IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0061

BETWEEN:

R ACLAND

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

ON APPEAL FROM:

The Information Commissioner's Notice FS50419726

Dated: 5 March 2012

DECISION ON STRIKE-OUT

Subject matter

Rule 8(3)(c) The Tribunal Procedure (First-tier) (General Regulatory Chamber) rules 2009 No. 1976 (L.20)

S14 FOIA

Cases considered

Turner v Information Commissioner EA/2007/0106

Swain V Hillman [2001] 1 ALL ER (CA)

Rigby v Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103

Gowers v Information Commissioner and LB Camden EA/2007/0114

Decision of the Tribunal

The Tribunal upholds the Decision Notice dated 5 March 2012 and strikes out the appeal as having no reasonable prospect of success.

Dated 1 May 2012
Judge Chris Hughes

Reasons for Decision

1. This case arises out of a series of requests made by the Appellant of The Great Yarmouth and Waveney Primary Care Trust (the "Trust") in connection with the generic prescribing of medications and related issues. The requests were made on 24 August, 8 September and 9 September 2011 and comprised 16 separate requests.

2. The Trust provided some replies, and stated that some requests were repeated and therefore it did not have to reply to them. The Appellant complained to the Information Commissioner (the "Commissioner") who investigated and who concluded on 5 March 2012 that the Trust was entitled to rely on S14(1) and treat the requests as vexatious.

3. The Commissioner applied the five criteria which he has evolved in the light of decisions of this Tribunal:-

    - Whether compliance would create a significant burden in terms of expense and distraction;
    - Whether the request is designed to cause disruption or annoyance;
    - Whether the request has the effect of harassing the public authority or its staff;
    - Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and
    - Whether the request has any serious purpose.

4. the Commissioner concluded that although the request was not designed to cause disruption or annoyance, compliance would create a significant burden in terms of expense and distraction (§§ 24 – 38 of the decision notice); the requests had the effect of harassing the Trust or its staff (§§ 44 – 55 DN); the requests were obsessive (§§ 56 - 63 of the decision notice) and the serious purpose behind the requests did not outweigh these factors (§§ 64 – 78 DN).

5. By an Appeal received on 16 March 2012 the Appellant contested this decision on what may fairly be analysed as seven grounds:-

- That the ICO should only have considered whether the Trust was right or not in its handling of the requests and not the S14(1) vexatious issue
- Bias by the ICO
- The decision violates the Human Rights Act and in particular Article 6 of the Convention – the right to a fair trial
- The method by which the Commissioner concluded that the applications were vexatious was wrong
- That the substance of the underlying issues (dangerous drugs, illegal software to switch prescriptions to generic drugs, bribery of GPs) was such that the requests were not vexatious
- The extent of correspondence since 2004 was due to the Machiavellian conduct of the Trust
- The Appellant had not received much of the material which the Trust said that it had sent him

6. The Commissioner's reply argued that these grounds lack substance:-

- The Commissioner had to consider S14 since it had been raised by the Trust during his investigation
- The Commissioner rejected the claim of bias, which in effect flowed from the fact of an adverse decision and not from any evidence of bias
- The protections of the Human Rights Act with respect to the right to a fair trial do not extend to proceedings before the Commissioner
- The methodology for assessing vexatiousness was appropriate
- On balance the appellant' strong belief of these matters does not justify the request
- The Commissioner was satisfied that the requests would continue until the Trust agreed with the Appellant and the length and expense of dealing with these matters outweighed the "serious purpose"
- The commissioner noted that some of the disclosure of information had been made to the Appellant's associate but that this did not detract from the finding with respect to vexatiousness.

7. In his submissions with respect to this consideration of his Appeal under Rule 8(3)(c) the Appellant provided a helpful summary of his case:-

“a. it is established the PCT has paid cash to GPs to prescribe copy 2nd rate drugs made in one of 54 unregulated Chinese drug factories a country renowned for tens of thousands of babies being poisoned twice in recent years from baby milk products containing a bulk making additives. Drugs have additives.

b. it is established payments to private individual doctors or surgeries to coerce and pressure them into prescribing dangerous copy drugs is illegal.

c. it is established that circumventing the law using what might be illegal software to change GPs prescriptions if that software endangers lives or causes unexpected deaths of patients.

d. it is without doubt the submission by the Information Commissioner's staff using a sledge hammer against an elderly person not in good health using the might the State has empowered them with is: deliberate inhuman treatment causing very serious, cruel, intensive physical and mental suffering. That is degrading treatment and punishment arousing in me feelings of fear, anguish and inferiority capable of humiliation, debasement and deliberately meant to break my physical and moral resistance. It is abuse that at my age and health could kill me with a stroke and or cardiac arrest. That violate my human rights under Section 1 - Articles 2 [The right to life] and 3[inhuman and degrading treatment] of the Convention on Human Rights Act.”

Legal Framework

8. The Tribunal's powers with respect to this appeal are to be found in section 58 of FOIA. The Tribunal may uphold an appeal if under section 57 the Tribunal considers that the notice against which the appeal is brought is not in accordance with the law. Therefore, the Tribunal is concerned with grounds upon which it might be said that the DN was not in accordance with law. The tribunal does not take the Commissioner's decision again, rather its task is to consider the DN and to consider whether it can be impugned on legal grounds.

9. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provided at 8 (3):-

   "**the tribunal may strike out the whole or part of the proceedings if-**
   (c) the tribunal considers there is no reasonable prospect of the Appellant's case, or part of it, succeeding."

10. The test which the Tribunal applies in cases such as this is whether the appeal has a realistic prospect of success. In the case of *Turner v Information Commissioner 2007/0106* the Tribunal concluded that this test was analogous to the test under part 24 of the Civil Procedure Rules 1998. This makes provision for a claim which has no real prospect of success to be summarily dismissed. Guidance on the meaning of this test was provided in the case of *Swain V Hillman [2001] 1 ALL ER (CA)* by Lord Woolf MR who said that the words (no real prospect of succeeding) did not need any amplification as they spoke for themselves. The court (or in this case the Tribunal) must decide whether there is a realistic as opposed to fanciful prospect of success.

Consideration of the Issues raised by the Appeal

11. The Commissioner concluded that these applications were vexatious and that therefore the Trust was entitled to decline to respond to them. The first three grounds of appeal are entirely without foundation:-

    - The Commissioner needed to consider all the relevant legal questions in considering his decision – S14 was a matter which the Trust wished to rely upon and he found that the issue of vexatious had substance..
    - The DN showed a through and fair investigation; there was not one shred of evidence for bias.
    - The Commissioner is not a Court and to that extent Article 6 of the Convention does not apply. In any event he adopted a fair procedure and it is strongly arguable that a FOIA request does not fall within the rights protected by the convention.

12. The final four grounds largely turn on the nature of a vexatious request and in particular the substance of the Appellant's concerns.

13. Vexatious is not defined in the statute. The Commissioner has over the years, drawing on the decisions of this Tribunal, developed his guidelines as to how the question of vexatiousness may be approached. The guidelines have been endorsed by the Tribunal as a useful guide in *Rigby v Information Commissioner and Blackpool, Fylde and Wyre Hospitals NHS Trust EA/2009/0103.*

14. In order to consider whether a request is vexatious it is essential to look at the request in its context.. The Tribunal stated in *Gowers v Information Commissioner and LB Camden EA/2007/0114* that:-

"it is not only the request itself that must be examined, but also its context and history. A request which, when taken in isolation, is quite benign, may show the vexatious quality only when viewed in context. That context may include other requests made by the applicant to that public authority (whether complied with or refused), the number and subject matter of the requests, as well as the history of other dealings between the applicant and the public authority. The effect a request will have may be determined as much, or indeed more, by that context as by the request itself."

15. The Tribunal is satisfied that in order to come to a just decision it is required to understand the significance of the request in its context and its impact both for the requester and the public body receiving the request. In this case we have a well—documented history of contact between the Appellant and the Trust and its predecessors going back 8 years. The contacts have been voluminous. They have been marked by abusive comments about the Trust staff and allegations of serious criminal activity and corruption. The Trust have expended considerable effort to respond to the requests for information from the Appellant and from an organisation which it has rightly concluded is to all intents and purposes an agent of the Appellant (ssarmca). The Appellant has unsuccessfully attempted to launch judicial review proceedings on the issue. In a letter to the Commissioner the Trust noted:-

"In total, nine original and twenty supplementary requests for information about ScriptSwitch/prescribing matters were made between 4th November 2010 and 9th September 2011"

(the date of the third of the requests the subject of this appeal)

"Current members of staff who have maintained both professional and personal links with (former pharmacy adviser) have been given to understand that (a local pharmacist) has been the object of harassment for about a year and has reported matters to the police locally. It is alleged that (the Appellant) is harassing other NHS Staff, many in the legal profession including the PCT's solicitors. Staff at Great Yarmouth Mercury and people associated with Forces Reunited"

"*The ICO is invited to note that the request made by the Appellant and (his associated organisation) under the FOIA and the PCT's responses have been copied by (them) to such as the office of the Prime Minister, the office of the Deputy Prime Minister, the office of Andrew Lansley, Secretary of State for Health, the cabinet office, the Treasury, the National Audit Office, the Attorney General, the MHRA, the BMA, the GMC, the Patients Association; and both local and national newspaper and television media – none of these individuals or bodies has ever contacted the PCT in this regard."*

16. In considering the Appellant's summary of his case (paragraph 7 above) it is worth analysing the approach – in each case it is possible to discern an unwarranted statement or assumption or a link which simply cannot be sustained. With respect to what appears to be a central argument;-

"it is established payments to private individual doctors or surgeries to coerce and pressure them into prescribing dangerous copy drugs is illegal."

It is sufficient to observe that he has no evidence that the "copy drugs" are dangerous, and the payments to GPs around prescribing incentives are no different from the many sorts of payments GP's receive from the NHS in respect of the provision of healthcare to their patients. These payments are made under statutory authority and are lawful.

17. The arguments which he puts forward in his summary are all equally without merit.

18. It is important to bear in mind that vexatious is an ordinary term in common use. Guidelines, however useful, should not become a straightjacket or lead to an over-formulaic approach to issues. The Oxford English Dictionary definitions of "vexatious" extend over several columns. A working summary of the definition however is "tending to cause trouble or harassment by unjustified interference." Within this definition the issues raised by the Commissioner's five criteria – the amount of work and expense caused to the public body, the impact of staff feeling harassed, whether done to annoy, whether obsessive or manifestly unreasonable, whether lacking in serious purpose - all fit easily. It is important to take all these issues into account as they arise, however any one of these may be of great importance and others may not figure at all. They need to be used flexibly and in the light of the context of the request. It may be argued that the term "obsessive" is unlikely to add significantly to the term "manifestly unreasonable" which can fairly be seen as encompassing the former meaning; which indeed is an expression very similar in meaning, in this context, to vexatious.

19. In considering whether the history of this matter shows that the requests are vexatious or manifestly unreasonable, I am satisfied that the investigation made by the Commissioner using his five criteria identified many issues of concern regarding the applications for information. In particular I note that the burden on the Trust and the harassment of the Trust and the staff and others concerned have clearly been very substantial. There is however an aspect of the approach where I consider that the Commissioner has gone somewhat astray. In addressing the issue of serious concern the Commissioner has not considered the grounds upon which a serious concern is held. The grounds in this case are characterised by a lack of evidence for very firmly held beliefs which have been held for a protracted period of time, have driven his behaviour to a significant extent to his detriment and seems associated with a degree of grandiosity and some paranoia. In such a case as this, the individual's "serious concern" should not be given any substantial weight in the balance – a serious concern should be considered objectively and not subjectively. There is very little indication that there is any public concern with respect to the issues he has raised with such defamatory force for so

long. I am satisfied therefore that in considering this case, the Commissioner has, if anything, given too much weight to the concerns of the Appellant in striking his balance, since there is a lack of objective justification for those concerns which are delusional.

20. In all the circumstances of the case I am therefore satisfied that all the grounds advanced are without merit, the decision of the Commissioner is soundly based and there is no reasonable prospect of the case succeeding. Accordingly I strike this Appeal out under Rule 8(3)(c) of the Tribunal's rules.

Signed:
C Hughes
Judge
Dated: 1 May 2012

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UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0061

BETWEEN:

R ACLAND

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

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1. On 1 May 2012 the appeal to the First-tier Tribunal against a decision by the First Respondent that the request for information was vexatious was struck out as having no reasonable prospect of success.

2. The Appellant has sought leave to appeal against that decision to the Upper Tribunal. In that appeal he has repeated details of his underlying dispute with the relevant public body, fallacious claims as to bribery and irrelevant points with respect to the ECHR which were previously submitted to the Tribunal.

7. The Appellant has not identified an error of law in the decision of the Tribunal to strike out his Appeal. His appeal therefore has no realistic prospects of success and accordingly the Tribunal does not grant permission to appeal to the Upper Tribunal.

Signed:
C Hughes
Judge
Dated: 7 May 2012