Neutral Citation number: [2023] UKFTT 1035 (GRC)

Case Reference: EA-2023-0407

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decision Given on: 20 December 2023

Before

TRIBUNAL JUDGE BUCKLEY

Between

SAJAD HUSSAIN

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

JUDGE BUCKLEY

Sitting in Chambers
on 11 DECEMBER 2023

DECISION

1. The appeal is struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 .

REASONS

Application and response

2. The Commissioner applies for the appeal to be struck out under rule 8(2)(a) (no jurisdiction) and rule 8(3)(c) (no reasonable prospects of success) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Procedural Rules).

3. The Commissioner's application is based on the fact that the appellant's sole ground of appeal is:

> "I believe the decision by the ICO is a deliberate fraud and deception to whitewash the complaint under some private arraignment between the ICO and the Local Authority. I believe that the Local Authority are privately commissioning out the services of the ICO in order to cover up their failures."

4. The appellant was given the opportunity to respond. By email dated 11 October 2023, he submitted:

> "Please note the legal basis of my pursuing these matters to the First Tier Tribunal (FTT) is that failure to disclose the requested information is a violation of my human rights as defined under article 10 of the Human Rights Act 1998 - freedom of expression, and as subsequently upheld by the 2016 case law of **Magyar Helsinki Bizottság v. Hungary**, which I shall be reliant on as the bases of my legal argument in these proceedings.
>
> https://ilg2.org/2016/11/22/the-european-court-of-human-rights-and-access-to-information-clarifying-the-status-with-room-for-improvement/"

5. The appellant provided further submissions by email dated 12 October 2023:

> "I challenge the ICO's simply use of the term "no reasonable prospect of success" as a phrase to simply justify ending this process. This matter is an important Human Rights issue and the matter does need to be judicially deliberated on. Furthermore, I have proceeded to provide a legal base of European case law which I shall be heavenly reliant on in making my argument that the decision taken by the ICO is wholly incompatible with the superior European court's decision.
>
> I fully object to the ICO's justification for having this case struck out, on the use of a cryptic legal phrase, and would look to put them to proof."

6. The Commissioner provided a reply by email dated 16 October 2023 as follows:

> "…the Commissioner submits that in **Moss v Information Commissioner and the Cabinet Office** [2020] UKUT 242 AAC, the Upper

> Tribunal dismissed the argument that Article 10 was a relevant consideration when dealing with requests under FOIA."

7. The appellant applied for and was granted an extension of time to file further submissions in response to the strike out application.

8. By submissions dated 13 November 2023, the appellant submits that he is "challenging the ICO's broad interpretation and liberal usage of exemption FOI Section 40 (2) and their subjective definition or interpretation of what constitutes personal information as understood by the FOI legislation".

9. He submits that the 'singular question' that the FTT is being asked to deliberate on is:

> "Is a person's name personal information?
> According to the Data Protection Act 2018 it clearly is, as it can be used to identify a unique individual.
> Is a person's name personal information in the context of the FOI legislation?"

10. The appellant goes on to argue that an individual carrying out a trade or employment has no right to anonymity and privacy of their name. He makes a distinction between private citizens and public officers, where officers are any individual carrying out a work or trade to make money and a citizen is anyone who at the material time is not acting as an officer and is spending money to procure goods and services.

11. He states that the right to protection of anonymity of one's name is mutually exclusive: either a private citizen has a right to anonymity or the state agents or officers have a right to anonymity. They cannot both have a right at any one given time.

12. He states that the Commissioner's interpretation that all individuals' names are personal data is causing harm to members of the public and recounts a recent incident with the Commissioner in support of this assertion. In that incident the appellant covertly recorded a conversation with an employee of the Commissioner and placed it on YouTube. He objects to the fact that the individual attempted, in his or her private capacity, to get the recording removed. He asserts that the ability to covertly record conversations he is involved in, to expose malfeasance and corruption as a citizen journalist is crucial to what he does and its suppression is anachronistic to the principle of openness and transparency under the Freedom of Information legislation.

13. In conclusion he states:

> "I believe the matter should be allowed to proceed to the FTT, as it shall look to provide fuller clarity on the objective definition of what constitutes personal data as understood under section 40 (2) to provide clarity to not only members of the public or public authorities but to the ICO and those agents that they employ ... I would like to add that the present ICO interpretation of what constitutes personal data is also in contravention of the ICO's previous understanding of section 40 as per the decision made on the 22 of February 2006 decision notice FS50071194 (see attachment). If the FTT refuses my Application then they are denying me, as a private citizen, a legal remedy and access to justice and are knowingly permitting a public body such as the ICO and those it regulates to interfere with my freedoms and liberties as a private citizen."

14. The relevant parts of the attached decision notice FS50071194 states as follows:

> "The Commissioner is of the view that the information requested relates to individuals acting in an official as opposed to a private capacity; and whilst the information sought is personal data, the disclosure of this additional information would not impinge on the personal privacy to which individual MPs are entitled in their private lives. The Commissioner is minded that the information sought is personal data relating to MPs carrying out Parliamentary business for which they are receiving an official allowance. In addition, the Commissioner notes that the information sought in this case only differs from that already released into the public domain by dividing total figures for annual transport expenses into figures for three separate categories of transport. Therefore, it is the Commissioner's view that disclosure of the information in this case would not be unfair.
> …
> The Commissioner is therefore of the view that in this case the legitimate public interest in this information being made available outweighs any prejudice that there might be to the legitimate interests of the data subject (the MPs) in withholding it."

15. The Commissioner provided further submissions dated 16 November 2023. The Commissioner notes that Section 3(2) of the DPA defines personal data as "any information relating to an identified or identifiable living individual". The Commissioner submits that the withheld information in this case clearly relates to identifiable living individuals. The Commissioner submits that he was entirely correct to determine that the information withheld in this case falls under the definition of personal data as set out at section 3(2) of the DPA.

16. The appellant responded to those submissions in an email dated 30 November 2023. In that email he states that the Commissioner has failed to address the substantive issue of his outstanding grievance. He states:

> "The Appellant's disagreement with the ICO is that their reliance on exemption section 40 (2) is too broad, wide and far-reaching and furthermore using the Data Protection Act definition of what constitutes personal data is not a clear enough definition of what is personal information in the context of the Freedom of Information Act when the Information Commissioner (IC) refuses to equally consider other relevant laws such as the Human Rights Act (HRA) which the IC conveniently disregard as being a relevant law by deliberately cherry picking and choosing laws that strengthen his position but fails to focus on laws that clearly weaken his position, such as the HRA 1998."

17. The appellant asserts that the tribunal should ask two questions at this stage:
    - 17.1. Does the tribunal have jurisdiction to hear the appeal?
    - 17.2. Is the outcome being sought one that the tribunal can satisfactorily deliberate on?

18. The appellant re-emphasises that the problem for which he seeks a remedy is the Commissioner's failure to recognise the distinction between the rights of private citizens and the rights of corporate officers. This distinction must be used to establish if section 40(2) applies. The Commissioner convoluting the two is the problem.

19. The appellant asks the tribunal to take particular note that he suffers from dyslexia and that it is vitally important for him to be afforded the opportunity to record conversations he is involved in for his personal reference and as an aid to my memory without facing condemnation and reprisal action from publicly funded public servants or corporate Officers.

Discussion and conclusions

20. The arguments made in the appellant's submissions are entirely different to those raised in the grounds of appeal. I have assumed for the purposes of this application, without deciding, that the appellant will be given permission to amend his grounds of appeal and therefore I have considered the grounds raised in the grounds of appeal and in the subsequent submissions.

21. In the light of all the matters set out above I have considered whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of the appeal succeeding at a full hearing. That is the test that I must consider under rule 8(3)(c).

22. The appellant complains about the use by the Commissioner of the phrase 'no reasonable prospects of success'. That is the test, set down in the Procedural Rules, that the tribunal must apply in relation to a strike out under rule 8(3)(c). It is accordingly entirely appropriate to use that phrase.

23. In my view, there are no reasonable prospects of the appeal succeeding.

The original grounds of appeal

24. In relation to the ground set out in the original grounds of appeal, I note that this ground does not appear to be pursued. There is no reference to it in the appellant's submissions and he states in those submissions what the 'singular' question is that the FTT is being asked to consider.

25. Assuming that the ground is pursued, in my view the suggestion that the Commissioner's decision notice is a deliberate fraud and deception to whitewash the complaint under some private arrangement between the Commissioner and the local authority is entirely fanciful. As is the suggestion that the local authority are privately commissioning the services of the Commissioner to cover up their failures. There is no explanation as to why the appellant suspects this may be the case. The decision notice, as explained below, correctly applies the law to the facts. It appears to be an entirely rational decision. In my view there are no reasonable prospects of this argument being accepted by the tribunal.

The new grounds of appeal

26. In his submissions the appellant sets out that the singular question for the tribunal to answer: "is a person's name personal information?". There are no prospects of the tribunal answering anything but 'yes' to this question.

27. The appellant acknowledges that under the Data Protection Act 2018 a person's name 'clearly is' personal data, but asks if it is personal information in the context of the FOI legislation. Again there are no prospects of the tribunal answering anything but 'yes' to this question.

28. Under section 40(2) information is exempt information, under certain conditions, if it is 'personal data'. Under section 40(7) FOIA personal data is has the same meaning as in the Data Protection Act 2018:

> "In this section… "the GDPR", "personal data", "processing" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of that Act (see section 3(2), (4), (10), (11) and (14) of that Act).

29. There are no reasonable prospects of a tribunal concluding that a different definition of personal data should have been applied. The fact that this feels unfair to the appellant, or has certain consequences, is not relevant. Nor is the example of the incident involving the recording of a telephone call. The

tribunal and the Commissioner have to apply the definition of personal data in the primary legislation, which is clear and unambiguous.

30. In the decision notice attached by the appellant, the Commissioner applied the same legal tests as they did in this appeal. In both appeals the Commissioner concluded that the names were personal data.

31. The question of the capacity in which a person is acting is not relevant to the question of whether their name is personal data. It is relevant to the question of whether disclosure would contravene any of the data protection principles.

32. The fact that information is another person's personal data does not mean that it is automatically exempt from FOIA. The question of the capacity of the person whose data it is, will be factored into the question of whether disclosure is lawful, fair or transparent. This will ordinarily, in a FOIA context, include consideration of whether a legitimate interest is being pursued by the requestor, whether disclosure is necessary to meet those interests and whether those interests override the legitimate interests of the data subject.

33. That is why the Commissioner reached a different decision in the other decision notice attached by the appellant. The appellant has misunderstood if he thinks that the Commissioner's approach to personal data means that the personal data of corporate officers are exempt from FOIA in all circumstances.

34. The question of whether or not the appellant has a legitimate interest in the recordings made of telephone calls for the purposes of his dyslexia is not relevant to this appeal, but might be relevant to the consideration of whether processing of personal data is lawful in other circumstances.

A reframed grounds of appeal

35. I have taken account of the fact that the appellant is a litigant in person, and have considered whether the appeal would have any reasonable prospects of success if it was framed differently. I have considered whether there are any reasonable prospects of a tribunal accepting an argument that the Commissioner was wrong to find that disclosure would be in breach of the data protection principles, given that the individuals were acting in their capacity as Council Officers.

36. I have concluded that there are no reasonable prospects of the appeal succeeding even if it were argued on that basis.

37. The Commissioner applied the appropriate legal tests to the facts. The Council had disclosed information relating to senior staff and general contact information and only withheld the names and contact details of officers in

junior roles. The appellant had not identified any specific interest in the disclosure of the information requested.

38. The Commissioner had identified a legitimate interest in disclosure of information which allows individuals to contact relevant officers within the Council. He considered that the information that the Council had disclosed to date, along with the various other contact details and methods available on the Council's website were sufficient to meet this interest. He concluded that disclosure of the remaining information was not necessary to meet the legitimate interest. In my view, there are no reasonable prospects of the tribunal reaching a different conclusion.

39. The appellant asserts that the legal basis of pursuing these matters to the tribunal is that failure to disclose the requested information is a violation of his human rights as defined under article 10 of the Human Rights Act 1998 - freedom of expression, and as subsequently upheld by the 2016 case law of **Magyar Helsinki Bizottság v. Hungary**.

40. In **Maygar**, the European Court of Human Rights recognised that Article 10(1) might, under certain conditions, include a right of access to information, including in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

41. Like the Upper Tribunal in **Moss v Information Commissioner and the Cabinet Office** [2020] UKUT 242 (AAC) ('**Moss**')(at paragraph 59) the tribunal at the final hearing will be bound by the rules of precedent to follow the view of five members of the Supreme Court in **Kennedy v Charity Commission (Secretary of State for Justice and others intervening)** [2014] UKSC 20, as well as the Court of Appeal in **Kennedy** and two, if not three, members of the Supreme Court in **BBC v Sugar** (No.2) [2012] UKSC 4 that domestic law does not consider Article 10(1) extends to include a right of access to information. The tribunal will also be bound by the Upper Tribunal decision in **Moss** which holds that even if **Magyar** did apply, it does not provide a result more beneficial than is available under FOIA.

42. In the light of the binding authority the appellant's arguments based on article 10 and **Maygar** will not assist him. This argument has no reasonable prospects of success.

43. For the reasons set out above, I conclude that the appeal, however argued, has no reasonable prospects of success.

44. I have considered whether I should exercise my discretion to strike the appeal out. Taking into account the overriding objective, it is a waste of the time and

resources of the appellant, the tribunal and the Commissioner for this appeal to be considered at a final hearing. I do not agree that there is any wider public interest in having this appeal heard. The question of whether the definition of personal data from the DPA *should* be used in FOIA is not a question for this tribunal. Further, section 40(2) does not provide an absolute exemption for personal data of third parties – it is subject to the consideration of whether disclosure would be fair and lawful. Thus the classification of the data of corporate officers/public servants as personal data does not make it automatically exempt from disclosure under FOIA.

45. In my view, for those reasons it is appropriate to strike the appeal out under rule 8(3)(c).

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 11 December 2023