Forstater v Information Commissioner and others
[2023] UKUT 303 (AAC)

IN THE UPPER TRIBUNAL **UT ref: UA-2022-000248-GIA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Ms Maya Forstater

Appellant

- v –

The Information Commissioner

First Respondent

and

The Ministry of Justice

Second Respondent

and

The Judicial College

Third Respondent

Before: Upper Tribunal Judge Wright

Decided after a hearing on 19 July 2023

Representation: **Naomi Cunningham** of counsel for Ms Forstater
Katherine Taunton of counsel for the Information Commissioner
Ravi Mehta of counsel for the Ministry of Justice and the Judicial College

Decision date: 14 December 2023

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal dated 30 November 2021 did not involve the making of any error of law.

REASONS FOR DECISION

Introduction

1. This a somewhat unusual appeal because it concerns at its heart whether the body to which the information request was made was a "public authority" for the

purposes of the Freedom of Information Act 2000 ("FOIA") at the time the request was made to that body. If the body to whom the request was made was not a public authority under FOIA then that is the end of the matter. This is because the general obligation under section 1 of FOIA to provide the information requested only arises if the request is made to a "public authority".

Relevant background

2. The appeal arises from a request made by Ms Fostater to what was at the time Her Majesty's Courts and Tribunals Service ("HMCTS") on 18 March 2020. The request asked for information concerning training Ms Forstater understood had been delivered by an organisation called 'Gendered Intelligence' on 'Trans awareness' to judges of the employment and asylum and immigration tribunals. The request asked for the costs of the training, the contract/agreement/terms of reference for the commissioning of the training, the materials used at the training and the names of the judges who had attended the training.

3. The request led to a response at the end of March 2020. As the First-tier Tribunal (FTT) noted, the response was on Ministry of Justice ("MoJ") notepaper and was signed by an individual on behalf of the "Judicial College". The substance of that response was that the information was not held by the MoJ as:

> ""statutory responsibility for the provision and content of training for the judiciary rests with the Lord Chief Justice as Head of the Judiciary in England and Wales, and the Senior President of Tribunals, in line with the Constitutional Reform Act 2005…. [and]…the Judiciary are not a public authority for the purposes of FOIA…"

4. Ms Forstater sought an internal review of this decision by "HMCTS/the Judicial College" on the basis that, although the judiciary is not a public authority for the purposes of FOIA:

> "the Judicial Studies Board is listed under Schedule 1 [of FOIA] The Judicial College was formerly the Judicial Studies Board and there has been no indication that it has been removed from the scope of the Freedom of Information Act."

5. The reply to this internal review request was also issued on MoJ headed notepaper and was signed (electronically) by the Judicial College. The material parts of that reply, as far as this appeal is concerned, read as follows:

> "All information on judicial training that is held by the Judicial College, is only held on behalf of the judiciary of England and Wales, who are exempt from the provisions of the FOIA 2000 by not being cited as a public authority in Schedule 1 of the FOIA. Which is why it is not held by the MoJ.

6. The above is sufficient to describe the central issue which arises on this appeal.

7. The FTT set out the issues it considered fell for its consideration in the following terms:

> "(1) Is the Judicial College a public authority for the purposes of FOIA?
>
> (2) If yes, does the Judicial College hold any part of the requested information?
>
> (3) Irrespective of the answer to (1) above, does the Ministry of Justice hold any part of the requested information?

> (4) If the answer to either (2) or (3) above is in the affirmative, should the Tribunal issue a Substituted Decision Notice directing production of that part of the requested information that is found to be held?"

8. The FTT answered the first of these questions in the negative: the Judicial College is not a public authority for the purposes of FOIA. It also found that the MoJ is a public authority under FOIA, and that the MoJ held information falling within the scope of Ms Forstater's request in respect of the cost of the "Trans Awareness Training delivered to the ET and AIT by Gendered Intelligence".

9. The FTT gave detailed reasons for why it found that the Judicial College is not a public authority for the purposes of FOIA. Given the challenge by Ms Forstater to the FTT's decision on this issue, I set most of that reasoning out below.

> "22…..the Judicial College is not named within Schedule 1 to FOIA. Given the unambiguous terms of section 3 of FOIA, one could be forgiven for thinking that this is all that requires saying on this issue. However, the appellant asserts that although the Judicial College is not listed by name within Schedule 1, it is nevertheless a body listed therein as the successor to the Judicial Studies Board, a body which is specifically named within that schedule.
>
> 23. Amelia Wright provided the Tribunal with detailed written and oral evidence on the history and operational scope of both the Judicial Studies Board and the Judicial College, which we accept as accurate in its entirety. This evidence was clear, plausible and consistent throughout.
>
> 24. The Judicial Studies Board was set up in 1979, following a review by Lord Justice Bridge, to provide training for judges in the criminal jurisdiction. In 1985, its role was extended to cover the provision of training in the civil and family jurisdictions and the supervision of training for magistrates and judicial chairs and members of tribunals.
>
> 25. Prior to the Constitutional Reform Act 2005 coming into force in April 2006, the position was that the Judicial Studies Board was a non-departmental public body overseen by the Lord Chancellor (a Cabinet Minister). The Permanent Secretary of the Lord Chancellor's Department (a senior civil servant) was responsible for advising the Lord Chancellor on how the Judicial Studies Board's plans fitted into his or her overall strategy. As well as providing training, the Judicial Studies Board advised the Lord Chancellor and other government departments on the policy for, and content of, training for lay magistrates, appropriate standards for, and content of, training for judicial officers in Tribunals and on the training requirements of judges, magistrates and judicial officers in Tribunals. Operational objectives were agreed annually between the Lord Chancellor and the Judicial Studies Board. The Chair (a member of the senior judiciary) and board members of the Judicial Studies Board were appointed by the Lord Chancellor. Each year the Judicial Studies Board made a report to the Lord Chancellor on its activities. The Lord Chancellor and the Minister of State were answerable to Parliament on matters relating to the Judicial Studies Board. Staff within the Judicial Studies Board were all civil servants.

26. In his oral statement to the House of Lords on 26 January 2004, the Secretary of State and Lord Chancellor set out detail on the Government's proposals for the transfer of the Lord Chancellor's judiciary-related functions to the Lord Chief Justice. Judicial independence was enshrined in law with the commencement of the Constitutional Reform Act 2005 and all judicial functions previously held by the Lord Chancellor transferred to the Lord Chief Justice.

27. In November 2009, the Lord Chief Justice and the Senior President of Tribunals agreed to establish the Unified Judicial Training Advisory Board ("UJTAB") under the chairmanship of Lord Justice Sullivan. The UJTAB was asked to advise them on unified judicial training and in its July 2010 report it recommended the establishment of a joint Judicial Training College - a single judicial training organisation in England and Wales for judges, legal advisers, magistrates and non-legal members of tribunals. The Lord Chief Justice and Senior President accepted the recommendation.

28. There was a transition period during which the Judicial Studies Board supported the Lord Chief Justice (instead of the Lord Chancellor) in his new responsibilities for judicial training. During that time, the Judicial Studies Board transitioned to being operated as an independent judicial body and part of the Directorate of Judicial Offices for England and Wales - the forerunner of the current Judicial Office.

29. On 1 April 2011, the Judicial College came into being and at the same time the Judicial Studies Board came to an end. The Judicial College is not a body established by statute but is a constituent part of the Judicial Office, an administrative arms-length body of the Ministry of Justice. The Judicial College advises the Lord Chief Justice and is accountable to him through the Judicial Executive Board.

30. There is no dispute that the Judicial Studies Board was listed as a public authority in Schedule 1 to FOIA prior to the Constitutional Reform Act 2005 and that, despite the transfer of functions from the Lord Chancellor to the Lord Chief Justice as a consequence of that Act and the subsequent extension of Judicial Studies Board's remit, it remained listed in Schedule 1 and, indeed, remains listed to this date. It is also beyond dispute that in the approach to 1 April 2011, the functions and operation of the Judicial Studies Board closely resembled, or were identical to, the functions and operation of the Judicial College in the immediate aftermath of that date.

31. The appellant's primary submission is that the Judicial College is the same body as the Judicial Studies Board, with the consequence that it is a public authority by virtue of the Judicial Studies Board being listed in Schedule 1 to FOIA. We reject this submission. In doing so we need say no more than that we accept Amelia Wright's evidence that the Judicial Studies Board "*came to an end*" on 31 March 2011 and that "*On 1 April 2011, the Judicial College, a new body, came into being…*". There is nothing before us to directly contradict Amelia Wright's evidence in this regard, and the mere fact that the Judicial Studies Board fulfilled the same functions or operated with the same structure before 1 April 2011 as the

Judicial College did from 1 April 2011 does not lead us to reject the clear and consistent evidence provided by Amelia Wright.

32. The fact that the Judicial Studies Board remained listed in Schedule 1 to FOIA, despite the significant changes brought about by the Constitutional Reform Act 2005 and the coming into being of the Judicial College on 1 April 2011, is not indicative of the Judicial College being the same body as the Judicial Studies Board. The leap in logic required to reach such a conclusion is simply too great and one we are not prepared to make. In such circumstances we find, contrary to the appellant's submissions, that: (i) the Judicial College is not the Judicial Studies Board, renamed; and, (ii) the literal interpretation of the words "*Judicial Studies Board*" in Schedule 1 to FOIA is not "*the Judicial College*".

33. We now move on to consider the appellant's alternative position, which is put in the following terms in paragraph 32 of the appellant's skeleton argument of 13 October 2021:

> "If the Tribunal does not accept that the interpretation urged by the appellant is a straightforward literal construction of the words of the schedule, it is in any event a properly purposive construction. The will of parliament should be given effect, not thwarted: and since the JSB was included on the schedule when the Act came into force in 2005, and parliament has not since then evinced any intention to remove it or to take a different view of the proper status of the JC, giving effect to the will of parliament involves interpreting the words "Judicial Studies Board" to mean the JSB's successor body, the JC. If necessary, it is submitted that the conditions are met for a "rectifying construction" to substitute the words "Judicial College" for "Judicial Studies Board": see Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others [2000] 1 WLR 586."

34. Once again, we reject the appellant's submission. It is beyond legal argument that there is a presumption that the text of a statute is the primary indication of Parliament's intention and that the enactment is to be given its literal meaning. If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying interpretive criteria. Where the meaning of statutory words is plain and unambiguous it is not for the courts or tribunals to interfere, nor invent ambiguities.

35. In our view the words "*Judicial Studies Board*" could not be clearer. They refer to the body known by that name and described above, which was set up in 1979, was in existence at the time of the passing of FOIA and which ceased to exist on 31 March 2011. What the appellant urges the Tribunal to do is to read words into FOIA that are not there. This is not beyond the scope of the Tribunal's jurisdiction, but this jurisdiction is confined to plain cases of drafting mistakes: see Inco Europe Ltd. and Others at [592E]. The absence of an Order made pursuant to section 4 of FOIA to either remove the Judicial Studies Board from Schedule 1 to the Act or to add the Judicial College thereto, is not akin to a drafting mistake in the words of a statute. If the tribunal were to conclude otherwise, we

> would in effect be, in our view impermissibly, taking on a function reserved by statute to either the "*Secretary of State or the Minister for the Cabinet Office*". We have no evidence as to why the Judicial College has not been added to the list of public authorities in Schedule 1 of FOIA, nor do we have evidence as to why the Judicial Studies Board has not been removed from such list and, in our view, it would be entirely wrong to speculate on such matters.
>
> 36. The appellant makes one further submission in her attempt to persuade the Tribunal that the Judicial College is a public authority for the purposes of FOIA, and that is to place reliance on responses to FOIA requests issued by the Judicial College between 2013 and 2015, in which the Judicial College identifies itself as being subject to FOIA. The issue of whether the Judicial College is a public authority listed in Schedule 1 to FOIA is, however, one of legal interpretation. The fact that individuals within the Judicial College, or even the Judicial College itself, took the position that it was a public authority for the purposes of FOIA is not a matter capable of bearing on the legal analysis required to determine that issue."

Relevant statutory framework

10. Section 1 of FOIA provides, subject to immaterial exceptions on this appeal, the core duty under FOIA. It states:

> "**General right of access to information held by public authorities.**
>
> 1(1) A 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."

The underlining, which is mine, makes it clear that the duty under section 1 only arises in respect of information held by a "public authority".

11. Just what is a "public authority" for the purposes of FOIA is defined by section 3 of that Act.

> "**Public authorities.**
>
> 3.(1) In this Act "public authority" means—
>
> (a) subject to section 4(4), any body which, any other person who, or the holder of any office which—
>
> (i) is listed in Schedule 1, or
>
> (ii) is designated by order under section 5, or
>
> (b) a publicly-owned company as defined by section 6.
>
> (2) For the purposes of this Act, information is held by a public authority if—
>
> (a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

12. Section 4 of FOIA is also relevant, and provides, in so far as is material, as follows:

> "**Amendment of Schedule 1.**
>
> 4.(1)The Secretary of State or the Minister for the Cabinet Office may by order amend Schedule 1 by adding to that Schedule a reference to any body or the holder of any office which (in either case) is not for the time being listed in that Schedule but as respects which both the first and the second conditions below are satisfied.
>
> (2) The first condition is that the body or office—
>
> (a) is established by virtue of Her Majesty's prerogative or by an enactment or by subordinate legislation, or
>
> (b) is established in any other way by a Minister of the Crown in his capacity as Minister, by a government department…..
>
> (3) The second condition is—
>
> (a) in the case of a body, that the body is wholly or partly constituted by appointment made by the Crown, by a Minister of the Crown, by a government department…., or
>
> (b) in the case of an office, that appointments to the office are made by the Crown, by a Minister of the Crown, by a government department…..
>
> (4) If either the first or the second condition above ceases to be satisfied as respects any body or office which is listed in Part VI or VII of Schedule 1, that body or the holder of that office shall cease to be a public authority by virtue of the entry in question.
>
> (5) The Secretary of State or the Minister for the Cabinet Office may by order amend Schedule 1 by removing from Part VI or VII of that Schedule an entry relating to any body or office—
>
> (a) which has ceased to exist, or
>
> (b) as respects which either the first or the second condition above has ceased to be satisfied.
>
> (6) An order under subsection (1) may relate to a specified person or office or to persons or offices falling within a specified description…."

13. Sections 5 of FOIA provides as follows:

> "**Further power to designate public authorities**.
>
> 5.(1) The Secretary of State or the Minister for the Cabinet Office may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—
>
> (a) appears to the Secretary of State or the Minister for the Cabinet Office to exercise functions of a public nature, or
>
> (b) is providing under a contract made with a public authority any service whose provision is a function of that authority.

> (2) An order under this section may designate a specified person or office or persons or offices falling within a specified description.
>
> (3) Before making an order under this section, the Secretary of State or the Minister for the Cabinet Office shall consult every person to whom the order relates, or persons appearing to him to represent such persons."

14. No argument was made before me relying on anything in section 6 of FOIA, which defines what is a "publicly-owned company" for the purposes of section 3(1)(b) of FOIA.

15. I need not set out Schedule 1 to FOIA here. It is broken down into seven Parts covering: Part I "General" (which, for example, covers any government department); Part II "Local Government"; Part III "The National Health Service"; Part IV "Maintained Schools and other Educational Institutions"; Part V "Police"; Part VI "Other Public Bodies and Offices: General"; and Part VII "Other Public Bodies and Offices: Northern Ireland".

16. As we shall see, the "Judicial Studies Board" was listed in Part VI of Schedule 1 to FOIA up to 1 September 2022 and so was listed as a public authority in FOIA at the time of Ms Forstater's request in March 2020.

17. It is common ground that the "Judicial College" has never appeared in Schedule 1 to FOIA. (Nor has it been designated as a "public authority" under section 5 of FOIA.)

18. Pausing at this point, and just looking at matters generally, on the face of it the provisions in sections 3-5 of FOIA might be thought to provide a complete code for whether a body is a "public authority" for the purposes of the Act. A body is a public authority if it is named in Schedule 1 to FOIA and is not if it does not appear in Schedule 1 and is not designated by an order under section 5: see, relatedly, paragraph [56] of Sugar v BBC *Sugar v BBC* [2009] UKHL 9; [2009] 1 WLR 430 (discussed in paragraph forty three below). Moreover, the mechanism for making a body a public authority for the purposes of FOIA is for the Secretary of State or Cabinet Office Minister to add it to Schedule 1 under section 4(1) of FOIA. However, until that has been done (and ignoring for present purposes a designation Order under section 5 of FOIA) the body is not a "public authority" under FOIA. This would appear to the plain effect of section 3(1)(a)(i) of FOIA: regardless of whether the two conditions in section 4(2) and (3) are both met, Schedule 1 has to be amended under section 4(1) in order for the body to be "listed in Schedule 1".

19. By contrast, certain bodies (that is, those listed in Parts VI or VII or Schedule 1 to FOIA) will cease to be public authorities for the purposes of FOIA, it would seem, simply by virtue of the body having ceased to satisfy either the condition in section 4(2) or the condition in section 4(3) of FOIA, even though the body may continue to be named in Schedule 1 to FOIA. For this class of extinguishment it is not necessary for Schedule 1 to be amended under section 4(5) of FOIA. Section 4(5) empowers, but does not oblige, the amendment by order so as to remove from Schedule 1 a body which has ceased to exist or which has ceased to satisfy either of the conditions in section 4(2) and (3) of FOIA.

The Upper Tribunal proceedings

20. Ms Forstater sought permission to appeal against the FTT on eight grounds. Many of these grounds overlap. They are that the FTT erred in law:

> (1) in failing to make any finding on the crucial factual issue that determined whether the Judicial College was the same body as the Judicial Studies Board, namely what was the nature of the change that took place on 1 April 2011;
>
> (2) in approaching the legal questions for its determination on the basis that the Appellant bore a "burden of proof" to satisfy it that the Commissioner's decision was wrong in law;
>
> (3) in approaching its factual determination about the nature of the transition from the Judicial Studies Board to the Judicial College on the basis (tacit, or implicit) that the Appellant bore the burden here too;
>
> (4) in finding (at paragraph 32) with no proper basis in the evidence that the Judicial College was separate body from the Judicial Studies Board, and not simply the same body under a new name;
>
> (5) in failing, if necessary, to give the expression "the Judicial Studies Board" a properly purposive construction to give effect to Parliament's evident intention in the drafting of Schedule 1;
>
> (6) in failing, if necessary, to adopt an amending construction of the expression "the Judicial Studies Board" in Schedule 1 to the same end;
>
> (7) in failing, when considering the appellant's submission that the purpose of the Judicial College was to train the judiciary, to consider or decide what the purposes of the Judicial College were, or whether they included the training of the judiciary; and
>
> (8) in inferring from its conclusion that the information was held by the Judicial College to support its judicial functions that the Judicial College held the information on behalf of the judiciary, and (by implication) not for its own purposes.

21. Permission was refused on all eight grounds by the Chamber President of the First-tier Tribunal, Upper Tribunal Judge O'Connor. However, Upper Tribunal Judge Wikeley granted Ms Forstater permission to appeal on grounds 1, 3 and 4, but refused permission to appeal on the five other grounds of appeal. Judge Wikeley (rightly in my view) characterised the three grounds on which he gave permission to appeal as all "amounting to a challenge to the First-tier Tribunal's findings of fact and reasoning in paragraphs [31] and [32] of its decision". That is a view which Ms Forstater shares: see paragraph 2 of appellant's reply of 6 January 2022. Judge Wikeley went on to comment:

> "it is conceivable that in the absence of any explanation as to the nature of the transition from the JSB to the JC that "the only available inference … was that the body responsible for the training of judges had changed its name" (as it is put in ground 4). Indeed, whether or not these grounds of appeal have real merit there is in any event a public interest in ensuring that the status of the JC as a public authority subject to FOIA (or not, as the case may be) is clarified at this level."

22. With the consent of the parties, the remaining five grounds on which permission was being sought were the subject of a rolled-up hearing at the same time as the appeal hearing on the three grounds for which Ms Forstater had permission to appeal. By 'rolled-up' I mean that argument could be put forward on why permission to appeal should be given (or refused) on any of the other five grounds of appeal and why the appeal should be allowed (or refused) on any of those grounds. However, grounds 2 and 6 were not pursued by Ms Forstater before me. Ms Cunningham also told me that Ms Fostater was no longer relying on the *Inco Europe* line of argument she had made to the FTT: see paragraphs 33-35 of the FTT's decision.

Discussion and Conclusion

23. Ms Forstater, through Ms Cunningham, raised a number of what I will term policy issues before me at outset of the oral hearing of the appeal – such as, that judicial training "should not be secret", that decisions about training are not about the exercise of judicial functions, and that judicial independence is undermined by not being subject of FOIA – by way of general argument. I did not find these arguments to be of any real assistance. The legal issue before me on this appeal is not whether the Judicial College ought to be listed in Schedule 1 to FOIA. As I have already said, it was common ground before me that a body called the 'Judicial College' has never appeared in Schedule 1 to FOIA.

24. Ms Forstater's arguments at their core came down to two propositions First, in the statutory context set out above can the listing of the 'Judicial Studies Board' in Schedule 1 to FOIA up to 1 September 2022[1] lawfully (as a matter of statutory construction) be read as meaning the 'Judicial College'? Second, though this may be no more than an aspect of the first argument, did the evidence before the FT show only that the Judicial Studies Board had done no more than change its name to the Judicial College and, therefore, the Judicial College had to be read as being the Judicial Studies Board at the time of Ms Forstater's request in March 2020? I will take these two overarching points first before addressing, insofar as it remains necessary to do so, the grounds of appeal on which Ms Forstater still relies.

25. The argument that the 'Judicial College' as a matter law – or, as it was put to the FTT, as a matter of literal construction of the words of Schedule 1 to FOIA - is the same body as, and must be read as being, the 'Judicial Studies Board' under Schedule 1 of FOIA as at 18 March 2020 has no merit. It is not disputed that a body called the Judicial College has never appeared in Schedule 1 to FOIA. It was therefore, per section 3(1)(a)(i) of FOIA, not listed in Schedule 1 to FOIA on 18 March 2020 and so, as a matter of law, was not a "public authority" under (section 3) of FOIA. The fact that the Judicial Studies Board remained listed in Schedule 1 to FOIA for over eleven years after it had ceased to exist is taken by the appellant, in my judgment, to prove too much. I cannot see that this historical fact alone, and absent any other considerations, can show the necessary legal intendment that the Judicial College should be treated as the Judicial Studies Board. The most likely explanation is that the relevant Minister simply did not get round to the amending Schedule 1 of FOIA under section 4(5)(a) of FOIA once the Judicial Sturdies Board had ceased to exist. Alternatively, the Minister may have thought that as the Judicial Studies Board

[1] The Judicial Studies Board was removed from Schedule 1 of FOIA with effect from 1 September 2022 by Article 2 and the Schedule to the Freedom of Information (Removal of References to Public Authorities) Order 2022 (SI 682 of 2022).

had ceased to exist, it was no longer "established" under section 4(2) of FOIA and therefore that alone was sufficient to mean it no longer constituted a public authority for the purposes of FOIA. However, the detail of the mechanisms in section 4 of FOIA for adding a body to FOIA as a "public authority" (section 4(1)) or removing a body as a public authority from the scope of FOIA (section 4(5)), points in my judgment strongly against mere inaction on the part of the Minister as a constituting a positive intendment that 'Judicial Studies Board' was to be read as meaning 'Judicial College' in Schedule 1 to FOIA.

26. There is also no merit in my judgment in the argument that the evidence before the FTT showed only that the Judicial Studies Board had changed its name to the Judicial College, but otherwise it was a body which was exercising the exact same functions, and therefore adopting what I will call a functional approach to statutory construction (or more accurately the application of the statutory words to the evidence) the FTT had erred in law in not finding the Judicial College was the Judicial Studies Board in March 2020.

27. There are several problems with this argument.

28. First, as I have touched on in paragraph eighteen above, it is at least arguable, given the detailed code for adding and removing bodies as public authorities under FOIA found in section 4 of that Act, that evidential considerations do not apply in determining whether a body which is not listed in Schedule 1 to FOIA should be held as being a body which is in fact listed in Schedule 1. In such a case it may be said that the remedy provided for by Parliament is not to go behind the references to bodies listed in Schedule 1 but instead to seek the addition of the new body and removal of the old body under, respectively, sections 4(1) and 4(5) of FOIA.

29. However, Mr Mehta at least was prepared to concede that there may be a case where if *all* that was in issue was a change of name of the public authority, it may be open to argument that the renamed body, where it otherwise remains in terms of its function and responsibilities on all fours with its previous named incarnation, falls to be read as being the body listed in Schedule 1 to FOIA. I suppose such a case might fit consistently with the terms of section 4(2) or 4(3) of FOIA if it can be shown, for example, that the body with the new name remains the body established by appointment made by a Minister of the Crown. However, it seems to me that the evidence in such a case would need clearly to show that this was the case.

30. Mr Mehta stressed, however, that even if such an argument could be made, this was not such a case. I agree. There was no positive evidence before the FTT showing that all that occurred on 1 April 2011 was that the 'Judicial Studies Board' changed its name to the 'Judicial College', but otherwise the Judicial Studies Board remained in place as the (same) body (save for a name change) established, for example, by Royal Prerogative. The absence of a such evidence is not the same as evidence that all that occurred was a name change.

31. Second, it seems to me given the terms of section 4(1)-(3) of FOIA that the argument that the Judicial College was the Judicial Studies Board in March 2020 required that it be shown not only that there was a mere change of name but also, and as part of this, that the Judicial College remained the same body <u>established</u> by Royal Prerogative or by an enactment or subordinate legislation, or established in any other way by a Minister of the Crown, or remained the same body as had had been <u>appointed</u> by the Crown or by a Minister.

32. Third, and most directly and importantly, evidence was considered by the FTT and in my judgment it was entitled to conclude on that evidence that the Judicial College was a new body and not the same body as the Judicial College, and therefore the parts of Ms Forstater's request other than the part of it which related to the costs of the training had not been made to a public authority under FOIA. That evidence was the witness statement of Amelia Wright, executive Director of the Judicial College. Undue focus has been placed in Ms Forstater's argument, in my judgment, on what occurred at midnight on 31st March 2011 and the supposed lack of explanation about what exactly changed at that point in time. This is to take Ms Wright's evidence out of context. Read in context, as the FTT did at paragraphs 23-29 of its decision, the FTT was entitled rationally to hold that that evidence showed that the Judicial College was not the same body as the Judicial Studies Board. The Constitutional Reform Act 2005 introduced significant changes vesting judiciary-related functions in (what was then) the Lord Chief Justice instead of the Lord Chancellor. One of those functions was training the judiciary. Given the sea-change introduced by the Constitutional Reform Act 2005 with effect from April 2006, it is perhaps not surprising that it took time to ensure the appropriate structures were in place to ensure the Lord Chief Justice (and, from 2007, the Senior President of Tribunals) could deliver his statutory responsibility in respect of training. That process, on Ms Wright's evidence, took until April 2011. However, there is nothing irrational in a point in time being needed at which the Judicial Studies Board would end and the Judicial College came into being. Indeed, such a point in time must in almost all cases be a necessary part of such a change. The critical point, however, is that, as the FTT was rationally entitled to find, the Judicial College was "new body": that 'newness' being as a result of the changes brought in by the Constitutional Reform Act 2005.

33. There is in my judgment no merit in the appellant's argument that the "only rational inference from Ms Wright's evidence is that the [Judicial Studies Board] underwent substantial changes between 2005 and 2011, none of which affected its status as a schedule 1 public authority; and then changed its name with effect from 1 April 2011". As a perversity challenge to the FTT's findings of fact, this argument is quite hopeless. It ignores the detail of Ms Wright's evidence and, perhaps more critically, entirely leaves out of account the constitutional reasons why a new body was considered necessary. And the argument is not assisted by making gratuitous comments which refer to Ms Wright's evidence about the history of the Judicial Studies Board between 1979 and March 2011 being "[t]he noise of Ms Wright's sophisticated and detailed explanation".

34. The Judicial College not being listed in Schedule 1 to FOIA can therefore be seen as a conscious legislative choice, post the Constitutional Reform Act 2005 to exclude the information held by an independent judiciary and by bodies such as the Judicial College on behalf of the judiciary from the requirements of FOIA.

35. The above is sufficient to dispose of the first and fourth of the appellant's grounds of appeal.

36. However, insofar as it may be necessary for me to do so, but also given the comment Judge Wikeley made when giving permission to appeal, I address the discrete criticism of Ms Forstater that the FTT failed to make any findings about the nature of the change that took place on 1 April 2011. That argument has no merit for the reasons given by the Information Commissioner in his skeleton argument. As I

agree with the Information Commissioner I need do no more than set out that part of his skeleton argument.

> "…the FTT did make findings as to the "nature of the change that took place on 1 April 2011":
>
> (1) At paragraphs 25-27, the FTT noted: (i) that the Judicial Studies Board was (prior to the Constitutional Reform Act 2005 ("CRA 2005")) overseen and accountable to the Lord Chancellor; and (ii) the developments which took place as a result of the CRA 2005, which transferred the Lord Chancellor's judiciary-related functions to the Lord Chief Justice.
>
> (2) At paragraph 28, the FTT noted: (i) the transition period prior to 1 April 2011, in which the Judicial Studies Board supported the Lord Chief Justice (instead of the Lord Chancellor) in his new responsibilities for judicial training; and (ii) that during this time the Judicial Studies Board transitioned to being operated as an independent judicial body.
>
> (3) At paragraph 29, the FTT noted the coming into being of the Judicial College, at the same time as the Judicial Studies Board came to an end, on 1 April 2011.
>
> (4) At paragraph 30, the FTT noted that during the 'transition period' prior to 1 April 2011, the functions and operations and the Judicial Studies Board "closely resembled, or were identical to" the functions and operation of the Judicial College in the immediate aftermath of that date.
>
> (5) At paragraphs 31-32, the FTT expressly addressed – and rejected – the appellant's submission that the Judicial College is the Judicial Studies Board, renamed. It accepted the evidence of Ms Wright that the two bodies are not the same, despite the similarity of the operations and functions of the Judicial Studies Board immediately prior to 1 April 2011 to the Judicial College immediately after that date. The FTT found that there was nothing before it to directly contradict Ms Wright's evidence in this regard. It was entitled to do so: indeed, the Appellant does not rely on any conflicting evidence."

37. The only other ground of appeal for which Ms Forstater has permission concerns whether the FTT wrongly imposed the (legal and evidential) burden on her of showing that the Judicial Studies Board and Judicial College were the same body. This is an arid argument which has no merit. The argument here rests solely on what the FTT said in paragraph 19 of its decision. Having set out the relevant law the FFT said this:

> "19. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision [is] wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

38. As a matter of substance there is nothing startling or wrong in this statement. Although one might quibble with the use of the word "proof", with its connotations of establishing something on the evidence, in the context of FOIA for an appeal to be allowed under section 58 of FOIA the FTT has to "consider" that the Information Commissioner's decision notice (against which the appeal is brought) is not in accordance with the law or should have involved a different exercise of a discretion which the Information Commissioner held. That 'consideration' is the end point of the

FTT appeal process. I do not consider that in paragraph 19 the FTT was doing any more than making the obvious point that an appellant has to put forward argument to make good their appeal that one of the section 58 remedies should apply.

39. More importantly, however, the FTT's reasons when read as a whole show clearly in my judgment that it did not rely on the Ms Forstater having failed to discharge any burden of proof on her as the basis for the FTT refusing her appeal. The FTT's conclusion that the appeal failed was based on all the evidence before it including. most notably, the detailed witness statement of Ms Wright. It must be borne in mind that Ms Wright was a witness from the Judicial College. That itself substantially undercuts Ms Forstater's argument that the FTT simply placed the onus on her to make out that the Judicial College was the same body as the Judicial Studies Board. If that had been the case, the FTT would not have needed to consider Ms Wright's evidence at all. However, the FFT heard from Ms Wright, who was cross-examined by Ms Cunningham for Ms Forstater, and it based its decision on Ms Wright's evidence.

40. I should add that I find nothing in the FTT's approach which offends against the Information Commissioner's helpful summary of the relevant legal principles in this area of the law. These principles are:

> (1) the FTT is required under section 58 of FOIA to decide independently whether the Information Commissioner's decision was in accordance with the law. In doing so the FTT "must apply the law afresh to the request taking account of the issues presented at the hearing or identified by the First-tier Tribunal.": *ICO v Home Office* [2011] UKUT 17 (AAC) at paragraphs [55]-[60];
>
> (2) the "ordinary presumption" is that it is for an appellant to prove their case. The burden will rest with the appellant except where statute expressly or impliedly provides otherwise: *Khan v Custom and Excise Commissioners* [2006] EWCA Civ 89; [2006] STC 1167 at [73.7]. Neither FOIA nor the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2008 contain any express provision about the burden of proof and neither by implication remove the 'ordinary presumption' either; and
>
> (3) however, the concept of the burden of proof is of secondary importance in tribunal proceedings which involve a full merits review, since to apply strict burdens of proof may prevent the tribunal from properly discharging its responsibility to decide the facts for itself and/or exercise any discretion afresh: *Doorstep Dispensaree* at [159].

41. I also refuse Ms Forstater permission to appeal on the remaining three grounds of appeal for which she sought permission (grounds (5), (7) and (8) in paragraph twenty above).

42. I cannot see that ground 5 – the FFT erred in law in failing, if necessary, to give the expression "the Judicial Studies Board" a properly purposive construction to give effect to Parliament's evident intention in the drafting of Schedule 1 – really adds anything to the grounds of appeal I have found against above. This argument, in truth, is not really one about statutory construction but is just another way of the appellant advancing her argument that the Judicial College was no more than a continuation of the Judicial College. In any event, it is not arguable with any realistic

prospect of success that the FTT erred in law in paragraphs 33-35 of its decision in applying a literal interpretation to the names of the bodies listed in Schedule 1 to FOIA. Once the *Inco Europe* line of argument was (rightly) abandoned by Ms Forstater, I struggled to understand what was meant by a purposive construction of Schedule 1 to FOIA.

43. In *Sugar v BBC* [2009] UKHL 9; [2009] 1 WLR 430 Lord Hope stated, at paragraph [56]:

> "…In common with all the other public bodies and offices listed in Part VI of the Schedule the name [the BBC] tells one all one needs to know. That, indeed, is the purpose of the listing. Its purpose is to enable people who wish to exercise the general right of access to exercise it without having to go to the courts to find out whether the body or office-holder to whom the request is directed is a public authority within the meaning of section 1(1). As the commentators on the Freedom of Information (Scotland) Act 2002 in *Current Law Statutes* explain in their general note on section 3 and Schedule 1, clarity of coverage in advance was understood by the legislature to be vital. It was appreciated that to replace the list in Schedule 1 with an omnibus provision that the Act applied to bodies that provided a public service could lead to endless litigation. This was contrary to the principle that the primary role in enforcing the Act should rest with the Commissioner and not the courts: section 47(1). The system of listing is elaborate and, as section 7 recognises, will require constant monitoring to ensure that it is kept up to date. Its value, however, is that it reduces to the minimum the scope for dispute about whether a particular body or office-holder is, or is not, a public authority."

Given that starting point, the scope for a purposive, as opposed to literal, construction of Part VI of Schedule 1 to FOIA seems faint if not non-existent, and would need to be better articulated than the general argument made by Ms Forstater.

44. Grounds 7 and 8 have no arguable merit either. These grounds are: (7) that the FTT failed to decide what were the purposes of the Judicial College and whether those purposes included training; and (8) the FTT erred in law in inferring from its conclusion that the requested information (other than on costs) was held by the Judicial College to support its judicial functions, that the Judicial College held the information on behalf of the judiciary, and (by implication) not for its own purposes.

45. Again, I fail to understand what these grounds add or bringing separately to these proceedings. The argument in ground 7 has no realistic prospect of success because it comes flat up against paragraphs 51-52 of the FTT's decision where the FTT set out, which was obviously linked to and followed on from the paragraphs in the decision set out at paragraph nine of this decision above, that:

> "51. As we have concluded above, the Judicial College exists to support the Lord Chief Justice and the Senior President of Tribunals to meet their statutory responsibilities for the training of the judiciary. It is constituted both by members of the judiciary, and civil servants who provide administrative support to those members of the judiciary.
>
> 52. In acting in their roles within the Judicial College, the judiciary are fulfilling a judicial function – to train, and to oversee the training of, judicial office holders. Anything undertaken by a member of the judiciary under the

> auspices of the Judicial College is undertaken in that person's capacity as a member of the judiciary. The judicial constituent of the Judicial College does not work for, nor are they any a part of, the Judicial Office. This is in contrast to the administrative staff of the Judicial College, who are part of the Judicial Office and employed in that capacity by the Ministry of Justice.

46. As for ground 8, no arguable error of law is made out either. The FTT's analysis was based on a distinction between the judicial and administrative arms of the Judicial College in terms of its operation. Those conclusions were based on and entirely consistent with the evidence before it: see paragraphs 46, 52 and 54 of the FTT's decision.

47. It is for all these reasons that I have disallowed the appeal and refused permission to appeal on the other grounds of appeal still advanced by Ms Forstater.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 14th December 2023