JA v Information Commissioner & Arts Council England
[2011] UKUT 114 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. GIA/1504/2010

Judge Turnbull

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

Applicant:	Mr Joel Almeida
Respondent:	Information Commissioner
Additional Party:	Arts Council England
Tribunal:	First-tier Tribunal (Information Rights)
First-tier Tribunal Case No:	EA/2009/0105
First-tier Tribunal Venue:	Central London Civil Justice Centre
First-tier Tribunal Hearing Date:	18 March 2010

Case No GIA/1504/2010

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

1. This is an application for permission to appeal against a decision of a First-tier Tribunal (Information Rights) made on 18 March 2010. For the reasons set out below I refuse the application. (References in this determination to page numbers are, save where otherwise stated, to page numbers in the bundle of documents which was before the First-tier Tribunal).

2. The Applicant (A) is a South Indian musician. He is a practitioner of konnakol, which is a South Indian classical method of vocalising rythms, and is part of the cultural tradition which defines his South Indian ethnic identity.

3. On 2 October 2007 Arts Council England (ACE) made to A an offer of a grant of £5,000 in relation to a project whose principal purpose was "ending the marginalisation of konnakol". The project included the writing of a concerto for konnakol and viola in collaboration with a viola player of international reputation, Ms Rivka Golani, and thereby to promote and celebrate konnakol in an attempt to integrate this music form into western music circles.

4. The grant was subject to a special condition requiring two public performances of the work and requiring details to be supplied about the proposed public performances and the musicians intended to be engaged in the performances.

5. A accepted the offer on 24 October 2007. At the time of accepting the offer he supplied certain information in relation to proposed performance, which he considered complied with the part of the special condition which required information to be supplied. ACE considered, however, that he had not supplied the required information, and requested further information, although after a delay caused by the absence owing to illness of the person at ACE dealing with it. The Applicant perceived the request for further information as an attempt to alter the terms of the grant, and he objected to it.

6. In the words of the District Judge who heard the County Court claim which I refer to in more detail below: '

> "From this date a flow of correspondence began in which [A] sought to emphasise and re-emphasise the particular nature of the activity for which he had sought the grant, and questioned the need for further information. In return [ACE] sought to justify the request for further information. And very shortly [A's] correspondence became a formal complaint." (para. 55 of the judgment).

7. What then followed was a full use of ACE's complaints procedures beginning with a stage one complaint to the Area Director by a letter of 8 January 2008. The focus was the special condition and related allegations of race discrimination ("I would now appreciate immediate cessation of the ongoing unlawful discrimination"). At the end of the letter A sought information/documents under 8 categories, relating to race discrimination related aspects of ACE's activities in relation to music funding.

8. The complaints were considered by a regional executive director. His decision was set out in a letter of 22 January 2008. He upheld the special condition and the public benefit reasons for it and rejected the complaint of race discrimination.

9. By letter to A dated 24 January 2008 ACE stated that they were treating A's request dated 8 January 2008 as a request under FOIA. They requested clarification of what was required under one of the 8 categories, and stated that in relation to another of the categories it was estimated that the cost of providing it would be likely to exceed £450, and therefore by virtue of s.12 of FOIA they were not obliged to provide it. "Please get in touch with me if you would like to find ways to narrow down this point of your request."

10. By letter dated 3 February 2008 A wrote stating, among other things, that he had never invoked FOIA.

11. By letters dated 5 and 8 February 2008 ACE formally responded to the requests for information in the letter of 8 January 2008. An internal ACE memo of 4 February records that ACE staff had spent a total of 13 hours on "FOI" in relation to A.

12. By letters dated 5 and 6 February A requested certain further race discrimination related information. That was answered substantively on 13 February 2008.

13. By letter dated 15 February 2008 (some 12 pages long, containing 34 numbered points) A made a stage two complaint to the Chief Executive of [ACE], Alan Davey. The response to the complaint is found in Mr Davey's 18 page letter of 5 March 2008. Mr Davey rejected the complaint of race discrimination and supported the imposition of the special condition on public benefit grounds. He accepted that there was delay in clarifying the condition which was due to staff illness and he apologised for that delay. At the end of the letter he stated that "in the interests of seeking a resolution to this matter" the special condition of two confirmed public performances would be removed.

14. Counsel for [ACE] explained to the District Judge that [the] decision of the Chief Executive meant that [A] did not any longer have to perform his work at a public performance at all. Thus, both limbs of the special condition fell away as from 5 March 2008.

15. Accordingly the grant was paid to [A] on 27 March 2008.

16. A made a stage 3 complaint to the Independent Complaints Reviewer (ICR) by letter dated 9 April 2008 (16 pages, including incorporated "background information"). He requested redress in respect of the imposition of and the delay in removing the special condition, which he said was "unfair and even seemingly unlawful".

17. By letter to Mr Davey dated 16 May 2008 A put forward contentions in relation to other grants awarded by ACE and contended that "ACE's failure to monitor and report the cost-effectiveness of public access for each RFO grant [i.e. a grant to a regularly funded organisation] works to the disadvantage of those excluded "Asian" people who offer "Asian" arts which feature very cost-effective public accessibility." He then requested 3 items of information.

18. By letter to ACE dated 7 July 2008 A requested copies of the application forms for two grants which had been made to third parties. He said that he was doing so "in preparing my claim for fair treatment". ACE provided that information by letter dated 1 August 2008. On receipt of that, A responded on 3 August by asking for a detailed set of further information in a 4 page letter.

19. The ICR, Barbara Stow, reported on 5 August 2008, in a report some 39 pages long. She upheld parts of A's complaint in that she concluded (in the words of her summary) that "there was unreasonable delay in replying to [A's] acceptance letter and further delay because the terms of the special condition were not stated clearly. There was then a two

month delay in providing a full copy of the assessment of his application. There was delay in starting the complaints process and central parts of the complaint were not adequately considered. However the volume and complexity of [A's] correspondence meant the key issues were not always clear." She recommended that ACE reconsider the record of the purpose and classification of A's activity and make a payment of £500.

20. The ICR considered that it was beyond the scope of her review to consider the allegations of unfair discrimination on grounds of ethnicity. However, she said:

> "From the material I have seen, I do not conclude that [A] has made out a case that he has been treated unfairly on grounds of his race but I conclude that ACE did not answer properly his objection that the special condition was particularly onerous in light of the innovative and minority status of his art form."

21. By letter dated 11 August 2008 A requested further information relating to other grant assessments. That was supplied by letter dated 15 August 2008.

22. On 26 August 2008 A served a questionnaire, some 65 pages long [p.35], pursuant to s.65 of the Race Relations Act 1976.

23. On 7 September 2008 A sent to Mr Davey a 7 page letter asking a series of detailed questions, including requests for documents, in relation to contentions, stated at the beginning of the letter, that "(A) over 100 million pounds of ACE funding gone astray (B) How £500 taxpayers' cash per day was paid to someone to "sleep a lot"". The letter asked in particular for a substantial amount of information, including documentation, in relation to two grants which had been made by ACE, nos. 7424505 and 9929763, in relation to which the letter said:

> "£111,250 of ACE cash were paid in contracts to a non-minority English expatriate living in South Africa, during the space of less than a year (.... Grant nos. 7424505 and 9929763). This expatriate was apparently formerly an administrator of a regional arts body in England."

Para. 3 of the letter contained one list of required information relating to those grants. That list included all but one of the items mentioned in para. 4 of the later letter of 22 December 2008 in issue in these proceedings.

24. On 9 September 2008 ACE's director of legal services responded as follows:

> "Over the past few months, we have received an inordinate and frankly, overwhelming volume of correspondence from you, containing numerous statements, demands, questions and requests for information. You have exhausted our complaints process culminating in a 40-page report from the Independent Complaints Reviewer and significant follow up action on our part including the payment to you of £500.
>
> Your RRA section 65 is another voluminous document, and I consider that we ought to respond to it (despite the fact that much of it is a rehashing of your complaint and the matters dealt with therein). Your further and related correspondence, which covers substantially the same grounds, is not helpful. We have done a great deal to meet your demands, requests for information, etc. We are however, not obliged to respond to correspondence where it becomes vexatious. I consider, on the basis of the history of that matter, and the somewhat incessant, repetitive and circular nature of your correspondence, that we have already reached that point as a matter of law.

> We will not be responding to further correspondence from you on these matters. As previously advised, you will have our response on the section 65 questionnaire, but we cannot expend our charitable resources unnecessarily by continually responding to related correspondence which is vexatious."

25. On 15 September A responded, stating that

> "ACE has never in any way even begun to address my stated concerns about grants bearing numbers 7424505 and 9929763, let alone providing a full response. My request does not appear to fit the criteria for refusal set out in the Information Commissioner's Awareness Guidance no. 22 on section 14 of FOIA...."

26. A's letter of 15 September then went on to summarise, "for ACE's convenience", the documents which had been requested in the letter of 9 September. The list of documents required in relation to those grants were itemised in terms which included all the items in para. 4 of the later letter of 22 December. (I note that, although para. 4 of the letter of 22 December merely required a statement of whether the documents existed, the letters of 7 and 15 September asked for copies of the documents, if they existed). The letter of 15 September concluded:

> "If ACE remains unpersuaded by the information I volunteer above, then perhaps we should seek the opinion of the Information Commissioner regarding my request. ....."

27. By a separate letter of 15 September A also wrote, in relation to ACE's letter of 9 September, that

> " ..... ACE's message ..... creates an intimidating situation for me. I consider on the basis of the facts above that this ACE message amounts to contravention of section 3A of the RRA. I request respectfully that it be withdrawn and replaced by a more considered and lawful response.
>
> Further, ACE's message ..... treats me less favourably than other taxpayers by reason that I have previously alleged that ACE has contravened the RRA. I consider that this contravenes section 2(1) RRA. I request respectfully that this message be replaced by a more considered and lawful response."

28. On the same day Mr Pugh's response included the following:

> "You must understand that your correspondence is creating an inordinate demand on our resources. We simply cannot manage them when they keep coming through to the frequency and magnitudes that they have been. ....."

29. By around this time A had also made a complaint to the National Audit Office. According to the Information Commissioner's findings the NAO "carried out an investigation, spending a number of days at [ACE] in September 2008 and it did not find that [ACE's] procedures were inadequate."

30. On 30 September 2008 ACE responded to the s.65 questionnaire, the response extending to some 23 pages plus appendices.

31. By October 2008 the concerto was written and feedback was received from A's mentor and the soloist.

32. On 22 December 2008 A wrote to Mr Davey:

> "In relation to my claims about ACE's contravention of the Race Relations Act, please provide the following .....:

The letter then set out the required information, in 5 paragraphs. They are set out verbatim in para. 10 of the Information Commissioner's Decision Notice. The items under paras. 1, 4 and 5 had been requested previously. Those in paras. 2 and 3 appear to have been new. In relation to those under para. 4, however, this letter did not seek copies of the documents themselves, but only a statement of whether or not the documents existed.

33. On 19 January 2009 Mr Pugh replied, stating that the information would not be provided because the request was considered to be vexatious.

34. On 4 February 2009 A issued a Claim Form seeking relief in the Bristol County Court under the RRA 1976. Particulars of Claim were issued on 2 June 2009 [p.386], extending originally to 50 pages and 119 paragraphs. A complained that the discrimination to which he was allegedly subject led to delay in the payment of the grant, and that delay disrupted his planned programme of activity and caused him distress. In particular he claimed that it brought about a deterioration of his relationship with the person upon whose co-operation his project depended.

35. On 4 June 2009 A complained to the Information Commissioner (IC) about ACE's failure to provide the information which had been requested in his letter of 22 December 2008.

36. The Information Commissioner's decision was made on 26 November 2009.

37. In relation to the information requested under para. 1 of the letter of 22 December 2008, the IC decided that the information, if held, would be A's own personal data. The IC therefore considered that this element of the request should have been considered to be a Subject Access Request under s.7 of the Data Protection Act. The IC therefore only considered the application of s.14 (i.e. whether the request was "vexatious") in relation to the information sought in paras. 2 to 5 of the letter of 22 December.

38. The IC considered the issue of vexatiousness by reference to the factors set out in the IC's Awareness Guidance 22, as follows:

(1) Compliance would impose a significant burden in terms of expense and distraction: "the Commissioner is satisfied that a great deal of [ACE's] time has already been spent dealing with previous requests and with [A's] associated correspondence. The substantive issues have already been investigated in two independent investigations and the request of 22 December was covering the same issues."

(2) The request was not designed to cause annoyance or disruption. "The [IC] believes that [A's] genuine intent is to prove, or obtain evidence that disproves, that [ACE] complied with the Race Relations Act."

(3) Although it was not A's intention to cause distress to ACE's staff, the effect of A's requests was to harass ACE's staff.

(4) The request could be characterised as obsessive "as there is evidence that the matters related to the information requested by [A] have been considered by other bodies and further information has been provided where necessary for the legal process. Further information may also be made available should the court feel it necessary through the separate process of disclosure."

(5) The request did have a serious purpose but did not have value in the circumstances. The IC "believes the issues raised have already been considered and it is disproportionate in the circumstances to continue in this instance. He has considered the context of the request and the fact is that the grant is a discretionary grant of public money, that [ACE's] role is to administer it and it gave [A] the grant in this instance, albeit with some delay."

39. The IC accordingly determined that "a reasonable public authority would find [A's] request of 22 December 2008 vexatious."

40. On 7 April 2010 the First-tier Tribunal dismissed A's appeal against the IC's decision. It did so following a paper hearing. I refer to the grounds for its decision in more detail below, when considering A's grounds for seeking permission to appeal to the Upper Tribunal.

41. On 14 May 2010 the chairman of the First-tier Tribunal refused A's application for permission to appeal to the Upper Tribunal. The reasons in support of A's application to the Upper Tribunal for permission extend to 16 closely typed pages, in addition to which he made further written submissions on 27 August 2010 and 27 September 2010.

42. Meanwhile, A's county court claim had been allocated to the small claims track. Considerable correspondence appears to have taken place between A and ACE in relation to what documents should be disclosed by ACE pursuant to Rules of Court. Shortly before the hearing before me I was provided by ACE with a copy of a letter from ACE to A dated 4 August 2010, and the table enclosed with it. Para. 2 in A's request of 22 December 2008 appears partially to overlap item 12 in that table. ACE contended in the table that it was not obliged to disclose these under the rules for standard disclosure. Para. 3 appears to be the same as item 13 in the table, which ACE again contended that it was not obliged to disclose. Para. 4 appears partially to overlap item 3 in the table. The first grant reference number specified in para. 4 was said in the table not to exist (perhaps because the number had become garbled), and the reply in the table said that much of the requested information did not exist in relation to the second grant number, because the grant was a managed funds project.

43. The county court claim was heard on 26 October 2010, by a District Judge sitting with 2 assessors. A had made it clear that, in the alternative to his claim under the RRA, he wished to seek to recover his alleged losses by way of a claim for breach of contract in failing to pay the grant on time, and was permitted to pursue such a claim. As a result of an order made at the beginning of the hearing the allegations of indirect discrimination, which were in paras. 13, 15, 25 and 26 of the amended particulars of claim, were stayed, with liberty to A to apply by 21 July 2011 to lift the stay, failing which those allegations were to stand dismissed. The claims which were heard on 26 October 2010 were therefore those of direct discrimination, and the claims for breach of contract. A gave evidence, and was able to cross-examine the ACE witnesses. There were in excess of 2000 documents in evidence before the Court.

44. The District Judge handed down judgment on 21 January 2011, and dismissed both the claims under the Race Relations Act and the claims for breach of contract. The judgment extends to 30 pages and 155 paragraphs. A's application to the District Judge for permission to appeal was apparently refused. He was directed to file detailed grounds of appeal in support of a renewed application to a Circuit Judge by 11 March 2011.

I directed an oral hearing of A's application to appeal against the First-tier Tribunal's decision of 18 March 2010. That hearing took place on 10 March 2011. A appeared in person. Neither the IC nor ACE appeared or were represented.

The grounds of appeal to the Upper Tribunal

45. Para. 7 of A's proposed grounds of appeal is headed "outline of core points in appeal". Para. 7.1 is as follows:

> "FOIA s.14(1) is meant to protect a public authority against irresponsible use of the FOIA. A's request of 22 December 2008 did not invoke the FOIA. Therefore it was not any kind of use of the FOIA at all by A, let alone irresponsible use of the FOIA. Therefore the First-tier Tribunal erred in law by finding that FOIA s.14(1) was engaged."

46. A elaborated on that at the hearing before me by submitting that he had wanted a declaration from the IC that s.14 FOIA could not be applied, because he was seeking information under other legislation, and in particular discrimination legislation, to which reference is made in para. 14 of the Secretary of State's Code of Practice under FOIA, which reads as follows:

> "Public authorities should not forget that other Acts of Parliament may be relevant to the way in which authorities should provide advice and assistance to applicants or potential applicants, e.g. the Disability Discrimination Act 1995 and the Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000)."

47. In my judgment those contentions are misconceived. The IC's jurisdiction arose only because A had applied to him under s.50 of FOIA, which provides:

> "Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."

48. The IC's jurisdiction, which A had invoked by his letter of 4 June 2009 (para. 35 above), was therefore to decide whether any or all of A's request of 22 December 2008 was "vexatious", within the meaning of s.14 of FOIA. If A considered that ACE was or could become obliged, by virtue of duties arising from a source other than FOIA, to provide the requested information, it was open to him to seek to enforce those duties by the appropriate means, and s.14 of FOIA would not be directly material in relation to the enforcement of such a duty. But the IC was not empowered to adjudicate on or enforce obligations to provide documents or information arising other than under FOIA, and therefore the IC could not hold s.14 to be inapplicable (i.e. not "engaged") simply because of the possible existence of other obligations to provide information to which s.14 itself would be no defence.

49. If A's position was that he wanted only to rely on and enforce obligations arising other than under FOIA, then his correct course of action was not to make a complaint to the IC at all. He had the option, when the information was refused by ACE in reliance on s.14, to seek to enforce by the appropriate means obligations arising other than under FOIA. In particular, it was open to him to invoke the powers of the Court to order disclosure of documents in connection with proceedings, or to draw adverse inferences against ACE in the event of a request under s.65 of the Race Relations Act 1976 not being sufficiently answered (see s.65(2)(b)).

50. In para. 7.2 of his grounds of appeal A contends as follows:

> "Further, or in the alternative, A's request of 22 December 2008 was a warranted course of action with a proper and justified cause: compliance with the CPR principles of pre-action conduct. A would have faced costs sanctions had he not so

complied. Also, the substantive RRA issue has not already been judged and it is now before the court. Therefore even if A's request of 22 December 2008 had invoked the FOIA, which it did not, that request could not have been an irresponsible use of the FOIA. Therefore the First-tier Tribunal erred in law by finding that FOIA s.14(1) was engaged."

51. In so far as this contends that the fact that, in the Race Relations Act context, A was acting responsibly in requesting the information, means that s.14 was not engaged at all – i.e. could not as a matter of law have been a good reason for ACE not to have provided the information in compliance with the duty under FOIA – this contention is wrong as a matter of law. However, the context in which the request was made is clearly capable of being taken into account, when considering whether a request is vexatious. It seems to me that the context may operate either for or against the complainant. For example, the context may show that the complainant has a reason for wanting to know the information, which may render it less likely that the request is vexatious. On the other hand, if that and related information has repeatedly been requested and is likely to be the subject of attempts to obtain it other than under FOIA, that may indicate an element of vexatiousness. I return below to the question whether the original purposes of the request still subsist, and if so what significance should be attached to that in this application.

52. A makes a separate submission that the IC found that the request was vexatious partly because it was made in the context of intended proceedings under the RRA, and that in doing so the IC was guilty of "discrimination by way of victimisation", contrary to s.2(1) of the RRA. Section 2(1) (headed "discrimination by way of victimisation") provides as follows:

> "A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –
>
> > (a) brought proceedings against the discriminator or any other person under this Act; or
> > (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or
> > (c) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or
> > (d) alleged that the discriminator or any other person has committed any act which (whether or not the allegation so states) would amount to a contravention of this Act,
>
> or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them."

53. The First-tier Tribunal dealt with that submission as follows:

> "22. The Race Discrimination point raised by [A] – on the basis that his request was made in the context of the complaint against [ACE] under the Race Relations Act 1976 and as such was a "Protected Act" as defined by the RRA – is an allegation that the IC held the actions against [A] when the Decision Notice was issued.
>
> 23. The Tribunal has no difficulty in finding that this point is misconceived. It is, in effect, a complaint regarding the IC's conduct in the investigation. [A] wrote to the IC on 30 November 2009 stating: *"The Commissioner did not afford me any opportunity*

to challenge the misrepresentation of fact in ACE's account. I respectfully submit that this was [a] biased, unfair and faulty procedure, to the detriment as given later."

24. The Tribunal stated clearly in its decision in the case of *Stuart v IC and DWP* that the : *"Tribunal is not required to determine the issues of reasonableness or unfairness on the part of the Commissioner, as it has the ability to hear fresh evidence. The Tribunal is not conducting a judicial review, but exercising its powers under section 58 FOIA ..... Mr Stuart is complaining about the conduct of the investigation and not the Decision Notice itself, consequently, the Tribunal has no jurisdiction.*

25. The Tribunal has had the same opportunity as the IC to consider the background to the request, and the correspondence between [A] and [ACE], which is set out in detail in the appeal bundle.

26. There is no evidence on the face of all the papers seen by the Tribunal that the IC has discriminated in any way against [A] during the course of the investigation in reaching his decision."

54. I think that I would put the matter in a rather different way from that in which it was put by the First-tier Tribunal. I am doubtful whether A's contention can properly be categorised as one which went to the IC's *conduct of the investigation*. The alleged breach of natural justice, which the First-tier Tribunal referred to in its para. 23, seems to me to have been a different point from A's point based on s.2(1) of the 1976 Act. However, it is nevertheless the case that in determining, as required by s.58(1) of FOIA, whether the IC's decision notice was "in accordance with the law", the First-tier Tribunal was by s. 58(2) given power to review any finding of fact made by the IC. The First-tier Tribunal in effect considered afresh, as it was entitled to do, whether the request for information was vexatious. By s.19C of the 1976 Act the general prohibition (in s.19B(1)) on a public authority doing any act which constitutes discrimination does not apply to "any judicial act (whether done by a court, tribunal or other person)". The First-tier Tribunal was therefore clearly not subject to the duty in s.19B(1) not (inter alia) to do any act amounting to victimisation within the meaning of s.2. A's proposed appeal is of course against the First-tier Tribunal's decision, and it is that decision which he has to show was at least arguably wrong in law.

55. In addition, there was in my judgment no evidence before the First-tier Tribunal that either ACE or the IC had treated the request made on 22 December 2008 in a different manner from that in which they would have treated it if the various requests for information which A had been making, including that made on 22 December, had been made for purposes which had nothing to do with the Race Relations Act. In my judgment, in the particular context of a person whose request for information has been refused as vexatious, the relevant comparison for the purpose of s.2 is not a comparison with a person who has made no previous requests, but with one who has made requests involving a similar degree of work, trouble etc for the public authority, but for other purposes (or perhaps no particular purpose at all). There was absolutely no evidence that it was the fact that A's requests were in relation to possible race discrimination which caused his request to be treated as vexatious; cf. *Cornelius v University College Swansea [1987] IRLR 141* at para. 33.

56. Further, I am not persuaded that any of A's other contentions, set out in his grounds of appeal, as to respects in which the First-tier Tribunal erred in law in the course of finding that the request of 22 December 2008 was vexatious, are arguable. A recurring theme of them is that the First-tier Tribunal erred in law in in effect adopting the IC's finding that the substantive complaint of race discrimination which A was pursuing had already been investigated by two bodies (the ICR and the National Audit Office). (As to the IC's findings in

this respect, see paras. 34, 46, 47 and 56 of the IC's Decision Notice; that is echoed in para. 27 of the First-tier Tribunal's Statement of Reasons: "the substantive issue had already been independently investigated twice by outside bodies.") I do not think that either the IC or the First-tier Tribunal meant that A's allegations of discrimination had been adjudicated on by a body having jurisdiction to do so. They in my judgment meant no more than that A had complained to outside bodies in relation to ACE's conduct in relation to the grant to him, and that those investigations (and certainly that by the ICR) to some extent overlapped the race discrimination issues. In particular, although the ICR did not purport to adjudicate on the discrimination issue, it formed part of A's complaint to the ICR, and the ICR gave some consideration to it: see in particular paras. 93 to 96 of her report. The First-tier Tribunal was in my judgment entitled to take that into account in determining the issue of vexatiousness.

57. I return to the question whether (even if it were in some respects arguable) the proposed appeal would serve any continuing purpose. A's submission to me was that his intention at the time of the request of 22 December 2008 was to give ACE the opportunity, by producing the information, to show that it had not acted in a discriminatory manner. He was at that time seeking to avert litigation under the Race Relations Act. He went on to submit that to that extent the requested information became immaterial one he had launched proceedings. In para. 8 of A's written submission to the First-tier Tribunal he said:

> "A regrets the burden to all concerned that unfortunately accompanies proper pre-action conduct or subsequent litigation, in a dispute over the RRA. However, A respectfully maintains his right to continue towards authoritative determination of his civil rights under the RRA, through a public hearing by an independent and impartial tribunal established by law, for just disposal and fair compensation."

58. It seems to me that A's own submissions acknowledge that the proposed appeal to me serves no purpose, looked at from the point of view of the use to A of the requested information. Much water has passed under the bridge since the time when his request was made. In particular, he has pursued his Race Relations Act claim (save the allegations of indirect discrimination) to judgment, and had the opportunity to seek disclosure of documents in the course of that claim. It was, he contends, in relation to that claim that he sought the information. He did not contend before me that he wished to pursue this appeal in order now actually to obtain the information.

59. He submitted to me that his reasons for wishing to pursue the appeal were the following. First, he wished to establish a precedent that a person pursuing rights under the Race Relations Act could not be denied information to which he was entitled in that context by being met with a decision by the IC that his request was vexatious. I have already dealt with that in paras. 45 to 55 above.

60. Secondly, he wished to remove the "stigma" of having a decision by the IC and the First-tier Tribunal that his request had been "vexatious". He said that this was of continuing importance in that in her "case summary and amended list of issues" to the District Judge of 24 October 2010 ACE's counsel had referred to and relied on the IC's finding to that effect. He indicated to me that he had no wish to subject the other parties to the time and trouble of dealing with this appeal if it were unnecessary, and that if this application for permission to appeal were to remain undetermined by the time when his application for permission to appeal against the District Judge's decision is decided, that would at least enable him to "take some of the sting out of" the IC's and the First-tier Tribunal's decision by pointing to the fact that he has an outstanding application for permission to appeal against the First-tier Tribunal's decision, and that it should not be assumed that the First-tier Tribunal's decision would not be overturned. He indicated that he would be content, for the moment, with a "pragmatic" outcome whereby this application for permission to appeal is stayed pending his application for permission to appeal against the District Judge's decision.

61. I indicated at the end of the hearing (but expressly without binding myself) that that then appeared to me to be an attractive possibility. However, that was on the assumption that the appeal was to some extent arguable and that the First-tier Tribunal's finding that the request was vexatious would be of significance in relation to the application for permission to appeal the District Judge's decision. As I informed A at the outset of the hearing, I had received a version of that judgment, in electronic form, from ACE's solicitor very shortly before the hearing, but had not had the opportunity to read more than a very small part of it. Having now read it, it seems to me that the District Judge placed no reliance whatever on the First-tier Tribunal's finding that the request of 22 December was vexatious. As far as I can see, neither the IC's decision nor that of the First-tier Tribunal are referred to in the District Judge's judgment. In those circumstances I cannot see that the First-tier Tribunal's finding that the particular request for information made on 22 December 2008 (which was only a small part of the information sought by A) was vexatious, for the purpose of s.14 of FOIA, will have any consequence in relation to A's application for permission to appeal the District Judge's decision (or in relation to that appeal itself, if permission is granted).

62. For all the reasons set out above, I am now of the clear view that permission to bring this appeal should be refused. The proposed appeal would have no real prospect of success, and in any event would now serve no useful purpose.

(Signed)

Charles Turnbull
Judge of the Upper Tribunal

(Dated) **15 March 2011**