**IN THE UPPER TRIBUNAL** **Appeal No. UA-2022-001546-GDPA**
**ADMINISTRATIVE APPEALS CHAMBER**

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

**Between:**

**Lindsay Fraser**

Applicant

- v –

**The Information Commissioner**

Respondent

**Before: Upper Tribunal Judge Wikeley**

Decision date: 4 December 2022
Decided on consideration of the papers

**Representation:**

Applicant: In person
Respondent: No representation

**NOTICE OF DETERMINATION OF**
**APPLICATION FOR PERMISSION TO APPEAL**

**I refuse permission to appeal.**

**I also record the fact that the application for permission to appeal is totally without merit.**

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

## REASONS

### Summary

1. I refuse permission to appeal as there is no arguable error of law in the First-tier Tribunal's decision. I also certify the application for permission to appeal as being totally without merit, with the consequence that there is no right for the application to be renewed at an oral hearing before the Upper Tribunal.

### The First-tier Tribunal background: a short chronology

2. On 13 January 2022 Mr Fraser made an application to the First-tier Tribunal ('the FTT') under section 166 of the Data Protection Act (DPA) 2018.

3. On 7 March 2022 the Information Commissioner applied for that application to be struck out on the basis it had no reasonable prospects of success.

4. On 12 May 2022 Registrar Bamawo of the FTT issued case management directions requiring the Applicant to provide a single, short document responding to the Commissioner's application. The registrar noted that Mr Fraser had sent the FTT office a total of 131 e-mails/pdf documents.

5. On 22 July 2022 Registrar Bamawo considered the matter further and acceded to the Commissioner's application, so striking out Mr Fraser's application made under section 166. The Applicant exercised his right to have the matter reconsidered by a judge under rule 4(3) of the relevant procedural rules.

6. On 8 August 2022 Judge McKenna carried out a review afresh and confirmed the registrar's decision to strike out the section 166 application.

7. On 22 October 2022 Judge O'Connor CP refused the Applicant permission to appeal to the Upper Tribunal.

### The Upper Tribunal proceedings

8. On 16 November 2022 Mr Fraser applied direct to the Upper Tribunal for permission to appeal.

9. On 25 November 2022 I issued Directions with the following observation:

> "The FTT's decision runs to just 2 sides. Judge O'Connor's ruling runs to just 5 sides. By contrast, as well as sending a UT1 application form, Mr Fraser has sent the Upper Tribunal office over 20 e-mails with assorted attachments, which amount to a total of 450 pages in all. It is difficult to discern what the actual grounds of appeal are from this disorganised mass of documents. It is quite unrealistic to expect a Judge to read all 450 pages to find out what the grounds of appeal are. On any basis, the application is substantially longer than the FTT decision. It is, in a word, excessive."

10. The accompanying Directions required Mr Fraser to produce a "revised summary document setting out his grounds of appeal in a concise manner", limited to 6 sides of A4 and subject to various formatting requirements. I warned that the application for permission to appeal would be struck out for non-compliance with these Directions.

11. On 28 November 2022 Mr Fraser sent the Upper Tribunal office a further 9 e-mails, one of which included a 6-page document purporting to set out grounds of appeal.

12. This submission has kept within the 6-page limit, albeit that it is arguable that the Directions regarding formatting requirements have been ignored. However, I consider it is consistent with the overriding objective of dealing with cases fairly and justly to deal with the case on its merits rather than on a procedural technicality.

13. The problem for Mr Fraser is that his application for permission to appeal has no merits and indeed is totally without merit.

**The application for permission to appeal**

14. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" of the First-tier Tribunal (section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal will give permission to appeal only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so (see, by analogy, Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538).

15. The error of law must also be material, i.e. one that affected the outcome of the case in some relevant way. The Court of Appeal set out a summary of the main errors of law in its decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraph [9]. Some examples of where the FTT may go wrong in law include (in plain English) situations where the tribunal (a) did not apply the correct law or wrongly interpreted the law; (b) made a procedural error; (c) had no evidence, or not enough evidence, to support its decision; (d) failed to find sufficient facts; or (e) did not give adequate reasons.

16. I have read Mr Fraser's 6-page summary document several times. I am neither any wiser nor any better informed. There is not a single sentence that could be regarded as a potential ground of appeal, let alone an arguable ground of appeal. Indeed, there appears to be no reference to, or mention of, the FTT's decision in any meaningful respect. However, at page 4 of the summary document, there is the following remarkable passage (which is entirely typical of the document as a whole). The grammar and syntax is as in the original:

> "Edwards, McKenna, Bamawo and others are currently being Prosecuted for Nazi copied Crimes against Humanity, Denial of the Truth Crimes at the U.N. The International Criminal Court's Directives have been frustrated, by ICO and police and authorities' perjury, sabotage of access to evidence, and concealment of evidence, Perverting the Course of International Criminal Justice. Criminal violations Articles of Rome Treaty and Human Rights to procurement."

17. Elsewhere in the original application for permission to appeal Mr Fraser asserts:

> The [ICC] Prosecutors want the Defendants, Commissioner Edwards, Bamawo, McKenna, O'Connor, Marsh, sacked forthwith before they are Prosecuted, to prevent their further damage to other victims of State baby kidnap for use in the United Kingdom's Josef Mengele, Auschwitz copied sterilisation experiments.

18. Unsurprisingly, there is not a jot of evidence produced to justify these fantastical and wild assertions about supposed ICC prosecutions, which are the stuff of conspiracy theorists.

19. Mr Fraser also claims that "it is impossible to compress to summarise all the case components against ICO for Perjury and Denial of the Truth Crimes" (p.6) within 6 sides of A4. As such the Applicant is plainly labouring under at least two misconceptions. First, the purpose of the grounds of appeal is to show where the FTT arguably erred in law, no more and no less. Secondly, neither the FTT nor the Upper Tribunal has any sort of general regulatory oversight role over all of the functions of the Information Commissioner's Office.

20. In the absence of any meaningful grounds of appeal, I am driven to conclude that this case is not arguable with a realistic prospect of success. Nor am I persuaded there is, exceptionally, any other good reason to grant permission to appeal in the absence of an arguable ground of appeal. Indeed, there is every good reason why permission should be refused. So, accordingly, I refuse permission to appeal to the Upper Tribunal.

**Consideration of the 'totally without merit' (TWM) test**

21. I now move on to consider whether this application for permission to appeal is "totally without merit" in the legal sense of that term.

22. Rule 22(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698, 'the 2008 Rules'), as inserted by rule 3(4)(b) of the Tribunal Procedure (Amendment) Rules 2022 (SI 2022/312) with effect from April 6, 2022, provides as follows:

> "(4A) Where the Upper Tribunal considers the whole or part of an application to be totally without merit, it shall record that fact in its decision notice and, in those circumstances, the person seeking permission may not request the decision or part of the decision (as the case may be) to be reconsidered at a hearing."

23. The concept of an application which is "totally without merit" (TWM) is not defined by the 2008 Rules, but is familiar both from the Civil Procedure Rules (CPR) in the courts and the parallel judicial review provision in the Upper Tribunal Rules (see rule 30(4A)). It has also been authoritatively considered in the case law. The two leading cases are *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091; [2014] 1 WLR 3432 and *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82; [2016] 1 WLR 2793.

24. In *R (Grace) v SSHD* Maurice Kay LJ characterised the purpose of the TWM rule as being "to ensure that hopeless cases do not take up more of the time of respondents and of the court and the tribunal than is reasonable and proportionate" (paragraph 2). An application could be TWM even if it was not abusive or vexatious: "Hopeless cases are not always, or even usually, the playthings of the serially vexatious. … I have no doubt that in this context TWM means no more and no less than 'bound to fail'" (at paragraph 13).

25. The Court of Appeal returned to the question of the proper approach to the TWM provision and in more detail in *R (Wasif) v SSHD*. As Underhill LJ observed, "The rule-maker evidently intended that applications certified as TWM

should represent a sub-set of applications in which permission was refused: there must, therefore, be a difference between 'not arguable' and 'bound to fail', despite the conceptual awkwardness. The problem is how to define the difference" (at paragraph 13). Speaking for the Court as a whole, Underhill LJ gave detailed guidance at paragraphs 15 and 16, concluding as follows:

> "17. It is inescapable that the distinction between those cases which are "bound to fail" (and thus fall for certification as TWM) and those where permission is refused on the less definitive basis identified above is a matter for the assessment of the judge in each case. The scope for general guidance is limited: adjectives and phrases of the kind such as "bound to fail", "hopeless" and "no rational basis" are, we hope, helpful, but they are necessarily imprecise."

26. I turn now to consider the potential application of the TWM provision to Mr Fraser's application for permission to appeal. I have concluded his application is indeed totally without merit. The application is beyond "not arguable"; rather, it is "bound to fail" as being utterly devoid of even the faintest glimmer of merit. My reasons are as follows.

27. The Applicant's supposed grounds of appeal are nothing more than a rambling diatribe based on the confused and prolix every day currency of conspiracy theorists. There is no connection with the legal issues to be determined by a FTT acting on an application under section 166 of the DPA. There is nothing to suggest that these hopeless grounds of appeal will be improved in any way or rescued by oral advocacy. To that extent I do not consider that an oral hearing would provide any added value to the proceedings. Rather, it would be a disproportionate and wasteful use of scarce public resources to have such a hearing and to give a public platform for the dissemination of such nonsense.

28. Although there is no requirement for an application for permission to appeal to be abusive or vexatious in order for the TWM power to apply, the Applicant's conduct of the proceedings before both the FTT and the Upper Tribunal has also undoubtedly been abusive in at least two ways.

29. First, the Applicant has sought, despite warnings, to impose quite unrealistic demands on judicial office holders and their HMCTS administrative support teams in terms of the huge volume of e-mails and pdf documents that have been sent. This behaviour represents a blatant breach of the requirement to co-operate with the Tribunals generally in the furtherance of the overriding objective (rule 2(4) of the 2008 Rules).

30. Second, the Applicant has used what is at best intemperate language about judges and registrars and at worst insulting and offensive language. He has, for example, repeatedly made a series of scurrilous and outrageous allegations about Judge McKenna, as to which the extracts above provide just a flavour.

31. The Court of Appeal in *R (Wasif) v SSHD* acknowledged that "some judges may find it a useful thought-experiment to ask whether they can conceive of a judicial colleague taking a different view about whether permission should be granted" (paragraph 17(4)). Applying that thought-experiment, I cannot conceive of any Upper Tribunal judge granting permission to appeal in this case on the purported grounds advanced by Mr Fraser or indeed on any other grounds of appeal.

**Conclusion**

32. As well as refusing permission to appeal, I therefore record the fact that this application for permission to appeal is **totally without merit**.

**RULE 22(4A) OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008 APPLIES. THE APPLICANT MAY NOT REQUEST THAT THE DECISION TO REFUSE PERMISSION TO APPEAL BE RECONSIDERED AT A HEARING.**

**Nicholas Wikeley**
**Judge of the Upper Tribunal**

**(Approved for issue on) 4 December 2022**