NCN: [2023] UKFTT 00316 (GRC) **Case Reference: EA/ 2022/0214**

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Heard: by determination on the papers
Heard on: 24 March 2023
Decision given on: 27 March 2023
Before: Judge Alison McKenna

Dr. TONY CUTLER	**Applicant**
and	
THE INFORMATION COMMISSIONER	**First Respondent**
and	
THE EQUALITIES AND HUMAN RIGHTS COMMISSION	**Second Respondent**

RULING
on application for permission to appeal:
Permission is granted.

REASONS

1. On 27 January 2023 the Registrar struck out this appeal under rule 8 (3) (c) of the Tribunal's Rules[1] on the basis that it had no reasonable prospects of success. By application dated 10 February 2023 the Applicant asked for that decision to be considered afresh by a Judge, pursuant to rule 4 (3) of the Tribunal's Rules. On 20 February 2023, I considered that the Notice of Appeal should be struck out under rule 8 (3)(c) of the Tribunal's Rules.

2. By application dated 9 March 2023, the Applicant now applies for permission to appeal against my 20 February ruling. He relies on grounds that I impermissibly took into account the fact that his original information request appeared to include some questions rather than requests for recorded information. He submits that it was an error of law for me to assess the likelihood of his appeal being successful by reference to criteria that had not been pleaded by the parties.

[1] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

3. The background to this matter is that the Information Commissioner issued a Decision Notice dated 13 July 2022 in which he found that the public authority (the Second Respondent) did not hold information within the scope of parts one and two of the Applicant's request and was entitled to rely on the statutory exemption under s. 44 FOIA 2000[2] in respect of parts three to eight.

4. The Applicant lodged a Notice of Appeal with the Tribunal dated 3 August 2022. The First Respondent filed a Reply on 6 September 2022 and the Second Respondent, having been joined, filed a Response on 8 November 2022. The Second Respondent's Response included an application for the appeal to be struck out under rule 8 (3) (c) of the Tribunal's Rules. In accordance with rule 8 (4), the Applicant was given an opportunity to make representations on the proposed strike out, which he duly did on 19 December 2022.

5. In considering the strike out application afresh under rule 4(3), I noted that the relevant parts of the Applicant's original information request, as described in the Decision Notice, were phrased as questions: "… *is that what you intended?* and "*…would you regard?"*. As such, I commented that it is difficult to see how they could have been described as requests for recorded information so as to require the public authority to respond under FOIA 2000. I noted that the case had nevertheless proceeded on the basis that the request was for any information that would help answer those questions.

6. The Applicant's Notice of Appeal relied on grounds that the Information Commissioner's investigation was inadequate and did not support his finding on the balance of probabilities that no information within the scope of parts one and two of the information request was held. It did not take any issue with the finding that the public authority was entitled to rely upon s. 44 FOIA 2000. It asked the Tribunal to direct a fresh investigation as to whether the information was held.

7. In considering afresh whether to grant the Second Respondent's application for a strike out, I considered the Upper Tribunal's decision in *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC), in which it is stated at [41] that:

> *…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 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement 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…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.*

8. I concluded that this case had proceeded on a confused basis from the start, because parts one and two of the request were questions and thus not properly to be regarded as requests for recorded information. The public authority and the Information Commissioner had been helpful to the Applicant in trying to overcome this difficulty, but it followed from the opaque nature of the original request that there was never a clearly identified range of recorded information which was to be searched for by the public authority. In my view, any case in which there has been a search for insufficiently particularised information was bound to fail because the Tribunal would never be able to make a finding as to whether the search for such information was adequate or inadequate.

9. I concluded that this is appeal was not fit for a full hearing as its prospects of success were fanciful. I suggested that the Applicant should make a fresh information request, properly phrased as a request for recorded information, so that the public authority could make a fresh response.

10. Turning to the present application for permission to appeal, I have first considered in accordance with rule 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 whether to review the Tribunal's Decision but have decided not to undertake a review, as I am not satisfied that there was an error of law in the Decision.

[2] Freedom of Information Act 2000 (legislation.gov.uk)

11. I have gone on to consider whether the grounds of appeal identified are *arguable.* This means that there must be a realistic (as opposed to fanciful) prospect of success – see Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538. I have concluded that the grounds are arguable because, in taking a point about the Appeal's likelihood of success that had not been raised by the parties, I consider it arguable that they should have first been given an opportunity to comment on the new point. The arguable ground of appeal is one concerning natural justice, but I remain of the view that this appeal has a fanciful prosect of success if it goes to trial and that the Applicant is more likely to receive the information he seeks to obtain if he were to ask for it afresh and in a different format.

12. The Upper Tribunal will be able to re-make the strike out decision having received submissions on the natural justice point. Accordingly, I now give permission to appeal.

(signed) **Dated: 24 March 2023**
Judge Alison McKenna