



Please add NCN: [2024] UKFTT 00796 (GRC)

First-tier Tribunal

Case Reference: EA-

2023-0407

**General Regulatory Chamber
Information Rights**

Hearing by CVP on 30th August 2024

**BEFORE
DISTRICT JUDGE MOAN**

Between

SAJAD HUSSAIN

Applicant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is not struck out under rule 8(3)(c) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 (no reasonable prospects of success). Some grounds of appeal are struck out and may not be pursued.

2. The following grounds of appeal are struck out -

(i) That the Commissioner and local authority have colluded to cover-up the investigation or whitewash the investigation, or any ground that requires an examination into the behaviour/conduct of the Commissioner or the local authority beyond examining whether an exemption applies.

(ii) That Article 11 of the European Convention on Human Rights provides an avenue to request information over and above that provided by FOIA 2000.

3. The ground of appeal that will be considered by the Tribunal is –
(a) the balancing test under Article 6(f) as to whether the personal data of the local authority employees should be disclosed.

4. Further directions will be contained in a separate case management order.

REASONS

1. The issue for consideration at this hearing is the application of the Respondent Commissioner dated 6th October 2023 for the appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. The Commissioner contends that the Appellant's grounds of appeal have no realistic prospect of being successful.

The original grounds of appeal

2. The Appellant lodged an appeal on 19th September 2023 against the Commissioner's decision notice IC-240684-F9V5 dated 19th September 2023 on the grounds that –

"I believe the decision by the ICO is a deliberate fraud and deception to whitewash the complaint under some private arraignment between the ICO and the Local Authority. I believe that the Local Authority are privately commissioning out the services of the ICO in order to coverup their failures."

3. The Commissioner had been asked to investigate a complaint made by the Appellant following his request for information on 16th June 2023 for the telephone directory of elected members at the City of Bradford Metropolitan Borough Council. Originally that request was refused but during the investigation a redacted directory had been provided. The telephone directory included general contact numbers and email addresses as well as details of individual Council officers, including their names, role/service area, work and mobile telephone numbers and email addresses. The Council had disclosed information relating to senior staff and general contact information, but it had withheld the names and contact details of officers in junior roles. The Commissioner decided that the redactions were justified based on section 40 of the Freedom of Information Act 2000 (personal data).

4. The Commissioner in their initial response dated 6th October 2023 and later in their full submission dated 13th November 2023 invited the Tribunal to strikeout the Appellant's appeal under Rule 8(3)(c) no reasonable prospects of success.

5. The Commissioner's application reiterated that the Appellant's sole ground of appeal was a cover up rather than any substantive objection the decision notice. However, the Appellant's subsequent correspondence appeared to raise additional or substituted grounds of appeal. There has been no formal application to amend or substitute the grounds of appeal.

Correspondence and issues raised by the Appellant post-application

6. The Appellant was given the opportunity to respond to the application. By email dated 11th October 2023, he submitted:

*"Please note the legal basis of my pursuing these matters to the First Tier Tribunal (FTT) is that failure to disclose the requested information is a violation of my human rights as defined under article 10 of the Human Rights Act 1998 - freedom of expression, and as subsequently upheld by the 2016 case law of **Magyar Helsinki Bizottság v. Hungary**, which I shall be reliant on as the bases of my legal argument in these proceedings".*

7. The Appellant provided further submissions by email dated 12th October 2023:

"I challenge the ICO's simply use of the term "no reasonable prospect of success" as a phrase to simply justify ending this process. This matter is an important Human Rights issue and the matter does need to be judicially deliberated on. Furthermore, I have proceeded to provide a legal base of European case law which I shall be heavenly reliant on in making my argument that the decision taken by the ICO is wholly incompatible with the superior European court's decision. I fully object to the ICO's justification for having this case struck out, on the use of a cryptic legal phrase, and would look to put them to proof."

8. The Commissioner provided a reply by email dated 16th October 2023 as follows:

*"...the Commissioner submits that in **Moss v Information Commissioner and the Cabinet Office [2020] UKUT 242 AAC**, the Upper Tribunal dismissed the argument that Article 10 was a relevant consideration when dealing with requests under FOIA."*

9. By submissions dated 13th November 2023, the Appellant submitted that he was *"challenging the ICO's broad interpretation and liberal usage of exemption*

FOI Section 40 (2) and their subjective definition or interpretation of what constitutes personal information as understood by the FOI legislation".

10. He said -

"Is a person's name personal information?

According to the Data Protection Act 2018 it clearly is, as it can be used to identify a unique individual.

Is a person's name personal information in the context of the FOI legislation?

That is the singular question that the FTT is being asked to deliberate on in regard to the usage of Section 40 (2) exemption.

Taken into its extreme interpretation, the ICO and the Public Authorities would look to argue that everyone's name alone is to be protected under the Data Protection Act and therefore does not need to be disclosed under FOI thus affording every individual the right to anonymity. This interpretation would inevitably undermine openness, transparency and accountability to people holding positions of authority in officialdom. My argument is that a clear distinction needs to be first drawn, evaluated and determined on the individual in question before their name can be viewed as needing to be protected from disclosure. And that is achieved by means of identifying if the individual in question is a private citizen or a member of the public to be afforded the rights of data protection under the Data Protection Act, or if that individual is in fact part of a collective organisation, such as if they are an Officer or employed agent of a corporation, such as a public authority, subject to the Freedom of Information (FOI) legislation in the context of evaluating if the data is private or public.

In basic terms, I look to argue that any individual who carries out a trade or employment at the material time of the data being created does not have a right to anonymity and privacy of their name. According to my understanding of the ICO's broad definition of what constitutes personal data, unless I am mistaken, they believe it still does. Effectively what the ICO wants and the Public Authorities require is that their workers or employees have a right to privacy and anonymity while being employed as agents of a public corporation and part of a corporate structure by classifying their name as private data not needing to be disclosed to the public and protected under the Data Protection Act. By the ICO convoluting this definition they are undermining the rights of members of the public they are meant to serve. In its simplest form, the right to protection of privacy of one's name is mutually exclusive, as either the private citizen have a right to anonymity or the state agents or Officer have a right to anonymity. Both individuals cannot have the same right to anonymity at any one given time."

11. He added -

"The ICO's interpretation that all individuals' names are personal data fails to make the distinction between those individuals that are consumers of services and those that are providers of those services, or as I would look to make the distinction between private Citizens and public Officers, where Officers are any individual carrying out a work or trade to make money and a Citizen is anyone who at the material time is NOT acting as an Officer and is spending money to procure goods and services."

12. And -

"I believe the matter should be allowed to proceed to the FTT, as it shall look to provide fuller clarity on the objective definition of what constitutes personal data as understood under section 40 (2) to provide clarity to not only members of the public or public authorities but to the ICO and those agents that they employ such as Fizza Nisar. I would like to add that the present ICO interpretation of what constitutes personal data is also in contravention of the ICO's previous understanding of section 40 as per the decision made on the 22 of February 2006 decision notice FS50071194 (see attachment). If the FTT refuses my Application then they are denying me, as a private citizen, a legal remedy and access to justice and are knowingly permitting a public body such as the ICO and those it regulates to interfere with my freedoms and liberties as a private citizen. "

13. The decision notice FS50071194 as referred to by the Appellant stated:

"The Commissioner is of the view that the information requested relates to individuals acting in an official as opposed to a private capacity; and whilst the information sought is personal data, the disclosure of this additional information would not impinge on the personal privacy to which individual MPs are entitled in their private lives. The Commissioner is minded that the information sought is personal data relating to MPs carrying out Parliamentary business for which they are receiving an official allowance. In addition, the Commissioner notes that the information sought in this case only differs from that already released into the public domain by dividing total figures for annual transport expenses into figures for three separate categories of transport. Therefore, it is the Commissioner's view that disclosure of the information in this case would not be unfair.

The Commissioner is therefore of the view that in this case the legitimate public interest in this information being made available outweighs any prejudice that there might be to the legitimate interests of the data subject (the MPs) in withholding it."

14. In summary, the Appellant's position was said that the person taking his calls did not have a right to anonymity. He recalls having conversations with employees and covertly recorded them and publicising them on YouTube. He was disgruntled that the person at the other end of the call had sought to have

the media removed and against what he understood to be transparency via the Freedom of Information legislation. He objected to the application to strike out as he believed clarity was needed on what section 40(2) covered and to deny him his right to appeal would be to deny his access to justice.

15. The Commissioner provided further submissions dated 16th November 2023. The Commissioner notes that Section 3(2) of the DPA defines personal data as “any information relating to an identified or identifiable living individual”. The Commissioner submits that the withheld information in this case clearly relates to identifiable living individuals. The Commissioner submits that he was entirely correct to determine that the information withheld in this case falls under the definition of personal data as set out at section 3(2) of the DPA.

16. The Appellant responded to those submissions in an email dated 30th November 2023. In that email he states that the Commissioner has failed to address the substantive issue of his outstanding grievance. He stated:

“The Appellant’s disagreement with the ICO is that their reliance on exemption section 40 (2) is too broad, wide and far-reaching and furthermore using the Data Protection Act definition of what constitutes personal data is not a clear enough definition of what is personal information in the context of the Freedom of Information Act when the Information Commissioner (IC) refuses to equally consider other relevant laws such as the Human Rights Act (HRA) which the IC conveniently disregard as being a relevant law by deliberately cherry picking and choosing laws that strengthen his position but fails to focus on laws that clearly weaken his position, such as the HRA 1998.”

17. The Appellant asserts that the Tribunal should ask two questions at this stage:

Does the Tribunal have jurisdiction to hear the appeal?

Is the outcome being sought one that the Tribunal can satisfactorily deliberate on?

18. The Appellant re-emphasised that the problem for which he seeks a remedy is the Commissioner’s failure to recognise the distinction between the rights of private citizens and the rights of corporate officers. This distinction must be used to establish if section 40(2) applies. The Commissioner convoluting the two is the problem he said.

19. The Appellant asked the Tribunal to take particular note that he suffers from dyslexia and that it is vitally important for him to be afforded the opportunity to record conversations he is involved in for his personal reference and as an aid to my memory.

20. The appeal was originally struck out by Judge Buckley on 20th November 2023 on the basis that the appeal had no reasonable prospects of success. That decision was later rescinded, and the appeal re-instated, and the application for strike out re-listed for an oral hearing which took place on 30th August 2024. The Tribunal also gave a timeline for the Appellant to amend his grounds of appeal should he seek to do so. He has not filed any amended grounds.

The Legal Framework

21. Rule 8 of the 2009 Rules provides as follows:

"(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."

22. The power to filter cases that are destined to fail furthers the overriding objective by ensuring resources are targeted to other cases and the resources of the parties are not expended unnecessarily. The power to end cases/appeals early is a power utilised across jurisdictions whether expressed as a strike out or no case to answer.

23. Disclosing no reasonable case is often referred to as an unwinnable case that has no other benefit in continuing. The lack of prospects of success should be clear and obvious.

24. The right to information in section 1 of the Freedom of Information Act 2000 is subject to exemptions. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as: *"any information relating to an identified or identifiable living individual."* The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

25. The data protection principles are set out Article 5(1) of the UKGDPR. Article 5 provides - Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing

for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');
(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy')

26. Article 6 provides - Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

27. In summary, Article 5(1)(a) UKGDPR provides: that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. Article 6(1) UKGDPR provides that processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies.

28. The Council process their employee's data when they release their information pursuant to a FOIA request. The Appellant had not considered Article 6 albeit the only paragraph of that Article which appears to apply is (f) namely that processing is necessary for legitimate interest of the requestor save where the interest or fundamental rights of freedoms of the Council staff require protection of personal data. The Respondent has provided a simple guide to the relevant considerations in their written submissions.

29. The Appellant was invited to attend a hearing by CVP to consider the strike out application. The Respondent indicated that they did not intend to attend the hearing but preferred to rely on their submissions. He had sent a link to a YouTube that he wanted me to watch which was about the Prime Ministers handling of the recent riots.

30. At the outset of the hearing, the Appellant was warned that he was not allowed to make a recording, whether by video or audio or otherwise, of the hearing. The hearing was recorded by the Tribunal and a transcript could be made available later if that was needed. Recording a Tribunal hearing is a Contempt of Court, as would publishing it by sending that recording to others or uploading to social media.

31. The Appellant challenged his inability to record the hearing. The Appellant was advised that the hearing was being recorded by the Court and a transcript could be made available, if required. He was also advised that the 1981 Act prohibited unauthorised recordings and the nuisance behind that legislation was to prevent altered or inappropriate pictures or snippets of dialogue to be released that may not properly represent the hearing and bring the Tribunal into disrepute. The ability to alter digital recordings and use artificial intelligence made the 1981 Act even more important in terms of restricting recordings. The President of this Chamber had issued guidance confirming that any application based on reasonable adjustments needed to be made promptly, and had not in fact been made by this Appellant in advance of this hearing despite the Appeal being the system for almost a year. The Tribunal was aware that the Appellant had previously uploaded to social media recorded conversations with the Commissioner's office and this would never be permitted in any event. The Appellant was a very articulate man who had no difficulty in repeating back to me accurately what he understood from my explanations about the Tribunal's remit for the appeal and why some grounds of appeal may not be permissible. If the Appellant requires measures to participate in the appeal, he will need to be clear about the difficulties and what measures he seeks. The Tribunal will then consider that application and out in pace such measures as it considers fit.

34. The Appellant maintained his concerns contained in the grounds of appeal. He appeared to concede that the Tribunal would not look at the behaviour of the Commissioner and that his Article 10 claim had already been dealt with by a superior court. He said that he wanted to look at the Upper Tribunal decision to see if the decision applied to his circumstances. I advised him that the way his ground of appeal was expressed, the Article 10 ground would not be able to proceed but he was at liberty to apply to amend his grounds and that I would

make directions about that to ensure that was done quickly so as not to delay the appeal further. I asked the Appellant to consider carefully the comprehensive submission of the Commissioner dated 13th November 2023 as this would assist the Appellant in challenging the personal data exemption as it correctly set out the law and tests that the Tribunal would apply. It would be helpful if he addressed those tests in any subsequent submissions.

35. The Appellant asked me to order the Commissioner to have a telephone chat with him regarding his appeal. I explained that I could ask the Commissioner as part of case management directions to respond to submissions and documents, but I could not order the Commissioner to have direct dialogue with him in a specific way. That would be the Tribunal managing the Commissioner, something the Tribunal does not have power to do.

Discussion and conclusions

32. The initial ground of appeal was not a challenge to the Commissioner's decision that the Tribunal had jurisdiction to consider, namely, the exposure of a whitewash and cover-up. The Tribunal does not have jurisdiction to generally supervise the Commissioner or indeed the local authority. Whilst the Appellant maintained that he perceived collusion and claimed fraudulent behaviour, those are matters for other agencies and not the Tribunal. There is absolutely no basis for the appeal to continue on the initial ground of appeal in his notice of appeal form and there is no prospect at all that the initial ground of appeal could succeed.

33. The emails sent in subsequently raise different arguments to those propounded in the original written notice of appeal. For completeness, I have considered them also even though there has been no application to formally amend the grounds of appeal. There is no doubt that the question of whether an exemption applied, and the definitions and ambit of those exemptions is fairly within the proper remit of the Tribunal.

34. The Appellant goes onto submit that a European Court decision has decided that information should be available under article 10 as not to disclose would breach his freedom of expression under the ECHR. and that the Tribunal must follow that decision. He cites the 2016 case of **Magyar Helsinki Bizottság v. Hungary**.

35. In **Maygar**, the European Court of Human Rights recognised that Article 10(1) might, under certain conditions, include a right of access to information, including in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right. The case does give freestanding rights and I remind myself that decisions of the European Court are not binding on UK Courts.

36. The Upper Tribunal have already considered the issue of article 10 and the **Maygar** case comprehensively. In **Moss v Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC)** the Tribunal considered that that domestic law does not consider Article 10(1) extends to include a right of access to information and in any event, the European dicta could not afford greater rights than already provided by FOIA. The case of **Moss** is binding on this Tribunal and the European Court case is not.

37. On the basis that this ground of appeal has been exhaustively considered by the Upper Tribunal already and dismissed, this ground of appeal is also destined not to succeed and must be struck out as having no reasonable prospect of success also.

38. The Appellant has since submitted that the single question for the Tribunal to consider is whether a person's name is personal information. Personal data is defined by statute and is something that identified a person. There is no rational basis for concluding that a name is not personal data. If that were so, then there would be no need for Data Protection legislation. The exemption claimed under FOIA directly refers to the Data Protection Act 2018 definition. There is no other definition that can be applied as this is explicit within the legislation.

39. The Appellant suggested that the exemption should not apply to a person operating in a professional capacity or as a servant of an authority. FOIA specifically refers back to the data protection principles and the UK GDPR. A person's status might impact on the balancing test under Article 6(f) but there is no exemption that refers solely to a person's status. The issue for the Tribunal is a more nuanced version of the Appellant's ground of appeal.

40. There are no reasonable prospects of a Tribunal concluding that a different definition of personal data should have been applied. The Tribunal and the Commissioner must apply the definition of personal data that is

enshrined within the legislation. There is no room for doubt about the names being personal data. That argument also has no realistic prospects of success.

41. The question of the capacity in which a person is acting is not relevant to the question of whether their name is personal data. It is relevant to the question of whether disclosure would contravene any of the data protection principles.

42. The principles that are fundamental under the UK GDPR are the lawfulness, fairness and transparency of the personal data being disclosed. Their office/employment is not determinative in itself but issues concerning the data subject may be considered in considering Article 6(f). As the Commissioner alludes in his submissions dated 13th November 2023, the Tribunal must consider the legitimate interests in disclosure whether it is necessary and whether the interests of the requestor override the legitimate interests of the data subject. The position of the MPs expenses in the decision notice supplied by the Appellant is a fact-specific example noting the public interest in MPs expenses. It is unlikely to assist here.

43. The Commissioner has outlined the pertinent tests and applied them to the facts on this case (particularly paras 19-25). The Appellant has not done the same and would be well advised to take each test in turn and create his own submissions in response.

44. The Appellant grounds of appeal have always remained very generalised and including matters of principle. He has not addressed the data protection principles specifically or in the round. He has not identified why the disclosure was necessary or how his legitimate interests would override that of the junior staff member's personal data.

45. The personal data exemption required several considerations. It is not appropriate for the Tribunal to take a binary approach to that ground of appeal. It will be a matter for the Tribunal what factors they consider are relevant and what weight they place on each. In my judgment, that ground of appeal should not be struck out and should proceed to a final hearing.

46. I have struck out those grounds of appeal which are unarguable to allow the parties and the Tribunal focus on the ground of appeal that requires determination.

My decision was explained orally to the Appellant at the end of the hearing which he confirmed that he understood but is given more fully in writing to assist both parties and ultimately the next Tribunal to hear the final appeal.

47. A separate case management order accompanied this judgment.

District Judge Moan sitting as a First-Tier Tribunal Judge

30th August 2024