



**THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Upper Tribunal Case No. GIA/2683/2010

PARTIES

Eric Jennings

and

The Information Commissioner

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

JUDGE WIKELEY

**DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

The **DECISION** of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 15 October 2010 under file reference EA/2010/0129 does not involve any error of law.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This case concerns the appellant's appeal against the ruling dated 15 October 2010 by Tribunal Judge McKenna of the First-tier Tribunal (General Regulatory Chamber) (Information Rights). She decided to strike out his appeal to the First-tier Tribunal for want of jurisdiction under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; "the GRC Procedure Rules").

The background to the appeal

2. The appellant had requested various items of information about broadcast complaints handling by OFCOM. He was unhappy with the way that OFCOM dealt with his request and complained to the Information Commissioner ("the Commissioner"). The Commissioner issued a Decision Notice on 21 June 2010 (FS50286013) which concluded that OFCOM was entitled to refuse the information requested on cost grounds under section 12 of the Freedom of Information Act (FOIA) 2000. The Commissioner did not require any formal steps to be taken by OFCOM.

3. However, the Commissioner also concluded that OFCOM had been in breach of its procedural requirements under section 17(5) of the Act. This states that "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." That time limit is 20 working days (see section 10).

4. The Commissioner also noted with concern that it had taken OFCOM over 40 working days to conduct an internal review of the public authority's refusal to disclose, despite guidance published in the Commissioner's Code of Practice.

5. The appellant lodged a Notice of Appeal in good time on 13 July 2010. He set out two pages of detailed grounds for his appeal. His main points, in summary, were that OFCOM had broken time limits in dealing with his request and that the Commissioner had taken no action against OFCOM despite these as he saw it repeated breaches.

6. The Commissioner provided a formal response to the appeal (dated 11 August 2010), inviting the tribunal to dismiss the appeal. In short the Commissioner argued that the Notice of Appeal did not suggest that the Decision Notice was wrong in law and that the tribunal had no power either to review the public authority's conduct of its internal reviews or to compel the Commissioner to take any enforcement action.

The ruling by the First-tier Tribunal (Information Rights)

7. There was extensive e-mail correspondence between the appellant and the First-tier Tribunal's administrative staff. On 21 September 2010 Tribunal Judge McKenna wrote to the appellant, explaining that she was proposing to strike out his appeal under rule 8 of the GRC Procedure Rules. That indication was clearly made to conform to rule 8(4). The appellant made further representations.

8. Tribunal Judge McKenna then considered the matter again on 15 October 2010 under reference EA/2010/0129. Her ruling was that the appellant had not provided grounds of appeal that fell within the tribunal's jurisdiction. As such, she concluded that she had no choice but to strike out the appeal under rule 8(2).

The application for permission to appeal to the Upper Tribunal

9. The appellant then applied for permission to appeal the ruling to strike out his appeal. Tribunal Judge McKenna considered that application on 25 October 2010. She refused to admit the application on the ground that it failed to comply with rule 42(5) of the GRC Procedure Rules, namely that it did not identify any error of law.

10. On 5 November 2010 the appellant lodged an application for permission to appeal directly with the Upper Tribunal. The central reason that the appellant gave for his application was that "crime and punishment go hand in hand". Essentially his point was that in any other walk of life if there is a breach of the rules then sanctions necessarily follow. He argued that OFCOM has flouted time limits under FOIA 2000 and effectively, in plain English, has been allowed to get away with it.

11. On 27 January 2011 I gave the appellant permission to appeal. I was, however, not persuaded by the main thrust of the appellant's argument. Rather, I gave permission to appeal as it seemed arguable that the First-tier Tribunal's ruling might have been in error of law in two respects.

12. First, the Commissioner had plainly decided that the public authority had "failed to comply with any of the requirements of sections 11 and 17" within section 50(4)(b) and yet, in apparent contravention of the rest of section 50(4), the Decision Notice did not then "specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken." I noted that a different First-tier Tribunal had taken the view that section 50(4) was mandatory in nature: see the case of *Gaskell v Information Commissioner* (EA/2010/0090), a decision which is still currently under appeal to the Upper Tribunal under reference GIA/3016/2010. There was therefore an arguable case – and I put it no higher than that – that "the notice against which the appeal is brought is not in accordance with the law".

13. Second, it appeared to be arguable that Tribunal Judge McKenna should have considered whether the appeal should have been struck out not because it was outside the tribunal's jurisdiction (under rule 8(2)) but rather because it had no reasonable prospects of success (under rule 8(3)). On that basis it might well have

been that she should have exercised the strike out power under rule 8(3)(c), rather than under rule 8(2). As Tribunal Judge McKenna noted, there is a fundamental distinction between the mandatory nature of rule 8(2) and the discretionary nature of rule 8(3). However, as Upper Tribunal Judge Jacobs has also observed in *A W v Essex County Council (SEN)* [2010] UKUT 74 AAC; [2010] AACR 35: "It may be that a tribunal has jurisdiction over an issue, but can only properly give one decision on the evidence" (at paragraph 15). That case is covered by rule 8(3), and not by rule 8(2). Upper Tribunal Judge Levenson drew attention to the same important distinction in *F L v First-tier Tribunal and CICA* [2010] UKUT 158 (AAC).

The submissions to the Upper Tribunal on the appeal

14. Neither party has requested an oral hearing of this appeal and I am satisfied that the matter can be determined on the written submissions alone and without a hearing.

15. The Commissioner's Response to the appeal acknowledges that if the appellant's complaint is indeed seen as an appeal against his refusal to notify any particular steps under section 50(4), then the matter would in principle fall within the tribunal's jurisdiction, and so a strike out on the basis of rule 8(2) alone would not be appropriate. However, the Commissioner argues that in the circumstances of this case there were no particular steps which could have been specified under section 50(4) to deal with any procedural breaches under sections 11 and 17. So, in effect, the Commissioner argues that he could not have exercised his discretion any differently and the tribunal would have been bound to dismiss the appeal in any event. The Commissioner therefore invites the Upper Tribunal to strike out the appeal under rule 8(3)(c).

16. The appellant, understandably perhaps, has not engaged with the legal technicalities in his Reply. He repeats his point that "crime and punishment go hand in hand". He argues that OFCOM has repeatedly failed to keep to the relevant time limits and that it has in his words "conned" the Commissioner.

The Upper Tribunal's analysis

17. The first matter that I have had to decide is whether to proceed with deciding this appeal or whether it should be stayed, or postponed, pending the outcome of the appeal in *Gaskell v Information Commissioner* (EA/2010/0090; GIA/3016/2010). There are, in summary, two views of section 50(4). The Commissioner's view is that the provision gives him a discretion, and if it is appropriate for no particular steps to be specified, then he is entitled to direct that the public authority need take no steps. The alternative view, which commended itself to the First-tier Tribunal in *Gaskell*, is that section 50(4) is a mandatory provision and that therefore, where the Commissioner finds that a public authority has failed to comply with any of the requirements of section 11 and 17, then, if there are any steps which the public authority can take at the time the Decision Notice is issued, so as to remedy the breach(es) identified, the Commissioner must require the public authority to take those steps.

18. On balance I have concluded that this case need not await the outcome of *Gaskell v Information Commissioner*. One possibility in the present case is that the Commissioner was not actually purporting to exercise any discretion under section 50(4) at all, but was simply stating his view that, in the circumstances of this case, there were simply no steps which could be specified for the purposes of section 50(4). This would appear to be the Commissioner's view – in his Response he

asserts that he did not issue steps for OFCOM to comply with the section 10 time limit because OFCOM would not have been able to remedy the identifiable breach. As I put it when giving permission to appeal, "the horse has already bolted". If that is right, then *Gaskell* may not have any direct bearing on the present appeal. In addition, the outcome of any First-tier Tribunal would inevitably have been that the appeal would have no reasonable prospect of success and could be struck out on that basis.

19. The alternative possibility in the present case is that the Commissioner was indeed exercising a discretion under section 50(4) to decline to specify any steps. If the outcome of the *Gaskell* appeal is that the Commissioner does indeed have such a discretion, then the First-tier Tribunal would have had jurisdiction but in the circumstances the appeal would have no reasonable prospect of success and again could be struck out on that basis. If, however, the true position is that the Commissioner has no discretion, then the Commissioner's Decision Notice would have been wrong in law, as the Commissioner would then be purporting to exercise a discretion he did not enjoy. However, this would be a Pyrrhic victory for the appellant, as the tribunal could only have substituted a Decision Notice to the effect that OFCOM was not obliged to take any steps as there were no steps which could now be taken to meet section 17(5) in the context of the appellant's request for information.

20. For these reasons it seems to me that there is little to be gained, and potentially much time to be lost, by awaiting the outcome of the *Gaskell* appeal.

21. I therefore turn to consider the two points on which I gave permission to appeal against the ruling of Tribunal Judge McKenna. The first related to the possibility that the Commissioner's Decision Notice may arguably have been in breach of section 50(4) and to that extent have been wrong in law. Tribunal Judge McKenna understandably did not address that issue in terms as it had not been put to her; rather, the appellant had put his case on the basis that the Commissioner had failed to take enforcement proceedings against OFCOM. For the reasons set out at paragraphs 18 and 19 above, I am satisfied that if there was an error by the First-tier Tribunal in this respect (and I am not sure that there was), then it did not have any material impact on the outcome of the matter. For that reason there was no material error of law.

22. The second point on which permission to appeal was granted concerned the inter-relationship of rule 8(2) and 8(3). It is important to note that the Commissioner has various options open to him in tackling a recalcitrant public authority. These powers include making a practice recommendation (section 48), identifying the public authority in a report to Parliament (section 49) or indeed issuing an enforcement notice (section 52). Indeed, the appellant has drawn my attention to the Commissioner's recent press release on this issue ("Government departments facing regulatory action for transparency delays"; ICO press release dated 12 April 2011). However, any such action would be outside the remit of a Decision Notice and so also outside the jurisdiction of the tribunal on appeal. Accordingly, if the appellant's appeal was exclusively an appeal against the Commissioner's decision not to use any of these various enforcement tools in relation to OFCOM, then the First-tier Tribunal was correct to conclude that the appeal fell outside its jurisdiction and so had to be struck out under rule 8(2).

23. If, however, the appellant's appeal was at least in part against the fact that the Decision Notice did not require OFCOM to take any specific steps (under section 50(4)) to remedy the procedural breach in his case, then in principle such a matter

did fall within the tribunal's jurisdiction and so could not be struck out in the exercise of the mandatory provision under rule 8(2). It could, however, have been struck out under rule 8(3) on a discretionary basis as having no reasonable prospect of success (for the reason identified in paragraph 18 above).

24. The appellant has frankly stated that he does "not know one section from another". However, in his Reply he has repeated his point that the Commissioner has various options open to him, e.g. "the power to name and shame OFCOM, in parliament if need be".

25. Having read all the correspondence and submissions on file, it seems clear that the appellant's principal complaint against the Commissioner is that his office has not made use of the various weapons in his armoury, and identified at paragraph 22 above, to bring OFCOM to book over what the appellant regards as their repeated failures. I do not read the appellant as making any particular focussed objection to the Commissioner's omission to specify a particular step for the purposes of section 50(4), which must by definition be connected with the particular procedural failing under section 11 and/or 17.

26. On that basis I have reached the conclusion that Tribunal Judge McKenna did not err by ordering a strike out of the appeal on the basis of rule 8(2). From the way in which the case was presented to her, the appellant was asking the tribunal to overturn the Decision Notice and to order the Commissioner to take steps which were outwith the tribunal's jurisdiction. The First-tier Tribunal was accordingly entitled to strike out under rule 8(2). If I am wrong about that, and the appeal was in fact within the tribunal's jurisdiction, as the challenge was on the basis of section 50(4), then the First-tier Tribunal would have had ample grounds for striking out under rule 8(3), as there was no reasonable prospect of success, given that no specific and time-limited step could now be ordered by the tribunal to remedy the particular procedural failing under section 11 and/or 17. On that basis, if there was any error of law by the tribunal judge, it was not a material error of law as it would have made no difference to the eventual outcome.

27. I accept that the appellant will doubtless feel frustrated at the outcome of this appeal. However, the simple fact is that the right of appeal to the First-tier Tribunal could never deliver what he wanted in terms of requiring the Commissioner to take enforcement measures against OFCOM. The Commissioner's exercise of his discretion to consider which measures, if any, to select from his menu of enforcement options is not a matter that can be challenged through the tribunal system. Instead, the appellant would have to take proceedings for judicial review in the Administrative Court.

Conclusion

28. For the reasons explained above, I dismiss this appeal.

**Signed on the original
on 26 April 2011**

**Nicholas Wikeley
Judge of the Upper Tribunal**