IN THE UPPER TRIBUNAL **Appeal No. GIA/650/2019**
ADMINISTRATIVE APPEALS CHAMBER **GIA/651/2019**

INTERIM DECISION

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

Between:

1. The Cabinet Office

2. Department for Digital, Culture, Media and Sport

Appellants

- v –

The Information Commissioner

Respondent

Before: Upper Tribunal Judge K Markus QC
Decision date: 23rd April 2020
Determined on consideration of the papers

Representation:
Appellants: Rory Dunlop QC, instructed by Government Legal Department
Respondent: Rupert Paines, instructed by in-house Solicitor

DECISION

The appeals are allowed. The decisions of the First-tier Tribunal made on 15th November 2018 under numbers EA/2018/0120 and EA/2018/0121 were made in error of law.

Case management directions

1. Within one month of the date on which this Decision is sent to the parties, they are to send to the Upper Tribunal (with a copy to the other party) written submissions as to the disposal of the appeals which address the matters in paragraph 29 of the Reasons below.

2. Each party may reply to the other party's submissions within seven days of the date on which those submissions are sent to them.

3. The file will then be returned to me for determination of the disposal of the appeals.

4. Submissions are to be sent to the Upper Tribunal and other parties by email.

REASONS FOR DECISION

1. On 3rd July 2017 the Department for Culture Media and Sport announced that it its name was to be changed to the Department for Digital, Cultural, Media and Sport. In these Reasons I use the acronym 'DCMS' to refer to the Department both before and after the name change.

2. On the same day a request was made to DCMS under the Freedom of Information Act 2000 ('FOIA') for specified information associated with the change of name, including the ministerial submission concerning the decision and "correspondence with the Cabinet Office concerning this departmental name change". Also on the same day, the requester wrote to the Cabinet Office ('CO') asking for documentation on the name change, "namely any submissions to the Prime Minister, other Cabinet Office ministers or Cabinet Office civil servants, any internal file notes and any internal or cross-departmental correspondence".

3. The DCMS refused to provide the information, initially relying on section 35(1)(a) of FOIA, and on review additionally relying on section 36(2)(b)(i) and (ii). The CO refused to provide the requested information, relying on section 35(1)(a) and (b) and section 42 of FOIA, and confirmed that decision on review.

4. The requester complained to the Information Commissioner about both decisions. During the course of the investigation DCMS withdrew reliance on section 35(1)(a). The Commissioner decided that (save in relation to some information which was exempt under section 42) the exemptions in sections 35 (relied on by the CO) and 36 (relied on by DCMS) were engaged but that the public interest favoured disclosure of the information.

5. The DCMS and the CO appealed to the First-tier Tribunal. The only issue in the appeals, which were heard together, was whether the balance of public interest lay in favour of disclosure or withholding of the disputed information. In support of the appeals, Lord Butler (former Cabinet Secretary) and Dame Susan Owen (Permanent Secretary in the DCMS) gave evidence, summarised by the First-tier Tribunal in its statement of reasons as follows:

> "11. In his evidence Lord Butler emphasised the significance of the role of the Cabinet Secretary in supporting policy discussion and decision making between the Prime Minister and other Ministers and the Cabinet Secretary's role in providing full and frank advice in those process. He considered that the disputed material showed that the authors were candid and frank; they were sensitive to the issues and understood the various tensions which needed to be managed and the disruptive effect on the process if the authors needed to second guess who would have access beyond the intended audience. He had consulted his successor (Sir Jeremy Heywood) who shared the view that he and Dame Susan would have been less open and frank if they thought that their behind the scenes opinions were to be made public. They were aware of FOIA but also aware of the exemptions in FOIA which made provision for free and frank policy discussions. He emphasised the importance of the Cabinet Secretary maintaining positive relations with Ministers "*in his role of a neutral and fair mediator*". There was a particularly strong public interest in maintaining the confidentiality of the Cabinet Secretary's communications *"in order to allow the holder of that role to be as candid as he feels necessary to offer the Prime Minister honest and effective advice essential to good decision- making"*.

12. He concluded: -

"release of the disputed information would prejudice the role of the Permanent Secretary at DCMS, the Cabinet Secretary and other senior officials, and would also prejudice their successors in those roles. Given the detriment to the effective running of government that even a minor prejudice would have, this would clearly be against the public interest. The consequent damage would, in my view, far outweigh any minor public interest there might be in revealing these exchanges."

13. In oral evidence he confirmed his view that while there were benefits from FOIA there were also some costs. He felt that all advice to Ministers should have a very high level of protection – equivalent to the protection afforded to legal advice. In this case legal advice had been necessary to ensure that the route to changing the name of DCMS would be robust in the face of possible Parliamentary challenge. He confirmed that at a re-shuffle everything has to be done quickly and therefore has to be done through e-mail. At such times people do not have disclosure in mind. In closed evidence questions as to the specific content of the material and the extent of public interest, benefits and harm flowing from disclosure of different parts of the material. He confirmed that during his tenure as Cabinet Secretary e-mail exchanges were not such a feature of the work within Cabinet Office.

14. In her evidence Dame Susan Owen explained the expanding role of DCMS in the area of digital media, data protection, internet security and related fields. There was a benefit in keeping the identity of the Department as DCMS and a need to recognise the increasing importance of Digital within the work of the Department. During the internal review DCMS had considered that withholding the disputed information was justified under both s35 and 36. Officials needed to be able to *"communicate quickly to work out the best solution without worrying their emails would be made public…Releasing the withheld information may make it more likely that advice will be given that is materially different because of the possibility of disclosure."* She understood the basic principle of FOIA that disclosure was required unless an exemption applied. Uncertainty as to whether material was protected from disclosure had changed behaviour. In closed evidence she discussed with the tribunal the issues and sensitivities raised by the disputed material."

(the italics are the tribunal's)

6. The First-tier Tribunal allowed the appeals in part. The tribunal described the disputed information as consisting "in essence of emails passing between two Government Departments and e-mails internal to each Department". It decided that there was "only a modest residual public interest" in disclosing the information, as the naming of the department was not a matter of any substance and a press release had already set out a transparent justification for the change of name. The tribunal continued as follows:

"20. The tribunal reminded itself that the disputed information consisted of exchanges between very senior public servants who are well aware of their obligations as such. They understand the considerable responsibility they have assumed with their positions to act in accordance with the Nolan principles and the Civil Service Code as they work to secure the good government of the UK. Their primary role in this context is to advise Ministers (including the Prime Minister) and assist in the effective formulation of policy. These are individuals of considerable intellect, rigour and fortitude and it is improbable (to say the least) that they would be prevented from providing the best advice to Ministers by fear that their

> communications setting out such advice would be released. There is however a significant distinction to be drawn between the substantive advice which shapes policy and the penumbra of other material generated in the rapid exchanges between officials as the policy proposal is passed between departments and starts to assume its final form.

7. As to the substantive advice, the tribunal concluded that the public interest in disclosure outweighed the potential prejudice in doing so, explaining as follows:

> "21. Very different considerations arise with respect to these different forms of material. The former, the material with a substantive policy content is the core material for FOIA. It is the answer to the question – "*Why is the government doing this?"* As such it is both worth knowing and likely to engage an exemption, that the disclosure could cause harm. The primary issue in this case is how is the balance between those positions to be struck.
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> 22. It must be borne in mind that the substantive issue was put in the public domain by the departmental press release which also set out the justification for the name change. As the IC has acknowledged the information in the disputed material might not be particularly significant but *"there is a public interest in understanding how the process evolved including the factors relevant to implementing the name change"*. The other side of the balance is the potential prejudice caused because information is released which relates to the formulation of Government policy and Ministerial communications.
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> 23. It seems to the tribunal that understanding how public policy was formed in this case is of some (limited) public interest. The fact that the policy formulation was completed and announced before the request was made diminishes the potential for prejudice. The disclosure of the information we have identified as setting out that evolution is, on balance, in the public interest."

8. The tribunal went on to conclude that "the penumbra and other material generated" should not be disclosed. It set out in schedules the material which was to be disclosed. This comprised five emails (subject to redaction) and a note on the name of the DCMS ('the note').

9. The DCMS and the CO have appealed to the Upper Tribunal (with my permission) against the decision only in relation the note. The note included a potentially controversial idea that was not pursued. In her closed evidence in the First-tier Tribunal Dame Susan Owen, Permanent Secretary of the DCMS, had identified a specific harm that she said would be caused by disclosing that the idea was even considered by the DCMS.

10. On behalf of the DCMS and the CO, Mr Dunlop QC submitted that the First-tier Tribunal did not have regard to, or give reasons for discounting, two specific harms arising from disclosure of that note: the harm discussed in Dame Susan Owen's closed statement and a broader harm to good government, that being the chilling effect on the willingness of officials to write down potentially unpopular ideas for fear that the idea may later have to be disclosed (and harm caused) even if the idea is rejected. The decision referred to the fact that Dame Susan Owen "discussed with the tribunal the issues and sensitivities raised by the disputed material", but no-one could be sure from that statement that the tribunal had regard to the particular harm identified in her closed evidence in relation to the note. It also summarised the CO's closing submissions as including the public interest in protecting blue-skies thinking (which was in essence what Dame Susan Owen had been talking about), but the tribunal did not explain what it made of that submission as it applied to the

note. One does not know whether the tribunal thought the harms were unrealistic, unlikely or insignificant, or that there was a particularly strong interest in disclosure of the note, or whether the First-tier Tribunal simply overlooked the relevant harms.

11. Mr Paines for the Information Commissioner submitted that the tribunal's reasons were adequate. The decision must be read as a whole, and it should not be assumed that, just because a particular paragraph in Dame Susan's evidence was not mentioned, that it was not considered. Moreover, the tribunal specifically concluded at paragraph 20 that officials in the position of Dame Susan would not change their practices as result of disclosure. It was apparent from the First-tier Tribunal's consideration of the "chilling effect" in relation to less substantive communications (the "penumbra of other material") that it had had that matter in mind and it was fanciful to suggest it was not considered in respect of the note.

12. Finally, Mr Paines submitted that even if the reasons were inadequate, then the Upper Tribunal could have regard to the First-tier Tribunal's reasons for refusing permission to appeal.

Discussion

The UT's approach to a reasons challenge

13. It is clearly established that, in considering the adequacy of the reasons of the of the First-tier Tribunal, the Upper Tribunal should exercise restraint and should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it (*R (Jones) v First-tier Tribunal (SEC)* [2013] UKSC 19, [2013] 2 AC 48 at [25]). In *Re F (Children)* [2016] EWCA Civ 546 Sir James Munby P explained at [22] and [23] that a tribunal's reasons must be sufficient to enable the parties to understand why they have won or lost, and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable, but the judge need not slavishly restate either the facts, the arguments or the law, and should not engage in tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics.

14. Furthermore, as Lloyd Jones LJ said in the Court of Appeal in *DWP v Information Commissioner and Zola* [2016] EWCA Civ 758 at [34], the Upper Tribunal should be particularly slow to interfere with the First-tier Tribunal's findings and evaluation of facts in areas where its specialist expertise has a bearing. Although Lloyd Jones LJ dissented from the majority of the Court of Appeal on the outcome of the appeal, there was no disagreement on this point.

15. Mr Dunlop submitted that this passage from *Zola* was not applicable in the present case as Lloyd Jones LJ was concerned with how ordinary courts should treat decisions by specialist tribunals in their specialist areas. I disagree. The judge said that he was addressing the approach to be taken by "a reviewing court or tribunal", and *Zola* was concerned with the approach taken by the Upper Tribunal to a decision of the First-tier Tribunal.

16. Mr Dunlop next submitted that, in any event, the approach set out in *Zola was* inapplicable in this case because the errors alleged did not turn on law within the First-tier Tribunal's specialised field. However, neither the Upper Tribunal nor the Court of Appeal confined their approach to matters of law and the context in which those principles were discussed was a perversity challenge to the First-tier Tribunal's findings as to likely prejudice. As the Court of Appeal said at [35], the "case did not turn on legal analysis but

on the evaluation of factual evidence". Indeed, while the appellate court or tribunal can generally assume that the specialist tribunal knows what it is doing, it would undermine the appellate structure if the appellate body was required to defer to the First-tier Tribunal's expertise in matters of law.

Whether the tribunal's reasons were adequate

17. The First-tier Tribunal's reasons as to the public interest balance in relation to the material that it decided was to be disclosed is set out at paragraphs 20-23 of the decision. It is to these paragraphs that one must look for an explanation of its decision relating to the note.

18. Not only are those paragraphs silent about the note and the particular issues that were referred to by Dame Susan in relation to it, but substantial elements of the reasoning in those paragraphs could not apply to the contents of the note. Those parts of the note which discussed the idea which was not pursued did not provide the answer to the question "why is the government doing this?" (paragraph 21 of the First-tier Tribunal's decision). Furthermore the idea was not put in the public domain by the departmental press release (paragraph 22). The considerations at paragraph 23 were irrelevant to those parts of the note because the fact that the policy formulation was completed and announced did not diminish the concern regarding disclosure of the idea which was not pursued. As was clear from Dame Owen's evidence, that remained a concern for quite different and specific reasons to those relating to the rest of the materials.

19. The First-tier Tribunal's reasons do not demonstrate any recognition of the harm asserted and why the modest public interest in disclosure (as the First-tier Tribunal had found) outweighed it.

20. Mr Paines rightly pointed out that the reasons at paragraphs 20-23 are not to be read in isolation but in the context of the decision as a whole, but there is nothing elsewhere in the reasons which sheds light on how the First-tier Tribunal approached the note nor why it decided that the note should be disclosed in its entirety despite the particular harms relied upon by the DCMS and CO. The tribunal's reference at the end of paragraph 14 to Dame Susan's closed evidence regarding the issues and sensitivities raised by the closed material and, in paragraph 16, to counsel's submissions about the importance of protecting blue-skies thinking, does not show that the tribunal had in mind the specific issues arising from the note nor does it shed any light on the tribunal's reasoning in that regard.

21. I acknowledge that the First-tier Tribunal concluded at paragraph 20 that very senior officials would not change their practices as a result of FOIA, but that was not the only harm relied on by Dame Susan in relation to disclosure of the note. This passage of the tribunal's reasons has no bearing on the very specific harm referred to in her closed evidence.

22. If the tribunal was unable to say more about the issues relating to the note in the open reasons, it should have addressed the matter in closed reasons. In *Davies v The Information Commissioner (GIA)* [2019] UKUT 185 (AAC) the Upper Tribunal said this about the duty to give reasons where a closed procedure has been adopted:

> "16. The adoption of a closed procedure does not diminish the fundamental obligation of a tribunal to give adequate reasons…Adequate reasons perform a number of important functions. They enable the parties to understand why one has won and the other has lost; they impose a discipline on the court or tribunal in focussing on relevant issues and ensuring that its decision is sound; and they enable

> a person affected by a decision or the appellate court or tribunal to judge whether the decision is lawful.
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> 17. … if the tribunal is able to explain its decision without making use of closed reasons, so much the better. But if the decision cannot be explained adequately without giving closed reasons, the tribunal must do so rather than risk its decision being held to be wrong in law for inadequate reasons. Providing closed reasons will not assist in the parties who have been excluded from the closed hearing or third parties understanding the result. But they will assist in fulfilling the other two functions of reasons which we have set out above: assisting the tribunal to reach the right decision, and enabling the appellate court or tribunal to identify whether the decision contains an error of law.
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> 18. It follows that, even though the whole of the reasons may not be open, the required standard of reasons in a closed procedure case is no lower than that required in any other case."

23. As Mr Paines pointed out, a closed process is always to some extent a derogation from open justice, but that does not mean that it is proper for a tribunal not to provide a closed decision where it is unable adequately to explain its decision in open reasons.

24. For the reasons which I have explained above, I conclude that the tribunal did not provide adequate reasons for its decision that the note should be disclosed in its entirety. The Upper Tribunal cannot assess whether the First-tier Tribunal erred in law in relation to that matter because it does not know what the First-tier Tribunal took into account in relation to the specific harm relied on by Dame Susan. Furthermore one is left with a real concern that the First-tier Tribunal forgot about the note, or failed to appreciate that it raised different issues. That concern is reinforced by the tribunal's failure to mention in any part of the decision that the disputed material comprised a note or to allude anywhere to the fact that the materials discussed an idea which was not progressed. On the contrary, at paragraph 19 the First-tier Tribunal described the disputed information as comprising emails, and all the reasoning relates to emails which were concerned with the name change that was eventually adopted.

Relevance of the First-tier Tribunal's reasons for refusing permission to appeal

25. In reaching this decision I have not had regard to the tribunal's permission ruling. Mr Paines' submission was that where an allegation of failure to give reasons is made, the first-instance tribunal can be asked to provide additional reasons if it is appropriate: *English v Emery Reinbold v Strick* [2002] 1 WLR 2409 at [23]-[25]. Moreover, a tribunal's reasons for refusing permission can be considered as part of the reasoning of the decision under appeal: *Greenwich Millenium Village Ltd v Essex Services Group plc* [2014] 1 WLR 3517 at [7].

26. The approach in those cases, which concerned appeals in the courts, cannot be transferred to the very different appellate regime in tribunals. Whether or not a first instance tribunal has power to revisit its own decision or supplement its reasons depends on the statutory scheme governing the tribunal's powers. In *VK v Norfolk CC v SEND Tribunal* [2004] EWHC 2821 (Admin), Stanley Burnton J said that, where there is a statutory duty to give reasons as part of the notification of the decision, the adequacy of the reasons is a condition of the legality of the decision and only in exceptional circumstances (if at all) will subsequent evidence of reasons be accepted.

27. The provisions of the Tribunals Courts and Enforcement Act 2007 and the Procedure Rules for the First-tier Tribunal (GRC) and the Upper Tribunal are not consistent with the First-tier Tribunal being permitted to supplement its reasons in its permission ruling. The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 require the First-tier Tribunal to provide written reasons for a decision which finally disposes of all issues in the proceedings (rule 38(2)). The Rules do not permit the First-tier Tribunal to amend its written reasons save in specific circumstances: to correct a clerical mistake or other accidental slip or omission (rule 40), where the tribunal sets aside a decision and remakes (rule 41), and where the tribunal reviews the decision for error of law (rule 44). There is no other power for the First-tier Tribunal to amend or supplement its reasons.

28. In any event, even if its reasons for refusing permission could be taken into account, in this case the First-tier Tribunal's permission ruling did not shed light on the reasons for the substantive decision. The First-tier Tribunal said that it paid due regard to the harms relied on by Dame Susan but that provided no explanation as to how it addressed those matters.

Conclusion and disposal

29. For the above reasons I allow the appeals. The tribunal's decisions in relation to the note will need to be reconsidered by another tribunal on the evidence. The remainder of the tribunal's decisions have not been challenged and it seems to me that they are not vitiated by the error that I have found. My provisional view is that the next tribunal's reconsideration of the appeals should be limited to the note and should otherwise adopt the previous tribunal's decision (*Sarkar v Secretary of State for the Home Department* [2014] EWCA Civ 195). The parties have not addressed the Upper Tribunal on disposal and so, before I make an order under section 12(2) of the Tribunals Courts and Enforcement Act 2007, I have directed the parties to do so.

Kate Markus QC
Judge of the Upper Tribunal

Authorised for issue on 23 April 2020