[2025] UKUT 177 (AAC)
Appeal No. UA-2025-000146-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

The Information Commissioner

Applicant

- v -

The Secretary of State for Health and Social Care

1st Respondent

and

Access Social Care

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 5 June 2025
Decision date: 10 June 2025

Representation:

Applicant:	Mr Eric Metcalfe of Counsel
1st Respondent:	Mr Christopher Knight of Counsel
2nd Respondent:	No attendance or representation

NOTICE OF DETERMINATION OF
APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal to the Upper Tribunal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DETERMINATION

The subject matter of this application for permission to appeal

1. This application for permission to appeal to the Upper Tribunal concerns an attempt by the Information Commissioner to challenge a case management direction made by the First-tier Tribunal as to which party was to be responsible for the preparation of the open hearing bundle.

The context: the substantive proceedings

2. In May 2023 Access Social Care, a charity, made a Freedom of Information Act ('FOIA') request to the Department of Health and Social Care ('DHSC' or 'the Department') for information about funding for adult social care. In June 2023 the DHSC refused to provide all the information sought on the grounds that it was exempt under FOIA section 35(1)(a) (formulation of government policy). On 3 May 2024 the Information Commissioner, in response to Access to Social Care's complaint, issued Decision Notice IC-269593-P7Q5. This directed the DHSC to provide the requester with the withheld information. The DHSC then lodged an appeal with the General Regulatory Chamber ('GRC') of the First-tier Tribunal ('FTT'). In the course of preparing for the substantive hearing of the DHSC's appeal, the FTT directed that the Information Commissioner should prepare the open bundle and that the Department should prepare the closed bundle.

The context: the General Regulatory Chamber's *Bundles Guide*

3. In May 2024 the GRC Chamber President issued the latest version of the Chamber's *Bundles Guide* for users. This document is divided into three Parts. Part 1 briefly explains the purpose of bundles in proceedings before the FTT, namely:

> To help the Tribunal identify the relevant issues and understand the arguments in an appeal, it is important that there is a well-organised bundle of all the documents each side relies upon in support of their case, whether the case is to be considered with a hearing, or without a hearing.

4. Part 2 then sets out a series of more detailed 'Notes for Unrepresented Appellants'. This includes the following statements:

> **2.1 Who provides the bundle?**
>
> In this Tribunal, because the Respondent (the regulator) is a public body and is usually represented by legal professionals or other officials, they will normally be expected to put together the bundle and send it to you and the Tribunal. …
>
> Sometimes the Respondent may ask the Tribunal to direct that you should provide the bundle, but that is unusual. If that happens a decision will be made by a Tribunal registrar or judge, after considering any comments you have.

5. Part 3 of the *Bundles Guide*, which deals with 'Notes for Bundle Providers', opens with the statement that "The Tribunal usually expects the regulator will be the party that prepares the bundle." As Mr Metcalfe for the Information Commissioner

put it, "that single sentence is the cause of all our misery and woe". However, that general expectation is subject to potential modification where there is closed material. Paragraph 3.6 relevantly explains:

> If the Tribunal needs to see the information in dispute in an Information Rights case, this will need to be placed in a separate "Closed" bundle. When a public authority has joined the proceedings as a second respondent, the Tribunal may ask that they prepare any Closed bundle.

6. That is indeed precisely what happened in the instant case, albeit that the DHSC was the appellant rather than the second respondent.

7. It seems to me self-evident from its tenor that the GRC issued the *Bundles Guide* in order to provide clarity and consistency of approach on various issues relating to bundles for appeal hearings in its manifold appellate jurisdictions (e.g. responsibility for their production, as well as consistency of content and format). The *Bundles Guide* is not exclusively devoted to appeals against decision notices by the Information Commissioner. Rather, the GRC hears appeals from a wide range of regulators, large, middling and small. The *Bundles Guide* adopts as a starting point the position that the regulator will usually have responsibility for preparing the open bundle, given that the regulator will be a respondent in every case and the appeal will inevitably be some form of a challenge to the regulator's decision.

The saga of the First-tier Tribunal's case management directions

8. In this case on 5 July 2024 the Information Commissioner requested that the FTT should direct the Department to prepare the bundles for the instant appeal. The Commissioner pointed out that, in civil litigation generally, appellants were responsible for preparing bundles and that this approach was consistent with the overriding objective "given that [DHSC] is the relevant public authority and is legally represented".

9. On 19 July 2024 the DHSC submitted a note drafted by counsel, inviting the FTT to direct the Commissioner to prepare the open bundle, essentially as this was in line with the FTT's published guidance in the *Bundles Guide*.

10. On 2 August 2024 the Information Commissioner filed further detailed submissions, reiterating its request that the Department be directed to prepare the open bundle, in response to the DHSC's representations.

11. On 25 October 2024 the FTT Judge issued detailed case management directions for the substantive appeal, running to three pages in length. These included (at paragraph 6c) a direction that "the party producing the bundle" (but without actually specifying which party that should be) was required to send a draft index to the other parties for their agreement. Under the heading 'Reasons' there were three short sentences, none of which touched on the issue of the responsibility for bundle preparation.

12. On 4 November 2024 the Information Commissioner advised the FTT that the parties had been unable to reach agreement as to which of them should prepare the bundles and repeated its request that the DHSC be directed to undertake this role.

13. On 29 November 2024 the FTT Judge issued a revised version of the case management directions of 25 October 2024. These directions amended paragraph 6c to include the statement that "the Information Commissioner will prepare the open bundle and the Appellant will prepare the closed bundle." There was no amendment to the very brief reasons provided.

14. On 20 December 2024 the Information Commissioner lodged an application for a review of the decision of 29 November 2024 or in the alternative for permission to appeal.

15. On 2 January 2025 the FTT Judge refused the Information Commissioner's application, giving the following reasons:

> There were no reasons included on the Order dated 29th November. In those circumstances, the Respondent was at liberty to require clarification of the reasons. The Respondent has not done so. Had the Tribunal been asked to clarify its reasons, the Respondent would have been advised that the decision was in accordance with the Bundles Guidance.
>
> It is noted that this is the second appeal from the Respondent against a case management decision about who bears the burden of providing the open bundle; the first case was FT/EA/2024/0136. Rather than make additional applications and creating additional work, the Respondent may be well advised to seek permission from the Upper Tribunal in one case and if given, get guidance that be applied or if refused, accept it is a matter for the First Tier. Sequential applications only serve to delay cases and create extra work for all concerned. The reasons that follow replicate the reasons already given in the first application for permission to appeal which was duly refused.
>
> The Bundles Guidance, primarily aimed at litigants in person, states that the Regulator (in this case the Commissioner) as the Respondent will usually provide the bundle. That paragraph of the Guidance then goes onto explain that on occasion the Appellant may be expected to provide the bundle. For example, contempt proceedings. There is no separate provision in that Guidance as to when the public authority is to provide the bundle save for closed bundles. The 2024 Guidance replicates the understanding of bundles provision prior to the issue of that Guidance. The Guidance was not changing expectations, it was merely formalising them in writing.
>
> The difficulty with the Commissioner's submission that this public authority has the resources to provide the bundle is that there is then uncertainly and the need for a case-by-case decision as to who is to provide the bundle on each and every appeal. Public authorities like the Secretary of State for Health and Social Care have very different resources to the small parish council. The submission of the Commissioner almost invites the Tribunal to hold a means/resources enquiry before making bundles direction in each case. That would neither be practical nor consistent, and would undoubtedly involve unnecessary additional submissions and extra work.
>
> The Tribunal has issued the Bundles Guidance not only to the Commissioner to but to all Regulators. The Guidance attempts to achieve consistency and certainty amongst numerous Regulators. It would not be in

the interests of the overriding objective to have different Bundles Guidance for individual Regulators noting that the Tribunal deals with over 400 appeal rights. It would also not be in the interests of the overriding objective to introduce a resources type argument into every information rights appeal as to whether the Commissioner or public authority should produce the bundle.

The Commissioner states that the submissions about bundles were not repeated in the Order and that the reasons were brief. There is no requirements on the Tribunal to repeat submissions and indeed on an interlocutory application that would be unnecessarily time-consuming. The Tribunal was able to give reasons for its decision when requested and were proportionate to the issue in dispute. It follows that any party can ask for amplification of reasons should they consider it necessary to do so. No application was received.

The Commissioner has not put forward any basis for the Tribunal to consider that the Order dated 29th November was unreasonable or contrary to Rule 1 of the Chamber Rules. The Commissioner simply disagrees with the decision made and the potential precedent it sets. That is not a ground for review or appeal.

In summary, the Tribunal considers that there is no error of law, procedural irregularity or exceptional ground upon which to either review its decision or grant leave to appeal.

Whilst the Chamber is sympathetic as to the resources of the Commissioner, the same challenges also apply to many public authorities and indeed to the Tribunal itself.

The onward challenge

16. The Information Commissioner now applies direct to the Upper Tribunal for permission to appeal.

17. It may be added that the current challenge is just one of (at least) three cases which raise the same issues. The other two cases in the Upper Tribunal are *Information Commissioner v Cabinet Office* (FTT reference FT/EA/2024/0136; UT reference UA-2025-000159-GIA) and *Information Commissioner v Cabinet Office* (FT/EA/2024/0431; UA-2025-000682-GIA). Both these applications have been stayed in the Upper Tribunal pending the outcome of the present application.

Applications for permission to appeal: the general principles

18. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" of the FTT (see section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal will give permission to appeal only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

19. The error of law must also be material. The Court of Appeal has set out a summary of the main errors of law in its decision in *R (Iran) v Secretary of State*

for the Home Department [2005] EWCA Civ 982 at paragraph 9. The main examples of where the FTT may go wrong in law include (in plain English):

- the tribunal did not apply the correct law or wrongly interpreted the law;
- the tribunal made a procedural error;
- the tribunal had no evidence, or not enough evidence, to support its decision;
- the tribunal failed to find sufficient facts;
- the tribunal did not give adequate reasons.

20. It was also common ground that the threshold for appealing against a case management decision is high. As Chadwick LJ observed in *Royal & Sun Alliance Insurance plc v T & N Ltd* [2002] EWCA Civ 1964 (at [38]):

> … this Court should not interfere with case management decisions made by a judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.

21. In the same case Arden LJ (as she then was) explained the thinking behind that approach (at [47]):

> The principle that an appellate court should only interfere in matters of case management where a judge is plainly wrong is well-established and has been emphasised on many occasions since the introduction of the CPR. Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process. Moreover, the judge dealing with case management is often better equipped to deal with case management issues.

22. More recently, in another case management context – whether to make a debarring order against a party in FTT proceedings – Lord Neuberger held in *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 55; [2017] 1 WLR 2945 as follows (emphasis added):

> the issue whether to make a debarring order on certain facts is very much one for the tribunal making that decision, and an appellate judge should only interfere where the decision is not merely different from that which the appellate judge would have made, but is a decision which the appellate judge considers cannot be justified… **In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that is unjustifiable.**

The oral permission hearing of this application for permission to appeal

23. I held a rolled-up oral hearing of the Information Commissioner's application for permission to appeal on 5 June 2025 at Field House in London. This was by way of a conventional face-to-face hearing. The Information Commissioner was represented by Mr Eric Metcalfe of counsel. The Secretary of State was represented by Mr Christopher Knight of counsel. I am indebted to both counsel for their careful written and oral submissions. As an effective bystander to this aspect of the litigation, the Second Respondent (Access Social Care) understandably neither attended nor was represented at the oral hearing.

The Information Commissioner's two grounds of appeal

Introduction

24. The Information Commissioner's proposed grounds of appeal are two-fold. The first ground ('Ground 1') is that the FTT Judge failed to give reasons for her direction as to the responsibility for the preparation of the open bundle and misdirected herself as to the relevant law. The second ground ('Ground 2') is that the Judge's direction was itself unreasonable and contrary to the overriding objective. I agree with Mr Knight that it is best to consider these grounds in reverse order, thus enabling the focus to be on the substance rather than the form.

Ground 2

25. The Information Commissioner's second (but, in reality, his primary) ground of appeal is that the FTT's direction that the Information Commissioner should prepare the open bundle for the substantive appeal hearing was both unreasonable and contrary to the overriding objective. Mr Metcalfe accordingly launched a two-pronged attack on the bundles direction.

26. First, and in terms of the reasonableness or, as he characterised it, the unreasonableness of the FTT's bundles direction, Mr Metcalfe began with a consideration of the *Bundles Guide*. He noted that the *Bundles Guide* gave no explanation for its assertion in Part 3 that the usual expectation was that the regulator would be the party that prepares the bundle. However, he also observed that paragraph 2.1 of the *Bundles Guide* advised litigants in person that the regulator would normally be expected to prepare the bundle, being a public body and usually represented by legal professionals. By the same token, Mr Metcalfe submitted, the DHSC should be required to prepare the bundle in the instant case. He advanced four principal arguments in support of that submission. The first was that the DHSC was a well-resourced public body represented by legal professionals. The second was that the Department had access to all the relevant documents. The third was that it was a matter of choice for the DHSC whether to appeal to the FTT, whereas the Information Commissioner had no choice but to be a party. The fourth was that if the DHSC had instituted proceedings for judicial review then the burden would have been on the Department to prepare the bundles. However, these arguments are not persuasive for the following reasons.

27. As to the first point, this argument assumes that the explanatory consideration in paragraph 2.1 of the *Bundles Guide* necessarily underpins the usual expectation in Part 3 that the regulator prepares the bundles. However, Part 2 is confined to giving guidance to litigants in person, whereas Part 3 applies across the piece of all GRC jurisdictions. Furthermore, it lays down a clear delineation of the default (and usual but not immutable) position of the regulator's responsibility for bundle preparation.

28. As to the second matter, this is simply not correct – as Mr Knight put it, no one party has hegemonic access to all the documents. In practice in FOIA cases there may be a wealth of correspondence between the requester and the ICO which the public authority will see for the first time in the hearing bundle.

29. As to the third issue, it is undoubtedly true that the Information Commissioner is a conscript rather than a volunteer in every FOIA appeal before the FTT. That applies whether the appellant is the requester or the public authority. However, that truth simply reflects the fact that the Information Commissioner has a recognised role as in effect the statutory guardian of FOIA (see *Browning v IC and Department for Business, Innovation and Skills* [2014] EWCA Civ 1050; [2014] 1 WLR 3848 at [33] and *Greenwood v IC and the Commissioner of the Police for the Metropolis* [2025] UKUT 76 (AAC) at paragraph 88).

30. As to the fourth argument, the purported analogy with the hypothetical of the DHSC bringing judicial review proceedings under Part 54 CPR does not take the present application anywhere. The FTT jurisdiction is consciously different from Part 54 CPR proceedings, and in any event in the latter arena the Department would be at risk of all costs and not just the cost of producing the bundle.

31. In that context it is important not to lose sight of the nature of the Information Commissioner's challenge in these proceedings. This application is not an application for permission to apply for judicial review of the GRC's *Bundles Guide* and should not be seen through that prism. Judicial review was an option open to the Information Commissioner but represents a path not taken. In the absence of any legal challenge to the *Bundles Guide*, the Upper Tribunal is faced now with a much narrower question – is the bundles direction in this case "unjustifiable" (*per* Lord Neuberger) in the sense of being "plainly wrong" (*per* Chadwick LJ), bearing in mind the high threshold set by *Royal & Sun Alliance Insurance plc* for any challenge to a case management direction? It follows from the analysis above that I do not regard it as arguable that the FTT's bundles direction was *Wednesbury* unreasonable.

32. Secondly, it was also submitted on behalf of the Information Commissioner in support of that challenge that the bundles direction was plainly contrary to the overriding objective. Rule 2 familiarly provides as follows:

> **Overriding objective and parties' obligation to co-operate with the tribunal**
>
> **2.—**(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.

> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally.

33. The Information Commissioner's submission was that in making the bundles direction the FTT had in effect disregarded the obligation to take account of the "resources of the parties" in rule 2(2)(a). There are at least three difficulties with this submission. The first is that the logical end-point of this submission is that the FTT should have considered the comparative budgets of the parties, a task which is completely unrealistic in practice. The second is that although consideration of resources is in very general terms relevant to the overriding objective, and underpins paragraph 2.1 of the *Bundles Guide*, it provides no real assistance in differentiating between the situation of the Information Commissioner and a central government department, each of which will face competing calls on their doubtless limited budgets to defend their decisions in litigation. The third is that in any event rule 2 mandates a multi-factorial assessment of competing considerations, not all of which may point in the same direction. The balancing of those considerations when making case management directions is quintessentially a matter for the good judgement of the tribunal charged with the conduct of the proceedings.

34. It follows that, on whichever basis it is put (whether unreasonableness or breach of the overriding objective), Ground 2 is not arguable.

Ground 1

35. The Information Commissioner's first ground of appeal is a reasons challenge, premised not so much on the alleged inadequacy of reasons as on their complete absence. Thus, Mr Metcalfe points out that the FTT Judge provided no reasons at all for her amended bundles direction of 29 November 2024 and submits that amounted to a plain error of law. Mr Metcalfe accepts that ordinarily reasons would not be necessary for a case management direction but argues that in the particular circumstances of this case reasons were required, not least given the detailed submissions made by the parties, indicating it was a matter of some importance to them. Mr Knight candidly acknowledges the absence of reasons in the amended bundles direction but submits that it matters not in this case.

36. The starting point must be the legislative framework and in particular rules 5, 6 and 38 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976). Rule 5(3)(i) empowers the FTT to make a direction to "require a party to produce a bundle for a hearing". So far, so good. Rule 6 then provides as follows:

> **Procedure for applying for and giving directions**
>
> **6.—**(1) The Tribunal may give a direction on the application of one or more of the parties or on its own initiative.
>
> (2) An application for a direction may be made—
>
> (a) by sending or delivering a written application to the Tribunal; or
>
> (b) orally during the course of a hearing.
>
> (3) An application for a direction must include the reason for making that application.
>
> (4) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send written notice of any direction to every party and to any other person affected by the direction.

37. It is noteworthy that the requirement to give reasons in rule 6 is asymmetric – a party seeking a direction must include their reason(s) for doing so (rule 6(3)) whereas the FTT need only send written notice of the direction to the parties (rule 6(4)), with no requirement to provide the reason(s) for making that direction.

38. Rule 38 further provides as follows:

> **Decisions**
>
> **38.—**(1) The Tribunal may give a decision orally at a hearing.
>
> (2) Subject to rule 14(10) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following a direction under rule 5(3)(e)—
>
> (a) a decision notice stating the Tribunal's decision;
>
> (b) written reasons for the decision; and
>
> (c) notification of any right of appeal against the decision and the time within which, and manner in which, such right of appeal may be exercised.
>
> (3) The Tribunal may provide written reasons for any decision to which paragraph (2) does not apply.

39. Thus, the requirement on a tribunal to give written reasons only applies to a decision "which finally disposes of all issues in the proceedings" (rule 38(2)). By its very definition this necessarily excludes a mundane case management direction that apportions responsibility for the preparation of a hearing bundle. In cases not covered by rule 38(2) the FTT has a discretion to provide written reasons (rule 38(3)).

40. The default position, therefore, is that there is no categorical expectation in the statutory scheme governing the FTT's procedural rules that reasons need to be given for a tribunal's case management direction.

41. The question then is whether there is any support for the Information Commissioner's submissions in the case law. In that regard Mr Metcalfe relied

heavily upon the Court of Appeal's decision in *R (LND1 & Ors) v Secretary of State for the Home Department* [2024] EWCA Civ 278, and, in particular, the following passage (at [67]) from the judgment of Underhill LJ (with Mr Metcalfe's emphasis added):

> It is not necessary, nor appropriate, in this case to consider the precise content of the duty to give reasons. It is sufficient to say that, in general, the reasons must adequately address the principal points relied upon by the applicant. The reasons may be brief and what will be adequate will generally depend upon the content of the decision and the points raised by the applicant.

42. Mr Metcalfe rightly recognised that the subject matter of *R (LND1 & Ors)* and the present case were poles apart, as the Court of Appeal was concerned with the reasons given by the Home Office for a decision about whether an Afghan judge qualified for relocation in the UK. It was, quite literally, potentially a matter of life and death. The case was also a judicial review challenge to an administrative decision on whether to admit the applicant to the UK. That very different context means that the Court's decision is of very limited assistance in the current proceedings.

43. Much more in point is the Court of Appeal's decision in *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33, where a social security tribunal's refusal to grant an adjournment was in issue. Laws LJ observed as follows as to the limitations of such a challenge (at [12]):

> If it is clear that the adjournment was in fact refused for good reason, but the expression of that good reason was insufficient and failed to fulfil applicable legal standards, that failure would not, in my judgment, of itself necessarily justify this court in allowing the appeal. The legal defect constituted by the tribunal's failure to express sufficient reasons would, or at least might, be remedied by this court declaring that the reasons given were in truth legally insufficient, even though the appeal were dismissed.

44. Laws LJ also held as follows (at [25]):

> the extent or the depth of a duty to give reasons is heavily dependent on the context in which the duty arises. For my part I consider is clear that, in the ordinary way and as a matter of practical good sense, any obligation to give reasons for an ancillary or procedural act, such as the grant or refusal of an adjournment, will be relatively summary in nature, at least by contrast to the quality of reasons required for an outcome decision itself.

45. In addition, and relevantly, Laws LJ (at [29]) regarded it as:

> … important to recognise that the brief reference given by the tribunal itself in the decision notice to the refusal to adjourn, though in one sense a statement which could be regarded as more of a conclusion than a reason, was addressed to a tutored audience. Everyone involved in the case knew the short summary of facts …

46. The decision in *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 was followed and applied in *KP v Hertfordshire CC (SEN)* [2010]

UKUT 233 (AAC), where the position was summed up as follows (at paragraph 30):

> There was no statutory duty on the tribunal to give reasons for its interlocutory decision on the parties' respective applications. Instead, the tribunal had a discretion as to whether to give reasons. The exercise of that discretion is not governed by the *Meek* test, although the overriding objective in Rule 2 of the HESC Rules will be relevant. It may well be good judicial practice to give brief reasons for any interlocutory decision. This tribunal did just that. The submission that it erred in law in some way is simply unsustainable.

47. However, notwithstanding the absence of any general duty to give reasons for decisions that do not finally dispose of all issues in the proceedings, reasons may still be required for an interlocutory decision that would appear "aberrant" without reasons: *R (Birmingham CC) v Birmingham Crown Court* [2009] EWHC 3329 (Admin); [2010] 1 WLR 1287. Conversely, even where no reasons have been given (as here), where the matter was an interlocutory one of a case management kind and the outcome was not apparently "aberrant", it may be held that any error was not material such as to justify allowing an appeal. Furthermore, I agree with Mr Knight that an interlocutory decision that is adjudged to be "aberrant" is equivalent to saying that it is "plainly wrong". To that extent the Information Commissioner's reasons challenge adds nothing to the mix.

48. True, the FTT Judge did not provide a specific reason for her amended bundles direction, but (as noted above) she was under no statutory obligation to provide reasons. The FTT had been provided with competing submissions from the Information Commissioner and the DHSC respectively and was faced with a binary choice as regards preparation of the open bundle. There was no potential third way. As such, the FTT Judge was dealing with what Laws LJ described as a "tutored audience", who understood where the battle lines had been drawn. The necessary and indeed inevitable inference was that the Department's submissions had been preferred for the reasons given by the DHSC. As the Upper Tribunal three-judge panel noted in *Information Commissioner v Experian* [2024] UKUT 105 (AAC):

> 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.

49. Moreover, if the absence of explicit reasons for the amended bundles direction represented a failure and an error of law on the part of the FTT – and, for the reasons above, I find that it did not – then any such failure and error was amply cured by the FTT's review decision of 2 January 2025, to which it is permissible to have regard (see *Greenwich Millennium Village Ltd v Essex Services Group Plc & Ors* [2014] EWCA Civ 960; [2014] 1 WLR 3517 at [7]).

50. In all those circumstances I do not need to consider the significance, if any, of the reasons given by the same FTT Judge for the bundles direction in the parallel proceedings in *Cabinet Office v Information Commissioner* (FTT reference FT/EA/2024/0136; UT reference UA-2025-000159-GIA).

51. It follows that Ground 1 is also not arguable.

Conclusion

52. In conclusion, I do not consider that the proposed appeal has any realistic prospects of success on a point of law. I therefore refuse this application for permission to appeal.

53. As this is a decision on an application for permission to appeal, this determination is technically not precedent-setting and so would not usually be published on the Administrative Appeals Chamber's decisions website (or on The National Archive [TNA] Find Case Law site). However, given that it may be of assistance in other cases, I have directed that the determination should be allocated an NCN so that it can appear on both websites.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 10 June 2025