



Neutral citation number: [2024] UKFTT 00609 (GRC)

Case Reference: EA/2023/0328

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard: Determined on the papers

Heard on: 2 July 2024

Decision given on: 11 July 2024

Before

RECORDER CRAGG KC sitting as a Judge of the FTT

Between

LUCY HOLDSTOCK

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

DECISION ON STRIKE OUT APPLICATION

1. Decision: The Respondent's Strike Out Application dated 2 October 2023 made pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General

Regulatory Chamber) Rules 2009 (“the Rules”) on the grounds that there is no reasonable prospect of the appeal succeeding, is granted.

REASONS

LEGAL BACKGROUND

1. The Tribunal has the power to strike out the present appeal under rule 8(3)(c) of the Tribunal Rules on the ground that it has no reasonable prospect of success. The phrase ‘reasonable prospect of success’ has been explained by the Court of Appeal in *Swain v Hillman & Another* [1999] EWCA Civ 3053 in the context of considering the phrase for the purposes of summary judgment under Part 24 of the CPR at [7]:

“...the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.”

2. By way of a Notice of Appeal, the Appellant made an application to the First-tier Tribunal (the Tribunal). The Commissioner opposes the application and invites the Tribunal to strike it out under rule 8(3)(c) of the Tribunal Rules on the grounds that it has no reasonable prospect of succeeding:-

Rule 8(3)(c)

- (3) The Tribunal may strike out the whole or a part of the proceedings if—
 - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

3. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the

information (s.1(1)(a) FOIA) and to have that information communicated to him, if the public authority holds it (s.1(1)(b) FOIA).

4. When determining whether or not information is held the Commissioner and Tribunal should apply the normal civil standard of proof, on the balance of probabilities.

FACTUAL BACKGROUND

5. The Decision Notice in this case stemmed from an information request made by the Appellant to the UK Statistics Authority (UKSA) for information relating to deaths by vaccinations. The Appellant asked:-

Please can you confirm whether the analysis for any deaths after May 2021 has been completed using 2011 [census] data? If so please can you send that. If not, can you please send any papers and emails that relate to the decision to stop using census 2011 data to inform deaths by vaccination status report?

6. UKSA responded on 3 March 2023 providing the following link:

<https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/deathsbycovid19vaccinationstatusandtheircalculation>

7. The Appellant requested an internal review the same day stating:

Please review this response. I do not believe it has adequately answered my query - in particular it fails to provide any documentation relating to the decision to switch from 2011 to 2021 census data. It explains the public rationale for making the change but this is not my request.

8. Following an internal review UKSA wrote to the Appellant on 10 May 2023 and explained it had carried out a further search but no information was held. It further explained that the only information it held similar to that requested is its decision change log, which was published in response to another FOI request. The complainant has been provided with the decision change log.

9. The Commissioner's decision notice states, in response to the Appellant's complaint that further information should ne held:-

Although UKSA has not explicitly described the searches undertaken for the requested information, the Commissioner has taken a pragmatic view and has no reason to doubt adequate searches were carried out. It is the Commissioner's opinion that the fact UKSA record its decisions on a decision log as indicated in paragraph 8 above provides sufficient rationale for its decision, and it is not mandatory for it to keep any correspondence relating to that decision. Therefore, it is the Commissioner's view that UKSA does not hold the requested information.

10. The Appellant's appeal states:-

I am really surprised that such a significant decision could be taken and no emails, meeting notes or briefing papers retained to explain the rationale and approach taken to promote continued transparency on this important issue. The ICO also notes that the UKSA have not detailed the searches they have made - this despite taking several weeks and multiple prompts to reply.

11. The Commissioner now applies for an order striking out the appeal on the basis of rule 8(3)(c) of the Rules (no reasonable prospect of success). The Commissioner argues that there is no prospect of the FTT finding the Commissioner's conclusion that the information was not held contained an error of law. The Commissioner also says 'should the Tribunal consider further searches to be necessary, the UKSA will need to either be joined to the proceedings and / or directed to conduct further searches and provide submissions'.

DISCUSSION

12. It is the case that the only issue in the appeal is whether the Commissioner was correct to find that UKSA did not hold the information.
13. However, I note that the Commissioner decided not to ask UKSA about the searches it had carried out and the Commissioner decided the case on the basis that he assumed that UKSA had carried out sufficient searches.
14. As there is no evidence of the searches carried out, I do not think this appeal should be struck out at this stage. I do think that UKSA should be required to submit evidence and/or submissions about the searches carried out for the information requested by the Appellant, and I make directions to that effect. That evidence and/or

submissions need not be extensive, but sufficient to allow the Tribunal and the parties to understand what steps UKSA has taken to search for the requested information.

15. I note that UKSA has communicated that it does not wish to be joined as a party. However, by rule 5(1)(d) of the Tribunal Rules the Tribunal can ‘require a party or another person to provide documents, information or submissions to the Tribunal’.

FURTHER CASE MANAGEMENT DIRECTION

16. I make the following directions:-

1. By 5 August 2024 the UKSA is directed, by way of a witness statement or submissions to explain the searches carried out to locate the information sought by the Appellant and the result of those searches.
2. A copy of this decision to be provided to UKSA.
3. The statement or submissions should be sent by email to the Tribunal Office, and the Tribunal Office shall forward the parties.
4. The parties have permission to respond to the statement or submission by 19 August 2023, such response to be filed with the Tribunal and served by email on the other party.

Signed: Judge S Cragg KC

Date: 8 July 2024