



Neutral Citation Number: [2026] UKUT 399 (AAC)
Appeal No. UA-2025-001700-GDPA

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

THOMAS JOHN EVANS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**APPLICATION FOR PERMISSION TO APPEAL
AGAINST A DECISION OF A TRIBUNAL**

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE WEST

ON APPEAL FROM

Tribunal: First-tier Tribunal (General Regulatory
Chamber) (Information Rights)

Tribunal Case No: FT/EA/2024/0341/GDPR
[2025] UKFTT 01057 (GRC)

Panel: Judge Scherbel-Ball, Members
Palmer-Dunk and Saunders

Tribunal Hearing Date: 18/8/2025

Tribunal Decision Date: 9/9/2025

BEFORE UPPER TRIBUNAL JUDGE WEST

DECISION ON THE APPLICATION FOR PERMISSION TO APPEAL

The application by the Appellant for permission to appeal against the decision of the First-tier Tribunal dated 9 September 2025 under file reference FT/EA/2024/0341/GDPR [2025] UKFTT 01057 (GRC) is refused.

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

REASONS

Introduction

1. This is an application for permission to appeal against the decision of the First-tier Tribunal (Judge Scherbel-Ball, Tribunal Members Palmer-Dunk and Saunders) dated 9 September 2025 after a hearing on 18 August 2025 whereby it upheld a decision of the Information Commissioner (“the IC”) and dismissed the Appellant’s application for an order under s.166(2) of the Data Protection Act 2018 (“the DPA”).
2. The First-tier Tribunal subsequently refused permission to appeal against its decision on 8 October 2025. The Appellant then sought permission to appeal from the Upper Tribunal on 19 October 2025. I directed an oral hearing of the application on 18 November 2025, which I was due to hear in either Leeds or Manchester, but the Appellant then asked for the matter to be determined at a remote hearing, a request to which I acceded.
3. I heard the application for permission to appeal on 27 May 2026 when the Appellant appeared before me. The IC was represented by Mr Samuel Willis of counsel. The hearing was originally due to take place by videolink, but as a result of technical problems it ultimately proceeded by telephone. I am grateful to both the Appellant and Mr Wilis for their crisp and economical submissions.

The Test to be Applied

4. An appeal to the Upper Tribunal lies only on “any point of law arising from a decision” (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal’s decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in **Smith v. Cosworth Casting Processes Ltd** [1997] 1 WLR 1538). In the exercise of its discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal’s decision.

The Background

5. I can largely take what follows from the decision of the Tribunal below. The Tribunal explained the background to the application as follows:

“1. This is an application made by Mr Evans under s.166(2) of the Data Protection Act 2018 (the “DPA 2018”) for an order requiring the Commissioner to take appropriate steps to respond to a complaint made by Mr Evans in respect of the processing of his personal data by a data controller (the “Complaint”). In this case, the data controller about whom Mr Evans complained to the Commissioner was the Financial Conduct Authority (the “FCA”).

...

Background to the Application

3. This application arises out of the Commissioner’s handling of the Complaint. The Complaint was made by Mr Evans to the Commissioner on 26 October 2023. The Complaint concerned Mr Evans’ assertion that the FCA had inadequately responded to a subject access request he had made of the FCA for his personal data. In his application, Mr Evans says the relief which he seeks is for *“the Tribunal to find that the ICO incorrectly dismissed my request for an investigation into the FCA’s refusal (by silence) to supply requested personal documents, and to advise the ICO to treat my request properly.”*

4. By 12 December 2023, the Commissioner had not allocated the Complaint to a Case Officer. However, a Case Officer at the Information Commissioner’s Office

(the "ICO") was subsequently appointed by the Commissioner. On 26 January 2024, the Case Officer responded to Mr Evans in relation to the Complaint (the "Response"). In the Response, the Commissioner explained that it deals with complaints such as that from Mr Evans:

"under s.165 of the [DPA 2018] which requires us to take steps to respond to complaints including investigations to the extent that we feel is appropriate. It also requires us to inform the complainant of the outcome of their complaint."

The Commissioner informed Mr Evans that

"at this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case....As we do not appear to hold any clear evidence of an infringement we have closed this case."

5. Mr Evans was not content with the Response; on 28 January 2024, he complained to the Commissioner about the Response. In so doing, he invited the Commissioner to reconsider its position and *"submit a substitution"*. On 28 February 2024, Mr Evans made a further *"formal complaint"* in respect of the Response. At paragraph 6 of this formal complaint, Mr Evans stated *"On 26 January 2014 [sic], the ICO dismissed my complaint against the FCA"*. Initially, Mr Evans complained that the Commissioner had dealt with the Complaint under data protection legislation rather than under the Freedom of Information Act 2000 ("FOIA").

6. The ICO responded to Mr Evans' complaint about the Response on 8 March 2024. In this letter, amongst other things, the ICO informed Mr Evans that it:

"cannot involve ourselves in disputes between data controllers and data subjects when there is a disagreement regarding what personal information is held and/or provided by an organisation. Ultimately as a regulator, we have to take what a controller says in good faith, our investigations under s.165 of the [DPA 2018] are not to prove matters beyond reasonable doubt, instead to provide an outcome based on the balance of probabilities. As such a SAR may not be the most appropriate route for obtaining the information or documents you seek. In light of this, you may wish

to consider independent legal advice with a view to obtaining a Court Order to access the documents you require...

...A case review is the final stage of the ICO's case handling process which means that we won't consider this complaint further. However, I recognise that you may continue to disagree with our view. It may be helpful to explain that you are entitled to take your own cases to court under data protection legislation, irrespective of our decision."

7. The ICO's letter advised Mr Evans that he could complain, if he so wished, to the Parliamentary and Health Service Ombudsman. It made no reference to any rights under s.166 of the DPA 2018.

8. Mr Evans remained dissatisfied with the ICO's position. Following further correspondence and a complaint about the review Mr Evans had received, the ICO sent a further letter to Mr Evans dated 31 January 2025 (the "Clarification Letter"). The Commissioner describes this as a "*Clarification Letter...the purpose of [which] was to assist the Applicant's understanding of the [ICO's] regulatory role in investigating complaints.*" The Clarification Letter, stated, amongst other things:

"When you submit a complaint to The Information Commissioner's Office (ICO) you are asked to provide supporting documents to evidence your data protection complaint. The ICO has very limited resources and we can only use those resources effectively if concerns are presented in a manner which is clear and concise, and where we are provided only with the appropriate evidence which is actually relevant to the appropriate elements of the legislation concerned. Unfortunately, you provided the ICO with a large volume of documents/correspondence which meant we were unable to determine the evidence we require to support your complaint. We did note that the FCA responded to your SAR and provided the following information in relation to any redactions applied: 'You will notice that some redactions have been applied. There are two reasons for this. Firstly, we have removed the personal data of third parties which have no connection with your personal data. Secondly, we have removed information that is not 'personal' data at all and therefore falls outside the UK GDPR.'"

...

"At no point, through the assessment process, have you clarified the main data protection concerns beyond you being unhappy with the way in your SAR was handled by the FCA. Using the information available to us on this case, we were able to determine that the FCA responded to your SAR and provided information in regard to any redactions made. This is in line with our guidance and in accordance with UK GDPR legislation.

We therefore cannot determine any infringement has occurred by the FCA on this occasion. This is what we implied when we advised you 'At this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case.'

If you believe the FCA has deliberately withheld your personal data, you will need to provide clear evidence to support this claim. This might include specific instances where you believe data was omitted or inconsistencies in the information provided. I hope this provides you with some clarification on how we have assessed your complaint and arrived at our decision outcome letter."

9. By letter dated 2 February 2025, Mr Evans rejected the points made by the ICO in the Clarifying Letter stating, amongst other things *"I cannot accept that your further clarification is any more than a restatement of previously made comments justifying your decision not to investigate the circumstances."*

10. Mr Evans issued the instant application under s.166 of the DPA 2018 on 17 August 2024. The grounds of the application were stated in the following terms by Mr Evans:

"I submitted a request on 26 October 2023 to the [ICO] to investigate a breach of the legislation by the [FCA].... The ICO rejected my request by their e-mail dated 26 January 2024...

Their decision not to investigate my complaint was based upon the following statement in the above referenced e-mail:

At this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case.

The rejection was ostensibly confirmed by the ICO Team Manager in her e-mail of 10 April 2024... I say ostensibly because, rather surprisingly, her e-mail is totally devoted to pointing out that I was wrong to make my request under [FOIA] and that the ICO was correct in declaring it, and treating it as, a complaint under the [DPA 2018]. She did not confirm her caseworker's findings that there was no evidence of an infringement of the legislation but, since she declared the correspondence closed, we must assume that she was confirming the caseworker's findings.

On the matter of which Act my complaint should have been considered under, I refer the Tribunal to the following extract from the ICO's website, drawn to my attention by the Parliamentary and Health Service Ombudsman (PHSO):

A request does not have to include the phrases "subject access request," "right of access," or "section 45(1) of the DPA 2018". It just needs to be clear that the person is asking for their own personal information. Indeed, a request may be a valid SAR even if it refers to other legislation, such as [FOIA] or the Freedom of Information (Scotland) Act 2002.

Consequently, I am relaxed about the fact that the complaint was considered and decided on the basis of Section 165, and other relevant Sections, of the DPA.

This appeal is built upon the ICO Lead Case Officer's statement that there was "no clear evidence of an infringement of the legislation". I reject this statement, and I submit that there was ample such evidence. I shall now confirm what that evidence was.

1. In my initial Subject Access Request (SAR) of 12 September 2023 (Attachment D) I specified under paragraphs A and B the types of document I was seeking.

2. I repeated this request in my e-mail to the FCA dated 26 October 2023 (Attachment E), adding that

a subsequent (late) response by the FCA included an e-mail to them from their Complaints Commissioner seeking clarity on some issues. I pointed out that the FCA had not sent me their response to the Complaint Commissioner's request, and asked specifically for a copy.

None was forthcoming.

I submit that non-supply of the requested data, together with the absence of a reason for such non-supply is a breach of the legislation."

11. The Commissioner opposes the making of any order under s.166(2) of the DPA 2018. He filed his response to the application dated 10 February 2025. In short summary, the Commissioner contended in his response to the application that he had complied with the procedural requirements of the UK GDPR and the DPA 2018. The Commissioner submitted that the FTT did not have jurisdiction to consider the application and/or that it has no real prospect of success and therefore should be struck out under either r.8(2)(a) and/or r.8(3)(c) of the Tribunal's rules. The Commissioner filed an application seeking the strike out of the application.

12. Mr Evans filed a reply dated 20 February 2025 in which he opposed the strike out application. In summary, in his reply, Mr Evans contended that:

12.1. He *"believes that the FCA is guilty of suppressing a serious legitimate complaint against a major British bank, and he seeks to remedy that situation by submitting a formal complaint against the FCA. To that end, he sought a copy of relevant documents that the FCA held relating to his original complaint to the FCA. His request was not satisfied, so he complained to the [ICO]. The [ICO] refused to investigate his complaint."*

12.2. The application was based upon *"the refusal of the [ICO] to take appropriate steps to respond to the complaint...and also on [the ICO's] refusal to "inform the complainant of the progress on the complaint..."*. Mr Evans was not *"seeking to argue the merits of the complaint, nor is he seeking to challenge the substantive outcome of the [ICO's] investigation into the complaint...To the contrary, [Mr Evans] is complaining that the procedure which the [ICO] is obliged to follow has not been investigated, even to a minimal extent...the [ICO] declined to investigate the complaint. There is no*

substantive outcome of the [ICO's] investigation because there was no investigation."

12.3. When he made the Complaint, Mr Evans had set out the request for documents he had originally made of the FCA.

12.4. Mr Evans had never been asked by the Commissioner to clarify his concerns when he made the Complaint and he had demonstrated on many occasions that he had clearly identified the documents which he was seeking and had confirmed that they were not provided.

12.5. The Clarification Letter would have been expected to set out the actions the Commissioner had taken to inform its conclusion in relation to the lack of sufficient evidence of a breach of the legislation. There was no such clarification contained there or in the response to this application.

12.6. Mr Evans was not able to provide evidence that he had not been supplied with documents he requested, apart from providing copies of the requests made of the FCA together with a statement he had not received them.

12.7. Paragraph 46 of the Court of Appeal's decision in *R (on the application of Delo) v Information Commissioner and Wise Payments Ltd* [2024] 1 WLR 263 (CA) ("*Delo CA*") was particularly apposite. This paragraph concerned submissions by the Commissioner in that case concerning the need to take "appropriate steps" even where an outcome was provided.

12.8. The dismissal of the Complaint was not an outcome for the purposes of the DPA 2018 and the UK GDPR. The Response was not an "outcome" but was rather a "*dismissive flick inviting the Appellant to go away*".

12.9. Even if there had been an outcome, there had not been an investigation. The Complaint had not been handled by an investigation to the extent appropriate and no "appropriate steps" had been taken.

12.10. The DPA 2018 does not provide the Commissioner with "*carte blanche*" to do whatever he wishes with a complaint. He has a duty to "deal with" all complaints referred to him "*to the extent appropriate*". Mr Evans relied on paragraph 63 of *Delo CA* which he asserts stated:

'....the Commissioner's principal obligations are to address and deal with every complaint by arriving at and informing the complainant of some form of "outcome", having first investigated the subject matter "to the extent appropriate" in the circumstances'"

12.11. Unlike in *Delo CA*, there was no evidence that the Commissioner had reviewed any correspondence, or undertaken any form of investigation. The Commissioner had not provided any witness evidence to support his position about an investigation. The Commissioner had not advised Mr Evans that the FCA had likely complied with its obligations. In *Delo CA*, Mr Evans contended that there had *"obviously been a reasonable amount of investigation"* by the Commissioner prior to issuing the outcome letter in that case.

12.12. A complete absence of investigation was only appropriate where a complaint was frivolous or vexatious.

12.13. The "error" committed by the Commissioner was of a procedural nature and was therefore within the scope of the Tribunal's jurisdiction.

13. By order dated 3 June 2025, Judge Heald refused the Commissioner's strike-out application. The Judge found that the Commissioner had not shown that Mr Evans' case had no reasonable prospect of success. The issue of whether the Commissioner's actions in considering the Complaint objectively amounted to "appropriate steps" was one which should be considered at a hearing."

The Relevant Legal Principles

6. The Tribunal then considered the relevant legal principles:

"14. If a data subject has a complaint about the handling of their personal data by a data controller under the UK GDPR or DPA 2018 (as applicable depending on the appropriate data processing regime), they have two options, which are not mutually exclusive. One option for a data subject is to apply to court for an appropriate remedy (see Article 78 of the UK GDPR and ss.167 and 168 of the DPA 2018). Alternatively, a data subject has the right to make a complaint to the relevant supervisory authority, which in the United Kingdom is the Commissioner. This judgment and the issues which it addresses concern the latter of these two options.

15. The right to make a complaint to the Commissioner about an alleged infringement of the UK GDPR is set out in Article 77(1) of the UK GDPR. Article 77(2) of the UK GDPR provides that the Commissioner shall inform the complainant on the progress and the outcome of the complaint, including the possibility of a judicial remedy pursuant to Article 78 of the UK GDPR. The judicial remedies which must be available under Article 78 of the UK GDPR are (i) an effective judicial remedy against a legally binding decision of the Commissioner concerning them and (ii) the right of a data subject to an effective judicial remedy where *"the Commissioner does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77."*

16. Article 77 of the UK GDPR must be read in conjunction with Article 57(1) of the UK GDPR. This latter provision sets out "tasks" of the Commissioner under the UK GDPR. Article 57(1)(f) provides that one of these tasks is to *"handle complaints lodged by a data subject....and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with a foreign designated authority is necessary."*

17. These provisions of the UK GDPR must be read alongside the relevant provisions of the DPA 2018. Specifically, s.165(1) of the DPA 2018 identifies that Articles 57 and 77 of the UK GDPR *"confer rights on data subject to complain to the Commissioner if the data subject considers that, in connection with the personal data relating to him or her, there is an infringement of the UK GDPR."*

18. S.165(2)-(5) of the DPA 2018 concern complaints about the processing of personal data under legislative frameworks other than the UK GDPR. Specifically these subsections concern complaints to the Commissioner about processing under Parts 3 and 4 of the DPA 2018 (law enforcement processing and intelligence services processing respectively). Accordingly, they are not relevant for the purposes of this application.

19. S.166 of the DPA 2018 is headed *"Orders to progress complaints"*. S.166(1) provides that the section *"applies where, after a data subject makes a complaint under section 165 or Article 77 of the UK GDPR, the*

Commissioner – (a) fails to take appropriate steps to respond to the complaint, (b) fails to provide the complainant with information about progress on the complaint, or the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or (c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months."

20. If one of these three gateway conditions is established, then s.166(2) of the DPA 2018 provides that the Tribunal, *may*, on an application by the data subject, make an order requiring the Commissioner (a) to take appropriate steps to respond to the complaint, or (b) to inform the complainant of progress, or of the outcome of the complaint, within a period specified in the order. S.166(3) provides that an order under s.166(2)(a) may require the Commissioner to (a) take steps specified in the order, and/or (b) to conclude an investigation, or take a specified step within a period specified in the order.

21. Recital 141 of the UK GDPR provides that an investigation *"following a complaint should be carried out, subject to judicial review, to the extent that it is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period."*

22. Both, (i) the scope of the Commissioner's obligations under Articles 57 and 77 of the UK GDPR and (ii) the scope of the Tribunal's jurisdiction under s.166 of the DPA 2018 have been subject to judicial scrutiny in a number of appellate cases in recent years. These decisions include (i) **Delo CA**, (ii) **Killock & Veale & Others v Information Commissioner** [2022] 1 WLR 2241 ("**Killock**"), (iii) **Smith v Information Commissioner** [2025] UKUT 74 (AAC) ("**Smith**"). **Delo CA** and **Killock** were also considered by a decision of the FTT in **Mahmood v Information Commissioner** [2023] UKFTT 1068 (GRC) ("**Mahmood**") albeit that decision is not binding on this Tribunal and predates the Upper Tribunal's decision in **Smith**. We have considered the decision in **Mahmood** although we do not think it adds anything to the other binding authorities, in particular as a result of the subsequent decision of the Upper Tribunal in **Smith**.

23. We consider that the following core principles can be derived from these authorities when the Tribunal is

considering its jurisdiction and discretion as to whether to make an order under s.166(2) of the DPA 2018:

23.1. First, s.166 is a "forward-looking provision" concerned with remedying ongoing procedural defects that stand in the way of a timely resolution of a complaint by a data subject to the Commissioner. It is not the role of the Tribunal when considering an application under s.166 to assess or challenge the merits of an outcome which has already been given by the Commissioner. That is a matter for the supervisory function of the High Court on an application for judicial review. Accordingly, the focus of the Tribunal is on procedural omissions – **Killock** at [74], [75] and [87], **Smith** at [136].

23.2. Second, the scheme of the legislation does not require the Commissioner to determine every complaint on its merits. Rather, the Commissioner's principal obligations are to address and deal with every complaint by arriving and informing the complainant of some form of "outcome" - **Delo CA** at [62] – [64] and [80].

23.3. Third, the "outcome" must be the end point of the Commissioner's handling of a complaint. A conclusive determination or ruling on the merits will be an "outcome" but the term is intended to have broad scope. Therefore an "outcome" will also include (i) a decision not to investigate further and to cease handling a specific complaint while informing and assisting wider investigation, (ii) a conclusion by the Commissioner that a data controller had "likely" complied with its obligations under the relevant data protection legislation without reaching any final conclusion and taking no further action - **Delo CA** at [64] and [80], **Smith** at [47].

23.4. Fourth, the outcome will have been reached after the Commissioner has investigated the complaint "*to the extent appropriate*" in the circumstances of the case. The legislation provides the Commissioner with a broad direction to decide the intensity of any investigation according to the circumstances of the case - **Delo CA** at [66] and [80].

23.5. Fifth, the Commissioner also has secondary obligation to inform the complainant of the progress of the investigation and of the complaint – **Delo CA** at [63].

23.6. Sixth, where a complainant has received an outcome, there may still be circumstances where it is appropriate for the complainant to ask the Tribunal to

"wind back the clock" and order an appropriate step being taken in response to a complaint under s.166(2)(a). However, these circumstances will be limited. In particular, the Tribunal will "*firmly resist*" attempts either to use such a mechanism to achieve a different complaint outcome or attempts to "dress up" a substantive merits challenge as procedural failings for the purposes of s.166 – **Killock** at [87], **Smith** at [60] and [136].

23.7. Seventh, the question of what amounts to "appropriate steps" is not determined by the Commissioner and the Commissioner's view is not decisive in this regard. The question of appropriateness is for the Tribunal to decide itself. Accordingly, the Tribunal must decide for itself, applying an objective test what is "appropriate" by way of investigation and not merely review the Commissioner's decision as the High Court would on an application for judicial review. The Tribunal should therefore expressly direct itself to consider whether, applying an objective test, it was appropriate for the Commissioner to take further steps to respond to a complaint – **Killock** at [74], [84] and [116], **Smith** at [84] – [85].

23.8. Eighth, when considering the appropriateness of the steps taken by the Commissioner, the Tribunal will nevertheless take into account and give weight to the views of the Commissioner as the expert regulator. A decision of the Tribunal which fails to recognise the wider regulatory context of a complaint and to demonstrate respect for the special position of the Commissioner may be susceptible to appeal. However, in so doing, the Tribunal must not tamely accept the Commissioner's position in such a way to derogate from the judicial duty to scrutinise a case – **Killock** at [85] – [86].

23.9. Ninth, examples of where there may be a justified reason for the Tribunal to make an order to "wind back the clock" under s.166(2) include (i) where the Commissioner has failed to take appropriate steps to investigate a complaint at all because it has failed to apply its own Service Standards – **Killock** at [117] or (ii) where the Commissioner's outcome only deals with part of a complaint and fails to deal with another part of the complaint as a result of oversight or other mistake – **Smith** at [61].

23.10. Tenth, the Tribunal always retains a discretion whether to make an order under s.166(2). It is not obliged

to do so even if there has been a procedural failing by the Commissioner – **Killock** at [117].

23.11. Eleventh, any order made under s.166(2) should not be reduced to a formalistic remedy. The Tribunal has the power to make an order requiring the Commissioner to take appropriate steps to respond to a complaint, which can include investigating the subject matter of the complaint to the extent necessary – **Killock** at [83]. The steps which a Tribunal can prescribe, where appropriate, include directing the Commissioner to make contact with the data controller to understand its position and considering in light of any such responses whether the data controller's actions were lawful – **Killock** at [118].”

Discussion and Conclusion

7. Having set out the parties’ submissions, the Tribunal continued:

“33. We have applied the legislative framework and legal principles set out above to the facts of this case. Having done so, we have decided to dismiss the application. In summary this is because we largely accept the Commissioner's submissions as summarised at paragraph 32 above. In reaching our conclusion, we have expressly concluded that, objectively judged, the Commissioner did take "appropriate steps" to handle the Complaint, including investigating to the extent appropriate.

34. The starting point for our reasoning is to emphasise the essentially procedural and "forward-looking" nature of the jurisdiction under s.166 of the DPA 2018. This permits the Tribunal, where appropriate, to make an order to progress complaints in circumstances where there has been a procedural error on the part of the Commissioner. That requires consideration on the part of the Tribunal of the appropriateness of the steps taken by the Commissioner to progress a complaint, including in particular whether there has been an "outcome" to a complaint. In so doing, this is not an appeal against the Commissioner's outcome. It is a procedural application to progress a complaint. Insofar as Mr Evans has framed the application as an appeal, this is a misunderstanding of the legislative framework.

35. In this regard, we reject Mr Evans' attempts to suggest that there has not been an outcome in respect of the Complaint. That is not sustainable on the facts. The

Response (as defined at paragraph 4 above) was plainly the outcome of the Complaint. It stated in terms, *"at this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case....As we do not appear to hold any clear evidence of an infringement we have closed this case."* This conclusion falls well within the scope of a potential outcome as set out in the authorities summarised at paragraph 23.3 above. It is the Commissioner expressing a regulatory judgment in respect of the Complaint.

36. This conclusion is reinforced by the language which Mr Evans has used to describe the Response e.g. at paragraph 5 of his skeleton argument, Mr Evans himself described the Response as a "rejection of the [C]omplaint". That would be a fair description of the Response and indeed is plainly an outcome which was available to the Commissioner. The authorities make clear that it is not this Tribunal's role to interfere with his outcome as a matter of substance. Our view is further reinforced by a proper analysis of Mr Evans' subsequent correspondence with the Commissioner following the Response, including multiple complaints he made about the Response.

37. In light of our conclusion that there was an outcome to the Complaint, the authorities make it clear that there is limited scope for "winding back the clock" to challenge the adequacy of the "appropriate steps" taken by the Commissioner. We do not accept that there was a wholesale failure on the part of the Commissioner to consider the Complaint or that he failed to deal with a part of the Complaint as advanced. While the circumstances set out in the authorities are not intended to be exhaustive, they do indicate that this will likely be because there has been a wholesale or material procedural failing. We do not consider that applies on the circumstances of this case.

38. In this regard, the real thrust of Mr Evans' submissions focused on what he contended was the lack of an investigation, or adequate investigation, of the Complaint. He used this submission as the springboard for his assertion that there had been no outcome in respect of the Complaint. We have explained above why we reject the submission that there was no outcome in respect of the Complaint. We also reject the submission that there was no investigation or adequate investigation.

39. As a matter of law, we do not accept that every complaint must involve an investigation by the Commissioner, if by investigation what is meant is external engagement with a complainant and a data controller and the acquisition of relevant information from third parties such as the relevant data controller. That would be to overstate the meaning of "investigation" and to ignore the critical qualifying phrase in Article 57(1)(f) of the UK GDPR, that investigation is only required "*to the extent appropriate*". In some, perhaps many cases, investigation may only require a desktop consideration of a complaint. Indeed, it may be immediately obvious on consideration of a complaint that any detailed or further investigation is not necessary from the terms of the complaint itself. For example, the complete absence of a response or any engagement from a data controller to the exercise of a data subject's rights. In other cases, more detailed investigation and engagement with the complainant and the relevant data controller may be justified. However, *De lo CA*, as summarised at paragraph 23.4 above, is clear and binding authority to the effect that the Commissioner has a wide discretion as to the intensity of the investigation required for each complaint. There is no requirement, as Mr Evans contended should have happened in his case, that the Commissioner should seek clarification from a complainant or engage in further correspondence about the adequacy of the framing of the complaint.

40. We acknowledge that the Commissioner has not submitted any extraneous evidence in the form of a witness statement or correspondence with third parties, as to the nature of the investigation which the ICO undertook. In *Smith* at [104], the Upper Tribunal suggested that "*in general*" a brief documentary trail or short witness statement may be appropriate "*in demonstrating the steps taken in dealing with any complaint*". However, we do not consider that the Upper Tribunal in *Smith* was setting out an immutable position that such evidence would always be necessary. Indeed, that would be to ignore the express caveats given at paragraph 104 of *Smith*. In any event, Mr Evans' submission as to the lack of evidence relates to the nature of the investigation carried out by the ICO. Paragraph 104 of *Smith* concerns evidence "*demonstrating the steps taken in dealing with any complaint*". That is not the same as requiring detailed evidence to demonstrate the extent of any investigation into the complaint.

41. Regardless of these distinctions, we do consider that there is an adequate documentary trail as to the steps which the Commissioner took in handling the Complaint. In this regard, we reject Mr Evans' submission that there is *no* evidence of any investigation before the Tribunal. In this case, there is evidence before the Tribunal of an investigation by the ICO and the handling of the Complaint. This is found in the contents of the Response itself and the Clarification Letter. In this regard:

41.1. The Response itself expresses the conclusion that there was a lack of clear evidence of an infringement of the relevant legislation. It can properly be inferred that this conclusion was the result of consideration by the ICO of the Complaint.

41.2. The Clarification Letter itself provides further evidence of the investigation which was undertaken by the ICO. Indeed it states that it is an explanation of how the ICO *"assessed [the] complaint and arrived at [its] decision outcome letter."* In this regard, it contains substantially similar information to what which could alternatively have been included in a witness statement as envisaged where appropriate in *Smith*. For example, the Clarification Letter addresses the ICO's recognition when considering the Complaint that the FCA had applied redactions to the information provided in response to the subject access request because it contained third party personal data or because it did not comprise Mr Evans' personal data. The ICO considered this position which was in line with its guidance and issued the outcome which it did. It explained, that if Mr Evans wished to contend that the FCA had deliberately withheld his personal data, he would need to provide clear evidence to support his claim. In response to this, Mr Evans submitted that he could not prove a negative, other than identifying the request and the response received. That submission however misses the point being made by the ICO. It presupposes that the information which Mr Evans says he should have been given by the FCA is his personal data in the first place. In this regard, the Tribunal notes that some of the documentation which Mr Evans contended had been withheld by the FCA was correspondence between the FCA and the Bank of Scotland, the Complaints Commissioner, the ICO itself and internal FCA communications. The fact that this correspondence may not have been disclosed to Mr Evans is not proof that the FCA failed to comply with its data protection obligations in response to a subject access request. Indeed, one of the most significant early

cases on the meaning of personal data, *Durant v Financial Services Authority* [2003] EWCA Civ 1746 confirms that not all information held in relation to a complaint about a financial services institution will necessarily amount to the complainant's personal data and therefore be provided in response to a subject access request. It may be that such documentation can be provided by the FCA under different legislation (for example FOIA) but that is a separate issue as to whether it amounts to or contains Mr Evans' personal data which is responsive to a subject access request.

41.3. We accept that the Clarification Letter rather confusingly states *"you provided the ICO with a large volume of documents/correspondence which meant we were unable to determine the evidence we require to support your complaint."* In isolation, this wording, which appears to have been copied and pasted into the Clarification Letter, lacks clarity and could doubtless have been better expressed. Judged in its fuller context and in particular having regard to the preceding paragraph, it suggests that the material which Mr Evans filed with the Complaint lacked sufficient clarity or evidential basis for the Commissioner to find the Complaint well founded - i.e. "to support the Complaint". Again, this shows that consideration was given by the Commissioner to the material filed by Mr Evans in support of the Complaint.

41.4. The nub of Mr Evans' submission in this application, properly judged, is about the adequacy of the investigation. In the hearing, he submitted that there was no evidence that the ICO had made contact with the FCA or that any clarification of the Complaint had been sought from him. The Tribunal accepts that neither of these steps were taken. However, we have set out about that not every investigation will require such steps. The legislation affords the Commissioner considerable latitude in deciding the intensity of the investigation and on the facts of this case, we consider that it was objectively appropriate for the ICO to take the steps which it did and did not take in responding to the Complaint.

42. Taking all these points together, we find that objectively judged, the Commissioner did take appropriate steps to handle the Complaint, having taken into account and considered the Commissioner's particular role as a specialist regulator and the wide margin which he is afforded as to the intensity of any investigation applied to a particular complaint.

43. Moreover, in light of the conclusions we have set out above, we also accept the Commissioner's contention that in reality this application is a merits complaint about the outcome dressed up as a complaint about the adequacy of procedural steps. The authorities make clear the Tribunal should be astute to avoid such an approach. This is demonstrated by (i) the content of Mr Evans' complaints to the Commissioner following the Response and (ii) the grounds of his application to the Tribunal which state, in terms *"this appeal is built upon the ICO Lead Case Officer's statement that there was "no clear evidence of an infringement of the legislation." I reject this statement, and I submit that there was ample such evidence...I submit that non-supply of the requested data, together with the absence of a reason for such non-supply is a breach of the legislation."* The recalibration of Mr Evans' grounds for an order under s.166(2) DPA 2018 in the Reply to focus on the alleged lack of investigation does not alter the substance of the application. It is precisely the type of approach which the authorities make clear is impermissible.

44. Put another way, we do not consider that there is any meaningful procedural benefit which could be derived from an order requiring the Commissioner to investigate (or further investigate) Mr Evans' the Complaint. The Commissioner has investigated the Complaint, and Mr Evans' subsequent complaints about the Complaint, and it has rejected them. An order for further steps will not progress it further. It would be entirely circular. Accordingly, while we are satisfied that there is no basis for the exercise of our discretion to make an order under s.166(2) DPA 2018, we would have declined to exercise that discretion for the reasons we have given.

45. Finally, we address Mr Evans' contentions that the Commissioner failed to inform him of the progress of the Complaint and failed to inform him of his rights under s.166 of the DPA 2018. While Mr Evans advanced these points under s.165(4) and (5) of the DPA 2018 which concern data processing under data protection legislation other than under the UK GDPR, we do not consider that anything turns on this as the same secondary rights exist Article 77(2) of the UK GDPR.

46. We reject Mr Evans' submission that the Commissioner failed to inform him of the progress of the Complaint. We make two points in this regard:

46.1. First, on the evidence before the Tribunal, the ICO did inform Mr Evans of the progress of the Complaint, in an email from a Legal Executive at the ICO to Mr Evans dated 12 December 2023. In this email, the Legal Executive explained that the Complaint was awaiting allocation to a case officer and that going forward he should liaise directly with the ICO's casework department. We consider this sufficient to meet the requirement of Article 77(2) of the UK GDPR.

46.2. Second, in any event, the jurisdictional gateway to make an order under s.166(2) of the DPA 2018 requires that the Commissioner must have failed to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months. In light of our conclusion about the Response as set out above, Mr Evans was provided with both information about the progress of the Complaint and indeed the outcome of the Complaint within the period of 3 months. There is accordingly no basis for making any order under s.166(2) of the DPA 2018.

47. In relation to Mr Evans' contention that he was not informed of his rights to a judicial remedy to progress his complaint under s.166 of the DPA 2018, we accept that on the evidence before us, the ICO did not inform Mr Evans of his rights to a judicial remedy under Article 78, as required by Article 77. The hearing bundle does not appear to contain the "standard holding reply" which Mr Evans acknowledges he received from the ICO when he filed the Complaint (see his letters to the ICO of 14 November 2023 and 7 December 2023). The Tribunal does not know therefore whether the potential judicial remedy was indicated in this correspondence. Accordingly, on the evidence before us, we find that the Commissioner did fail to inform Mr Evans of his right to a judicial remedy under Article 78(2) of the UK GDPR.

48. However, assuming that this did amount to a failure by the Commissioner to "take appropriate steps" to respond to the Complaint for the purpose of s.166(1) of the DPA 2018, which is itself debatable, we would decline to exercise our discretion to make any such order if the jurisdiction was engaged to allow us to do so. This is because any order would be entirely academic and redundant in these circumstances where (i) such a remedy only arose where the Commissioner had not handled a complaint or informed Mr Evans of the progress or outcome of his complaint within 3 months of the date of the Complaint, which it did for the reasons we have set

out above and (ii) Mr Evans has in any event attempted to exercise those rights through the making of the present application. It is not the role of the Tribunal to make orders which serve no purpose. An order under s.166(2) DPA is supposed to be substantive, not formulaic.

49. For these reasons, we dismiss the application for an order against the Commissioner under s.166(2) of the DPA 2018. Our decision is unanimous.”

(Given that the decision of the Tribunal contains the full case reference citations for **Delo (CA)**, **Killock** and **Smith**, I shall not repeat them in the text below.)

The Grounds of Appeal

8. As finally clarified by the Appellant in his skeleton argument and his subsequent addendum of 22 May 2026, there were two grounds of appeal:

(1) the Tribunal erred in law in finding that the IC had taken appropriate steps in the investigation of his complaint

(2) the IC had not produced evidence of those steps to the Tribunal.

The Appellant’s Submissions

9. By way of background, the Appellant submitted that the central issue before the Tribunal was whether the IC had taken any steps capable of meeting the statutory threshold of “appropriate steps” under s.166 of the DPA. His case before the Tribunal was that the IC had failed to investigate his complaint, had subsequently failed to provide any evidence of steps taken and had failed to comply with the procedural requirements identified in the relevant Upper Tribunal authorities.

10. The IC did not provide the Tribunal with a witness statement or a documentary trail of the steps taken in dealing with the complaint. The only material before the Tribunal was a brief dismissal email dated 26 January 2024 (subsequently labelled the “Outcome” by the IC), stating that the evidence supplied by the Appellant to him was “not clear”, together with a further email dated 31 January 2025 (some 12 months later), euphemistically defined as a

“Clarification Letter” and written well after the period when an investigation should have been held and an Outcome published. For reasons highlighted by the Tribunal, that latter document carried absolutely no weight.

11. The Tribunal said at [41.3] of its decision:

“We accept that the Clarification Letter rather confusingly states “you provided the ICO with a large volume of documents/correspondence which meant we were unable to determine the evidence we require to support your complaint.” In isolation, this wording, which appears to have been copied and pasted into the Clarification Letter, lacks clarity and could doubtless have been better expressed.”

12. The Tribunal nevertheless inferred from these two dubious documents that the IC had taken appropriate steps, without identifying what those steps were or requiring evidence of them.

13. As to the first ground of appeal, the Appellant submitted that in its decision the Tribunal correctly stated that the question of what constitutes “appropriate steps” is an objective one for the Tribunal. However, it failed to apply that test. Instead, it inferred from the IC’s brief email that appropriate steps had been taken, without identifying or scrutinising those steps. That was an error of law.

14. The Tribunal failed to engage with the Appellant’s primary submission: that the IC had taken no steps at all. The Tribunal did not ask itself the logically prior question of whether any steps had been taken, let alone whether they were appropriate. The Tribunal’s reasoning proceeded on the assumption that steps had been taken, despite the absence of evidence: the decision at [41.1] stated “It can properly be inferred that this conclusion was the result of consideration by the ICO of the Complaint.”) That exercise of inferring rather than ascertaining for itself what steps had been taken was an error of law.

15. The Tribunal failed to apply the principles in **Killock**, which required the Tribunal to determine for itself what steps were taken and whether they were

appropriate. The Tribunal instead accepted the IC's assertion without scrutiny, contrary to the approach mandated by **Killock**.

16. The Tribunal mischaracterised the Appellant's case as a challenge to the merits of the IC's decision by stating in [43] "Moreover, ... we also accept the Commissioner's contention that in reality this application is a merits complaint about the outcome dressed up as a complaint about the adequacy of procedural steps.") The Appellant's case was crystal clear. It was that the IC had failed to investigate and had provided no evidence of steps taken. That mischaracterisation led the Tribunal into error.

17. The Tribunal's conclusion that the IC had taken appropriate steps was irrational in the **Wednesbury** sense. No reasonable decision-maker could have reached that conclusion in the absence of evidence identifying what steps were taken.

18. As to the second ground of appeal, the Appellant submitted that the Tribunal erred in law in not requiring the IC to provide evidence that he had taken "appropriate steps". No witness statement by the investigating officer was provided to the Tribunal and no documentary record of the IC's actions was produced at the hearing or before.

19. In **Killock** the Upper Tribunal held that the Tribunal must identify the steps taken and assess their adequacy. The Tribunal could not lawfully do so in the absence of evidence. Where a party asserts that it took certain steps, but provides no evidence of those steps, the Appellant submitted that the Tribunal was entitled to draw an adverse inference. The IC's failure to provide a witness statement or documentary record strongly suggested that no such steps were taken. The Tribunal erred in failing to apply or even consider the principle of adverse inference.

20. In **Smith** at [104] the Upper Tribunal held that procedural fairness generally required the IC to provide either (a) the documentary trail of steps taken or (b) a short witness statement from the officer who handled the complaint. The IC's

failure to provide such evidence and the Tribunal's failure to require such evidence rendered the decision process unfair and legally flawed.

21. The Appellant therefore asked the Upper Tribunal to set aside the decision of the Tribunal below and substitute its own decision requiring the IC to take appropriate steps.

The IC's Submissions

The Legal Framework

22. For the IC Mr Willis made the following submissions.

Complaints to the IC

23. The right of a data subject to make a complaint to the IC and his responsibilities in respect of such complaints was governed by Articles 57(1)(f) and (2) and 77 of the UK GDPR and s.165 of the DPA.

24. S.165 of the DPA provides in material part

“(1) Articles 57(1)(f) and 77 of the UK GDPR (data subject's right to lodge a complaint) confer rights on data subjects to complain to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of the UK GDPR”.

25. Article 57 UK GDPR provides in material part (with emphasis added)

(1) Without prejudice to other tasks set out under this Regulation, the Commissioner must:

...

(f) handle complaints lodged by a data subject, ..., and investigate, *to the extent appropriate*, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or

coordination with a foreign designated authority is necessary;
... ”

26. Article 77 UK GDPR provides as follows (again emphasis added)

“(1) Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with the Commissioner if the data subject considers that the processing of personal data relating to him or her infringes this Regulation.

(2) *The Commissioner shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 78*”.

Case Law on the Meaning of “Outcome”

27. As the Court of Appeal held in **Delo (CA)**, the word “outcome” has a broad meaning. Warby LJ explained the meaning of “outcome” at [64] (with emphasis added)

“An “outcome” must be the end point of the Commissioner’s “handling” of a complaint. A conclusive determination or ruling on the merits that brings an end to the complaint is certainly an “outcome” but that word is intended to have broader connotations. In *Killock*, the Upper Tribunal decided, in my view correctly, that it embraced a decision to cease handling a specific complaint whilst using it to inform and assist a wider industry investigation. In the present case, Mostyn J held that *the word “outcome” is an apt description of the Commissioner’s decision to conclude his consideration of Mr Delo’s complaint by informing him of the Commissioner’s view that the conduct complained of was “likely” to be compliant with the UK GDPR* (or, put another way, that the complaint of infringement was “likely” to be ill-founded). *Again, I would agree with that.*”

28. Warby LJ concluded at [80] (again emphasis added)

“For the reasons I have given I would uphold the conclusion of the judge at [85] that the legislative scheme requires the Commissioner to receive and consider a complaint and then provides the Commissioner with a

broad discretion as to whether to conduct a further investigation and, if so, to what extent. *I would further hold, in agreement with the judge, that having done that much the Commissioner is entitled to conclude that it is unnecessary to determine whether there has been an infringement but sufficient to reach and express a view about the likelihood that this is so and to take no further action.* By doing so the Commissioner discharges his duty to inform the complainant of the outcome of their complaint.”

29. In these paragraphs, Warby LJ in **Delo (CA)** approved Mostyn J’s reasoning and conclusions in the following paragraphs of **R (on the application of Delo) v Information Commissioner** [2022] EWHC 3046 (Admin), [2023] 1 WLR 1327 (“**Delo (HC)**”) (again with emphasis added)

82. ... To be sure, the commissioner has to provide an outcome, and the complainant has to be told that, but, as has been seen, *an outcome can include taking no action on the complaint following investigation.* ...

...

85. In my judgment, for the reasons I have given at some length, Mr Bedenham correctly submits that *the legislative scheme requires the commissioner to receive and consider a complaint and then provides the commissioner with a broad discretion as to whether to conduct a further investigation*, and, if so, to what extent. He correctly submits, further, that this discretion properly recognises that the commissioner is an expert regulator who is best placed to determine on which cases he should focus.

30. Applying these authorities in **Smith**, Upper Tribunal Stout summarised the Court of Appeal’s interpretation at [47] in the following way: “an “outcome” in this context could include a decision not to investigate further, not just a merits assessment” (citing [64] of Warby LJ’s judgment in **Delo (CA)**).

Jurisdiction of the First-tier Tribunal

31. This is an application brought under s.166 of the DPA which provides in material part (with emphasis added)

“(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the UK GDPR, the Commissioner–

(a) fails to take *appropriate steps to respond* to the complaint,

(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or

(c) if the Commissioner’s consideration of the complaint is not concluded during this period, fails to provide the complainant with such information during a subsequent period of 3 months.

(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner–

(a) to take *appropriate steps to respond* to the complaint, or

(b) inform the complainant of progress of the complaint, or of the outcome of the complaint, within a period specified in the order.

(3) An order under subsection (2)(a) may require the Commissioner–

(a) to take steps specified in the order;

(b) to conclude an investigation, or take a specified step, within a period specified in the order.

(4) ...”.

32. S.166 of the DPA provides a forward-facing procedural remedy in respect of the IC’s handling of the data subject’s complaint under Articles 57(1)(f) and 77 UK GDPR and section 165 DPA 2018. The Upper Tribunal provided guidance as to the nature of this jurisdiction in **Killock** (Farbey J, UT Judge West, Tribunal Member De Waal) and in **Smith**. In **Killock**, the Upper Tribunal held the following at [74] (with emphasis added)

“The remedy in section 166 is limited to the mischiefs identified in section 166(1). We agree with Upper Tribunal Judge Wikeley’s conclusion in *Leighton (No. 2)* [2020]

UKUT 23 (AAC) that those are all procedural failings. They are (in broad summary) the failure to respond appropriately to a complaint, the failure to provide timely information in relation to a complaint and the failure to provide a timely complaint outcome. ... *It is plain from the statutory words that, on application under section 166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome. Any attempt by a party to divert a tribunal from the procedural failings listed in section 166 towards a decision on the merits of the complaint must be firmly resisted by tribunals.*"

33. Judge Stout held the following at [136] of **Smith** (again with emphasis added)

"[T]he reality is that the heart of the appellant's section 166 application, as he advanced it, was that he considered the outcome of his complaint was wrong/perverse as a result of the mistakes that he considered the Commissioner made and/or that the Commissioner had failed to give adequate reasons for the outcome. Those are all public law errors that could form the basis of a claim for judicial review of the Commissioner's decision: see *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13]. It is clear from *Killock and Veale* and *Delo* that *challenges to the legal merits of the outcome of a complaint (and challenges to the adequacy of the Commissioner's reasons for his decision are also challenges to the legal merits) should be taken to the High Court on judicial review. They should not be 'dressed up' as procedural errors and brought as section 166 applications to the First-tier Tribunal.*"

34. Judge Stout also provided the following guidance on evidence in applications brought under s.166 of the DPA at [104]) (again with emphasis added) [AB/203]:

"I add this: in general, in section 166 cases, given their limited scope, all that will be necessary for the fair disposal of the application is for the Commissioner to put before the Tribunal the documentary trail demonstrating the steps taken in dealing with any complaint (as the Commissioner did in this case by disclosing the 7 February 2023 email among others) or, if that does not tell the story, a short witness statement from the officer who

dealt with the complaint may be appropriate. *Since the Tribunal is not concerned with the merits of the complaint, what is required by way of disclosure or witness statement will in most cases be neither extensive or elaborate, and there is certainly no requirement for the Commissioner to put in evidence justifying or explaining the merits of the decision he took on the complaint.*"

The Tribunal's Assessment of "Appropriate Steps"

35. The leading authority on the approach to be taken by the Tribunal when deciding whether the IC has taken "appropriate steps" is **Killock** (as confirmed by UT Judge Stout in **Smith** at [84] and [85]). The relevant passages of **Killock** are as follows (with emphasis added)

"84. ... In determining whether a step is appropriate, the Tribunal will decide the question of appropriateness for itself [objectively].

85. However, *in considering appropriateness the Tribunal will be bound to take into consideration, and give weight to, the views of the Commissioner as an expert regulator* ... [The Commissioner's] decisions about these matters will be informed not only by the nature of the complaint itself but also by a range of other factors, such as her own regulatory priorities, other investigations in the same subject area and her judgment on how to deploy her limited resources most effectively. Any decision of a tribunal which fails to recognise the wider regulatory context of a complaint and to demonstrate respect for the special position of the Commissioner may be susceptible to appeal in this chamber.

86. We do not mean to suggest that the Tribunal must regard all matters before it as matters of regulatory judgment: the Tribunal may be in as good a position as the Commissioner to decide (to take Mr Milford's example) whether a complainant should receive a response to a complaint in Braille. Nor need the Tribunal in all cases tamely accept the Commissioner's judgment which would derogate from the judicial duty to scrutinise a party's case. *However, where it is established that the Commissioner has exercised a regulatory judgment, the Tribunal will need good reason to interfere (which may, in turn, depend on the degree of regulatory judgment involved) and cannot simply substitute its own view.*"

36. Once a s.165(1) DPA complaint has resulted in an outcome, the authorities are clear that the scope for “winding back the clock” by ordering the IC to take “appropriate steps” will be limited. Judge Stout made this clear at [60] of **Smith** (with emphasis added)

“[T]he scope for finding that an “appropriate step” has been omitted once an ‘outcome’ has been produced is limited. This is the effect of all the authorities, it seems to me. They all hold that, on an application under section 166, it is for the Tribunal to decide, applying an objective test, if an “appropriate step” has been omitted, but observe that, in practice, that is unlikely to be the case where an ‘outcome’ has been produced. That is for two main reasons: first, because section 166 is a procedural provision and, as the principal mechanisms for enforcing rights or challenging the Commissioner are either claims against the data controller or judicial review of the Commissioner, *section 166 should not be used to obtain ‘by the back door’ a remedy normally only available in those proceedings*; secondly, because, if the Commissioner has already produced an outcome then, given the very wide discretion that the Commissioner has, both as to what and how to investigate and as to outcome, the scope for the Tribunal to say that an “appropriate” step has been omitted is limited.”

37. As Judge Stout explained in **Smith**, there are essentially two reasons for this: (a) the need to prevent s.166 of the DPA being used to obtain “by the back door” a remedy only available in judicial review proceedings; and (b) the “very wide discretion that the IC has, both as to what and how to investigate and as to outcome” ([60]). She gave an example of one of the limited circumstances in which the Tribunal could make an order to take appropriate steps where an outcome has already been provided: “where the Commissioner’s outcome only deals with part of a complaint and fails to deal with another part of the complaint as a result of oversight or other mistake” ([61]).

38. In reaching this conclusion, Judge Stout drew on the Upper Tribunal’s judgment in **Killock**. The Upper Tribunal addressed that issue at [87] of **Killock** (again with emphasis added)

“Moreover, section 166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. The Tribunal is tasked with specifying appropriate “steps to respond” and *not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court)*. It will do so in the context of securing the progress of the complaint in question. We do not rule out circumstances in which a complainant, having received an outcome to his or her complaint under section 165(4)(b), may ask the Tribunal to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint, under section 166(2)(a). *However, should that happen, the Tribunal will cast a critical eye to assure itself that the complainant is not using the section 166 process to achieve a different complaint outcome.*”

Ground 1

39. The Appellant’s first ground was that the Tribunal failed to decide for itself, applying an objective test, what steps were “appropriate” in the IC’s handling of the complaint. The Appellant says the Tribunal failed to do this because it made the following inference at paragraph [41.1] of the decision:

“The Response itself expresses the conclusion that there was a lack of clear evidence of an infringement of the relevant legislation. It can properly be inferred that this conclusion was the result of consideration by the ICO of the Complaint.”

40. The Appellant’s criticism of this paragraph, and the crux of this ground, was that the statement in paragraph 23.7 required the Tribunal to decide for itself what were the appropriate steps in an investigation and whether such steps were followed. Merely “inferring” that a proper procedure was followed was totally the opposite of the Tribunal investigating objectively and then deciding for itself. The decision did not indicate that the Tribunal took any objective actions to confirm or otherwise consider that appropriate steps had been taken.

41. That ground was entirely hopeless.

42. First, it was illogical to argue that Tribunal failed to decide for itself objectively whether an appropriate step was taken because it made the inference that the IC had considered the complaint. The Tribunal made that inference in the course of deciding for itself whether objectively appropriate steps had been taken. Indeed, the factual finding at [41.1] of the decision was a necessary step in the Tribunal's reasoning as to whether, objectively, appropriate steps had been taken. The Tribunal made that inference because it was deciding the issue objectively for itself. The Appellant was therefore wrong to say that the Tribunal "accepted the Commissioner's assertion without scrutiny, contrary to the approach mandated by *Killock*".

43. The Appellant's ground 1 was, accordingly, founded on a misconception. The Tribunal was entitled to make inferences – and challenges to such findings of fact were subject to the perversity standard.

44. That analysis of ground 1 was confirmed by his skeleton argument, where he challenged the Tribunal's findings of fact in respect of the Outcome and Clarification Letter. The Appellant stated that the Tribunal nevertheless inferred from these two "dubious" documents that the IC had taken appropriate steps, without identifying what those steps were or requiring evidence of them. The Appellant's description of the Outcome and Clarification as "dubious" was baseless. The Appellant's challenge to the Tribunal's finding of fact, as represented in that ground, fell hopelessly short of the perversity standard.

45. The Appellant appeared in that ground to be attempting to circumvent that very high threshold by arguing that the Tribunal erred in law merely by making an inference when deciding the issue of whether appropriate steps had been taken. That was plainly unarguable.

46. Secondly, the Appellant was unarguably incorrect to suggest the Tribunal decision did not indicate that it took any objective actions to confirm whether appropriate steps had been taken. It was apparent on the face of the decision that the Tribunal did decide for itself whether, objectively, appropriate steps had been taken:

(1) first, the Tribunal correctly directed itself as to the legal position at [23.7]

(2) it was apparent from the Tribunal's repeated references to the objective approach that it was, in fact taking that approach: see [33] ("we have concluded that, objectively judged, the Commissioner did take "appropriate steps" to handle the complaint"), [41.4] ("we consider that it was objectively appropriate for the ICO to take the steps which it did and did not take in responding to the Complaint", [42] ("we find that objectively judged, the Commissioner did take appropriate steps" of the decision.

(3) secondly, at [39] the Tribunal addressed the question of what the words "investigation" and "to the extent appropriate" in Article 57(1)(f) UK GDPR require. This was an important step in the analysis of what was objectively an appropriate step.

(4) thirdly, in [40] and [41] the Tribunal set out the evidence that it would consider when determining whether objectively appropriate steps had been taken. That was another important step in the analysis of what was objectively an appropriate step.

(5) fourthly, in the sub-paragraphs of [41], including the impugned [41.1], the Tribunal assessed the available evidence (namely, the Outcome and the Clarification Letter) and the inferences to be drawn from them. In doing so, it made findings of fact.

(6) lastly, in light of these findings of fact, the Tribunal decided for itself objectively at [42] whether appropriate steps to handle the complaint had been taken, concluding that they had been.

47. Taking this together, it was unarguable that the Tribunal failed to decide for itself objectively whether the IC had taken appropriate steps to handle the Appellant's complaint. The Appellant's ground 1 was illogical, misconceived and wrong. There was no other reason in the public interest to grant permission on that ground, nor had the Appellant advanced one.

Ground 2

48. The Appellant's ground 2 contended that in the decision at [40] the Tribunal had incorrectly interpreted **Smith** at [104] on the basis that the Tribunal erred in law in not requiring the IC to provide evidence that he had taken "appropriate steps": "No witness statement by the investigating officer was provided to the Tribunal, and no documentary record of the Commissioner's actions was produced at the hearing or before."

49. That ground was unarguably wrong and had no realistic prospect of success. It is premised on a misreading of [104] of **Smith**. Upper Tribunal Judge Stout stated as follows in that paragraph (emphasis added):

"[I]n general, in section 166 cases, given their limited scope, all that will be necessary for the fair disposal of the application is for the Commissioner to put before the Tribunal the documentary trail demonstrating the steps taken in dealing with any complaint (as the Commissioner did in this case by disclosing the 7 February 2023 email among others) or, if that does not tell the story, a short witness statement from the officer who dealt with the complaint may be appropriate. Since the Tribunal is not concerned with the merits of the complaint, what is required by way of disclosure or witness statement will in most cases be neither extensive or elaborate, and there is certainly no requirement for the Commissioner to put in evidence justifying or explaining the merits of the decision he took on the complaint."

50. The Appellant impugned the Tribunal's approach to [104] of **Smith** in the decision at [40] where it stated that

"We acknowledge that the Commissioner has not submitted any extraneous evidence in the form of a witness statement or correspondence with third parties, as to the nature of the investigation which the ICO undertook. In *Smith* at [104], the Upper Tribunal suggested that "in general" a brief documentary trail or short witness statement may be appropriate "in demonstrating the steps taken in dealing with any complaint". However, we do not consider that the Upper Tribunal in *Smith* was setting out an immutable position that such evidence would always be necessary. Indeed,

that would be to ignore the express caveats given at paragraph 104 of *Smith*. In any event, Mr Evans' submission as to the lack of evidence relates to the nature of the investigation carried out by the ICO. Paragraph 104 of *Smith* concerns evidence "demonstrating the steps taken in dealing with any complaint". That is not the same as requiring detailed evidence to demonstrate the extent of any investigation into the complaint."

51. There was no arguable error in the Tribunal's reasoning at [104] of *Smith*:

(1) [104] of *Smith* does not require the IC in every case to provide "a brief documentary trail or short witness statement". The Tribunal was plainly right on that point.

(2) the issue was really whether the Tribunal had sufficient evidence before it to decide the issues. It concluded at [41] that it did: "Regardless of these distinctions, we do consider that there is an adequate documentary trail as to the steps which the Commissioner took in handling the Complaint".

(3) the Tribunal had before it the Outcome (referred to by the Tribunal as the Response) and the Clarification Letter. The Tribunal drew the following inference from the Outcome letter: that the IC concluded there was a lack of clear evidence of an infringement of the relevant legislation as a "result of consideration by the ICO of the Complaint" at [41.1]. In addition to this plainly rational inference, the Tribunal noted at [41.2], that "[t]he Clarification Letter itself provides further evidence of the investigation which was undertaken by the ICO. Indeed it states that it is an explanation of how the ICO "assessed [the] complaint and arrived at [its] decision outcome letter." In that regard, it *contained substantially similar information to what which [sic] could alternatively have been included in a witness statement* as envisaged where appropriate in *Smith*" (emphasis added).

(4) in other words, the Tribunal found that the documentary evidence before it was sufficient to decide the issues (also concluding that one of the documents contained substantially similar information to what could have been provided in

a witness statement). It was plainly entitled to proceed on that basis. [104] of **Smith** provided no basis for criticising that approach.

(5) the Appellant was accordingly wrong to say that no evidence of the IC's steps was provided and that an adverse inference should have been drawn. The Tribunal did not err by "failing to apply or even consider the principle of adverse inference"

52. In reality, the ground was a challenge to the findings of fact made by the Tribunal – the Appellant disagreed with the conclusions reached by the Tribunal on the evidence before it at the hearing. Such a challenge was to a perversity standard. The Appellant's attempt to sidestep that high threshold was misconceived and unfounded. Ground 2 had no real prospect of success. There was no other reason in the public interest to grant permission on that ground, nor had the Appellant advanced one.

Analysis

Ground 1

53. In my judgment, the first ground of appeal plainly fails to get off the ground.

54. In the first place, the Tribunal correctly directed itself as to the legal position at [23.1] and [23.7]:

"23.1. First, s.166 is a "forward-looking provision" concerned with remedying ongoing procedural defects that stand in the way of a timely resolution of a complaint by a data subject to the Commissioner. It is not the role of the Tribunal when considering an application under s.166 to assess or challenge the merits of an outcome which has already been given by the Commissioner. That is a matter for the supervisory function of the High Court on an application for judicial review. Accordingly, the focus of the Tribunal is on procedural omissions – **Killock** at [74], [75] and [87], **Smith** at [136].

...

23.7. Seventh, the question of what amounts to "appropriate steps" is not determined by the Commissioner and the Commissioner's view is not

decisive in this regard. The question of appropriateness is for the Tribunal to decide itself. Accordingly, the Tribunal must decide for itself, applying an objective test what is "appropriate" by way of investigation and not merely review the Commissioner's decision as the High Court would on an application for judicial review. The Tribunal should therefore expressly direct itself to consider whether, applying an objective test, it was appropriate for the Commissioner to take further steps to respond to a complaint – **Killock** at [74], [84] and [116], **Smith** at [84] – [85].

55. Secondly it is plain beyond argument that, from the Tribunal's repeated references to the objective approach, it was in fact taking such an objective approach:

(1) at [23.7] "The Tribunal should therefore expressly direct itself to consider whether, applying an objective test, it was appropriate for the Commissioner to take further steps to respond to a complaint"

(2) at [33] "we have concluded that, objectively judged, the Commissioner did take "appropriate steps" to handle the complaint"

(3) at [41.4] "we consider that it was objectively appropriate for the ICO to take the steps which it did and did not take in responding to the Complaint"

(4) at [42] "we find that objectively judged, the Commissioner did take appropriate steps.

56. As a result of its analysis, the Tribunal concluded that

"42. Taking all these points together, we find that objectively judged, the Commissioner did take appropriate steps to handle the Complaint, having taken into account and considered the Commissioner's particular role as a specialist regulator and the wide margin which he is afforded as to the intensity of any investigation applied to a particular complaint."

Again the Tribunal explicitly referred to the making of an objective judgment. The argument that it did not make an objective judgment is simply untenable.

57. Thirdly, the Tribunal in my judgment as unarguable right to hold as it did in its decision at [39] that

“39. As a matter of law, we do not accept that every complaint must involve an investigation by the Commissioner, if by investigation what is meant is external engagement with a complainant and a data controller and the acquisition of relevant information from third parties such as the relevant data controller. That would be to overstate the meaning of "investigation" and to ignore the critical qualifying phrase in Article 57(1)(f) of the UK GDPR, that investigation is only required "*to the extent appropriate*". In some, perhaps many cases, investigation may only require a desktop consideration of a complaint. Indeed, it may be immediately obvious on consideration of a complaint that any detailed or further investigation is not necessary from the terms of the complaint itself. For example, the complete absence of a response or any engagement from a data controller to the exercise of a data subject's rights. In other cases, more detailed investigation and engagement with the complainant and the relevant data controller may be justified. However, *Delo CA*, as summarised at paragraph 23.4 above, is clear and binding authority to the effect that the Commissioner has a wide discretion as to the intensity of the investigation required for each complaint. There is no requirement, as Mr Evans contended should have happened in his case, that the Commissioner should seek clarification from a complainant or engage in further correspondence about the adequacy of the framing of the complaint.”

58. I therefore reject the contention that the Tribunal failed to apply an objective test. The Appellant's criticism was then that, instead of applying an objective test, it inferred from the IC's brief email that appropriate steps had been taken, without identifying or scrutinising those steps. That was an error of law. The argument was that the exercise of inferring rather than ascertaining for itself what steps had been taken was an error of law. As I have said, I do not accept that the Tribunal did not apply an objective test, but I do not accept that the act of drawing an inference was an error of law in any event.

59. The question of drawing an adverse inference was explained by the Supreme Court in **Royal Mail Group Ltd v Efobi** [2021] UKSC 33 at [41] per Lord Leggatt (with emphasis added)

“41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. *So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.* Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

60. On the facts of that case the Tribunal did not draw an adverse inference. In the instant case it did. Lord Leggatt said with reference to the specific case before him

“42. There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant’s many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw

such an inference. That is, in its very nature, an extremely hard test to satisfy.”

61. But the cardinal point which emerges from that paragraph is that, whether or not a tribunal does, or does not, draw an adverse inference on the facts of the case before it, to succeed in an appeal on that ground, the claimant would accordingly need to show that, on the facts of the case, no reasonable tribunal could have drawn, or omitted to draw, such an inference. That is, in its very nature, an extremely hard test to satisfy. It is not satisfied in this case.

62. The Tribunal concluded at [41.1] that

“41.1. The Response itself expresses the conclusion that there was a lack of clear evidence of an infringement of the relevant legislation. It can properly be inferred that this conclusion was the result of consideration by the ICO of the Complaint.”

63. Given that the Response was plainly the outcome of the complaint, as a result of which it stated in terms that

“at this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case ... As we do not appear to hold any clear evidence of an infringement we have closed this case”,
the Tribunal was entitled that it could properly be inferred that this conclusion was the result of consideration by the ICO of the complaint. I agree. So far as possible, a Tribunal should be free to draw, or to decline to draw, inferences from the facts of the case before it using its common sense without the need to consult law books when doing so. That is what the Tribunal did in this case.

64. The Appellant sought to impugn the Response and the Clarification Letter as “dubious documents”. I see no basis for the attempted stigmatisation of the documents, although I accept, as did the Tribunal, that the latter was not happily worded, but neither of them can be regarded as tainted or somehow not quite proper.

65. The correct approach which tribunals should take is set out in **Killock**. The Tribunal in this case did not depart from that approach:

“74 The remedy in section 166 is limited to the mischiefs identified in section 166(1). We agree with Upper Tribunal Judge Wikeley s conclusion in *Leighton (No 2)* [2020] UKUT 23 (AAC) that those are all procedural failings. They are (in broad summary) the failure to respond appropriately to a complaint, the failure to provide timely information in relation to a complaint and the failure to provide a timely complaint outcome. We do not need to go further by characterising section 166 as a remedy for inaction which we regard as an unnecessary gloss on the statutory provision. It is plain from the statutory words that, on an application under section 166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome. We reach this conclusion on the plain and ordinary meaning of the statutory language but it is supported by the Explanatory Notes to the Act which regard the section 166 remedy as reflecting the provisions of article 78(2) which are procedural. Any attempt by a party to divert a tribunal from the procedural failings listed in section 166 towards a decision on the merits of the complaint must be firmly resisted by tribunals.

...

84 There is nothing in the statutory language to suggest that the question of what amounts to an appropriate step is determined by the opinion of Commissioner. As Mr Black submitted, the language of section 165 and section 166 is objective, in that it does not suggest that an investigative step in response to a complaint is appropriate because the Commissioner thinks that it is appropriate: her view will not be decisive. Nor has Parliament stated that the Tribunal should apply the principles of judicial review which would have limited the Tribunal to considering whether the Commissioner’s approach to appropriateness was reasonable and correct in law. In determining whether a step is appropriate, the Tribunal will decide the question of appropriateness for itself.

85 However, in considering appropriateness the Tribunal will be bound to take into consideration, and give weight to, the views of the Commissioner as an expert regulator. The GRC is a specialist tribunal and may deploy (as in Platts) its non-legal members appointed to the Tribunal

for their expertise. It is nevertheless our view that, in the sphere of complaints, the Commissioner has the institutional competence and is in the best position to decide what investigations she should undertake into any particular issue, and how she should conduct those investigations. As Mr Milford emphasised, her decisions about these matters will be informed not only by the nature of the complaint itself but also by a range of other factors, such as her own regulatory priorities, other investigations in the same subject area and her judgment on how to deploy her limited resources most effectively. Any decision of a tribunal which fails to recognise the wider regulatory context of a complaint and to demonstrate respect for the special position of the Commissioner may be susceptible to appeal in this chamber.

86 We do not mean to suggest that the Tribunal must regard all matters before it as matters of regulatory judgment: the Tribunal may be in as good a position as the Commissioner to decide (to take Mr Milford's example) whether a complainant should receive a response to a complaint in Braille. Nor need the Tribunal in all cases tamely accept the Commissioner's judgment which would derogate from the judicial duty to scrutinise a party's case. However, where it is established that the Commissioner has exercised a regulatory judgment, the Tribunal will need good reason to interfere (which may, in turn, depend on the degree of regulatory judgment involved) and cannot simply substitute its own view.

87 Moreover, section 166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. The Tribunal is tasked with specifying appropriate steps to respond and not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court). It will do so in the context of securing the progress of the complaint in question. We do not rule out circumstances in which a complainant, having received an outcome to his or her complaint under section 165(4)(b), may ask the Tribunal to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint, under section 166(2)(a). However, should that happen, the Tribunal will cast a critical eye to assure itself that the complainant is not using the section 166 process to achieve a different complaint outcome.

88 The same reasoning applies to orders under section 166(2)(b) requiring the Commissioner to inform the complainant of progress on the complaint or of the outcome of the complaint within a specified period. These are procedural matters (giving information) and should not be used to achieve a substantive regulatory outcome.”

66. The Appellant sought to derive some comfort and support for his contentions in what the panel had concluded in **Killock** in the second of the cases before it, that of EW, in which it concluded that

“116 As we have explained above, section 166 is a procedural, not a substantive, remedy which provides for a right of appeal to the Tribunal on process, where the Commissioner fails to address a complaint under section 165 of the DPA in a procedurally proper fashion. However, as we have concluded above, the appropriateness of the investigative steps taken by the Commissioner is an objective matter which is within the jurisdiction of the Tribunal and is not something solely within the remit of the Commissioner to determine for herself. In our judgment, by misconstruing and misapplying her own Service Standards, and thereby simply declining to investigate the complaints at all, the Commissioner did not take such steps as were appropriate to respond to the complaints.

117 In those circumstances, where the Commissioner has failed to take appropriate steps to investigate the subject matter of EW’s complaints, the Tribunal may make an order under section 166(2)(a) of the DPA. We propose, in the exercise of our discretion, to make such an order in EW’s case because of (i) the seriousness of the subject matter underlying the complaint (namely, EW’s local authority records which touch on his right to respect for private life); and (ii) EW’s young age which makes him (at least to some degree) vulnerable and thus less able to undertake the sort of administrative processes which correspondence with the Commissioner requires. For the avoidance of doubt, we make it plain that we are not expressing any view on whether EW should see his records: that is not our task.

118 The order which this Tribunal proposes to make is that the Commissioner:

(i) Must take appropriate steps to respond to EW’s complaints by (i) within 14 days of the date of the

promulgation of this decision, initiating correspondence with the relevant officials at the Council with a view to determining the basis on which EW's SARs were refused and (ii) having considered any responses provided by the Council, assessing whether or not those refusals (or any of them) were lawful;

(ii) Must conclude the investigation of EW's complaints within two months of the date of the promulgation of this decision and, having concluded such investigation, inform him by the end of that time of the outcome of his complaints."

67. In fact, that case, properly understood, provides no support for the Appellant's position.

"107 EW's case, as Mr Rabinowitz submitted to us, was materially different from the others before us, in that his complaints to the Commissioner were not investigated at all and he was not even offered the review of correspondence which was offered in C. A wide-ranging investigation akin to that in *Killock and Veale* would not have been required given the relatively narrow ambit of his individual SARs seeking his full health and social care le . . . as well as [his] school records and later all data held by the Council about himself.

108 Instead what happened was that the Information Commissioner's Office declined to investigate his complaints at all ...

...

114 There is nothing to suggest that the Commissioner had corrected her erroneous interpretation of her own Service Standards by 9 April 2020. Indeed, the response of that date demonstrates that she had not.

115 We therefore accept Mr Rabinowitz's submission that the Commissioner has not properly applied the Service Standards in this case. It is not therefore correct to assert, as the Commissioner did in para 88 of her skeleton argument, that she had applied the Service Standards or that she applied the Service Standards fairly and consistently."

68. That distinguishes EW's case from the Appellant's. In that case the IC had simply declined to investigate his complaints *at all*.

Ground 2

69. Ground 2 is plainly insupportable and can also be dealt with in short order.

70. What Judge Stout said in **Smith** at [104] (with emphasis added) was that

"[I]n general, in section 166 cases, given their limited scope, all that will be necessary for the fair disposal of the application is for the Commissioner to put before the Tribunal the documentary trail demonstrating the steps taken in dealing with any complaint (as the Commissioner did in this case by disclosing the 7 February 2023 email among others) or, if that does not tell the story, a short witness statement from the officer who dealt with the complaint may be appropriate. Since the Tribunal is not concerned with the merits of the complaint, what is required by way of disclosure or witness statement will in most cases be neither extensive or elaborate, and there is certainly no requirement for the Commissioner to put in evidence justifying or explaining the merits of the decision he took on the complaint."

71. It is clear from the opening words of that paragraph that Judge Stout was not purporting to lay down any hard and fast, or immutable, rule that in every case the IC must provide "a brief documentary trail or short witness statement".

72. It was on that basis that the Tribunal stated at [40] of its decision that

"40. We acknowledge that the Commissioner has not submitted any extraneous evidence in the form of a witness statement or correspondence with third parties, as to the nature of the investigation which the ICO undertook. In Smith at [104], the Upper Tribunal suggested that "in general" a brief documentary trail or short witness statement may be appropriate "in demonstrating the steps taken in dealing with any complaint". However, we do not consider that the Upper Tribunal in Smith was setting out an immutable position that such evidence would always be necessary. Indeed, that would be to ignore the express caveats given at paragraph 104 of Smith. In any event, Mr Evans'

submission as to the lack of evidence relates to the nature of the investigation carried out by the ICO. Paragraph 104 of *Smith* concerns evidence "*demonstrating the steps taken in dealing with any complaint*". That is not the same as requiring detailed evidence to demonstrate the extent of any investigation into the complaint."

73. That paragraph was a perfectly correct exposition of the law as laid down in *Smith*. The real question was whether the Tribunal had sufficient evidence before it to decide the issue. It concluded at [41] (with emphasis added) that it did:

"Regardless of these distinctions, we do consider that there *is* an adequate documentary trail as to the steps which the Commissioner took in handling the Complaint. In this regard, we reject Mr Evans' submission that there is *no* evidence of any investigation before the Tribunal. In this case, there is evidence before the Tribunal of an investigation by the ICO and the handling of the Complaint. This is found in the contents of the Response itself and the Clarification Letter."

74. It went on in the next four numbered sub-paragraphs to explain why it reached that conclusion. In reality, the Appellant is seeking to relitigate the findings of fact made by the Tribunal, but disagreement with the Tribunal's assessment of the evidence comes nowhere near the threshold for a challenge to factual findings on the basis of perversity.

75. The Tribunal had before it the Outcome (to which it referred as the Response) and the Clarification Letter. At [41.1] it concluded that

"41.1. The Response itself expresses the conclusion that there was a lack of clear evidence of an infringement of the relevant legislation. It can properly be inferred that this conclusion was the result of consideration by the ICO of the Complaint."

76. It can hardly have reached a conclusion to that effect without having first considered the initial complaint. That was a perfectly proper inference for the

Tribunal to make. The rock on which the entirety of the present application founds is the IC's Response of 26 January 2024

"at this stage we do not appear to hold clear evidence of an infringement of the legislation that we oversee in your case ... As we do not appear to hold any clear evidence of an infringement we have closed this case."

77. The Tribunal went on to note at [41.2] (with emphasis added) that

"41.2. The Clarification Letter itself provides further evidence of the investigation which was undertaken by the ICO. Indeed it states that it is an explanation of how the ICO *"assessed [the] complaint and arrived at [its] decision outcome letter."* In this regard, *it contains substantially similar information to what which could alternatively have been included in a witness statement as envisaged where appropriate in Smith.*"

78. The Tribunal accepted that the wording of the Clarification Letter was infelicitous; it described it as confusing, lacking in clarity and doubtless capable of better expression

41.3. We accept that the Clarification Letter rather confusingly states *"you provided the ICO with a large volume of documents/correspondence which meant we were unable to determine the evidence we require to support your complaint."* In isolation, this wording, which appears to have been copied and pasted into the Clarification Letter, lacks clarity and could doubtless have been better expressed.

79. However, it concluded that

"Judged in its fuller context and in particular having regard to the preceding paragraph, it suggests that the material which Mr Evans filed with the Complaint lacked sufficient clarity or evidential basis for the Commissioner to find the Complaint well founded - i.e. "to support the Complaint". Again, this shows that consideration was given by the Commissioner to the material filed by Mr Evans in support of the Complaint."

80. In that context, it is also important to understand the proper approach of an appellate tribunal such as the Upper Tribunal in determining whether to grant permission to appeal from a fact-finding tribunal. That was explained by the Court of Appeal in **Volpi v Volpi** [2022] EWCA Civ 464 (with emphasis added)

“2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should

it be picked over or construed as though it was a piece of legislation or a contract.

...

65. This appeal demonstrates many features of appeals against findings of fact:

i) It seeks to retry the case afresh.

ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").

iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.

iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.

v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.

66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done ... In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal."

81. I can see no error of law in the Tribunal's final numbered sub-paragraph:

"41.4. The nub of Mr Evans' submission in this application, properly judged, is about the adequacy of the investigation. In the hearing, he submitted that there was no evidence that the ICO had made contact with the FCA or that any clarification of the Complaint had been sought from him. The Tribunal accepts that neither of these steps were taken. However, we have set out about that not every investigation will require such steps. The legislation affords the Commissioner considerable latitude in deciding the intensity of the investigation and on the facts of this case, we consider that it was objectively appropriate for the ICO to take the steps which it did and did not take in responding to the Complaint."

82. I therefore entirely agree with Mr Willis that the Tribunal found that the documentary evidence before it was sufficient to decide the issue (also concluding that one of the documents contained substantially similar information to what could have been provided in a witness statement). It was plainly entitled to proceed on that basis. What Judge Stout said in **Smith** at [104] provided no basis for criticising that approach. It was therefore wrong to assert that no evidence of the steps taken by the IC was provided and that an adverse inference should have been drawn. The Tribunal did not err by “failing to apply or even consider the principle of adverse inference”

Conclusion

83. As Judge Stout rightly said in **Smith** at [136]

“Yet further, the reality is that the heart of the appellant’s section 166 application, as he advanced it, was that he considered the outcome of his complaint was wrong/perverse as a result of the mistakes that he considered the Commissioner made and/or that the Commissioner had failed to give adequate reasons for the outcome. Those are all public law errors that could form the basis of a claim for judicial review of the Commissioner’s decision: see *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13]. It is clear from *Killock and Veale* and *De/lo* that challenges to the legal merits of the outcome of a complaint (and challenges to the adequacy of the Commissioner’s reasons for his decision are also challenges to the legal merits) should be taken to the High Court on judicial review. They should not be ‘dressed up’ as procedural errors and brought as section 166 applications to the First-tier Tribunal. The shortcomings in the Commissioner’s handling of the appellant’s complaints that have emerged on this appeal could and should have formed the basis for a judicial review challenge if they were to be pursued. Save to the extent that they could have been put before the First-tier Tribunal as a simple application that the Commissioner should take the appropriate step of responding to the appellant’s 14 December 2022 email that had been overlooked, the appellant’s complaints are in reality challenges to the merits of the Commissioner’s outcome decision and, as such, they belonged in the High Court and not in the First-tier Tribunal.”

84. That consideration underlay at least part of the Appellant's attack in this case, as was apparent from the way in which he formulated his argument in relation to Ground 1 by reference to **Wednesbury** unreasonableness, as I have set out in paragraph 17 above. The Tribunal did not mischaracterise the Appellant's case in that regard.

85. The Tribunal made its findings of fact and gave adequate reasons for reaching the conclusion which it did. I can see no error of law in the way in which it went about its task or in the decision which it reached or in the adequacy of the reasons which it gave for that decision. I can detect no arguable error of law in its decision.

86. There is no realistic prospect of the Appellant establishing that the First-tier Tribunal's decision was erroneous in law or that there is some other good reason to grant permission to appeal.

87. Accordingly, permission to appeal is refused.

88. It is, however, appropriate to repeat the postscript to what the Upper Tribunal said at the end of **Killock**:

"130 With regard to future potential law reform, Upper Tribunal Judge Wikeley in *Scranage* [2020] UKUT 196 (AAC) observed at para 34:

There is a wider jurisdictional issue in play here. Plainly the GDPR requires that data subjects have an effective judicial remedy against both a supervisory authority (here, the Commissioner) and a data controller or processor (see GDPR articles 78 and 79 respectively). Domestic legislation provides that procedural redress against the Commissioner under article 78(2) is sought from the Tribunal whereas substantive redress under article 79 must be pursued in the courts (being the county court or the High Court). The policy reason for this jurisdictional disconnect, which is hardly helpful for litigants in person, or for developing a coherent system of precedent, is not immediately apparent. A comprehensive strategic review of the various

appellate mechanisms for rights exercisable under the DPA is arguably long overdue. This might include consideration of whether the section 166(2) procedure is working as anticipated. Anecdotally at least, the experience of both the First-tier Tribunal and the Upper Tribunal is that a significant proportion of these applications have little merit yet consume a considerable and disproportionate amount of judicial and administrative resources.

131 We would endorse those observations.”

89. It is now nearly 5 years since those observations were made. They apply now with even more force than they did then.

Mark West
Judge of the Upper Tribunal

Signed on the original 6 July 2026