



Case Reference: EA/2022/0039 GDPR

NCN: [2023] UKFTT 459 (GRC)

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

Heard: by determination on the papers

Heard on: 31 May 2023

Decision given on: 02 June 2023

Before: Judge Alison McKenna

Mr G BRIDA

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

**RULING on Application for Permission to Appeal:
Permission is Refused**

REASONS

1. On 6 April 2023, the Registrar refused to extend time for this Notice of Appeal to proceed. By application dated 20 April 2023, the Applicant 'renewed' his application. On 28 April 2023, I considered the matter afresh and concurred that the extension of time should not be granted.
2. Noting that I had discretion to extend the time limit under rule 5 (3) (a) of the Tribunal's Rules, I considered the Upper Tribunal's decisions in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC).
3. Applying the recommended approach, I found: (i) that the purpose of the time limit is to ensure that proceedings are conducted in an orderly way and that the principle of finality in litigation may be observed; (ii) that the period of delay was 131 days, which is a significant period; (iii) that the reason for the delay was a good one; (iv) and (v) that the consequences for the parties of extending or not extending time were that if I refused, the proceedings would be brought to an end today and if I agreed the Information Commissioner would be obliged to file a Response to the out of time Notice of Appeal.
4. The Applicant sought an Order under s. 166 DPA 2018. It was undisputed that the ICO gave him an outcome letter on his complaint (dated 14 December 2022), albeit one with which he did not agree. The Applicant filed his Notice of Appeal on 13 January 2023 in which he asked the Tribunal to direct a fresh investigation of his complaint.

5. I explained that the powers of this Tribunal in determining a s. 166 application are limited to those set out in s. 166 (2) DPA 2018. In order to exercise them, the Tribunal must be satisfied that the Commissioner has failed to progress a complaint made to the ICO under s. 165 DPA 2018. The jurisdiction to make an Order is limited to circumstances in which there has been a failure of the type set out in s. 166 (1) (a), (b) and (c). This Tribunal has no supervisory jurisdiction in relation to the handling of a complaint to the Information Commissioner's Office and the Tribunal may not review the Information Commissioner's decision to take no further action in relation to a complaint. That view has been frequently expressed by the Upper Tribunal and was also recently taken in the High Court by Mostyn J. in *R (Delo) v ICO* [2022] EWHC 3046 (Admin)¹ at [128] as follows:

“...Sections 166(2) and (3) allow the Tribunal to order the Commissioner to take steps specified in the order to respond to the complaint. In my judgment, this would not extend to telling the Commissioner that he had to reach a conclusive determination on a complaint where the Commissioner had rendered an outcome of no further action without reaching a conclusive determination. This is because s. 166 by its terms applies only where the claim is pending and has not reached the outcome stage. It applies only to alleged deficiencies in procedural steps along the way and clearly does not apply to a merits-based outcome decision.”

6. In this case, it was clear that the ICO progressed the complaint and informed the Applicant of the outcome decision. In the light of Mostyn J.'s judgment, I considered that the outcome letter (and case review letter) served to deprive the Tribunal of jurisdiction under s. 166 DPA, as the complaint could no longer be said to be 'pending' when the Notice of Appeal was lodged.
7. I conclude that, if I were to extend time to allow the Notice of Appeal to proceed in this case, then I would immediately have proceeded to consider a strike out of the appeal under rule 8 (2) (a) on the basis that the Tribunal has no jurisdiction to determine it. Such a strike out would be mandatory.
8. In all the circumstances, I concluded that it was not appropriate to exercise my discretion to extend time to admit this Notice of Appeal, and so I refused to do so.
9. By an application dated 11 May 2023, the Applicant now applies for permission to appeal against my ruling of 28 April. His grounds of appeal are that:
- (i) I misdirected myself on the law in relation to the Tribunal's jurisdiction under s. 166 DPA 2018, and should have preferred the Upper Tribunal's conflicting Decision to the High Court's judgment in *Delo*;
 - (ii) I also misdirected myself as to the law because the part of Mostyn J's judgment in *Delo* referred to is *obiter dicta*;
 - (iii) The Applicant's Notice of Appeal did not seek to re-litigate an earlier issue but rather to compel the Information Commissioner to comply with his legal duties;
 - (iv) That the reasoning in my Ruling of 28 April was inadequate;
 - (v) That I misdirected myself as to the law regarding the proposed rule 8 (2) (a) strike out because it would have been necessary to give the Applicant an opportunity to make further submissions under rule 8 (4);
 - (vi) There are strong public policy reasons for granting an extension of time in this case.
10. I have first considered in accordance with rule 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 whether to review my Ruling of 28 April 2023 but have decided not to undertake a review, as I am not satisfied that there was an error of law in the Decision.
11. I have considered whether the grounds of appeal identified *arguable*. This means that there must be a realistic (as opposed to fanciful) prospect of success – see Lord Woolf MR in *Smith v Cosworth Casting*

¹ [BEN PETER DELO, R \(on the application of\) v THE INFORMATION COMMISSIONER & Anor - Find case law \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

Processes Ltd [1997] 1 WLR 1538. I have concluded that the grounds are not arguable for the following reasons. Firstly, I note that the applicability and the application of the *Data Select* test is not challenged. This is of course the material basis for the Ruling made. Further, as to (i) *Delo* is the most recent and authoritative statement of the Tribunal’s jurisdiction under s. 166 DPA 2018 and I was entitled to follow it in preference to the older UT Decisions; As to (ii) I disagree that this is arguable; As to (iii) this is a point to be made in a judicial review – the Tribunal has no power to make the direction suggested; As to (iv) I disagree that this is arguable; As to (v) I entirely agree. I did not say that I would summarily strike out the appeal but would proceed to consider such a strike out. This would of course have included receiving the Appellant’s further comments under rule 8 (4) before making a final decision. There was no error of law as suggested. I was entitled to consider the prospects of the Notice of Appeal proceeding in considering whether to exercise my discretion. As to (vi) this is not an applicable test for granting permission to appeal from a first instance decision.

12. For all these reasons, I now refuse permission to appeal.

(signed)
Judge Alison McKenna

Dated: 31 May 2023

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