

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 21 August 2018 under file reference EA/2017/0166 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The Upper Tribunal is not in a position to re-make the decision under appeal. The Appellant's appeal against the Information Commissioner's Decision Notice FS50661288, dated 20 July 2017, is remitted to be re-heard by a differently constituted First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

**DIRECTIONS**

**The following directions apply to the re-hearing:**

- (1) The new First-tier Tribunal should not involve either the tribunal judge or either of the members who were previously involved in considering this appeal on 21 August 2018 under FTT file reference EA/2017/0166.
- (2) The new First-tier Tribunal should also not involve either the tribunal judge or either of the members who were involved in considering the earlier appeal on 9 March 2016 under FTT file reference EA/2015/0226.
- (3) These Directions may be supplemented by later directions issued by the Tribunal Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

This decision is given under section 12(2)(a), 12(2)(b)(i) and 13(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

## REASONS FOR DECISION

### **The context**

1. Mr Coombs, the requester and the appellant in these proceedings, is conducting ongoing research into how selective schools determine which children are admitted. The University of Durham, the public authority, has a unit known as the Centre for Evaluation and Monitoring (or CEM), which is one of the two main providers in the UK of 11+ testing used by selective senior schools. CEM generates a significant income stream for the University.

### **The immediate background**

2. Mr Coombs made a freedom of information request to the University of Durham for details of candidates' test marks for 11+ exams set by CEM. His request was limited to numerical information. The University disclosed some of the requested information but withheld other information under section 43(2) of FOIA (the commercial interests qualified exemption). Mr Coombs lodged a complaint with the Information Commissioner, whose decision was that the remaining withheld information was exempt from disclosure under section 43(2), as the public interest in maintaining the exemption outweighed the public interest in disclosure. The First-tier Tribunal subsequently dismissed Mr Coombs's appeal against the Information Commissioner's decision notice. Mr Coombs then appealed to the Upper Tribunal.

### **The Upper Tribunal's decision: the short version**

3. The short version of my decision is that the First-tier Tribunal (from now on, 'the FTT') made a material error of law in its approach in terms of the inadequacy of its reasoning. I therefore allow Mr Coombs's appeal. I also set aside the FTT's decision. I am not in a position to re-make the FTT's decision myself. I consider the fairest mode of disposal is to remit (or send back) the case back for re-hearing before a differently constituted FTT. The longer version of my decision is as follows.

### **Mr Coombs's FOIA request and the University of Durham's response**

4. Mr Coombs's original FOIA request was for the test marks for candidates sitting CEM's 11+ test for the autumns of 2014, 2015 and 2016. In particular, he requested, for each of the sub-test components (numeracy, verbal reasoning and non-verbal reasoning), the raw test scores for each test before any age weighting was added ('the 2a information') and the raw test score for each test with age weighting added (or the amount of the age weighting if that was how it was recorded) ('the 2c information'). Whilst the University disclosed some of the other requested information in the course of the Information Commissioner's investigation, it relied on the section 43(2) exemption to withhold the 2a and 2c information.

### **The Information Commissioner's decision on Mr Coombs's complaint**

5. The Information Commissioner investigated Mr Coombs's complaint. The University argued that the commercial success of CEM's 11+ exams was built on their reputation for being 'tutor-proof' (or more 'tutor-proof' than the main competitor's products), which it described as its unique selling point (USP). The University contended that release of candidates' raw scores would enable both competitors and tutors to understand CEM's methodology in a way that would undermine CEM's ability to reduce the effects of coaching for its test (and so undermining its USP).

6. The Information Commissioner concluded that section 43(2) was engaged, noting that one of her earlier decision notices on a similar previous request had been upheld in a majority decision by a First-tier Tribunal (see *Coombs v Information Commissioner*, EA/2015/0226, 10 September 2015). A subsequent application for permission to appeal by Mr Coombs against that FTT decision was refused by Upper

Tribunal Judge Jacobs (under file reference GIA/1880/2016). Having weighed the respective public interest arguments in favour of disclosure and in favour of maintaining the exemption, the Information Commissioner concluded the requested information was exempt from disclosure under section 43(2). Mr Coombs appealed the resulting decision notice to the FTT.

### **The First-tier Tribunal proceedings**

7. The FTT sat to hear the appeal on 27 January 2018. Mr Coombs attended and the Information Commissioner was represented by counsel (Ms Natalie Connor). The University of Durham did not send a representative; Mr Coombs variously described the University as having “abstained” or as “boycotting” the hearing. Following detailed submissions on the various issues raised by the appeal, the FTT adjourned the hearing. The following day Mr Coombs sent all concerned an e-mail in which he sought to clarify the issues in dispute, concluding by saying “in the interests of moving forwards, I would like to concede that s.43(2) is correctly engaged so that the Tribunal can progress to balancing the arguments”. He also asked for permission to amend his grounds of appeal accordingly (as his original grounds had been that the exemption was not engaged in the first instance). The FTT subsequently issued further case management directions dated 7 February 2018, prefaced by the following observations:

“The Tribunal sat at Alfred Place on Thursday 27 January 2018 to hear this oral appeal. The appeal was not helped by the absence of the Second Respondent. It is not for the Commissioner to satisfy the Tribunal of the veracity of the Public Authority’s reliance on establishing the commercial sensitivity they claim exists to engage the exemption relied upon. The Tribunal need to satisfy themselves of the veracity of the evidence supporting the exemption they rely upon. The parties made lengthy submissions after a comprehensive hearing. Ms Natalie Connor, Counsel representing the First Respondent made a helpful ‘gist’ note of the closed session. The Tribunal ultimately adjourned the matter for a hearing where the second Respondent could appear to present their evidence relating to some of the issues identified in the closed session together with evidence of the commercial sensitivity they claim engages the exemption. In the interim the Appellant has sent an e-mail to the Tribunal on 28 January 2018 inviting the parties and the Tribunal to reconsider the appeal in light of the issues raised on the oral hearing referred to above.”

8. The First Respondent’s solicitor responded by e-mail on 28 February 2018, making suggestions for the way forward, in the course of which she observed that the hearing had “highlighted factual issues which the Tribunal would have to resolve in order to determine the public interest question, namely whether the University really does try to reduce the effects of coaching and whether it achieves this on some level”.

The FTT then issued further case management directions dated 21 March 2018, permitting the appellant’s amendment to the grounds of appeal, which in turn were followed by written submissions by both Mr Coombs and the University on the public interest issues. The Information Commissioner did not make any further submissions on those issues; this was in keeping with the FTT Judge’s observation at the end of the hearing that her case was clear and she did not need to participate or be represented thereafter.

9. In the event the FTT did not hold a further hearing. Having considered the further written submissions, the FTT reached its decision on 21 August 2018. The narrative in paragraphs 1-35 of its decision compendiously sets out the background to the appeal, including the Information Commissioner’s decision notice, the grounds

of appeal and the parties' various submissions on both the engagement of the exemption and the public interest balancing test. The nub of the decision is in the passage headed 'Conclusions' at paragraphs 36-42:

[36] The Tribunal has considered all the evidence and the submissions made by the parties in this appeal. We are satisfied that the DN was reached after careful consideration of the facts as presented by the University including the closed information. The Commissioner has further asserted that it was for neither her nor the Tribunal to look behind the University's assertion that it has achieved considerable commercial success as a result of its USP, or to interrogate the commercial validity of this USP. She denied that she had ignored the facts of the present case, rather stating that she had assimilated them with the current issues and determined that there was no substantive difference between this and earlier appeals. We have no sound reason to reject these assertions and accept and adopt the Commissioner's reasoning. We do not accept that there is a proven error on the facts or in the Law in the DN [decision notice].

[37] This Tribunal joined the Public Authority, the University, as a co-respondent and they have emphasised that the Tribunal was not the correct forum through which to explore the benefits and pitfalls of selective education and the University's ability to provide tests. Having heard all the evidence we do not doubt the University's reasoning or bona fides in this regard and accept this submission.

[38] The University has stated to this Tribunal that: "*its method of ensuring fairness requires maintaining uncertainty as to the method of setting and scoring the tests*".

The structure of the test, they maintain, is not published, and the University "*maintains a proprietary approach to test development and construction*". They explain; "*that past papers are not made available nor are practice materials sold to the public*". This, they say, is done in an effort to "*reduce the advantage that more affluent parents can obtain for their children by paying for private tuition*". The University have explained to us that they "*feared that tutors would be able to reverse-engineer raw scores and the test format in order to allow their tutees to focus on specific areas of the test and pass on that basis rather than taking the whole test 'at face value'*". Explanations of how this could be done were provided to the Tribunal in a closed bundle. The Appellant disagrees but we are not persuaded that it is for us to determine the issues on the arguments on the merits of his criticisms.

[39] The University also pointed to the fact that Centre for Evaluation and Monitoring (CEM's) main competitors are not subject to FOIA. It argued that there is a public policy decision that permits and encourages the University to engage in commercial activities and that the release of its intellectual property into the public domain would undermine its competitive position which would not be the same for organisations not subject to FOIA. It said that this was unfair and anti-competitive.

[40] Finally, it said by the University that the income from CEM was an important revenue stream for the University and that a reduction in this revenue stream would impact the public purse.

[41] The Tribunal accept the assertions made by the University and in the circumstances and on the evidence before us we have come to the view that the section 43(2) exemption is engaged and that in all the circumstances of the case

the public interest in maintaining the exemption outweighs the public interest in disclosure.

[42] Accordingly we dismiss the appeal.'

10. On 24 September 2018 the FTT Judge refused the appellant permission to appeal.

### **The proceedings before the Upper Tribunal**

11. On 9 November 2018 I gave Mr Coombs permission to appeal to the Upper Tribunal on his renewed application. In doing so I made the following preliminary observations:

"2. I am satisfied there is sufficient in the five grounds in the present application to merit a grant of permission to appeal. It is at least arguable the FTT may have erred in law on one or more of such grounds, although some appear stronger than others. The comments that follow are provisional in nature, do not express a decided view and are intended to assist the parties in making their submissions.

3. *Ground 1: disposal of proceedings without a hearing* (§4-§11): I am appending to this grant of permission the relevant documents from the FTT file. If the documents are incomplete, doubtless one of the parties will explain how that is so. The FTT's case management directions (CMD) of 7 February 2018 would seem to envisage there would be a further oral hearing. The further CMD of 21 March 2018 are silent on the issue of a further hearing, although the absence of any mention of a further hearing might imply that a decision had been taken that one was not necessary. If so, what was the basis for such a ruling?

4. In this context the Appellant refers to rule 32 of the Tribunal Procedure (FTT) (GRC) Rules 2009 and relies on my decision in *IICUS v IC and BIS and Ray* [2011] UKUT 205 (AAC). I am not entirely sure how far this takes him, as my recollection is that in that case the aggrieved third party plainly wanted a hearing and there simply was no oral hearing at all. The present case may arguably be distinguished on the basis that there was at least a hearing – albeit apparently not an entirely satisfactory one. If a party (here the Appellant) has had a hearing, and has been given to understand there will be a further hearing, can it be said that he "has consented to the matter being determined without a hearing" within rule 32(1)(a)? Did the FTT comply with the overriding objective and did it need to give reasons for proceeding as it did?

5. *Ground 2: incorrect interpretation of FOIA section 3(2)* (§12-§16): At present I have some difficulty with the arguments on this ground. The issue for the FTT to determine was whether the ICO's decision notice was in accordance with the law. The ICO's decision notice was to the effect that the University as public authority could rely on the exemption in section 43(2) of FOIA. It was never in dispute but that the University held the requested information. Whether other bodies held the information does not seem to be a live issue on the appeal. Nor am I sure that the point made at §16 takes the Appellant anywhere, as to some extent each case must turn on its own facts.

6. *Ground 3: placing the burden of proof on the appellant* (§17-§20): It would appear arguable that the FTT may have been asking the Appellant to disprove a contention made by the Second Respondent, when it was a matter for the latter

to establish. I am not sure that because the Appellant accepted that section 43(2) was engaged he necessarily accepted that all of the University's arguments in support of that finding were also accepted.

7. *Ground 4: having insufficient evidence to support its decision (§21-§30)*: This ground is arguable, and is to some extent bound up with the fate of the first ground of appeal.

8. *Ground 5: failing to consider the benefits of disclosure (§31-§35)*: This ground is also arguable. It might also be rephrased in terms of a challenge based on inadequacy of reasons. In that context I note the FTT itself appears to consider that its reasoning is embodied in paragraphs [36]-[41] of its decision (see the FTT's refusal of permission ruling dated 24 September 2018). Clearly, the FTT's decision must be read as a whole, but it is arguable that the passage in question restates some of the evidence and asserts conclusions rather than provides adequate reasons as such. I see that in the earlier case referred to, GIA/1880/2016 (*Coombs v Information Commissioner*, EA/2015/0226), in which Upper Tribunal Judge Jacobs refused permission to appeal, the Judge ruled as follows (emphasis added):

'5. Mr Coombs' second ground related to its assessment of the public interest. As I said to him at the hearing, there is a difference between the public interest and public concern or curiosity. This was, unusually, a majority decision and we know that the majority consisted of the specialist members. They and their colleagues are members of the panels that hear information right appeals on account of their knowledge and experience relevant to the workings of public authorities and to the assessment of the public interest. Their specialist knowledge and experience means that their assessment of the public interest merits particular respect. *In this case, they devoted 3½ pages to explain why section 43(2) of FOIA was engaged and almost a further 4 pages to setting out their analysis of the public interest. Such a detailed and carefully reasoned analysis deserves respect. I have not been able to identify any significant factor relevant to the public interest that they overlooked or anything irrelevant that they took into account. It is impossible to say that they were not entitled to decide the case as they did in favour of the public authority.*'

9. Obviously what matters is the quality of reasoning not the quantity, so it cannot simply be a question of comparing page lengths. However, is this FTT's fact-finding and reasoning really adequate bearing in mind the arguments advanced on the appeal?

10. I note the Appellant also asks the Upper Tribunal to clarify the definition of information where a commercial company (Granada Learning Associates) is said to exercise functions of a public nature (see grounds at §36). I simply make the obvious point that the Upper Tribunal's jurisdiction is limited by statute. This appeal is confined to consideration of the issues directly raised by the present appeal from this FTT decision. The proper categorisation of Granada Learning Associates would have to be tested through other proceedings arising out of a relevant ICO decision notice."

12. In accordance with my directions, all three parties have now filed written submissions. For present purposes I need only summarise them, which barely does justice to the assistance I have gained from them, and especially the submissions by Ms Connor for the First Respondent and by Mr Coombs himself.

13. Ms Connor's first and overarching submission is that the FTT's decision may be untenable because the parties and the FTT may have been at cross-purposes to

some extent since 28 January 2018 (and so since the appellant's e-mail the day after the hearing). Both the FTT and the Information Commissioner had assumed that Mr Coombs had not just accepted that section 43(2) was engaged, but had also conceded the University's arguments as to *why* that exemption was engaged. However, it should have been clear from the subsequent submissions that Mr Coombs had not accepted all those arguments (as I intimated when giving permission to appeal). In particular, it was plain that Mr Coombs strongly contested the University's argument that private tutors could benefit from the release of the raw test marks (e.g. by so-called reverse engineering designed to give those they coached an unfair advantage in terms of examination tactics for the 11+).

14. So far as ground 1 is concerned (the failure to hold a further hearing), the Information Commissioner's position is that it is arguable the FTT should have exercised its discretion to hold a further hearing in line with its original directions, given it continued to regard the engagement of the exemption as a live issue. Ms Connor notes that in the circumstances it may have been inconsistent with the overriding objective not to hold a second hearing.

15. The Information Commissioner is distinctly lukewarm about ground 2 (the section 3(2) point as to whether information was held), regarding it as best a challenge based on adequacy of reasons. Ms Connor is similarly unenthusiastic about ground 3 (the alleged reversal of the burden of proof), "but notes the paucity of reasoning in general in the decision". She provides little support for ground 4 (evidence supporting the decision) but supports ground 5 (inadequacy of reasoning). Put simply, her submission is that the FTT set out the competing public interest arguments but singularly failed to explain why the University's arguments were accepted.

16. The University, in summary, strongly resists grounds 1 to 4 inclusive (except insofar as ground 4 overlaps with ground 5). As to ground 5, the University very fairly accepts that the FTT's decision "comes to a conclusion without documenting in full the reasoning that led to that conclusion".

17. Mr Coombs has submitted a detailed reply. I only need cite one passage, which in a sense reflects the lowest common denominator of the arguments in these proceedings: "I've read a number of FTT rulings and whilst this one summarises the parties' submissions I struggle to find anywhere in its 42 paragraphs where the Tribunal explain why they came to their decision. The FTT erred in law by failing to give adequate reasons for its decision." Mr Coombs also asked for an oral hearing of this appeal to the Upper Tribunal, an application I refused in my ruling of 18 March 2019 for the reasons I need not repeat here.

#### **The Upper Tribunal's analysis**

18. In a nutshell, I agree that this appeal succeeds on ground 5, namely inadequacy of reasons. In effect the appeal succeeds by consent on that ground. In the circumstances of this case I do not need formally to review and determine the remaining grounds of appeal.

19. I would just add that I agree with Ms Connor's overarching point that the FTT and the parties seem to have proceeded at cross purposes in the period after the hearing. Ms Connor has helpfully provided copies of the e-mail thread which followed the appellant's acceptance that section 43(2) was engaged and in which the further arrangements were discussed. Reading those e-mails as an outsider, I can quite see how both the FTT and the University assumed that everyone understood that the FTT would now proceed to decide the case 'on the papers'. However,

reading that exchange through the eyes of a litigant in person, even one who has some experience of other proceedings such as this appellant, I can equally well see how Mr Coombs thought there would be a further hearing. Perhaps the message is that FTT judges and administrators need to take special care to ensure that case management directions are crystal clear and where they have been varied there is a formal record of such a change.

20. So, having found that the FTT's decision involves an error of law and having allowed the appeal, what should the Upper Tribunal do now? Given the inadequacy of the FTT's reasons, the decision cannot stand and so is set aside. The choice then before me is either to remit the underlying appeal to the FTT or to re-make the decision myself (see Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(2)(b)(i) and (ii)). At the outset of these proceedings Mr Coombs suggested (in the alternative) that I could take the latter course of action. However, I am satisfied this is a case which requires the specialist expertise of the FTT in the potential application of a qualified exemption and the public interest balancing test. However, the parties take divergent views on the question of the mode of remittal.

21. The University argues that the appeal should be remitted to the same FTT solely for proper reasons to be provided. The University does not consider that the case needs to be allocated to a differently constituted FTT or that a further hearing is required.

22. The Information Commissioner occupies the middle ground, arguing for remittal for proper reasons to be provided but accepting that the underlying issues may require "some level of reconsideration by the FTT". She "does not see any reason why the matter should be remitted to a differently constituted Tribunal."

23. Mr Coombs, by implication at least, presses for a complete re-hearing of the appeal before a freshly-constituted FTT to resolve disputed issues of fact.

24. I am in no doubt that it would be inappropriate for the matter to go back to the same FTT panel, whether purely for the provision of proper reasons or more generally and without such a limitation. I accordingly direct that the appeal should be re-heard by a completely new and differently constituted First-tier Tribunal (TCEA 2007, section 12(3)(a)).

25. Why not remit just for proper reasons? As Upper Tribunal Judge Jacobs observed in *CT v Secretary of State for Defence (WP)* [2009] UKUT 167 (AAC) (at paragraph 41):

"the passage of time that will have occurred before the Upper Tribunal decides that the reasons are inadequate as they stand would make it difficult for the First-tier Tribunal to provide further reasons. If the tribunal's recollection would not be reliable, supplementary reasons should not be sought: *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 383."

26. The original hearing of this appeal was in January 2018. The FTT reached its decision on the papers in August 2018. It is now 15 months since the former and 7 months since the latter date. At the very minimum it is likely to take another 2 months or so to reconstitute the same FTT panel. All in all, this is far too long a gap, especially as this is not the type of case in which modest supplementary reasons are required (as might have been appropriate to be called for, typically at an earlier stage in these proceedings, under rule 5(3)(n) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)).



27. Why not remit to the same FTT panel? The passage of time alone makes this inappropriate. Given the delays in finally resolving this appeal, it is important it is reheard by the FTT reasonably expeditiously. That process will only be hindered by remitting to the same panel, leaving aside potential issues such as retirement, ill-health and annual leave. I therefore direct that the appeal is reheard by a completely different panel. Given the overlapping subject matter, it is also probably wise that those who sat on the earlier appeal (EA/2015/0226) are also excluded.

**The University's non-participation in the appeal hearing before the Tribunal**

28. Mr Coombs, in his reply, argues that the FTT's failings can ultimately be traced back to the Second Respondent's lack of engagement with the appeal process and its failure to attend the January 2018 hearing. He requests that I investigate any sanctions to compel the University to engage properly in the proceedings.

29. In general, I do not consider it appropriate to lay down precise case management directions under section 12(3)(b) of the TCEA 2007 for the re-hearing of this appeal by the First-tier Tribunal. Such issues are best left to the judiciary (and, where appropriate, the registrar) in the General Regulatory Chamber. The First-tier Tribunal judiciary is far better positioned than the Upper Tribunal to refine the appropriate case management directions for this appeal.

30. Subject to any such directions, it is a matter for the University whether it participates in the proceedings by way only of written submissions, which may of course include witness statements, or whether it also sends a representative (and any witnesses) to any re-hearing. However, if the University fails fully to engage, it necessarily runs the risk that its submissions may not be found to be persuasive. This would appear to be a very real risk, not least given the observations by the (dissentient) legal member about the "incomprehensibility" of the University's explanation in the earlier appeal (referred to above at paragraph 6).

**Conclusion**

31. I conclude that the decision of the First-tier Tribunal involves an error of law. I allow the appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I am not able to re-make the decision under appeal and remit the appeal for re-hearing before a freshly constituted First-tier Tribunal (section 12(2)(b)(i) and (3)(a)).

**Signed on the original  
on 4 April 2019**

**Nicholas Wikeley  
Judge of the Upper Tribunal**