribunal under section 61 of FOIA could only be exercised where there were proceedings on foot, but the FTT had no jurisdiction in the present case. She further concluded that there was no breach of the ECHR (European Convention on Human Rights) as Mr Dransfield had been able to make submissions at every stage and had the alternative remedy of judicial review (and/or complaining to the Parliamentary and Health Service Ombudsman (PHSO) about the Council).

32. At this stage I should just briefly digress to consider a separate jurisdictional or procedural issue raised by the Appellant. He argues that the FTT issued two decisions (dated 13 November 2019 and 17 January 2020) and questions whether Judge Macmillan had jurisdiction to issue a second ruling refusing permission to appeal (dated 21 February 2020), having already refused permission to appeal on 17 January 2020. The FTT certainly had the power to issue the decision of 17 January 2020 reviewing, but not setting aside, the decision of 13 November 2019 and supplementing the FTT's reasons (see Tribunals, Courts and Enforcement Act 2007 (TCEA), section 9(4)(b)). It is less clear whether the FTT, as Judge Macmillan did, could properly invite or entertain a further application for permission to appeal. Arguably the FTT was by that stage *functus* (i.e. its role was finished) in that respect. I have not received detailed argument on that point but do not consider it necessary to do so. The Appellant has not been disadvantaged in any material way as a result of the course of action adopted by the FTT. The central issues raised by this appeal remain the same.

Mr Dransfield's appeal to the Upper Tribunal

33. I made the following observation when giving Mr Dransfield permission to appeal to the Upper Tribunal:

> "The Upper Tribunal will give permission to appeal only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538. It seems to me on a preliminary review that there are a number of difficulties facing several of Mr Dransfield's arguments. However, I consider there is, exceptionally, a good reason to give permission as this case raises issues about the scope of, and the procedure associated with, the certification of contempt under s.61(4) of FOIA (as amended by the DPA 2018). In addition, on the Applicant's case at least, the appeal raises issues about access to justice."

34. The Appellant's original submissions in this appeal fell under three principal heads. The first is his argument that the First-tier Tribunal erred in law in holding it had no jurisdiction to determine Mr Dransfield's purported appeal. The second is his submission that the Information Commissioner was in contempt of court and the FTT erred in law by failing to certify that contempt to the Upper Tribunal. His third line of argument is that the conduct of the Commissioner and the FTT constituted a breach of Mr Dransfield's rights under the ECHR. In his reply to the Commissioner's response to the appeal, Mr Dransfield advances the arguments in a slightly different way. He argues that (1) the Information

Commissioner committed contempt; (2) in any event, the Upper Tribunal has what he describes as 'direct' jurisdiction; and (3) the Commissioner issued a Decision Notice properly so-called.

35. In addition to filing his reply to the Commissioner's response, Mr Dransfield at the same time made a series of seven associated applications:

    (i) An application for a three-judge panel to determine the appeal;
    (ii) An application for an oral hearing;
    (iii) An application for contempt proceedings to be placed before UTJ Jacobs;
    (iv) An application for recusal of UTJ Wikeley for conflict of interest;
    (v) An application for a stay of the proceedings;
    (vi) An application for further information to be provided by the Information Commissioner;
    (vii) An application for the representation of Mr Dransfield.

36. Dame Judith Farbey DBE, Chamber President of the Administrative Appeals Chamber, has refused the application for a three-judge panel. I have dealt with the remaining six applications as set out in Appendix B to this decision. In particular, I have given my reasons there for dealing with this appeal without holding an oral hearing. I also deal later in this decision with a separate series of applications, aside from the seven matters above, which were made by Mr Dransfield for witness orders. In deciding this appeal, I have of course considered all the multifarious written submissions in these proceedings.

Analysis of the arguments as to the First-tier Tribunal's jurisdiction

Introduction

37. When giving Mr Dransfield permission to appeal, I made the following preliminary observations on the issue of the FTT's jurisdiction (which turns on whether there was indeed a Decision Notice properly so-called):

> "*Did the FTT have jurisdiction to hear Mr Dransfield's appeal against the IC's 19.07.1019 email?*
> 12. The nub of Mr Dransfield's case is that the IC [Information Commissioner]'s e-mail of 19.07.2019 was a decision notice which gave him a right of appeal to the FTT.
>
> 13. This submission appears to be somewhat problematic in the light of the statutory framework. A FOIA requester may make a complaint to the IC for a decision as to whether a public authority has dealt with the FOIA request in accordance with Part I (see FOIA s.50(1)). Where an application is made under s.50(1), then the IC has a binary choice. She must <u>either</u> notify the complainant she is not making a decision and why (s.50(3)(a)) <u>or</u> serve a decision notice on the requester and the public authority (s.50(3)(b)). Moreover, according to FOIA s.50(2)(c), the IC "shall make a decision unless it appears to [her]… that [e.g.] the application is frivolous or vexatious". It is only where a decision notice has been served under s.50(3)(b) that both the requester and the public authority have the statutory right of appeal to the FTT against that notice (FOIA s.57(1)). There is, seemingly, no right of appeal against a s.50(3)(a) letter.

14. If the IC has consciously elected to go down the s.50(3)(a) route, rather than the s.50(3)(b) route, it is difficult to see how a right of appeal can arise. On that basis the FTT would appear to have been correct in determining that it lacked jurisdiction to hear Mr Dransfield's appeal."

The Appellant's submissions on jurisdiction

38. In his notice of appeal, Mr Dransfield's argument as to jurisdiction was put this way (emphasis as in the original):

"Failure to Accept the Decision Notice

13. The Information Commissioner has issued what is a de-facto civil restraint order against Mr Dransfield. However, this is far stricter than any civil restraint order, and it is issued without any kind of judicial authority.
14. The mechanism by which the Commissioner purports to do this is to reject every application Mr Dransfield makes to her by claiming to rely on s.50(2)(c) and not issue a decision notice.
15. Section 50(2)(c) allows the Commissioner not to issue a decision notice on an **application** if *"that the application is frivolous or vexatious"*. It does not allow her to ban **individuals** from their constitutional rights, or issue de-facto civil restraint orders.
16. Thus, the purported trapping of banning Mr Dransfield on the basis he (and thus his requests) are vexatious has no basis in law. It is equivalent to the case where the Commissioner misstated his appeal rights. In such a case, the wrong trappings is of no moment: *Kirkham v Information Commissioner* [2018] UKUT 6 (AAC) at [56]. The First-tier Tribunal was in error of law for striking out Mr Dransfield's appeal. Even if that submission is wrong, then it is well arguable that Mr Dransfield has a decision notice and the Upper Tribunal should allow this case to proceed to resolve the difference between *Fish Legal* and *Sugar* (as discussed in the *Kirkham* case)."

39. In an annex to the notice of appeal, the argument was further developed thus:

"Ground 2: Whether the Refusal is a Decision Notice

14. Mr Dransfield also considers that the decision on jurisdiction under s.50 is fundamentally misconceived in law, for the following reasons (amongst others):

a. The UT's decision in *Kirkham v ICO* [2018] UKUT 303 (*Kirkham #2*) is not binding (being a strike out of an application for PTA) and simply decided (in any event) that one has to read the document and determine it from what was said. In *Kirkham #2*, the Commissioner said a decision notice would eventually be forthcoming (and of course, this was all prior to the redesign of Section 61 of the Freedom of Information Act (2000)). What's more, the decision overlooks *Kirkham v ICO* [2018] UKUT 6 (*Kirkham #1*), where the matter was transferred to the UT to be heard at first instance there, and all the ICO said was that they had closed the case because they did not believe a request had been made to a Public Authority. That decision from Paragraph 53 onwards makes it clear that *Fish Legal* does not impose much in the way of requirements on decision notice, but it

might be wrong in light of *Sugar*. Contrary to Judge MacMillan's assertion, this matter is far from being settled law (as UTJ Wikeley made abundantly clear in *Kirkham #1*) and the issue would benefit from determination by the Upper Tribunal.

b. The references to *Sugar* and *Fish Legal* relied upon are not ratio, so this analysis is fundamentally flawed. Instead, it is cherry picking to reach the wrong result (i.e. to improperly rule against Mr Dransfield, presumably based on his reputation).

c. Given the matter is open and the practical effect of the situation is to undermine Mr Dransfield's Article 6 and 10 rights (and that of other requesters more generally), the law should be interpreted in the way that Mr Dransfield contends."

The Information Commissioner's submissions on jurisdiction

40. For the Information Commissioner, Mr Bailey's submissions on jurisdiction proceed in three stages.

41. First, Mr Bailey accepts that, as a preliminary step, the FTT can determine whether it has jurisdiction. In that regard he relies on Upper Tribunal Judge Wright's observation in *Kirkham v Information Commissioner* [2018] UKUT 303 (AAC) (in the extract at paragraph 2):

> "It is trite law that the First-tier Tribunal can only make decisions on matters over which it has jurisdiction, though it can rule on whether it has jurisdiction as a necessary preliminary step in that process. Section 57 of FOIA does not, however, confer a right of appeal at large or in respect of all and any acts or omissions of the Information Commissioner. Most critically for the purposes of Dr Kirkham's application, the right of appeal to the First-tier Tribunal only arises '57.-(1) Where a decision notice has been served…..', and that means a decision notice under section 50(3)(b)."

42. Second, Mr Bailey draws attention to the drafting of section 50 of FOIA, and especially section 50(2) and (3), when read together with section 57. Appeal rights only arise "where a decision notice has been served" (see section 57(1)). Moreover, Mr Bailey's submission is as follows:

> "Section 50(2) requires the Commissioner to make a decision unless one of the specified exemptions applied. If one of the exceptions applies, the Commissioner would be obliged to notify the complainant that she has not made any decision and of her grounds for doing so pursuant to section 50(3)(a). Unless the Commissioner relies on one of those exemptions, section 50(3)(b) imposes a duty on the Commissioner to serve a decision notice."

43. Third, Mr Bailey contends that the Commissioner's e-mail of 19 July 2019 was not a "decision notice" such as to generate appeal rights. Again, he relies on *Kirkham v Information Commissioner* [2018] UKUT 303 (AAC), in which the FTT, for want of jurisdiction, had struck out Dr Kirkham's 'appeal' against the Commissioner's decision to refuse his request that his section 50(1) complaint against EPSRC be expedited. The Upper Tribunal had struck out the application

for permission to appeal, ruling that the FTT had correctly held it had no jurisdiction. In particular, Mr Bailey relied on the following passage (at paragraph 6 of Judge Wright's ruling), where it was held that:

> "to amount to a 'Decision Notice' under section 50(3)(b) of FOIA the email of 9 November 2017 had to amount to the Information Commissioner's decision on Dr Kirkham's complaint about whether the EPSRC had dealt with his request for information in accordance with Part I of FOIA. On no rational basis can the ICO's email of 9 November be read as making such a decision. All it was 'deciding' was not to accelerate the making of the decision on Dr Kirkham's compliant about the EPSRC's handing of his request for information. The contrary is simply not arguable."

44. As such, Mr Bailey concludes as follows:

> "14. Therefore, in this case, for the email of 19 July 2019 to amount to a 'decision notice' under section 50(3)(b) of FOIA, the email had to amount to the Information Commissioner's decision on the Appellant's complaint under section 50(1) about whether the Council had dealt with the Appellant's request for information in accordance with Part 1 of FOIA. The ICO's email cannot be read as making such a decision. On the contrary, the email explains why it is not a 'decision notice' under section 50(3) (b) by reference to the exception in section 50(2)(c).
>
> 15. On the facts of this case, having relied upon section 50(2) (c) as the ground upon which the Commissioner refused to issue a decision notice, the Commissioner, by her email of 19 July 2019, in effect issued a notification to the Appellant pursuant to section 50(3)(a) 'that he has not made any decision under this section as a result of the application and of his grounds for not doing so'. Whilst the email does not explicitly state that 'he has not made a decision under this section', the Commissioner would submit that this is the clear inference. The email then clearly sets out the grounds for not issuing a decision notice. The Appellant is in effect by his appeal seeking to challenge this notification under section 50(3)(a) that no decision is made."

The Upper Tribunal's conclusions on the jurisdiction of the First-tier Tribunal

45. The starting point for any analysis of the FTT's jurisdiction in freedom of information appeals is section 57 of FOIA (see paragraph 22 above). As the three-judge panel of the Upper Tribunal held in *Fish Legal* (at paragraph 22):

> "Section 57 of FOIA is clear. It provides that the complainant or the public authority may appeal to the First-tier Tribunal "Where a decision notice has been served". For the purposes of this case, that means a decision notice under section 50(3)(b)."

46. Likewise, as Judge Wright explained in *Kirkham* (at paragraph 10):

> "The language of section 57 of FOIA, which is the only basis upon which the First-tier Tribunal has any jurisdiction under that Act (and it has no jurisdiction other than by this route), is in my judgment clear and unequivocal: the First-tier Tribunal only has jurisdiction in respect of a "decision notice" which has been served under section 50(3)(b) of that Act. The contrary is simply unarguable."

47. The three-judge panel in *Fish Legal* also emphasised the importance of the legislative framework for FOIA appeals (emphasis added):

> "25. We begin by considering how the legislation operates in a straightforward case. Assume that a person has requested information from a local authority, is met with the response that the information is not held, and applies to the Commissioner for a decision under section 50. There is no dispute that the person, referred to in section 50 as the complainant, made a request for information from a public authority. The choices open to the Commissioner on that application are set out in mandatory terms. *If it appears to the Commissioner that section 50(2) applies, he has to notify the complainant under section 50(3)(a) that he is not making a decision. If the complainant is dissatisfied with that response, the remedy lies in judicial review. If the Commissioner does not rely on section 50(2), section 50(3)(b) imposes a duty to serve a decision notice. This obliges the Commissioner to come to a decision on whether the request was dealt with in accordance with the requirements of Part I of FOIA. If the complainant is dissatisfied with the decision notice, the remedy lies on appeal under section 57."*

48. In a subsequent passage, the three-judge panel explained why it was rejecting the Secretary of State's submission in that case that a negative decision by the Commissioner (i.e. a decision that a body is not a public authority) was not a decision under section 50(3)(b) and so could only be challenged by judicial review. In the course of its reasoning the three-judge panel held as follows (emphasis added):

> "38. We have not overlooked the possibility of the Administrative Court transferring the judicial review proceedings to the Upper Tribunal under section 31A of the Senior Courts Act 1981. That would merely add to the complexity of the proceedings for an individual requester, thereby reinforcing our argument. *Nor have we overlooked that judicial review is the only remedy available if the Commissioner decides that one of the heads in section 50(2) applies. He is then prevented by section 50(3)(a) from giving a decision notice, which is a condition precedent to an appeal under section 57.* The availability of a remedy does not mean that it will be exercised. So, since heads (a) and (d) in section 50(2) are unlikely to be contentious, they will not generate a challenge. *Heads (b) and (c) might be more contentious, but it is a rational legislative policy to leave these matters to the jurisdiction of judicial review, which is discretionary, and exclude them from the jurisdiction of the Commissioner and the First-tier Tribunal, which is as of right.*
>
> 39. These anomalies and problems would be avoided if a negative decision was also a decision within section 50(3)(b). Although they cannot found that result on a literal interpretation, they can and do provide support for the view that such a conclusion would accord with the underlying intention of FOIA. *In our view, the mandatory requirements of section 50 found the view that any decision on an application made to the Commissioner that is not based on section 50(2) is a decision on that application within section 50(3)(b).* So, in our view, a negative decision is a decision within section 50(3)(b) that, like a positive decision, has

> consequences that give it sufficient existence in law and validity to allow an appeal."

49. The analysis in *Fish Legal* thus puts beyond any shadow of a doubt that the Commissioner faces a mandatory and binary choice under section 50(2) of FOIA. One route (the section 50(2) and (3)(a) 'this is not a decision notice' route) can be challenged only in the High Court on judicial review, while the other route (the section 50(3)(b) 'this is a decision notice' route) may lead to the FTT on a statutory appeal. Having considered the 'straightforward case', the Upper Tribunal's analysis in *Fish Legal* continued as follows (again, emphasis added):

> "26. The same applies in more complicated cases. Assume that a person has requested information from a local authority, is met with the response that the request is vexatious, and applies to the Commissioner for a decision under section 50. Vexatious requests are governed by section 14(1):
>
> > '(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.'
>
> The way that section operates is to relieve the local authority of the duty that would otherwise apply under section 1(1). The request does not cease to be a request just because it is vexatious. Accordingly, when the Commissioner considers the request under section 50, there will be no dispute that the person made a request for information from a public authority. *Unless the Commissioner relies on section 50(2) – for example on the ground that the application (as opposed to the request) was vexatious – section 50(3)(b) imposes a duty to serve a decision notice.* This obliges the Commissioner to come to a decision on whether the request was dealt with in accordance with the requirements of Part I of FOIA. Assuming the Commissioner agrees that the request was vexatious, the decision notice will say that the local authority was not under a duty under section 1(1) and had acted in accordance with the requirements of Part I. If the complainant is dissatisfied with the decision notice, the remedy lies on appeal under section 57."

50. This example demonstrates again that the Commissioner's consideration of a complaint under section 50 of FOIA leads to a fork in the decision-making path. This parting of the ways is prescribed by the primary legislation – either the Commissioner decides to make no decision and explains why (section 50(2) and (3)(a)) or she is under a duty to issue a decision notice on the complaint (section 50(3)(b)), with only the latter course generating appeal rights. The same point was recognised by the three-judge panel in *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC); [2018] AACR 29 (at paragraphs 80 and 86). As a matter of precedent, I should follow the decision of the three-judge panel in *Fish Legal* (and indeed *Malnick*) unless there are compelling reasons as to why I should not (*Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at paragraph 37(iii)). There are no such compelling reasons and, in any event, I respectfully agree with the

analysis of the three-judge panels (one of which decisions in fairness I must acknowledge I was party to).

51. So, in order to succeed in this appeal, it follows Mr Dransfield has to show that the Information Commissioner's e-mail of 19 July 2019 was a "decision notice" within the terms of FOIA. However, on any reasonable reading of that e-mail, the fact is that it was a section 50(3)(a) explanation as to why, pursuant to section 50(2)(c), no decision was being issued on his complaint. It was not by any stretch of the imagination a section 50(3)(b) "decision notice" on Mr Dransfield's complaint and so could not confer a right of appeal to (and so jurisdiction on) the FTT by virtue of section 57. I accept Mr Bailey's submissions (as summarised above) to that effect.

52. I am singularly unpersuaded by the various arguments to the contrary advanced on behalf of Mr Dransfield. I take them in the order they were made in the notice of appeal (see paragraphs 38-39 above).

53. First, it is contended that section 50(2)(c) only permits the Commissioner not to issue a decision notice on an <u>application</u>, and not to ban an <u>individual</u> from exercising their constitutional rights under FOIA. One obvious difficulty with this argument is that it is a challenge to the Commissioner's original letter of March 2018, but that is not the matter currently under challenge. The FTT only has jurisdiction if the Commissioner's e-mail of 19 July 2019 is a decision notice. However, taken on its own terms, the e-mail of 19 July 2019 fell squarely within the terms of section 50(2)(c). The Appellant's suggestion that the Commissioner has purported to issue a de facto civil restraint order is wide of the mark – there was nothing in law to stop Mr Dransfield from seeking permission to apply for judicial review of the Commissioner's decision as communicated in that e-mail.

54. Second, it is argued that the label attached to a communication from the Commissioner is not decisive and that a decision notice does not require formal trappings. Reliance is placed on my observation in *Kirkham v Information Commissioner* [2018] UKUT 6 (AAC) to the following effect (Mr Knight was counsel for the Commissioner in that case):

> "56. One potential area of dispute can be disposed of quickly in this context. Does it matter that the senior case officer's communication of 12 April 2017 was by way of a letter e-mailed to Dr Kirkham, rather than in the familiar stand-alone format of an Information Commissioner's formal Decision Notice with all its usual trappings? Mr Knight accepted that this made no difference in and of itself. That concession on behalf of the Information Commissioner must be right. As Lord Phillips of Worth Matravers held in *BBC v Sugar*, 'Section 50 of the Act does not prescribe the form of a "decision notice". I consider that this phrase simply describes a letter setting out the commissioner's decision' (at paragraph 37)."

55. This observation does not assist Mr Dransfield in any way. The objection to treating the e-mail of 19 July 2019 as a decision notice is not because it came in the form of an e-mail. It is because it came in the form of a section 50(2)(c) notification and section 50(3)(a) explanation as to why the complaint was regarded as vexatious. Whether the complaint was actually vexatious is a separate matter.

56. Third, what is described somewhat elliptically as “the difference between *Fish Legal* and *Sugar* (as discussed in the *Kirkham* case)” – on which see the discussion in *Kirkham v Information Commissioner* [2018] UKUT 6 (AAC) at paragraphs 53-65 – simply does not arise in the present circumstances. For the reasons already explained, the present case never gets into the territory of being a potential decision notice for the simple reason that the Commissioner elected to take the section 50(3)(a) route. In addition, and in any event, the context in both *Fish Legal* and *Sugar* was very different, namely being whether a body was a public authority for the purposes of FOIA (or the EIR 2004).

57. Three further arguments are maintained on behalf of Mr Dransfield in the annex to the notice of appeal (see paragraph 59 above).

58. As to the first, it is perfectly correct that *Kirkham v ICO* [2018] UKUT 303, as a ruling refusing permission to appeal, is not strictly binding on me (or the FTT). Nor is *Kirkham v ICO* on all fours, as it concerned a request to the Commissioner to expedite her investigation into Dr Kirkham’s complaint against the EPSRC (and so was one further remove from being a decision notice under section 50(3)(b)). However, for the reasons above, I respectfully agree with Judge Wright’s analysis of the legislative framework of FOIA.

59. As to the second argument, the observations from *Fish Legal* relied upon above were plainly central to the Upper Tribunal’s understanding of the legal architecture of FOIA. They were followed and affirmed in *Malnick*. There is no need to rely on *Sugar v BBC* [2009] 1 WLR 430.

60. As to the third argument, relating to Mr Dransfield’s ECHR rights under Articles 6 and 10, these points are considered separately at paragraphs 77-80 below.

61. Finally, and relatedly, it is suggested that a purposive interpretation of the statutory scheme should be adopted so as to afford Mr Dransfield the opportunity to challenge the Commissioner’s decision before the First-tier Tribunal in a way that is consistent with his ECHR rights. There are two obvious problems with this submission. In the first place, as discussed above, it is contrary to case law authority. Additionally, it is a fundamental principle of statutory interpretation under the Human Rights Act 1998 that any implication must “go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation … falls on the wrong side of the boundary between interpretation and amendment of the statute” (*Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [121] *per* Lord Rodger of Earlsferry). The Appellant’s submissions involve taking a crow-bar to the statutory language.

62. In conclusion, Mr Dransfield has no satisfactory answer to the Commissioner’s submission that her email of 19 July 2019 was a notification under FOIA section 50(2)(c) and (3)(a). It was not, however generously construed, a decision notice under section 50(3)(b) that gave rise to the right of appeal to the FTT under section 57. Accordingly, the FTT was correct to find that it had no jurisdiction.

Analysis of the arguments as to contempt of court

Introduction

63. Mr Dransfield’s arguments as to contempt of court are essentially two-fold. His first submission relates to the Upper Tribunal’s decision in *GIA/1988/2013*. The

second line of argument concerns section 61 of FOIA. As will be seen, neither takes him anywhere.

The Upper Tribunal's decision in GIA/1988/2013: another Dransfield case

64. First of all, a couple of paragraphs by way of explanation are in order. The Upper Tribunal's decision in *GIA/1988/2013*, now relied upon by Mr Dransfield, was published as *AD v Information Commissioner and Devon CC* [2013] UKUT 550 (AAC). The individual referred to as 'AD', as is evident to anyone reading that decision, was Mr Dransfield. So, this was a Dransfield case but not the *Dransfield* case. In this other FOIA appeal, the FTT judge had warned Mr Dransfield about the tenor of his communications to the tribunal and had stated that the appeal would be struck out if Mr Dransfield did not moderate his language. In a subsequent e-mail to the FTT, and notwithstanding that warning, Mr Dransfield accused the Commissioner and the public authority (as Upper Tribunal Judge Jacobs rehearsed in his subsequent decision) "of 'conniving and colluding to pervert the Course of Justice' and of producing 'a pack of lies and deception'. He later referred twice to a 'wider conspiracy to pervert the course of justice' and said that there was sufficient evidence to justify arresting the Commissioner's legal representative and Judge Wikeley for conspiracy to pervert the course of justice" (paragraph 6). The FTT struck out Mr Dransfield's appeal. He appealed to the Upper Tribunal.

65. In *GIA/1988/2013* Judge Jacobs, having analysed the nature of the strike out jurisdiction (paragraphs 12-15), concluded his decision, allowing Mr Dransfield's appeal, as follows (paragraphs 16-20):

> "**Analysis**
> 16. Most appellants correspond with the tribunal only when necessary, make moderate criticisms and allegations, and express themselves politely. There is, however, a small body of appellants who are persistent in their correspondence which contains wild allegations that are expressed in an intemperate or aggressive tone. This is true of all the tribunals I have been involved in over the last quarter of a century and is probably true of all judicial bodies.
>
> 17. It is usually possible to deal with that small minority of appellants without resorting to the power to strike out proceedings. It is possible to ban a party from using emails and direct that any that are sent will be ignored. Another way is to limit a party to communicating in writing and only when requested, with other letters being filed but ignored. At a hearing, it is possible to limit the time allowed to a party or, if necessary, to require a party to leave the hearing room. In my experience, measures such as this are usually effective. The tribunal is also able to protect the other parties by directing that all correspondence be channelled through the tribunal. These are just examples; they are not intended to be exhaustive.
>
> 18. The tribunal specifically mentioned the content of the last email and their total number. As to the content, this type of allegation is regularly made in appeals before this Chamber and just as regularly ignored by the judges. As the psychologist William James said: 'the art of being wise is

> the art of knowing what to overlook.’ As to the number, the remedy was simply to ban the use of emails and not to read any that were sent.
>
> 19. In conclusion and despite the submissions of the respondents, I consider that the tribunal was not entitled to take the draconian step of striking out the proceedings in Mr Dransfield’s appeal. This had the effect of bringing proceedings to an end and shutting him out from having a judicial consideration of his right to the information he had requested. This was not a proportionate response to his behaviour. There were more flexible responses that could have been employed. Mr Dransfield’s behaviour could have been managed in ways that were just as effective. The tribunal could have protected itself, its staff and the other parties without depriving Mr Dransfield of his right of appeal. That is why I have set aside the First-tier Tribunal’s decision and re-made it to provide that his appeal to that tribunal is not struck out.
>
> **The future**
> 20. Just to avoid any misunderstanding, this does not mean that the First-tier Tribunal can no longer strike out the proceedings in this case. It retains that power, which it may exercise if the circumstances justify it. All that I have decided is that in the circumstances obtaining in May this year it was not fair and just to exercise that power.”

66. So, how is this 2013 case involving Mr Dransfield said to be relevant to the current proceedings? The Appellant’s grounds of appeal in the present case include an application for contempt proceedings against the Commissioner, based on *GIA/1988/2013* as follows:

> “The basis of this application is simple. The Commissioner has refused to accept a binding decision on her that the First-tier Tribunal may not strike out Mr Dransfield’s appeals (or obstruct them from proceeding) because he is rude or makes ‘wild allegations’. Yet, in purporting to ban Mr Dransfield from the First-tier Tribunal, the Information Commissioner has done just that and for precisely the reasons Judge Jacobs made clear were inappropriate in a binding decision.”

67. The basis of this contempt application is not so much simple as simply wrong, if not utterly misconceived. The decision in *AD v Information Commissioner and Devon CC* was certainly binding on the FTT and, in so far as it was relevant, the Commissioner. However, the supposed parallel between that case and the present appeal is a jurisprudential apples and pears argument. The issue in *AD* was the FTT’s exercise of its case management power under rule 8 of the 2009 GRC Rules to strike out an extant FTT appeal. The very different issues in the present case concern the Commissioner’s power to opt out of making a decision (pursuant to section 50(2)(c) of FOIA) and thus by extension to exclude the FTT’s jurisdiction (under section 57). In addition, Judge Jacobs did not, as erroneously asserted in the grounds of appeal, hold “that the First-tier Tribunal may not strike out Mr Dransfield’s appeals (or obstruct them from proceeding) because he is rude or makes ‘wild allegations’”. Rather, Judge Jacobs held that in the particular circumstances of *AD,* and on the facts as they then were, a rule 8 strike out ruling was disproportionate when there were other case

management powers available to the FTT. Judge Jacobs expressly recognised that in principle "the tribunal was entitled to exercise all its powers and, if appropriate, strike out the proceedings, even if that would have the effect of depriving Mr Dransfield of the hearing" (at paragraph 8; see also paragraph 20, quoted at paragraph 65 above). So, as Mr Bailey for the Commissioner submits, Judge Jacobs's decision in 2013 that an FTT at that time should not have issued a strike out ruling under rule 8 of the GRC Rules 2009 does not in any way preclude the Commissioner in an entirely separate case in 2019 from relying on section 50(2)(c) of FOIA. The analogy Mr Dransfield seeks to draw is patently false.

Section 61 of FOIA

68. The second limb of Mr Dransfield's submissions on contempt is his argument that the FTT has erred in law by refusing to certify an offence to the Upper Tribunal under section 61(4) of FOIA. As amended by section 211(1) of, and paragraph 60 of Schedule 19 to, the Data Protection Act (DPA) 2018, section 61 of FOIA provides (since 25 May 2018) as follows:

> "**Appeal proceedings**
>
> **61.**—(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)."

69. According to the Explanatory Notes to the DPA 2018, "Paragraph 60 mirrors the provisions on contempt of court in section 202 of this Act to ensure they apply to FOI proceedings" (paragraph 881). Section 202 provides in turn (for DPA purposes):

> "**Proceedings in the First-tier Tribunal: contempt**
>
> **202.—**(1) This section applies where—
> (a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal—
> (i) on an appeal under section 27, 79, 111 or 162, or
> (ii) for an order under section 166, 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.
> (2) The First-tier Tribunal may certify the offence to the Upper Tribunal.
> (3) Where an offence is certified under subsection (2), 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.
> (4) Before exercising the power under subsection (3)(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."

70. Thus, legislation now enables the FTT to certify an offence to the Upper Tribunal if a person does something (or fails to do something) in relation to tribunal proceedings which would constitute contempt of court if the proceedings were before a court. This power exists both in relation to DPA matters (section 202 of the DPA 2018) and FOIA issues (section 61 of FOIA). These provisions in effect replicate paragraph 8 of Schedule 6 to the Data Protection Act 1998, with the exception that instead of certifying the contempt of court offence to the High Court, the FTT may now certify the offence to the Upper Tribunal (which, of course, has its own contempt powers; see section 25 of the TCEA): see *Information Commissioner v Moss and Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC) at paragraph 17. See further, on the procedure to be adopted, rule 7A of the GRC Rules 2009.

71. Returning to the instant appeal, plainly as a matter of construction any certification under section 61(4) of FOIA can only come into play where both of the conditions set out in section 61(3) apply.

72. The first is that "a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions". However, neither the Commissioner's original letter of 15 March 2018 nor her e-mail of 19 July 2019 were "in relation to proceedings before the First-tier Tribunal on an appeal under those provisions". Rather, and for the reasons already set out above, they were in relation to a preliminary stage, namely the

Commissioner's conduct of her investigations, and were in a manner contemplated by statute.

73. The second is that "if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court". However, even if proceedings were on foot, there was (for the reasons above) no conceivable argument that the e-mail amounted to a contempt of court vis-à-vis the decision of the Upper Tribunal in *AD v Information Commissioner and Devon CC*.

74. The Appellant makes a more ambitious submission still, namely that the Commissioner's actions constitute a contempt of court "in line with the House of Lords' decision in *Raymond v Honey* … [by] obstructing his access to the First-tier Tribunal". This ambitious argument does not assist Mr Dransfield. In *Raymond v Honey* [1983] AC 1 the House of Lords held that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away either expressly or by necessary implication, including the right of unimpeded access to the court. Obstruction of that right, the House of Lords held, may be a contempt of court. The obvious difficulty with transposing this authority to the present context is that here the primary legislation (FOIA) expressly contemplates that the Commissioner must exercise the binary choice as described above. She must either issue a decision notice (which carries appeal rights under section 57) or alternatively explain why she is not doing so (see section 50; which carries no such right of appeal to the FTT but is subject to judicial review). Either way Parliament has ensured there remains a right of access either to the FTT or the courts. The purported analogy with *Raymond v Honey* is wholly misconceived.

75. It follows that the FTT correctly concluded that there were no grounds under section 61 of FOIA for certifying to the Upper Tribunal the alleged contempt by the Commissioner.

76. The Upper Tribunal also has an original jurisdiction to deal with contempt, or what the Appellant's reply describes as its 'direct' jurisdiction (see TCEA, section 25). However, the Appellant's arguments in this context are all premised on the assertion that the Commissioner's letter and e-mail constitute a contempt of court by blocking his access to the FTT. For all the reasons above, that edifice is a structure built on sand. Put very simply, I am not prepared to rule that the Commissioner is acting in contempt of court when all she is doing is operating the machinery as provided for by Parliament in section 50 of FOIA.

Analysis of the arguments as to the European Convention on Human Rights

77. The grounds of appeal also assert that the practical effect of the situation is "to undermine Mr Dransfield's ECHR Article 6 and 10 rights."

78. So far as Article 6 is concerned, I consider this does not assist Mr Dransfield. This is for the reasons given by Upper Tribunal Judge Wright in *Moss v Information Commissioner and Cabinet Office* [2020] UKUT 242 (AAC):

> "153. However, it appears at least very doubtful whether Article 6(1) does apply in the context of requests made under FOIA. The closest authority on the point comes from an earlier iteration of the *Sugar* litigation referred to above. In *Sugar v BBC (No.1)* [2008] EWCA Civ 191; [2008] 1 WLR 2289, the Court of Appeal rejected an argument that Mr Sugar's Article

6(1) rights were engaged in the consideration of his request for information. The court said the following of relevance on this point (the "Balen report" is the information Mr Sugar was seeking from the BBC):

> "41……the two bases of Mr Eicke's submission were as follows. First, the judge had been wrong to think that Mr Sugar had no civil right to see the Balen Report sufficient to engage Article 6; and that, including in excluding him from the ability to apply to the Information Tribunal and leaving him with only the possibility of applying for judicial review of the Information Commissioner's decision, the judge's decision deprived Mr Sugar of a hearing of the determination of those rights by a tribunal.
>
> 42. Under the first point, Mr Eicke referred as hot from the press to a dictum of the European Court of Human Rights in paragraph 39 of its judgment of 15 January 2008 in *Micallef v. Malta* (Application no. 17056/06) which spoke of Article 6 extending to "the right of access to administrative documents," and citing in the latter respect *Loiseau v France,* decision 4680999. That last decision was before the judge, and it is clear from the passage put to him and to us that a very strong consideration weighing upon the European Court of Human Rights in considering whether Article 6 extended to an applicant for a teaching post, seeking to see administrative documents relating to his recruitment was that, whilst it was difficult to derive from the Convention a general right of access to administrative data and documents, account would be taken of the importance in appropriate cases of disclosure for the applicant's personal situation. We have not seen the Balen Report, but there is no reason at all to think that it is anything at all to do with the applicant's personal situation. The judge was, with respect, quite right to hold that the appellant's interest in it did not generate a relevant Article 6 right."

154. The important point for present purposes from *Sugar (No.1)* is its focus on the need for disclosure of information relating to the requester's personal or private situation. Just as in *Sugar (No.1)*, there is nothing in the information Mr Moss requested that related to his personal or private situation. In the context of FOIA, *Sugar (No.1)* on its face limits 'civil rights' under Article 6(1) to the private or personal rights of individuals. However, as I have said the information sought by Mr Moss did not fall into this category, and the basis of his case founded on *Magyar* has to do with him requesting the information in order to be able to provide it to the public."

79. Even if that is wrong, and Article 6 is engaged, the argument that there has been a breach goes nowhere. Article 6 does not necessarily guarantee a right to an oral hearing in all cases. Mr Dransfield has had ample opportunity, which he has taken, to put his arguments to both the First-tier Tribunal and the Upper Tribunal. It is, moreover, consistent with the overriding objective in this case for the jurisdictional issue to be determined 'on the papers'.

80. So far as Article 10 is concerned, I agree with the analysis of Judge Wright in *Moss v Information Commissioner and Cabinet Office*. In short, I am bound by domestic court authority not to follow the expanded view as to the reach of Article 10 of the ECHR taken by the Strasbourg court in *Magyar Helsinki Bizottság v Hungary* [2016] ECHR 975. Furthermore, even if *Magyar* does apply in domestic law, its application does not assist Mr Dransfield to obtain a result more beneficial to him than otherwise applies under FOIA. Accordingly, the FTT made no material error of law in the decision to which it came.

The Commissioner's letter of 15 March 2018 and the e-mail of 19 July 2019

81. For the reasons explained earlier in this decision, I have concluded that neither the Commissioner's letter of 15 March 2018 (see Appendix A) nor her e-mail of 19 July 2019 (see paragraph 15 above) amount to a "decision notice" such as to found the FTT's jurisdiction. The appropriate way to challenge either communication would have been by way of judicial review in the Administrative Court. I simply make the following three observations in that regard.

82. The first is that the availability of judicial review has been repeatedly signposted to Mr Dransfield. That route of challenge is expressly referred to by Mr Sowerbutts in the original letter itself. It is perfectly true that this remedy was not referred to in the (short) e-mail. However, that e-mail referred back to the original letter and both the GRC Registrar and Judge Macmillan helpfully referred to judicial review in their respective rulings. Mr Dransfield has also been reminded of his right to complain to the PHSO.

83. Secondly, and on the face of it, the Upper Tribunal would lack jurisdiction to consider any application for judicial review in respect of either of the Commissioner's disputed communications. The Upper Tribunal has only a limited judicial review jurisdiction – see section 18 of the TCEA and the Lord Chief Justice's *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327. It is perfectly true that Mr Dransfield could have commenced judicial review proceedings in the Administrative Court and then applied for the application to be transferred to the Upper Tribunal (see section 31A of the Senior Courts Act 1981 and section 19 of the TCEA). However, that opportunity has presumably now passed, given the very strict time limits that apply in judicial review proceedings.

84. Thirdly, in the event that Mr Dransfield *had* applied for permission to bring proceedings for judicial review in respect of either of the Commissioner's communications, I do not doubt that Dr Kirkham could have developed some respectable arguments on behalf of Mr Dransfield. For example, Dr Kirkham would doubtless contend that the Commissioner was operating what was in effect a blanket policy and as such was improperly fettering her discretion. In addition, Dr Kirkham would presumably argue – to borrow a footballing idiom – that the Commissioner was playing the man and not the ball (in focusing on Mr Dransfield's conduct rather than the application itself). In that vein, it might also be argued that the linkage of the costs issue from the *Dransfield* case could be problematic, in that the statement that the Commissioner might review the cases if Mr Dransfield made a proper offer of payment might be seen as undermining the contention that each application was itself intrinsically frivolous or vexatious. However, the fact remains that no judicial review proceedings have been launched and those matters are not before me for determination.

The Information Commissioner's new letter

85. For the record I note that on 21 October 2020 Mr Dransfield forwarded to the Upper Tribunal an e-mail and a letter he had received from the Commissioner's office. The Commissioner's e-mail was dated 20 October 2020. It declined to investigate or issue a decision in respect of one of Mr Dransfield's more recent complaints. The Commissioner said that in doing so she was acting under section 50(2)(c) and referred to a letter of 6 May 2020. That four-page letter declined to investigate a complaint about the Cabinet Office on the basis of section 50(2)(c). It referred back to Mr Sowerbutts's letter and reviewed developments since March 2018. It again advised Mr Dransfield that he could challenge the letter by way of judicial review.

86. Mr Dransfield has not indicated whether he has taken that course of action. He may, of course, be out of time (at least to challenge the letter by judicial review, even if he is not yet time-barred as regards the October 2020 e-mail). Be that as it may, the Commissioner's new letter has no direct bearing on the issue for decision in this appeal.

The Appellant's applications for witness orders

87. Mr Dransfield has also made several applications by e-mail for witness orders to be made in respect of various individuals. These have been drafted in his own inimitable style; there is no evidence that Dr Kirkham had any involvement in these applications or is even aware of them. Two examples will suffice.

88. First, Mr Dransfield makes an application for a witness summons in relation to Ms Helen Weltman, the councillor who was the subject of his original FOIA request in this case (see paragraph 12 above). Mr Dransfield asserts that she "holds key evidence that the [Council] acted in concert with the ICO to pervert the course of Justice by serious breaches of section 77 of the said act [FOIA]." I should add that section 77(1) of FOIA makes it a criminal offence, where a FOIA request has been made, if a person "alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled". Mr Dransfield has not produced a shred of evidence to suggest that any of the Council's elected members or officers has acted in breach of section 77.

89. Second, Mr Dransfield makes the following application by e-mail:

> "I wish to make a formal request to the UT for a Witness Order against Elizabeth Denham UK ICO and Daren Fitzhenry, the Scottish ICO.
>
> I think the attendance of both Commissioners will assist the UT Panel of Judges to reach a proportionate decision. The other reason I believe it would be prudent of both Commissioner to attend the UT Hearing (TBC), I do state that both Commissioners have acted in concert to pervert course of Justice to ensure Alan M Dransfield is obstructed by a blanket vexatious decision ALL his requests. They BOTH know my Human and Civil rights are being breached by BOTH ICO Offices North and South of the Border. I remind parties that English Law Cover's Miss Denham's activities and Scottish Law is applicable to the Scottish ICO.

> I put the UT on notice that if my witness request is refused, I would consider it further as breaches of my Human Rights i.e. section 6/10 and Equality of arms. I trust this request meets with your approval."

90. I disregard the underlying and erroneous assumption on Mr Dransfield's part that his appeal will be dealt with by way of an oral hearing in front of a three-judge panel. The fact remains that this is a wholly vexatious application with absolutely no conceivable merit, not least as (and as the application itself acknowledges) the tribunals of England and Wales have no jurisdiction to consider the decisions of the Scottish Information Commissioner.

91. I therefore refuse all of Mr Dransfield's applications for witness orders under rule 16 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). The appeal before the Upper Tribunal has been confined to the legal issues analysed above. With the greatest of respect to Ms Weltman and Ms Denham (and indeed to the other individuals named in Mr Dransfield's assorted applications), I am not persuaded that their evidence would in any way assist my role, which is to determine whether the FTT erred in law in any material way.

92. In Appendix B I dismiss the other applications for directions made (presumably by Dr Kirkham) on behalf of Mr Dransfield (see paragraph 35 above). The sole exception is the application for a three-judge panel. This application has already been dismissed by the Chamber President.

Conclusion

93. I therefore conclude that the decision of the First-tier Tribunal involves no material error of law. I dismiss the Appellant's appeal. The decision of the First-tier Tribunal that it had no jurisdiction to consider Mr Dransfield's purported appeal stands (Tribunals, Courts and Enforcement Act 2007, section 11).

Nicholas Wikeley
Judge of the Upper Tribunal
Authorised for issue on 10 December 2020

APPENDIX A

DATE: 15 March 2018

Dear Mr Dransfield

FS50700840 – Greater London Authority
FS50702695 – Information Commissioner's Office
FS50716487 – Ministry of Justice
FS50719510 – London Legacy Development Corporation
FS50719521 – Cheshire West and Chester Council

I refer to the above cases in which you have applied to the Information Commissioner's Office for decisions about the named public authorities' handling of your freedom of information requests to them.

In accordance with section 50 of the Freedom of Information Act 2000 ("the Act") you have applied to the Commissioner asking her to consider whether or not these public authorities were correct in refusing to comply with your freedom of information requests.

Section 50(2)(c) of the Act provides that the Commissioner may refuse to deal with an application made to her under section 50 of the Act if it appears to her that the application is frivolous or vexatious.

The application of section 50(2)(c) of the Act has similarities to section 14(1), under which a public authority is not obligated to deal with a request which is found to be vexatious. If section 50(2)(c) is engaged, the Commissioner is not required to make a decision in response to a complainant's application.

In assessing whether section 50(2)(c) of the Act is engaged in relation to a given application, the Commissioner will take into account both the complainant's apparent purpose and the effect of handling an application, whether or not such effects are intended. It is not necessary to demonstrate both intent and effect; if the effect alone is unwarranted, that may be sufficient reason for the Commissioner to decide that an application appears frivolous and/ or vexatious.

In deciding whether an application engages section 50(2)(c), the Commissioner must consider the effect that dealing with such an application will have, both in relation to her own duty to make effective use of her resources, and in ensuring that both her office and the Act itself are not brought into disrepute by progressing applications which, for whatever reason, do not justify serious consideration.

The Commissioner will also consider whether an application has no serious intent, or may otherwise be considered unworthy of serious treatment. As with section 14 of the Act, the Commissioner will have regard to the circumstances surrounding an application.

The Commissioner has now considered your applications for decision set out above. I am writing to advise you that is the Commissioner's conclusion that section 50(2)(c) is engaged by each of the applications you have made because they are frivolous and/ or vexatious. Accordingly, the Commissioner will not be dealing with your applications and will not be making a decision in relation to them. The reasons for reaching these conclusions are as follows:

You are a frequent and experienced user of the Act, albeit one who corresponds with both this office and others in frequently intemperate or derogatory terms. You have made a considerable number of requests to a range of public authorities, including to this office. The number of complaints you have brought to this office runs well into three figures and you have asked for, and been given, decision notices in relation to a number of your requests, some of which you have pursued on appeal in the Tribunal and Higher Courts, most notably to the Court of Appeal in the case of *Dransfield v Information Commissioner & Devon County Council* (C3/2013/1855).

In that case the Court of Appeal found against you and you were refused permission to appeal to the Supreme Court. However, despite having had your case heard in the senior courts, and having definitively reached the end of the appeals process, you have consistently and repeatedly refused to accept the conclusion that the Court of Appeal reached in your case. You consistently refer to that ruling as the *"Dransfield Vexatious BS Court Precedent".* Despite their Ladyships' judgment being good and binding case law, you consistently deny its validity and maintain that it is wrongly used as cover for what you allege, without evidence, is corruption and malpractice.

Over a period of some years, you have levelled serious allegations of misconduct against a number of the Commissioner's staff. In recent correspondence, you go beyond this, saying that the Commissioner's reliance upon clear and legally binding precedents is simply intended *"to cover up heinous crimes"* and is *"demonstrable concrete evidence"* that the Commissioner in person is *"perverting the course of Justice".* You have stated, in terms, that you consider that you consider the Commissioner personally is *"a lying cheating thieving scoundrel".*

You have published those intemperate and wholly unsubstantiated allegations to a number of media outlets. That is defamatory.

Whilst making information requests and pursuing matters through the appropriate statutory mechanisms is an entirely proper exercise of rights, making consistently defamatory statements about named individuals and entirely refusing to accept the proper and final outcome of the statutory and judicial process you are engaged in, is not. Rather, in the Commissioner's assessment, it is clear evidence that you are either wholly disinclined, or wholly unable, to engage in the FOI request and appeals process in a manner which remains within acceptable bounds of conduct.

Furthermore, in *Dransfield v Information Commissioner & Devon County Council* (C3/2013/1855), the Court of Appeal found against you. It awarded costs against you and made an order on 14 May 2015 that you meet the ICO's costs of the appeal in the sum of £2880.00.

To date, in addition to refusing to accept the validity of the Court of Appeal's ruling, you have failed to comply with the costs order and, despite correspondence, have failed to make meaningful proposals to do so. Indeed, you initially indicated that that you were refusing to pay the costs ordered before offering to discharge your liability at the rate of 50 pence per week. This was a clearly risible offer.

Despite this, this office responded in a conciliatory manner, by proposing a modest payment schedule of £100 per month, as opposed to simply seeking to enforce the costs order against you in full at that point. You have rejected this proposal but not made any counter offer. Consequently, and despite the Commissioner's best endeavours, no agreement has been reached as to how you intend to discharge your legal obligations. You remain liable for the principle [*sic*] sum of the costs order, plus interest which is accruing.

Accordingly, it appears to the Commissioner that whilst you are fully willing to exercise your rights under the Act, you are entirely disinclined or unprepared to accept your concomitant responsibilities under the legislation.

In the Commissioner's analysis it appears that your unwillingness to accept the Court of Appeal's judgment, your failure to comply with the outstanding costs order made against you and your repeated and continued use of derogatory and defamatory language is clearly indicative of your refusal to engage in a meaningful, responsible and civil manner with the statutory and the judicial process provided for by Parliament under the Act.

Given this history, the Commissioner has concluded that you have no desire or intention to engage meaningfully and responsibly in the statutory process provided for by the Act. In the absence of evidence to the contrary, the Commissioner must conclude that, should the circumstances which gave rise to the costs order in *Dransfield v Information Commissioner & Devon County Council* (C3/2013/1855) arise again, you would again refuse to acknowledge or accept your responsibilities and would seek to avoid the liabilities placed upon you by the Court.

In the Commissioner's analysis, your consistent and demonstrable refusal to engage with the entire FOI process in a meaningful and responsible manner – as opposed to simply those elements which suit you – means that the applications you have made and which are listed above will be approached by you in the same manner. As such, they appear to the Commissioner to be frivolous for the purposes of section 50(2)(c) of the Act.

Likewise, your consistent and demonstrable refusal to engage in the FOI process in a civil manner which refrains from insulting derogatory and defamatory language, which is again evidence in the applications you have made, means that those applications appear to the Commissioner to be vexatious for the purposes of section 50(2)(c) of the Act.

In all the circumstances, accepting such applications from you under section 50 of the Act would, in the Commissioner's view, risk harming the reputation of both the Commissioner's office and the legislation she regulates. It would amount to an inappropriate use of the ICO's resources and it would be incongruous to continue to

accept applications from a complainant under section 50 of the Act when that individual has singularly refused to comply with an adverse costs order arising from earlier litigation arising from a decision notice issued under section 50 of the Act.

Consequently the Commissioner has concluded that the applications listed above appear to her to be frivolous and/ or vexatious for the purposes of section 50(2)(c) of the Act. Accordingly, the Commissioner will not be issuing a decision in relation to those applications and the cases will be closed at this stage.

It is important to stress that the Commissioner does not refuse to decide an application made to her under section 50 lightly. She is, however, entirely satisfied that refusing to decide your applications in these cases is wholly proportionate and reasonable in all of the circumstances.

These decisions to refuse to deal with your applications because they appear to the Commissioner to engage section 50(2)(c) of the Act are final and are not subject to further internal review.

Nevertheless, if you discharge your outstanding costs liabilities (or take reasonable and sustained steps to do so) and you provide your formal written commitment to engage in a civil and responsible manner with this office, in terms satisfactory to the Commissioner, her decisions in these cases may be revisited.

Should you wish to challenge the Commissioner's decisions in any of these cases, it is open to you to seek judicial review in the Administrative Court. There are strict time limits to seeking such a review and if you intend to do so, we would recommend that you seek independent legal advice without delay, specifically drawing your legal advisor's attention to the date of this email.

You are also entitled to complain to the Parliamentary and Health Service Ombudsman. In order to pursue such a complaint, you should contact your local constituency MP.

Finally, in correspondence on case reference FS50702695, you state that you wish to formally complain about Mrs Clements for failing to address your *"serious complaints of wrongdoing by Senior ICO Officials".* I have examined your complaint and can find no basis for upholding it – Mrs Clements has simply corresponded with you in the usual course of business and you have failed to provide any substantiation, other than your own bald assertion, for the serious allegations that you raise. In the context of your consistent course of dealing with this office, I have concluded that you approach in this matter is a further indication of the vexatious and/ or frivolous nature of your wider interaction with this office. Accordingly, having considered your complaint, I am dismissing it and it will not be considered further.

Yours sincerely,

Adam Sowerbutts
Head of Freedom of Information Complaints and Appeals
The Information Commissioner's Office

APPENDIX B

Introduction

1B. Mr Dransfield filed a reply dated 31 August 2020 to the Information Commissioner's response to his appeal to the Upper Tribunal. In doing so, Mr Dransfield made a series of applications for directions covering the following matters, and as set out in the following sequence:

(i) An application for a three-judge panel to determine the appeal;
(ii) An application for an oral hearing;
(iii) An application for contempt proceedings to be placed before UTJ Jacobs;
(iv) An application for recusal of UTJ Wikeley for conflict of interest;
(v) An application for a stay of the proceedings;
(vi) An application for further information to be provided by the Information Commissioner;
(vii) An application for the representation of Mr Dransfield.

2B. The first of these applications is not a matter for me to determine. I then take the fourth of these applications out of sequence in second place as a preliminary issue, as it must logically precede any consideration of all the other remaining applications.

(i) Application for three-judge panel to determine the appeal

3B. This is matter for the Chamber President to determine. She has already ruled on and refused the application for a three-judge panel (see separate ruling dated 23 October 2020).

(iv) Application for recusal of UTJ Wikeley for conflict of interest

4B. The principles governing recusal were most recently summarised in *Crossland v Information Commissioner and Leeds CC* [2020] UKUT 260 (AAC) at Annex B (paragraphs B4-B5):

> *'The principles governing recusal*
> B4. I am treating this application as a preliminary issue in these proceedings. The principles governing recusal are well-established. They are set out in my decision in *Kirkham v Information Commissioner (Recusal and Costs)* [2018] UKUT 65 (at paragraphs 14-20). I repeat that passage here for convenience:
>
> > "*The principles governing recusal by a judge*
> > 14. The law governing apparent bias is well known. The test is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased": see Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. The "fair-minded and informed observer", according to Lord Steyn in *Lawal v Northern Spirit* [2003] UKHL 35, "is neither complacent nor unduly sensitive or suspicious" (at [14]). See also *Gillies v Secretary of State for Work and Pensions* [2006]

UKHL 2; [2006] 1 WLR 781 (also reported as *R(DLA) 5/06*), where Lord Hope added that the "fair-minded and informed observer" must be taken to be to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant.

15. Thus, as Underhill LJ recently observed in *Shaw v Kovac* [2017] EWCA Civ 1028 at [86], "An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties". Moreover, as Burnett LJ (as he then was) added in the same case at [88], "The party who seeks to bounce a judge from a case may be fair-minded and informed but may very well lack objectivity."

16. The rule against bias was considered in more detail by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; [2000] QB 451, where it was stressed that the "mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection". So, for example, where a member of a tribunal makes it clear (e.g. through comments or body language) that he or she is unimpressed by evidence that is being given, that may be a rational reaction to the evidence even though it may be discourteous or even intemperate. In such circumstances, it does not show that the tribunal member had a closed mind or was biased, with the result that the tribunal's decision is not vitiated (*Ross v Micro Focus Ltd* UKEAT/304/09).

17. As already noted, the "fair-minded and informed observer" will recognise that judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. As Mr Commissioner Bano (as he then was) pointed out in *CIS/1599/2007* at paragraph 12:

> "In *R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524 the Court of Appeal held, applying the *Porter* test, that the fact that a Lord Justice of Appeal had refused leave to appeal was not a ground for requiring the lord justice to recuse himself from hearing the full appeal, and in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* [2005] 1 All ER 723 the Court of Appeal held that the same principles apply even where an adjudicator has already decided an issue on the merits against one of the parties."

18. Referring to the passage in *Locabail*, and cited above, Dyson LJ held as follows in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* (at paragraph 21): "…As was said in *Locabail*, the

mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in *Ealing London Borough Council v Jan* [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him 'further than he could throw him'."

19. Thus in *Otkritie International Investment Management Limited v Urumov* [2014] EWCA Civ 1315 the Court of Appeal held that the fact a trial judge had made adverse findings against a party did not preclude him or her sitting in subsequent proceedings. As Davis LJ further noted in *Shaw v Kovac* (at [19]), "It is striking that in that case the trial judge was held by the Court of Appeal to have been positively wrong to recuse himself on the application of the defendant in circumstances where, in the same complex commercial proceedings, the judge previously had made findings of actual fraud on the part of the defendant."

20. Whilst each case necessarily turns on its own facts, these authorities demonstrate clearly that judges must be robust and are not expected to jump to recuse themselves. The rationale was explained clearly by Chadwick LJ in *Triodos Bank N.V. v Dobbs* [2005] EWCA Civ 468, in which the defendant had invited Chadwick LJ to recuse himself as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ observed as follows:

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if

> the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.""

B5. There is a more concise account of those principles set out in my later decision in *Leighton v Information Commissioner (No.2)* [2020] UKUT 23 (AAC) at paragraph 35. There is, furthermore, a very helpful analysis of the principles governing recusal in the decision of Upper Tribunal Judge Jacobs in *Kirkham v Information Commissioner and UK Research & Innovation (Strike out and Recusal)* [2020] UKUT 93 (AAC). Judge Jacobs's discussion helpfully distinguishes between *recusal as a duty* and *recusal as a power* (see paragraphs 24-33). In addressing the latter power, Judge Jacobs observes as follows (at paragraph 33), citing *Triodos Bank N.V. v Dobbs*:

> "A litigant who wants a judge to exercise the power of recusal cannot do worse than insulting or criticising the judge or presenting their case in a way that appears to do so. This approach will almost certainly be self-defeating. In exercising the power to recuse, it is important that judges should not allow litigants to generate a recusal by criticising them, their conduct or their decisions."'

5B. The following full passage from the judgment of the very strong Court of Appeal in *Locabail* is also illuminating (a short part of which is cited in the extract above):

> "25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v. Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person

> in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

6B. In addition, and more recently, the Court of Appeal has made it plain that any allegation of bias "if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced" (*Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492 at [53(1)]). Although that observation was made in the context of a complaint of bias or misconduct in the First-tier Tribunal proceedings, and so on a subsequent application for permission to appeal, the same principle applies where an application to recuse is made in the course of ongoing appellate proceedings, at whatever level.

7B. Finally, I am mindful of the observations of Farbey J, the Chamber President, in *Crossland v Information Commissioner and Leeds City Council* [2020] UKUT 263 (AAC):

> "45. In other submissions, the applicant launches a wholesale assault against my treatment of his cases to date (though he also attacks the GRC and those other judges of this Chamber who have played a part in considering his various appeals). These submissions do not bear repetition here: they are largely misconceived and rake over the previous history of proceedings in this and the applicant's other appeals. The main points seem to be that (i) I have lacked transparency in case managing the latter part of the proceedings – which is not correct; and (ii) I have made some previous case management decisions adverse to the applicant – which is correct. I regard his submissions as breaching rule 2(4) of the UT Procedure Rules and as undermining the administration of justice. There is no merit in the recusal application which I reject as vexatious."

8B. Much the same could be said of the current proceedings. Be that as it may, the current recusal application is based on two allegations of a 'conflict of interest' as made by Mr Dransfield. I will take each in turn.

The earlier litigation

9B. First, the application refers to some of the earlier litigation involving Mr Dransfield (but not the *Dransfield* case itself), namely an appeal decided by Upper Tribunal Judge Jacobs (the quotation from paragraph 6 in the extract below is taken from Judge Jacobs's decision in the earlier appeal):

> "38. There are the strange attempts of Judge Wikeley to interpret *AD v Information Commissioner and Devon County Council* [2013] UKUT 550 (AAC), which said:
>
> > 6. On 12 May 2013, Mr Dransfield emailed the First-tier Tribunal. I am not going to set it out in full. It is sufficient to say that Mr Dransfield accused the Commissioner and Council of 'conniving and colluding to pervert the Course of Justice' and of producing 'a pack of lies and deception'. He later referred twice to a 'wider conspiracy to pervert the course of justice' and said that there was sufficient evidence to justify arresting the Commissioner's legal representative and Judge Wikeley for conspiracy to pervert the course of justice. The reference to Judge Wikeley refers to another case in which that judge dismissed Mr Dransfield's appeal to the Upper Tribunal.
>
> 39. Plainly it would be inappropriate for Judge Wikeley to be seeking to address the effect of that wider decision in these proceedings. Mr Dransfield has a reasonable apprehension of bias, given the substantive issue in that case and how it relates to the present proceedings."

10B. This submission is fundamentally misconceived.

11B. First, the test is not whether "Mr Dransfield has a reasonable apprehension of bias", but whether the "fair-minded and informed observer" would have such an apprehension, which may well be a very different matter. As Underhill LJ observed in *Shaw v Kovac* [2017] EWCA Civ 1028 at [86], and as noted above, "An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties". See also Burnett LJ's observation in the same case: "The party who seeks to bounce a judge from a case may be fair-minded and informed but may very well lack objectivity" (at [88]).

12B. Second, the logical corollary of the Appellant's submission is that a litigant can make allegations against a judge and the more outlandish they are, the better his chances of being able to say the judge is therefore bound to be biased against him. However, the "fair-minded and informed observer" will appreciate that professional judges are able to put such allegations to one side. As UTJ Jacobs put it in *AD v Information Commissioner and Devon County Council* (emphasis added):

> "16. Most appellants correspond with the tribunal only when necessary, make moderate criticisms and allegations, and express themselves

politely. There is, however, a small body of appellants who are persistent in their correspondence which contains wild allegations that are expressed in an intemperate or aggressive tone. This is true of all the tribunals I have been involved in over the last quarter of a century and is probably true of all judicial bodies.

17. It is usually possible to deal with that small minority of appellants without resorting to the power to strike out proceedings…

18. The tribunal specifically mentioned the content of the last email and their total number. *As to the content, this type of allegation is regularly made in appeals before this Chamber and just as regularly ignored by the judges.* As the psychologist William James said: 'the art of being wise is the art of knowing what to overlook.' As to the number, the remedy was simply to ban the use of emails and not to read any that were sent."

The Society of Legal Scholars

13B. The second aspect of the recusal application is the claim that there is what is described as a "direct conflict of interest" given (a) my "(relatively intimate) involvement in the Society of Legal Scholars"; and (b) the fact that the Information Commissioner and I are both Honorary Members of that learned society. The application seeks to make its case as follows:

"44. The reason that Judge Wikeley is on that list (the only Judge below High Court level on there) is simple: he has been heavily involved in the society over many decades, and continues to be involved. Indeed, he even used to be its President. He is still actively involved, for example, last year he attended the conference and gave the after-dinner speech, wearing what appears to be a 'The Simpsons'™ tie. (One would observe that his casual choice of attire shows how comfortable Judge Wikeley is in that community: indeed, he's effectively part of its fabric and furniture.) It might well also be his route to further employment in legal academia, for example after retiring as a Judge of the Upper Tribunal.

45. What about Elizabeth Denham? To say the least, it is unclear how she became an honorary member or objectively met the entry criteria. Moreover, a finding that her office is in contempt would be embarrassing to the Society of Legal Scholars and many people that Judge Wikeley is friendly with (and in a way that is very different to the Commissioner merely losing an appeal). Indeed, Judge Wikeley may even have influenced her appointment as an 'Honorary Member', given how close he is to that community and its senior leadership. At the least, there is a conflict of interest in Judge Wikeley being involved in these proceedings (and the Information Commissioner is opportunistically suggesting jurisdictional wheezes to avoid him making a substantive decision against her). He must recuse himself."

14B. Mr Dransfield's reference to my after-dinner speech at the annual dinner at the SLS annual conference in September 2019, held at the University of Central Lancashire in Preston, is supported by photographic evidence provided with the

application, being based on a less than flattering photograph of me that I gather appears on the SLS's Facebook page (although the super-observant would note that the SLS annual dinner itself was held at Ewood Park in Blackburn): https://www.facebook.com/pg/legalscholars/photos/?ref=page_internal. Be all that as it may, I do not need to address my sartorial choices for that event, however ill-judged they may be on my part and however misinterpreted they may be by others (the clue to the choice of tie was the SLS's choice of the venue for the annual dinner). This is all, frankly, the stuff of conspiracy theorists.

15B. The actual facts are straightforward. My involvement with the Society of Legal Scholars ('the SLS') is a matter of public record (at least for those who have any interest in such arcane matters). I served as Honorary Secretary of the SLS from 2001 to 2006 and was President for the 2009/10 academic year. Since then I have had only limited involvement in the Society's work. I have attended at most one or two functions a year organised by the SLS over the past decade. I have never met the Information Commissioner (either at an SLS function or elsewhere) and indeed, before reading this application for recusal, I was unaware even that she also happens to be an Honorary Member of the SLS. I note that she was not appointed to her UK regulatory role until 2016, having previously held a similar post in Canada. I have made enquiries of the SLS's Honorary Membership Secretary, who informs me that Ms Denham, like me, was voted in as an Honorary Member at the Society's AGM at the September 2019 annual conference. That election took place at a meeting I did not attend. I was also unaware of the names of the other nominees.

16B. It will be recalled that the recusal assessment must be made from the perspective of the fair-minded and informed observer; and the threshold for a finding of apparent bias is a "real possibility". As Lord Steyn (giving the opinion of the Judicial Committee) observed in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 (at [14]):

> "Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."”

17B. This second limb of the Appellant's recusal challenge, based on my shared status with the Information Commissioner as Honorary Members of a learned society in the world of legal academia, plainly reflects an "unduly sensitive or suspicious" mind. The fair-minded and informed observer, in considering the suggestion that there is an appearance of bias, will consider in particular the following case-specific factors, in addition to the general circumstances addressed in the authorities:

> i) I have never met Ms Denham.
> ii) I have never spoken to Ms Denham.
> iii) I have never corresponded with Ms Denham.

iv) Frankly, and meaning no disrespect, I would not know Ms Denham if I passed her in the street.
v) I had no part, whether formal or informal, in the nomination or election of Ms Denham to the status of Honorary Member.
vi) Other than attending perhaps a couple of functions a year, I play no active role in the work of the Society of Legal Scholars and have not done so for several years, going back to a time well before Ms Denham was elected to Honorary Member status.
vii) It is in any event common for senior judges and practitioners to meet at events held under the auspices of the SLS without any suggestion that this alone is a ground for recusal.
viii) The judicial oath or affirmation, by which I am bound, includes a pledge to do justice without fear or favour, affection or ill-will.

18B. In my judgment, and for all the reasons above, the Appellant's contention that there is an appearance of bias by reason of the two matters raised in the present application is manifestly ill-founded. It does not come even close to being an arguable case. It is truly vexatious in any sense of that word. I therefore dismiss the recusal application.

(ii) Application for an oral hearing

Introduction

19B. There is no absolute right to an oral hearing before the Upper Tribunal. Rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) provides that “the Upper Tribunal may make any decision without a hearing”. However, rule 34(2) provides that it “must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter”. It is also the case, of course, that the application of rule 34 in any given case must be read in the light of the overriding objective of dealing with cases fairly and justly (rule 2).

The parties’ views

20B. The Appellant’s application is put as follows:

> “Mr Dransfield asks for an oral hearing. These issues are not straightforward (at the least, the Tribunal seems to be failing to understand the written submissions) and also involve a trial of factual issues, which he was deprived of by the First-tier Tribunal. Thus, on the merits, and also on the basis of Mr Dransfield’s Article 6 rights, Mr Dransfield seeks an oral hearing.”

21B. The Commissioner, for her part, “would not object to an oral hearing”. Taking the Appellant’s points in reverse order, and pointing to the jurisdiction of the Upper Tribunal, she does not accept that there is any “trial of factual issues”. Rather, she contends that the Upper Tribunal is confined to deciding issues of law, namely whether there was any error of law in the decisions of Judge Macmillan (i) to uphold the GRC Registrar’s decision to strike out the Appellant’s appeal for want of jurisdiction (on the ground that there was no decision notice); and (ii) to rule that the Information Commissioner was not in contempt of Judge Jacobs’s decision in *GIA/1988/2013*. However, the

Commissioner also considers that some of the issues around the scope of (and the procedure associated with) the certification of contempt under section 61(4) of FOIA are not straightforward and may benefit from oral argument.

Discussion and conclusion

22B. The position under the Upper Tribunal's procedural rules, vesting this Tribunal with a discretion, must be read against the background of the common law. In broad terms the position at common law is that a case can be determined without an oral hearing unless that would be unfair because, for example, oral evidence is required or the case is complex. The present appeal is not a case in which oral evidence as to the facts is required, for the reason identified by the Commissioner. Notwithstanding the Commissioner's own somewhat guarded support for the application for an oral hearing, nor do I accept this case is unduly complex. The underlying and fundamental issue at stake – the question of the FTT's jurisdiction – is a narrow issue of law and relatively straightforward. I have also taken into account the factors identified under rule 2. Mr Dransfield had had ample opportunity, which has been taken, to make detailed written submissions, and so has participated fully. Dealing with the case on the papers is proportionate to the importance of the case and the level of complexity of the issues. Moreover, it is quite usual to deal with jurisdictional issues 'on the papers'. The additional invocation of Article 6 carries little weight for the reasons given in the main decision. Having considered the Appellant's detailed written submissions, I am not persuaded that contested oral argument could make any material difference to the outcome. I dismiss the application for an oral hearing.

(iii) Application for contempt proceedings to be placed before UTJ Jacobs

23B. Mr Dransfield's original application for contempt proceedings in the Upper Tribunal was addressed to Upper Tribunal Judge Jacobs. It was claimed by the Appellant to be a continuation of proceedings that had previously taken place before that same Judge some seven years earlier in *AD v Information Commissioner and Devon County Council* [2013] UKUT 550 (AAC) (as explained in the main decision). The Upper Tribunal AAC office duly acted on that request and forwarded the application to UTJ Jacobs (instead of, as would be usual, sending the file to me, as information rights lead judge, for onward allocation). Judge Jacobs then in turn passed the application to me, having formed the view that he was *functus officio* as regards *AD v Information Commissioner and Devon County Council.*

24B. There is, therefore, no merit in the application on the facts. However, there is also a more problematic aspect to the application. In this context I refer to the Chamber President's comments in *Crossland v Information Commissioner and Leeds City Council*. There Farbey J observed as follows:

> "42. The Administrative Appeals Chamber is from time to time faced with individuals who seek improperly or unreasonably to influence the allocation of their application or appeal towards or away from a particular judge. Such conduct undermines the rule of law and breaches the overriding objective. Rule 2(4) of the UT Procedure Rules stipulates that the parties are under a duty to help the Tribunal to further the overriding objective and to cooperate with the Upper Tribunal generally. Judges of

this Chamber may regard this sort of conduct as such a wholesale assault on the overriding objective that the application (and other any part of the proceedings flowing from it) should be struck out under rule 8(3)(b)."

25B. I do not need to take that draconian step in these proceedings, but this application is accordingly dismissed in short order.

(v) Application for a stay of the proceedings

26B. Mr Dransfield refers to the FTT case of *Dr Reuben Kirkham v Information Commissioner & Alan M Dransfield* (EA/2019/0227). In those FTT proceedings, I understand that Mr Dransfield hopes to obtain further documentation that he says is relevant to the present case he wishes to advance in the Upper Tribunal. The subject matter of the underlying information request in EA/2019/0227 is concerned with the events surrounding how Mr Dransfield came to be subjected to the Information Commissioner's purported ban. There is evidently a connection between the two sets of proceedings, in that they both arise out of the purported ban. However, there is no good reason why this appeal should be delayed pending the outcome of those other proceedings. Disclosure of such information cannot be determinative of the issue of the FTT's jurisdiction as raised by this appeal. In any event, the Commissioner submits, the information requested in *Kirkham v Information Commissioner and Dransfield* has either been disclosed by now or was not held. This application is refused.

(vi) Application for further information to be provided by the Commissioner

27B. Mr Dransfield requests that the Tribunal direct the Commissioner to disclose all cases and notices where she has relied upon section 50(2)(c) of FOIA and the documents related to them. There is no need for any such disclosure. In one sense it does not matter if the Commissioner has only issued the one letter or half a dozen in the same terms as the correspondence in the present case. What matters in the present appeal is the status of the Commissioner's e-mail of 19 July 2019 and hence the lawfulness of the FTT's decision on jurisdiction. It is difficult to see how other similar communications are going to shed any light on the legal issues involved in the present case. As the Commissioner puts it, "past decisions made by the Commissioner relying upon s.50(2)(c) would not assist the Appellant's argument for example that such a reliance would constitute a decision notice over which the FTT would have jurisdiction". This application to the Upper Tribunal in truth is more akin to a freestanding FOIA request to a public authority but one dressed up as an application for a direction. As such, it should be made to the appropriate public authority under FOIA. This application is refused.

(vii) Application for the representation of Mr Dransfield

28B. This application is obviously contingent on the application for an oral hearing, but that has been dismissed and so the application falls away. In any event I have no power to direct the provision of legal representation for the benefit of a party to Upper Tribunal proceedings (see by analogy Social Security Commissioner's decision *CJSA/5101/2001*).