IN THE UPPER TRIBUNAL **Appeal No. GIA/697/2019**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Mr Tony Mason

Appellant

- v –

1. The Information Commissioner

2. London Borough of Barnet

Respondents

Before: Upper Tribunal Judge K Markus QC

Decision date: 19th February 2020
Decided on consideration of the papers

Representation:
Appellant: In person
1st Respondent: In-house solicitor
2nd Respondent: Barred from taking part

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 16th November 2018 under number EA/2018/044 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to the First-tier Tribunal to be decided entirely afresh.**

2. **The members of the First-tier Tribunal who reconsider the case should not be the same as those who made the decision which has been set aside.**

3. **These Directions may be supplemented by later directions by a Judge or Registrar of the First-tier Tribunal.**

REASONS FOR DECISION

1. The background to this appeal has been set out in previous case management directions and my determination of Mr Mason's application for permission to appeal. Given the limited scope of the appeal, a brief summary will suffice.

2. Mr Mason had been in negotiations with the London Borough of Barnet ('Barnet'), on behalf of himself and some other Barnet residents, for the purchase of portions of land adjoining their gardens. He made two requests for information both of which were refused by Barnet. The Information Commissioner ('IC') upheld Barnet's decisions and the First-tier Tribunal ('FTT') dismissed Mr Mason's appeals against the two decisions.

3. Mr Mason sought permission to appeal against both decisions of FTT. The FTT gave permission to appeal against the decision in one of the appeals on one ground only (see below) and refused permission to appeal against the decision in the other appeal. Mr Mason applied to the Upper Tribunal for permission to appeal on all remaining grounds in the first case and all grounds in the second. Following an oral hearing, I refused permission to appeal on all those grounds.

4. In consequence this appeal is concerned only with the one ground on which the FTT gave permission to appeal. That related to Mr Mason's request for "All Procedures, Rules and documentation historically used (since Jan 2012) to guide the administration of the Estate Management and Valuation function of Barnet Council (or relevant departments prior to any organisational change". He had identified certain specific documentation that this should include. Barnet had refused the request in reliance on section 12 of the Freedom of Information Act 2000 ('FOIA'), having estimated that it would take approximately 20 hours to comply with it. In the FTT proceedings, Mr Mason had contended that the information requested was environmental, within the Environmental Information Regulations 2000 ('EIR'). If that was so, the costs exception relied on by Barnet would have been considered under regulation 12 of EIR and not section 12 of FOIA. The FTT decided that the applicable regime was FOIA and that the exemption in section 12 applied. The ground on which the FTT gave Mr Mason permission to appeal was whether it had erred in law in deciding that FOIA and not the EIR was the correct regime.

5. On 28th November 2019 I barred Barnet from taking further part in the proceedings as a result of their failure to comply with my directions. The IC and Mr Mason have made written submissions on the appeal.

The parties' submissions

6. The Information Commissioner's position is that the FTT erred in law in deciding that FOIA applied because the tribunal did not apply the correct legal test as explained by the Court of Appeal in *Department for Business, Energy and Industrial*

Strategy v Information Commissioner and Henney [2017] EWCA Civ 844, [2017] PTSR 1644 ('*Henney'*) as further explained and applied by me in *Department for Transport, DVLA and Porsche Cars GB Ltd v Information Commissioner and Cieslik (GIA)* [2018] UKUT 127 (AAC) ('*Cieslik*'). The IC submits that, had the tribunal approached the matter correctly, it may have come to a different conclusion. The IC had vacillated over whether the appeal should be remitted to the FTT to decide whether the information was environmental and, if so, whether the exception under regulation 12(1)(b) EIR was engaged, or whether the Upper Tribunal should decide that the EIR applied and remit the matter to the FTT to consider the application of regulation 12(1)(b), but she finally settled on the former position.

7. Mr Mason submits that it is not only regulation 2(1)(c) of EIR which is in play here but also regulation 2(1)(a) and (e). He submits that the FTT failed correctly to apply the guidance in *Henney*, the importance of which has been emphasised by the judgment of the Court of Appeal in *Department for Transport v IC and Hastings* [2019] EWCA Civ 2241. He also submits that the IC's procedures (and those of Barnet) for deciding the present case, including the correct legal regime, were flawed.

8. Mr Mason submits that the onus was on the IC and Barnet to show that FOIA applied, and that it was not for him to establish that the EIR applied. He submits that the IC and Barnet had not correctly applied *Henney* and so had not made the case for the correct regime being FOIA. However, the FTT's statement that Mr Mason had "not explained why he considers that" the EIR applied shows that it wrongly placed the burden on him, and did not explain why it decided that FOIA applied. He also makes a number of submissions in support of his case that the requested information is environmental information within the EIR.

9. Finally, Mr Mason submits that the information requested in this case was closely linked to the other information request (the subject of the other appeal which was dismissed by the FTT) and that the error by the FTT in this case infected its decision in the other case. This is not a matter which I can consider within the current appeal. Mr Mason has not obtained permission to appeal against the other FTT decision and that case is now closed.

The FTT's error of law

10. I agree with both Mr Mason and the IC that the FTT failed correctly to apply the guidance in *Henney*. In the light of their agreement on this point and the fact that (for reasons which I explain below) I have decided to remit this case for reconsideration by another tribunal, it is not necessary here to set out the statutory framework and the key relevant principles in *Henney.* They are set out in the IC's response dated 15th August 2019.

11. The FTT's reasoning in relation to the regime was brief:

> "We accepted that the Rules and any related processes/guidance could be described as "policies" (and therefore "measures"). We also accepted that the definition of environmental information needs to be interpreted broadly and purposively. However, whilst there are references in the Rules to environmental terms/matters, it seemed to us that neither the Rules nor any associated procedures/guidance constitute (or would be likely to

> constitute) information "on" (about, relating to or concerning) policies affecting or likely to affect the state of the elements of the environment.
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> Paragraph 2.1 of the 2014 Rules explains that the Rules "provide the governance structure [my emphasis] within which the Council may acquire, lease, act as landlord, licence, develop, appropriate, change use of, or dispose of Assets within its Asset Portfolio." The aims of the Rules are set out in paragraph 2.3.The Rules deal with such matters as: delegation of decision making; links to other corporate and strategic plans; responsibility and accountability of the Council's Directors; valuation methods; and evidence requirements etc. prior to acceptance of asset acquisition/disposal.
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> The Appellant has not explained why he considers that the processes/guidance that he is seeking would constitute information on measures affecting or likely to affect the state of the elements of the environment. In our judgement, they did not."

12. Contrary to Mr Mason's submission in this appeal, in the FTT he did not argue that the information fell within regulation 2(1)(e) as well as (c). Although in his skeleton argument for the FTT he set out the provisions of both sub-paragraphs, his submission was confined to subparagraph (c) (see paragraphs 10 and 11 of the skeleton argument). It is true that the FTT is required itself to identify the correct legislative regime, but it was not wrong to confine itself to subparagraph (c) of regulation 2(1) where that was the only provision relied on by Mr Mason and, as far as I can see, there was nothing else which called for the FTT to consider subparagraph (e). However, as I am remitting this case to the FTT, it will be open to Mr Mason to advance a case relating to subparagraph (e) if he so chooses.

13. I am satisfied that the FTT approached the application of regulation 2(1)(c) erroneously, for reasons which I now explain.

14. In *Henney* the Court of Appeal said that the crucial question is to ask whether the disputed information was "on" a measure within regulation 2(1)(c) but, as long as that question was asked, it did not matter whether a tribunal started with the measure or the information (judgment at [37]). In the present case the FTT found that the measure was the Rules, processes and guidance requested. That was to confuse the measure with the information which was sought. The request was for the procedures, rules and documentation that "guide the administration of the Estate Management and Valuation function". That function constituted a "measure" in this case.

15. It may be that there were other matters which also constituted a "measure". As the Court of Appeal said at [39], the tribunal "is not restricted by what the information is specifically, directly or immediately about". I have not had submissions about this but it is something which the next FTT may need to address.

16. It is clear that the information requested was "on" the measure which I have identified. The link is inherent in the request.

17. The next question for the FTT was whether that measure affected or was likely to affect the elements and factors in subparagraphs (a) or (b) of regulation 2(1). Because the FTT did not identify the correct measure, it asked itself the wrong question in this regard. It asked whether the Rules affected or were likely to affect

the environmental elements or factors, but it should have asked whether the Estate Management and Valuation function (or any other measure which the FTT identified, on a correct approach) affected or was likely to affect those elements or factors.

18. The FTT's decision cannot stand in the light of these errors. It is not clear what conclusion the FTT would have reached as to the applicable regime if it had approached the case consistently with *Henney*. Furthermore, as I have pointed out in previous Observations, if the EIR applied this may have made a difference to the outcome of the case. The approach under regulation 12(4)(b) of the EIR is not the same as under section 12 of FOIA.

Whether to remake the decision or remit the appeal to the First-tier Tribunal

19. The IC's position in response to this appeal had originally been that she could not reach a definitive decision on whether the information was environmental without seeing it. However, as Barnet relied on the costs of providing the information, it had not provided it and so the IC had not seen it. The IC said the matter should be remitted to the FTT. In Observations dated 3rd October 2019 I expressed surprise at this position. As I said then:

> "3. … if the IC cannot [reach a view] then it also follows that the First-tier Tribunal cannot do so? But, as the IC points out, to require the local authority to provide the requested information for the purposes of the appeal would defeat the object of section 12 or regulation 12.
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> 4. As things seem to me at present, I do not understand why the IC is unable to form a view on the question. In considering the original complaint, the IC was bound to decide which statutory regime applied. She could not shirk that responsibility because it was difficult to do so without sight of the information. Equally, the First-tier Tribunal was bound to decide that matter once it was put in issue. It seems to me that, if I were to find an error of law in the First-tier Tribunal's decision and remit it to the tribunal for reconsideration (or, indeed, if I were to remake the decision), the First-tier Tribunal or this Tribunal would determine that matter without sight of the information."

20. In the light of this the IC changed her position. She submitted that, "in the absence of being able to review the withheld information, the Commissioner would accept…." that the information was environmental, invited the Upper Tribunal to remit the matter to a differently constituted FTT and stated that it would be open to the FTT to direct Barnet to provide a sample of the withheld information.

21. On 28th November 2019 made further observations as follows:

> "5. …I am not presently of the view that the Upper Tribunal is in a position to decide whether the EIR did apply. I note that the IC had originally also been unable to express a view on that matter. In her recent submissions her position has changed, somewhat inexplicably. It strikes me that her agreement that the EIR applied may be made by way of concession rather than because she is satisfied, on the application of the law to the facts, that the requested information was environmental. This is not a proper basis on which the Upper Tribunal can decide that the EIR applied, in particular where the outcome of the appeal affects the rights of the local authority. Even though LB Barnet has chosen not to participate in the Upper Tribunal

> proceedings, the Upper Tribunal cannot ignore the potential consequence of the appeal for LB Barnet.
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> 6. In the absence of further submissions and relevant evidence, I am not in a position to determine whether the information was environmental. My present view is that the appeal should be remitted to the First-tier Tribunal for decision whether a) the requested information was environmental information within regulation 2 of the EIR and, if so, b) the exception in regulation 12(4)(b) applied. My present view is that, if the First-tier Tribunal were to decide that the EIR did not apply, it would then have to decide again whether section 12 of FOIA applied."

22. The IC's final position was to agree with paragraph 6 of the above Observations.

23. Mr Mason has not commented on the above but his submissions, which argue that the EIR applied, suggest that he would like to Upper Tribunal to determine the matter.

24. I do not consider that it is appropriate for the Upper Tribunal to remake the FTT's decision. The question of the applicable regime involves consideration of the wider context. That is likely to involve consideration of evidence which has not been addressed in the Upper Tribunal and is likely to call for further submissions from the parties. Moreover, even if the Upper Tribunal determined the applicable regime, that would not be the end of the matter. If the Upper Tribunal decided that the EIR applied, it would then need to decide if regulation 12 applied. That would involve consideration of arguments and evidence which have not been aired in the Upper Tribunal or the FTT. Indeed, the Respondents in the FTT did not address regulation 12 at all, the matter only having been raised by Mr Mason in the course of those proceedings.

25. Finally, if the Upper Tribunal were to decide that FOIA applied, it would need then to consider the exemption in section 12. While I have found no error in the last FTT's approach to section 12, once that decision has been set aside the Upper Tribunal would need to consider section 12 for itself, including making the necessary findings of fact

26. Thus the effect of setting aside the FTT's decision is to require a full reconsideration of the appeal. That is not an appropriate task for the Upper Tribunal. The proper course is to remit the appeal to the FTT to determine afresh.

What happens next

27. I have given directions remitting the appeal to be considered afresh by another FTT. The next FTT will need to decide a) whether the requested information was environmental information within regulation 2 of the EIR; b) if it was environmental information, whether the request was manifestly unreasonable on grounds of cost within regulation 12(4)(b) of the EIR; c) if it was manifestly unreasonable, whether the public interest in maintaining the exception outweighed the public interest in disclosing the information (regulation 12(1)(a)); and (c) but only if the EIR did not apply, whether the exemption in section 12 of FOIA applied.

28. As the appeal is to be decided afresh, there is no need for me to determine the other submissions made here by Mr Mason but I consider that it is nonetheless helpful to make some observations on them. First, there is no presumption that the EIR applied and so no question of the onus being on one party or the other. The FTT must decide, applying the correct legal test, which statutory regime applied. Second, many of Mr Mason's submissions as to the handling of his request by Barnet or of his complaint by the IC will not be relevant to the determination by the FTT of the applicable regime or, indeed, other aspects of the appeal. The FTT need not consider irrelevant submissions or evidence, and it is for the FTT to decide what is and is not relevant.

29. I have not addressed the IC's suggestion that the FTT could direct Barnet to provide a sample of the material. That will be for the next FTT to consider, in the light of the positions of the parties and other relevant matters.

Signed on the original
on 19th February 2020

Kate Markus QC
Judge of the Upper Tribunal