



Neutral Citation Number: [2023] EWCA Civ 1438

Case No: CA-2023-000224

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
THE HONOURABLE MRS JUSTICE FARBEY
[2023] EWHC 27 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2023

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE PHILLIPS
and
LORD JUSTICE LEWIS

Between:

DEREK MOSS **Appellant**
- and -
(1) THE ROYAL BOROUGH OF KINGSTON-UPON- **Respondent**
THAMES
(2) THE INFORMATION COMMISSIONER

Derek Moss appeared in person (attending remotely).
Philip Coppel KC and John Fitzsimons (instructed by South London Partnership) for the
First Respondent
The Second Respondent did not appear and was not represented

Hearing date: 19 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewis:

INTRODUCTION

1. This appeal arises out of a decision dated 20 March 2017 made by the First-tier Tribunal (General Regulatory Chamber) (“the FTT”) that the respondent, the Royal Borough of Kingston-upon-Thames (“Kingston”), should provide the appellant, Derek Moss, with advice and assistance within 30 days to enable him to reformulate a request for information made pursuant to the Freedom of Information Act 2000 (“FOIA”). It is accepted that Kingston had not complied with that decision.
2. The FTT does not have a power to commit a person for contempt of court in the event of a failure to comply with one of its orders. The statutory provisions then in force for dealing with such failures provided that the FTT may certify what was described as an offence if any person had been guilty of an act or omission which would constitute contempt of court if it had been committed before a court having power to commit for contempt. The matter would then be transferred to the High Court. That Court had power to inquire into the matter and, subject to certain procedural safeguards, had power to deal with the person in any manner in which it could have dealt with the person if he had engaged in that conduct in proceedings in the High Court.
3. In the present case, the FTT certified an offence to the High Court, that offence being the failure by Kingston to comply with the terms of the FTT’s decision dated 20 March 2017. The matter was then considered by the High Court which found that the failure to comply with the decision of the FTT did not amount to a contempt of court.
4. The principal issue on this appeal is whether the High Court had jurisdiction to determine whether the omission amounted to a contempt of court or whether it was limited to determining the appropriate sanction on the basis that the FTT had already determined that the omission amounted to a contempt. A second issue is whether the way in which the matter was considered by the FTT or the High Court involved a breach of the appellant’s rights under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

THE STATUTORY FRAMEWORK

5. FOIA provides a scheme for the disclosure of information held by public authorities. Section 1(1) of FOIA provides that a person making a request for information to a public authority is entitled to be informed in writing whether the public authority holds information of the description specified and, if so, to have that information communicated to him. There are exceptions to that obligation. In the present case, the material exception is contained in section 12 of FOIA which provides that section 1(1) does not oblige a public authority to comply with a request for information if the cost of doing so would exceed a prescribed limit (at the material time, £450 or the equivalent of 18 hours of work). Section 16 of FOIA imposes a duty on a public authority to provide advice and assistance to a person who proposes to make, or has made a request.

6. Part IV of FOIA deals with enforcement. Section 50 provides that a person may apply to the Information Commissioner (“the Commissioner”) for a decision on whether a request has been dealt with in accordance with the requirements of Part 1 of FOIA. The person making the request is referred to in FOIA as “the complainant”. The Commissioner may, amongst other things, serve a notice of his decision on the complainant and the public body concerned. Section 54 provides that if a public authority has failed to comply with a decision notice, or in purported compliance, knowingly or recklessly makes a statement which is false in a material respect, the Commissioner “may certify in writing to the court that the public authority has failed to comply with the notice”. Section 54(3) provides that the court may inquire into the matter and, after hearing any witness and hearing any statement offered in defence, deal with the authority “as if it had committed a contempt of court”.

7. Part V of FOIA deals with appeals. Section 57 of FOIA provides for a right of appeal by a complainant or public authority against a decision notice served by the Commissioner. An appeal may simply be allowed or a different decision notice may be substituted (see section 58 of FOIA). Section 61 of FOIA as originally enacted provided that Schedule 6 to the Data Protection Act 1998 (“the 1998 Act”) applied to appeals under Part V of FOIA. That resulted in such appeals being heard by the Data Protection Tribunal established under the 1998 Act. That tribunal was comprised of a legally qualified chairman (or deputy chairman) and two members, one representing the interests of data subjects and one the interests of data controllers (see section 6 and paragraph 4 of Schedule 5 to the 1998 Act). Paragraph 7 of Schedule 6 to the 1998 Act provided a power for the Secretary of State to make rules for regulating the exercise of rights of appeal. The Data Protection Tribunal was an inferior tribunal and did not have a power to commit a person for a contempt arising out of its proceedings. Paragraph 8 of Schedule 6 to the 1998 Act, however, provided for the Data Protection Tribunal to certify what was described as an offence and provided power for the High Court to inquire into the matter and deal with the person. Paragraph 8 of Schedule 6 is the key paragraph in the present appeal and is in the following terms:

“Obstruction etc.”

 - (1) If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court or, in Scotland, the Court of Session.

 - (2) Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court.”

8. The power to hear appeals, and certify offences, was transferred to the FTT in 2010 by the Transfer of Tribunal Functions Order 2010.

9. For completeness, section 61 of FOIA was amended in 2018. The amended section provided for the FTT to certify an offence and for the matter then to be considered by the Upper Tribunal (rather than the High Court). Other than that change, the provisions of section 61 are materially similar to Schedule 6 to the 1998 Act. It provides, so far as material:

“61 Appeal proceedings

(1) Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).

.....

(3) Subsection (4) applies where—

(a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and

(b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.

(5) Where an offence is certified under subsection (4), the Upper Tribunal may—

(a) inquire into the matter, and

(b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.

(6) Before exercising the power under subsection (5)(b), the Upper Tribunal must—

(a) hear any witness who may be produced against or on behalf of the person charged with the offence, and

(b) hear any statement that may be offered in defence.

.....”

THE FACTUAL BACKGROUND

Mr Moss's Request for information

10. The factual background is fully described in the decision of the High Court in *Moss v Royal Borough of Kingston-upon-Thames* [2023] EWHC 287 (KB). The facts that are particularly material to this appeal can be stated shortly.
11. Mr Moss has an interest in the provision of social housing in the Kingston area. He operates a website which provides information to other individuals and groups which they have found valuable when speaking to residents and others about Kingston's proposals. One of the projects in which Mr Moss was interested was known as the Cambridge Road Estate regeneration programme ("the regeneration programme"). On 16 February 2016, he made a request under section 1 of FOIA for information about the regeneration programme. That request was divided into four parts. In summary, Parts 1 and 2 requested information about the appointment of two consultants to the regeneration programme. Part 3 concerned information about a body called the Affordable Homes Working Group. Part 4 sought details of the stakeholders in the regeneration programme. On 9 March 2016, Kingston confirmed that it held information relating at least to Parts 1,2 and 3 but it declined to provide the information on the ground envisaged by section 12 of FOIA, namely that the costs of providing the information would exceed the appropriate limit.
12. Mr Moss took the matter to the Commissioner. By a decision notice dated 21 September 2016, the Commissioner determined that Kingston was correct in its application of section 12 of FOIA and had sought to provide assistance in accordance with section 16. She did not require Kingston to take any steps.
13. Mr Moss appealed against the Commissioner's decision to the FTT. The parties to that appeal were Mr Moss and the Commissioner. Kingston was not named as a party. In a written response, the Commissioner indicated that she would oppose the appeal in relation to section 12 of FOIA but that she had reviewed her position in relation to section 16, the duty on a public authority to provide advice and assistance, and considered that Kingston may have breached its duty in this regard. The Commissioner invited the FTT to issue a direction joining Kingston as a party to the appeal in view of her change of position. The FTT did not seek any representations from Kingston and declined to issue a direction joining Kingston as a party as the Registrar was not persuaded that there was a need to do so. A copy of the Commissioner's letter was sent to Kingston and Kingston was invited to make any application it wished to make to be joined as a party by 23 December 2016. In the event, Kingston did not apply to be joined as a party but sent submissions to the Commissioner who forwarded them to the FTT.
14. By a written decision dated 20 March 2017, the FTT decided that Kingston was entitled to rely on section 12 of FOIA but had failed to comply with its duties under section 16 of FOIA. Kingston was required to take the steps set out in paragraph 54 of its decision, namely,

"to provide advice and assistance to enable a reformulation of the request that falls within the appropriate limit. This must include provision of Part 4 and be done within 30 days."
15. The decision was served on Mr Moss and the Commissioner pursuant to the relevant rules. The decision was not served by the FTT on Kingston as it was not

a party to the appeal. A copy of the decision was, however, forwarded by the Commissioner to Kingston.

The Applications for a Contempt Order and for Certification

16. Mr Moss considered that Kingston had failed to comply with the decision of 20 March 2017. On 28 February 2018, he applied to the FTT for a contempt order. On 25 March 2018 he applied to certify an offence pursuant to paragraph 8 of Schedule 6 to the 1998 Act. The FTT originally struck out the applications on the basis that it lacked jurisdiction to deal with them. On appeal to the Upper Tribunal, that Tribunal held that the FTT had no jurisdiction to issue a contempt order (essentially because the FTT has no power to commit a person or corporate body for contempt) but it did have jurisdiction to consider Mr Moss's application to certify an offence and that the FTT should deal with that application.
17. On 3 December 2020, Mr Moss applied to withdraw the application for certification. On 5 January 2021, the Registrar of the FTT consented to the application being withdrawn. Mr Moss reflected on matters and, on 10 January 2021, applied to reinstate the application. On 20 January 2021, the Registrar reinstated the application.

Proceedings before the FTT

18. On 20 January 2022 there was a hearing before the FTT of Mr Moss's certification application. The parties were Mr Moss, Kingston and the Commissioner. Mr Moss and Kingston were each represented by counsel. The Commissioner was not represented and took no part in the proceedings. Mr Moss also provided evidence in the form of a transcript of a telephone call between him and a Mr Furby, who had been an employee of Kingston and who had, it seems, been the leader of the team responsible for dealing with Mr Moss's request for information. That transcript was considered as relevant evidence that Kingston knew of the FTT decision and the need to comply with it. The FTT also had a witness statement dated 13 July 2021 made by Rhian Allen, the Information Governance and Records Manager and Data Protection Officer of Kingston. Ms Allen's responsibilities included management of Kingston's team for dealing with FOIA. The FTT also heard oral evidence from Ms Allen. In her witness statement of 13 July 2021, Ms Allen confirmed that Kingston had failed to comply with the decision and repeated the apology given on behalf of Kingston to Mr Moss in a letter dated 1 March 2021. Ms Allen stated that since that time Kingston had sought fully to comply with the original request and provide the advice and assistance required by section 16 of FOIA. Further, Kingston had introduced new procedures in order to improve the processing, and follow-up, of requests for information under FOIA.
19. The decision of the FTT was as follows:

“DECISION AND CERTIFICATE: We certify an offence by the Royal Borough of Kingston-upon-Thames to comply with the terms of the Tribunal's decision in EA/2016/0250, dated 20 March 2017.”

20. In lengthy reasons attached to its decision, the FTT found that Kingston had failed to comply with the FTT decision of 20 March 2017, and concluded that that failure constituted a contempt of court. It decided in the exercise of its discretion to certify an offence to the High Court.

Proceedings in the High Court

21. Following certification, the FTT lodged its decision to certify with the High Court. That decision was considered by Farbey J., who then happened also to be the President of the Administrative Appeals Chamber of the Upper Tribunal. On 21 July 2022, she made an order giving directions for dealing with the matter. They included a requirement that Mr Moss (who was described in the order as the applicant) was to file an agreed bundle containing only the documents relevant to the issues before the court. The order provided for a timetable by which Mr Moss was to file and serve a written submission limited to 10 pages setting out his position on those issues that he would like the court to determine and a timetable for Kingston to do the same in response. The order provided that the parties were to agree a timetable for service of skeleton arguments and a bundle of authorities. The case was to be listed before Farbey J. for a hearing in October 2022. Liberty was given to each party to apply to vary the order.
22. In an application dated 26 July 2022, Mr Moss applied, amongst other things, to vary the order of 21 July 2022. In that application, he set out his arguments that the case law of the European Court of Human Rights (“the European Court”) established that a successful litigant could not be expected to shoulder the burden of enforcing compliance with a judgment against the state. Mr Moss set out his contention that that principle was breached in the present case as he had to start certification proceedings in the FTT. Mr Moss also set out his argument that the High Court did not need to determine whether Kingston was guilty of contempt and the only appropriate issue for the High Court to determine was the appropriate punishment for the contempt that had already been proven in the FTT. Mr Moss explained that counsel in the FTT had been acting *pro bono* and might be willing to assist subject to his availability. He asked the High Court to vary the directions contained in the order of 23 July 2022 so that the only issue the court would decide would be the appropriate penalty, that the parties’ submissions all be filed on the same date and serve as their skeleton arguments, and that the bundles be filed by the second respondent (i.e. the Commissioner). He also requested that the hearing be conducted remotely so that he was able to observe (or represent himself if necessary) and that the bundles be filed electronically.
23. By an order dated 29 July 2022, Farbey J. varied the earlier order and provided that Kingston (not Mr Moss) serve the agreed bundle of documents, and that they should be served electronically, but she did not otherwise vary the order. In her reasons, Farbey J. explained that she had assumed that the leading counsel (who had represented Mr Moss before the FTT) would continue to assist Mr Moss and was only now aware that he had not been instructed in the proceedings in the High Court. In those circumstances, Farbey J. thought it appropriate for Kingston, not Mr Moss, to prepare and serve the bundles of documents.

24. The hearing took place on 17 October 2022. Ms Moss appeared in person (attending remotely). Kingston was represented by counsel. The Commissioner was not represented at the hearing and played no part in the proceedings. The High Court was provided with a hearing bundle which included documents produced by Mr Moss and Kingston. Mr Moss also supplied a supplementary bundle. Ms Allen gave oral evidence and relied on her witness statement of 13 July 2021. Mr Moss cross-examined Ms Allen. Mr Moss and counsel for Kingston made submissions to the High Court.

The Judgment of the High Court

25. The judgment of the High Court was given on 11 January 2023. The judgment should be read as a whole. It deals first with preliminary issues. It then sets out the factual background. The judgment notes at paragraph 57 that Kingston accepted before the High Court (as it had before the FTT at the hearing of the certification application) that it had not complied with the FTT's decision of 20 March 2017. It then sets out the legal framework. At paragraph 86 the judge noted that Mr Moss raised five issues, which she dealt with in turn. As to the first and second issues (whether Mr Moss or the FTT was the applicant in the High Court proceedings and whether the FTT's procedures for enforcing its decisions and dealing with contempt were compatible with Article 6 of the Convention), the judge determined that the FTT had no function in the High Court proceedings and Mr Moss was appropriately called an applicant, while the second issue was not pursued: see paragraphs 92-96.
26. The third issue was whether Kingston could challenge or appeal the findings of the FTT in the High Court proceedings. The High Court recorded Mr Moss's submissions, and those of counsel for Kingston, at paragraphs 97 to 98. Essentially, Mr Moss submitted that the High Court was not permitted to re-open the FTT's findings or its conclusions that a contempt had been proved. Counsel for Kingston submitted that, on a proper interpretation of the relevant statutory provisions, the jurisdiction of the High Court was to inquire into the matter, and it started that inquiry with a blank canvas. The certification was, it was submitted, simply the gateway that vested jurisdiction in the High Court to inquire into the matter.
27. Farbey J accepted that paragraph 8 to Schedule 6 of the 1998 was not well drafted. Nevertheless, she accepted Kingston's submissions that the High Court's jurisdiction was to inquire into the matter and that it was not bound to accept the conclusion of the FTT that there had been a contempt. Farbey J. gave detailed reasons for that conclusion at paragraphs 100 to 108.
28. Farbey J. then considered whether or not the failure of Kingston to comply with the FTT decision of 20 March 2016 would have been a contempt if that failure had occurred in proceedings in the High Court. She concluded that it would not for the reasons given at paragraph 109 to 128 of her judgment. Permission to appeal on grounds relating to the correctness of those reasons has been refused. In view of the limited nature of the appeal to this Court, therefore, it is not necessary to analyse those reasons. I note in passing, however, that paragraph 127 is potentially open to different readings. Farbey J. considered that, on the basis of the evidence before her, she could not reach a conclusion that Kingston

intentionally omitted to provide advice and assistance within the specified 30 days. She noted that non-compliance could be as consistent with disorganisation and a failure to operate a competent department for dealing with requests under FOIA as it was with an intentional omission to provide advice and assistance. That observation cannot have been intended to mean that a failure to comply could never be found to be intentional simply because such failure was equally consistent with a public authority being disorganised. Rather, it will depend on the facts of a particular case whether relevant individuals within a public authority knew of a decision requiring it to take specified steps and intentionally omitted to take those steps.

29. As Farbey J. had found that it was not appropriate to treat Kingston as a contemnor, the fourth issue, what the appropriate penalty was, did not arise. Finally, on the fifth issue, Farbey J. held that contempt proceedings were not intended as a means of securing the payment of civil compensation for any breaches of Mr Moss's rights under Articles 6 or 10 of the Convention and noted that if Mr Moss had wished to bring a claim for damages under the Human Rights Act 1998 he should have made a separate claim.

THE APPEAL

30. Mr Moss sought permission to appeal on six grounds. Warby LJ granted permission to appeal on grounds 1 and 2 but refused permission on the remaining four grounds, though noting that some of the written argument made by Mr Moss in relation to ground 3 overlapped with the issues of law raised in grounds 1 and 2. Warby LJ confirmed that Mr Moss was not precluded from relying on those arguments when dealing with his appeal on grounds 1 and 2.

31. The two grounds of appeal are:

“1. In holding the Appellant responsible for prosecuting the First Respondent's contempt, the Judge failed to give effect to a binding decision of a superior court, disregarded a relevant statutory provision, and misunderstood or misconstrued the law.

2. In deciding that the court should start from scratch and determine whether the First Respondent was guilty of the offence of contempt which the First tier Tribunal found it guilty of and certified to the court, the Judge failed to give effect to a binding decision of a superior court, disregarded a relevant statutory provision, and misunderstood or misconstrued the law.”

32. It is sensible to deal with ground 2, the proper role of the High Court on certification by the FTT, first and then to deal with ground 1.

THE PROPER ROLE OF THE HIGH COURT - GROUND 2

Submissions

33. In summary, Mr Moss submitted that the decision of Farbey J. essentially disregarded the relevant statutory provisions, that is paragraph 8 of Schedule 6 of the 1998 Act. Those provisions expressly required the FTT to determine whether someone was guilty of an act or omission which amounts to contempt before it exercises its discretion to certify the offence. That is what the FTT did in the present case, concluding that Kingston was guilty of an omission which, if the proceedings were before a court, would constitute a contempt of court. Mr Moss submitted that the power of the High Court in paragraph 8(2) was a power to deal with a person “in any manner in which it could deal with him if he had committed the like offence in relation to the court”. That required the court to determine what punishment it would impose if the contempt had been committed in the High Court. It did not allow the High Court to overturn the FTT’s decision and declare the person innocent of the offence of which the FTT has found it guilty. Mr Moss submitted that any other interpretation would be inconsistent with sections 2 and 3 of the Human Rights Act 1998. He further submitted that it would be inconsistent with the decision of the Supreme Court in *R (Majera) (formerly SM (Rwanda)) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461, which recognised that a court order must be obeyed until set aside. That applied to the decision of the FTT in the present case which should be obeyed until set aside on appeal or review. The decision of the High Court effectively subverted the appeal process.
34. In summary, Mr Coppel KC, with Mr Fitzsimons, for Kingston, submitted that the High Court was correct to conclude that the fact that it was “to inquire into the matter” meant that the High Court began with a blank canvas. The fact that the FTT had made a certification decision was the gateway that vested jurisdiction in the High Court. The role of the court was to “inquire into the matter” which meant looking into the facts, matters and circumstances of what it is said that the alleged contemnor did or failed to do as regards “the matter”. That is why the High Court had to hear any witness produced against or on behalf of that person and hear any statement that may be offered in defence. Mr Coppel also submitted that the same phraseology had been used in other enactments which indicated that the model that Parliament had in mind was for the lower tribunal to certify the matter and for the High Court to determine whether or not conduct amounted to a contempt. Mr Coppel indicated that a similar approach could be discerned in statutes going back as far as the Tribunals of Inquiry (Evidence) Act 1921, where the chairman of the tribunal “may certify the offence” to the High Court and the court may “inquire into the alleged offence”. Mr Coppel referred to a number of similar enactments, including section 178 of the former Financial Services Act 1986 (considered by Slade LJ in the Court of Appeal in *In re an Inquiry under the Company Securities Act 1985* [1988] AC 660 at 665B-F), and section 149 of the Legal Services Act 2007 (considered by Lindblom J., as he then was, in *Deputy Chief Legal Ombudsman v Young* [2011] EWHC 2923 (Admin)).

Discussion

35. The issue on this ground of appeal is whether the High Court had jurisdiction to determine whether a failure to comply with a decision of the FTT amounted to contempt or whether the High Court was limited to determining the appropriate

sanction on the basis that the FTT had already determined that the omission amounted to a contempt. The resolution of that issue depends upon the proper interpretation of paragraph 8 of Schedule 6 to the 1998 Act. That involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation. A word or a phrase must be read in the context of the section as a whole and may need to be read in the context of a wider group of sections, as that may provide the relevant context for ascertaining, objectively, what meaning the legislature was seeking to convey in using those words. See generally, *R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraphs 29 to 31).

36. The context here is that Parliament conferred certain rights of access to information on individuals and imposed certain duties on public authorities. Parliament also created a regime enabling individuals to make complaints to the Commissioner. It also provided for appeals against decisions of the Commissioner. The appeals were, initially, heard by the Data Protection Tribunal and are now heard by the FTT. Those tribunals are inferior tribunals which do not have statutory powers to punish a person for a contempt arising from their proceedings. There was, however, a need to ensure that there was an appropriate mechanism for dealing with persons who failed to comply with the relevant rules or the orders or decisions of the tribunal in a way that obstructed the administration of justice before the tribunal. The mechanism established by Parliament in paragraph 8 of Schedule 6 to the 1998 Act was to provide for certification by the tribunal before whom the act or omission had occurred with the matter then being considered by the High Court which does have a power to commit for contempt. (The certification now is to the Upper Tribunal which is itself a superior court of record and is given the same powers as the High Court by virtue of sections 3(5) and 25 of the Tribunals, Courts and Enforcement Act 2007). The High Court (now the Upper Tribunal) may inquire into the matter and it may deal with the person in any manner in which it could have dealt with the person if the person had acted, or omitted to act, in that way in proceedings in the High Court.
37. Against that background, it is necessary to consider the particular wording of paragraph 8 of Schedule 6 to the 1998 Act. It is important to read paragraph 8(1) and (2) as a whole.
38. I deal first with paragraph 8(1) and the powers of the FTT to certify what is described as an offence to the High Court. The FTT may only certify if a person is guilty of any act or omission in relation to proceedings before the FTT which would, if the proceedings were proceedings before a court having power to commit, constitute contempt of court.
39. First, the FTT is concerned with whether or not a person has done an act, or omitted to do something, in relation to proceedings before the FTT. Secondly, that act or omission must be of such a nature that it would be a contempt of court if it had occurred in proceedings before a court with the power to commit for contempt. Read in isolation, I recognise that the phrase “would constitute contempt of court” could be read as indicating that the FTT must determine

whether or not the act or omission is a contempt. However, read in context, and particularly having regard to paragraph 8 as a whole, the words are not intended to mean that the FTT must make a final, conclusive and binding determination of whether or not, applying the law of contempt, the conduct is a contempt. Rather, the phrase means that the act or omission is one which by its nature is capable of constituting a contempt if it had occurred in proceedings before a court or tribunal with power to commit for contempt and the matter is therefore fit for consideration by the High Court which does have the power to deal with contempts. Here, by way of example, the omission was a failure to comply with a decision of the FTT. Failure to comply with an order of a court or tribunal is capable of amounting to a contempt. Whether or not it does so in a particular case may depend upon often complex legal and factual issues. The FTT was not required by paragraph 8(1) to conduct the exercise of considering such issues and reaching a concluded, and binding, view on whether or not the act or omission did amount to contempt. It was sufficient if the act or omission was capable of constituting a contempt.

40. Thirdly, the FTT may certify an offence to the High Court. Care needs to be taken with the use of the word “offence”. There is no statutory provision which provides that certain conduct done in relation to proceedings before the FTT constitutes an offence. Breach of an order of a court or tribunal gives rise to a civil not a criminal contempt and the word “offence” is not apt to refer to a civil contempt. The reference to “offence” in paragraph 8(1), therefore, is a reference back to the previous words in paragraph 8, i.e. to the fact that a person is guilty of an act or omission the nature of which is such that it may obstruct the administration of justice and may call for the imposition of a sanction (i.e. it “would constitute contempt” if it occurred in proceedings before a court with power to commit for contempt). Further, paragraph 8(1) confers a power “to certify the offence to the High Court”, i.e. the provision is concerned with creating a mechanism by which a matter is sent “to” the High Court rather than indicating that the certification is intended to be a final, binding decision on the matter by the FTT.
41. Paragraph 8(2) then sets out the powers of the High Court. It “may inquire into the matter” and, after following certain procedures, it “may deal with [the person] in any manner in which it could deal with him if he had committed the like offence in relation to the court” (i.e. done, or omitted to do, the same thing in proceedings in the High Court). The power to inquire into the matter is, read in context, a reference to an inquiry into the matter giving rise to certification, that is whether the act or omission which occurred in proceedings before the FTT was of such a nature as would constitute contempt if it had occurred before the High Court. The High Court is therefore empowered to inquire into whether the act or omission constitutes contempt. There is no reason to limit the words “may inquire into the matter” to a determination of what sanction is appropriate rather than inquiring into whether an act or omission constitutes contempt. Having inquired into the matter, the High Court “may deal with him” in ways it could have dealt with him if he had engaged in that conduct in proceedings in the High Court. Read in that way, paragraph 8 does not operate on the basis that the FTT has made a final, binding determination that the person is guilty of a contempt of court. Nor is the role of the High Court simply to determine the appropriate

sanction in light of that finding. Rather, the role of the High Court is to determine whether the conduct is such that it should be dealt with as if it were a contempt and, if so, to impose any appropriate sanction.

42. That interpretation is reinforced by the procedural provisions in paragraph 8(2). The High Court can only deal with a person “after hearing any witnesses who may be produced against or on behalf of the person” and “after hearing any statement that may be offered in defence”. The inquiry that the High Court carries out, therefore, may include the hearing of witnesses produced for and against the person concerned, and any statement made by way of defence before it decides how to deal with the person. Those provisions are consistent with the High Court having responsibility for deciding whether or not the conduct is such that it would amount to contempt if it had occurred in proceedings before the High Court.
43. Reading the words of paragraph 8(1) and (2) as a whole and in context, therefore, paragraph 8 is intended to provide a mechanism whereby the FTT certifies that an act or omission occurred in proceedings before it which may call for a sanction and should therefore be considered by the High Court (or now the Upper Tribunal). The FTT will determine whether the person is guilty of an act or omission which is capable by its nature of constituting contempt (which is what is meant in paragraph 8(1) when it refers to an act or omission which would constitute contempt if it had occurred in proceedings before a court or tribunal with power to commit for contempt). If so, it will decide whether to exercise its discretion to certify and send the matter to the High Court (or, now, to the Upper Tribunal) because, for example the act or omission appears sufficiently serious to warrant inquiry and possibly sanction.
44. In deciding whether an act or omission is something which would be capable by its nature of constituting a contempt, the FTT is not intended to undertake a detailed analysis of the law relating to contempt, nor the application of the law of contempt to the facts. Rather the FTT is considering simply whether the act or omission would be capable of constituting a contempt. In this context, the acts or omissions are ones involving breach of rules, directions or orders of the FTT governing the conduct of an appeal. It should be relatively straightforward in most cases to determine whether the act or omission (i.e. a breach of a rule, direction or order) is by its nature such as would be capable of constituting contempt. In the present case, for example, the omission (admitted by Kingston) was the failure to comply with an order of the FTT. Such an omission, by its nature, would be capable of constituting a contempt. The FTT was not required to deal with the questions of whether service of the order on Kingston as a party was required for the omission to be capable of constituting a contempt or whether notice of the order was sufficient for those purposes. Nor was it necessary for the FTT to determine whether or not individuals within Kingston had the mens rea necessary for the omission to amount to a contempt by Kingston. Those factual matters, and in particular, the final determination of those matters were for the High Court (now the Upper Tribunal).
45. If the FTT does certify, the matter goes to the High Court (now the Upper Tribunal). It decides how to proceed. It may inquire into the matter. It will have to hear witnesses produced against the person concerned, and witnesses produced on that person’s behalf, and any defence made by that person. That is the means

by which the final determination is made as to whether or not the act or omission (“the like offence”) would constitute contempt if it had occurred before a court or tribunal having the power to commit for contempt and, if so, it may deal with the person in any way it could if the act or omission had occurred in proceedings before it.

46. I appreciate that individual words or phrases in paragraph 8(1) (particularly if that paragraph is read in isolation) or in paragraph 8(2) could point to a different conclusion. Paragraph 8(1) provides a power to certify if “any person is guilty of an act or omission” in proceedings before it “which would constitute a contempt”. As I have indicated, the latter words could be read, in isolation, as requiring the FTT to determine whether the conduct is a contempt. Further, the FTT may certify “an offence” to the High Court. That could be said to mean that the FTT has determined that the person is guilty of the act or omission in question, that it would be a contempt of court if done before a court, and that it is “an offence” i.e. conduct which should be visited with an appropriate sanction. As the FTT has no power to impose a sanction, it could be said that it is the question of sanction which is to go to the High Court. Furthermore, the jurisdiction of the High Court only arises “Where an offence is certified” and, it could be said, the FTT must have determined that an offence had been committed otherwise the High Court would not have jurisdiction. Consequently, paragraph 8 could be read as indicating that the High Court is only concerned with determining the appropriate sanction for conduct which the FTT has found constitutes contempt.
47. That interpretation, however, fails in my judgment to reflect the context and the wording of paragraph 8 read as a whole. It sits ill with the fact that the power of the High Court is “to inquire into the matter”. That would be an unusual, and inapt, way to express a power which was concerned solely with determining sanction. Further, the power to impose a sanction is conferred by the final words of paragraph 8(2), i.e. that the court may “deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court”. The words “may inquire into the matter” must be given some meaning. The natural meaning, in context, is that the court may inquire into, that is consider, whether the conduct is of a nature such as to constitute contempt and to call for a sanction. That is also consistent with the High Court hearing witnesses for and against the person concerned and considering any statement made in that person’s defence. Further, the opening words of paragraph 8(2), “Where an offence is so certified” do not mean that the FTT must have power to make a final, conclusive determination that an offence has been committed before the High Court can acquire jurisdiction to inquire into the matter. Rather, those words mean that the High Court has jurisdiction where the FTT has certified that an act or omission has occurred in proceedings before it which is of such a nature as would constitute contempt if done in proceedings before the High Court.
48. I deal for completeness with some of the additional arguments put by each party. First, I do not consider that the provisions of other legislation, and the cases dealing with that legislation, relied upon by Mr Coppel assist and I doubt that they are a legitimate aid to the interpretation of paragraph 8 of Schedule 6 to the 1998 Act. The wording in each case is different. Section 1 of the Tribunals of

Inquiry (Evidence) Act 1921, by way of example, provides that following certification “the court may inquire into the alleged offence”, which makes it relatively clear that the certification of the chairman of the tribunal is not intended to be conclusive of guilt. Section 149 of the Legal Services Act 2007 provides that an ombudsman may certify the failure of a person to comply with a requirement to a court and the court “may enquire into the case” and provides that if “the court is satisfied that the defaulter has failed without reasonable cause to comply with the requirement” it may deal with him as if that person were in contempt. That, again, makes it clear that the court is deciding whether the defaulter has a reasonable excuse for his failure. Furthermore, it is doubtful that that legislation is admissible as an aid to the construction of paragraph 8 of Schedule 6 to the 1998 Act. Such legislation seems to establish at most that Parliament has on occasions adopted a model whereby certain matters are certified by an inferior tribunal or body to the High Court and it is for that court to determine whether or not the person should be found to have committed which constitute a contempt. The question, here, however, is whether that is the model adopted by Parliament in respect of the FTT in the context of FOIA appeals. That turns, ultimately, on the wording of the statutory provisions read in context.

49. Dealing with Mr Moss’s submissions, sections 2 and 3 of the Human Rights Act 1998 do not assist in the present case. The first question to be considered is the proper interpretation of paragraph 8 of Schedule 6. For the reasons given, that provision properly interpreted means that the FTT determines whether to certify certain conduct and the High Court (now the Upper Tribunal) decides whether the conduct is such that it amounts to a contempt. There is nothing in the case law of the European Court to indicate that that interpretation would involve any breach of any Convention right. That interpretation does not, therefore, involve any breach of sections 2 or 3 of the Human Rights Act 1998.
50. The reliance by Mr Moss on the decision in *Majera* is also misplaced. That decision recognises that an order of a court must be obeyed until it is set aside or varied. Consequently, an administrative body (there, the Home Secretary) could not act in a manner inconsistent with the order of the court. The question here is different. The question here is what is the proper role of the FTT and the High Court in connection with a failure by a public body to comply with a decision of a tribunal. In particular, is it the role of the High Court to determine whether the failure is of such a nature as to amount to contempt and to warrant the imposition of a sanction? Or is the question of whether the conduct amounts to contempt one that is determined by the FTT and the role of the High Court is only determine what, if any, sanction to impose? That question is not answered by reference to *Majera*.
51. Further, the interpretation of paragraph 8 that I consider to be correct does not subvert the appeal process, whether in respect of the decision of the FTT of 20 March 2017 or the certification on 28 March 2022. The FTT decided in March 2017 that Kingston was in breach of section 16 of FOIA and decided that Kingston was required to take certain steps within 30 days. If Kingston had wished to challenge that decision, it would have had to appeal. The issue in this case is different. The question is whether a sanction should be imposed because of the failure to comply with the decision of 20 March 2017. Nor does

interpreting paragraph 8 of Schedule 6 in the way I have indicated above involve subverting any right of appeal against the certification decision. The first question is what, on a proper interpretation of the statutory provision, are the roles of the FTT and the High Court respectively in cases of failure to comply with a decision or order of the FTT? If the answer is that the FTT certifies the matter and it is for the High Court to determine whether the conduct is such as to amount to contempt, that does not involve any subversion of any appeal process. Rather, it means in practical terms, that the question of whether the conduct amounts to a contempt is to be determined as part of the inquiry into the matter that follows after the matter is certified and sent to the High Court. Indeed, arguably, the oddity would be if the public body had to challenge the decision that the conduct amounted to contempt by way of appeal to the High Court (now the Upper Tribunal) against the decision to certify whilst the question of what sanctions was appropriate would be decided in the proceedings following certification. None of the other arguments advanced by Mr Moss persuade me that the role of the High Court following certification is limited to determining sanction rather than determining whether the conduct amounts to contempt and, if so, what sanction is appropriate.

Conclusion

52. The role of the FTT is to make a certification decision when the person had engaged in conduct (an act or omission) in relation to proceedings before it which it considers could be a contempt if that conduct had occurred in proceedings before a court or tribunal empowered to punish a person for contempt. It is not making a final determination of whether or not the conduct would be a contempt in those circumstances. The High Court (now the Upper Tribunal) may inquire into whether or not the conduct would have been a contempt if committed in proceedings before it. Farbey J. was correct, therefore, in concluding that she was entitled to determine whether the conduct in this case amounted to a contempt.

THE ROLE OF THE APPELLANT IN THE PROCEEDINGS - GROUND 1

Submissions

53. Mr Moss's essential submission on this ground of appeal is that the case law of the European Court establishes that the burden lies on the state authorities to ensure compliance with a judgment against the state. He accepts that a successful litigant may be required to undertake certain procedural steps in order to assist the enforcement of a judgment but that does not relieve the authorities of their obligation to take timely action with a view to honouring the judgment against the state. In the present case, Mr Moss submits that the state was responsible for enforcing the decision against Kingston made by the FTT on 20 March 2017. He submits that he was being made responsible for enforcing the decision of the FTT of 20 March 2017 by applying to the FTT to certify an offence to the High Court and that involved a breach of his rights under Article 6 of the Convention. He further submits that he was regarded as responsible for prosecuting matters in the High Court and that too involved a breach of his rights under Article 6. Mr Moss relies upon decisions in the European Court including, principally, decisions such as *Burdov v Russia* (2009) 49 EHRR 2, especially at paragraphs 65 to 69,

Hornsby v Greece (1997) 24 EHRR 250, especially at paragraph 40, and *Scordino v Italy (No. 1)* (2007) EHRR 7, especially at paragraphs 196 to 207.

54. In oral submissions, Mr Moss developed his essential submission by eight arguments, supported by reference to legislation or citations from case law. These arguments can be summarised as follows. First, Mr Moss submitted that the case involved his rights under FOIA which involved the determination of his civil rights for the purpose of Article 6 of the Convention and his rights under Article 10. Second, he submitted that section 12 of the Human Rights Act 1998 applied to the proceedings in question. Third, the case law of the European Court recognises that the right to timely execution of final, binding judicial decisions is an integral part of the right of access to a court (relying on *Hornsby*, *Scordino* and other cases). Fourth, this Court was obliged to follow decisions of the European Court absent special circumstances. Fifth, section 3 of the Human Rights Act 1998 required legislation to be read and given effect to in a way which was compatible with Convention rights and it was unlawful under section 6 of that Act for a public authority to act incompatibly with a Convention right. Sixth, the state should shoulder the burden of prosecuting the offence in the High Court. Seventh, the FTT must find a person guilty before it certifies an offence to the High Court. That position was distinguishable from other legislative provisions where an official certified a matter and then proved it to the satisfaction of the court. Eighth, the right to an effective remedy guaranteed by Article 13 of the Convention was given effect to by sections 7 and 8 of the Human Rights Act 1998. Mr Moss cited a number of authorities which he submitted established the propositions set out in these eight arguments.
55. In summary, Mr Coppel submitted that Mr Moss had not explained how exactly his rights under Article 6 had been breached and Farbey J. was entitled to say that she did not understand how any issue under Article 6 of the Convention arose. Mr Moss had made an application to the FTT to certify an offence and it had done so. Its functions came to an end at that point and the FTT could not be joined as a party in order for it to pursue proceedings in the High Court. So far as Mr Moss was complaining about the order made by the High Court on 22 July 2022, he had not appealed that order, and was out of time for doing so and had not applied for an extension of time for appealing.

Discussion

56. The question is whether there has in fact been any breach of Mr Moss's rights under Article 6 of the Convention in the present case. The position is that the FTT decided that Kingston was in breach of its duty under section 16 of FOIA and required it to provide advice and assistance within a specified period (30 days) in order to help Mr Moss reformulate a request for information. Mr Moss considered that Kingston had not complied with that decision and applied to the FTT for it to certify an offence. In response, Kingston accepted that it had failed to comply with the decision. In her witness statement of 13 July 2021, Ms Allen confirmed that Kingston had failed to comply with the decision and repeated the apology given on behalf of Kingston by letter dated 1 March 2021. Ms Allen stated that since that time Kingston had sought fully to comply with the original request and fulfil its duty to provide advice. Further, Kingston had introduced

new procedures in order to improve the processing, and follow-up, of requests for information under FOIA.

57. As indicated, Mr Moss applied to the FTT to certify an offence. The fact that the FTT has jurisdiction to entertain such an application does not, in itself, involve any breach of Article 6 of the Convention. That is particularly so given the nature of the complaint in the present case. The complaint was that Kingston had failed to comply with the decision within the specified period. The FTT would not necessarily know that a person had failed to comply with one of its decisions unless that was brought to its attention. The fact that Mr Moss was able to make an application which, in effect, drew the non-compliance to its attention, was not incompatible with Article 6.
58. Furthermore, for the reasons given above, the role of the FTT will be to consider whether the person has failed to comply with the order and, if so, whether certification is appropriate. That is likely to be a relatively straightforward task. It may need some evidence from the person making the application to establish that the order was not complied with (although here, in fact, Kingston accepted that it had failed to comply with the decision some time before the FTT hearing). Mr Moss accepts that a person can be required to take certain steps to assist the process. The FTT does not have to undertake an extensive or detailed consideration of whether the conduct would be a contempt if it had occurred in proceedings in the High Court (or now the Upper Tribunal). Rather, it need consider only whether in its opinion the conduct is of the kind that is capable of being treated as contempt if it had been committed in the High Court. The extensive and detailed analysis of the law of contempt carried out by the FTT in this case is unlikely to be required. But, in any event, it is difficult to see that Mr Moss's rights under Article 6 were in fact breached in the present case. It was for the FTT to determine whether to certify. Mr Moss, it seems, had leading counsel acting for him *pro bono*, and that counsel was able to ensure that any submission Mr Moss wished to make was made, and any evidence that Mr Moss wanted the FTT to consider was considered. The FTT ultimately decided that it would certify an offence. The process by which the FTT considered Mr Moss's application for certification did not involve any breach of Mr Moss's rights under Article 6 on the facts of this case.
59. Thereafter, it was the FTT which sent its certification decision to the High Court as appears from the recitals to the High Court order of 21 July 2022. It was the High Court which decided to inquire into the matter on considering the decision of the FTT. Mr Moss was not required to, and was not involved, with ensuring that the matter once certified was considered by the High Court. The process by which the matter came before the High Court did not involve any breach of Mr Moss's rights under Article 6 of the Convention.
60. The High Court gave directions for dealing with the matter. That involved Mr Moss (and Kingston) being required to submit written submissions on the issues that they wanted the court to determine. As Mr Moss had initiated the certification process, and had participated in the FTT proceedings, there seems nothing wrong in giving Mr Moss the opportunity to identify the issues that he considered the High Court should address. The High Court gave directions for a bundle of relevant documents to be provided (and placed the burden of doing so

on Kingston once it realised that Mr Moss might not have legal representation). Thereafter, it was clear that Mr Moss wished to participate in the proceedings before the High Court. He applied for the hearing to be held remotely so (as he put it in his application of 26 July 2022) he could “observe (or represent himself if necessary)”. There has been no appeal by Mr Moss against those orders. They do not involve any breach of Mr Moss’s rights under Article 6 of the Convention.

61. Thereafter, the hearing was held before Farbey J. She was provided with the documents produced by Mr Moss and Kingston in accordance with her directions. Mr Moss produced an additional supplementary bundle of documents. Farbey J. heard the witness produced on behalf of Kingston (as she was required to by the provisions of paragraph 8(2) of Schedule 6 to the 1998 Act). She heard submissions on behalf of Kingston (and she was required by paragraph 8(2) to hear any defence put forward by Kingston). All of that would have occurred whether or not Mr Moss participated in the proceedings. Mr Moss also made submissions and was permitted to cross-examine Kingston’s witness. He was not compelled to do so and need not have done so. Whether or not Mr Moss made submissions or cross-examined anyone, the High Court was seised of the matter because the FTT had certified an offence and sent its certification decision to the High Court. The High Court could (and did) take a decision on whether the conduct of Kingston amounted to a contempt. In doing so, the High Court was prepared to, and did, hear submissions from Mr Moss, considered the documents that he wanted the court to consider and permitted him to question a witness. There is no basis upon which it can reasonably be said that the process followed in this particular case involved any breach of Mr Moss’s rights under Article 6 of the Convention. It cannot reasonably be said on the facts of this case that Mr Moss was forced to shoulder the burden of the prosecution.
62. Mr Moss objected to the description of himself in the orders made by Farbey J. and in the judgment as an applicant. Given that he had initiated the process and applied for the matter to be certified, it is not inaccurate to describe him as an applicant (although the case could have been referred to, perhaps more accurately, by another title such as *Re Royal Borough of Kingston-upon-Thames*). However, what is important is what in fact happened and whether in fact there was any breach of Mr Moss’s rights under Article 6 of the Convention, irrespective of how the proceedings were named.
63. For the reasons given, I do not consider there was any breach of Mr Moss’s rights under Article 6 of the Convention in the way that this matter proceeded in the FTT or the High Court. There was nothing, on the facts of this case, which involved any violation of the general principles identified in the case law relied upon by Mr Moss.

CONCLUSION

64. Where the FTT had certified an offence under paragraph 8(1) of Schedule 6 to the 1998 Act, the High Court was entitled to inquire into whether the conduct that had occurred in the proceedings before the FTT constituted a contempt. Farbey J. was entitled, therefore, to consider whether the failure by Kingston to comply with the decision of the FTT of 20 March 2017 amounted to a contempt. There was no breach in this case of Mr Moss’s rights under Article 6 of the Convention

in the way in which the matter was dealt with by the FTT nor in the way in which the proceedings in the High Court were dealt with. I would dismiss the appeal.

Lord Justice Phillips:

65. I agree with Lewis LJ that the appeal should be dismissed and have nothing to add to his compelling analysis of ground 1.
66. As for ground 2, I agree with Lewis LJ's conclusion that paragraph 8(2) of Schedule 6 to the 1998 Act, read in context, has the effect of bestowing on the High Court (now, under amended section 61 of FOIA, the Upper Tribunal) full jurisdiction to determine not only the sanction (if any) for the "offence", but also the prior question of whether the conduct in question would have been a contempt of court if committed in proceedings before it. There is no doubt that such jurisdiction is conferred under section 54(3) of FOIA in the context of certification by the Commissioner of a failure to comply with a decision notice. That the position is, unsurprisingly, the same under paragraph 8(2) is confirmed by the language of that paragraph itself, as identified by Lewis LJ in [41] and [42] above.
67. Where I take a different view is in relation to the task to be performed by the FTT in certifying an offence under paragraph 8(1), now section 61(4) of FOIA. The issue does not, in my view, strictly require determination for disposal of the appeal, but is one of considerable practical importance for the FTT in considering whether to certify an "offence" in future cases.
68. The FTT's express statutory power is that it may certify an offence where any act or omission "would constitute contempt of court" if the proceedings were before a court having the power to commit for contempt of court. Lewis LJ interprets that provision as requiring the FTT to determine whether "an act or omission occurred ... which may call for a sanction" [43], but not to consider whether the act or omissions would constitute a contempt. Instead, on Lewis LJ's interpretation, the FTT may certify if the act or omission is "capable by its nature of constituting contempt" [43]. On this analysis, the FTT need not and should not concern itself with issues of service or notice of an order, nor whether the alleged offender had the requisite mens rea [44].
69. The first and fundamental difficulty with this interpretation, in my judgment, is that it requires re-writing the statutory test for certification. Indeed, it is not merely a refinement of that test, but an abrogation of the express meaning: on this re-wording, the FTT may certify an "offence" even though it has not considered a highly arguable defence (so that the act or omission may *not* constitute a contempt), so long as it was capable of being one.
70. The second difficulty is understanding the precise boundaries of the FTT's suggested task. It appears to be accepted that the FTT must determine whether there are acts or omissions which, on their face, breach an order: see [43] above. But determining that a party has not (yet) complied with an order is meaningless unless it has been proved that the alleged offender was on notice of its terms (and been served if necessary). Attempting to divorce the fact of mere failure to comply from the facts and law relating to service and notice is, in my judgment,

to misunderstand the essence of contempt. Equally, to find non-compliance but not to consider whether performance was practicably possible, or whether non-performance was deliberate, is to undertake only part of the fact-finding exercise necessary for considering contempt.

71. The third difficulty arises from the nature of the FTT. Although it is an inferior tribunal, it is nonetheless a judicial body (its membership including all the Senior Judiciary). It is fully capable of considering and determining issues of law as well as fact, including issues as to notice and mens rea. The FTT's rules include the overriding objective, being to enable the FTT to deal with cases fairly and justly (rule 2), and require written reasons for decisions (including the decision to certify – rule 7A(6)). Parties are entitled to a hearing (rule 32), certification not being an exception. The FTT's decisions, including a decision to certify an offence, are subject to appeal to the Upper Tribunal (subject to permission) where an error of law is alleged. In many cases, where an order has been breached, certification will be straightforward and may not be opposed. But in cases where issues as to notice and/or mens rea do arise, perhaps combined with a difficult issue as to interpretation of an order, FTT Judges would be placed in a difficult position if they are required to certify that conduct is capable of being a contempt without determining issues which could result in a finding that it was not a contempt. I find it hard to see how a judge would not consider it necessary and desirable to investigate potential defences before deciding how to exercise the undoubted discretion as to whether to take the serious step of certifying a contempt.
72. I understand and sympathise with the desire to avoid a full evidentiary process before the FTT, to be followed by a complete re-hearing before the Upper Tribunal (mirroring what happened in the present case). The problem has arisen, it seems to me, because the certification route, originally used to send matters from administrative bodies to the High Court, has been retained where the certifying entity is itself a fully-fledged judicial body with full power and duty to hear evidence and submissions before reaching a decision. Whilst potentially unfortunate, I do not consider that the answer is to read down the statutory test for certification or require the FTT effectively to ignore issues it knows to be highly pertinent to the matter it is certifying.
73. A partial answer, in my judgment, lies in new rule 7A in the FTT's rules. Rule 7A(5) provides that, where a party makes an in-time application for certification of a contempt, the FTT must give directions for the procedure to be followed. Given that the Upper Tribunal has jurisdiction to determine the question of contempt *de novo* (for the reasons set out above), it would be consistent with the overriding objective and the principles of proportionality for the FTT to adopt a streamlined procedure for hearing evidence and submissions, but one which leads to a reasoned decision as to whether any act or omission found would amount to a contempt of court if it had occurred in proceedings before a court or tribunal with a contempt jurisdiction.

Lord Justice Peter Jackson:

74. I also agree that the appeal should be dismissed. I do so for the reasons given by Lewis LJ, and I add some observations of my own about the nature of the

exercise to be performed by the FTT when it is asked to certify an offence. As to that, I agree with the approach taken by Farbey J and with the reasoning of Lewis LJ.

75. In a narrow sense, this appeal does not directly concern the definition of the powers of the FTT, because it is common ground that the FTT was entitled to certify an offence on the part of Kingston. However, Mr Moss's arguments on Ground 2 rest on his interpretation of the respective roles of the FTT and the High Court under subparagraphs 8(1) and 8(2), and now the Upper Tribunal under subsections 61(4) and (5). In that sense, I accept that in order to identify the scope of the higher court's powers, one needs to understand what is (and what is not) happening when the FTT certifies an offence. It would also be unhelpful for future cases if this court confined itself to considering of the position in the higher court.

76. In my view, Farbey J construed the legislation correctly in paragraphs 98-108 of her judgment. On the role of the FTT, she said this:

“105. ... Before the High Court may inquire into the charge, the FTT must consider whether the act or omission of the putative contemnor “would constitute contempt of court.” In my judgment, when read in context, those words do not refer to an act or omission proved as a contempt in the Tribunal but to the kind of act or omission that may permissibly form the subject matter of a certification to the court.

106. ...The certification has – in effect – the same function as a charge in criminal proceedings: it enables the putative contemnor to know the case against him.”

This correctly encapsulates the nature of the FTT's certification function under subparagraph 8(1) and subsection 61(4). The test is identified by Lewis LJ, namely whether the act or omission appears to the FTT to be capable of constituting a contempt. I also agree with Farbey J and Lewis LJ that there is no unfairness in such a procedure, nor any breach of Article 6, because an applicant has an opportunity to press their case and a respondent has an opportunity to defend themselves in the High Court or UT.

77. The debate about the role of the FTT has arisen because, as Farbey J noted, the legislation is not happily drafted. The answer is not apparent from the statutory language. A literal reading is therefore inadequate and one must resort to a purposive construction, taking account of the overall context, to find out what Parliament intended. When one does that, there are in my view a number of strong pointers to the correct interpretation.

78. First, in the context of freedom of information, Parliament can be presumed to have intended to set up an enforcement system that operates in a fair and efficient way. We are agreed that (contrary to Mr Moss's main submission) the lower court cannot bind the higher court on the question of whether a contempt has occurred. The inevitable consequence of that, in my view, is that Parliament cannot have intended there to be a duplication of effort between the tribunal and

the court. That is bound to waste resources and it may also lead to inconsistency if two bodies were to carry out what is in substance the same exercise. This case is a vivid illustration. By one means or another, a relatively straightforward default by Kingston in March 2017 led to a blizzard of interlocutory litigation in the FTT and UT: see paragraphs 16-20 above. This wasted considerable resources and ended with a lengthy certification decision of the FTT in March 2022 – five years after the underlying order. Even then, all that had been achieved was a certification. It was then another nine months, despite firm case management, before the High Court was able to give its decision in January 2023. As it happens, the decision was not consistent with the findings of the FTT (and here I agree with Lewis LJ’s comment at paragraph 28 about disorganisation not necessarily negating intention). Be that as it may, these proceedings did not conclude until almost seven years after Mr Moss made his original FOIA request. Enforcement should be a swift and effective process, and what happened here is certainly not what Parliament intended.

79. Second, the certification framework under FOIA is a lineal descendant of certification in other contexts by bodies that lacked the legal armoury of the FTT. Those bodies were not equipped to make findings of fact on matters of possible contempt. Instead, the intention of the certification framework was to enable them to protect their processes from obstruction and disobedience by enlisting the investigatory and coercive powers of a duly constituted court whenever they thought it necessary. If Parliament wanted to produce a different result when it enacted FOIA, it could easily have said so. In fact, it used very similar words, and from that it can be inferred that it did not intend to achieve a different result.
80. Third, the issue here arises because the FTT is an inferior court that does not have a contempt jurisdiction. As Farbey J noted, it has no expertise in that area. It is highly unlikely that Parliament intended it to make what would in effect be shadow findings of contempt. That is not to disrespect the status of the FTT but to recognise the limits of its jurisdiction in this specific respect. The fact that, by section 6 of the Tribunals and Enforcement Act 2007, every judge from a district judge to the Lord Chief Justice (sic) is a judge of the FTT is not an aid to statutory construction, as powers belong to courts and not to persons.
81. Fourth, although it postdates Mr Moss’s request for certification, Parliament did in fact speak in September 2019 when it added rule 7A to the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976):

“Certification

7A.—(1) This rule applies to certification cases.

(2) An application for the Tribunal to certify an offence to the Upper Tribunal must be made in writing and must be sent or delivered to the Tribunal so that it is received no later than 28 days after the relevant act or omission (as the case may be) first occurs.

(3) The application must include— (a) details of the proceedings giving rise to the application; (b) details of the act

or omission (as the case may be) relied on; (c) if the act or omission (as the case may be) arises following, and in relation to, a decision of the Tribunal, a copy of any written record of that decision; (d) if the act or omission (as the case may be) arises following, and in relation to, an order of the Tribunal under section 166(2) of the Data Protection Act 2018 (orders to progress complaints), a copy of the order; (e) the grounds relied on in contending that if the proceedings in question were proceedings before a court having power to commit for contempt, the act or omission (as the case may be) would constitute contempt of court; (f) a statement as to whether the applicant would be content for the case to be dealt with without a hearing if the Tribunal considers it appropriate, and (g) any further information or documents required by a practice direction.

(4) If an application is provided to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)— (a) the application must include a request for an extension of time and the reason why the application was not provided in time, and (b) unless the Tribunal extends time for the application, the Tribunal must not admit the application.

(5) When the Tribunal admits the application, it must send a copy of the application and any accompanying documents to the respondent and must give directions as to the procedure to be followed in the consideration and disposal of the application.

(6) A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply.”

This rule sets out the practical steps that must accompany an application for certification and states at sub-rule (5) that the tribunal must give directions as to the procedure to be followed in the consideration and disposal of the application. If Parliament believed that the FTT would have to make formal findings of fact as part of any certification process, the rule would surely have reflected this. Instead, Rule 7A bears out Farbey J’s description of a process designed to enable a respondent to know the case against them.

82. This contrast between certification proceedings and contempt proceedings is apparent from a comparison between Rule 7A and CPR 81, which governs the latter. It is only necessary to cite CPR 81.4:

“Requirements of a contempt application

81.4

(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable

—
(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.”

CPR 81 also includes mandatory stipulations about service and publicity. It overlaps with Rule 7A(5) to the extent that the alleged contempt must be specified, but it then goes on to emphasise important procedural aspects of contempt proceedings. As noted above, the FTT Rules are silent about that, with the inference that Parliament did not consider that the FTT is engaged in a shadow contempt process.

83. The evaluative nature of the process is reinforced by the statutory language (“the Tribunal *may* certify”), which shows that the FTT has a discretion about certification even if it considers that there has been a default. No doubt it will weigh up whether the default appears to be serious enough to justify sending the matter to the higher court. If the FTT certifies in a case where there is plainly no prospect of a contempt being proved, or where it would be plainly disproportionate to certify, there can be an appeal: the same applies in reverse in respect of a refusal to certify.
84. All these considerations lead me to a firm conclusion that Farbey J and Lewis LJ have correctly interpreted Paragraph 8 of Schedule 6 and Section 61(4).
85. In contrast, Mr Moss’s interpretation, which finds favour with Phillips LJ, confuses the process of certification with the process of contempt. It rests on a literal reading of the statutory words that would lead to inefficiency and potential unfairness. It neither serves the interests of the parties nor the administration of justice:
 - 1) The enforcement process would be pointlessly onerous for applicants, who would be put to prove the same thing twice. That is likely to be undesirably discouraging to applicants, who are usually individuals facing institutions.

- 2) Although the interpretation is presumably considered to offer a layer of protection to respondents, it in fact deprives them of the protections inherent in the contempt process. There is a difference between allegations and findings, and we do not and should not recognise a process that allows for adverse findings without the protections that apply in courts with a contempt jurisdiction. Moreover, the suggestion that the FTT might adopt a streamlined procedure leading to a reasoned decision that a contempt of a higher court would have occurred is unworkable. It is unclear what streamlining might involve, but if respondents are faced with the prospect of shadow findings of contempt, they may with good reason resist an abbreviated procedure and it might, to say the least, be unfair to impose one upon them. In any case, a process that might loosely be described as 'contempt-lite' is, as I have said, objectionable in principle.
- 3) From the point of view of the administration of justice, duplication of effort would be unavoidable and conflicting findings an ever-present possibility. If ever a case demonstrated the unsatisfactory results of the alternative statutory interpretation, the present case is it.

86. I therefore conclude that when the FTT is asked to certify (or decides to do so itself) it is asking whether the conduct in question is of a kind that is capable of constituting contempt of court and, if so, whether it should be certified. It is not making findings of fact. Instead it is performing the role of a specialist tribunal engaged in managing its proceedings, taking a view of the issue in front of it and disposing of it accordingly. In the great majority of cases, the picture will be relatively simple; in the rare case where it is not, the FTT can decide whether it needs to investigate further in order to understand enough to make a certification decision, mindful of the limited nature of the decision. Approached in this way, certification decisions should be capable of being made in accordance with the overriding objective.

87. The appeal is dismissed.
