IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. *UA-2024-000218-GIA*
2024] UKUT 215 (AAC)

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

Between:

Mr Sajad Hussain

Appellant

– v –

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 23 July 2024
Decided on consideration of the papers

Representation:

Appellant:	In person
Respondent:	Mr Christian Davies of Counsel, instructed by the Information Commissioner

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. The Appellant challenges the decision taken by the First-tier Tribunal to strike out his appeal. In short, he argues that the First-tier Tribunal erred by ignoring his request (on account of his dyslexia) for an oral hearing of the Information Commissioner's strike out application. I conclude that there is no material error of law in the First-tier Tribunal's decision. It follows that the Appellant's further appeal to the Upper Tribunal must be dismissed.

The background

2. The underlying appeal in this case concerns a request made by Mr Hussain to the City of Bradford Metropolitan District Council under the Freedom of Information Act 2000 ("FOIA"). Mr Hussain complained to the Information Commissioner about the way his FOIA request had been handled. In a Decision Notice dated 20 September 2023 (IC-240677-S6H5), the Information Commissioner rejected that complaint, finding that the Council had complied with its obligations under FOIA. Mr Hussain appealed to the First-tier Tribunal (FTT) against the Information Commissioner's Decision Notice. He set out his sole ground of appeal in the following concise terms:

> I believe the ICO is conspiring with the Public Authority City of Bradford Metropolitan District Council (CBMDC) under some quid-pro-quo arrangement to help coverup the LA's failures to comply with their obligation to the FOI regulation, in clear contravention of the Fraud Act 2006.

3. The Information Commissioner then applied to the FTT to have Mr Hussain's case struck out, contending that "the Appellant's ground of appeal falls out of the Tribunal's jurisdiction of what to consider when determining this appeal … the Commissioner applies for this appeal to be stuck out variously, under Rule 8(2)(a) [no jurisdiction] and Rule 8(3)(c) [Appellant's case has no reasonable prospects of success] of the Tribunal Rules."

The First-tier Tribunal's decision on the Commissioner's strike out application

4. Judge Aleksander of the First-tier Tribunal granted the Commissioner's application, ruling as follows:

> "13. Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 provides that the Tribunal must strike out proceedings if the Tribunal does not have jurisdiction in relation to them. Rule 8(3) provides that I may strike out proceedings if they have no reasonable prospect of success.
>
> 14. I agree with the Information Commissioner that the grounds of Mr Hussain's appeal fall outside the jurisdiction conferred upon this Tribunal under s58 FOIA. As the Tribunal has no jurisdiction to deal with the grounds of appeal, this appeal must be struck out.
>
> 15. Even if I am wrong in my determination that the Tribunal lacks jurisdiction, Mr Hussain does not particularise in any way his grounds that the Information Commissioner is in any way conspiring with Bradford Council to cover up its failures to comply with the FOIA, nor does he provide any evidence of such a cover up. In these circumstances his appeal is

bound to fail. As I find that it would have no reasonable prospects of success, I would strike it out under Rule 8(3).

16. Finally, if Mr Hussain believes that there is a contravention of the Fraud Act 2006 and has evidence to support his beliefs, he should report the matter to the police."

5. Mr Hussain then applied to the FTT for permission to appeal. One of his proposed grounds of appeal related to his dyslexia. Refusing permission to appeal, Judge Aleksander held as follows (the italicised sentence is my emphasis):

> "The fourth ground is that Mr Hussain suffers from dyslexia, and struggles with a written procedure, and needed an oral hearing to fully express himself. *Mr Hussain did not identify his dyslexia to the Tribunal, nor did he make a request for reasonable adjustments.* The application by the Information Commissioner to strike-out the appeal was made on the grounds that the Tribunal had no jurisdiction to decide the appeal. Whilst I appreciate Mr Hussain's desire for an oral hearing of the application to take account of his dyslexia, I find that that this would not have resulted in a different decision – the nature of Mr Hussain's grounds of appeal (that the Information Commissioner conspired with Bradford to cover up its failures) is plainly outside the jurisdiction of the Tribunal, and even if Mr Hussain had the benefit of an oral procedure, it could not have changed the outcome. I find that this ground of appeal does not have any prospect of success."

The Upper Tribunal's decision to grant limited permission to appeal

6. I gave Mr Hussain limited permission to appeal. I decided that one of his two grounds of appeal to the Upper Tribunal was arguable whilst the other was not arguable and indeed was, in legal terminology, "totally without merit". My reasons were as follows:

> **The present application for permission to appeal**
>
> 6. I am persuaded on balance that the application for permission to appeal is arguable, in part at least. I am not at this stage persuaded that the appeal is more likely than not to succeed, but that is not the appropriate test at the permission stage.
>
> 7. There are essentially two grounds of appeal. The first (Ground 1) relates to what the Applicant describes as malfeasance and collusion. The second (Ground 2) is a procedural issue relating to his dyslexia. In his grounds of appeal, Mr Hussain states as follows as regards the latter:
>
> > "**My Dyslexia**
> >
> > In paragraph 8 of the refusal notice dated 15th of January 2024, Judge Aleksander states the following :
> >
> > "Mr Hussain did not identify his dyslexia to the Tribunal, nor did he make a request for reasonable adjustments."
> >
> > Yet clearing in section 8 "about your requirements" on the T98 Notice of Appeal or Application initially sent to the FTT dated the 20th of September 2023, I clearly state "I have Dyslexia".

> The Judge's duty was to help me formulate my case within the jurisdiction of the Tribunal therefore his clear disregard for my condition was an inappropriate approach.
>
> Furthermore, there has been error in law recently accepted in a judgment made Judge Buckley case reference EA/2023/0407 on the 29th of January 2024, which had Judge Aleksander been aware of in this case then I believe he would not have made the same decision regarding refusing my application seeking permission to Appeal his original decision of the 5th of November 2023.
>
> Finally, I was not expecting the ICO to have responded to all my three FTT applications (EA/2023/0402, 0407 and 0409) in October 2023, which had caught me off guard because the ICO, I was informed had sought and extension of time for 3 months because of their backlog."

8. So far as Ground 2 is concerned, the Applicant plainly informed the Tribunal of his dyslexia on his Form T98. There is no suggestion or hint in the FTT's strike out decision that his dyslexia was considered when deciding to proceed to determine the Commissioner's strike out application on the papers. Indeed, the FTT's ruling to refuse permission to appeal indicates that factor was overlooked. The ruling of Judge Buckley in the related matter would suggest that omission was material. Taken together, these points suggest that the second ground of appeal relating to the Applicant's dyslexia is at least arguable.

9. I therefore grant (limited) permission to appeal on Ground 2.

10. As to Ground 1, Mr Hussain seeks to re-run his argument at first instance that the public authority and the Respondent were guilty of malfeasance and collusion. However, the FTT was perfectly entitled to find that he had not produced any evidence to support his allegations of fraudulent conduct. The Applicant's case appeared to proceed by way of assertion rather than evidence. In those circumstances he has been unable to demonstrate any arguable error of law by the FTT in relation to this aspect of the case.

11. I therefore refuse permission to appeal on Ground 1.

12. For the avoidance of doubt I must therefore stress the limited scope of this appeal before the Upper Tribunal. In summary, the only question for the Upper Tribunal is whether there was an error of law by the FTT in proceeding to determine the strike out application without having regard to the Appellant's dyslexia and possibly holding an oral hearing. The Upper Tribunal is not concerned with the actions of the public authority. Nor is the Upper Tribunal concerned with the merits or otherwise of the Information Commissioner's decision notice.

13. I now consider the 'totally without merit' test insofar as it may apply to Ground 1.

The totally without merit test

14. There is a qualified right to apply for an oral reconsideration hearing in respect of any ground on which permission to appeal is refused 'on the

papers' (see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 22(3)-(5)). However, that qualified right to apply for reconsideration at an oral renewal hearing does not exist if the application (or part) is recorded by the Judge to be "totally without merit". Rule 22(4A), as inserted by rule 3(4)(b) of the Tribunal Procedure (Amendment) Rules 2022 (SI 2022/312) provides as follows:

> "(4A) Where the Upper Tribunal considers the whole or part of an application to be totally without merit, it shall record that fact in its decision notice and, in those circumstances, the person seeking permission may not request the decision or part of the decision (as the case may be) to be reconsidered at a hearing."

15. The concept of an application which is "totally without merit" (TWM) is not defined by the Rules, but has been considered in the case law. The two leading and authoritative cases are *R (Grace) v Secretary of State for the Home Department (SSHD)* [2014] EWCA Civ 1091; [2014] 1 WLR 3432 and *R (Wasif) v SSHD* [2016] EWCA Civ 82; [2016] 1 WLR 2793.

16. In *R (Grace) v SSHD* Maurice Kay LJ characterised the purpose of the TWM rule as being "to ensure that hopeless cases do not take up more of the time of respondents and of the court and the tribunal than is reasonable and proportionate" (paragraph 2). An application could be TWM even if it was not abusive or vexatious: "Hopeless cases are not always, or even usually, the playthings of the serially vexatious. … I have no doubt that in this context TWM means no more and no less than 'bound to fail'" (at paragraph 13).

17. The Court of Appeal returned to the question of the proper approach to the TWM provision and in more detail in *R (Wasif) v SSHD*. Speaking for the Court as a whole, Underhill LJ gave detailed guidance at paragraphs 15 and 16, concluding as follows:

> "17. It is inescapable that the distinction between those cases which are "bound to fail" (and thus fall for certification as TWM) and those where permission is refused on the less definitive basis identified above is a matter for the assessment of the judge in each case. The scope for general guidance is limited: adjectives and phrases of the kind such as "bound to fail", "hopeless" and "no rational basis" are, we hope, helpful, but they are necessarily imprecise."

18. I consider that this application for permission to appeal – with the critical exception of Ground 2 – is indeed totally without merit. The remaining Ground 1 in the application is beyond "not arguable"; rather, it is "bound to fail" for the reasons already identified above. In *R (Wasif) v SSHD* the Court of Appeal acknowledged that "some judges may find it a useful thought-experiment to ask whether they can conceive of a judicial colleague taking a different view about whether permission should be granted" (paragraph 17(4)). Applying that thought-experiment, I cannot conceive of any Upper Tribunal judge granting permission to appeal in this case on the remaining ground advanced by the Applicant (again, with the sole exception of Ground 2). So, as well as refusing permission to appeal on the remaining ground of appeal, I therefore record the fact that this application for permission to

> appeal is **totally without merit** in so far as it relates to issues **other than the question of Ground 2**.
>
> **Conclusion**
>
> 19. I therefore refuse the request for an oral hearing of the application but grant limited permission to appeal. Ground 2 (dyslexia) is arguable. Ground 1 (malfeasance and collusion) is not arguable and moreover is certified as being totally without merit.

7. At this juncture a short explanation about the ruling by Judge Buckley is in order. This ruling concerned another FTT appeal brought by Mr Hussain (EA/2023/0407). In that case, Mr Hussain's original ground of appeal on his Form T98 had been similar to the present case (i.e. an allegation of conspiracy and fraud on the part of the Commissioner). However, he later sought to amend those grounds to introduce arguments based on the interpretation of data protection legislation. Judge Buckley had initially struck out the appeal in EA/2023/0407 on the papers. However, in a subsequent ruling Judge Buckley set aside that strike out decision on the basis that she had overlooked Mr Hussain's dyslexia and would have listed the strike out application for an oral hearing if she had taken it into account.

8. Returning to the present case, it therefore proceeded as an appeal before the Upper Tribunal, albeit limited to one ground of appeal only.

The proceedings in the Upper Tribunal

9. The Upper Tribunal's grant of limited permission to appeal provided for the Information Commissioner to file a written response to the appeal within one month and for the Appellant to lodge a reply after another month. Both parties were expressly directed to "indicate if an oral hearing of the appeal is sought and, if so, why."

10. The Respondent duly filed a response dated 9 April 2024, drafted by Mr Christian Davies of Counsel, resisting the appeal and asking for it to be dealt with 'on the papers'. In short, the Information Commissioner invited the Upper Tribunal to dismiss Mr Hussain's appeal. In summary, whilst the Commissioner accepted that Judge Aleksander had failed to take Mr Hussain's dyslexia into account when making his original strike out decision, the Commissioner submitted that this made no difference to the outcome. This was because Mr Hussain's case would inevitably have been struck out in any event.

11. The Upper Tribunal issued the Information Commissioner's response to Mr Hussain on 23 April 2024, inviting him to provide his reply within one month, in accordance with the earlier case management directions. No reply (nor indeed any other communication) was received from the Appellant within the stipulated month. The Appellant was sent a reminder on 2 July 2024, advising that any representations could still be made within a further 14 days, despite the original deadline for a reply having passed. No reply from the Appellant was received to the reminder.

12. The Upper Tribunal has a discretion to exercise as to whether to hold an oral hearing: see rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). The test I have to apply is whether "fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake":

R (Osborn) v Parole Board [2014] AC 1115 at [2(i)]. I am also required to have regard to the parties' views: rule 34(2). There has been no request for an oral hearing of the appeal and I do not consider an oral hearing is necessary. The issue is a narrow one and the parties' respective positions are clear, even in the absence of an Appellant's reply. The case is therefore ready for determination on the papers and it is fair and just to proceed on that basis. I would be wasting valuable court time and unfairly raising Mr Hussain's expectations if I were to direct an oral hearing.

The Information Commissioner's response to the appeal

13. Mr Davies, for the Information Commissioner, makes the following submissions:

> 13. The question for the UT is whether the FTT made a material error of law in making the Strike Out Decision without an oral hearing: see *R (Iran) v SSHD* [2005] EWCA Civ 982, §10.
>
> 14. The starting point is that the FTT had the power under Rule 32(1)(b) of the GRC Rules to make the Strike Out Decision in a paper determination provided that it was satisfied that it could determine the issues without a hearing.
>
> 15. There is no general principle that a litigant with dyslexia must always be given the opportunity to present their case at an oral hearing. Much will depend on the facts of the specific case. It is perfectly possible for the FTT to conclude that it is able to dispose of such a case in a paper determination, for example if the grounds of appeal are based solely on allegations which fall outside of the FTT's jurisdiction and/or are entirely fanciful and unsubstantiated. In those circumstances, an oral hearing would make no difference to the ultimate outcome and therefore is unlikely to accord with the overriding objective.
>
> 16. The Commissioner accepts that, in the present case, the FTT erred insofar as Judge Aleksander said in the FTT PTA Decision that Mr Hussain had not notified the FTT of his dyslexia. Mr Hussain had in fact noted his dyslexia in his Form T98.
>
> 17. However, in the Commissioner's submission, this oversight made no difference:
>
> (1) The reasoning in §§13-16 of the Strike Out Decision is plainly correct. The FTT did not have jurisdiction to consider the allegations of the conspiracy and fraud, which were the sole basis of Mr Hussain's case. In addition, those allegations are entirely baseless such that the case had no reasonable prospect of success. UT Judge Wikeley's certification of the related Ground 1 of this appeal as totally without merit further indicates the hopelessness of the underlying case. In that context, it was entirely appropriate for the FTT to strike the case out without an oral hearing, notwithstanding Mr Hussain's dyslexia.
>
> (2) As noted above, Judge Aleksander said at §8 of the FTT PTA Decision: "the nature of Mr Hussain's grounds of appeal (that the Information Commissioner conspired with Bradford to cover up its failures) is plainly outside the jurisdiction of the Tribunal, and even if Mr Hussain had the benefit of an oral procedure, it could not have changed the outcome." It is

clear Judge Aleksander would in fact have decided to strike the case out on the papers in any event. Accordingly, the failure to take Mr Hussain's dyslexia into account was not a material error.

18. The fact that Judge Buckley listed an oral hearing in relation to Mr Hussain's other appeal does not alter the position:

(1) The question of whether to make a decision on the papers or after an oral hearing is essentially a discretionary case management decision for the FTT judge in the relevant case. The fact that Judge Buckley considered an oral hearing to be appropriate in one case taking into account Mr Hussain's dyslexia, does not mean that Judge Aleksander would have been bound to reach the same view in the present case. In fact, as explained above, it is clear that Judge Aleksander would have made the Strike Out Decision in a paper determination, even if he had taken Mr Hussain's dyslexia into account.

(2) In any event, the facts of the two cases are materially different. Judge Buckley listed an oral hearing in the other case to consider Mr Hussain's application to amend his grounds, and to consider the issue of strike out following any such amendment. There is no such application in relation to the present case. Mr Hussain's grounds in this case are based solely on the allegations of conspiracy and fraud (which Judge Buckley had described in §25 of her original strike out decision as "entirely fanciful"). As such, even if an oral hearing was needed to determine the issues in EA-2023-0407, the same was not true in the present case.

14. The Respondent therefore invites me to dismiss the appeal or, in the alternative, to remit the case to the FTT with directions to determine two questions. First, should Mr Hussain's appeal be struck out for the reasons given in the original strike out decision? Second, should the FTT hold an oral hearing before deciding that first question? The Information Commissioner submitted that the answers to those two questions were 'Yes' and 'No' respectively.

The Upper Tribunal's analysis

15. I make the following observations on paragraphs 13-18 of the Information Commissioner's response to the appeal.

16. As paragraph 13 states, the question for determination on this appeal is whether the FTT made a material error of law in making the strike out decision without holding an oral hearing.

17. However, the starting point is not actually rule 32(1)(b), as paragraph 14 asserts. This is because an oral hearing can only be dispensed with under rule 32(1) if "each party has consented to the matter being determined without a hearing" (rule 32(1)(a)), which was evidently not the case here. Rule 32(1) is expressly subject to rule 32(3), which provides that "The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case)". Thus, the proposition is correct albeit the statutory authority is different.

18. As to paragraph 15, I agree with the Respondent that there is "no general principle that a litigant with dyslexia must always be given the opportunity to present their case at an oral hearing". Tribunals have a broad discretion to exercise in such case management issues. The fact that a party experiences

dyslexia may well be a factor – and sometimes an especially important factor – to be considered in the exercise of that discretion. It is not, however, an automatic passport to an oral hearing. There may be other countervailing factors to be taken into account in the light of the overriding objective.

19. Paragraph 16 of the Information Commissioner's response correctly acknowledges that the FTT overlooked the Appellant's disclosure that he had dyslexia.

20. However, I concur with paragraph 17 for the reasons set out there that this omission on the part of the FTT was in no way material to the outcome of the strike out proceedings.

21. Likewise, I accept the Information Commissioner's submissions in paragraph 18. It is axiomatic both that one FTT does not bind another as to issues of fact and, as already noted, tribunals enjoy a wide discretion in matters of case management. The present case, in any event, is materially different from the case in which Judge Buckley directed a hearing should take place.

Conclusion

22. The First-tier Tribunal directed itself properly on the relevant law. It also provided an adequate explanation of why it had reached the decision it had. Its decision reveals no material error of law. Accordingly, I dismiss the Appellant's appeal (section 11 of the Tribunals, Courts and Enforcement Act 2007).

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 23 July 2024