



Appeal number: EA/2018/0036

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Dr REUBEN KIRKHAM

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

Before:

Judge Alison McKenna (CP)

Sitting in public at Field House on 5 March 2019

The Appellant appeared in person

The Respondent was represented by Leo Davidson, counsel

DECISION

1. The appeal is dismissed.

REASONS

A: Background to Appeal

2. On 15 May 2017, the Appellant wrote to the Information Commissioner's Office ("ICO"). His letter contained (*inter alia*) a request for the following information:

"The number of cases since the Fish Legal decision was issued (the 16 February 2015) where the ICO has issued a Decision Notice by accident...As I understand it, these are coded as a specific category in the ICO's database.

I also ask for copies of all these accidental decision notices.

[And] All correspondence with the First-tier Tribunal administration concerning such matters....."

3. The ICO clarified the Appellant's request on 27 May 2017 as follows:

"(1) We understand you are asking for the number of times and copies of final letters the ICO has written to a complainant to advise them that the organisation they have complained about is not a public authority (Not PA) or otherwise the matters raised are not eligible for consideration under s. 50 Of the Freedom of Information Act 2000 (Not s.50), where the ICO have failed to advise the individual of their right to appeal to the First-tier Tribunal.

(2)Again, we understand that you are asking us to provide you with all correspondence exchanged between the ICO and the First-tier Tribunal administration staff that relates to any appeal or query raised with the Tribunal by any individual who has received a letter from the ICO advising them that the organisation they have complained about is not a public authority (not PA) or otherwise the matters raised are not eligible for consideration under s. 50 of the Freedom of Information Act 2000 (Not s.50)."

4. The ICO provided the Appellant with its response to the clarified request on 22 June 2017. This explained that it was not obliged to comply with either of the requests because to do so would exceed the relevant costs limit. The ICO maintained its view on review on 21 July 2017. The Appellant complained to the Respondent.

5. The ICO subsequently disclosed information within the scope of the first part of the clarified request. The Appellant nevertheless wished to continue with this complaint on both parts of the clarified request.

6. The Respondent issued Decision Notice FS50696426 on 5 February 2018, in which she found that the ICO had complied with ss. 12 and s. 16 of the Freedom of Information Act 2000 ("FOIA") and required no steps to be taken.

B: Appeal to the Tribunal

(i) Pre-Hearing

7. The Appellant's Notice of Appeal dated 27 February 2018 appended grounds of appeal which were six pages long but clearly identified only two grounds of appeal, at paragraphs 13 and 15 as follows:

"Ground 1

13. The time counted in this request is impermissible, as the ICO has a legal obligation to compile the information. As this was not addressed by the Information Commissioner in her Decision Notice I simply repeat what I said in my internal review request.....

...

Ground 2

15. The ICO's calculations are in any event sufficiently misconceived as to not amount to an estimate, but a failure to understand how their own systems work."

8. The Appellant has made numerous interlocutory applications in this matter. The Tribunal issued Rulings on 14 March, 10 April, 20 April, 9 May, 5 June, 19 June, 26 June, 28 June, 21 November and 21 December 2018. There were also Directions on 11 January 2019. There was an oral case management hearing on 21 November 2018. The Upper Tribunal also refused the Appellant's applications for disclosure of the information requested in this case (albeit made in separate proceedings) on 13 July and 26 October 2017. I have no doubt that this matter could have been concluded more expeditiously and cost-effectively if the Appellant had not tested the boundaries of accepted Tribunal procedure quite so relentlessly.

9. Amongst the preliminary matters which were determined were: (1) the Appellant's wish to be treated as an expert witness in his own case (refused); (2) the Appellant's wish to conduct the hearing in a laboratory in Newcastle (refused); the Appellant's wish to conduct a live computer search in the hearing (refused); (4) the Appellant's application for an assessor to be appointed (refused); the Appellant's application for a debarring Order against the Respondent (refused); the Appellant's application for the Respondent to file evidence in advance of the Response (refused); the Appellant's application for all case management to be conducted by a Judge and not by the Chamber's Registrar (refused).

10. I also found it necessary to make a Direction under rule 14 (1)(a) of the Tribunal's Rules in respect of the Respondent's witness evidence, after the Appellant proposed to publish it on the internet and invite the public's comments to assist his cross-examination. I continued that Direction at the hearing pending final determination of the appeal. I give further directions about that matter below.

11. The Respondent's initial Response, dated 4 April 2018, maintained the analysis as set out in the Decision Notice. It was noted that the Appellant has not challenged the public authority's aggregation of the two requests for the purposes of applying s. 12 FOIA. With reference to the disclosure that had by then taken place in respect of the first part of the

clarified request, it was submitted that the time taken to comply with that part of the request alone had taken an amount of time which exceeded the cost limit.

12. Following the promulgation of the Upper Tribunal's Decision in *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC)¹, the Respondent was directed to file a fresh Response to this appeal, which she did on 21 May 2018. The Respondent's pleaded case in her fresh Response was, in relation to the Appellant's ground one, that there had been no separate legal obligation to compile the requested information either in the context of on-going litigation or under her own publication scheme, so that the time included in the estimate was all attributable to permissible tasks. In respect of the Appellant's second pleaded ground, it was stated that the ICO had given sufficient detail of how the estimate was reached to meet its obligations and that its estimate was reasonable. Whilst it was acknowledged that the Appellant's suggested computerised method of searching was one way to reach an estimate, it was asserted not to be the only permissible approach.

13. In compliance with case management directions dated 9 May 2018, the Respondent filed and served on 22 May 2018 the evidence on which she relied in support of her estimate. This was (i) a letter to the ICO dated 8 December 2017; (ii) a letter from the ICO dated 10 January 2018; (iii) an extract from the appeals log referred to in items (i) and (ii) showing the information which the ICO captures in relation to appeals. This evidence is considered further below.

14. The Appellant did not file a Reply to the second Response, despite the Registrar's 9 May directions referring to his request to delay doing so until he had seen all the Respondent's evidence. Instead, on 14 June 2018 the Appellant applied for the Respondent to be disbarred from taking further part in these proceedings on the basis that she had provided insufficient evidence to substantiate her estimate. In the alternative, he applied for a generalised form of disclosure direction. That application was refused by the Registrar on 19 June and by myself on reconsideration on 28 June 2018.

(ii) The Hearing

15. The Tribunal convened an oral hearing at the Appellant's request. The panel comprised a Judge sitting alone in accordance with paragraph 11 (3) (iv) of the Practice Statement on Composition of Tribunals in this Chamber.

16. The Appellant represented himself and made submissions with the assistance of a 70-slide power point presentation and diagrammatic overview of his case, which I have added to the bundle. The Respondent was represented by Leo Davidson, counsel, who produced a helpful skeleton argument, also added to the bundle.

¹ https://assets.publishing.service.gov.uk/media/5ae969fc40f0b631578af0c5/GIA_1055_2016-00.pdf

17. I had before me an agreed bundle of nearly 200 pages and an authorities bundle. The Appellant submitted some additional documents in a supplementary bundle (175 pages). The Appellant submitted at the oral hearing that some of his written submissions had been omitted from the bundle in error, so I gave him permission to file and serve these after the hearing. I have received and added to the bundle the document he sent, which was his application dated 14 June 2018, referred to at paragraph 14 above.

18. I refused the Appellant permission to make closing submissions in writing after the oral hearing. I agreed that he should be provided with a copy of the audio tape of the hearing, subject to the usual formalities being completed. I understand that he now has the tape.

C: The Law

19. Section 12 of FOIA provides (where relevant) as follows:

“(1) Section 1 (1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2)...

(3)In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases

(4)...

(5)The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

20. Regulation 4 (3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 provides as follows:

“(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) Determining whether it holds the information,

(b) Locating the information, or a document which may contain the information,

(c) Retrieving the information, or a document which may contain the information,

(d) Extracting the information from a document containing it”.

21. The Upper Tribunal’s Decision in *Kirkham v Information Commissioner*² concerned this Appellant’s submissions about s. 12 FOIA in another case. Upper Tribunal Judge Jacobs agreed with the approach of UTJ Markus QC in *Cruelty Free International v Information*

² There are several reported cases with this name. I refer here to the decision of UTJ Jacobs dated 11 April 2018 and hyperlinked at footnote 1 above.

Commissioner [2017] UKUT 0318 (AAC), that the costs of compliance will be related to the way in which the public authority holds the information; that the method adopted to making an estimate of costs must be capable of producing a result with the precision required by the legislation in the circumstances of the case; and that the Tribunal should take a sceptical approach to estimates, asking the public authority to provide evidence of how an estimate was undertaken, with follow up questioning if necessary.

22. At paragraphs 17 to 20 of its Decision, the Upper Tribunal described the required approach to s.12 FOIA as follows:

17. On a complaint, the issue for the Commissioner is whether the public authority dealt with the request in accordance with Part I of FOIA (section 50(1)). On appeal, the issue for the First-tier Tribunal is whether the Commissioner's decision notice was in accordance with the law (section 58(1)). The latter in effect requires the First-tier Tribunal to consider afresh whether the public authority dealt with the request in accordance with Part I.

18. Two issues arise under Part I. The first is whether the authority made an estimate. This arises under section 12. If it did not make an estimate, it is not entitled to rely on the section, as the existence of an estimate is a precondition for the application of the section. If it did, the second issue is whether the estimate included any costs that were either not reasonable or not related to the matters that may be taken into account. This arises under regulation 4(3). Both issues focus on the authority, on how it holds the information, and how it would retrieve it.

*19. The first issue is entirely subjective to the public authority. That is the language of section 12; it is personal to the authority. The cost of compliance will be related to the way that the authority holds the information. This is consistent with Upper Tribunal Judge Markus's analysis in *Cruelty Free International v Information Commissioner* [2017] UKUT 318 (AAC)³. I agree with her that it does not matter if the way in which the information is held fails to comply with other legal obligations than FOIA. It might be otherwise if the authority had deliberately distributed the information in a way that would always allow it to rely on section 12. That is not the case here and it was not the case in *Cruelty Free*.*

20. The second issue contains an objective element. The issue arises under regulation 4(3) of what costs 'a public authority ... reasonably expects to incur in relation to the request'. The word 'reasonably' introduces an objective element, but it does so as a qualification of the costs that the authority in question expects to incur. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. This mixture of subjective and objective elements is comparable to the approach taken to the

³ https://assets.publishing.service.gov.uk/media/599d407ee5274a28b5790955/GIA_0724_2016-00.pdf

interpretation and application of similar language in what is now regulation 100(2) of the Housing Benefit Regulations 2006.

23. The Upper Tribunal, in dismissing the Appellant's appeal, concluded that the appellant's "rigorous scientific approach" to s. 12 FOIA operated at an evidential level but not as an aide to statutory interpretation.

24. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

D: Evidence

25. In support of his appeal, the Appellant filed a witness statement dated 15 December 2018, in which (contrary to the Tribunal's earlier Ruling) he offered expert opinion evidence. I am content to admit the witness statement into evidence but, as I explained at the hearing, I am not bound to rely on the opinions he has expressed. I note this his statement is not presented in a format generally required for expert evidence – see CPR part 35 and PD 35. Nor could it be, given that the Appellant would be unable to confirm his independent opinion in a matter to which he is a party. I acknowledge that the Appellant is a computer science expert, but that does not make him eligible to assist the Tribunal as an expert witness in his own appeal. I reject his submission that Judge Jacobs treated him as an expert witness in the Upper Tribunal.

26. The Appellant's witness statement made scant reference to his pleaded case. It was overwhelmingly concerned with his assertions about how the ICO should and could carry out an automated search within the costs limit. He explains that data stored on a computer can be searched for by using a Command Line Interface ("CLI") or a Graphical User Interface ("GUI"). He suggests at paragraph 24 that the Tribunal should ban public authorities from relying on GUIs when undertaking s. 12 FOIA estimates. He comments that the ability to make SQL queries of a database is so basic a skill that it is part of the GCSE Computing Syllabus. He exhibits the BBC's published GCSE revision materials. He rejects the idea that the automated searches he has proposed in correspondence with the ICO could compromise its data security in any way because he says the relevant searches could be executed on a

backup copy of the data base and do not need to be run on a live system. He implicitly accepts at paragraphs 40 to 44 that the ICO would need to buy in external expertise to carry out the searches he has suggested but expresses the view that this would be a sound investment for responding to future information requests. The Appellant exhibited to his witness statement a journal article that he has himself written and published about s. 12 FOIA and comments in his witness statement about how well-received it has been by the academic community, without producing any evidence in support of that assertion.

27. The Respondent's witness evidence was from Neil Smithies, who is the ICO's Head of Digital and IT Architecture. He filed a witness statement dated 16 January 2018. He supported the ICO's position, expressed in the earlier correspondence, that it would be necessary to conduct a manual check of each and every appeal case folder in order to comply with the Appellant's request. In particular, he explains that this is because the staff within the ICO have levels of computer access limited to the requirements of their role for security reasons. Mr Smithies accepts that the ICO's database could be searched using a CLI or GUI approach but notes that CLI applications are generally used by staff in IT departments and not by case officers. He says that this is as true for the ICO as it is for other public authorities and businesses. He confirms that no GUI Macros or Bots are used within the ICO's computer environment and that SQL scripts are used only by a small number of specialist staff. He states that there is no facility to search the content of the database after it is backed up and that the skillsets to complete the searches suggested by the Appellant do not exist within the ICO's internal IT team. It would therefore be necessary to buy in outside expertise in order to proceed as the Appellant has suggested.

28. Mr Smithies' evidence was that, in order to conduct the CLI searches advocated by the Appellant, a systems change would be required. A business case would need to be made for installing an additional application (including the purchase costs of a licence), followed by an information security assessment, installation, testing and training. He explains that, for security reasons, the USB ports of staff computers are disabled so that the suggested application could not be run directly from a USB stick.

29. Turning to the ICO's computer system for storing information, Mr Smithies explains that, where no Decision Notice has been issued, a folder is unlikely to be created and so the correspondence is unlikely to be saved and would usually be deleted from the ICO's mailbox after six months.

30. Both witnesses were cross examined at the oral hearing on 5 March 2019. The Appellant accepted in response to Mr Davidson's questions that he had never been employed by a public authority or worked as a systems architect. The Appellant accepted that he was suggesting the ICO should "*download software*" but did not accept that his suggested approach involved a significant change to its systems, only a "*trivial*" change.

31. The Appellant cross-examined Mr Smithies about his qualifications and experience. Mr Smithies accepted that he does not have a degree in computer science but explained that he has nineteen years' experience in public sector IT systems. He explained that the ICO buys in expertise in relation to the maintenance and management of its database and does not rely on its own staff for this work. The Appellant put to Mr Smithies that, as a rogue member of staff could access the database in breach of his or her terms and conditions of employment, his

security-based objection to the Appellant's suggested methods of searching was untenable. Mr Smithies disagreed with this approach to data security. Mr Smithies accepted that the Appellant's suggested method of searching using Excel was possible but said that there are no staff who have the ability to undertake such searches so it would involve chargeable work from the external provider which fell outside of the current contractual arrangements. In re-examination, Mr Smithies clarified that anyone with administrative access to the ICO's systems was required to be security cleared at a higher level than the usual civil servant.

32. As noted at paragraph 13 above, the Respondent's case also relied on the following documentary evidence: (i) a letter from the ICO case officer to the Respondent dated 8 December 2017 asking for details of its estimate for s. 12 FOIA purposes; (ii) a letter from the Respondent to the ICO case officer dated 10 January 2018 explaining the basis of the s. 12 FOIA estimate in this case (pages 129 to 131 of the main hearing bundle); (iii) an extract from the appeals log referred to in items (i) and (ii) and showing the information which the ICO captures in relation to appeals (page 88 of the bundle). This documentary evidence sets out the ICO's approach to the estimate as follows:

"In order to respond to the first part of the request, we had to manually check 402 closed cases to locate the information he was looking for as Antonia had established that between 16 February 2016 and 27 May 2017 (the date of the clarification) we had closed 402 FOIA cases under the categories "Not PA" and "Not s50". She carried out a sampling exercise and established that on 20 of these cases locating whether or not we had advised the complainant about the information tribunal within our correspondence took approximately two minutes per case. Of these cases, only one included advice to the complainant of their right to appeal to the tribunal. Therefore, based on these calculations we estimated that locating the information would take over 13 hours.

In respect of the second part of the request, our records indicated that between 16 February 2015 and 27 May 2017 we had received notification of an appeal to the Tribunal 648 times. Whilst basic details of these appeals are kept within our FOI appeals log, the Log does not include the level of detail we need to be able to locate those appeal cases that relate specifically to issues concerning "Not PA" or "Not s50" outcomes.

As before, in order to locate the information we would need to individually check each of these 648 appeal cases, and in particular the opening correspondence between the Tribunal administration staff and the ICO. We again estimate this search would take 2 minutes per case. Therefore, based on these calculations we estimated that locating the information would take over 21 hours".

E: Oral Submissions

33. It is notable that, despite having been a party to the Upper Tribunal litigation in which he received UTJ Jacobs' Decision, the Appellant continued to pursue in his oral submissions the "rigorous scientific approach" which had been rejected by the Upper Tribunal.

34. The Appellant's submissions at the oral hearing (accompanied by his 70-slide power point presentation) raised numerous issues, not all of which clearly advanced his pleaded case. They may be summarised as follows: expert witness status (slides 1 to 6); the estimate given to part one of the request in this case (slides 7 to 21, 30 to 31, 51 to 57); generalised submissions about searching (slides 22 to 29); submissions on whether the requested information was held for the purposes of FOIA (slides 32 to 33); a suggested alternative method of searching in Excel (slides 35 to 39); submissions on the estimate in relation to part two of the request (slides 41 to 47); "rounding up" (slide 48); "sampling" (slides 49 to 50); his proposed alternative means of estimating (slides 58 to 70).

35. The Appellant also submitted that the Tribunal should disapply the Fees Regulations as incompatible with the Human Rights Act and article 10 ECHR. Further that the Tribunal should rule on whether there had been a data loss in this case or whether the information requested was still "held" by the ICO. Finally, it was noticeable that he had dis-aggregated his request for the purposes of his submissions whilst having previously accepted their aggregation.

36. I asked the Appellant at the oral hearing about the fact that his grounds of appeal did not challenge the particular methodology of the Respondent's estimate, whereas he had in his oral submissions devoted much time to challenging the practice of sampling, the practice of "rounding up" and the adequacy of the evidence in support of the estimate. He responded that he had clearly raised these issues on a number of occasions throughout the life of the case so that they ought to have been considered "in play".

37. I also asked the Appellant at the hearing whether his ground one was still pursued as he had not referred to it once in his submissions. He said that things had moved on, so he had dropped it.

38. Mr Davidson's submissions in reply were that the Respondent's time estimate was reasonable. It was submitted that reasonableness for the purposes of FOIA did not require the technical approach advocated by the Appellant. The Appellant's suggested approach was not so clearly preferable as to render the ICO's estimate unreasonable. In particular, Mr Smithies' evidence was that the ICO did not have the technical capability, in terms of its systems or its staff capability and their permitted level of access, to undertake the computerised searches the Appellant had suggested. The Respondent's evidence clearly set out the security concerns which Mr Smithies had about the Appellant's suggestions, together with his evidence that external expertise would be required to be bought in and any new applications risk assessed before staff could be trained to use them. In short, it was for the ICO itself to determine its IT infrastructure and it had made a realistic estimate taking these arrangements in to account.

39. It was submitted by Mr Davidson that the estimate undertaken by the ICO and of which there was evidence before the Tribunal had been reached taking into account the ICO's existing systems and processes, as was required by UTJ Jacobs' Decision. As to the Appellant's challenge to the sufficiency of the actual methods used, Mr Davidson responded that this challenge had not formed any part of the Appellant's grounds of appeal and that he had actually confirmed that this was not part of his pleaded case at paragraph 12 (a) of the

long “grounds of appeal” document which stated “...*the actual time it took the ICO is not directly relevant*”.

40. Mr Davidson submitted that this Tribunal was not at liberty to disapply the law in favour of the Appellant’s preferred approach to s. 12 FOIA. Also, that the issue of whether the information was “held” under s. 1 FOIA was not at issue in this case.

41. The Appellant used his opportunity to have the final word at the oral hearing by stating that there was no meaningful distinction between him submitting that there was not an estimate and submitting that the estimate was not reasonable. He asked rhetorically what was the point of the Tribunal if it just rubber-stamped the public authority’s self-certification of an estimate. He submitted that s. 12 FOIA should be revised to refer to electronic searches.

F: Conclusion

42. It seems to me that the only aspect of the Appellant’s oral submissions which may fairly be taken to advance his pleaded case were that the ICO’s estimate was not entitled to be treated as a valid estimate, because it involved “self-certification” (ground two) . Nevertheless, in considering whether there is an error of law in the Decision Notice, I have asked myself whether the ICO’s costs estimate might be considered unreasonable more generally, in the light of the approach set out in the authorities to which I was referred. Although this issue was not clearly pleaded by the Appellant, Mr Davidson responded to it ably in his oral submissions.

43. I note that UTJ Jacobs considered in the Appellant’s case (see footnote 1) the need for a Tribunal to consider critically the basis on which a public authority’s estimate was reached and to ask questions about its approach, if necessary. It seems to me that the Appellant’s submissions about “self-certification” seek to elevate this principle to one of the Tribunal approaching the public authority’s evidence from a starting point of assumed dishonesty or bad faith. I consider that, if that were ever to be the correct approach, there would need to be an evidential basis for putting a public authority to proof that it was respectful of its legal obligations. I have seen no such evidence in this case.

44. Having considered the documentary evidence produced by the Respondent (see paragraph 32 above), I am satisfied that the Decision Notice was correct in concluding that the ICO’s costs estimate was reasonable. Following *Cruelty Free International*⁴, I find that the ICO’s estimate in this case involved a straightforward practical assessment of its real-world situation. I note that the estimate was based upon the application of a considered process, which was used as the basis for its calculation. I found no need to ask further questions about that exercise.

45. I have gone on to consider whether the Appellant’s suggested alternative approaches to computer searches raised an alternative approach which was so obvious that it should not be ignored. I have concluded that his approach is one involving the technical competence of a computer science academic, and not one that may reasonably be expected of a public authority. I accept Mr Smithies’ evidence that the ICO lacks the applications and technical

⁴ Hyperlinked at footnote 3 above.

ability to conduct the Appellant's suggested searches in-house and I find that it is beyond the scope of s. 12 FOIA for the ICO to buy in additional expertise to conduct a search for requested information.

46. Applying UTJ Jacobs' approach (see paragraph 22 above) I conclude that the ICO did make an estimate so that it was entitled to rely on s. 12 FOIA in response to the Appellant's request. Secondly, (and it has not been argued to the contrary) I find that it did not take into account any impermissible matters in making its assessment of the costs likely to be incurred in complying with the Appellant's request.

47. For all these reasons, I am satisfied that this appeal must be dismissed.

G: Costs

48. It seems to me that the Appellant's conduct of these proceedings may have been such as to engage the Tribunal's costs jurisdiction under rule 10. I regard many if not most of his interlocutory applications in this matter as having been entirely without merit. I note in particular the Appellant's persistence with his "rigorous scientific approach" to s. 12 FOIA, notwithstanding the fact that it was disapproved of by the Upper Tribunal in proceedings brought by him a year ago. As I have found, he strayed a very long way from his pleaded case in making his submissions at an oral hearing.

49. I take into account the fact that the Appellant is not legally qualified. Nevertheless, his pursuit of applications to this Tribunal is sufficiently frequent to be regarded as occupational. He is an intelligent man and his frequent interlocutory applications demonstrate his familiarity with the Tribunal's rules of procedure. For these reasons, I do not regard his status as a litigant in person as taking him outside the scope of rule 10 in these circumstances.

50. I invite the Respondent to make an application under rule 10 (1) (b) or to inform the Tribunal within 14 days that she does not wish to do so. I refer both parties to the Decision of the Upper Tribunal (Lands Chamber) in *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC)⁵, which sets out the principles I would apply in determining an application for costs under the Tribunal Procedure Rules.

H: Rule 14 Direction

51. I intend to discharge the rule 14 direction I made in relation to Mr Smithies' witness statement with effect from the date fourteen days after the date appearing below. I have taken into account the guidance issued by the Court of Appeal in *Cape Intermediate Holdings Limited v Dring*⁶, and the role that the witness statements relied on in proceedings may play in helping the public to understand a judicial determination. The Respondent is at liberty to

⁵ <https://www.bailii.org/uk/cases/UKUT/LC/2016/290.html>

⁶ <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1795.html>

apply on notice for a continuation of my Direction within 14 days, in which case I will issue further directions.

(Signed)

ALISON MCKENNA

CHAMBER PRESIDENT

DATE: 8 April 2019
PROMULGATED: 11 April 2019

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