IN THE UPPER TRIBUNAL **Case No. *UA-2023-001393-GIA***
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 206 (AAC)**

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

Between:

Mrs Ruth Farnsworth

Appellant

- v -

Information Commissioner

Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 12 July 2024
Decided on consideration of the papers

Representation:
Appellant: by herself
Respondent: by Christian Davies of counsel

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal under reference EA/2023/0045, made on 5 July 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. "**regulations**" are to the Environmental Information Regulations 2004 (SI 2004/3391)

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

    b. the "**FTT decision**" are to the FTT decision under reference EA/2023/0045, issued on 5 July 2023 (and made "on the papers"), striking out (under rule 8(3)(c) of the FTT procedure rules) the appeal of the Appellant ("**Mrs Farnsworth**") against a decision notice (the "**challenged IC decision**") of the Respondent ("**IC**") dated 20 December 2022, as having no reasonable prospect of success

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

The FTT decision

2. This is an appeal against the FTT decision, which struck out Mrs Farnsworth's appeal against the challenged IC decision.

3. The challenged IC decision related to one item in an information request made by Mrs Farnsworth on 11 November 2021 to her local borough council, relating to a planning application she had made: the request itself described the requested information as the "DLP report" for a particular planning reference ("DLP" was shorthand for DLP Planning Ltd, a company that had contracted with the council to deal with planning applications – more will be said about this in what follows). The FTT decision described the requested information as a "draft report"; and decided that it was covered by the exception (to the duty to disclose environmental information) in regulation 12(4)(d) – i.e. that the request related to material still in the course of completion, to unfinished documents or to incomplete data.

4. The FTT decision, at [4], summarised Mrs Farnsworth's grounds of appeal (box 5a of her FTT appeal form) as

    a. querying only one paragraph in the challenged IC decision (paragraph 35); and

    b. suggesting (in box 6 of the form, asking the outcome sought) that Mrs Farnsworth should be able to see whether the requested information (the "draft report", as the FTT decision called it) contained any consideration of alternative proposals which would have assisted a (new) application for planning permission which Mrs Farnsworth was contemplating making.

At [5], summarising Mrs Farnsworth's response to IC's application to have her appeal struck out, the FTT decision said that Mrs Farnsworth had said she just wanted a judge to look at the "draft report" and tell her about it.

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 and s58 of the Freedom of Information Act 2000 (applicable to the [regulations]) 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 but seek to use the [FTT] as a vehicle for further disclosure."

6. At [8], the FTT decision added that no tribunal properly directed could allow Mrs Farnsworth's appeal "because it does not suggest any error of law in [IC's decision notice]" and Mrs Farnsworth sought a remedy which the FTT may not provide.

The Upper Tribunal proceedings

7. Following a hearing on 13 February 2024, I gave permission to appeal.

8. The permission decision noted that, in addition to how the FTT decision summarised Mrs Farnsworth's FTT appeal form, box 5a of that form ("grounds of appeal") said "Please see my notes attached" and these run from A15 to A46 in the FTT bundle; these were largely copies of documents, as the FTT decision noted, but they are interspersed with notes by Mrs Farnsworth. The permission decision noted that, in these, Mrs Farnsworth referred to the information requested as the DLP consultants report (for example on page A30).

9. The permission decision found it arguable that the FTT erred in law by construing Mrs Farnsworth's grounds of appeal overly literally, given that she is a litigant in person; arguably, the FTT, acting inquisitorially and in keeping with the overriding objective of the FTT's procedure rules, should have recognised that

    a. asking the FTT to tell her the "differences" between the information she requested (in her terms, the DLP consultants report), and a report published by the council (and to which she had access), Mrs Farnsworth was in effect just asking (again) for disclosure of the information she had requested; and

    b. it was inherent in her information request (by her repeated reference to the "DLP consultants report") that she regarded her request as relating to a self-standing document (being a (complete) document delivered by a separate company, DLP Planning Ltd, to the council) – and so, contrary to the position taken in the challenged IC decision, outwith regulation 12(4)(d)

(although Mrs Farnsworth, not being a lawyer, did not articulate her position by reference to that regulation).

10. The permission decision found the foregoing arguable error on the part of the FTT to be material: if the FTT had recognised Mrs Farnsworth's grounds as being that the challenged IC decision erred by treating her information request as caught by regulation 12(4)(d), then it was realistically arguable that the FTT would not have struck out the appeal as having no reasonable prospect of success, as it was (again) realistically arguable that a report written by a consultant company and given to the council was neither "material still in the course of completion", nor an "unfinished document". (The permission decision noted in particular that "material" in the former phrase was held in *Highways England Company Ltd v IC and Manisty* [2019] AACR 17, a 'reported' decision of this chamber of the Upper Tribunal, at [23], to mean something with physical existence i.e. not something incorporeal, like a project, an exercise or a process).

11. IC produced a response to the appeal, drafted by counsel; and Mrs Farnsworth put in a reply. IC said the appeal should be determined on the papers; Mrs Farnsworth asked for an oral hearing. In all the circumstances, I have decided it is fair and just to determine this appeal without a hearing.

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

IC's submissions

13. IC's submissions referred to the detail of the challenged IC decision, in particular paragraphs 13 and 14 (under the heading, "The Council's arguments"), which stated that

    a. the requested information was "the draft version" of the decision made by the council on Mrs Farnsworth's planning application;

    b. the council had explained to IC that "a third party was contracted to assist with a number of planning applications, due to an increased workload. The contract involved the third party investigating and processing planning applications, which were then sent for consideration by the Council's Head of Planning and the Development Control Manager; much the same way that the Council's own officers would work".

14. IC's submissions also referred to several of the paragraphs of the challenged IC decision under the heading, "Balance of the public interest", which contained reasoning about the public interest in releasing "draft reports in relation to planning applications", and included noting that the council published "the final versions of these reports online". IC had seen the requested information (the "draft decision document", as the challenged IC decision called it) and noted that "whilst there are some changes, these do not impact on the outcome of the final draft report that has been disclosed. Amendments have been made from the draft to the final version, however, these are to make the final version clearer

and more concise, as well as removing information which could be considered personal data".

15. IC submitted that:

    a. the FTT decision was right to conclude that Mrs Farnsworth's FTT appeal notice did not raise any ground of appeal falling within the FTT's jurisdiction

    b. there was nothing on the face of Mrs Farnsworth's FTT appeal form capable of being construed as an argument that the requested information was a self-standing complete document, such that regulation 12(4)(d) was not engaged; it was contended that Mrs Farnsworth "appears to accept" that the requested information was a "draft": her email to IC of 9 August 2022 was cited, which referred to the "DLP consultants draft report"

    c. in the alternative – even if the FTT decision did err in law by not construing Mrs Farnsworth's true ground of appeal as being that regulation 12(4)(d) did not apply to the requested information – it was submitted that any such error was immaterial, because

        i. the law is clear that "drafts" of documents are "unfinished documents" (and remain so even after the document is finalised) and so fall within regulation 12(4)(d)

        ii. on the facts of this case, the requested information related to a draft of the council's report on the relevant planning application; the "unfinished" nature of the document to which the requested information related, was not "negated" by the fact that the council "outsourced its production" to DLP, rather than being produced in-house by the council's own staff

        iii. an appeal on the basis that the requested information did not relate to an "unfinished document", therefore, had no reasonable prospect of success.

Approach to rule 8(3)(c) strike out applications

16. 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."

17. 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

18. The jurisdiction of the FTT in this case was broad and, in concept, simple – had the challenged IC decision wrongly applied the law?

19. A litigant in person in person, like Mrs Farnsworth, will not be across the ins and outs of the law. What such litigants will therefore often do – as Mrs Farnsworth did in this case – is simply throw before the tribunal all the reasons she believes the challenged decision is wrong.

20. In such cases it is for the tribunal, on an application to strike out under rule 8(3)(c), to look at those reasons, reasonably and realistically and with fairness and justice firmly in mind, and decide whether they disclose a realistic case that, in this case, the challenged IC decision wrongly applied the law.

21. Here, the text Mrs Farnsworth inserted in box 5a ("grounds of appeal") of her FTT appeal form (of 17 January 2023), was 28 words long; it expressed what she wanted to get out of the information she requested (to see if the DLP report, as she called it, recommended "another proposal") – it did not therefore give any reason to think the challenged IC decision had wrongly applied the law. It did, however, refer to her attached "notes" – these ran to 31 pages. They included the following:

    a. On the first page there is a short chronology; this includes: on 5 August 2021, "application validated"; on 14 August 2021, "DLP Consultant took over the planning application as my case officer"; on 20 August 2021, "DLP Consultants meet me on site"; on 30 August 2021, "DLP Consultants asked for a written agreement to extend the determination date". After the chronology, it is stated: "The DLP Consultants came on site, therefore appreciate the levels, layout surroundings etc".

    b. There is then what looks like a reproduction of an online record of Mrs Farnsworth's planning application (it has the application number, site address, "application description" and "application

type"). Under the heading "Case Officer", it says: DLP Planning Consultants.

c. On the next page, there is a copy of an email of 30 September 2021, from an email address ending "@dlpconsultants.co.uk", and signed off with the sender's name and status as "Senior Planner, DLP Planning Limited". The email refers to Mrs Farnsworth's application, the sender's site visit the previous week, and says: "my colleague and I are now reviewing all of the application's details comprehensively so that we can proceed to determination for you as soon as possible in these coming days". It then says they were writing to "formally request" a 2-week extension of time. The email then says: "We will seek to determine the application as soon as possible for you within this time period".

d. The next page refers to, amongst other things, objections to the application received by the council, and alleges that that "LPA" (i.e. the council) failed to inform Mrs Farnsworth "or the DLP Consultants" of the objections, in a timely fashion.

e. On the next page, after quoting from guidance about the "importance of continued discussion about a planning application", it was noted that "The DLP Consultants wrote a report that I believe suggested an alternative planning proposal …".

f. Later in the document, the following is said: "The LPA stopped the DLP Consultants communicating with me from 15th October 2021, that I consider unreasonable, as I had no engagement from [the council] during the planning application process … they refused to send a copy of the DLP report before it was overwritten."

22. In my view, it is reasonably clear from what is noted above that Mrs Farnsworth felt that she had been interacting with "DLP Consultants" during a significant part of the planning application process and, for various reasons, wanted to see the report that DLP had written and given to the council. It is reasonably clear that, from her perspective, the DLP report is something distinct and self-standing; she does not regard it as the "draft" of what later appeared on the council's website. (The fact that, in an email to IC, Mrs Farnsworth adopted IC's approach of referring to the requested information as a "draft " report, does not affect what I say here, or amount to Mrs Farnsworth "conceding" this point).

23. Clearly, the challenged IC decision saw matters differently: this was spelled out at paragraphs 13 and 14, cited above. IC asserts that, in the language of regulation 12(4)(d), there was one "document" (presumably, the council's published notice of decision at page D114 of the FTT bundle and following); and what DLP produced was but a "draft" of that document (and so an "unfinished" version of it); the situation is analogous, IC say, to the council's employees drafting a document that is later finalised and published by the council.

24. I am not here deciding whose interpretation of these matters is correct; but it does seem to me clear from the materials sent with her FTT appeal form that Mrs Farnsworth has a position that engages the question of whether the challenged IC decision erred in law – and her position is that it did, because the DLP report was a distinct (and complete) document (rather than a "draft"). The fact that, being a litigant in person, Mrs Farnsworth did not articulate her appeal grounds in this fashion, is not determinative; the tribunal has the "enabling" role described at paragraph 20 above.

25. I therefore do not accept IC's primary submission: in my view, the FTT decision did not do justice to Mrs Farnsworth's case as was reasonably evident from her FTT appeal form, and so erred in law in deciding that her appeal did not engage the tribunal's jurisdiction.

26. As to IC's alternative submission – in essence, that Mrs Farnsworth's argument is fanciful, because it is well-settled that "draft" documents are "unfinished documents" – it will be evident from the foregoing that, in my view, the true issue raised by the appeal is whether whatever report DLP delivered to the council, is, for the purposes of regulation 12(4)(d), the same "document" as that published by the council. On the authorities, it may be *Highways England v IC & Manisty* at [31] is in point, where it is said that the exception in regulation 12(4)(d)

> … is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. … The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. ....

27. In my view the evidence it seems, from her FTT appeal form, that Mrs Farnsworth would be likely to give (that DLP had a standalone role in the planning application – and so their report to the council was not, in the circumstances, a "unfinished" version of what the council later published) – gives her argument the required degree of conviction to be "realistic" as opposed to "fanciful"; it obviously differs from the perspective of the challenged IC decision, at paragraphs 13 and 14 (as cited above); and so it will be the job of the FTT, at least in part, to determine which version is right, based on all the evidence put before it.

28. I do not therefore accept IC's "alternative" argument, that the FTT decision's error in not fairly and justly identifying Mrs Farnsworth's grounds of appeal, was an immaterial one.

29. It follows that the FTT decision erred in law materially and so falls to be set aside. IC submitted that, in such circumstances, I should remit the case for reconsideration, rather than remake the decision (on strike out) myself. This does not, however, seem to me the fair and just option in this case, in part because, as part of considering arguments about the "materiality" of the FTT decision's error, I have just covered the very issues that would be considered on a remitted case, namely, whether Mrs Farnsworth's case carries the conviction required to have a realistic, as opposed to fanciful, prospect of success. More fundamentally, I am satisfied that I am in as good a position as the FTT to resolve that issue: it does require a view being taken on the evidential strength of Mrs Farnsworth's case; however, as the authorities caution, a mini-trial is to be avoided, and the volume of evidence I have had to consider is relatively small. I have therefore decided to remake the decision and, consonant with my thinking above, my remade decision is to refuse the application for strike-out, as I consider Mrs Farnsworth's case, as I have articulated it, to have sufficient evidential and legal basis to merit consideration by the FTT.

30. As a postscript (as these are not, strictly, matters for the Upper Tribunal), I add that my expectation is that Mrs Farnsworth'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 12 July 2024