Lin v Information Commissioner
[2023] UKUT 143 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2023-000363-GIA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

Hwan C. Lin

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Wikeley

Decision date: 21 June 2023
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Mr Oliver Jackson of Counsel, instructed by the Information Commissioner

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal dated 12 January 2023 under number EA/2022/0305 involves an error of law. The First-tier Tribunal's decision is set aside. The case is remitted to the First-tier Tribunal subject to the following Directions. This decision is made under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

1. **The First-tier Tribunal should reconsider the Respondent's application to strike out the Appellant's appeal to that Tribunal.**

2. **The case is to be reconsidered by a different First-tier Tribunal judge.**

REASONS FOR DECISION

The issue on this appeal to the Upper Tribunal

1. This appeal concerns a challenge to a strike out decision made by the First-tier Tribunal (FTT) in proceedings under the Freedom of Information Act (FOIA).

The outcome of the appeal

2. The appeal to the Upper Tribunal is allowed. The FTT's decision striking out the Appellant's appeal to the FTT is set aside. The matter is remitted to the FTT for reconsideration by a different judge. This may or may not result in the same outcome.

The parties to this appeal

3. The Appellant is the FOIA requester, Dr Lin, a Professor of Economics at an American university. The Respondent is the Information Commissioner. The public authority concerned with Dr Lin's FOIA request (the London School of Economics, or 'the LSE') was not a party in the FTT proceedings and likewise is not a party to this appeal.

The Information Commissioner's Decision Notice

4. The context of this case is captured in the opening three paragraphs of the Information Commissioner's Decision Notice IC-150443-P0Y0, which Dr Lin appealed to the FTT:

> 1. The complainant has requested information about a public statement made regarding the degree awarded to current Taiwanese President Tsai Ing-wen. The Council of the London School of Economics and Political Science ("the LSE") relied on section 17(6) of FOIA to decline to issue a refusal notice as it considered the request to be vexatious.
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> 2. The Commissioner's decision is that the LSE was entitled to rely on section 17(6) of FOIA to decline to issue a refusal notice.
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> 3. The Commissioner does not require further steps.

5. Section 14(1) of FOIA provides that "Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".

6. Section 17(5) and (6) of FOIA then provide as follows:

> (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
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> (6) Subsection (5) does not apply where—
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> (a) the public authority is relying on a claim that section 14 applies,
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> (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
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> (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

7. Having set out the three-fold test in section 17(6), the Information Commissioner's Decision Notice concluded as follows:

> 13. On the available evidence, the Commissioner considers that all three criteria are met.
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> 14. The complainant provided a copy of a previous refusal notice he had received from the LSE refusing a request he made in 2019 as vexatious.
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> 15. The present request is also vexatious. It seeks to question the provenance of a statement that was published on the LSE's website two years ago – the implication being that some "third party" hijacked or coerced the LSE into both making a statement on its website in 2019 and (presumably) maintaining that statement on its website ever since.
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> 16. The complainant is, by his own admission, one of the main proponents of what he calls the "doctorate scamming" conspiracy theory. The Commissioner has dealt with this conspiracy theory in previous decision notices, finding it to be of extremely dubious public interest.
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> 17. Given the complainant's self-confessed advocacy of this conspiracy theory, the Commissioner considers that he is unlikely to be satisfied by any response the LSE provides and is likely to require the LSE to divert further resources to responding to follow-up queries.
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> 18. Given the information already released into the public domain by the LSE, the current and contemporaneous records that exist, the Commissioner considers that the complainant's pursuit of this matter (some three years after questions were first raised) can fairly be characterised as obsessive. Furthermore, the Commissioner notes that the complainant's evidence demonstrates that he is working in conjunction with other individuals who are making requests to the LSE about the same matter.
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> 19. The Commissioner is therefore satisfied that this request is a manifestly unjustified, inappropriate or improper use of a formal procedure and is thus vexatious.
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> 20. Finally, the Commissioner has considered whether it was appropriate for the LSE to not issue a refusal notice in these circumstances. He considers that it was.
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> 21. The complainant has drawn the Commissioner's attention to the recent public statement he made regarding the "doctorate scamming" conspiracy theory. Whilst issued after the request was dealt with, the Commissioner considers that this statement adequately demonstrates that the complainant's obsessive and unreasonable pursuit of this matter is unlikely to cease in the near future. The LSE is entitled to consider the likely effect of issuing a further refusal notice – which is likely to involve further diversion of resources in a disproportionate manner.
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> 22. Whilst the original reliance on section 14 occurred some two years prior to the request that is the subject of this notice, the Commissioner does not consider that anything of significance has changed in the intervening period. Nor would there be any public value in the information that the request seeks.

> 23. The Commissioner therefore considers that it was reasonable in the circumstances for the LSE not to have issued a further refusal notice.

8. The previous Decision Notices issued by the Commissioner and referred to in paragraph 16 of this Decision Notice can be consulted under the ICO decision notice references IC-40405-s7l3 and IC-83994-c7z4.

The proceedings in the First-tier Tribunal

9. On 10 October 2022 Dr Lin lodged a notice of appeal with the FTT against the Commissioner's Decision Notice IC-150443-P0Y0.

10. On 15 November 2022 the Commissioner filed a response resisting Dr Lin's appeal. The Commissioner invited the FTT to strike out the appeal under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) on the basis that the Appellant "has failed to set out in the grounds of appeal why the Commissioner's Decision Notice is not in accordance with the law". In the alternative, the Commissioner invited the FTT to uphold the Decision Notice and so dismiss the substantive appeal.

11. The FTT accordingly permitted the Appellant to make representations on the strike out application as required by rule 8(4). Dr Lin did so in writing on 13 December 2022 and in a revised reply dated 15 December 2022.

12. The FTT acceded to the Commissioner's strike out application in a ruling dated 12 January 2023 as follows (with a minor typo corrected in paragraph (4)):

> 1. The Respondent's Strike Out Application dated 15 November 2022 is allowed.
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> 2. The Information Commissioner published a Decision Notice on 13 September 2022 which found that the public authority was entitled to rely on s. 17 (6) of the Freedom of Information Act 2000 ('FOIA') in refusing to answer the Appellant's information request. The Appellant filed a Notice of Appeal on 10 October 2022.
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> 3. On 15 November 2022, the Information Commissioner, in filing its Response to the appeal, applied for a strike out under rule 8 (3)(c) of the Tribunal's rules on the basis that the appeal had no reasonable prospects of success.
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> 4. The Appellant's Grounds of Appeal take issue with the Decision Notice on many levels and ask the Tribunal to direct that the request was not vexatious. However, they do not clearly engage the jurisdiction of this Tribunal under s. 57 FOIA by identifying an error of law or wrongful exercise of discretion in the Decision Notice.
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> 5. The Appellant was invited to make submissions in response to a proposed strike out, as required by rule 8 (4). On 13 December and 15 December 2022, the Appellant reiterated his grounds of appeal and provided the Tribunal with exhibits A to G.
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> 6. I have 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
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> > *…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.*
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> 7. Applying this approach, I have considered both parties' representations and concluded that this is a case which may be described as 'not fit for a full hearing'. This is because the role of this Tribunal under s. 57 FOIA is to decide whether there is an error of law or inappropriate exercise of discretion in the Information Commissioner's Decision Notice. The grounds of appeal simply do not engage with that jurisdiction.
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> 8. It does not therefore seem to me that any Tribunal properly directed could allow this appeal. In all the circumstances, I have concluded that this appeal should be struck out as having no reasonable prospects of success. I direct accordingly.

13. On 20 February 2023 the FTT then also refused permission to appeal to the Upper Tribunal.

The Upper Tribunal's grant of permission to appeal

14. On 3 April 2023 I granted the Appellant permission to appeal, observing as follows:

> 7. The First-tier Tribunal struck out the appeal on the basis that the Appellant's grounds of appeal "do not clearly engage with the jurisdiction of this Tribunal under s.57 FOIA" (paragraphs 4 and 7). On that basis it was found that the case was "not fit for a full hearing", citing *HMRC v Fairford Group* [2014] UKUT 329 (TCC).
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> 8. However, the Appellant's letter of appeal asserted (at §4) that the "Appellant's FOIA request was not manifestly unjustified, inappropriate, burdensome, threatening, impolite, nor an improper use of a formal procedure". The letter of appeal went on to take issue with several of the factual findings of the Respondent in the Decision Notice. Arguably, those were all issues which went to the issue of whether the request under FOIA was vexatious within the terms of section 14. In those circumstances, can it really be said that the grounds did not engage with the Tribunal's jurisdiction?
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> 9. I recognise that the grounds of appeal may not have been professionally drafted by a lawyer. However, that should not preclude a fair trial of the issues. In that context, I draw the parties' attention to the observations of the Upper Tribunal on the operation of the strike out procedure in cases involving litigants in person in the following cases: *AW v IC and Blackpool CC* [2013] UKUT 30 (AAC), *AM v Information Commissioner* [2014] UKUT 239 (AAC) and *Jones v Information Commissioner & Anor (Northern Ireland)* [2016] UKUT 82 (AAC). All three decisions are available for consultation free of charge on Bailii. I accept that not all the observations in those cases will be directly in point – for

example, in *AM v Information Commissioner* there was an expectation that there would be an oral hearing of the appeal. However, I consider the following summary from *AW v IC and Blackpool CC* still holds good:

> *The principles governing the application of rule 8(3)(c)*
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> 7. It is important to consider issues of first principle. It is well established in the ordinary courts that the historic justification for striking out a claim is that the proceedings are an abuse of process (see e.g. *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 541B *per* Lord Diplock). On that basis, the power should only be exercised in plain and obvious cases (see *Lonrho PLC v Fayed* [1990] 2 QB 479 at 489F-G *per* Dillon LJ and 492G-H *per* Ralph Gibson LJ).
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> 8. More recent rulings from the superior courts point to the need to look at the interests of justice as a whole (see e.g. *Swain v Hillman* [2011] 1 All ER 91). It is also well established that striking out is a draconian power of last resort: see *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 at 1933B *per* Lord Woolf MR (where, admittedly, the issue was delay rather than lack of reasonable prospects) and also, in the Upper Tribunal, *AS v Buckinghamshire CC (SEN)* [2011] AACR 20 and [2010] UKUT 407 (AAC) at [14]. It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules.
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> 9. So what then is meant by saying that "there is no reasonable prospect of the appellant's case, or part of it, succeeding" (within rule 8(3)(c))? The standard and authoritative commentary on tribunal procedure, by Judge Edward Jacobs (*Tribunal Practice and Procedure*, 2nd edn, 2011, at [12.39]), advises that this "is only appropriate if the outcome of the case is, realistically and for practical purposes, clear and incontestable. *It is not usually appropriate if facts relevant to the ultimate outcome of the case are disputed*" (emphasis added).
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> 10. Judge Jacobs cites as authority for this proposition the employment case of *Ezsias v North Glamorgan NHS Trust* [2007] EWC Civ 330; [2007] ICR 1126. There Maurice Kay LJ held as follows:
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> > "29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is was [sic] Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed

> contemporaneous documentation. The present case does not approach that level."
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> 11. Furthermore, in *JP v Standards Committee of Surrey County Council* [2011] UKUT 316 (AAC) Judge Jacobs held that there was "no significant difference in meaning between 'reasonable prospect of the appeal being successful' and 'realistic prospects of success'" (at [16]) and noted that, in a different context, the Court of Appeal has decided that 'no realistic prospect of success' can for practical purposes be taken to mean the same as 'clearly unfounded': *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448 at [10].

The proceedings before the Upper Tribunal

15. Both parties have made detailed, measured and helpful written submissions on the appeal. There has been no application from either party for an oral hearing of the Upper tribunal appeal (and indeed Dr Lin throughout has indicated that he is content with paper determinations). I am satisfied that it is fair and just to proceed to a decision on the papers.

16. The Appellant's grounds of appeal to the Upper Tribunal, although not overly long, are nonetheless written in a somewhat discursive style. Certainly he has not highlighted and enumerated specific grounds of appeal. Be that as it may, it is tolerably clear that the FTT's strike out decision is challenged on the basis that it involves an "abuse of discretion constituting procedural error". In support of this proposition, it is further argued that, as the strike out power is an extraordinary and draconian power, it follows that the rationale for its exercise must be explained. However, it is submitted that the FTT's decision in this case involves "the unexplained conclusionary statement '*not fit for a full hearing*' as explanation [and] is effectively unreviewable thus undermining appellate review". Furthermore, it is argued that an allegation of vexatiousness sets a high bar and "an appeal cannot be struck for vexatiousness without an articulated rationale".

17. The Commissioner, in his Response, opposes the appeal, identifying the central issue as being whether the FTT was correct to strike out the Appellant's case. His submission, in short, is that the appeal to the Upper Tribunal should be dismissed. In the first instance the Commissioner argues that the FTT was correct to strike out the case for the reasons it gave. Alternatively, if the FTT were to be found to have erred in law, the Commissioner contends that the Upper Tribunal should remake the FTT's decision and strike out Dr Lin's case for itself. These submissions are considered in more detail below.

18. The Appellant's Reply reiterates several themes from the Notice of Appeal, but also takes issue with the Respondent's characterisation of the main issue in the appeal. Dr Lin asserts that the "sole issue" now is rather the sufficiency and adequacy of the reasons for the FTT's decision. He states that he "has not sought permission to appeal the strike out itself" and has "not put the merits of the strike out Decision before this Court". He proposes, by way of remedy, that the matter is "remanded" back to the same FTT judge for the reasoning for the strike out decision to be explained.

Analysis

19. I need to address the points in the previous paragraph first. The Appellant in this case is understandably more familiar with both the language and the conventions of US courts and tribunals than the courts and tribunals of England and Wales. This greater familiarity is reflected in the submissions he makes. However, the Commissioner is correct to identify the central issue on the instant appeal as being whether the FTT was right to strike out the Appellant's case. This is an inquisitorial and not an adversarial jurisdiction and one which does not turn on narrow points of pleading and procedure. The effect of the Upper Tribunal's grant of permission to appeal was to allow an error of law challenge to the FTT's decision on the Commissioner's strike out application. In addition, paragraphs 8 and 9 of my grant of permission to appeal made it clear that I was questioning whether the strike out power was indeed properly exercised on the basis that the grounds of appeal did not engage with the Tribunal's jurisdiction.

20. I turn now to the substance of the matter. The FTT's powers on an appeal under section 57 of FOIA are contained in FOIA section 58, which provides that the FTT may only allow the appeal (or substitute such other notice as could have been served by the Commissioner):

> … if the Tribunal considers:
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> (a) that the notice against which the appeal is brought is not in accordance with the law, or
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> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently.

21. The precise meaning and import of this statutory provision has long been the subject of some debate, However, it is perfectly clear that the FTT's remit under section 58 is to conduct a full merits review appeal that may include making different findings of fact to those of the Commissioner.

22. The Commissioner's primary submission in this respect is that the appeal should be dismissed as the FTT was correct to find that the grounds did not engage its statutory jurisdiction under section 58. It is certainly true that Dr Lin complained about several issues that were essentially irrelevant to the proper scope of the appeal (e.g. the adequacy of the ICO investigation in this case). However, the Commissioner's Response to the appeal then seeks to argue that the Appellant's challenge to the vexatiousness finding in the Decision Notice was insufficient to engage the FTT's jurisdiction (at §32):

> Read fairly, the Grounds also stated that the Request was not vexatious (§4). Whether the request is vexatious is the first of the three limbs of the test in s.17(6) FOIA. But Grounds §4 amounted to no more than a bare assertion. It did not identify any reasons at all, meritorious or otherwise, for why it could be said that the Request was not vexatious. This not a technical pleading point – the Commissioner accepts that the Grounds assert that the Request was not vexatious. But that by itself is insufficient to engage the Tribunal's jurisdiction. A bare minimum of relevant reasons must be given as to why the Commissioner's Decision was wrong for an appeal to be brought under ss.57-58 FOIA.

23. This submission is not persuasive for at least two reasons.

24. First, while it is true that Grounds §4 is in effect a bare assertion, denying that the FOIA request was vexatious, this was not the end of the matter. Several of the Appellant's remaining grounds amounted to challenges to those of the Commissioner's factual findings which constituted the building blocks for the conclusion that the Appellant's FOIA request was indeed vexatious. Thus, the Appellant took issue with the Commissioner's reading of the original FOIA request (Grounds §11), with the Commissioner's finding that the Appellant was a self-confessed conspiracy theorist (Grounds §12 & §13), with the Commissioner's findings that the Appellant was acting in concert with others (Grounds §14) and his conduct was obsessive and unreasonable (Grounds §15-§19). These challenges may well be good points or they may equally well or more so be bad points, or a mixture of the two, but what is clear is that they are all relevant to the test under section 14 and 17(6)(a). As such, the grounds engaged the jurisdiction of the FTT under section 58.

25. Second, and to the extent that the grounds of appeal were unclear, the draconian nature of a strike out order is such that other case management directions might have been usefully explored. For example, in such a case the FTT could have referred to say three or four of what were apparently the most powerful factors pointing towards a finding on the facts of vexatiousness. The FTT could then direct an appellant to explain the basis of, and evidence for, the proposed challenge to the finding in question.

26. As Upper Tribunal Judge Stockman observed in *Jones v Information Commissioner & Department for the Environment (NI)* [2016] UKUT 82 (AAC); [2016] AACR 33 at paragraph 42:

> Against a background of limited resources to defend appeals, it is easy to understand why the first respondent might apply for the FTT to strike out of the particular appeal under rule 8(3)(c). However, any exercise of the power to strike out is subject to the overriding objective of the FTT to deal with cases fairly and justly, and in particular to avoid unnecessary formality and seek flexibility in the proceedings (regulation 2(2)(b)) and to ensure that parties are able to participate fully in the proceedings (regulation 2(2)(c)).

27. The FTT found the Appellant's appeal had no reasonable prospects of success as his grounds of appeal did not engage its statutory jurisdiction. His appeal may, or may not, have had reasonable prospects of success but the grounds of appeal were sufficiently particularised to engage the FTT's jurisdiction. The FTT's decision on the Commissioner's application accordingly involved an error of law and is set aside (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)).

28. In those circumstances the Commissioner's submission is that the Upper Tribunal should re-make the FTT's decision and strike out the case. This is on the basis that (as the Response argues at §40) "enough judicial time and resource has been taken up already by this plainly unmeritorious case". I demur. Fact-finding is best regarded as the prerogative of the FTT. I remit the case, and so the Commissioner's application for a strike out, to the FTT for reconsideration before a different judge.

Conclusion

29. I conclude that the decision of the First-tier Tribunal dated 12 January 2023 involves an error of law. I therefore allow the Appellant's appeal and set aside the First-tier Tribunal's decision. I remit the case for reconsideration by the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on: 21 June 2023