IN THE UPPER TRIBUNAL **Case No. UA-2023-000326-GIA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 134 (AAC)**

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

Between:

Mr Steven Edward Burton

Appellant

- v -

Information Commissioner

Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 3 May 2024
Decided on consideration of the papers

Representation:
Appellant: by himself
Respondent: by Oliver Jackson of counsel

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal under reference EA/2022/0243, made on 9 January 2023, and striking out the Appellant's appeal to the First-tier Tribunal, involved the making of an error in point of law.

Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake that decision. **My remade decision is to refuse to strike out the Appellant's appeal to the First-tier Tribunal.**

REASONS FOR THE DECISION

1. References in what follows to

    a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000

    b. the "**FTT**" are to the First-tier Tribunal

    c. the "**FTT decision**" are to the FTT decision under reference EA/2022/0243, issued on 9 January 2023, and striking out the appeal under s57 of the Appellant ("**Mr Burton**") against a decision notice ("**IC's decision notice**") of the Respondent ("**IC**") dated 2 August 2022, as having no reasonable prospect of success

    d. numbers in square brackets are to paragraphs of the FTT decision

    e. "**DHSC**" are to the Department of Health & Social Care.

The FTT decision

2. This is an appeal against the FTT decision, which was a decision to strike out Mr Burton's appeal under rule 8(3)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (no reasonable prospect of the appellant's case succeeding). The FTT decision was made "on the papers" i.e. without a hearing.

3. At [2], the FTT decision recorded that IC's decision notice had found that "the burden of complying with [Mr Burton's information request to DHSC] would be 'grossly oppressive' so as to satisfy s14(1)" (vexatious or repeated requests).

4. At [4], the FTT decision stated that Mr Burton's grounds of appeal were

> "(a) a challenge to the 'cost of compliance' (although s12 is not relied on in [IC's decision notice]); (b) he states that he does not believe that DHSC did not hold a single summary report rather than the 166 reports which it found to fall within the scope of [Mr Burton's] request; and (c) he submits that [IC] is engaged in medical censorship. I note that he does not in his grounds challenge [IC's decision notice's] findings as to the nature of the burden on the public authority."

5. After citing paragraph 41 of *HMRC v Fairford Group plc* [2014] UKUT 329 at [6], the FTT decision at [7] said that, applying that approach, it concluded

> "… that this is a case which may be described as 'not fit for a full hearing'. This is because the role of the [FTT] under s57 is to

> decide whether there is an error of law or inappropriate exercise of discretion in [IC's decision notice]. The grounds of appeal simply do not engage with that jurisdiction. Although he takes issue with DHSC and [IC], [Mr Burton] has not presented an argument which engages the [FTT's] jurisdiction".

The Upper Tribunal proceedings

6. Following a hearing on 3 October 2023, I gave permission to appeal. In the permission decision, I said that it was realistically arguable that the FTT erred in law in its core reasoning because

    a. it did not do justice to Mr Burton's grounds; in particular, the three-point summary of Mr Burton's grounds at [4], an abbreviated version (it would appear) of IC's three-point summary of those grounds in its response (dated 7 October 2022) to Mr Burton's appeal (at paragraph 23), characterised the first ground, (a), as "a challenge to the 'cost of compliance' (although s12 FOIA is not relied on in the Decision Notice)", whereas it is more fairly characterised as a challenge to the weight placed on the cost of compliance with Mr Burton's request (calculated using a methodology somewhat based on s12 costs thresholds) in the multifactorial assessment of what is "vexatious" required by the relevant case law (see *Dransfield* in the Court of Appeal, at [68]) (and this aspect of the ground was brought out in the IC response's (more complete) summary, when it spoke of the costs of compliance (calculated as above) being a "drop in the ocean" (i.e. relatively insignificant) in the context of the overall expenditure of the public authority in question; and/or

    b. it failed to carry out the inquisitorial (and enabling) role of the FTT, as required by the fact of Mr Burton being a litigant in person, by failing to identify that the reliance placed by the IC's decision notice on s12 costs thresholds (which IC's response to the appeal said, at paragraph 27 and again at paragraph 30, were a "useful starting point", but appear to have been materially relied on, with no further explanation, in reaching the conclusions in the decision notice), was potentially wrong in law,

7. IC produced a response to the appeal, drafted by counsel; and Mr Burton put in a reply. IC expressed no view on whether there should be a hearing; Mr Burton requested an oral hearing only if the Upper Tribunal was "not minded to uphold this matter on the papers". In all the circumstances, I decided it was fair and just to determine this appeal without a hearing.

8. I am grateful to both parties for their submissions.

Summary of relevant law

Section 14

9. I gratefully rely on the summary of the proper legal test in s14 as set out in *Cabinet Office v CIC and Ashton* [2018] UKUT 208 (AAC) at paragraphs 24-27. Subject to that, I accept the following points of emphasis helpfully made in IC's response to this appeal:

    a. the success – or otherwise – of an appeal involving s14 derives from a holistic assessment of all the circumstances of the case;

    b. whether a request is vexatious will typically depend on a balancing exercise between competing themes (such as balancing the burden that answering the request would impose on the public authority against any serious value and purpose lying behind it);

    c. as was said in *Dransfield* in the Court of Appeal ([2015] EWCA Civ 454) at paragraph 85 - "[T]here is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of, or solely because of, the costs of complying with the current request".

Approach to strike out applications

10. The Upper Tribunal said the following in *HMRC v Fairford* at paragraph 41:

> "In our judgment an application to strike out in the FTT under rule 8(3)(c) should be considered in a similar way to an application under CPR r3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the FTT Rules to summary judgment under Part 24). The tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance), prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 1 All ER 91 and *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at para 95 per Lord Hope of Craighead. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike-out procedure is to deal with cases that are not fit for a full hearing at all."

11. For completeness, I note that in *The First De Sales Ltd Partnership v HMRC* [2019] 4 WLR 21, the Upper Tribunal said that although the above summary

in *Fairford* was "very helpful", it preferred to apply a more detailed statement of principles, as set out in that case at paragraph 33.

Why I have decided that the FTT decision involved a material error of law and falls to be set aside

12. The core of the FTT decision was that none of Mr Burton's grounds of appeal engaged the FTT's jurisdiction under s58(1), namely, consideration of whether (in this case) IC's decision notice was not in accordance with the law, or that it involved an exercise of discretion by IC and IC ought to have exercised that discretion differently. (In what follows, for shorthand, I will refer to a decision notice considered unlawful or an incorrect exercise of discretion, in s58(1) terms, as "wrong" by reference to the law or discretion it was purporting to apply or exercise.)

13. The FTT decision is brief in explaining how it formed this view, saying little other than that Mr Burton's appeal grounds "simply do not engage with" the FTT's jurisdiction; it seems the FTT considered it *self-evident* from Mr Burton's grounds, as it summarised them at [4], that this was the case.

14. Part of the permitted grounds for this appeal was that the FTT decision, in forming the view that Mr Burton's appeal grounds did not engage the FTT's s58(1) jurisdiction, arguably did not "do justice" to Mr Burton's grounds; in particular, it was arguable that limb (a) of Mr Burton's appeal grounds, as summarised in the FTT decision - "a challenge to the 'cost of compliance' (although s12 FOIA is not relied on in the Decision Notice)" - mischaracterised the ground as an argument that IC's decision notice was "wrong" by reason of its application of s12 (*exemption where cost of compliance exceeds appropriate limit*); whereas, on a fair basis, Mr Burton's ground was that IC's decision notice was "wrong" by reason of its application of s14 (in putting exaggerated weight on the cost burden (calling it "grossly oppressive") in the holistic assessment of what is "vexatious" request, as required by the relevant case law).

15. IC's response to this appeal argues that it was not an error for the FTT to interpret Mr Burton's case as being that IC's decision notice was "wrong" (solely) by reason of its application of s12 (such that, on the FTT's interpretation, Mr Burton's case did not allege that IC's decision notice was "wrong" by reason of its application of s14).

16. In my view, this issue is resolved by examining Mr Burton's appeal grounds, as set out in section 5a (grounds of appeal) of Mr Burton's notice of appeal to the FTT:

> "My FOI request to the DHSC in its original form, submitted 13th October 2020, was rejected on the 'section 12' basis that time required to search out the information requested would exceed 'appropriate limit for cost of compliance' of £600 worth of a clerk's time, as noted in sections 67 to 72 if the ICO decision notice, with The Commissioner stating that rather than

requesting internal review by the DHSC (which would have without doubt resulted in the same response) the complainant accepted the DHSC application of section 12. This is incorrect, I did not accept the application of section 12 but having been told by the DHSC in their response that rules of FOI state section 12 was applicable and the FOI therefore would not be answered, but I could submit a 'trimmed down/less intense effort required' request, I did so and revised my request on 10th November 2020 as noted in section 6 of the ICO decision notice. My revised request was not responded to until 2nd June 2021 despite many intervening requests for response, with the response being a refusal citing that whilst the requested information did exist section 36(2)(c) 'the effective conduct of public affairs' was being applied - one might ask what could be any more of an affair the public should have access to information for, than results of a public consultation? In the response was no mention of 'section 12' as their had been to my original request. I requested a DHSC internal review on 21st June 2021 contacting the ICO also same date and unsurprisingly after several more months of my chasing, the refusal citing section 36(2)(c) was maintained in a response on 11th October 2021, as noted in section 9 of the ICO decision notice. Further complaint investigation that I requested of the ICO, who challenged the basis for section 36(2)(c) application, eventually resulted in a revised response from the DHSC back to citing section 12 once more (as per original request) and section 14 'vexatious requests', as reason why the revised request information would not be released and with previously not advised rationale that the single summary report requested in my revised request, did not indeed exist, only a set of 166 summary reports which would would trigger the 'appropriate limit for cost compliance' criteria. I still find this hard to fathom as to why this response wasn't given in June 2021 if a single summary didn't exist and it does seem odd that I am expected to believe that health chiefs and government ministers, had to work with 166 individual and lengthy reports to inform their decision in a very short review period when they were all extremely busy? **I also find it hard to fathom as to how a request for results of a public consultation to be released, with some 22 months now having passed since the consultation, could be considered 'vexatious'. Even if the amount of effort should exceed the £600 worth of a clerk's time, revise estimated by the ICO on review of DHSC estimate being approximately 83 hours at £25 per hour (£2,075), this is surely 'a drop in the ocean' to a government department with the size of budget the DHSC holds** (remember it spent £35billion on test, track and trace, £billions on the vaccine roll-out programme and many more £millions on PPE procurement contracts)? Further suggestions sumarised in the decision notice section 36, as made by the DHSC and apparently agreed with by the ICO that the majority of

> respondants to the vaccine consultation were by organised 'anti-vax' groups and their responses contained mis and dis-information is surely and quite simply ludicrous and entirely subjective, as there is not and can not be any definitive / cast iron guaranteed safety and efficacy information about a novel technology vaccine that was to be, and indeed was, brought into use in a fast tracked emergency licence arrangement without having undergone full clinical trials to include mid term and long term studies. Section 37 of the decision notice appears to be even more ludicous and quite frankly disturbing, in that it states that the disclosure of opinions of those opposed to covid-19 vaccination (bearing in mind we now have evidence that the vaccines have killed people and the government has begun paying out compensation to victims), would risk damaging uptake of the vaccine. This is nothing more than medical censorship in what is supposed to be a democratic country. Section 40 of the decision notice is also questionable as it intimates ballanced information relating to covid-19 vaccinations (composition and safety?) is already available in the public domain, when in fact government, health agencies and mainstream media channels have actively stifled any presentation of information that challenges the desired view of government, that the vaccines have been the only answer to covid-19 and are anything other than completely safe and effective (they budgeted over £300million pounds for media services contracts to drive this message 24 hours a day, 7 days a week, for 2 years and are still driving it). In summary of the above, my appeal is a reiteration of the stance that I have taken throughout this FOI request, that the results of a public consultation (which should have been made publicly and timely viewable as a matter of course) should be released to me as requested and that the ICO decision to support the DHSC refusal to release is flawed and should be reversed, demanding release, as the grounds for withholding are insufficient in context of the importance of the information to the general public of this country."

17. I have highlighted wording in the above which, in my view, makes it clear that Mr Burton's case was *not* limited to saying that IC's decision notice was "wrong" in its application of s12 (but, rather, included saying that IC's decision notice was "wrong" in its application of s14).

18. It seems to me that the highlighted wording, read in context and rephrased in more "legal" language, is an argument that, in the holistic balancing exercise required to determine whether a request is "vexatious", it is relevant, when considering the cost burden of complying with the request, to consider the costs relative to the resources available to the public authority; whereas, in contrast, the "fixed" cost figures that govern s12 (alluded to in Mr Burton's reference to "£600" in the highlighted wording) have little or no relevance. The argument is therefore that IC's decision notice was "wrong" to have

disregarded a relevant factor (the cost, relative to overall resources available) and to have paid regard, or overmuch regard, to a factor of little or no relevance (figures derived from s12, which IC's decision notice referred to as "limits" at paragraphs 52 ("grossly above the 24 hour limit") and 55 ("double the limit prescribed") and which appears to have informed its view, implied by paragraph 56 and by paragraph 2, and as understood by the FTT decision at [2], that the cost burden of Mr Burton's request was "grossly oppressive").

19. I think it right, given that Mr Burton was not legally represented and that tribunals have an "enabling" function (and, per the overriding objective of their procedural rules, are to avoid unnecessary formality and ensure full participation by the parties), to rephrase Mr Burton's argument as I have done above; it is a matter of taking an argument expressed in "lay" but perfectly understandable terms (the cost burden of compliance was a "drop in the ocean" in the context of DHSC's budget) and fairly drawing out its legal implications, in the context of the case; it is not a matter (as clearly would be improper) of expanding or (in substance, as opposed to legal form) improving Mr Burton's arguments. Nor, for completeness (as this point was raised in the IC's response to this appeal at paragraphs 31-32), is it a matter of "reformulating" an appeal under one statutory provision as being under a different such provision (as it is, in my view, perfectly clear that Mr Burton's appeal grounds were alleging that IC's decision notice was "wrong" in its application of s14).

20. It follows that, to the extent that the FTT decision was on the basis that Mr Burton's case was confined to the IC's decision being "wrong" in its application of s12 (and did not extend to IC's decision being "wrong" in its application of s14), that was an error of law in the FTT decision, as, in my view, it is quite clear that Mr Burton's case was not so confined.

21. I add, for the avoidance of doubt, that to the extent that the FTT decision can be read as having recognised that Mr Burton's case relied, at least in part, on IC's decision being "wrong" in its application of s14, in my view the FTT decision erred in not explaining its reasons adequately; in particular, it failed to engage with Mr Burton's s14 "drop in the ocean" argument (as articulated at paragraph 18 above), and explain why, in its view, it was fanciful.

22. The error (or errors) described in the preceding paragraphs was (or were) material to the FTT decision; for this reason I consider it appropriate that the FTT decision be set aside.

Why I have decided to remake the decision and refuse strike-out

23. IC's response to this appeal argued "in the alternative" (if the FTT decision was found to err in law) that the decision should be remade by the Upper Tribunal so as to strike out Mr Burton's appeal.

24. IC's response advocated the Upper Tribunal "remaking" as opposed to "remitting" to the FTT, as there were "no significant factual issues to resolve"; IC cited *Ainslie v IC and Dorset CC* [2012] UKUT 441 (AAC) at paragraph 39,

where (in an appeal against a decision of the FTT following full consideration of the case, as opposed to a strike out by the FTT) Upper Tribunal Judge Wikeley accepted as well-made the point that "a s14(1) case" did not involve the types of issues which may require the specialist and broader experience of the FTT; IC also argued that there was a need for "closure, or at least further progress" in this matter, as Mr Burton's request was made in November 2020.

25. Applying (as the FTT decision did) the principles in *HMRC v Fairford* at paragraph 41, the main question on a strike-out application like this one is whether the appeal's prospects of success at a full hearing are realistic as opposed to fanciful; a mini-trial is to be avoided.

26. It does not seem to me that resolution of this question in this case requires the fact-finding specialism of the FTT; and so I am satisfied that in this case it is appropriate that, having set aside the FTT decision for error of law, I remake the decision.

27. IC's response to this appeal makes out a case that s14 is satisfied in this case, concluding as follows at paragraph 40:

> "It follows that the significant and unchallenged burden that answering the Appellant's request would impose on the DHSC, balanced against its minimal value and purpose, is sufficiently onerous for the request to be vexatious within the meaning of s.14."

28. I note, however, that this does not directly address the point of whether Mr Burton's counter-arguments (in his appeal grounds) are fanciful as opposed to realistic.

29. In my view, Mr Burton's argument, as articulated it at paragraph 18 above, that IC's decision was "wrong" in its approach to the cost burden of compliance as part of the holistic determination of whether Mr Burton's request was vexatious, carries the necessary degree of conviction: whilst acknowledging that the burden of cost of compliance alone can amount to vexatiousness, and that Mr Burton is unlikely to be able adduce evidence to challenge what, per the views set out in IC's decision notice, the cost burden would be, I consider Mr Burton's core argument that IC's decision notice, in finding the cost burden of compliance to be "grossly oppressive", placed overmuch reliance on s12 figures, and failed to put the compliance cost figures in the context of DHSC's resources, sufficiently grounded in both evidence and law to make it worthy of consideration by the FTT.

30. I have therefore remade the decision so as to refuse the application for strike-out.

31. As a postscript (as these are not, strictly, matters for the Upper Tribunal), I add that my expectation is that Mr Burton's appeal will now progress to full hearing before the FTT; and that it would seem appropriate for the FTT

hearing the appeal to have sight of this decision as part of their appeal papers.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 3 May 2024