IN THE UPPER TRIBUNAL **Case No. UA-2023-001028-GIA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Public Law Project

Appellant

- v -

Information Commissioner

Respondent

Before: Upper Tribunal Judge Zachary Citron

Hearing date:	11 January 2024
Hearing venue:	Field House, Breams Buildings, London EC4

Representation:

Appellant:	Rupert Paines of counsel, instructed by Mishcon de Reya
Respondent:	Harry Gillow of counsel, instructed by legal department of the Respondent

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal under reference EA/2022/0228, issued on 1 February 2023, did not involve the making of an error on a point of law.

REASONS FOR THE DECISION

Preliminaries

1. References in what follows to

    a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000 ("**FOIA**") (unless otherwise indicated)

    b. the "**FTT**" are to the First-tier Tribunal

    c. the "**FTT decision**" are to the FTT decision under reference EA/2022/0228, issued on 1 February 2023, and dismissing the appeal under s57 of the Appellant ("**PLP**") against a decision notice (the "**IC decision notice**") of the Respondent ("**IC**") dated 26 July 2022

    d. numbers in square brackets are to paragraphs of the FTT decision.

2. This is an appeal against the FTT decision, which found that the IC decision notice was in accordance with the law.

3. I am grateful to counsel for their written and oral arguments. In what follows, I have not recited or summarised their submissions as such, although I have, where I have not accepted a material submission made, endeavoured to summarise it and explain why I did not accept it.

4. Part of Upper Tribunal hearing was "closed", during which I was shown the non-disclosed "criteria" (it will become evident in reading this decision what "criteria" I am here referring to).

The information request that led to the IC decision notice and its context

5. The IC decision notice related to information requested by PLP from the Home Office ("**HO**") (a public authority) in November 2020 about a "triage model" operated by HO's 'marriage referral assessment unit' ("**MRAU"**). Amongst other things PLP requested copies of

    a. "any equality impact assessments or data protection impact assessments completed in relation to the model"; and

    b. "any internal policies, guidance or standard operating procedures which deal with the process of handling marriage referrals and the use of the model".

6. Context for this is provided by one of the documents before the FTT: *Marriage Investigations*, a HO guidance document, version 6.0, 30 December 2021. This explains:

a. under section 24 and 24A of the Immigration and Asylum Act 1999, a *sham marriage* is one in which all of the following apply:

    • one or both of the parties is not a 'relevant national' (British, Irish, EU settled status)

    • there is no genuine relationship between the parties to the marriage

    • either, or both, of the parties enter into the marriage for the purpose of circumventing UK immigration controls

b. sham marriages are viewed as a significant abuse of the immigration rules. HO investigates and takes action against individuals suspected of assisting others to engage in sham marriage activity, and against those whose relationships are suspected to have been established to enable either, or both, of the parties to circumvent UK immigration controls

c. Part 4 of the Immigration Act 2014 introduced a referral and investigation scheme for proposed marriages and civil partnerships across the UK. Under the sham marriage referral and investigation scheme, all proposed marriages and civil partnerships in the UK will be referred to HO by the registration official if they involve:

    • a person who is not a relevant national and who has limited or no immigration status in the UK

    • a person who is not a relevant national and who does not provide specified evidence that they are exempt from the scheme

d. MRAU are responsible for initial enquiries in relation to the sham marriage referral and investigation scheme. Referrals from England and Wales are referred electronically from the registration officers through data feeds and include information provided by the couple when they gave notice and, if appropriate, a section 24 or 24A report setting out the registration officer's suspicions about the marriage. This information then enters a triage process, where is it assessed against risk factors to determine the potential risk of the couple engaging in a sham marriage. Referrals from Northern Ireland and Scotland are triaged manually by MRAU against the same risk factors.

e. following triage, all referrals are allocated either a:

> • ‘pass’ or ‘no extension’ outcome indicating no interest in investigating the relationship at this time - the couple’s notice period will not be extended
>
> • ‘fail’ or ‘extension’ outcome, indicating there are factors raising a reasonable suspicion that the relationship is not genuine, and there is a need to investigate the relationship further - the couple’s notice period will be extended for that purpose.

f. MRAU process these outcomes and are required to send letters to the couple confirming whether they will be investigated, within 28 days of the couple giving notice to marry or form a civil partnership. The letters ask the relevant parties to comply with requirements of the investigation and to confirm their contact details and explains that failing to comply without a reasonable excuse means the couple are unlikely to be granted permission to marry.

HO’s response to the information request

7. In response to PLP’s information request, HO sent, amongst other things, a 15 page document (the “**EIA**”) headed “Borders Immigration Citizenship Systems/Equality Impact Assessment”. The EIA set out the “equalities considerations” for introduction of an automated system to be used to triage referrals under the sham marriage referral and investigation scheme. It stated that sham marriages allow individuals to gain an “immigration advantage” to which they are not entitled; it said that sham marriages were linked in “many” cases to wider organised crime; which is why, it said, HO focus on “disrupting facilitators” as well as prosecuting individuals involved in sham marriages.

8. The EIA stated that information on referral under the sham marriage referral and investigation scheme is assessed against the “risk factors” in the automated triage system, being “eight specific criteria”, to determine the potential risk of the couple engaging in a sham marriage.

9. On page 6, there was a redacted section, following the words: “The triage process uses the following eight criteria.”

10. Following this, the EIA stated as follows:

> “An extensive model training exercise was undertaken in 2018-19 to select the most appropriate features as defined above.
>
> It is important to note that the model works by combining the predictive power of all the features. For instance, a larger value of one feature doesn’t necessarily mean there is a stronger correlation of a pass or fail of the triage.

> The most powerful features identified related to the interactions between the couple, reflecting the fact that the model is predicting the likelihood of sham marriages. In the case of the Section 24 features, these are generated from the Section 24 form which is populated by the registrar observing the behaviour of the couple. Registrars meet large numbers of people giving notice to marry and are able to ascertain unusual behaviour. Another important feature is shared travel events, whereby if a couple have travelled on many flights together there is a suggestion of a stronger relationship between the parties.
>
> Other considerations included the independence of the features and the avoidance of protected characteristics. Age is a protected characteristic, but it is important to consider the at the model does not use an individual's age, but instead uses the age difference in days between the couples ages."

11. HO cited section 31(1)(a) and 40(2) for the redactions in the information it provided.

12. PLP, in response, sought "internal review" of the redactions made by HO, as well as of HO's "failure to disclose its full analysis of the impact of the triage model on different nationalities". This was on the basis that the EIA stated on page 9 that "a review of the nationalities involved has been conducted" and page 10 included a graph of the impacts on different nationalities (which, PLP said, was "incompletely labelled"). PLP said that it wanted a "review" of HO's failure to disclose "all of its assessments of the equality impacts" of the triage model, "as originally requested".

13. HO responded (22 June 2021), saying that s31(1)(a) was engaged to withhold the criteria that the triage model uses; and that HO did not hold any further information on the point about the impact of the triage model on different nationalities.

14. Later in the process (after PLP had made a "complaint" to IC under s50), HO provided a version that disclosed two of the triage process criteria listed on page 6 of the EIA: "number of shared travel events", and "age difference between the couple".

15. HO said this to IC (email of 22 September 2022) about its disclosure of the "age difference" criterion:

> "I considered redacting this section. This is the only triage criteria that touches on a protected characteristic. There is the potential for there to be some indirect discrimination based on age. I felt it was in the public interest to understand how we justified this potential indirect discrimination. The risk of disclosing one criteria was outweighed by the public interest in understanding this impact. The other criteria do not use protected characteristics and therefore the risk of disclosing them outweighed the public interest."

The IC decision notice

16. PLP's s50 application to IC for a decision referred to HO's refusal to disclose the triage process criteria on page 6 of the EIA. It disagreed with HO about the applicability of s31 and said it was not justifiable on public interest grounds. It also said that, in light of what was said on page 9 of the EIA, it believed HO held further information about the impacts of the triage model on different nationalities. In what follows, I will refer to the latter aspect (which hearkens back to PLP's requests on "internal review" – see paragraph 12 above) as PLP's "**further information**" request.

17. The IC decision notice said that HO was entitled to rely on s31.

18. It said that IC accepted that the requested information would be useful to sham marriage organisers or organised criminal gangs intent on avoiding detection in their attempts to facilitate sham marriages and/or entrance to the country illegally; such actions would clearly be prejudicial to law enforcement; consequently, IC was satisfied that disclosure would represent a real risk to law enforcement matters. As IC accepted that the outcome of disclosure predicted by HO would be likely occur, IC was satisfied that the exemption provided by s31 was engaged.

19. It said that HO had told IC that

    a. "disclosure of the triage criteria could lead to circumstances in which individuals change their behaviour in order to avoid meeting the criteria and therefore be more likely to evade scrutiny as someone entering into a potential sham marriage for gain. This would likely lead to a weakening of the Home Offices ability to detect sham marriages and likely lead to a reduction in the Home Office's ability to maintain an immigration control (s31(1)(e) (immigration control)) and prevent and detect crime (s31(1)(a) (prevention/detection of crime)."

    b. organised crime groups "are known to coerce vulnerable individuals into sham marriages; they also financially benefit from arranging such marriages. Money is central to all organised crime. It is a reward for crime as well as an enabler, with profits funding future criminal activity. It is our view that disclosure of the triage criteria could be exploited by these groups who can take advantage of vulnerable individuals and direct their activities in ways to ensure the maximum benefit to them, e.g., by offering 'advice' to individuals (at no doubt, a substantial cost) as to how they could increase their chances of gaining status in the UK.

       "It must not be forgotten that taking steps to deceive the authorities in order to gain an immigration advantage is itself an infringement of immigration law, so disclosure would be likely to

lead to circumstances where the Home Office's (and its law enforcement partners') ability to prevent and detect crime (s31(1)(a) (prevention/detection of crime)) is compromised."

20. The IC decision notice said that HO had provided "further rationale" which IC was unable to reproduce in the IC decision notice "as to do so would compromise its withholding of the information".

21. As for the public interest balancing test, IC recognised

    a. a general public interest in disclosing information that promotes accountability and transparency in order to maintain the public's confidence and trust;

    b. a very strong public interest in protecting the law enforcement capabilities of public authorities;

    c. the public interest in the prevention and detection of crime and avoiding prejudice to the operation of the immigration control;

    d. the public interest in preventing individuals intending to circumvent immigration controls – and those who wish to assist them – from having access to information which could assist them in building a picture of how they can best achieve their aims and enter the UK illegally. Provision of information which could assist their knowledge of the UK's capabilities around the security of the UK's borders would not be in the public interest;

    e. that disclosure of any information that would assist people to commit unlawful activities and circumvent immigration controls, also putting human life at risk, would not be in the public interest;

    and concluded that the factors in favour of disclosure did not equal or outweigh those in favour of maintaining the exemption.

22. In its "response" to PLP's appeal to the FTT (28 September 2022), IC accepted (at paragraph 47) that the IC decision notice was silent about the "further information" complaint and said it was on oversight for which IC apologised. It then repeated what was said by HO in an email to IC (about the "further information" sought, on "internal review") on 10 June 2022: "As part of the AQA process and the production of the [EIA], the [Data Services and Analytics unit] conducted a review of the nationalities involved in the marriage process. This review has been copied into the EIA. No further review exists."

The exemption in s31 (*Law enforcement*)

23. Under s31(1), information which is not exempt information by virtue of s30 (*Investigations and proceedings conducted by public authorities*) is exempt

information if its disclosure under FOIA would, or would be likely to, prejudice (amongst other things)

a. the prevention or detection of crime

b. the operation of immigration control

24. Section 31 is not an absolute exemption. This means that it is effective (to prevent an obligation to disclose) only where in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (s2(2)). I refer to this in what follows as the public interest balancing test, or **PIBT**.

The FTT hearing and the conclusions in the FTT decision

25. The FTT decision followed a hearing (by video) on 6 January 2023. PLP was represented at that hearing, but IC was not. Two witnesses (both put forward by PLP) provided witness statements in advance of the FTT hearing: Reuben Binns, an associate professor of human-centred computing at the department of computer science, University of Oxford; and Joseph Tomlinson, a professor of public law at the University of York.

26. At [15], the FTT decision cited *DWP v IC and FZ* [2014] UKUT 0334 (AAC), which said at [26]: “It is well-established that the prejudice must be real, actual or of substance, and that in this context “likely” means a very significant and weighty chance of prejudice (see *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) at paragraph [106])”.

Decision on likelihood of prejudice

27. In the “Conclusions” section of the FTT decision, the first bold heading was “*Section 31(1) is engaged*”; this was followed by the following four paragraphs:

> [53] The Tribunal find that s31(1) is engaged and does apply by virtue of paragraph (a) "the prevention or detection of crime" and (e) "the operation of the immigration controls". Paragraph (a) applies even in the absence of knowing which specific crime is said to be committed. It is clear enough, on the basis of simple research, that entering a sham marriage for the purpose of deception would contravene s24a of the Immigration Act 1971. Paragraph (e) is at the heart of the request in question and so is highly relevant.
>
> [54] The Tribunal have considered the criteria set out in the closed bundle and are satisfied that it would be likely, or more than probable that there would be prejudice, that would be real, actual and of substance. This prejudice would result from disclosure of the withheld information to the world at large. It is, in our view predictable that understanding the criteria could lead

> interested individuals or parties, to adapt their behaviour or answers to any questioning or subsequent investigation. We find that this in turn would have a negative effect, including on the voluntary supply of information to the HO in the future. The Tribunal therefore accept that Section 31(1)(a) is engaged.
>
> [55] In any event and quite independently the tribunal further finds that the HO is best placed to assess the nature and extent of prejudice resulting from disclosure. Further it was the intention of Parliament that this should be so.
>
> [56] The focus of the request is on the potential bias associated with the triage model, and this is clearly accepted by all parties. Specific nationalities may be more vulnerable to suspicions or accusations of abuse of systems and the processes involved. The Tribunal also accept that there will be some indirect discrimination for the reasons in the appellants arguments, however the Tribunal cannot support the suggestion that disclosure of the criteria will help to minimise or help to understand such prejudice in so far as the referral into the tool could equally have impact in terms of indirect discrimination. Therefore, and in any event, we find disclosure of the triage criteria is unlikely to meet the aim of the requestor.

28. [60], in the following section (about PIBT), refers to "the prejudice that would likely be caused to the immigration system through disclosure of the withheld information"; and states that "HO has disclosed a large amount of information about the need for a triage system and have clearly thought carefully to limit that to information which would minimise or reduce the risk of cause of prejudice".

Conclusions on PIBT

29. Under the heading *The Public Interest Test*, the FTT decision said that it "generally accept[ed] and adopt[ed]" the reasoning in the IC decision notice ([57]). It referred to a "a very strong public interest" in protecting the ability of public authorities to enforce the law and protect society from the impact of crime. It said that the public interest in detecting human trafficking was "very strong" ([58]). It stated at [60] that the prejudice likely to be caused to the immigration system outweighed there being "some" public interest in knowing what the redacted "criteria" are.

Conclusions on PLP's "further information" request

30. The FTT decision found (at [72]) that PLP's "further information" request was a "new request" and was not therefore within the original information request or part of the appeal, as it did not arise from the IC decision notice.

Grounds of appeal

31. The FTT granted permission to appeal. PLP's grounds of appeal were:

a. the FTT decision's conclusions on the engagement of the exemption in s31 were flawed:

i. the FTT decision's conclusion that the exemption was engaged was reached without any sufficient evidential basis, and on the basis of materially deficient reasoning. There is no analysis in the FTT decision of the core of PLP's case: namely its submission that the 'gaming' concern was not properly made; and the longest single paragraph in the FTT decision ([56]) is (with respect) incoherent;

ii. the FTT decision's alternative basis for that conclusion was reached on the basis of an erroneous decision to defer to HO on the question of prejudice, contrary to binding authority;

b. the FTT decision's conclusions on the public interest were flawed; the FTT erred in

i. incorrectly analysing HO's approach to disclosing the triage process criteria, reaching a conclusion without evidential basis;

ii. failing to consider (or address) the implications which followed from the FTT's own conclusion that the application of the triage process criteria involved indirect discrimination; and

iii. relying on various factors (provisions under the Data Protection Act 2018, and other possible ways to raise indirect discrimination concerns) that do not, properly analysed, reduce the public interest in disclosure;

c. the FTT decision accepted that it was likely that "further information" was held by HO which had not been disclosed to PLP. However, it held that it did not have jurisdiction to require HO to conduct a further search for that material, since PLP's request had been specified at "internal review stage" (i.e. after the making of the original information request) to encompass such material. It reached that conclusion despite the fact that HO had accepted that specification and dealt with the full scope of the request in its response, and despite the fact that IC (having erroneously failed to deal with the point in the IC decision notice) had accepted that error in its response to the appeal and proposed that a substituted decision notice be issued on that point. The ground of appeal was that the FTT decision's conclusion was wrong, and reached on an incorrect analysis of the law.

Upper Tribunal's analysis

Grounds related to likelihood of prejudice

Ground a.i.

32. The question posed by s31, in the circumstances of this case, was: what effect would disclosure of the other "criteria" (or risk factors) used in the automated triage process in the government's sham marriage referral and investigation scheme have on the operation of immigration controls, and/or the prevention or detection of crime? Would disclosure of those criteria be "likely" to "prejudice" those things, on the understanding of those terms set out in the case law, as summarised at paragraph 26 above? The question is one of evaluative judgement or opinion, rather than of "tangible" fact.

33. The FTT decision's answer was clear from the first two sentences of [54]: in its opinion, real, actual and substantial prejudice "would" be likely; and the reasons for this opinion were compressed into the two sentences of [54] that follow.

Erred in relying on 'insufficient' evidence?

34. Part of this ground of appeal is that the FTT did not have "sufficient" evidence to make the finding at [54]; the error of law being alluded to here is that of making a finding that was perverse, or irrational, or which no reasonable tribunal could have come to on the evidence before it.

35. It seems to me that the evidence on which the FTT decision's conclusion on this was based, was, in summary in and in essence:

    a. the evidence about the context for the government's sham marriage referral and investigation scheme (of which the automated triage model formed part): the fact that 'sham marriages' had been identified by the government as a serious threat to immigration controls, leading to legislation to detect and investigate it; that there was organised criminal activity at work in the sphere of 'sham marriages', including by exploiting vulnerable people; the place of the automated triage process in the sham marriage referral and investigation scheme that had been set up, under statute; the fact that the triage process had eight criteria, or risk factors, to which referral information was subjected, and by which the government agency assessed the risk of a proposed marriage being sham (leading, if the risk was sufficiently high, to investigation); and the fact that three such criteria had been disclosed (registrar observation of unusual couple behaviour; number of shared travel events; and age difference between the couple); and

b. the reasoned opinions of HO and IC as to the effect on immigration controls and prevention/detention of sham marriages, if the "other" triage process criteria were disclosed. These are summarised paragraphs 18 and 19 above. In essence, the reasoning was that those involved in sham marriages, whether as criminal networks "advising" or arranging for others to enter into them, or as individuals seeking to enter into them, would, informed by knowledge of the criteria being used by the government to detect sham marriages, alter their conduct in such a way as to evade detection (and so defeat the aims of the government's sham marriage referral and investigation scheme). That altered conduct might be by means of such persons organising things such that criteria used in the triage process were not satisfied in a given case (and yet the proposed marriage was still a sham); or by falsifying things to give the impression that criteria were not satisfied for a proposed marriage (when, in reality, they were).

36. PLP argues that this evidence was "inadequate" because it did not include evidence of past examples of "altered conduct" of the kind just described (and achieving its desired effect, being rule evasion), in other, comparable circumstances; or evidence of such altered conduct having taken place (and achieving the desired effect), when HO disclosed three of the criteria used in the triage process.

37. I do not accept the argument that the FTT erred in law in drawing the conclusion it did on the evidence before it. In the context of making a finding about the likelihood of certain future events coming to pass (prejudice to immigration controls etc due to disclosure of information), it was not irrational, or perverse, or otherwise erroneous in law, for the FTT to have relied on the factual/contextual and reasoned opinion evidence (from HO and IC) just summarised. Its essential logic was not difficult to fathom:

    a. the government had set up a system to detect activity (which, by its nature, included dishonest and/or deceptive behaviour) aimed at evading immigration controls;

    b. the efficacy of that system would be materially reduced by revealing to the people involved in this activity, how the government went about assessing whether they were being dishonest/deceptive;

    c. that is because it is predictable that such people would use such information to try to frustrate the system and evade detection of their sham marriages.

    The fact that there was no evidence of comparable "altered conduct", and its efficacy in frustrating a comparable system, before the FTT does not, in itself, render this analysis irrational or perverse. Similarly, the fact that *some* information about how the government went about detecting this evasive

activity had been disclosed does not render it irrational or perverse to conclude that disclosure of *more* such information would have the effect described.

Erred in not taking PLP's evidence into account?

38. PLP further (and relatedly) argues that the FTT erred in law because it did not properly take into account the evidence PLP put before it, in particular that of the two professors.

39. The professors' evidence was not with regard to the factual context, as summarised at paragraph 35a above. Nor was it opinion evidence directly on the issue before the FTT – the likely effect of disclosure of criteria used in the automated triage process, on immigration controls, on crime prevention/detection, or, more specifically, on the government's sham marriage referral and investigation scheme. It was not surprising that the professors did not give opinion evidence on such matters, as (i) they did not know what the non-disclosed criteria were; and (ii) in any case, their area of expertise was not the phenomenon "sham marriages" and those organising and taking part in them (such that they might have an informed view on how those involved with sham marriages might react to disclosure of criteria used by the government to detect such marriages).

40. Rather, the professors' evidence, so far as relevant to this ground of appeal, was at the more 'generic' level of how disclosure of criteria used in "automated" systems *generally* might, or might not, affect the efficacy of those automated systems in achieving their ends. The professors' opinion evidence did not draw any specific, firm conclusions on the matters before the FTT (once again, not surprising, given their backgrounds and circumstances, as just described). But they did caution against a "broadbrush" approach to assessing the effect of disclosure on the efficacy of such automated systems. Their arguments focused on the phenomenon they called "gaming the system" – i.e. (per Professor Tomlinson, quoted verbatim at [46]) altering behaviour so as to seek to present a lawful marriage, or to do so in a way that could not be mitigated or guarded against – and expressed their opinion that

    a. such "gaming" was not inevitable, either because people could not actually change their facts and circumstances to present the "better" response to the criteria; or they would be reluctant to do so (because of, for example, the expense);

    b. "gaming" would not necessarily have a material effect on the efficacy of what the automated system was trying to do, because (for example) the weighting of different criteria within the automated system (which would remain a secret known only to the government). Per Professor Tomlinson (quoted verbatim at [46]), "even if some factors are in principle capable of being 'gamed', it is often the case that there is a low risk of this occurring in practice".

41. Professor Tomlinson's witness statement advocated (as can be seen from the extract set out verbatim at [46]) "close analysis of the level of risk associated with disclosing a particular part of an automated system"; "detailed appraisal of whether any particular criteria are capable of being gamed" and, if so, "a realistic assessment of the actual likelihood of gaming occurring". In effect, it was a "stepped" approach to deciding the effect of disclosing criteria, focusing on "gaming the system" as the principal risk.

42. I do not accept that it was perverse or irrational for the FTT, having considered the professors' evidence, and indeed PLP's parallel submissions at the hearing, to have come to the conclusion it did on the likely effect of disclosure on immigration controls and prevention/detection of crime – but without following the approach to decision-making advocated by Professor Tomlinson and summarised immediately above:

    a. in part, this is because the professors' evidence was focused on the phenomenon of "gaming the system" i.e. in the present context, people seeking to enter into sham marriages who change their behaviour so as to avoid satisfying criteria which they otherwise would have satisfied – and so rendering the automated system less efficacious in detecting the sham marriage; whereas the professors' evidence was less focused on the capacity of persons *acting dishonestly* to frustrate the system, either by lying or withholding information, or (in the case of criminal networks) organising matters (including by exploitation of others) such that those who satisfied fewer criteria (or who could arrange things such that they satisfied fewer criteria) engaged in "sham marriages". Given the (unchallenged) factual/contextual evidence that (i) this was all about a government scheme targeting people taking part in "sham" i.e. dishonest activity; and (ii) the participation of organised criminal elements in the sphere of sham marriages, this lack of focus on the "dishonesty" factor renders the opinions of the professors significantly less relevant; and

    b. in any case, the professors' views on how the FTT should make its decision – essentially, a counsel of caution – was not such as to render the essential logic of the FTT decision's conclusion, as set out at paragraph 37 above, irrational or perverse. The fact that more, or better, evidence might have been provided to support the FTT decision's conclusion, does not, in itself, mean that conclusion was an error of law by reason of being irrational or perverse.

43. An additional argument in Mr Paines' skeleton argument was that, because the professors' evidence was not tested in cross examination, or questioned by the FTT, it should have been "accepted" by the FTT. It cited *Griffiths v TUI (UK) Ltd* [2023] 3 WLR 1204, in which the Supreme Court upheld the general rule in civil cases that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which

they wish to submit to the court should not be accepted; that extended to witnesses as to fact and expert witnesses; the purpose of the rule, in an adversarial system of justice, was to make sure the trial was fair; the rule should not be applied rigidly.

44. Here, the professors' evidence was not as to the factual context, or as to their opinion on the question before the tribunal (the likely effect of disclosure, etc); rather, it was as to the approach to be taken in deciding the question before the tribunal ("stepped" versus more "broadbrush"); in my view, there was no unfairness to PLP or the professors in not being cross examined by IC on this point, as it was self-evident from the parties' cases that IC took a different view as to the proper approach to making this decision (indeed, it was IC's answer to the question, in the IC decision notice, that was the subject matter of the appeal). Neither fairness or justice would require, in the circumstances of this case, that the FTT "accept" PLP's witnesses' opinions as to the method for making the evaluative judgement that it was for the FTT to make, on grounds that the witnesses' opinions on that point had not been subject to cross examination: both sides knew the other's positions, and could, and did, argue against them; the final evaluative judgement fell, quite correctly, to be made by the FTT itself. To impose the general rule in *Griffiths* in this case would, in my view, be the sort of over-rigid application against which the case itself warns.

Inadequate reasons?

45. The final aspect of this ground of appeal is that the FTT failed to give adequate reasons for its conclusion as regards the likely effect of disclosure. This aspect is closely related to the previous one, as the FTT decision does not explain, in terms, why it did not adopt the stepped approach to decision-making advocated by the professors (see paragraph 41 above), in reaching its conclusion.

46. The authorities on adequacy of reasons make clear that "the extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter". The quotation is from the general comments on giving reasons in *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377; PLP relied on the sentences that follow, that say, where there is a straightforward factual dispute whose resolution depends simply on whose witness is telling the truth, it may be enough for the judge to indicate simply that he believes X rather than Y. But:

> "where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain one he prefers one case over the other".

47. Here, the issue was the likely effect of disclosure. Contextual and factual issues were not at issue. IC gave evidence of its view (and that of HO) of the likely effect of disclosure. PLP did not, in fact, produce evidence directly to the contrary, for the 'not surprising' reasons given in paragraph 39 above –

instead, its witnesses provided a counsel of caution as regards too "broadbrush" an approach to making the evaluative judgement. This was not, therefore, the classic "intellectual exchange with reasons and analysis advanced on either side", in the quotation from *Flannery* immediately above, in which the judge was to "prefer one case over the other".

48. In my view, the reasons given at [54] and [55] satisfy the "adequacy" standard in the circumstances of this case. Overall, it is adequately clear why the FTT decision came to the evaluative judgement it did as to the likely effect of disclosure.

    a. [54] found it "predictable" that "interested parties" would adapt behaviour or answers and that this would have the "negative effect" (which I read as the effect described in the first sentence of [54] i.e. prejudice); the wording is compressed, but, in my view, it is the essential logic spelled out at paragraph 37 above)

    b. [55] is, in my view, to be read, in context, as expressing the view that weight should be placed, in this case, on the reasoned analysis of HO, given their expertise in the sphere of "sham marriages". I do not read the words, "in any event and quite independently", in context, as meaning that the FTT was abdicating its decision-making role, or otherwise "deferring", to the HO; rather, I read [55], as a whole and in context, as offering further support, and reasoning, to the conclusion stated at [54].

49. As for the fact that there is no express explanation of why the FTT did not adopt the approach to decision-making recommended by PLP's witnesses, it seems to me sufficiently evident from the decision-making method which the FTT decision *did* use – see [54] and [55] – as well as the unchallenged factual context, as to why the FTT did *not* adopt that other approach. In short, the FTT took the view that the evidence before it *was* sufficient to support its conclusion. In context, I do not consider it an error of law that the FTT did not expressly lay out reasons for not following the "counsel of caution" approach advocated by PLP and its witnesses.

Ground a.ii.

50. It will be evident from paragraph 48b above that I do not consider the FTT decision at [55] to have erred in law by "deferring" to HO.

Grounds related to PIBT

Ground b.i.

51. This ground concerns part of the third sentence of [60], in the section of the FTT decision considering PIBT, which reads (with the challenged wording in italics): "The HO has disclosed a large amount of information about the need for a triage system and have clearly *thought carefully to limit that to information which would minimise or reduce the risk of cause of prejudice*."

From the context, it is clear that the "prejudice" referred to here is prejudice to the immigration system.

52. PLP argues that the italicised wording discloses a material error of law, because it is a finding of fact for which there was no, or insufficient, evidence.

53. I first observe that PIBT is an objective evaluation for the FTT: it does not therefore turn on whether HO had, or had not, "thought carefully" about something. In that sense, even if the FTT decision erred in its finding about what HO had "thought carefully" about, that would not be a material error.

54. However, read in context, I do not think the true import of the sentence scrutinised here was what HO had, or had not, thought about: what the FTT decision was actually expressing was the significant weight it was prepared to put on HO's views as to the (negative) public interest implications of disclosure of the "other" criteria used in the triage process (being, prejudice to the immigration system): as it said in the preceding sentence, that prejudice outweighed the (positive) public interest implications of disclosure (being, transparency). It is clear that it was those views of HO that caused it to resist disclosure.

55. PLP of course opposed the FTT placing weight on HO's views in this way; but it does not seem to me perverse, irrational, or otherwise an error of law, for the FTT decision to have done so.

Ground b.ii.

56. The context for this ground is as follows. At [56], "potential bias" was said to be the focus of PLP's information request: some nationalities may be subject to more suspicion of entering into "sham marriages". The FTT decision said that it accepted that there will be "some indirect discrimination" for reasons given in PLP's argument; but rejected the suggestion that disclosure of the "other" criteria would help to minimise or understand "such prejudice", as the "referral into the tool could equally have impact in terms of indirect discrimination". [62] recorded PLP's arguing that disclosure was particularly important "given that the available evidence demonstrates a prima facie situation of indirect discrimination." The FTT decision said that whilst this was "clearly" a matter of public interest – and that IC had accepted "this" – there were "alternative means" to address the issue (see paragraph 59 below for more on this). The FTT decision found that the "prejudices" identified ought not to be risked through disclosure, "in any event", but "particularly where there are alternative measures available to address such problems".

57. PLP argues that, because of the findings, summarised above, on the matter of indirect discrimination, the FTT decision erred in law in not following the view expressed by HO (and set out in the IC decision notice at paragraph 35) in its PIBT analysis that "it was deemed in the public interest to understand the justification behind any indirect discrimination linked to a protected characteristic" (and this is why HO disclosed the "age difference" criterion).

58. In my view, the views on indirect discrimination expressed in the FTT decision did not compel it to resolve PIBT in favour of disclosure, either because HO appeared to have done that (in respect of one criterion), or otherwise. It was not irrational or perverse for the FTT decision to have decided, as it did in [62], that the issue of indirect discrimination was not determinative of PIBT, for the reasons it gave. Nor was it irrational or perverse of the FTT decision, despite the weight it placed on HO's reasoned analysis (see [55]), not to have regarded its findings on "indirect discrimination" as determinative of PIBT: it was for the FTT to reach its own judgement on this point, which it did, and adequately explained.

Ground b.iii

59. At [61], the FTT decision said it was of the view that "the provision of alternative legal mechanisms or means, enabling access to the type of information requested" reduced the weight of PLP's PIBT arguments based on the importance of transparency. The FTT decision referred to individuals' right to information about automated decision making, under GDPR provisions. It said that this went "some way towards mitigating public interest through disclosure under FOIA". Furthermore, the examples of "alternative means" to resolve indirect discrimination issues, as set out at [62], were "judicial review or other legal causes of action, challenges and other public officials and/or authorities that can provide a means of redress".

60. PLP argues that the GDPR rights referred to in the FTT decision are "effectively excluded" in the area of immigration and crime (citing Schedule 2 (*Exemptions from GDPR*) Data Protection Act 20118, paragraphs 1-2 and 4).

61. Whilst I am persuaded that the FTT decision's reference to GDPR was far from fully explained, and should have dealt with the exemptions to which PLP has referred, I am not persuaded that there is any material error of law in the relevant parts of the FTT decision, read in context. The PIBT section of the FTT decision starts at [57] with the FTT decision generally accepting and adopting IC's arguments and reasoning on PIBT; then there is the finding of a "very strong public interest" in law enforcement, etc, at [58]. [59] and [60] consider public interest in disclosure: but within [60] there is a statement that public interest in disclosure "is outweighed by" the prejudice that would be caused to the immigration system (in other words, in effect, a conclusion on PIBT is reached at that point in the FTT decision). The factors discussed at [61] and [62] are not therefore, to my mind, decisive. This is reflected in the language used in those paragraphs: [61] says that the "alternative" means "reduce the weight" of PLP's transparency argument; and that GDPR-derived information (which, I say, is not adequately explored or explained in the FTT decision) "goes some way towards mitigating" public interest in disclosure. It seems to me that the language the FTT decision uses indicates that these were not determinative factors. It follows that there was no material error of law in the FTT decision's not presenting the GDPR position as fully as it should have.

Ground c.: PLP's "further information" request

62. The starting point in considering this ground is the jurisdiction of the FTT, as set out at s58: the FTT is to allow an appeal, in a case such as this, if it considers that the IC decision notice is not in accordance with the law; or, to the extent that the IC decision notice involved an exercise of discretion by IC, that IC ought to have exercised that discretion differently. The FTT's jurisdiction is thus "framed" by (in this case) the IC decision notice.

63. As for the content of that decision notice, s50 provides that, upon receiving an application (for IC to make a decision as to whether, "in any specified respect", a request for information has been dealt with in accordance with the requirements of Part I FOIA), IC must either notify the "complainant" that IC has not made an decision, or serve a decision notice on the complainant and the relevant public authority.

64. In this case, PLP's application to IC under s50 *did* specify PLP's "further information" request. Hence, PLP's "further information" request was *capable* of coming within the FTT's jurisdiction. (In this regard, I disagree with the FTT decision insofar as it found (at [67] and [72]) that because PLP's "further information" request was not within PLP's original information request, it could not come within the FTT's jurisdiction on appeal against the IC decision notice.)

65. In the event, however, PLP's "further information" request did *not* fall within the FTT's jurisdiction – and this was because the IC decision notice was silent on it. In other words, IC failed to carry out his obligations under s50(3): there was *no decision* in the IC decision notice on PLP's "further information" request. Neither did IC notify PLP, under s50(3)(a), of that failure (or of any valid grounds for it).

66. IC's failure in this regard is reflected in [70], where the FTT decision states that IC conceded in his "response" to the appeal that PLP's "further information" request was "overlooked" in the IC decision notice. IC invited the FTT to issue a substitute decision notice under s58(1) to the effect that IC did not hold the "further information" requested.

67. The FTT, quite correctly, declined to do this; in circumstances where the "further information" request was not dealt with in the IC decision notice, the FTT had no jurisdiction to deal with it, either. (It is possible that PLP had some other legal remedy against IC for its failure to fulfil its obligations under s50(3), such as judicial review, but that was not a matter for the FTT or, indeed, for this tribunal).

68. The FTT was therefore correct to decide that any appeal in relation to PLP's "further information" request was not within its jurisdiction, albeit for somewhat the wrong reasons.

69. I note, parenthetically, that the view I express here is consistent with that in *Information Rights* (6th edition, by Philip Koppel KC) at 46-048(3).

Conclusion

70. It follows that none of the grounds of appeal are made out and so the appeal falls to be dismissed.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 28 February 2024