IN THE UPPER TRIBUNAL **UT ref: UA-2020-001793-GIA**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

The Information Commissioner

Appellant

- v –

Mr Martin Adedeji

First Respondent

And

Wigan Borough Clinical Commissioning Group

Second Respondent

Before: Upper Tribunal Judge Wright

Decision date: 16 December 2022

Decided after an oral hearing on 14 September 2022

Representation: Rupert Paines of counsel for the appellant
Neither respondent appeared at the hearing

DECISION

The decision of the Upper Tribunal is to allow the appeal. The ruling given by the First-tier Tribunal on 20 September 2019 under case number EA/2019/0181 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and give the ruling the First-tier Tribunal should have given. That ruling is to strike out Mr Adedeji's appeal of 27 May 2019 under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as being outwith the First-tier Tribunal's jurisdiction.

REASONS FOR DECISION

Introduction

1. This appeal is brought by the Information Commissioner against a ruling made by the First-tier Tribunal on 20 September 2019 ("the tribunal"). It is brought with the permission of the First-tier Tribunal. By its ruling of 20 September 2019 the tribunal refused to accede to a request by the Information Commissioner to strike out an

appeal brought by Mr Adedeji on 27 May 2019 against a Decision Notice dated 29 April 2019. To understand why the appeal is said by the Information Commissioner to be outside the First-tier Tribunal's jurisdiction, and so ought to have been struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules"), requires me to sketch the background to what Mr Adedeji was seeking to appeal against in May 2019. That history will also provide some context to why the appeal to the Upper Tribunal has taken until 2022 to be decided.

Background

2. The critical history is grounded in requests for information that Mr Adedeji made to the Wigan Borough Clinical Commissioning Group (" the CCG") on 2 August 2016 and 5 September 2016. The exact contents of those requests are not material to this appeal. The CCG refused the requests on the basis that they were vexatious: per section 14 of the Freedom of Information Act 2000 ("FOIA"). Mr Adedeji's complaint to the Information Commissioner under section 50 of FOIA about the CCG's refusal was not upheld. However, on his appeal under section 57 of FOIA to the First-tier Tribunal against the Information Commissioner's Decision Notice, a First-tier Tribunal on 14 June 2018 allowed Mr Adedeji's appeal. The material parts of the First-tier Tribunal's decision under section 58 of FOIA read as follows:

> " **DECISION**
>
> 1. For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.
>
> **SUBSTITUTE DECISION NOTICE**
>
> Public Authority: Wigan Borough Clinical Commissioning Group
>
> Complainant: Martin Adedeji
>
> **The Substitute Decision**
>
> 1.For the reasons set out below the Public Authority was not entitled to refuse the Complainant's requests for information made on 2 August 2016 and 5 September 2016 on the grounds that they were vexatious.
>
> **Action Required**
>
> 2. Wigan Borough Clinical Commissioning Group is required to respond to Mr Adedeji's requests within 35 days of the date of promulgation of this judgment either by supplying the information sought or by serving a refusal notice under s 17 [of FOIA], including what grounds they rely on other than s 14(1).
>
> [The First-tier Tribunal then went on to give reasons for its decision.]"

3. The CCG on 22 August 2018 purported to comply with the First-tier Tribunal's decision. Its response was to tell Mr Adedeji that it did not hold information within the scope of the requests. On the face of the terms of First-tier Tribunal's decision and for reasons to which I will come, that was not an option open to the CCG.

4. Mr Adedeji raised his concerns about the CCG's response with the Information Commissioner who (the Information Commissioner now says wrongly) treated this as a fresh complaint under section 50 of FOIA. The Information Commissioner issued (again he now says wrongly) a further Decision Notice under section 50 on 29 April 2019. That Decision Notice held (i) that on part of the first request, information had on the balance of probabilities been held by the CCG at the date of the first request, but it was no longer held; and (b) on the remainder of the information requested under both requests, the information was not held by the CCG. It is Mr Adedeji's appeal against this 29 April 2019 (purported) Decision Notice which the Information Commissioner argues fell outside the First-tier Tribunal's jurisdiction.

The issues on the appeal

5. Two issues initially arose on the Information Commissioner's appeal to the Upper Tribunal.

6. The first issue remains a live one. It concerns whether and when, if a Decision Notice is issued by the Information Commissioner under section 50 of FOIA, or is substituted by the First-tier Tribunal following an appeal, and that decision requires the public authority to take certain steps, and a complaint is then made that those steps have not be taken, the Information Commissioner is permitted to issue a fresh Decision Notice under section 50 of FOIA or the complaint should be treated as raising an issue of compliance with the initial decision of the Information Commissioner or, where applicable (and as here), the substituted decision made by the First-tier Tribunal.

7. The second issue has now been settled by the decision of the Upper Tribunal in *Information Commissioner v Moss and Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC). That decision holds that it is for the First-tier Tribunal and not the Information Commissioner to consider issues of compliance with First-tier Tribunal (substituted) decisions. This appeal was initially stayed until the above *Moss* case was finally decided, and that only became apparent in June of 2021 (when it became clear that there was to be no further appeal from that *Moss* decision to the Court of Appeal.

The Law

8. Section 1 of FOIA creates a general right of access to information, subject to exceptions found in Part II of FOIA (per section 2 of FOIA). Section 1 provides, so far as is material, as follows:

> "**General right of access to information held by public authorities.**
>
> 1.-(1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

9. Sections 12 and 14 of FOIA remove the section 1 obligation in certain defined circumstances. These are, under section 12, where the cost of compliance would

exceed a financial limit and, under section 14, where the request is vexatious. Those provisions can act independently of whether the public authority holds the information (or not) or whether it could rely on a Part II exemption in respect of the requested information.

10. Section 17 of FOIA deals with the refusal of a request by a public authority. Importantly for the purposes of this appeal, it does not cover when a public authority refuses the request because it does not hold the requested information. Where the information requested is not held, the requirement to tell the requester that it is not held arises from section 1(1)(a) itself and its wording "whether it holds the information", which includes where the public authority does not hold the information. This is confirmed by the separate limbs within section 17(4) of FOIA set out below.

11. Section 17 of FOIA is in the following terms:

> "**Refusal of request.**
>
> 17.-(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
>
> (a) states that fact,
>
> (b) specifies the exemption in question, and
>
> (c) states (if that would not otherwise be apparent) why the exemption applies.
>
> (2) Where—
>
> (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
>
> (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
>
> (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
>
> (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
>
> (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50."

12. Section 50 of FOIA provides, so far as is relevant, as follows:

"**Application for decision by Commissioner.**

50.-(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal."

13. Section 54 of FOIA is not directly in issue on this appeal as it is concerned with failure to comply with the notices, including a section 50(3) decision notice, issued by the Information Commissioner. It provides so far as is relevant as follows:

"**Failure to comply with notice.**

54.-(1) If a public authority has failed to comply with—

(a) so much of a decision notice as requires steps to be taken,

(b) an information notice, or

(c) an enforcement notice,

the Commissioner may certify in writing to the court that the public authority has failed to comply with that notice….

(3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

(4) In this section "the court" means the High Court or, in Scotland, the Court of Session."

14. The equivalent to section 54, where the issue is the failure to comply with a First-tier Tribunal's decision, is section 61 of FOIA, which insofar as is relevant provides:

"**Appeal proceedings**

> 61.-(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."

15. The last piece of the legislative picture is the provisions in FOIA dealing with appeals. These are found in sections 57 and 58 of FOIA, which provide so far as is material as follows:

> "**Appeal against notices served under Part IV.**
>
> 57.-(1)Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice…
>
> **Determination of appeals.**
>
> 58.-(1)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.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

Discussion and conclusion

16. The starting point, and reverting to what I said in paragraph 3 above, is that the First-tier Tribunal's requirement in its substituted decision of 14 June 2018 that the CCG either (i) supply Mr Adedeji with the information sought, or (ii) serve him with a refusal notice under section 17 of FOIA (including the grounds relied in that section 17 notice other than section 14(1)), did not allow the CCG to refuse the request on the basis that it did not hold the requested information. This is for the reasons I have explained in paragraph 10 above. The First-tier Tribunal's substituted decision notice of 14 June 2018 did not, as it could have done, require the CCG to 'state if it held the information and, if it did hold it, either supply the information sought or serve a refusal notice under section of FOIA'. The terms of that First-tier Tribunal's substituted decision notice, made under section 58(1) of FOIA, simply did not allow the CCG to comply with the substituted decision notice by saying it did not hold the information. No challenge was made to that First-tier Tribunal decision nor any attempt made to correct its terms, so the substituted decision notice had to be read as it stands and cannot be ignored: see, more generally, *R(Majera) v SSHD* [2021] UKSC 46; [2022] AC 461.

17. What then was the correct course for Mr Adedeji to take when faced with the CCG's response to the First-tier Tribunal's substituted decision notice of 14 June 2018? I am satisfied on the arguments before me that it was not for him to seek to make a further section 50 complaint to the Information Commissioner. This is not intended as a criticism of Mr Adedeji but rather is a statement of what the law required.

18. It should be emphasised that what the law required in this case arose out of the particular terms of the substituted decision notice made by the 14 June 2018 First-tier Tribunal. Had the substituted decision notice been in different and broader terms (for example, as suggested in paragraph 16 above), the CCG would have been acting in compliance with the terms of such a decision notice in telling Mr Adedeji that it did not hold the requested information. But that is not what occurred in this case.

19. If the substituted decision notice had provided for the CCG to say whether it held the requested information and the CCG had then said it did not hold the requested information, that would not have been an issue about a failure to comply with the decision notice as the decision notice would have expressly allowed the public authority to seek to comply with Part I of FOIA by saying, inter alia and per section 1(1)(a) of FOIA), *whether* it held the requested information. In effect, the clock would have been reset for the public authority to seek to deal with the request in accordance with Part I of FOIA, though not by seeking to rely on section 14 of FOIA as to do so would be in breach of the terms of the postulated (substituted) decision notice. The fresh response of the public authority could then generate a fresh complaint to the Information Commissioner under section 50 of FOIA that the public authority had (still) not dealt with the request in accordance with Part I of FOIA. However, as I have already said, that is not what happened here.

20. What occurred in this case, in my judgment, was that the public authority failed to comply with the terms of the First-tier Tribunal's substituted decision notice. In those circumstances Mr Adedeji's further 'complaint' to the Information Commissioner following the CCG's response to the First-tier Tribunal's decision ought to have been treated (and should be so treated now, if Mr Adedeji wishes to pursue the matter), post the above *Moss* decision above, as an application by him to the First-tier Tribunal under section 61 of FOIA for the First-tier Tribunal to certify the CCG as

being in contempt because of its failure to comply with the 14 June 2018 substituted decision notice.

21. The view I have taken about the law is supported by the, admittedly non-binding, decision of the First-tier Tribunal in *Charman v IC and Olympic Delivery Authority* (EA/2017/0210). I agree with the Mr Paines for the Information Commissioner that *Charman* is (non-binding) authority for two propositions. First, where a first decision notice gave a public authority the option of disclosing information or issuing a refusal notice relying on fresh or further exemptions, if the public authority does the latter it would be appropriate for the Information Commissioner, on being presented with a section 50 FOIA complaint, to further investigate the public authority's compliance with Part I of FOIA and issue a fresh decision notice under section 50. Second, however, where the Information Commissioner is confronted by a section 50 complaint that is "in substance" a complaint that the first decision notice has not been complied with, that complaint is not apt to be resolved by a fresh decision notice as there is "a clear distinction between the right to appeal from the decision notice and the sanction for disobeying it".

22. I would accept that the dividing line between complying and not complying with the terms of a decision notice may sometimes be indistinct, and the somewhat fluid language used in *Charman* may reflect that. For example, issues might arise about whether a public authority has provided all the information it holds falling within the scope of the request, if it seeks to comply with the decision notice by purporting to provide all the information requested. However, in Mr Adedeji's case it is difficult to see how the CCG saying it did not hold any of the information requested could be said to amount to even partial compliance with the terms of the substituted decision notice as that notice did not provide it with that option.

23. In these circumstances, I am not sure that recourse to how Mr Adedeji framed his 'concern' (to try and use a neutral word) about how the CCG responded to the substituted decision, or what his intention might have been (as the tribunal placed weight in its ruling here under appeal) is necessary. However, in so far as it may assist, I would make two observations. First, Mr Adedeji had not made a further request to the CCG to which its 22 August 2018 response could be said to relate. It was the same 2 August and 5 September 2016 requests to which the CCG were required to respond by the First-tier Tribunal's substituted decision notice. Second, I would concur with Information Commissioner's view that Mr Adedeji's email of 6 September 2018 was on the face of it a clear allegation that the CCG were in contempt of the First-tier Tribunal's decision. Mr Adedeji said the following in that email:

> "Wigan Borough Clinical Commissioning Group's 22 August 2018 response to the Tribunal's decision is, on the balance of probabilities a contempt of Court in that it is misleading and untruthful. For example, [the CCG]'s response states, 'We do not hold any recorded information)…
>
> I would much appreciate being informed who is responsible for the enforcement of the Tribunal's decision…"

24. What then of the Decision Notice the Information Commissioner purported to give under section 50 of FOIA on 29 April 2019 when Mr Adedeji had raised his concern about the CCG's response to the First-tier Tribunal's substituted decision notice of 14 June 2018? I do not find the Information Commissioner's reliance on the

concept of it being a "nullity" entirely helpful as it plainly had sufficient status to enable an appeal to brought against it in which the First-tier Tribunal could determine whether it fell within its jurisdiction: per *Fish Legal v IC* [2015] UKUT 52 (AAC) at paragraph [30]. (See further the discussion of 'nullity' at paragraphs [89] to [101] of *IC v Malnick and Acoba* [2018] UKUT 72 (AAC); [2018] AACR 29.) So seized of the matter, the tribunal ought in my judgment have struck out the appeal on the basis of lack of substantive jurisdiction as it was not an appeal from a lawful section 50 decision notice. On any objective analysis, the concern Mr Adedeji raised about the CCG's response to the First-tier Tribunal's substituted decision notice was not, and could not have been, a (per section 50) request for a decision whether a request for information had been made in accordance with the requirements of Part I of FOIA. Mr Adedeji's concern was, and in my judgment could only have been, about the CCG's clear failure to comply with (in the sense of even purport to meet) the terms of substituted decision notice. A slightly different analysis, following *Malnick*, is that the tribunal's jurisdiction under section 58(1)(a) about whether a decision notice is "not in accordance with the law" must include within it whether the decision notice from which an appeal is sought to be brought is legally invalid, with rule 8(2)(a) of the GRC rules allowing such an appeal to then be struck out.

25. For the reasons given above, the appeal succeeds and I remake the First-tier Tribunal's decision in the terms set out above.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 16 December 2022