# THE UPPER TRIBUNAL
# (ADMINISTRATIVE APPEALS CHAMBER)

**UPPER TRIBUNAL CASE NO: GIA/2986/2011**

**PARTIES**

The London Borough of Camden, the Information Commissioner and Yiannis Voyias

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

**UPPER TRIBUNAL JUDGE: EDWARD JACOBS**

# DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 2 September 2011 under reference EA/2011/0007) involved the making of errors in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

## REASONS FOR DECISION

### A. Abbreviations

1. I have used these abbreviations:

| | |
|---|---|
| Camden: | London Borough of Camden |
| Commissioner: | Information Commissioner |
| FOIA: | Freedom of Information Act 2000 |

### B. History and background

2. On 25 August 2009, Mr Voyias requested information from Camden under section 1 of FOIA. He asked for the address of every void property in the Borough in which a non-individual was listed as the owner or as having a material interest in the property. He later said that he was only interested in residential property. At the hearing, he told me that the addresses were what he was interested in. 'The information is the addresses', he told me. In other words, he was not interested in any redacted information. Camden refused to provide the information sought. At first, it relied on the exemption in section 43(2) of FOIA. Later on review, it also relied on the exemptions in sections 12(1) and 21(1).

3. Mr Voyias applied to the Commissioner under section 50 of FOIA. In the course of the proceedings before the Commissioner, Camden withdrew the exemptions it had relied on. Instead, it relied on section 31(1)(a):

> **31 Law enforcement**
>
> (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
>
> (a) the prevention or detection of crime; ...

This is subject the public interest test under section 2(2)(b):

> **2 Effect of the exemptions in Part II**

> (1) In respect of any information which is exempt information by virtue of any provision in Part II, section 1(1)(b) does not apply if or to the extent that-
>
> ...
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Camden's argument was that the prevention of crime would be prejudiced by the increase in crime by squatters using the information sought to identify empty properties.

4. The Commissioner decided that the public interest favoured maintaining the exemption, with the effect that Camden was right not to disclose the information requested.

5. Mr Voyias exercised his right of appeal to the First-tier Tribunal. The tribunal consisted of Judge Henderson, Darryl Stephenson and Mike Jones. It decided the appeal without a hearing. It found that section 31(1)(a) was engaged in that:

> it is likely that disclosure of the disputed information would have a negative impact on the prevention of crime. We find that the list would be of use to organized squatters and that this type of squatting is associated with the types of criminal activity set out above. We are also satisfied that the list would be of use for the criminal purposes of organized criminals. The level of prejudice is real, actual and of substance.

The tribunal then undertook a detailed consideration of the public interest, which I will not attempt to summarise. It concluded that the public interest was in favour of disclosure. It directed Camden to provide the information set out in its decision.

6. Camden applied for permission to appeal. The First-tier Tribunal refused permission and Camden renewed its application to the Upper Tribunal. I gave permission and held a hearing on 28 May 2012. Ben Hooper of counsel appeared for Camden. Christopher Knight of counsel appeared for the Commissioner, speaking to a skeleton argument prepared by Edward Capewell of counsel. Mr Voyias spoke on his own behalf. I am grateful to them all for their written submissions and oral argument.

## C. The scope of the public interest in the prevention of crime

7. The tribunal made an error of law by misdirecting itself on the scope of its enquiry. I accept Mr Hooper's and Mr Knight's argument on this.

8. The error is contained in this passage:

> 50. The Tribunal adopts the approach applied at para 65(f) in *Bexley* that in considering public interest factors in favour of maintaining the

> exemption, they must relate to the particular interest which the exemption is protecting. In this case the prevention of crime. ... The Tribunal does not consider that any perceived social disadvantage of living next door to squatters, or the costs of the eviction of squatters are matters that the Tribunal is entitled to take into consideration since squatting is not illegal. However, *public* costs e.g. the costs of repair and extra security to *Council* buildings to prevent criminal damage is a legitimate factor as it is attributable to the interest that the exemption is protecting.

Judge Henderson purported to remove *public* and *Council* under the slip rule. There was a misdirection both as originally written and as later changed.

9. Sometimes the impact on the prevention of crime will have to be considered in general terms. Sometimes, as in this case, it is possible to consider particular crimes. The tribunal devoted most of its consideration to the argument that the information could be used by squatters who might commit criminal damage to gain access to, and to secure, the premises. I deal with the appeal on the same basis. Squatters might, though, commit other offences, such as abstracting electricity. And people other than squatters might use the list.

10. The error in the tribunal's reasoning was to assume that certain acts are made criminal just for their own sake. That is not so. Preventing crime prevents the criminal acts themselves and the consequences that accompany or follow them. These factors have to be taken into account as part of the assessment of the public interest. The consequences of a crime may be financial or social. They may be direct or indirect. Just to take criminal damage, there are the costs of security measures, the cost of repairs, increased insurance premiums for the area, and an impact on the local property values. There is no justification for taking account of only some of these financial consequences. There is no difference in principle between the costs that are carried by private individuals, by the public purse or spread through insurance premiums. Nor is there a difference in principle between the cost of repairing the damage and the cost of evicting someone who caused the damage in order to gain entry and possession. And there is no justification for severing financial costs from social costs. Mr Hooper gave a telling, if perhaps not very likely, example. Suppose that the crime were theft of the wheels from ambulances. The public interest would not be limited to the financial cost of replacing the wheels, but would surely include the impact on the patients if the ambulances were not available. These consequences may not be as easy to quantify, but they can be more important. Criminal damage and its consequences can reduce the quality of life in a neighbourhood. There is a psychological element involved, which may not be rational. People may feel more vulnerable or threatened than they really are. But the impact is none the less real for that.

11. There must, of course, be some limit to the factors that can be taken into account. Mr Hooper suggested that the line should be drawn at the consequences that were objectively foreseeable. Mr Knight preferred a test of reasonable foreseeability. I am not sure that there is much difference between them.

Reasonable foreseeability is the more familiar and has a respectable pedigree in other areas of law. But that is a problem in itself, as there is a danger that tribunals will carry across the learning from those areas. I prefer to start from the task that the tribunal has to perform. It has to make an assessment of the public interest. In performing that task, it should take account of any factors that are sufficiently connected to the interests involved to be part of that assessment. If I had to capture that connection in a phrase, I would say that the tribunal should take account of any consequences that can readily be anticipated as realistic possibilities. That would include the factors I mentioned in the previous paragraph. It would exclude factors such as the possibility of a flying splinter blinding a passing child as a door is broken open.

12. The tribunal was right that squatting itself is not an offence. It was right to focus on the prevention of crime rather than on the prevention of squatting. But it was wrong to focus so narrowly on the nature of the particular offence of criminal damage and its immediate consequences.

## D. Assuming that things will otherwise remain the same

13. As I have said, the disclosure of the information in this case might encourage other offences than squatting. It could be used by arsonists. More likely, it could lead to theft, especially theft of the heating and water systems. The tribunal dealt with this and decided that such thefts usually occurred on building sites rather than in empty properties. That may be what the evidence shows at the moment. But it does not follow that that would remain the case if the information were disclosed. Disclosure might change behaviour. Metal thieves with access to a full list of Camden's empty properties might think it worthwhile to change their practice. The tribunal did not deal with this possibility. I have not treated this as an error of law, as I did not hear argument on it. I mention it so that the tribunal can avoid making this assumption at the rehearing.

14. This point is not limited to theft of heating and water systems. Tribunals have to be alert to the possibility that disclosing information may affect behaviour. It is a mistake to assume that behaviour will continue as before and assess the public interest on that basis. The tribunal has to assess the likelihood of prejudice. It is wrong to limit that assessment by making assumptions one way or the other.

## E. The significance of other forms of accountability

15. The tribunal made an error of law by misdirecting itself on the significance of other forms of accountability. I accept Mr Hooper's and Mr Knight's argument on this.

16. Mr Voyias argued that disclosure would further accountability. Camden and the Commissioner argued that there were other forms of accountability that were more proportionate. Specifically:

- information provided to Central Government and held on the Department for Communities and Local Government website;
- Camden's internal statistical information;
- financial and policy incentives to relet as soon as possible; and
- audit.

17. The tribunal said:

> 55. It was argued by the Commissioner and accepted by the Tribunal in *Cabinet Office v ICO and Dr Christopher Lamb EA/2008.24&29* that the public interest in accountability is not *significantly* reduced just because of the existence of another regulatory mechanism.

Judge Henderson purported to add *significantly* under the slip rule. There was a misdirection both as originally written and as later changed.

18. The relevant passage in the majority decision in the *Cabinet Office* case is this paragraph:

> 80. The majority view also stresses that it is the coincidence of all the identified factors being applied to the particular information in question that generates the impetus for disclosure. This is not significantly reduced by the investigations and enquiries that have taken place. In the view of the majority the questions and concerns that remain about the quite exceptional circumstances of the two relevant meetings create a very strong case in favour of the formal records being disclosed.

I read that paragraph, especially the second sentence, as a statement made in the context of that case. The tribunal was merely setting out its assessment in that particular case. The word *significantly* was merely part of that assessment. I do not read the passage as stating any principle of general application. If it does, it is wrong in law. The tribunal has to apply section 2(2)(b) of FOIA. In doing so, it has to take account of the factors relevant to the public interest whether in maintaining the exemption or in favour of disclosure. If accountability is a factor, any other forms of accountability will be relevant. The tribunal must assess the nature and extent of their significance. That assessment can only be made in the context of the case.

19. Judge Henderson commented on this ground of appeal when refusing permission to appeal to the Upper Tribunal. She said that it was clear from the decision as a whole that the tribunal had not made this error. To show this, she then quoted a passage from the tribunal's reasons. I have considered what she says, but to me the passage does not have the effect she claims for it.

## F. First-tier Tribunal's approach to its previous decisions

20. This is a convenient place to comment on the way that the First-tier Tribunal approaches its own decisions and those of its predecessor, the Information Tribunal. In the cases I have seen, the tribunal is careful to say that it is not bound by those decisions. That is right as a matter of principle and

authority. See *Hampshire County Council v JP* [2009] UKUT 239 (AAC), [2010] AACR 15 at [15] and *West Midland Baptist (Trust) Association (INC) v Birmingham Corporation* [1967] 2 QB 188 at 210 and 225. Previous decisions are of persuasive authority and the tribunal is right to value consistency in decision-making. However, there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle. This, in my view, is what has happened in the decisions on vexatious requests (section 14 of FOIA). It can also lead to statements being taken out of their context and given a general significance. This is what has happened in this case.

## G. How to use the slip rule

21. Judge Henderson dealt with Camden's application for permission to appeal to the Upper Tribunal. She issued a document headed **Refusal of Application for Permission to Appeal and Amendments under the Slip Rule**. Among her detailed reasons for refusing permission she purported to make two changes to the tribunal's written reasons. I have mentioned them above. By the *slip rule*, she was referring to rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009:

> **40 Clerical mistakes and accidental slips or omissions**
>
> The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by—
>
> (a) sending notification of the amended decision or direction, or a copy of the amended document, to each party; and
>
> (b) making any necessary amendment to any information published in relation to the decision, direction or document.

22. Both Camden and the Commissioner criticised the judge for using the rule in the way she did. They also asked me to make clear for the First-tier Tribunal the scope of rule 40.

23. The tribunal made the same errors of law in both versions of the decision. In those circumstances, I do not have to decide whether the changes were outside the scope of rule 40. It is, however, my impression that they were. I will, therefore, deal with this issue. I explained how the slip rule should be used in *AS v Secretary of State for Work and Pensions* [2011] UKUT 159 (AAC) at [16]:

> Rule 36 [of the Tribunal Procedure) (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008] is by its contents a species of slip rule and should be interpreted in accordance with the nature of that type of provision. As such, it deals with matters that were in the judge's mind when writing but for some reason did not find their way onto the page. Typical examples are the typing error that produces the wrong date or a momentary lapse of concentration that results in the word 'not' being omitted. The rule does not

cover matters that the judge had planned to mention but forgot to include. Obviously, it is difficult for the Upper Tribunal to know what was in the judge's mind, but the extent of the changes are an indication. It is difficult to classify the omission of a total of nine lines of explanation as in the same category of mistake as a typing error or a momentary lapse of concentration. For that reason, I decide that the changes made by the presiding judge were not authorised by rule 36.

24. It follows that the tribunal cannot use rule 40 if it has changed its mind and had further thoughts. There is ample authority for that proposition. The decision of the Lands Chamber of the Upper Tribunal (George Bartlett QC and N J Rose FRICS) in *Leasehold Valuation Tribunal for the Midland Rent Assessment Panel v Clarise Properties Ltd* [2012] UKUT (AAC) 12 (LC) at [15]-[17] is but the latest.

25. I also draw attention to what the Court of Appeal said in *Brewer v Mann* [2012] EWCA Civ 246. The judge in that case had made much more extensive changes than Judge Henderson. The Court of Appeal analysed the authorities and said at [31]:

> ... where a judge has received no request from the parties to reconsider his judgment or add to his reasons, and has not demonstrated the need in conscience to revisit his judgment, but on the contrary has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, then it would be most unwise for him to rewrite his judgment (other than purely editorially) and it would take the most extraordinary reasons, if any, to justify such a course on his part. It is also plain to us that this was not the case of a short judgment on a straightforward issue where an appeal might be avoided if the judge supplied further reasoning which had been requested of him.

26. Judge Henderson could have made the changes she did under section 9(4)(b) of the Tribunals, Courts and Enforcement Act 2007. In order to do that, she would have had to carry out a review. It is clear from her reference to rule 40 that she did not use that procedure.

## H. The other grounds of appeal

27. There were other grounds of appeal. I have not dealt with them, because ultimately they are criticisms of the tribunal's assessment of the public interest. As the tribunal misdirected itself on the approach to that assessment, there would be little point in analysing whether its detailed assessment was flawed. The points can be made, if appropriate, to the tribunal at the rehearing.

## I. The rehearing

28. I have set the tribunal's decision aside, because it contained errors of law.

29. I have directed a rehearing because the assessment of the public interest would be better undertaken by a panel that contains members who have been selected for their knowledge and experience relevant to freedom of information.

30. I have directed that the case be heard by a different panel. This is not a case in which the First-tier Tribunal's decision was complete apart from one omission, which the same panel could usefully deal with. Nor is it a case in which the tribunal made a mistake that could be neatly severed from the rest of its decision. This is a case in which the tribunal misdirected itself on the approach to the assessment of the public interest. That assessment needs to be undertaken afresh and that is more easily done by a fresh panel.

**Signed on original**
**on 6 June 2012**

**Edward Jacobs**
**Upper Tribunal Judge**