IN THE UPPER TRIBUNAL **Case No**. ***UA-2024-000065-GIA***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 195 (AAC)**

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

Between:

James Coombs

Appellant

- v -

Information Commissioner

First Respondent

and

The Buckinghamshire Grammar Schools

Second Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 5 July 2024
Decided on consideration of the papers

Representation:

Appellant:	by himself
First Respondent:	not represented
Second Respondent:	Felicity McMahon and Hannah Gilliland, both of counsel

DECISION

The appeal is dismissed.

The decision of the First-tier Tribunal under reference EA/2020/0310, dated 8 December 2023, neutral citation number [2023] UKFTT 01026 (GRC), did not involve the making of an error on a point of law.

REASONS FOR THE DECISION

1. References in what follows to

    a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000 ("**FOIA**")

    b. the "**FTT**" are to the First-tier Tribunal

    c. the "**FTT decision**" are to the FTT decision under reference EA/2020/0310, dated 8 December 2023, neutral citation number [2023] UKFTT 01026 (GRC), dismissing the appeal under s57 of the appellant ("**Mr Coombs**") against a decision notice (the "**IC decision notice**") of the first respondent dated 22 September 2020;

    d. numbers in square brackets are to paragraphs of the FTT decision (unless the context indicates otherwise)

    e. "**TBGS**" are to the second respondent.

2. This was an appeal against the FTT decision, which found that the IC decision notice was in accordance with the law.

The original information request, the IC decision notice and the remaining undisclosed information

3. The IC decision notice related to certain information requested by Mr Coombs from TBGS on 13 October 2019, namely

    a. a copy of the "detailed statistical analysis" referred to in a letter dated 1 October 2019 from TBGS to parents and carers of children who had taken an 11+ test under the auspices of TBGS in which significant errors had been discovered (this was item 1 in the request); and

    b. the following "specific information" if not included in the report above (and following the numbering of items in the decision notice):

        2. the number and nature of the 'subtests' making up the overall assessment (e.g. verbal skills, comprehension, maths/numeracy and non-verbal reasoning)

        3. for each subtest, the number of questions set and reliability when the tests are set and administered without any errors

4. specific to the recent errors, for each subtest

    a. the number of questions removed from the assessment and

    b. the revised reliability.

4. The background to this request was, as set out at [4], that there were defects in an 11+ exam (the "**2019 exam**") managed and administered by TBGS, and held on 12 September 2019; as a result, TBGS and GL Assessment Limited ("**GLA**"), a third party contracted by TBGS to design and supply test material and provide other services relating to the 11+ exam, agreed on a "statistics-based solution"; they both put out public statements on 1 October 2019 explaining and defending their solution as a measure based on detailed statistical analysis and ensuring fairness for all children involved.

5. TBGS did not provide items 1, 2, 3 and 4b of Mr Coombs' information request (it disclosed the information at item 4a), citing the exemptions in sections 41 (information provided in confidence) and 43 (commercial interests).

6. The IC decision notice, in the words of [9], "purported to hold" that TBGS correctly applied s41 and s43(2) to the information it withheld (the FTT decision put it that way because, it said, in the accompanying reasons, the IC decision notice had dealt only with s41, and said that s43(2) had not been considered).

7. The FTT decision recorded at [19] that the parties reached agreement that the information which was the subject of the appeal (and to which I shall refer as the "**undisclosed information**") was limited to

    a. certain PowerPoint slides produced by GLA and "shared" with TBGS

    b. the number of questions in the 2019 exam

    c. the information concerning the reliability of the mathematics & non-verbal reasoning elements of the 2019 exam.

The FTT hearing and decision

8. The FTT decision followed a hearing on 27-28 November 2023, at which both Mr Coombs and TBGS were represented by counsel (Mr Coombs by David Lawson; TBGS by Felicity McMahon and Hannah Gilliland). The first respondent was not represented at the FTT hearing and, per [3], was content to rely on his written case, which corresponded closely with that of TBGS.

9. The backdrop to the FTT decision was that a previous decision by the FTT on the same appeal was set aside by the Upper Tribunal in *Coombs v Information Commissioner and TBGS* [2023] UKUT 157 (AAC) (a decision of mine), and the case was remitted to a freshly constituted panel of the FTT for reconsideration at an oral hearing. The Upper Tribunal directed that there was

to be a complete re-hearing of the appeal in all respects except that it would be taken as a finding of fact that the statistician's report referred to in the requested information was not held by TBGS (or by another person on its behalf) at times relevant to the appeal.

10. The FTT decision was not unanimous: the majority (the two specialist tribunal members) decided to dismiss the appeal; the minority (the tribunal judge) would have allowed it. Applying regulation 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 SI 2008/2835, the decision of the majority became the FTT decision. In what follows I refer to the reasons of the majority for dismissing the appeal, as the **FTT decision reasons**, and to the reasons of the minority for preferring to allow the appeal, as the **dissenting reasons**.

Outline of the FTT decision's findings and reasoning

11. The evidence before the FTT was noted at [16-17]: oral evidence from Mr Coombs (who had an academic background in statistics) and his two witnesses, Alan Parker (a retired former director of education for a London borough and subsequently, in quasi-judicial roles in bodies including for the Office of the Schools Adjudicator, Ofqual and Qualifications Wales; he had also been a trustee of the National Foundation for Educational Research) and Luke Knightly-Jones (conducting PhD research into perceptions and impact of private tuition for 11+ exams in England); and from Sue Walton (consultant at TBGS) and David Hilton (head of admissions testing at GLA) on behalf of TBGS; and the hearing bundles.

12. [31-62] were under the heading "Key Facts." As the sub-headings indicated, this consisted of findings about the arrangements for grammar school admissions in Buckinghamshire (i.e. the context for the 2019 exam); about the exam itself; about past papers, practice materials and a "familiarisation booklet" published by GLA; about tutoring; about the business and contractual relationship between TBGS and GLA; about the errors in the 2019 exam, the solution devised by TBGS and GLA, and related communications with parents and carers for the children who sat the exam, and the wider public; about the concept of "reliability", in the context of statistics; and about what the PowerPoint material contained.

13. Having summarised the rival arguments, the FTT decision reasons were presented at [70-84]

14. Considering s41(1)(b) (whether disclosure of the undisclosed information to the public by TBGS would constitute a breach of confidence actionable by it or any other person) – being the element of s41 that was in dispute – the three sub-questions identified by Megarry J in *Coco v AN Clark (Engineers) Ltd* (cited at [24]) were looked at. It was decided, on the facts as found, that the undisclosed information (1) had the necessary quality of confidence and (2) was communicated to TBGS in circumstances importing an obligation of confidence (the first two sub-questions).

15. The third *Coco v Clark* sub-question – whether unauthorised use of the undisclosed information would be detrimental to the party communicating it (which, the FTT decision said, was GLA) – was considered by looking, in turn, at two arguments made by TBGS: the "tutor advantage argument" and the "competitor advantage argument".

16. These two arguments are first mentioned in the FTT decision in a footnote to [64], which introduces them by saying that

    a. the "tutor advantage argument" is that disclosure of the undisclosed information would give an advantage to private tutors (and the children whom they tutor for the exam), disadvantage children whose parents could not afford to pay for tuition, and thereby undermine the fairness of the exam;

    b. the "competitor advantage argument" is that disclosure of the undisclosed information would present any current or future competitor of GLA with an unfair advantage in the market.

17. The FTT decision reasons found (at [76]) the "competitor advantage argument" to have force because, in overview, the undisclosed information, it found (1) was commercially sensitive and (2) would give a competitor an unfair, one-sided competitive advantage.

18. The FTT decision reasons saw some, limited force in the "tutor advantage argument": disclosure of the undisclosed information might be of some "marginal" (my word, not the FTT decision's) advantage to tutors and their pupils; GLA in turn might suffer reputational damage as a consequence of the fairness of the exam being (or appearing to be) undermined.

19. Having thus concluded that disclosure of the undisclosed information would constitute a breach of confidence actionable by GLA, the FTT decision reasons turned (at [79]) to whether an action for breach of confidence could withstand a public interest defence. The reasoning referred to the "critical importance of education" and a "powerful public interest" in fostering well-informed debate on education; but considered this outweighed by (and here I reorder the reasons somewhat, to bring out the substance of the reasoning) (1) the public interest in protecting commercially confidential information (see [79(5)]) (2) the fact that neither TBGS nor GLA misled, or attempted to mislead, in their public pronouncements about the errors in the exam or the fairness of their solution to these, together with the fact that TBGS (with GLA's permission) had, reasonably, disclosed *some* of the information requested by Mr Coombs (it being reasonable to do so, given the need to explain TBGS's decision-making and reassure those affected, and the wider public).

20. The FTT decision reasons concluded (at [80]) that s41 was satisfied; this was enough to dismiss the appeal; however, the FTT decision reasons went on to consider s43, and found (at [82]) that "an appreciable risk of prejudice to the commercial interests of both GLA and TBGS would arise" if the undisclosed information were made public; in respect of GLA, this was for the same reasons

as the FTT decision reasons found "detriment" to GLA in its s41 analysis; in respect of TBGS, this was because disclosure could result in TBGS changing the structure of the exam more frequently (and associated costs). As to the public interest balancing test under s2(1)(b), the FTT decision reasons referred to its s41 public interest defence reasoning (which it did not think was displaced by the "mild presumption in favour" of disclosure, when applying that test). It concluded that s43(2) applied.

The dissenting reasons

21. The dissenting reasons reached a different view on third *Coco v Clark* sub-question. The "competitor advantage arguments" were said to be "hugely overstated", due to the undisclosed information being "very narrow in scope" and relating to just one year's exam; disclosure of the undisclosed information would not tell the competition "anything of real significance" – the exam content is new every year; there is mention at [87(4)] of paucity of evidence for certain matters. The "tutor advantage arguments" were said to rest on "no evidential basis" and to depend on assertion and speculation. It criticised certain "theories" (about tutoring strategies) of Mr Hilton in evidence (indeed, the FTT decision reasons also rejected some such "theories", at [75(5)]; it is said that certain of TBGS's witness' evidence was "mere assertion wholly unsupported by any scientific or empirical evidence"; it praised the evidence of Mr Knightley-Jones, on the question of "tutors' advantage", as coming from someone "with conspicuous learning and an impressive command of the subject matter" ([86(7)]. The dissenting reasons saw no advantage to tutors as a result of disclosure of the undisclosed information.

22. The dissenting reasons went on to say that, even if the *Coco v Clark* test had been satisfied, an action for breach of confidence would have been defeated by a public interest defence. In the dissenting reasoning, the "strong public interest in protecting information communicated in confidence", is outweighed by the public interest in "testing", and fostering an informed debate about the fairness and appropriateness of, the solution devised by TBGS and GLA (and their public statements about it), given that it was speedily devised, and the exam errors were highly embarrassing to GLA. There was also public interest in facilitating an informed debate as to whether TBGS issued misleading information about the fairness of its solution to the errors in the exam; particularly where TBGS did not disclose that the "independent statistician" to which it referred at that time was someone who had worked for GLA between 1986 and 2010. These matters could not be assessed in a transparent and fair debate, without disclosure of the undisclosed information.

23. The dissenting reasons went on to say that, for similar reasons, the exemption in s43 was not made out: it had not been shown that disclosure of the undisclosed information would, or could well, give rise to risk of substantive harm to TBGS or to GLA; and the public interest balancing test favoured disclosure.

Grounds of appeal

24. The FTT granted permission to appeal on all grounds set out in an application dated 8 January 2024 (and drafted by Mr Lawson on Mr Coombs' behalf).

"Reasons" ground

25. It was said that the FTT decision reasons did not engage with or answer the factors raised in the dissenting reasons.

"Reasons and the finding of detriment"

26. Under the above sub-heading, the grounds made these points

First point

a. the FTT decision reasons did not explain what aspect of TBGS's evidence was accepted. The FTT decision reasons (at [75(5)]) found that "any" release of specific information about the 2019 exam would be of "some" benefit to tutors: this was said to be nebulous and unspecific; and based on minimal evidence;

b. specific factors:

i. points are made in the FTT decision reasons about the impact, on advantage for tutors, of disclosing the number of questions in the 2019 exam (see [75(2)]) – but why not release the other undisclosed information?

ii. in what way is knowing the number of questions an advantage for tutors - as it would be known by everyone?

iii. what is the answer to the point that the number of questions in a 25 minute exam must be in a limited range and there is no reasons to think it will be the same year on year? TBGS's witnesses did not challenge the point put to them that candidates had less than one minute per question;

Second point

c. the FTT decision reasons do not deal with the evidence of Mr Coombs' witnesses: Mr Knightley-Jones' evidence had two fundamental points: (1) tutors primarily focus on teaching children about the underlying subject matter e.g. maths. (2) there are mass online data bases of questions which can be used to prepare for each exam, with records of past success in the exam; his evidence was that tutors created a "base line figure", monitored progress and were able to predict success quite accurately; tutors

would not tell 10 year olds tactics (it would distract them from answering questions quickly);

d. it was wrong for the FTT decision reasons to have given no express consideration to evidence called by the appellant. Why was it not sufficient to show that there was no tutor advantage?

Third point – competitor advantage

e. considering the tests (for whether disclosure would, or would be likely to, prejudice commercial interests under s43(2)) in *Hogan and Oxford CC v ICO* (an earlier FTT decision, to which the FTT decision directed itself, at [27]), the FTT decision reasons state (as regards there being no competitor to GLA as at the time of the FTT hearing) (at [76(2)]) that the "competitor advantage argument" is persuasive in relation to a potential competitor as well as to a competitor already in the field; the grounds call this an "assertion";

f. the possible detriments described in the FTT decision reasons at [76(4)-(6)] (knowledge about the number of questions and reliability would give a competitor a "benchmark" from which it could develop a rival test) are said to "ignore the evidence about how the tests are created": questions are trialled to children to check for their reliability; GLA has "banks" of thousands of questions; each test is newly created each year; any competitor will face a significant barrier to entry (having to prepare a stock of questions) and, when doing so, will acquire data about how many questions children can do in 25 minutes, and reliability figures;

g. the FTT decision reasons do not give reasons for the points identified in the dissenting reasons e.g. that the number of questions must be in a narrow range, that the exam varies from year to year, and that there is no evidence that changing the number of questions would impose any costs;

Reasons and the finding on public interest

h. it is said that the remitting Upper Tribunal decision "compels specific reasons" from the FTT "answering the basis of the remittal to it";

i. the FTT decision reasons set out the public interest in disclosing the information, only in general terms: [79], second sentence; yet the FTT decision's findings of fact raise particular issues which support the dissenting reasons (at [89]), such as:

    i. [43]: the errors in the test caused a substantial degree of upset and consternation among pupils and their families

ii. [47]: TBGS ruled out the possibility of any re-sit, before any final decision as to how to deal with the errors and their consequences

iii. [56]: in his letter of 11 November 2019, Dr Hutchison did not make the assertion attributed to him by Mr Sturgeon (chair of TBGS) in his letter to parents and children of 1 October 2019 and repeated in the FAQ document that the proposed solution was fair for all children

iv. [50]: the board of TBGS required confirmation about the independence of the 'independent statistician'; but, per [57], Dr Hutchison had a very long-standing professional association with GLA - he had worked for it for about 24 years, ending in 2010

v. [52]: when Mr Sturgeon told parents and children that the testing would not be sufficient grounds for reviews or appeals on their own, he was intending to exclude any challenge based on any complaint of unfairness in the "solution" itself but to leave open the possibility of extenuating circumstances relating to the errors being relied upon

vi. [62]: without disclosure of the disputed information the public at large would not be in a position to make a comprehensive, independent, statistics-based assessment of the fairness of the exam (post-"solution").

"Failure to direct itself according to the law" ground

27. Regarding s41 and the public interest defence to actionable breach of confidence, the grounds said that the "minor" detriment to GLA (as found in the FTT decision reasons) could not sustain such a defence, on a proper application of the law as set out at [25].

28. Regarding s43 and the test in *Hogan and Oxford CC v Information Commissioner* (see [27]), it is said that "nothing identified in the [FTT] decision is substantial or likely to occur". It is also said that the FTT decision reasons do not apply what was said in *APPGER v Information Commissioner* (cited at [28]) about the public interest balancing test requiring "an appropriately detailed identification, proof, explanation and examination"" of both harm/prejudice and benefits of the proposed disclosure.

"Perverse balance of detriment and public benefit" ground

29. It is said that it is not reasonably possible to balance the factors as the FTT decision reasons do: the impact of the errors on the public and the incorrect statements to the public support disclosure, as does the FTT decision's finding that, without disclosure, the public cannot know if the distribution of school

places was fair; on the other side, the undisclosed information is narrow; there was a possibility that a possible future competitor might try to make a more reliable test; this might impose an unknown cost on GLA. There was no answer to the point in dissenting reasons at [89(6)], discussing the public interest defence: the detriment-based grounds on which TBGS resists disclosure have, at best, very little substance, and "offer no material counterweight to the compelling public interests favouring disclosure".

"Three general points"

30. The FTT decision's reasons as regards s43 and prejudice to commercial interests were challenged on much the same grounds as had already been argued:

    a. no viable finding of detriment

    b. no substantial and real harm to commercial interests, likely to occur, is identified

    c. no evidence of any costs associated with a new exam (which is anyway new each year)

    d. the undisclosed information is narrow

    e. no evidence of a major competitor, even at the date of the public authority's decision; though *Evans v Attorney General* [2015] UKSC 21 establishes that this is the relevant date, it also says that later facts may throw light on earlier decisions – the fact that the competitor later left the market says something about its strength.

31. *Montague v Information Commissioner* [2022] UKUT 104 at [24] is cited to the effect that the statutory language "cutting down" the right to information under s1 needs to be "carefully construed. The language of [FOIA] should, where possible, be construed broadly and liberally in the context of FOIA's statutory purpose to make provision for the disclosure of information held by public authorities in the interests of greater openness and transparency …". The grounds state that the FTT decision reasons fail to follow such a construction of FOIA. Why should residents of Buckinghamshire not know about the exam through which their children are admitted to schools they maintain and fund?

The Upper Tribunal proceedings

32. The respondents were directed to make a response to the appeal – TBGS did, but the first respondent did not – and Mr Coombs was invited to provide a reply to that response, which he did.

33. The parties were directed to indicate if they sought an oral hearing of the appeal. Neither TBGS, nor Mr Coombs, so indicated. Given this, and that I had

fulsome written submissions in the form of the grounds, the response, and the reply, I decided it was fair and just to determine this appeal without a hearing.

34. I am grateful to both Mr Coombs and TBGS for their clear and helpful written submissions.

Summary of law regarding the Upper Tribunal's "error of law" jurisdiction; and adequacy of reasons

35. It is helpful, in my view, to set out a recent summary by a three-judge "Presidential" panel of the Upper Tribunal, in *Information Commissioner v Experian* [2024] UKUT 105 (AAC), on an appeal from the FTT General Regulatory Chamber, of the law regarding the Upper Tribunal's "error of law" jurisdiction, and adequacy of reasons, as follows:

"***The Upper Tribunal's "error of law" jurisdiction***

60. The first task of the Upper Tribunal in an appeal such as this is to decide whether the FTT's decision involved the making of an error on a point of law. The Court of Appeal's brief summary of the most commonly encountered such legal errors, in *R (Iran) v SSHD* [2005] EWCA Civ 982, is well known. Also of assistance is the Supreme Court's recent summary of the correct approach to challenges on appeal to first-instance evaluative judgements in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, handed-down after the hearing of this appeal, but not, we think, making any material change to the law in this area:

"**The Correct Approach on Appeal**

46. This is another important matter, and it is appropriate to summarise the correct approach at this stage. A finding that an activity is or is not targeted at consumers in the UK necessarily involves an evaluation by the judge of a range of different facts and matters. It requires, in other words, a multifactorial assessment of the documents, the evidence and the submissions made by the parties. The evaluation is also one which, when made in that way, the trial judge is peculiarly well placed to carry out.

47. Conversely, an appeal court is inevitably at a disadvantage, as Lord Hoffmann explained in *Biogen Inc v Medeva plc* [1997] RPC 1 at 4, and so, where the application of a legal standard such as negligence or obviousness involves no question of principle, but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.

48. We consider that the position was well summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29; [2014] ETMR 26 in these terms at para 114:

"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C. 1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and, most recently and comprehensively, *McGraddie v McGraddie* [2013]

> UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:
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> i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
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> ii) The trial is not a dress rehearsal. It is the first and last night of the show.
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> iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
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> iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
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> v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."
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> 49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031, at paras 72–76. There, in a judgment to which all members of the court (McCombe LJ, Leggatt LJ and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.
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> 50. On the other hand, it is equally clear that, for the decision to be "wrong" under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."

61. "Perversity" challenges (i.e. ones based on a finding of fact by the first-instance tribunal being perverse or one which no reasonable tribunal could have reached on the evidence before it) must also bear in mind the expertise of the first-instance tribunal: as was said by Lloyd Jones LJ (as he then was) in *Department for Work and Pensions v Information Commissioner & Zola* [2016] EWCA Civ 758 at [34]:

> "The approach to be followed in perversity challenges to decisions of specialist Tribunals … is simply a reflection of the respect which is naturally paid to the decisions of a specialist Tribunal in an area where it possesses a particular expertise. Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts …."

62. …

Adequacy of reasons

63. There are many appellate authorities on the adequacy of reasons in a judicial decision. In this chamber of the Upper Tribunal, the principles were summarised in, for example, *Oxford Phoenix Innovation Ltd v Information Commissioner & Medicines and Healthcare Regulatory Agency* [2018] UKUT 192 (AAC) at [50-54]. At its most succinct, the duty to give reasons was encapsulated at [22] in *Re F (Children*) [2016] EWCA Civ 546 (one of the authorities cited there), as follows:

> "Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable."

64. As is well-known, the authorities counsel judicial "restraint" when the reasons that a tribunal gives for its decision are being examined. In *R (Jones) v FTT (Social Entitlement Chamber)* [2013] UKSC 19 at [25] Lord Hope observed that the appellate court should not assume too readily that the tribunal below misdirected itself just because it had not fully set out every step in its reasoning. Similarly, "the concern of the court ought to be substance not semantics": per Sir James Munby P in *Re F (Children)* at [23]. Lord Hope said this of an industrial tribunal's reasoning in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 at [59]:

> " … It has also been recognised that a generous interpretation ought to be given to a tribunal's reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis."

65. The reasons of the tribunal below must be considered as a whole. Furthermore, the appellate court should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision. *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) was cited by Floyd LJ in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 at [27] as explaining that the issues which a tribunal decides and the basis on which the tribunal reaches its decision may be set out directly or by inference.

66. The following was said in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 (a classic authority on the adequacy of reasons), on the question of the *context* in which apparently inadequate reasons of a trial judge are to be read:

> "26. Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. … If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.
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> ….
>
> 118. ... There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is

> the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision." "

67. I would add that the standard of reasoning required, to avoid error of law, in a decision upon reconsideration on remittal to the FTT by the Upper Tribunal following the setting aside of an earlier decision (as happened in this appeal), is as described in the preceding authorities – no more, no less.

Discussion

68. When considering whether the exemption in s41 applied, the issue in contention before the FTT was whether disclosure of the undisclosed information would cause an actionable breach of confidence (i.e. whether s41(1)(b) applied), and, specifically

    a. whether such disclosure would be detrimental to GLA; and

    b. if so, whether there was a public interest defence to actionable breach of confidence.

69. Resolving both of the above involved the FTT making evaluative judgements i.e. (in the words of the Supreme Court in *Lifestyle v Amazon*) "multifactorial assessment[s] of the documents, the evidence and the submissions made by the parties".

70. The FTT approached the question of "detriment" through analysing the "tutor advantage argument" (disclosure would advantage private tutors, and so undermine the fairness of the 11+ exam, to GLA's detriment) and the "competitor advantage argument" (disclosure would present a current or future competitor with an unfair (to GLA) advantage in the market).

71. It is clear enough that the FTT decision reached the view that disclosure *would* be detrimental to GLA principally on the basis of finding the "competitor advantage argument" persuasive: this is the clear inference from the FTT decision reasons expressly finding "limited" force in the "tutor advantage argument": see [75] opening sentence, and sub-paragraphs (4) and (5). I note what is said at [77] about the FTT decision reasons concluding on detriment "taking its analysis of the Tutor Advantage and Competitor Advantage arguments together"; but this does not detract from, or change, what is clearly and expressly said at [75] about the limitations of the "tutor advantage argument". As I put it in my summary of the FTT decision reasons above, any advantage accruing to private tutors as a result of disclosure was marginal; it follows that, even if it had been found that no material advantage would have accrued to tutors on disclosure of the undisclosed information, the conclusion of the FTT decision reasons would not have changed.

72. From this it follows that there is no need to deal with the aspects of the grounds of appeal that allege errors of law specifically with regard to the FTT decision reasoning on the advantage that would accrue to private tutors if the undisclosed information were disclosed; any legal errors in that reasoning would be immaterial.

73. Turning to the FTT decision's (material) finding that the "competitor advantage argument" was made out, such that disclosure would be detrimental to GLA by giving a potential competitor an unfair advantage – the grounds challenged this evaluative judgement on the FTT's part as inadequately explained, and so in error in law. In particular, the FTT decision reasons, it is said, inadequately explain why the countervailing submissions and evidence put before the FTT – that the nature of the 11+ exam was such that the undisclosed information would *not* give a competitor any meaningful advantage (over GLA) – was rejected. Further, related points were made in Mr Coombs' "reply" to TBGS' "response" to this appeal, about the evidence of Mr Hilton, whose witness statement spelled out the "unfair advantage" consequences of disclosure which the FTT decision found persuasive; it was said that the FTT decision had fallen into error because

    a. Mr Hilton was not qualified as regards statistical analysis - and this was necessary to understand the business of developing 11+ exams; and

    b. Mr Hilton seemed to think (according to Mr Coombs) that the measure of "reliability" constitutes intellectual property of GLA; Mr Coombs thought this was incorrect (and submitted that the Upper Tribunal should opine on the matter).

74. It seems to me the FTT decision reasoning on the "competitor advantage" point was clear and straightforward: its essence was (1) that the FTT had found the undisclosed information to be "important and sensitive" (see [72] – with whose analysis even the dissenting reasons agreed); and (2) that to hand such information to a competitor would be to give it a head-start or leg-up (my words; a "benchmark", is what the FTT decision calls it); that would be an unfair advantage. Reasons are given at [76(4)-(6)] as to why disclosing specific components of the undisclosed information – the number of questions in the 2019 exam, and the "reliability" analysis – would help a competitor, to GLA's detriment.

75. The grounds of appeal (in part by reference to the dissenting reasons) point to arguments (presented either in evidence or in submissions to the FTT) as to why the undisclosed information would be of no great value to a competitor; it was "narrow" information, about the exam for single year; new exams were set each year; GLA held "banks" of questions; knowing the number of questions couldn't possibly convey any material advantage.

76. In my view, it is clear enough, by obvious inference if not expressly, that the FTT decision simply did not accept that the undisclosed information was as trivial (in commercial terms) as these submissions, and witness evidence,

portrayed it; moreover, the FTT decision reasons *did* adequately explain, *in substance*, this evaluative judgement on its part: the undisclosed information was important, sensitive and gave a competitor a head-start (commercially) that had not been available to GLA.

77. As to whether there was an error of law in the FTT decision reaching the evaluative judgement that it did, that, as the authorities illustrate, is a relatively high hurdle. As is graphically illustrated by the split panel in this case, it is clear that different tribunal may have reached a different conclusion on the submissions and evidence that were presented; but, equally clearly, that is no indicator of the evaluative judgement reached being in error of law. The authorities make clear that, on an appeal against a first-instance tribunal's evaluative judgment, it is not the role of the appellate tribunal to "island hop" amid the evidence presented at first instance (or revisit the first instance panel's evaluation of the witnesses, including, here, Mr Hilton). The question is whether the evaluative judgement – about the undisclosed information being of material commercial value to a competitor, to GLA's detriment – was one no reasonable tribunal could have reached on the evidence before it; or whether some material factor was not taken into account. I am not persuaded. The judgement was based on Mr Hilton's evidence; the reasoning behind it was clear and straightforward, and dealt with the gist of the countervailing argument; it is not a judgement that can be said to be perverse or irrational. Moreover, it was an evaluative judgement by the specialist information rights tribunal, on a matter (the application of the exemption for confidential information) that arises for determination not infrequently.

78. For completeness, I add the following about some points made in the grounds of appeal and Mr Coombs' "reply":

    a. the question Mr Coombs' "reply" poses about the "reliability" analysis being intellectual property, is not in scope of this appeal: it was not alluded to in the grounds of appeal and, more fundamentally, there is no indication in the FTT decision that this was a material issue; and

    b. no cogent argument was made as to why it was an error of law for the FTT to have considered a potential competitor, as well as an actual one (as at the time of the public authority's decision), in its analysis of detriment. No error of law in the FTT decision is made out in this respect.

79. Turning now to the FTT decision's finding of no "public interest defence", the FTT decision reasons, in essence, found that the public interest in a fuller "inquest" (my word; I use it colloquially, to allude to the kind of "comprehensive, independent, statistics-based assessment of the fairness of the exam (post-solution)" as is posited at [62]) into the episode of the errors in the 2019 exam, and the solution devised by TBGS with GLA, was outweighed by the public interest in protecting confidential (commercial) information. Importantly, the FTT decision reasons found that TBGS and GLA did not mislead, or attempt to mislead, in their public pronouncements associated with the episode: see

[79(3)]. In my view, it is adequately clear, in context, that this latter finding materially countervailed, in the FTT decision reasoning, public interest concerns about actual or suspected "failings" (again, my word) by TBGS and/or GAL as found in the FTT decision (and which the grounds of appeal complain were not adequately dealt with in the FTT decisioning reasoning) e.g. the occurrence of the errors in the 2019 exam, and the upset they caused; and the statements made about the "independent" statistician, as against Dr Hutchison's past employment with GLA.

80. The FTT decision reasoning is therefore, in my view and in this regard, adequate. As to whether there is an error of law in the conclusion reached – another "classic" evaluative judgment by the specialist tribunal – I am again not persuaded that this judgement was one no reasonable tribunal could have reached on the evidence before it, or that some material factor was not taken into account. As before, the circumstances of the FTT decision illustrate that another tribunal may have weighted the various factors differently, and reached a different verdict; but this is nothing to the point. I conclude that no error of law is made out.

81. In my view this also deals with the somewhat whimsical point at the end of the grounds about openness, transparency, and why the "residents of Buckinghamshire" should not see the undisclosed information: the analysis above is not based on any unduly narrow construction of FOIA, but rather on whether an first-instance tribunal erred in law in its evaluative judgement following a full and fair hearing of the issue – to which I have found the answer to be "no".

Disposal

82. I have dealt in substance with all the grounds of appeal that could indicate error of law in the FTT decision as regards the application of s41; none have been made out. It is unnecessary for me to go on to consider how the grounds might indicate an error of law as regards the application of s43, as this would not make any difference to the conclusion that the FTT decision made no material legal error in dismissing Mr Coombs' appeal.

Zachary Citron
Judge of the Upper Tribunal

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