Case Reference: EA-2022-0139
NCN: [2023] UKFTT 00637 (GRC)

Heard remotely on 26th 2023

Decision given on: 31st July 2023

First-tier Tribunal
General Regulatory Chamber
Information Rights

Before

TRIBUNAL JUDGE BUCKLEY

Between

EDWARD WILLIAMS

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE UNIVERSITY OF SOUTHAMPTON

Respondents

JUDGE BUCKLEY

Sitting in Chambers
on 26 July 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

2. The second respondent applies by email dated 13 July 2023 for the appeal to be struck out under rule 8(3)(c) because the second respondent intended to provide all the withheld information. It argued that the appeal should be struck out 'for the

reasons already enumerated by the tribunal in the order of the 20th of June 2023 and so as not to incur further expense on the public purse in the continuation of this matter…'.

3. I gave the other parties the opportunity to make representations. The Commissioner agreed that it would be a waste of public resources for the matter to continue.

4. The appellant gave his response by emails dated 13, 14 and 18 July 2023.

5. The appellant argues that the appeal should not be struck out because he made the appeal to clarify the Commissioner's practice of 'refusing to serve on the requestor/publish the (full) decision notice'. The appellant wants a decision on the 'confidential annex' abuse of requestor rights. He wants this practice, which he submits is unlawful, to end. He argues that the right to appeal to the tribunal only arises when **both** parties have been served with the (whole) decision notice. Nothing else works.

6. Further, the appellant argues that there is no provision to strike out an appeal simply because the disputed information has been provided. He submits that the tribunal has no jurisdiction to consider such an application.

7. The second respondent confirmed by email dated 25 July 2023 that it had now released the withheld information to the appellant.

Discussion and conclusions

8. For similar reasons to those given in my order of 20 June 2023, I conclude the appeal is academic because all the requested information has now been disclosed. It would be a waste of the Tribunal's time and resources and an exercise in futility to hear the appeal in relation to material which has now been disclosed.

9. This is not invariably the case in any appeal where the requested information has been disclosed. There may be a reason why, in all the circumstances of the case, the appeal is not academic even though all the information has been disclosed.

10. I accept that the appellant still sees value in pursuing the appeal, because he wishes to obtain a ruling from the tribunal to the effect that the Commissioner has no power to issue a confidential annex and/or that the practice is unlawful.

11. There are two reasons why, in my view, this does not make a difference to my conclusion that the appeal is futile.

12. First, the tribunal that heard the appeal would not be making a ruling on whether or not the Commissioner's practice of issuing a confidential annex is unlawful. That is not what the tribunal would determine in this appeal. If the appeal were to succeed, the Commissioner would not be prevented from issuing confidential annexes, nor would there be any finding as to whether or not that practice was unlawful.

13. Second, the appellant has already had one opportunity to make his argument that the issuing of the confidential annex is unlawful in an oral permission hearing before the

Upper Tribunal in Appeal No. GIA/1120/2020. In a decision dated 8 March 2021, refusing permission to appeal, Upper Tribunal Judge Jones gave detailed reasons as to why, in his view, the Commissioner was entitled to issue a confidential annex at paragraphs 73-76 and 144-145.

14. Spending time and resources on the part of the parties and the tribunal in determining this appeal simply to allow the appellant to have another opportunity to attempt to challenge the Commissioner's practice of issuing confidential annexes would run counter to the overriding objective, under which dealing with a case fairly and justly includes dealing with the case in ways which are proportionate to the importance of the case and the anticipated costs.

15. As I found in relation to my earlier decision to strike out part of the appeal, there is no realistic prospect of any tangible or legitimate advantage to the appellant, even if he were to win his appeal, such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of the use of scarce tribunal resources and expense to the public purse.

16. In my view continuing this appeal amounts to an abuse of process, in the sense that Mr Williams is using the tribunal process for a purpose or in a way significantly different from its ordinary and proper use.

17. Having concluded that there is an abuse of process, I have considered whether I should exercise my discretion to strike out the claim.

18. In my view it is proportionate and in accordance with the overriding objective to strike out the appeal, in part for the reasons set out above. Furthermore, there is no significant hardship caused to the appellant by striking out the appeal given that (i) he has already had the opportunity to air this issue in an oral hearing before the Upper Tribunal, and (ii) even if he won the appeal, it would not achieve his aim and it would therefore bring him no tangible benefit.

19. Allowing the appeal to proceed would mean that the other parties and the tribunal would have to spend time and money in dealing with an issue that has become academic.

20. The appellant submits that I have no power to strike out an appeal simply because the disputed information has been provided. He submits that the tribunal has no jurisdiction to consider such an application. I gave detailed reasons for why I concluded that I had the power to strike out an appeal for abuse of process in my order of 20 June 2023. I repeat those reasons here.

21. The Court of Appeal decision in **Shiner, Sheinman v The Commissioners for HM Revenue and Customs** [2018] EWCA Civ 31 considered the power of the First-Tier Tribunal to strike out for an abuse of process under the Tribunals Courts and Enforcement Act 2007 (TCEA 2007) and the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tax Chamber Rules'). The relevant rules are identically worded in the GRC Rules and the Tax Chamber Rules.

22. It is helpful to set out the following section of the Court of Appeal's judgment which deals with the jurisdiction of the First-Tier Tribunal to strike out the grounds of appeal as an abuse process:

> "**Jurisdiction to strike out**
>
> 13. The first question raised by the appeal is whether the First-tier Tribunal has power under its rules to make an order striking out some of the grounds of appeal as an abuse of process even assuming that issue estoppel or abuse of process has any application in relation to a tax appeal. It is common ground that the First-tier Tribunal is a statutory tribunal with no inherent jurisdiction. It exists to perform the functions conferred on it by the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") and other statutes: see TCEA 2007 s.3(1). Its powers must be found in TCEA 2007 and the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") made under the power conferred by s.22.
>
> 14. Section 22 provides for the making of rules by the Tribunal Procedure Committee.
>
> Section 22(4) provides:
>
> "(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing— Judgment Approved by the court for handing down.
>
> Shiner & Anor v HMRC
>
> (a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
>
> (b) that the tribunal system is accessible and fair,
>
> (c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
>
> (d) that the rules are both simple and simply expressed, and
>
> (e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently."
>
> 15. So far as material, the Rules now in force provide:
>
> "2. -(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.

(b) avoiding unnecessary formality and seeking flexibility in the proceedings.

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings.

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

…..

5-(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

…..

8-(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them.

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

…..

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in
proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings."

16. Mr McDonnell submits that although it may be possible to imply a power to strike out as part of the Rules, the circumstances in which that is possible are very limited. It is necessary to show that the implied power can be treated as part of the tribunal's function to regulate its own procedure in order to carry out its statutory objective: see R (on the application of V) v Asylum and Immigration Tribunal [2009] EWHC 1902 (Admin) at [27]. Tribunals do not have an open-ended power to regulate their own procedure.

17. Because Rule 8(3) gives the First-tier Tribunal an express power to strike out part of the proceedings on specified grounds, there is, Mr McDonnell says, no room for any further implied power to strike out on other more general grounds. This is reinforced by a consideration of the function of the First-tier Tribunal which is to determine statutory tax appeals and to reach a conclusion on the correct amount of tax payable. Once an appeal is made under s.31 TMA 1970 the First-tier Tribunal must determine it either by upholding the assessment or by reducing or increasing it: see TMA 1970 s.50. It has, he says, a duty to determine the tax payable which differentiates tax appeals from ordinary civil litigation between private parties.

18. To strike out part of an appeal is also, Mr McDonnell says, a drastic step because it deprives the taxpayer of the opportunity of raising his arguments against a background of all the relevant facts. Unless the circumstances are exceptional, it carries with it the risk of denying the taxpayer a fair hearing. It is therefore a power which (if it exists) should only be exercisable in very limited circumstances.

> 19. The need to exercise caution in relation to any power to strike out proceedings prior to a full hearing is obvious. But it is a consideration which goes to the exercise of the power rather than to whether such a power exists. The Upper Tribunal in its decision at [55] did not take Mr McDonnell to have submitted that there was no power to strike out for abuse of process but in any event, in my view, the power contained in Rule 8(3)(c) is wide enough in its terms to include a strike out application based on those grounds. Such an application, if successful, would result in the First-tier Tribunal concluding that the relevant part of the appellant's case could not succeed. A power to strike out could also be said to be part of the power of regulation by the First-tier Tribunal of its procedure under Rule 5(1) (which was the view of the Upper Tribunal), but Rule 8(3)(c) is enough. There is no need to imply a power. It is worth observing that the equivalent provision in CPR 3.4(2) separates out a case where a statement of case discloses no reasonable grounds for bringing or defending the claim from a case where the statement of case is an abuse of the court's process. But for the First-tier Tribunal the Tribunal Procedure Committee has chosen a different but composite criterion of no reasonable prospect of success, which is wide enough to cover appeals which are legally hopeless as well as appeals which can be said to amount to an abuse of process. There is in my view express power to strike out on both grounds."

23. In my view, the reasons given by the Court of Appeal in paragraph 19 are equally applicable to this First-Tier Tribunal and the GRC Rules and on that basis I conclude that I have the power to strike out a claim, or part of a claim, if I conclude that it is an abuse of process because the power under rule 8(3)(c) to strike out claims for no reasonable prospect of success is wide enough to cover claims that amount to an abuse of process.

24. I do not need to consider whether the First-Tier Tribunal was correct to conclude in **Edwards v Information Commissioner** UKIT (EA/2010/0056) that rule 2(2) read with rule 5(2) gives the Tribunal the power to dispose of proceedings that are academic. There is no need to imply such a power because rule 8(3)(c) is enough.

25. For the above reasons the appeal is struck out under rule 8(3)(c).

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 26 July 2023