DETERMINATION STRIKING OUT OF APPLICATION FOR PERMISSION TO APPEAL

DETERMINATION

The proceedings on the applicant's application for permission to appeal against the ruling of the First-tier Tribunal dated 2 March 2018 are STRUCK OUT in their entirety under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

1. The proceedings under GIA/877/2018 are an application by Dr Kirkham for permission to appeal from a ruling made by the First-tier Tribunal on 2 March 2018 in effect striking out Dr Kirkham's purported appeal to the First-tier Tribunal on the basis that the First-tier Tribunal had no jurisdiction to decide the purported appeal.

2. On 15 June 2018 I gave directions on the application for permission to appeal raising issues as to its arguability and prospects of success. I asked Dr Kirkham to provide written submissions on why the application should not be struck out without a hearing under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Rules"). The directions said the following (I have corrected some typographical errors in the original wording):

> "Permission to appeal should only be given if there is a realistic prospect of the applicant establishing that the First-tier Tribunal **erred materially in law** in the decision to which it came or there is some other important issue of law that merits permission being given. It is not, therefore, the function of the Upper Tribunal to decide an appeal again on the factual merits.
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> The UT Rules govern the procedure, amongst other things, for dealing with applications made to the Upper Tribunal for permission to appeal from the First-tier Tribunal. The effect of rule 22(4) of the UT Rules is that if the Upper Tribunal refuses permission to appeal from the General Regulatory Chamber of [the] First-tier Tribunal on consideration of the papers alone,

the applicant may apply for the permission to appeal application to be reconsidered at an oral hearing. Alternatively, such an applicant may ask for an oral hearing before the Upper Tribunal of the application for permission to appeal at the outset of the application.

However, rule 22 does not contain an absolute rule and it is subject to rule 8 of the UT Rules. Rule 8(3)(c) provides in particular that "The Upper Tribunal may strike out the whole or a part of the proceedings if….the Upper Tribunal considers there is no reasonable prospect of…..the applicant's case….succeeding". Rule 8(4) of the UT Rules provides, however, that the Upper Tribunal may not invoke rule 8(3)(c) without first giving the applicant an opportunity to make representations as to why his application should not be struck out. The effect of rule 34(1) of the UT Rules is that there is no need for the Upper Tribunal to hold a hearing before striking out an application for permission to appeal under rule 8(3)(c): see further and to the same effect *Dransfield –v- Information Commissioner* [2016] UKUT 0273 (AAC) and *Martyres –v- Information Commissioner and Chief Constable of Cambridgeshire Police* [2016] UKUT 0471 (AAC)……..

Despite the breadth and learning in Dr Kirkham's grounds and submissions, the issue in this case is on its face a narrow and straightforward one. The essential facts are not disputed. Dr Kirkham had made a complaint to the Information Commissioner in respect of a request for information he had made to the EPSRC. That request for information was made under section 1(1) of the Freedom of Information Act 2000 ("FOIA"). The legal basis for the complaint was section 50(1) of FOIA, which provides that "(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I" (the underlining is mine, to which I will return). As far as I am aware, that complaint was properly brought by Dr Kirkham and is still being considered by the Information Commissioner.

By a letter to the Information Commissioner's Office dated 5 November 2017 Dr Kirkham put forward grounds for having the investigation of his complaint accelerated by the Information Commissioner. By an email in reply dated 9 November 2017 a Group Manager in the Information Commissioner's office refused the request that consideration of the complaint by the Information Commissioner be accelerated.

It is the decision not to accelerate the consideration of his section 50 complaint that Dr Kirkham sought to appeal to the First-tier Tribunal, and which the First-tier Tribunal struck out on the basis that it had no jurisdiction.

Section 50(2) and (3) of FOIA address what the Information Commissioner is to do on receipt of an application under section 50(1), which is:

> "(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
> (b) that there has been undue delay in making the application,
> (c) that the application is frivolous or vexatious, or
> (d) that the application has been withdrawn or abandoned.
> (3) Where the Commissioner has received an application under this section, he shall either—
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority." (my underlining added for emphasis)

It is immediately apparent from consideration of section 50 that, first, it is rooted in a complaint about a request for information not having been dealt with in accordance with Part I of FOIA, and, second, where the Information Commissioner has decided such a complaint she is obliged to serve a decision notice on the complainant and the public authority.

Both these points of emphasis are of central importance, and particularly the latter when it comes to looking at the jurisdiction conferred on the First-tier Tribunal under section 57 of FOIA. It is trite law that the First-tier Tribunal can only make decisions on matters over which it has jurisdiction, though it can rule on whether it has jurisdiction as a necessary preliminary step in that process. Section 57 of FOIA does not, however, confer a right of appeal at large or in respect of all and any acts or omissions of the Information Commissioner. Most critically for the purposes of Dr Kirkham's application, the right of appeal to the First-tier Tribunal only arises "57.-(1) Where a decision notice has been served…..", and that means a decision notice under section 50(3)(b).

I pause at this stage to observe that regulation 5 of Environmental Regulations 2004 ("the 2004 Regs") imposes a general duty on a public authority which holds environmental information that it must make it available on request. Under regulation 18 of the 2004 Regs the enforcement and appeal provisions of FOIA (including sections 50, 57 and 58) are made to apply for the purposes of the 2004 Regs (subject to immaterial exceptions). Accordingly, even if any or all of the information sought by Dr Kirkham was 'environmental

information', this fact would make no difference to the analysis of the First-tier Tribunal's appellate jurisdiction under FOIA.

I makes these "proposal to strike out directions" because I take the view on the basis of the written argument and papers before me that there is no reasonable prospect of Dr Kirkham succeeding in showing that the First-tier Tribunal erred materially in law in the decision to which it came when it decided it had no jurisdiction to decide his appeal against the Information Commissioner office's email of 9 November 2017.

The reason why, at present, I consider Dr Kirkham has no reasonable prospects of success are cumulative and are as follows.

i. First, his request of 5 November 2017 for acceleration of his section 50(1) EPSRC complaint was not a request for information (environmental or otherwise) held by the Information Commissioner.

ii. Second, he made no complaint under section 50(1) of FOIA, even on the assumption that the response to his request for acceleration was a response to a request for information, between 9 November 2017 and the date of his appeal to the First-tier Tribunal of 2 December 2017.

iii. Third, as a result and in any event, there was nothing that constituted a decision notice within the terms of FOIA on a s.50(1) complaint in respect of the request Dr Kirkham had made on 5 November 2017.

iv. Fourth, on the face of the evidence the Information Commissioner had not issued a decision notice in respect of Dr Kirkham's section 50(1) complaint about the EPSRC's handing of his request for information to the EPSRC before 2 December 2017.

v. Fifth, in consequence, given the wording of section 57 of FOIA the First-tier Tribunal had no jurisdiction to decide whether the Information Commissioner's refusal to accelerate her consideration of Dr Kirkham's complaint about the EPSRC's handling of his request for information to it was either not in accordance with the law or involved a misuse of a discretion under section 58 of FOIA.

vi. Sixth, the remedy for alleged unlawful delay in the Information Commissioner determining Dr Kirkham's complaint about the EPSRC's handling of his request to it was for Dr Kirkham to make an application to the High Court for judicial review of that alleged failure.

Dr Kirkham's argument, if I have understood it correctly, recognises the limits on the First-tier Tribunal's jurisdiction drawn by section 57 of FOIA but argues that the email reply of the Information Commissioner's office of 9 November 2017 to him **was** a "decision notice" under section 50(3)(b) of FOIA.

A number of difficulties however would seem to present themselves to this analysis. First, and perhaps of least consequence, the email was not served on any public authority. Second, no application had been made by Dr Kirkham to the Information Commissioner under section 50(1) of FOIA that the request for acceleration had not been dealt with in accordance with Part I of FOIA. Third, the request for acceleration was in any event not a request for information to a public authority. Fourth, for the reasons already set out……, the Information Commissioner's refusal to accelerate her consideration of [Dr Kirkham's] complaint could not constitute her decision notice on that complaint for the very reason that what she communicated on 9 November 2017 was a refusal to speed up making a decision and issuing [her] decision on the EPSRC complaint. It seems to me that this fourth point lies at the heart of the difficulty in Dr Kirkham's argument. For the reasons already given, the request for acceleration by itself does not engage Parts I and IV of FOIA. However, if the argument is that the request for acceleration is a necessary or constituent, albeit ancillary, part of the EPSRC [complaint], that arguably brings one back to the EPSRC complaint on which Dr Kirkham had no decision notice from the Information Commissioner which he could then appeal to the First-tier Tribunal in December 2017.

Moreover, I do not at present see on what basis the Information Commissioner's refusal to accelerate consideration of Dr Kirkham's EPSRC complaint itself constituted a refusal of access to information, as Dr Kirkham argues. Its effect was no more than, putting it bluntly, not allowing Dr Kirkham to jump the queue of section 50 complainants to the Information Commissioner. Even assuming the Information Commissioner through the section 50 procedure could herself provide access to the information Dr Kirkham had sought from the EPSRC, there is very arguably nothing in the email of 9 November stating that she will <u>not</u> provide the information. And if it was a separate refusal to provide information the mechanism was to make a section 50 complaint against the Information Commissioner as the refusing public authority.

Dr Kirkham argues in favour of the acceleration refusal email being a "decision notice" that the purpose of sections 50 and 57 of FOIA is to provide a meaningful right of access to information in a timely fashion. Even assuming in his favour that he is correct on this, this provides no basis as far as I can see at present for why the First-tier Tribunal under Part IV of FOIA

> has been vested with the legal responsibility for ensuring timely compliance, as opposed to the Administrative Division of the High Court. Indeed, it is very arguably difficult to discern what in the language of FOIA (Part IV or elsewhere) provides the statutory mechanism or power to either enable or require the First-tier Tribunal to compel the Information Commissioner to expedite her consideration of an individual section 50 complaint or decide on it by a particular date. In fact, for the reasons given above, Part IV of FOIA would seem to stand against Parliament having vested any such function in the First-tier Tribunal.
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> Nor do I consider that the High Court (or other) cases on which Dr Kirkham relies show that such a power or duty vests as matter of law in the First-tier Tribunal. What was said, for example, by Mr Justice Garnham at the end of paragraph 3 of his judgment in the "Secret Brexit Studies" case was it seems to me, at least at present, stating no more than the obvious point that decisions under FOIA *can* be expedited; but it says nothing about where any challenge is to be brought if expedition is refused less so that the First-tier Tribunal can determine whether expedition has been refused unlawfully. And as far as I can see nothing in that case was concerned with which court or tribunal had jurisdiction in challenges brought to a refusal to expedite.
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> I am mindful in making these proposal to strike out directions that, per *Martyres*, this power should not be used lightly and should only be used as a matter of last resort, and it should not be used where less severe steps could be taken to alleviate the perceived deficit in the application. But here the deficit in the application for permission to appeal is simply its lack of legal arguability and, subject to anything Dr Kirkham may now be able to say, I cannot see how that may be remedied without ruling on arguability, which is what rule 8(3)(c) covers."

3. The above directions were issued to Dr Kirkham, and the Information Commissioner, on 19 June 2018. The one-month period for any responses to those directions expired on 19 July 2018. On 25 June 2018 the Upper Tribunal received a response by email from Dr Kirkham. In that email he said he could not meaningfully reply to the directions as he did not understand them. On reading the substantive content of the response, however, it is clear that Dr Kirkham was able to understand the content of the directions in terms of the language in which they were written. His disagreement (couched by Dr Kirkham in terms of 'lack of understanding') is with my suggesting in the directions that he needed to show that he had been issued with a "Decision Notice" by the Information Commissioner in her email reply of 9 November 2017 refusing to accelerate consideration of his EPSRC complaint and with the argument that his doing so was 'hopeless'. He argued that my directions simply ignored the arguments he had made. He then restated his arguments. For example, Dr Kirkham referred to his

argument that requiring him to argue the matter before the High Court would be a violation of article 10 of the European Convention on Human Rights ("ECHR") due to the potential costs implications. He also argued that the Upper Tribunal's approach in *Fish Legal* adopting an expansive purposive construction of section 50 of FOIA would lead to the result for which Dr Kirkham contends.

4. In a further email to the Upper Tribunal dated 5 July Dr Kirkham stated that as he did not fully understand the possible grounds I had given for striking out his application there was little he could add (to his email of 25 June 2018). He went on, however: (i) to rely on the decision of the High Court in *R(Good Law Project and others) v Secretary of State for Exiting the European Union and others* [2018] EWHC 719 (Admin), (ii) to argue that he was not seeking to 'jump the queue', (iii) to further argue that the 'letter' from the ICO of 9 November 2017 should be treated as a refusal of his request for information and thus a Decision Notice, (iv) to state that the definition of information includes utility, and (v) to argue that Parliament could not have intended that the FOIA regime was to be subject of delays.

5. Having considered all of Dr Kirkham's arguments, I strike out his application for permission to appeal in GIA/877/2018 as it has no reasonable prospect of succeeding. My reasons are as follows. These are in addition, or by way of further emphasis, to the points I made in my directions of 15 June 2018, points which I consider still to be sound.

6. First, it is simply unarguable that the Information Commissioner's email reply of 9 November 2017 was a refusal of Dr Kirkham's request for information and thus a Decision Notice. First, there was no request for information under section 1 of FOIA by Dr Kirkham *to* the Information Commissioner. His request for information had been made to the EPSRC and Dr Kirkham then made a complaint to the Information Commissioner under section 50(1) of FOIA when that request for information had been refused by the EPSRC. Second, for it to amount to a "Decision Notice" under section 50(3)(b) of FOIA the email of 9 November 2017 had to amount to the Information Commissioner's decision on Dr Kirkham's complaint about whether the EPSRC had dealt with his request for information in accordance with Part I of FOIA. On no rational basis can the ICO's email of 9 November be read as making such a decision. All it was 'deciding' was not to accelerate the making of the decision on Dr Kirkham's compliant about the EPSRC's handing of his request for information. The contrary is simply not arguable.

7. Second, for much the same reasons, it is not arguable that the Information Commissioner's 9 November email was in effect deciding the complaint and upholding the EPSRC's decision. To so hold would run flatly contrary to what the email actually says. Moreover, such a 'default' argument – that is, treating the complaint as having been rejected in substance by the Information Commissioner if not decided after a particular period of time – would allow a procedural

requirement to subvert the substantive decision making of the Information Commissioner for which FOIA calls, whilst at the same time ignoring the mechanisms (the High Court on judicial review) by which administrative and procedural failings can be addressed.

8. Third, arguments about what ought to be the case in terms of the speed of the Information Commissioner's decision making (and her resources to do the same), do not go the legal issue of which court or tribunal is empowered by law to decide whether the Information Commissioner has unlawfully delayed in making her decision on any given complaint.

9. Fourth, the High Court's decision in the *Good Law Project* judicial review is not in point as it says nothing about whether a refusal by the Information Commissioner to expedite her decision making on a complaint either (a) itself amounts to a "decision notice" under section 50(3)(b) of FOIA, or (b) can otherwise be appealed to the First-tier Tribunal under section 57 of FOIA. As with Mr Justice Garnham's decision, with which I dealt in my directions of 15 June 2018, even if the *Good Law Project* decision shows that FOIA is (to use Dr Kirkham's words) "capable of operating at the required speed without recourse to the Administrative Court", that says nothing about the court or tribunal in which the decision making would vest if the "FOIA decision making" is alleged to be taking too long. Nor does it say anything about what constitutes a "decision notice" for the purposes of FOIA.

10. Fifth, if Dr Kirkham has a good argument as to the Information Commissioner having unlawfully failed to expedite her decision on his complaint but that the costs implications of bringing such an argument in the High Court would potentially interfere with his rights under Article 10 of the ECHR and/or the Aarhus Convention, those arguments could be made to the High Court as preliminary points so as to seek to prevent that Court imposing costs. In any event, I cannot see any arguable basis on which the Article 10 argument can lead to the provisions of sections 50 and 57 of FOIA being interpreted as conferring jurisdiction on the First-tier Tribunal to treat a decision of the Information Commissioner refusing to expedite making her decision under section 50(3)(b) as a decision notice under section 50(3)(b), or as otherwise conferring a jurisdiction on the First-tier Tribunal to rule on whether there has been a failure by the Information Commissioner to make a decision in time. The language of section 57 of FOIA, which is the only basis upon which the First-tier Tribunal has any jurisdiction under that Act (and it has no jurisdiction other than by this route), is in my judgment clear and unequivocal: the First-tier Tribunal only has jurisdiction in respect of a "decision notice" which has been served under section 50(3)(b) of that Act. The contrary is simply unarguable.

11. Nor do I understand how the Environmental Information Regulations 2004 (assuming for the sake of argument that they apply to Dr Kirkham's request to the EPSRC) being secondary legislation assist Dr Kirkham's human rights argument. Disapplying regulation 18 of those

regulations would not benefit Dr Kirkham as that would leave him with no statutory appeal right under those regulations. Nor would disapplying any of the modifications of Parts IV and V of FOIA found in regulation 18. Moreover, I cannot see any lawful basis under the Human Rights 1998 by which the modifications in regulation 18 of the Environmental Information Regulations 2004 could be read so as to modify either section 50 or section 57 of FOIA to allow for a refusal to expedite making a decision under section 50(3)(b) of FOIA to be read as a 'decision' over which the First-tier Tribunal has jurisdiction. Such a reading would involve rewriting the modifications contrary to the clear intent of Parliament as expressed in the limited modifications that regulation 18 does make and the clear intent of the legislation as set out in FOIA.

12. Sixth, whatever the reach of *Fish Legal*, it cannot in my judgment assist to turn what was plainly not a decision notice on Dr Kirkham's complaint about the EPSRC's handling of his information request into such a notice. The 9 November 2017 email was doing no more than communicating the administrative decision of the Information Commissioner that she would not accelerate making her decision on the complaint. However purposively one construes that decision it was not the section 50(3)(b) "decision notice" on the complaint and so, per section 57(1) of FOIA, could not confer a right of appeal to (i.e. jurisdiction on) the First-tier Tribunal. The context in *Fish Legal* was very different as it was concerned with the issue of whether a body was a public authority for the purposes of FOIA. However, it is instructive that the three-judge panel in *Fish Legal* accepted that the First-tier Tribunal only has jurisdiction over a decision notice issued by the Information Commissioner under section 50(3)(b) of FOIA. (This binding authority thus arguably alone provides the answer to Dr Kirkham's question why for him to succeed he must show that the 9 November 2017 email was a "decision notice".) The jurisdictional issue was then whether what the Information Commissioner had issued in *Fish Legal* was such a section 50(3)(b) decision notice. The rest of the "jurisdictional issue" analysis in *Fish Legal* is concerned with construing whether what was issued in that case was a "decision notice" under section 50(3)(b). For the reasons I have given above, it seems to me unarguable that the 9 November 2017 email was not the section 50(3)(b) decision notice on Dr Kirkham's complaint. Moreover, the reference to "negative decision" in *Fish Legal* is not *any* decision which disappoints the person who receives it. As paragraph 36 of *Fish Legal* shows, a 'negative decision' is one which has the effect of dismissing the complaint that the request for information was not made in accordance with Part I of FOIA. In this case, however, the email of 9 November 2017 had no such effect: the decision on the complaint was still to be made.

13. Seventh, insofar as there are any separate EU law arguments, they do not advance matters. Dr Kirkham's grounds of appeal to the Upper Tribunal refer in this respect to paragraph 21 of the three-judge panel's decision in *Fish Legal* and the Supreme Court's decision in the *Unison*

case [2017] UKSC 51. As to the former, however, the decision in *Fish Legal* contains no adjudication on any EU law argument on the issue of jurisdiction (and, as I have already indicated, insofar as *Fish Legal* is relevant it stands against Dr Kirkham's argument). As for the *Unison* decision, I do not consider that the "principle of effectiveness" spoken of in that decision is even arguably infringed by FOIA requiring a substantive decision to have been made by the Information Commissioner (i.e. by her issuing a "decision notice") before an appeal can be made to the First-tier Tribunal. Nor is the principle infringed by requiring issues of alleged delay in such decision making to be adjudicated in the High Court. Further, I do not consider it is even arguable on the facts of this case and the evidence advanced that that structure of decision-making imposes procedural requirements which are liable to render "practically impossible or excessively difficult" the exercise of any EU law right to freedom of information: per paragraph 106 of *Unison* citing *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483.

14. Nor do I consider that there is any arguable case on the arguments and evidence advanced before me by Dr Kirkham that the requirement of FOIA that there is a substantive determination by the Information Commissioner on the merits of a complaint brought to her before any appeal may be made to a First-tier Tribunal on the merits, imposes any illegitimate or disproportionate restriction on the exercise of any EU right to information.

15. Eighth and last, the "unnotified appeals" argument has no merit and is misconceived. The issue in *FH -v- Manchester City Council* (HB) [2010] UKUT 43 (AAC), concerned where a valid appeal **had** been made, against as substantive entitlement decision which **had** been made, but where the local authority (to whom the appeal had to be made) had delayed in forwarding the appeal to the First-tier Tribunal. The directions issued by the First-tier Tribunal in *FH* were, therefore, no more than case management directions on an appeal it was satisfied it had jurisdiction over. That case is nothing to do with a First-tier Tribunal assuming or accepting a jurisdiction to rule on whether the decision that was still to be made by the local authority was taking too long (which would be the equivalent to this case). Nor could it have assumed such a jurisdiction. Delays in decision-making in social security are matters for judicial review and not the First-tier Tribunal: see *C -v- SSWP* (Zacchaeus 2000 intervening) [2015] EWHC 1607 (Admin) and *R -v- Secretary of State for Social Services, ex parte CPAG* [1990] 2 QB 540.

Conclusion

16. It is for all these reasons that I strike out in its entirety the permission to appeal proceedings brought by Dr Kirkham to the Upper Tribunal under reference GIA/877/2018. Put shortly, the 9 November 2017 email from the Information Commissioner's office was not a "decision notice" under section 50(3)(b) of FOIA and the First-tier Tribunal was

therefore entirely correct to rule that it had no jurisdiction to determine an appeal against that 'decision', and the contrary argument has no reasonable prospect of succeeding.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

14th September 2018