Neutral Citation Number: [2025] UKUT 99 (AAC)
Appeal No. UA-2024-001681-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

GREGORY JOSEPH BOSWELL

Appellant

- v -

(1) THE INFORMATION COMMISSIONER
(2) OFFICE FOR NATIONAL STATISTICS

Respondent

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: In person
First Respondent: Gemma Garvey, Information Commissioner's Office
Second Respondent: Joanna Gilbert, Government Legal Department

On appeal from:
Tribunal: First-Tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No: EA/2023/0178
NCN: [2024] UKFTT 00779 (GRC)
Tribunal Venue: By video
Decision Date: 4 September 2024

SUMMARY OF DECISION

INFORMATION RIGHTS: PRACTICE AND PROCEDURE (93.10)

The Upper Tribunal decided that the First-tier Tribunal erred in law: (i) in construing the appellant's grounds of appeal; and (ii) in refusing the appellant's amendment application. Case remitted to the same First-tier Tribunal. The appeal was supported by the Information Commissioner.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by the same tribunal in accordance with the law in this decision.

The second respondent's application to be removed as a respondent is refused.

REASONS FOR DECISION

Introduction

1. This appeal concerns requests for information that the appellant made on 25 May 2022, 27 May 2022 and 1 June 2022 to the Second Respondent (the ONS). ONS refused the appellant's requests relying on the exception in section 14(1) of the Freedom of Information Act 2000 (FOIA) for vexatious requests. The First Respondent (the IC) upheld ONS's refusal in a decision notice dated 28 February 2023. The appellant appealed to the First-tier Tribunal against the decision notice.

2. The First-tier Tribunal at a hearing on 16 July 2024 determined that his appeal concerned only the request for information he made on 25 May 2022 (reference number DPR 188) and refused him permission to amend his appeal to include challenges to the IC's decision in relation to the other two requests (reference numbers DPR 189 and 190).

3. The First-tier Tribunal, by reserved decision sent to the parties on 4 September 2024, otherwise allowed the appellant's appeal in respect of DPR 188, concluded that the request was not vexatious and required ONS to issue a fresh response to the request made on 25 May 2022 which does not rely on section 14(1) of FOIA.

4. The appellant appealed to the Upper Tribunal. I granted permission to appeal limited two grounds in a decision sent to the parties on 10 January 2025:

   Ground (1): The First-tier Tribunal erred in law in holding that the appeal did not include a challenge to the ICO's conclusion that DPRs 189 and 190 were requests within the meaning of section 1(1) of FOIA;

   Ground (3): The First-tier Tribunal erred in law in not allowing the appellant to amend his appeal to include either or both those grounds.

5. The IC in his response to the appeal has conceded that the appeal should be allowed on both grounds. Both the IC and the appellant have agreed to a final decision being made by me on the papers, although they are not wholly in

agreement as to how I should dispose of the appeal. ONS has requested to be removed as a respondent to the appeal. The appellant has objected to that. I am satisfied that it is appropriate for me to deal with all matters on the papers as the issues are straightforward and it would be disproportionate to hold an oral hearing. The remaining issues between the parties will be the subject of a further oral hearing before the First-tier Tribunal as a result of my decision in this matter.

Why I am allowing the appeal

6. At the permission stage, I only had to be satisfied that the appellant had arguable grounds for appeal, now I have to be satisfied that those grounds are actually made out and that the decision of the First-tier Tribunal involved an error of law.

Ground (1) The First-tier Tribunal erred in law in holding that the appeal did not include a challenge to the ICO's conclusion that DPRs 189 and 190 were requests within the meaning of section 1(1) of FOIA

7. The First-tier Tribunal at [3] to [7] of the decision held that the appeal was limited in scope to challenging the IC's decision in relation to request DPR 188 and that there was no challenge to the decisions in relation to DPR 189-190 in the appeal, so he would have to apply to amend his appeal.

8. By rule 22(2)(e), (f) and (g) the notice of appeal is required to set out: details of the decision or act, or failure to decide or act, to which the proceedings relate; the result the appellant is seeking; and the grounds on which the appellant relies. That information then forms the basis for the appeal. By rule 5(3)(c) the Tribunal has power to permit a party to amend a document. That is a power to be exercised in accordance with the overriding objective in rule 2.

9. The question of whether a notice of appeal contains a particular ground of challenge or not is in the first instance a matter for the judgment of the First-tier Tribunal. The Tribunal has to consider the notice of appeal fairly, objectively, as a whole and taking due account of the skills, knowledge and experience of the drafter (in other words, in this case, making due allowance for it being drafted by a litigant in person). The observations of the HHJ Auerbach in *Pranckz v Hampshire County Council* UKEAT/027219/VP at [50]-[52] about how Employment Tribunal claim forms should be construed apply equally in this context, although other strictures as to the interpretation of employment tribunal claim forms may not. The relevant parts of those paragraphs are as follows:-

> 50. … I reject Ms Bone's submission that the Tribunal could, or should, have had regard to the contents of the response form, the Claimant's witness statement, or schedule of loss. … what the Tribunal had to consider was whether she had in fact brought any such claim in the claim form as presented.
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> 51. The Tribunal's task was to consider, fairly and objectively, looking at the claim form as a whole, whether it contained any complaint, other than for wages or holiday pay. This is a question of objective construction. As

> to how the task should be approached, I agree with the observations of Elisabeth Laing J in Adebowale (cited above) [i.e. Adebowale v ISBAN UK Limited UKEAT/0068/15 at [16]:
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> > "In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her."]
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> 52. More generally, technical or formal legal language did not need to be used, and, in that regard, due allowance should be made for the fact that the Claimant was a litigant in person, and for a little infelicity of expression. The legal cause of action did not have to be named, or statutory provisions cited. But, one way or another, the essential factual elements of the putative additional claim had to have been asserted. …

10. In this case, I consider that the First-tier Tribunal has erred in law in its construction of the appellant's notice of appeal. I acknowledge that the only outcome of the appeal that the appellant identified he wanted in box 6 of the form was the release of DPR 188, that DPR 188 is the only request he mentions on page 13 and that the beginning of the grounds of appeal attached to the notice of appeal states in bold that he is limiting the appeal to DPR 188. However, an appeal form needs to be construed as a whole. In this case, the first paragraph of the grounds of appeal states that the appellant found the Decision Notice to be a "painful document" on two main counts. The first of those is that the appellant says the ICO has treated as FOI requests, two requests that should have been treated only as subject access requests (SARs) and not as FOI requests. The requests he refers to are DPRs 189 and 190.

11. The document can therefore be understood as including as a ground of appeal that DPRs 189 and 190 were SAR requests and not FOI requests. The IC understood this to be a ground of appeal because [33]-[35] of the IC's response deals with this point. The Tribunal also recognises that this point was pleaded because it identified this as being one of the appellant's two grounds of appeal at [77.2] of its decision (albeit it there states that this ground of appeal is "outside our remit" rather than it was not part of the pleaded case at all, as it put it in [3]-[7] of its decision).

12. I therefore consider that it was irrational for the Tribunal to regard the appellant as not having pleaded as a ground of appeal that DPRs 189 and 190 should have been dealt with as SARs and not as FOIA requests.

13. There is also a further error in the First-tier Tribunal's decision. The reasons that the Tribunal gives for finding that this ground of appeal was 'outside its remit' were set out at [11]. In addition to holding that the ground of appeal was not pleaded, the First-tier Tribunal states that an assertion that a request should have been dealt with under data protection legislation was not a matter within its jurisdiction. The First-tier Tribunal stated it would only have jurisdiction to decide if the requested information was the requestor's personal data if the public authority had refused to provide the information under section 40(1) of FOIA (the personal data exemption).

14. However, in my judgment this reasoning is also wrong in law. The Tribunal, standing in the shoes of the IC on an appeal under sections 57 and 58, does have jurisdiction to decide whether they are 'requests for information' within the meaning of section 1(1) of FOIA 2000 or not and therefore whether they had rightly been treated as FOI requests by the ONS and the IC. That is because the First-tier Tribunal's jurisdiction is to consider whether the Decision Notice issued by the IC under section 50 is or is not in accordance with the law, which can in principle include considering whether the request for information was a request within the meaning of section 1(1) or not.

15. I need also to say something about the First-tier Tribunal's observations about section 40(1) of FOIA. If on an appeal the First-tier Tribunal decided that a request was a request for the appellant's personal data, then the question would arise as to whether ONS would wish, in order to comply with its duties as a controller of personal data, to rely on section 40(1) of FOIA to refuse disclosure under FOIA. The First-tier Tribunal is right that the fact that a public authority had not relied on section 40(1) (either when originally responding to the request or in the course of defending an appeal) would mean that any issue as to whether section 40(1) applied would not be before the Tribunal. That is because a local authority is not obliged to rely on exemptions, it just has the option to do so (since section 17 gives it a discretion as to whether it relies on exemptions and section 2 merely relieves the local authority of the obligation to disclose under section 1 where an exemption applies). However, consistent with the principles underpinning the data protection regime, if it were identified in the course of an appeal that a request included a request for personal data that had not previously been recognised or dealt with as such, the First-tier Tribunal would need to take that into account in relation to any discretion it exercised as to disposal of an appeal. For example, it may need if an appeal by a requester succeeds to issue a substitute decision notice (such as the First-tier Tribunal actually did in this case) which enables the public authority to have an opportunity to consider its obligations as a data controller rather than merely being required to release the information requested.

<u>Ground (3): The First-tier Tribunal erred in law in not allowing the appellant to amend his appeal to include either or both those grounds</u>

16. The First-tier Tribunal refused the appellant's application to amend to include as a ground of appeal that ONS was not entitled to rely on section 14(1) in order to

refuse disclosure in relation to DPRs 189 and 190 for the reasons it gave at [8]-[10] of the decision. (At least, I assume that these were the reasons of the whole panel, although I note that this part of the decision is drafted as if the judge took the amendment decision alone. Once a Tribunal panel is seized of a case, case management decisions should normally also be for the panel: cf *Jones v Corbin* (UKEAT/0504/10).)

17. The First-tier Tribunal considered the application was being made on the day of the hearing, orally, only in response to the First-tier Tribunal's questions and *"in effect, only by implication"*. The First-tier Tribunal further took into account the time it had taken to reach a final hearing, the basis on which it considered the other parties had responded to and prepared the case and "the amount of tribunal time that had been spent reading the 1200-page bundle, over 100 pages of supplementary evidence and listening to audio recordings and watching videos in preparation for the hearing". It also took into account the balance of prejudice, recognising that *"Mr Boswell would be deprived of the chance of formally challenging the decision notice in relation to the other requests and the fact that he was a litigant in person"*. It nonetheless decided to refuse the amendment.

18. A First-tier Tribunal enjoys a wide discretion in relation to case management decisions such as this and the Upper Tribunal will not interfere unless it is clear the First-tier Tribunal has made an error of law. That includes leaving out of account any obviously relevant factor, or taking into account any irrelevant factor: see *Vaughan v Modality Partnership* [2021] ICR 535 at [10] *per* HHJ Taylor (a decision in the employment sphere that contains a helpful discussion of the principles, most of which are equally applicable to the General Regulatory Chamber). HHJ Taylor emphasised the focus should be the balance of prejudice (ibid at [12]-[18]) and that this requires a focus on the "real practical consequences of allowing or refusing the amendment" (ibid at [21]).

19. In this case, it seems to me that the First-tier Tribunal's decision to refuse the amendment application was inevitably 'infected' by its prior errors in recognising the scope of the appeal. These errors meant that the First-tier Tribunal failed properly to consider the extent to which the amended grounds of appeal would have expanded the scope of the appeal, given the extensive nature of the arguments on vexatiousness already before the Tribunal. Indeed, the First-tier Tribunal does not seem to have analysed the extent to which considering DPR 189 and 190 would have expanded the actual arguments or evidence to be considered on the appeal.

20. A further relevant factor that needed to be taken into account by the First-tier Tribunal in my judgment was that the appellant's reply to the IC's response to the appeal had included arguments about DPR 189 and 190. If, and to the extent that, an opportunity had been missed by the First-tier Tribunal at an earlier case management stage to identify that the appellant needed to be alerted to the need to make an amendment application if he wished to run those arguments, that was a relevant factor for the Tribunal to consider whether it would be fair and just to allow the amendment. Likewise, this was relevant to the balance of prejudice in this case. Rule 2 requires the parties to co-operate with the Tribunal to further the

overriding objective. If a (represented) respondent (and especially a regulator such as the IC) sees that a litigant in person is seeking to raise arguments in proceedings that would require an amendment application, the respondent may (depending on the circumstances) reasonably be expected to alert the litigant and the Tribunal to the issue. If he fails to do so, and as a result the need for an amendment only becomes apparent at the hearing, that is also a relevant factor for the Tribunal to take into account, and one that may point towards allowing the amendment.

21. I therefore conclude that the First-tier Tribunal's decision on the amendment application also involved an error of law.

Disposal

22. Under section 12 of the TCEA 2007, I have power where I conclude that the First-tier Tribunal has erred in law to set the decision aside and either remit the case for re-determination by the same or a fresh Tribunal or to re-make the decision myself. If remitting, I can make directions as to the scope of the remitted hearing: see generally *Sarkar v SSHD* [2014] EWCA Civ 195, [2014] Imm AR 911 at [15].

23. In this case, there is no challenge on this appeal to the First-tier Tribunal's conclusion that ONS was not entitled to rely on section 14(1) in relation DPR 188. That part of the First-tier Tribunal's decision is not disturbed by this appeal. To the extent that I need formally to 'remake' that part of the decision in order to preserve it following this appeal, I do so.

24. It follows from my decision above that it was perverse for the First-tier Tribunal to regard the appeal as not including a challenge to the ICO's conclusion that DPRs 189 and 190 were requests within the meaning of section 1(1) of FOIA. I have concluded that it did. I do not consider, though, that it would be appropriate for me to continue to decide the substantive issue as to whether they were requests within the meaning of section 1(1) of FOIA. While some might think the answer to that question to be obvious, the parties have not on this appeal advanced arguments on this point and there is also the issue (to which I have referred when dealing with Ground (1) above) as to what the First-tier Tribunal should do if it concludes that they were requests for information within the meaning of section 1(1) of FOIA that were requests for the appellant's personal data. That is an issue on which the appellant, IC and ONS are likely to wish to make submissions.

25. I also consider that it would not be appropriate for me to re-make the decision as to whether the appellant should have permission to amend his appeal to include appeals on grounds that the ONS was not permitted to rely on section 14(1) in relation to DPR 189 and 190. I acknowledge that the appellant appears to be under the misapprehension that the IC has agreed that I should remake the First-tier Tribunal's decision by allowing his amendment application, but I did not indicate I might do that and the IC did not agree to that course. I am aware also that the appellant has sought to re-open his case in this respect with the IC, in the light of the First-tier Tribunal's decision in his appeal in relation to DPR 188, and the IC has indicated that he should instead pursue this through these

proceedings. I agree that seems to me to be the appropriate course, but I still do not consider that it would be appropriate for me to decide this issue for myself.

26. The First-tier Tribunal's knowledge of this case is far greater than mine and it is much better placed to assess the extent to which DPR 189 and 190 raise the same or different issues to those it has already decided in relation to DPR 188. I have no reason to doubt that the First-tier Tribunal will approach the issues that I am remitting to it with complete professionalism. It would be disproportionate, and not in accordance with the overriding objective, to remit this case to a different Tribunal, given the amount of work that this Tribunal put in to deciding (with scrupulous care) the issues that it did accept were before it.

27. The case is therefore remitted to the same Tribunal to decide: (i) whether requests DPR 189 and 190 were requests within the meaning of s 1(1) of FOIA; and (ii) whether the appellant should be permitted to amend his appeal to include a challenge to ONS's reliance on section 14(1) of FOIA in relation to those requests. Depending on the outcome of its decisions on (i) and (ii), the Tribunal will need to continue to deal with the appeal in the usual way. For the appellant's benefit, I emphasise that the Upper Tribunal does not retain a 'supervisory' role over remitted cases.

ONS's application to be removed as a respondent to the appeal

28. As the appeal is at an end, I do not consider it would be appropriate to remove ONS as a respondent now. ONS will no doubt wish to consider its position in the light of my decision and may yet wish to participate in the remitted hearing before the First-tier Tribunal.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 21 March 2025