



NCN: [2023] UKFTT 00304 (GRC)

Case Reference: EA/ 2022/0295 GDPR

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 17 March 2023

Decision given on: 21 March 2023

Before: Judge Alison McKenna

FREDERICO GARCIA LOPES DE LA TORRE

Applicant

- and -

THE INFORMATION COMMISSIONER

Respondent

**RULING on application for permission to appeal:
Permission to appeal is refused.**

REASONS

1. On 3 February 2023, the Registrar struck out this appeal under rule 8 (3) (c) of the Tribunal's Rules. By application dated 19 February 2023, the Applicant has applied for permission to appeal against the Registrar's Ruling of 3 February 2023. It is unusual for an Applicant to apply for permission to appeal against a Registrar's ruling, as there is a right to apply for the matter to be considered afresh by a Judge pursuant to rule 4 (3). However, as I understand it, the Applicant now prefers to proceed with an application for permission to appeal because he submitted it after his application for a rule 4 (3) consideration. I now proceed to determine his application for permission to appeal against the Registrar's decision, which is made in time.
2. The Applicant's Notice of Appeal dated 4 October 2022 sought an Order under s. 166 of the Data Protection Act 2018 on the basis that the Information Commissioner did not take appropriate steps in relation to his complaint. The Information Commissioner has informed the Tribunal that the complaint had been concluded by sending an outcome letter dated 17 August 2022. The Applicant disputes that this was a legitimate outcome.

3. The Applicant relies on grounds that the Registrar's decision was irrational, that he failed to consider all the evidence, failed to apply the law correctly, and provided inadequate reasons.
4. I have first considered in accordance with rule 44 whether to review the ruling of 3 February 2023, but have decided not to undertake a review, as I am not satisfied that there was an error of law in the Decision.
5. I therefore turn to consider the application for permission to appeal. I have considered whether the grounds of appeal referred to above are *arguable*. This means that there must be a realistic (as opposed to a fanciful) prospect of success – see Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.
6. It is important to remember that, when considering a strike out application, the Registrar is not conducting a trial. He is conducting an evaluation described by the Upper Tribunal in *HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation)* [2014] UKUT 0329 (TCC) as follows:

...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.

7. As such, I do not consider that the Applicant's grounds of appeal are arguable because they seek to hold the Registrar to the standards of a Judge conducting a trial. I consider that the Registrar considered the relevant issues in relation to a strike out application made in connection with an application for an Order under s. 166(2) DPA, that in doing so he made a rational decision and that he gave adequate reasons for his ruling, noting that there was no Order that the Tribunal could make.
8. I note that the powers of this Tribunal in determining an application under s. 166 of the DPA 2018 are limited to those set out in s. 166 (2). In order to exercise them, the Tribunal must be satisfied that the Commissioner has failed to progress a complaint made to the ICO under s. 165 DPA 2018. The jurisdiction to make an Order is limited to circumstances in which there has been a failure of the type set out in s. 166 (1) (a), (b) and (c). This Tribunal has no supervisory jurisdiction in relation to the handling of a complaint to the Information Commissioner's Office and the Tribunal may not review the Information Commissioner's decision to take no further action in relation to a complaint. That view has been frequently expressed by the Upper Tribunal and was also recently taken in the High Court by Mostyn J. in *R (Delo) v ICO* [2022] EWHC 3046 (Admin)¹ at [128] as follows:

“...Sections 166(2) and (3) allow the Tribunal to order the Commissioner to take steps specified in the order to respond to the complaint. In my judgment, this would not extend to telling the Commissioner that he had to reach a conclusive determination on a complaint where the Commissioner had rendered an outcome of no further action without reaching a conclusive determination. This is because s. 166 by its terms applies only where the claim is pending and has not reached the outcome stage. It applies only to alleged deficiencies in procedural steps along the way and clearly does not apply to a merits-based outcome decision.”

9. In this case, it is clear that the ICO progressed the complaint and informed the Applicant of its outcome decision. In the light of Mostyn J.'s judgment, it seems to me that this outcome letter served to deprive the Tribunal of jurisdiction under s. 166 DPA, as the complaint could no longer be said to be 'pending' when the Notice of Appeal was lodged. This would mean that a mandatory strike out under rule 8 (2) (a) of the Tribunal's rules could have been considered, although the Information

¹ [BEN PETER DELO, R \(on the application of\) v THE INFORMATION COMMISSIONER & Anor - Find case law \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

Commissioner's application was made under rule 8 (3) (c) and duly determined by the Registrar, having considered in full the Applicant's submissions.

10. In all the circumstances, I am not persuaded that the Applicant's grounds of appeal are arguable and accordingly, I now refuse permission to appeal. The Applicant may renew his application to the Upper Tribunal directly if he so wishes.

(signed)
Judge Alison McKenna

Dated: 17 March 2023

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