IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000404-GIRF
& UA-2022-000032-GIRF

UA-2021-000404-GIRF

Appellant: **Rotherham Metropolitan Borough Council**

First Respondent: **Liam Harron**

Second Respondent: **The Information Commissioner**

On appeal from: **First-tier Tribunal (General Regulatory Chamber); EA/2021/0009 (previously EA/2018/0090)**

UA-2022-000032-GIRF

Applicant: **Liam Harron**

First Respondent: **Rotherham MBC**

Second Respondent: **The Information Commissioner**

On certification by: **First-tier Tribunal (General Regulatory Chamber); EA/2021/0009 (previously EA/2021/0090)**

Before:

MRS JUSTICE FARBEY

Hearing date: 18 October 2022

Mr John Fitzsimons (instructed by **Anthony Collins Solicitors**) appeared for the Appellant/Applicant
The First Respondent appeared **in person**
The Second Respondent did not appear; **Mr Richard Bailey**, Solicitor to the Commissioner, **Information Commissioner's Office**, made written submissions

DECISION

UA-2021-000404-GIRF

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

2. The decision is that the First Respondent Mr Liam Harron's application to certify an offence to the Upper Tribunal is refused.

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3. The Upper Tribunal has no jurisdiction to inquire into an offence and so refuses to do so.

REASONS

Introduction

1. By a written decision and reasons promulgated on 2 May 2019 under reference number EA/2018/0090, the First-tier Tribunal (General Regulatory Chamber) ("FTT") allowed Mr Liam Harron's appeal against a decision notice of the Information Commissioner ("the Commissioner") dated 28 March 2018. The Commissioner's notice had dealt with a request by Mr Harron to Rotherham Metropolitan Borough Council ("RMBC") to provide him with information under section 1 of the Freedom of Information Act 2000 ("FOIA"). The FTT substituted its own decision for that of the Commissioner. The substituted decision was in the following terms:

> "[RMBC] is required, within 20 working days of receipt of this substituted Notice, to provide to [Mr Harron] the information requested in his FOIA request of 2 February 2017, ref. No. 1124-16, limited to information falling within the scope of that request, and excluding any emails passing between members of [RMBC's] legal department on 15 September 2016."

2. By notice of application dated 27 January 2021, Mr Harron applied to the FTT for certification to the Upper Tribunal ("UT") for contempt of court on the grounds that RMBC had breached the terms of the FTT's decision. By a written decision and reasons promulgated on 29 June 2021, the FTT (Upper Tribunal Judge O'Connor) certified an offence by RMBC. That offence was described as:

> "the failure to comply with the terms of the [FTT's] substituted Decision Notice in EA/2018/0090."

3. As a result of the FTT's certification, the case was transferred to the UT under reference number UA-2022-000032-GIRF. In addition, by a written decision dated 9 February 2022 under reference number UA-2021-000404-GIRF, UT Judge Wikeley granted permission to RMBC to appeal against the FTT's certification decision. By case management directions dated 22 July 2022, I directed that both the appeal and the certification proceedings should be listed for hearing together before me. That hearing took place on 18 October 2022.

4. This is the first case to come before the UT for decision in relation to the application of the certification provisions. Those provisions are found in section 61 of the Freedom of Information Act 2000 as substituted by the Data Protection Act 2018 Schedule 19(1) para 60.

5. Section 61 of FOIA (as substituted) provides so far as relevant:

> "(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).
>
> …
>
> (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."

6. I was provided with a hearing bundle. Mr Harron relied on an additional bundle of documents served with his skeleton argument. I heard oral evidence from Luke Sayers, the Assistant Director of Customer, Information and Digital Services at RMBC and its Senior Information Risk Owner. He relied on his witness statement dated 1 June 2022 and was cross-examined by Mr Harron.

7. I received Mr Sayers' evidence de bene esse (i.e. on a conditional basis) so that both the appeal and the certification proceedings could be progressed within a single day which was in accordance with the overriding objective. Mr Sayers' evidence was not before the FTT. On conventional principles, the lawfulness of a FTT decision must in general terms be assessed by reference to the evidence that was before it and so, for the purposes of RMBC's appeal, I have not taken into account Mr Sayers' evidence in my consideration of whether the certification decision involved the making of an error in point of law.

8. Pursuant to the UT's case management directions, the parties each filed written submissions. RMBC and Mr Harron filed skeleton arguments. I heard oral submissions from Mr John Fitzsimons on behalf of RMBC and from Mr Harron in person. The Commissioner was not represented at the hearing and relied on written submissions only.

Factual background

Mr Harron's requests for information: 2015-2016

9. In August 2014, Alexis Jay OBE published the report of the Independent Inquiry into Child Sexual Exploitation in Rotherham 1997 – 2013. On 15 February 2015, Mr Harron and Chrissy Meleady published a booklet called "Voices of Despair Voices of Hope." The booklet contained contributions from victims and others affected by child sexual exploitation. It aimed to give victims, survivors and their families a voice, to assist them in dealing with their experiences and to help inform what the FTT called "the establishment of systems and procedures" that would gain the support of those directly affected by child sexual exploitation. Mr Harron funded the publication of the booklet. The initial print run was 500 copies.

10. In around February 2015, the Secretary of State for Communities and Local Government suspended the Council, and its functions were thereafter carried out by Commissioners appointed by the Secretary of State. RMBC officers reported to the Commissioners.

11. On 10 March 2015, RMBC ordered 1500 copies of the booklet which were produced and delivered to RMBC. By email to Mr Harron dated 15 September 2015, David McWilliams (RMBC's Assistant Director, Early Help and Family Engagement) summarised the distribution of the booklet to date. He informed Mr Harron that RMBC had sought independent expert advice on the content of the booklet and had (in general terms) decided not to undertake any further distribution.

12. Mr Harron wanted to know why RMBC had decided to cease distribution of the booklet. By email to RMBC dated 16 September 2015, he made a request for information under FOIA. He requested "a copy of all communications relating to Voices of Despair, Voices

of Hope from 2 December 2014 to 16 September 2015." For ease of reference, I shall call this **Request 1**.

13. On 23 October 2015, RMBC responded to Request 1, providing Mr Harron with some copy documents. On 26 October 2015, and then again on 7 December 2015, Mr Harron sought an internal review in relation to Request 1.

14. By email to RMBC dated 26 October 2015, Mr Harron provided a list of information that he asserted had been missing from RMBC's response to Request 1. At the end of his email, he requested:

> "the information generated when processing this FOI request…which includes the internal notes, emails etc."

Mr Harron referred to this newly requested information as "the metadata." The FTT appeal decision is critical of RMBC for treating the "metadata" request at times as a fresh FOIA request and at times as some other form of request. I do not need to reach a conclusion on the status of the "metadata" request which I shall call **Request 2** for ease of reference. It is not clear whether anyone within RMBC asked Mr Harron to define what he meant by "metadata" which is not a statutory term.

15. It is extremely difficult to ascertain from the documents in the bundles before me the chronology of the extensive and convoluted communications between the parties from the date of Request 2 onwards. In setting out the facts, I have to a large degree relied on the recitation of the course of events in the FTT's appeal decision, and (in shorter but helpful terms) the Commissioner's written submissions which I have double-checked against the relevant documents in the bundles.

16. By email dated 7 December 2015, RMBC responded to Mr Harron's 26 October email. On 15 December 2015, Mr Harron sent comments on the information that he had received on 7 December.

17. On about 11 December 2015, Linton Steele, a solicitor employed by RMBC, was appointed to undertake an internal review. Mr Steele reviewed the information provided to Mr Harron on 23 October 2015 and Mr Harron's response of 26 October 2015. He concluded that RMBC had failed to deal with Request 1 within the statutory time limit and that RMBC had not provided Mr Harron with, at the very least, a copy of the expert opinion that had led to the decision to cease distribution of the booklet.

18. In relation to the expert opinion, Mr Steele set out the results of his enquiries with Jean Imray, the Interim Deputy Strategic Director of Children and Young Persons Services within RMBC. She had telephoned a "sexual violence practitioner" and requested his or her comments on the booklet. The practitioner had agreed to provide written comments but on the basis that he or she would not be identified. Ms Imray had subsequently received the practitioner's comments on her personal iPad. She had forwarded the comments to her RMBC email address. Mr Steele refused to disclose the identity of the author of the comments, relying on the exemptions in sections 40(2) and 41 of FOIA. Those sections exempt from disclosure personal information and information provided in confidence.

19. The FTT appeal decision states that, as a result of the review:

> "The Appellant…received…more information, and became aware of Jean Imray's involvement, what information she received, and how she had received it. He emailed Jean Imray directly on 15 January 2016… to ask her some further questions. She, by email of 15 January 2016… told Linton Steele, and others in RMBC that she had no intention of replying to the Appellant."

20. On 29 January 2016, an official in RMBC sent an email to a number of colleagues including Ms Imray and Mr McWilliams asking for all information generated when processing Request 1 with a view to providing a response to Request 2. In response to that email, Ms Imray expressed the view that she was "pretty sure" that that process had already been undertaken. She said that she had nothing to add.

21. By an attachment to an email dated 16 May 2016, RMBC treated Request 2 as a request for information under FOIA and refused that request under section 12 of FOIA on the basis that the cost of compliance exceeded the appropriate statutory cost limit.

22. By letter sent by email on 29 June 2016, Mr Harron requested an internal review in relation to Request 2 in the following terms:

> "I am requesting an internal review of the decision about my request for metadata on 26.10.15. I hope the review will consider the conflicting information shared with me, the numerous delays and the fact a final decision was communicated to me on 16.5.16 about a request for information on 26.10.15."

23. On 14 July 2016, Sumera Shabir (a solicitor with RMBC) wrote to Mr Harron to inform him that she had been appointed as the reviewing officer.

The "Business As Usual" process

24. However, RMBC formed the view that it would be preferable if matters raised in the request for an internal review could be dealt with by way of an alternative, extra-FOIA process called Business As Usual. Mr Harron agreed to that process. On 19 July 2016, he sent an email to RMBC withdrawing his request for an internal review in the following terms:

> "I confirm that I am withdrawing my request for an Internal Review.
> Let's get on with business as usual."

25. On 12 August 2016, as part of Business As Usual, Mr Harron met Ian Thomas (Strategic Director of Children and Young Persons Services within RMBC). At that meeting, he was provided with a document entitled "Questions posed by Mr Liam Harron" which contained five questions and RMBC's responses to those questions ("the Q & A document").

26. In an email to Mr Thomas and Sumera Shabir dated 10 August 2016 - which was before the FTT when it took its certification decision – Eira Owen (RMBC's Interim Information Manager) had stated:

> "Please see the **questions raised by Mr Harron and the responses**. Ian can you look over them please and let us know your thoughts. If you feel you want to add anything then please do. I will arrange to have four copies of everything on Friday along with copies of all the letters mentioned." (Emphasis added.)

27. It is plain (and Mr Harron has not made any proper argument to the contrary) that this email referred to the Q & A document which Mr Harron was to be given at the meeting with Mr Thomas on 12 August 2016.

28. The questions in the Q and A document were as follows:

> "**Question 1**
> Who made the decision to purchase the publication VOD, VOH?
>
> **Question 2**
> Who made the decision not to distribute and to return the publication and why? RMBC has not provided any original significant written communication about how officers made the decision to limit the distribution of the VOD VOH and to return 1390 copies.
>
> **Question 3**
> Who wrote paragraph 2 in Document 8 email 7.12.15 (Freedom of Information request 714)…?
>
> **Question 4**
> When was Jean Imray first made aware of the FOI request?
>
> **Question 5**
> Has Jean Imray ever been sent an email to or sent an email from [her work email address] about any aspect of Voices of Despair Voices of Hope between 6 April 2015 and 5 August 2015?"

29. For reasons which I need not set out, by letter dated 26 October 2016, Mr Harron reinstated his request for an internal review in relation to Request 2 which had lapsed during the Business As Usual Process. In a response prepared on 26 January 2017, RMBC provided Mr Harron with the outcome of the internal review. No further documents were provided to him.

FOIA request of 2 February 2017

30. By letter dated 2 February 2017, Mr Harron made a freedom of information request in the following terms:

> "Please can I have all of [sic] email exchanges and any other written information **arising from my Request for an Internal Review** of 29 June 2016 and the reinstatement of this request on 26 October 2016." (Emphasis added.)

Mr Harron stated that it was particularly important to have any email exchanges that involved Sumera Shabir, Eira Owen, Christine Hotson (Senior Access to Information Officer) and Ian Thomas. I shall call this **Request 3**.

31. In its appeal decision, the FTT observed that the content of Request 3 related to how RMBC proposed to deal with Mr Harron's request for an internal review. I agree with that observation: Request 3 was in terms limited to (i) written information which (ii) had arisen from a specific request for an internal review and the subsequent reinstatement of that specific request.

32. In a response dated 1 March 2017, RMBC refused to comply with Request 3, contending that the requested information was subject to legal professional privilege ("LPP") and so exempt from disclosure under section 42 of FOIA. In a decision notice dated 28 March 2018, the Commissioner upheld RMBC's refusal.

The appeal to the FTT

33. Mr Harron appealed to the FTT against the Commissioner's decision notice in relation to Request 3. The FTT did not make RMBC a party to the appeal which was heard on 29 August 2018. In a decision promulgated some 8 months later, the FTT (Judge Holmes, Tribunal Member Chafer and Tribunal Member Clarke) allowed the appeal.

34. RMBC had provided a closed bundle of documents to the FTT containing the material which was alleged to be exempt from disclosure by virtue of LPP. Having considered the closed bundle, the FTT concluded that not all of that material fell within the scope of the FOIA request that was the foundation of the appeal (i.e. Request 3) and that one email in the closed bundle was exempt from disclosure on LPP grounds. Other material fell to be disclosed to Mr Harron as (i) it fell within the scope of the request and (ii) it was not covered by LPP.

35. The FTT gave an account of the closed material in its open decision. There was no closed decision. The FTT did not specify which items of the material in the closed bundle fell within Request 3 but made the substituted decision in the general terms set out above.

36. By letter dated 6 June 2019, RMBC wrote to Mr Harron. It acknowledged the terms of the FTT's substituted decision and sought to comply with it by sending him a redacted version of the closed bundle that had been sent to the FTT. By letter sent by email on 14 June 2019, Mr Harron requested an internal review of the 6 June 2019 response. By attachment to an email dated 8 August 2019, Mr Harron was informed of the conclusions of a review which had been carried out by Paul Vessey who was at that time RMBC's Head of Information Management. Mr Vessey concluded that Mr Harron had been provided with all the information covered by the FTT's substituted decision.

A second FTT substituted decision

37. In its appeal decision, the FTT noted that the appeal before it (i.e. EA/2018/0090) was one of four connected appeals. Those other appeals related to other FOIA requests made by Mr Harron. One of those other appeals had the case reference EA/2018/0086. In that

case, Mr Harron had appealed against a decision notice issued by the Commissioner on 28 March 2018 in which the Commissioner had determined that (save in one regard) RMBC had correctly applied section 14(1) of FOIA on the grounds that Mr Harron's request for information made on 6 April 2017 was vexatious. On 2 May 2019, the FTT allowed Mr Harron's appeal against the Commissioner's decision notice in a separate appeal decision. It made a second substituted decision that RMBC was required within twenty working days to provide Mr Harron with the information requested in his 6 April 2017 request.

The certification proceedings

38. By letter sent by email dated 10 September 2019 in relation to EA/2018/0090, Mr Harron asked the Commissioner to: "direct officers at [RMBC] to disclose all of the information that I believe, on a close examination, is clearly missing from their responses following the [FTT] Ruling." By letter dated 19 September 2019, the Commissioner advised Mr Harron to contact the FTT in relation to any enforcement issues. By email 19 September 2019, Mr Harron contacted the FTT. By email dated 29 October 2019, the FTT informed Mr Harron that the question of whether the enforcement of a substituted decision notice lay with the Commissioner or the FTT was due to be considered by the UT. Mr Harron's request would be filed with no action taken until then because the FTT's view was that enforcement lay with the Commissioner.

39. On 30 May 2020, the UT (Judge Jacobs) concluded that the Commissioner has no power to enforce the breach of a substituted decision notice but that the FTT has the power to certify the breach by means of certifying a public authority's conduct as an offence of contempt: *Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC).

40. Following further communications with the FTT, Mr Harron applied for certification in two applications made under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, r. 7A. The first application was dated 20 January 2021 and related to the FTT's decision in EA/2018/0086. The second application was dated 27 January 2021. This latter application related to EA/2018/0090. The two applications were joined on 2 February 2021. Mr Harron was the applicant in the joined applications; RMBC was the first respondent; the Commissioner was the second respondent.

41. At the hearing of the joined applications on 19 May 2021, Mr Harron appeared in person; Mr Fitzsimons appeared for RMBC; the Commissioner did not appear and was not represented, relying on written submissions.

The certification decision

42. In its written decision and reasons, the FTT made plain that it had applied the criminal standard of proof. It had not been demonstrated to that standard that RMBC breached the terms of the substituted decision in EA/2018/0086 (i.e. the decision that I have called the second substituted decision above.) The FTT refused to certify an offence to the UT in relation to EA/2018/0086.

43. In relation to EA/2018/0090, RMBC had accepted at the certification hearing that, in

sending the content of the closed bundle to Mr Harron in response to the FTT's ruling, it had sent all relevant emails but not their attachments. The FTT found that the substituted decision was clear and unambiguous. By sending emails without their attachments, RMBC had approached the substituted decision in an unreasonable way.

44. Having reached that conclusion about RMBC's approach, the FTT went on to consider whether any of the email attachments fell within the scope of Request 3. In other words, the FTT considered whether any of the attachments arose from the request for an internal review on 29 June 2016 and the later reinstatement of that request. It found that a number of the attachments pre-dated the request for an internal review and that Mr Harron had failed to identify whether or not other attachments fell within the scope of Request 3. However, in relation to the Q &A document, the FTT held:

> "58. Having said that, one particular attachment has been consistently highlighted by the applicant; for example, in his request for an internal review of 14 June 2019, in his grounds in support of the instant application and in case management submissions made to the Tribunal - that being… '*the questions and answers which Ian Thomas took to the meeting on 12 August 2016'…* I am satisfied on the information before me that this document is within the scope of the Tribunal's substituted Decision Notice…
>
> …
>
> 60. Drawing the above strands together, I have found that the terms of the substituted Decision Notice were clear and unambiguous. It is not in dispute that RMBC were aware of the terms of the Notice or that RMBC, despite not being a party to EA/2018/0090, were bound by it. I have also found that the terms of the substituted Decision Notice did not restrict disclosure to '*email exchanges'* arising from the request for an Internal Review on 29 June 2016 and the reinstatement of that request on 26 October 2016, but also included '*any other written information*' arising from the Request for an Internal Review on 29 June 2016 and the reinstatement of this request on 26 October 2016… [The Q & A document] should, therefore, have been provided to the applicant in compliance with the Tribunal's substituted Decision Notice. This document was not produced in compliance with the substituted Decision Notice and, despite the applicant drawing this specific factor to the attention of RMBC in his internal review request of 14 June 2019, it was still not produced in response thereto or at any time in response to the substituted Decision Notice. The document was only produced in response to a further FOIA request made by the applicant in 2021."

It followed that RMBC had breached the terms of the substituted decision notice by failing to provide the applicant with a copy of the Q & A document within 20 working days of receipt of the FTT appeal decision.

45. The FTT considered whether, in light of the breach, it should exercise its discretion to certify an offence to the UT. It concluded:

> "In all the circumstances, given the clear and prolonged nature of the breach, and despite such breach not being wilful and having accepted that the relevant document has now been provided, I conclude that it is appropriate in furtherance of the public interest… to exercise my discretion to certify a contempt to the Upper Tribunal."

46. Before leaving the FTT's decision, I should note that the FTT found that Mr Harron had made a further FOIA request on 4 February 2021 in response to which RMBC provided the attachments. The FTT was therefore aware that, prior to the certification hearing, Mr Harron had been provided with the information in the attachments. It follows that the FTT was aware that, prior to the certification hearing, RMBC had provided Mr Harron with the Q & A document both at the meeting with Mr Thomas on 12 August 2016 and later in response to a FOIA request.

Proceedings in the UT

47. By notice of appeal dated 2 July 2021, RMBC applied to the FTT for permission to appeal against the certification in relation to EA/2018/0090. By a written decision dated 3 August 2021, the FTT refused the application. By notice of appeal dated 3 September 2021, RMBC applied for permission to appeal from the UT. By a written decision dated 9 February 2022, Judge Wikeley granted permission.

48. Mr Harron applied for permission to appeal against Judge O'Connor's refusal to certify an offence in relation to EA/2018/0086. By a written decision dated 14 March 2022, Judge Wikeley refused that application. Mr Harron's application to set aside the refusal of permission was refused on 29 June 2022.

49. By a written decision dated 15 March 2022, Judge Wikeley refused to grant Mr Harron permission to appeal against a decision of the FTT to strike out his appeal against a decision notice of the Commissioner relating to a FOIA request made on 29 July 2020. Mr Harron invited me to consider Judge Wikeley's decision. As a permission decision, it is not binding on me; it does not advance Mr Harron's case.

Legal framework

Requests for information under FOIA

50. Part I of FOIA sets down a scheme for access to information held by public authorities. Section 1(1) confers a general right of access to the extent that 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 or her.

51. Any person may apply to the Commissioner for a decision on whether his or her request for information has been dealt with in accordance with the requirements of Part 1 of the Act (section 50(1) of FOIA). The Commissioner may (under section 51) investigate the public authority's compliance. In cases in which the Commissioner has decided that there has been non-compliance, the Commissioner will serve notice of that decision on the

requestor and on the public authority (section 50(3)(b)). The decision notice must specify the steps which must be taken by the public authority and the period within which they must be taken (section 50(4)).

52. Where a decision notice has been served, the requestor or the public authority may appeal to the FTT (section 57). The FTT's jurisdiction is contained in section 58:

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

In the present case, the FTT substituted a decision notice for that of the Commissioner under section 58(1) by requiring RMBC to take specified steps within a specified time period.

Certification of an offence of contempt

53. The certification provisions of section 61 of FOIA replaced para 8 of Schedule 6 to the Data Protection Act 1998 ("the 1998 Act") which gave the FTT a power to certify an offence and the High Court a power to deal with the certified offence. Section 61 retains the FTT's power to certify but the power to deal with the certified offence now lies with the UT. There is no power to compel a public authority to comply with a substituted decision notice. In the context of para 8 of Schedule 6 to the 1998 Act, the UT has held that there is a power to punish for not doing so, although that power may operate as an incentive to comply (*Information Commissioner v Moss and Royal Borough of Kingston Upon Thames* [2020] UKUT 174 (AAC), para 1). I see no reason to take a different view about the scheme in section 61 of FOIA and would gratefully adopt Judge Jacobs' observations.

54. The principle that proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed is longstanding (for a recent restatement, see *JS (by her litigation friend KS) v Cardiff City Council* [2022] EWHC 707 (Admin), para 55). A person who breaches a court order, whether interim or final, in civil proceedings may be found to have committed a civil contempt. Given the nature and importance of the rights which Parliament has entrusted twenty-first century tribunals to determine, the public interest which the law of contempt seeks to uphold – adherence to orders made by judges – is as important to the administration of justice in tribunals as it is in the courts. There is no sound reason of principle or policy to consider that any

different approach to the law of contempt should apply in tribunals whose decisions fall equally to be respected and complied with.

55. Section 61(3) of FOIA provides the FTT with a discretion to certify the breach of a substituted decision in FOIA appeals. In *Navigator Equities Limited v Deripaska* [2021] EWCA Civ 1799, para 82, the Court of Appeal summarised a number of principles that must be applied in deciding whether a person alleged to be in breach of a court order should be treated as a contemnor:

> "The following relevant general propositions of law in relation to civil contempts are well-established:
>
> i) The bringing of a committal application is an appropriate and legitimate means, not only of seeking enforcement of an order or undertaking, but also (or alternatively) of drawing to the court's attention a serious (rather than purely technical) contempt. Thus a committal application can properly be brought in respect of past (and irremediable) breaches;
>
> ii) A committal application must be proportionate (by reference to the gravity of the conduct alleged) and brought for legitimate ends. It must not be pursued for improper collateral purpose;
>
> iii) Breach of an undertaking given to the court will be a contempt: an undertaking to the court represents a solemn commitment to the court and may be enforced by an order for committal. Breach of a court undertaking is always serious, because it undermines the administration of justice;
>
> iv) The meaning and effect of an undertaking are to be construed strictly, as with an injunction. It is appropriate to have regard to the background available to both parties at the time of the undertaking when construing its terms. There is a need to pay regard to the mischief sought to be prevented by the order or undertaking;
>
> v) It is generally no defence that the order disobeyed (or the undertaking breached) should not have been made or accepted;
>
> vi) Orders and undertakings must be complied with even if compliance is burdensome, inconvenient and expensive. If there is any obstacle to compliance, the proper course is to apply to have the order or undertaking set aside or varied;

vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant;

viii) Contempt proceedings are not intended as a means of securing civil compensation;

ix) For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking)."

56. The FTT in the present case did not have the benefit of the Court's judgment which post-dates its certification decision but the judgment sets out well-established propositions of law. I agree with Mr Fitzsimons that, in order to achieve consistency between courts and tribunals, the general principles in *Navigator* should be applied by the FTT in considering whether to exercise its discretion under section 61(3).

The role of the UT on appeal

57. An appeal to the UT lies only on a point of law (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). As an appellate tribunal, the UT will on conventional principles respect the fact-finding role of the FTT. Provided that the FTT asks the correct legal questions and applies the facts, as reasonably found, to those questions, the UT will generally not interfere.

The parties' submissions on the appeal

58. In his written and oral submissions, Mr Fitzsimons submitted that the FTT had erred in law by concluding that it was beyond reasonable doubt that the Q & A document fell within the scope of the FTT's substituted decision. Neither the timing of the document (which was attached to an email sent during the period in which Mr Harron had withdrawn his request for an internal review) nor its content (which did not concern the internal review) could be regarded on the criminal standard as "arising from" the internal review which was the narrow extent of the relevant FOIA request to which the substituted decision referred. It could not possibly be said that the substituted decision was clear and unambiguous: RMBC could not have been expected to know from its very broad terms that the Q & A document was to be treated as "metadata" or that it was required to provide Mr Harron with another copy of a document that he had already, in 2016, received.

59. Mr Fitzsimons explained that the FTT certification proceedings had concentrated on the general legal question of whether email attachments – rather than only the emails themselves – were capable of falling within the terms of the substituted decision. The FTT had not put to RMBC the specific allegation that the Q & A document fell within the scope of the decision (as opposed to being simply an attachment to an internal email

within RMBC). Mr Fitzsimons submitted that the FTT ought as a matter of fairness to have put the allegation to RMBC before certifying an offence.

60. Turning to the exercise of the FTT's discretion to certify, Mr Fitzsimons submitted that the FTT had failed to consider whether there was any public interest in certifying an offence of contempt on the basis of RMBC's failure to provide a copy of the Q & A document within the timeframe set down in the substituted decision when it was subsequently supplied in 2021. The public interest was questionable when RMBC's omission related to a single document out of many hundreds and when such a document was not specifically mentioned in the substituted decision.

61. In his written and oral submissions, Mr Harron took me in detail to the chronology of his sustained communications with RMBC since 2014. He emphasised the importance of full and transparent discussion between him and RMBC in relation to the booklet and in relation to his public activities which were intended to help the victims of child sexual exploitation and child sex abuse. He contended that RMBC had withheld relevant information both from the Commissioner and from the FTT. He drew my attention to those passages in the FTT's appeal decision in which it criticised the quality of RMBC's decision-making and the processes it had applied in dealing with Mr Harron's FOIA requests.

62. Mr Harron conceded that he had received a copy of the Q & A document during the meeting on 12 August 2016. He submitted that the important issue was not the existence of the document but his request for information about how the document (which he submitted was deeply flawed) had been constructed. He pointed to the piecemeal way in which RMBC had provided him with information. He submitted that all that RMBC had needed to do in order to comply with his FOIA requests was to sit down with him and have a conversation with him. He should have been afforded better treatment as he was an established campaigner providing a voice for the voiceless.

63. Mr Harron provided me with a list of 17 people – including numerous RMBC officials and the Leader of RMBC who (he submitted) had failed to take proper opportunities to supply "answers to important questions."

64. Mr Harron told me that he did not mind the fact that RMBC had stopped using his booklet but he did object to what he regarded as RMBC's failure to explain why the booklet was no longer used. He said that, at the centre of his argument, was his concern that RMBC had given reasons for ceasing to distribute his booklet that came from unidentified sources. He alleged that RMBC had gone to inordinate lengths to avoid providing full information.

65. Mr Harron drew my attention to the written submissions that he had made before Judge O'Connor. He highlighted various passages dealing with what he regarded as the demonstrative failings of various individuals within RMBC. He expressed particular concern about Ms Imray's involvement with various FOIA requests. He referred me to an email from Ms Imray dated 20 November 2015 to a redacted recipient in which she stated: "This is getting slightly ridiculous – we will be going over the 18 hours at this rate. I emailed [redacted name] from my private email address asking them for a view. I am not obliged to disclose this so I am not going to but what I asked and why I asked it is set out in the long response to question 2. …". He said that it had taken him several

FOIA requests to "get to the bottom" of this email. This was a good example of how RMBC constructed documents by seeking input from more than one person. In relation to the Q & A document of 2016, he had not been provided with information to show which individuals were responsible for which parts of the document.

66. Mr Harron submitted that the responses to the questions raised in the Q & A document (particularly in relation to Question 2 and Question 5) were incomplete and demonstrated to the criminal standard that RMBC had wilfully refused to provide proper answers to questions. He made criticisms of particular RMBC officials. He was particularly critical of Ms Imray. I do not propose to be drawn into an analysis of the merits of the answers within the Q & A document which strike me as irrelevant to the legal issues that fall for consideration.

67. In written submissions, the Commissioner set out the material chronology in order to demonstrate that, by the time that the Q & A document was drafted, Mr Harron's review request had been withdrawn such that the Q & A document could not be regarded as "arising from" that request. None of the five questions in the Q & A document related to the request for an internal review or from any email communications internal to RMBC relating to an internal review. It followed that the Q & A document was not within the scope of Request 3 and so not within the FTT substituted decision which related only to Request 3.

Analysis and conclusions on the appeal

68. The certification proceedings concerned only Request 3 which was narrow in scope: it concerned only information "arising from" the request for an internal review of 29 June 2016 which was withdrawn on 19 July 2016 and reinstated on 26 October 2016. Any information falling outside the scope of Request 3 fell outside the scope of the FTT's substituted decision which concerned Request 3 alone. Any act or omission falling outside Request 3 could not lawfully be regarded as breaching the substituted decision and could not lawfully be a candidate for a contempt.

Fairness

69. The burden lay on Mr Harron to raise clear and comprehensible allegations (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2016] EWHC 192 (Ch), para 41). The FTT noted that he had repeatedly and consistently highlighted the Q & A document during the overall course of the certification proceedings. The FTT did not however provide adequate reasons why repeated references to a document may in themselves amount to an allegation of contempt.

70. As I have mentioned, I have considered Mr Harron's written submissions produced for the FTT certification proceedings. They do not contain any clear or comprehensible allegation that he ought to have received the Q & A document as part of the FTT's requirements in the substituted decision. Conversely, there was no burden on RMBC to discern, infer or otherwise ascertain for itself that a document that Mr Harron did not want and that he had received long before the substituted decision was a candidate for contempt.

71. The court in the *Navigator* case (para 79) recognised the need for a "high standard of procedural fairness." The court reiterated the need for fairness at para 132:

> "There can be no doubt that the making of an application for civil contempt is a significant step which carries potentially very serious consequences for a respondent, including the loss of liberty. As already indicated and set out above, there must be a correspondingly high standard of fairness."

72. In my judgment, the FTT ought as a matter of fairness to have ensured that any breach of a requirement to provide a copy of the Q & A document in response to the substituted decision was put to RMBC as a specific allegation and dealt with at the hearing. The FTT's decision to treat RMBC as contemptuous on the basis of an allegation not clearly put to RMBC was a material error of law because RMBC was not given a fair opportunity to deal with the allegation.

73. Mr Harron was a litigant in person ("LIP") without the benefit of counsel to filter or refine his allegations. It is common in FOIA proceedings in the FTT for individuals to appear as LIPs. It is irrelevant to the proper application of the law of contempt that a person does not have a lawyer. The same standards of fairness to the putative contemnor apply. The FTT must ensure – through early case management or otherwise – that the allegations are provided in clear terms to the party accused of breach.

The chronology

74. Mr Harron withdrew his request for an internal review on 29 June 2016. He did not reinstate the request until 26 October 2016. The Q & A document was attached to an internal RMBC email from Eira Owen to Ian Thomas and Sumera Shabir dated 10 August 2016. It follows that the Q & A document was attached to an email produced after Mr Harron had withdrawn his request for an internal review and before he had reinstated it. On the date of the email to which the Q & A document was attached, there was no pending review.

75. In its certification decision, the FTT did not adequately explain how a document produced during a period in which no review was pending was – to the criminal standard - a document "arising from" a review. In my judgment, it was not open to the FTT to conclude that a document attached to an email sent after the withdrawal of the request for a review was a document "arising from" that review.

76. As I have indicated, Mr Harron's concern was that the Q & A document was constructed over a period of time. He submitted that there could be other, undisclosed information – such as text written by various people within RMBC – that contributed to a final version or that was edited for inclusion in the Q & A document. However, Mr Harron's submission is inconsistent with the FTT's finding that the evidence before it did not even begin to make a case that there was other information falling within the terms of the substituted decision notice that had not been disclosed. Even if more than one person drafted some of the text for inclusion in a final version, I was directed to no evidence which would prove on the criminal standard that any part of the Q & A document (which is alone the subject of the FTT's certification) was drafted while any internal review was pending.

77. In any event, the issue in the appeal is not whether there were some further, undisclosed documents falling outside the certification decision but whether the certification was one which a reasonable tribunal could make. In the absence of persuasive evidence that any part of the Q & A document was drafted during the currency of an internal review, the FTT was not reasonable to conclude that the Q & A document fell within the scope of Request 3 and was not reasonable to conclude that RMBC had breached its duty under the substituted decision to disclose the Q & A document. These conclusions, which were not open to the FTT, amount to material errors of law.

The subject matter

78. In addition, it needs to be recalled that the FTT's substituted decision related to a FOIA request for information arising from a request for an internal review arising from a request for information generated when processing a FOIA request. There are five questions within the Q & A document. In broad terms, the questions concern the purchase and distribution of Mr Harron's booklet; the author of a paragraph within a 2015 email; Ms Imray's awareness of a FOIA request; and Ms Imray's email communications about the booklet.

79. In light of their nature, it cannot reasonably be concluded that any of those questions arose from the internal review that had been requested. None of the five questions can reasonably be regarded as "arising from" the request for an internal review in the terms in which the review was sought, as opposed to some other form of interaction between Mr Harron and RMBC. For that reason too, the Q & A document fell outside the scope of the FTT's substituted decision and could not be the foundation of any breach of the FTT's requirements.

80. Even if Mr Harron had intended the questions in the Q & A document to mirror what he wanted to achieve from an internal review, the FTT accepted (correctly) that, in order to certify an offence, the non-disclosure of information must fall clearly and unambiguously within the terms of the FTT's substituted decision (see *Navigator*, para 82(ix), above). Although the FTT properly directed itself in law in this regard, it failed to apply the law to the facts in a way that was open to it. The Q & A document was sent other than in the course of an internal review and, on its face, it dealt with questions of a general nature about Mr Harron's longstanding complaints about his treatment in relation to his booklet. In my judgment, the background and context mean that no reasonable tribunal could conclude that it fell clearly and unambiguously within the terms of the substituted decision. The FTT's conclusion amounted to a material error of law.

The administration of justice

81. Mr Harron received a copy of the Q & A document in August 2016. In my judgment, it would be highly unlikely that a court would treat a public authority as a contemnor in relation to something that had already taken place prior to the commencement of any court proceedings. Such a step would be to punish a public authority for (at most) a "purely technical" contempt (contrary to *Navigator*, para 82(i), above) and would not be proportionate (contrary to *Navigator*, para 82(ii), above). The same approach should have been applied by the FTT.

82. The FTT certified an offence in relation to a single document among the numerous other documents that RMBC had supplied to Mr Harron. On this basis too, any contempt order was bound to be disproportionate and so no offence should have been certified. The interests of the administration of justice are not served by disproportionate contempt orders. The FTT erred in concluding that its certification served the administration of justice.

Conclusion on the appeal and remaking the decision

83. For these reasons, the FTT's decision to certify an offence to the UT was wrong in law. RMBC's appeal is allowed. The FTT's decision is set aside.

84. Neither party submitted that I should remit the question of certification to the FTT. I am able to remake the decision.

85. It would plainly be insupportable for me to certify an offence in relation to the Q & A document. The FTT found that there were no other grounds to conclude that the substituted decision notice had been breached and that there were no other grounds to certify an offence. Considering the matter for myself, I have reached the conclusion that there are no other grounds for certification.

86. Mr Sayers' evidence – which I admit for the purpose of remaking the decision – related in the main to issues relating to the Q & A document. Mr Harron cross-examined Mr Sayers about his personal competence. Mr Sayers agreed that in late October 2016 he had become Mr Harron's designated "single point of contact" for his dealings with RMBC officials. As such he had put in place technical measures so that emails from Mr Harron to RMBC were automatically directed to him. This technical fix included, for less than 24 hours, emails sent to elected councillors. When that error came to light, Mr Sayers acknowledged that he had made an error and took steps to put it right.

87. Mr Sayers' evidence was honest, measured and consistent with the documents. I accept that diverting Mr Harron's emails away from democratically elected councillors was simply a mistake. In my judgment, the culpability of that mistake is mitigated in the context of the significant time and resources that Mr Sayers and RMBC dedicated to Mr Harron's 43 FOIA requests, 19 requests for internal review in relation to FOIA requests, 24 subject access requests under data protection legislation and 18 requests for internal review in relation to subject access requests. I accept that additional resources were required to service Mr Harron's use of multiple email addresses (13 on Mr Sayers' evidence; 7 on Mr Harron's account). In my judgment, this line of cross-examination demonstrated no more than an error which was rectified; it had nothing to do with contempt of court.

88. Nothing of significance arose in cross-examination by Mr Harron in relation to any wider grounds for certification. No persuasive or realistic grounds for certification have been advanced before me. I refuse to certify any offence.

My powers of inquiry

89. In the absence of any certification under section 61((4) of the Act, the UT has no jurisdiction to undertake an inquiry under section 61(5) and so I decline to do so.

90. The UT directed the parties to deal both with the appeal and with the inquiry in tandem because this is the first case in which the contempt provisions of section 61 have been considered by the UT. It was in the interests of the overriding objective for the UT to have the ability to take a compendious view of how the certification process should operate. In future cases, the UT may wish to hear and decide any appeal before embarking on an inquiry.

91. There must at any rate be a rigid divide between appellate proceedings and any inquiry because the statutory criteria for allowing an appeal and those that govern an inquiry are not the same. As part of that rigid divide, I do not propose to deal with anything that would have arisen from my exercise of the UT's contempt powers which, as a matter of law, fall outside my jurisdiction in light of my conclusions on the appeal.

THE HON MRS JUSTICE FARBEY

Authorised for issue on 23 January 2022