



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2011/0064

BETWEEN:-

DAVID BLACK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision and Reasons

Determined on the papers by:

Alison McKenna, Tribunal Judge
Richard Fox, Tribunal Member
Nigel Watson, Tribunal Member

On 5 September 2011 at Field House, London

Decision dated: 8 September 2011

Subject Matter: Regulation 2 of the Environmental Information Regulations 2004

DECISION

This appeal is hereby dismissed.

REASONS

Background

1. This appeal concerns the Respondent's Decision Notice FER0224316 dated 8 February 2011.
2. The Appellant made an information request to the Chief Executive of English Heritage on 12 July 2008. His request concerned, inter alia, the conditions imposed by English Heritage in relation to the internal refurbishment of a listed property. The request was not initially responded to as one falling under the Freedom of Information Act 2000 ("FOIA") or the Environmental Information Regulations 2004 ("EIR"), although following the intervention of the Respondent, it was appropriately responded to, albeit later than the statutory scheme required. The Respondent concluded in his Decision Notice that all the information to which the Appellant was entitled under the statutory scheme had been provided to the Appellant. The Respondent found there to have been procedural breaches of FOIA and the EIR but required no steps to be taken.
3. The Respondent concluded in his Decision Notice that some of the information requested fell under FOIA and some under EIR. In particular, the Respondent made a distinction between internal and external works and concluded that information concerning internal fixtures, such as fireplaces or chimney pieces, did not fall within the definition of "environmental information" in Regulation 2 (1) of EIR. This meant that certain aspects of the information request fell to be considered under FOIA rather than EIR, and that certain provisions in EIR did not apply to that aspect of the Appellant's information request. This part only of the Respondent's Decision Notice is now appealed to the Tribunal.

The Role of the Tribunal

4. This appeal is brought under s.57 FOIA. The FOIA appeals system is applied to appeals under EIR by regulation 18 of EIR.

5. The powers of the Tribunal in determining an appeal under s.57 FOIA are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The Issue for the Tribunal

6. The sole issue for the Tribunal in this appeal is whether the Respondent erred in law in concluding that information relating to internal fixtures, such as fireplaces or chimney pieces, did not fall within the definition of “environmental information” in Regulation 2(1) of EIR and therefore fell to be dealt with under FOIA. The Appellant bears the burden of proof in relation to his grounds of appeal.
7. It was noted in the Decision Notice that the Appellant had apparently pursued his complaint on the erroneous assumption that the Information Commissioner was entitled to form a judgement as to the correctness or quality of English Heritage’s decisions or decision-making processes. The Tribunal also notes that the Appellant has sought to introduce a number of additional issues (both procedural and substantive) into these proceedings, which are not relevant to the issue before the Tribunal, but which are considered at paragraph 22 below.

The Parties’ Submissions

8. The Appellant advanced three grounds of appeal in his Notice of Appeal dated 8 March 2011. These were:

That the Information Commissioner had erred in law by failing to have regard to the case law of the European Court of Justice, so that his Decision Notice thereby infringed European law. In particular:

- (i) He had erred in concluding that the information requested did not constitute “environmental information” within the meaning of Directive 2003/4/EC. The characteristics of appropriate replacement neoclassical timber or marble chimneypieces for the principal rooms of Late Georgian and Early Regency Grade 1 and Grade 2 listed buildings did constitute “environmental information” within the terms of the Directive;
- (ii) That as such information was “environmental information”, the Information Commissioner should have held that there was a duty on English Heritage to comply with Article 3(1) of the Directive and so provide him with information at his request and without him having to state an interest;
- (iii) That as such information was “environmental information”, the Information Commissioner should have held that there was a duty on English Heritage to comply with Article 8(1) of the Directive and so ensure that the information it held was up to date, accurate, and comparable.

9. In his Reply to the Respondent’s Response and in his substantial written submissions for the Tribunal hearing, the Appellant expanded upon these three grounds of appeal. He submitted hundreds of pages of argument and materials to the Tribunal. The Tribunal found it difficult to follow the relevance of his arguments at times, however it is mindful of the fact that the Appellant is not legally represented and has sought to identify those arguments which best support his case. These are:

- (i) That EIR was ineffective to implement Directive 2003/4/EC and that the Tribunal should refer this appeal to the European Court of Justice for determination;
- (ii) That as a result of (i) above, the Appellant is able to rely on the Directive itself in his application to the Tribunal;

- (iii) That the definition of “environmental information” for the purposes of the Directive has not always been restricted to the natural environment, and he referred us to Advocate General Kokott’s Opinion in Case C-266/09 *Stichting Natuur en Milieu* which the Appellant argued supported the view that everything occurring in the environment should be regarded as an element of the environment. He argues that buildings and structures fall under the generic heading of “landscape” in the Directive;
- (iv) That the distinction that the Respondent seeks to draw between the natural and the artificial environment in this case is wrong in principle and in law.

The Appellant advanced a number of other arguments which are considered at paragraph 22 below.

10. The Respondent filed a Reply and further written submissions in this matter, prepared by counsel. He commented that many of the Appellant’s arguments appeared to be irrelevant to his grounds, but responded to the substantive grounds of appeal as follows:

- (i) The EIR implement the Directive. Regulation 2(1) of EIR, which contains the definition of “environmental information”, is directly transposed from Article 2 of the Directive, so it is difficult to see how the Appellant can maintain an argument that the implementation of that provision was defective. To the extent that he argues that the implementation of other provisions of the Directive were not properly implemented, these do not support the grounds of appeal and do not relate to the matters before the Tribunal. There is no need for the Tribunal to refer this matter to the ECJ for a preliminary ruling under Article 267 of TFEU unless it would be necessary to have such a ruling before the Tribunal could resolve the dispute before it;
- (ii) The Appellant’s reliance on the Advocate General’s Opinion in *Stichting* is misconceived. He quotes from the Opinion only partially and out of context. A proper understanding of her Opinion is to the effect that “environmental information” is not intended by the Directive to be a

wholly elastic concept, however it should not be restricted to naturally occurring flora and fauna but also include, for example, agricultural crops and commercial forests. In other words, she was referring to a natural environment on which there has been human interference. This authority does not therefore support the Appellant's "leap" to the contention that the definition should be read as including the internal fixtures of a building;

- (iii) Grounds two and three are reliant upon ground one being successful. If the information relating to chimneypieces is not "environmental information" within the meaning of the Article 2 (1) EIR then there was no separate obligation on English Heritage to comply with Regulations 3(1) and 5(4) of EIR;
- (iv) The Appellant has interpreted Regulation 5(4) too broadly in any event. Even if his request was for environmental information, the Regulation applies only to information "compiled" by the public authority and imposes no obligation on the public authority to correct historic information. In any event, the Appellant apparently seeks to argue that Regulation 5 (4) imposes an obligation on the Respondent, rather than on English Heritage, which is erroneous;
- (v) The Reply apparently seeks to introduce a new ground of appeal namely that *"contrary to the legal obligations imposed on him by Directive 2003/4 and the principles of legality, legal certainty and the protection of legitimate expectations, the Commissioner neither faithfully summarised the precise nature and scope of the "environmental information" set out in the documents referred to...nor addressed the legal characteristics and consequences of that information in the DN, in order to avoid having to undertake a diligent and impartial examination of the factual and legal issues brought to his attention"* . To the extent that this issue is before the Tribunal (not having been introduced in the grounds of appeal), it represents a serious and unsubstantiated allegation of bias and misconduct against the Respondent which is denied.

The Tribunal's Conclusion on the Issue

11. The aspect of the original information request with which this appeal is concerned is information about the internal features of a particular listed building. As noted above, the Respondent concluded that information about internal works was not “environmental information” within the EIR definition. The Appellant disputes this interpretation of EIR. The Tribunal concludes that it is able to determine this dispute between the parties and that there is no need for it to refer this appeal to the ECJ for a preliminary ruling.

12. Regulation 2(1) of EIR defines “environmental information” as follows:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements”.

Regulation 2(1) (b) to (f) refer to certain factors, measures, reports, analyses and assumptions and the state of human health and safety relevant to matters within the Regulation 2(1)(a) definition.

13. The Appellant has argued that the information he requested falls within the generic description of “landscape” in the Directive (and the EIR). He argues that European case law supports this contention, however he has not referred us to any case directly on the point. The Tribunal does not accept that the Opinion in the case of *Stichting* to which the Appellant referred us supports his contention and we prefer the analysis advanced by the Respondent in respect of *Stichting*. On a plain reading of both the Directive and the EIR (which are identical in any event) the Tribunal finds that information relating to the internal fixtures of a building does not constitute “environmental information” within the definition, whether as landscape or otherwise. The Tribunal accordingly finds

that the Appellant has not discharged his burden of proof and finds against him on ground one of his grounds of appeal.

14. The Tribunal finds that, if the information which is the subject matter of the request is not “environmental information” within the EIR definition, then there is no obligation on the public authority to comply with Regulations 3 and 5 EIR, as the Appellant suggests in grounds two and three of his grounds of appeal. The Tribunal accordingly finds against him in relation to those grounds.
15. The Appellant has not advanced any evidence in support of the contention, included in his Reply, that there was misconduct and bias by the Respondent. To the extent that it was intended to be a new ground of appeal, the Tribunal has no hesitation in rejecting this argument, which is quite unsubstantiated by evidence.

Mode of Hearing, Procedural Matters and the Appellant’s Additional Arguments

16. This appeal was determined on the papers with the agreement of the parties. The Tribunal was satisfied that it could properly determine the issues without an oral hearing, pursuant to rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”). The Tribunal was provided with an open hearing bundle (the contents of which had been agreed by the parties) running to some 400 pages, and also with substantial additional materials provided by the Appellant. There was no “closed” material before the Tribunal in this appeal.
17. The Appellant’s Reply was served out of time without the permission of the Tribunal. Having consulted the Respondent, the Tribunal admitted the Reply so that the Appellant’s full arguments were before the Tribunal.
18. The Appellant subsequently sought the Tribunal’s permission to substitute new written submissions for those he had filed earlier. Having consulted the Respondent, the Tribunal admitted the replacement submissions so that the Appellant’s full arguments were before the Tribunal when it reached its decision.

19. The Tribunal had issued directions requiring the Appellant to provide a paginated and indexed bundle of the authorities upon which he relied. After the Appellant sent the Tribunal a link to a website where he said it could find the relevant information, the Tribunal put him on notice that it had the power under rule 8 (3)(a) of the Rules to strike out all or part of an appeal if the Appellant did not comply with the Tribunal's directions. The Respondent e mailed the Tribunal (copied to the Appellant) to say that he did not seek a strike out but did wish to put the Appellant on notice that he might apply for costs under rule 10 of the Rules in respect of the Appellant's unreasonable conduct. The Appellant subsequently provided the Respondent and the Tribunal with his authorities.
20. On 18 August, the Appellant applied to the Tribunal to amend the hearing bundle and further to amend his Notice of Appeal so as to introduce new grounds concerned with *"inter alia, breach of public policy, such as the force of res judicata with absolute effect which is a matter of public policy which must, consequently, be raised by a court or tribunal of a Member state of its own motion..."*. The Tribunal refused this application in view of the proximity of the hearing date, the need for the Panel to be able to read substantial materials before the hearing, and the likelihood that the Respondent would need to respond to new argument at a late stage. The Tribunal also refused the Appellant's application for an extension of time in which to respond to the Respondent's written submissions and in the event he did not so respond.
21. On 19 August the Appellant applied for the Tribunal Judge to *"amend the directions of 1 June, 3 August and 19 August to the extent that the provisions in question are in breach of (1) Article 4(3) TFEU; (2) Article 19(1) TEU; (3) Article 267 TFEU; (4) Directive 2003/4 and the principles of legality, legal certainty and the protection of legitimate expectations"*. He also asserted that the Tribunal was not an independent and impartial adjudicating body, had denied him justice and had called into question the necessary guarantees that are required to be adopted by the United Kingdom to protect the right to a fair trial. The Tribunal responded that it was unable to consider this as a request for directions under rule 6 of the Rules because it did not specify what directions were sought and

why and further that the Tribunal could not rule on constitutional matters. It reminded him that the Respondent had put him on notice that it might apply for costs against him if he increased its need for legal advice unnecessarily and reminded him that the panel hearing would be going ahead on 5 September and that he would be notified of its decision as soon as possible thereafter.

22. As noted at paragraph 9 above, the Appellant introduced a number of additional arguments before the Tribunal. The Respondent frequently indicated in his Response that he did not understand the relevance of these arguments and so could not respond to them. The Tribunal summarises these arguments in italics, below, providing its conclusion in relation to each in standard font and including a reference to the page of the hearing bundle on which the arguments appear:

- (i) *That the principles of legality, legal certainty and the protection of legitimate expectations, as interpreted by case law, required the IC to rule that the information sought was “environmental information”* (p. 326, 327). The Appellant has not specified the source of these principles, has not cited case law supporting them, and did not explain how they supported his grounds of appeal. The Tribunal therefore rejects this argument;
- (ii) *That the Convention for the Protection of the Architectural Heritage of Europe (“Granada Convention”) supports the Appellant’s case* (p.319). The Appellant has not explained the relevance of this provision to the issue before the Tribunal. The Tribunal therefore rejects this argument;
- (iii) *That Directive 2005/36/EC concerning the recognition of professional qualifications supports the Appellant’s case* (p.319). Again, the Appellant has not explained the relevance of this provision to the issue before the Tribunal. The Tribunal therefore rejects this argument;
- (iv) *That the United Kingdom has not transposed parts of the Information Directive correctly (regarding parts of the Directive unrelated to the definition of “environmental information” or this appeal)* (p. 321, 323, 325). The Appellant has not identified how he says this allegedly ineffective implementation leads to the result that the EIR does not

achieve the result intended by the Directive. The Tribunal therefore rejects this argument;

- (v) *That the UK regional legislative and administrative bodies do not exercise their functions in compliance with the principle of the separation of powers* (p. 322). The Appellant has not explained the relevance of this provision to the issue before the Tribunal. The Tribunal therefore rejects this argument;
- (vi) *That certain UK judicial bodies including the Upper Tribunal, Court of Appeal and Supreme Court are not courts or tribunals for the purposes of Article 267 TFEU* (p.349). The Tribunal is not able to determine this issue.
- (vii) *That the Respondent failed to have due regard to certain documents concerning the protection of architectural heritage* (p. 328); *to information relating to the market for the supply of and the demand for high quality facsimile neoclassical timber or marble chimneypieces* (p. 337); *to the Annual Report of the Georgian Group* (p.338, 344); *to the manner in which EH has discharged its functions* (p. 340, 342); *to the complaint by Appellant's company (which manufactures facsimile chimneypieces) to the Directorate General for Competition of the European Union and Article 102 TFEU* (p.344). The Appellant has not explained how the Respondent's alleged failure to have regard to these matters is pertinent to the question of whether there was an error of law in the Decision Notice. The Tribunal takes the view that these documents would not, in any event, be relevant to the issue before the Tribunal. The Tribunal therefore rejects this argument.
- (viii) *That the Information Commissioner has not provided adequate information to the public on their rights in the field of EU law* (p. 346, 353, 355) and (p. 357) and that he has not required the Tribunal to adopt rules of procedure which comply with Article 267 TFEU. There is no such obligation on the Respondent and neither are these matters pertinent to the issue before the Tribunal;
- (ix) *That there has been a breach of the Aarhus Convention in this case* (p. 348). This is not a matter which is within the jurisdiction of the Tribunal nor one which is pertinent to the issue before the Tribunal.

23. For the reasons above, the Tribunal dismisses this appeal and upholds the Decision Notice.

Signed:

Dated: 8 September 2011

Alison McKenna
Tribunal Judge



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2011/0064

BETWEEN:-

DAVID BLACK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

**Decision on Application for Set Aside and Application for
Permission to Appeal**

DECISION

The application for the Decision of 8 September to be set aside is refused. The application has also been considered as an application for review and for permission to appeal, which applications are also refused.

REASONS

1. The Appellant made an information request to the Chief Executive of English Heritage on 12 July 2008. His request concerned, inter alia, the conditions imposed by English Heritage in relation to the internal refurbishment of a listed property. The Information Commissioner concluded in his Decision Notice that all the information to which the Appellant was entitled under the Freedom of Information Act ("FOIA") and the Environmental Information Regulations ("the EIR") had already been provided to the Appellant. The Respondent found there to have been certain procedural breaches of FOIA and the EIR by English Heritage, but required no steps to be taken.

2. The Appellant appealed to the Tribunal and Tribunal refused his appeal against the Respondent's Decision Notice by its Decision dated 8 September 2011. The Appellant has now applied for the Tribunal's Decision to be set aside pursuant to rule 41 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("The Rules"). His Grounds are set out over 50 paragraphs and are dated 6 October. He has also raised some procedural and other matters in correspondence, which I address below.
3. By virtue of rule 45 of the Rules, the Tribunal may treat an application for a Decision to be set aside as an application for a review or for permission to appeal to the Upper Tribunal. I have accordingly considered the Appellant's submissions as applications for each of these remedies.

Procedural Queries

4. By e mail dated 14 October, the Appellant asked the Tribunal for clarification of certain procedural matters, which I now provide:
 - (i) *Whether the application for the Decision to be set aside had been sent to the Information Commissioner.* I can confirm that it has not, this not being a requirement of The Rules.
 - (ii) *What are the procedural rules by which his application will be determined.* I can confirm that The Rules (referred to above and as cited by the Appellant in his application) govern this application.
 - (iii) *Whether his application would be determined by a full panel and not by the Judge sitting alone as he understood that this should be a full panel decision.* I can confirm that this application must be determined by a Judge sitting alone pursuant to paragraph 14 of the Practice Statement on the Composition of Tribunals in the General Regulatory Chamber, which is available on the Tribunals website.
 - (iv) *Whether the decision of 8 September would be published on the Tribunal's website pending determination of his application.* I can confirm that the Decision of 8 September has already been published on the Tribunal's Decisions page.

5. The Appellant also sent the Tribunal two letters with the Grounds. In the first, the Appellant raised issues about the right to public legal funding for his application and cited European authorities in relation to this. The Tribunal is unable to advise him on this issue nor (if his letter is to be treated as an application for such funding) does it have any power to determine such an application. The second letter provides corrections for certain paragraphs of the Grounds which I have duly taken into account in considering the Grounds.

The Grounds

6. The sole issue determined by the Tribunal in its Decision of 8 September was whether the Respondent had erred in law in concluding that information relating to internal fixtures, such as fireplaces or chimney pieces, did not fall within the definition of “environmental information” in Regulation 2(1) of the EIR and therefore fell to be dealt with under FOIA. The Tribunal concluded that there had been no error of law by the Respondent and accordingly dismissed the appeal in a fully reasoned decision.
7. The Appellant has provided the Tribunal with Grounds in support of his application for the Decision of 8 September to be set aside. The Appellant’s Grounds consist of a preamble setting out the background to his case (paragraphs 1 – 10), a statement of the order sought (paragraph 11) and a list at paragraphs 12 – 29 of his reasons for asking for the Tribunal’s Decision to be set aside. These include complaints that the Tribunal failed to deal with issues of public policy; that it made findings which were inconsistent with the evidence before it; that the Tribunal’s statement of reasons does not satisfy the requisite standard; that it exceeded its jurisdiction; that there were unspecified procedural irregularities to his detriment; that the Tribunal failed to determine the relevant question in the light of the evidence and argument presented to it; the Tribunal did not correctly reproduce the arguments of the Appellant; and that the Tribunal did not establish whether the Respondent’s evidence was accurate, reliable or consistent before relying on it.
8. The Appellant also argues that “*the Tribunal could not, without falling into error of law, dismiss the appeal as unfounded*”. He has reproduced many of his first instance arguments in support of this claim at paragraphs 30 to 50.

The Rules

9. The Appellant's application falls under part 4 of The Rules, which provides as follows:

“Interpretation(a)

39. In this Part—

“appeal” means the exercise of a right of appeal on a point of law under section 11 of the 2007 Act [or by any other enactment]; and

“review” means the review of a decision by the Tribunal under section 9 of the 2007 Act.

Clerical mistakes and accidental slips or omissions

40. 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.

Setting aside a decision which disposes of proceedings

41.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—

- (a) the Tribunal considers that it is in the interests of justice to do so; and
- (b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—

- (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
- (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
- (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
- (d) there has been some other procedural irregularity in the proceedings.

(a) Rule 39 was amended by S.I. 2010/43.

22

- (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

Application for permission to appeal

42.—(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.

(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received no later than 28 days after the latest of the dates that the Tribunal sends to the person making the application—

- (a) written reasons for the decision;
- (b) notification of amended reasons for, or correction of, the decision following a review; or
- (c) notification that an application for the decision to be set aside has been unsuccessful.

(3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 41 (setting aside a decision which disposes of proceedings) or any extension of that time granted by the Tribunal.

(4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 5(3)(a) (power to extend time)—

- (d) the application must include a request for an extension of time and the reason why the application was not provided in time; and
- (e) unless the Tribunal extends time for the application under rule 5(3)(a) (power to extend

- time) the Tribunal must not admit the application.
- (5) An application under paragraph (1) must—
- (f) identify the decision of the Tribunal to which it relates;
- (g) identify the alleged error or errors of law in the decision; and
- (h) state the result the party making the application is seeking.

Tribunal's consideration of application for permission to appeal

- 43.**—(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44 (review of a decision).
- (2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.
- (3) The Tribunal must send a record of its decision to the parties as soon as practicable.
- (4) If the Tribunal refuses permission to appeal it must send with the record of its decision—
- (a) a statement of its reasons for such refusal; and
- (b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.
- (5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

Review of a decision

- 44.**—(1) The Tribunal may only undertake a review of a decision—
- (a) pursuant to rule 43(1) (review on an application for permission to appeal); and
- (b) if it is satisfied that there was an error of law in the decision.
- 23
- (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
- (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

Power to treat an application as a different type of application

- 45.** The Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things.”

Application to Set Aside the Tribunal's Decision

10. I have considered whether the Appellant's Grounds provide a basis for setting aside the Tribunal's Decision of 8 September in accordance with rule 41 of The Rules. I have discretion to set aside the Decision if it is in the interests of justice to do so and one or more of the conditions in paragraph (2) are satisfied. The Appellant has not specified how it is said that any of the conditions in paragraph (2) are met. I have considered whether any of the Grounds point to a relevant consideration under paragraph (2) and have concluded that they do not. In the circumstances I refuse this application.

Application for Review and for Permission to Appeal

11. In reliance upon rule 45 of The Rules, I have considered whether the Appellant should be granted a Review of the Tribunal's Decision and/or given permission to appeal to the Upper Tribunal.
12. On receiving an application for permission to appeal, the Tribunal must first consider whether to undertake a review of its decision pursuant to rule 44 of the Rules. The Tribunal may review its original decision if it is satisfied there was an error of law in it. I have accordingly considered whether the Grounds of Appeal as summarised above identify what may be described as "errors of law" in the First-tier Tribunal's decision.
13. Whilst it is clear that the Appellant strongly disagrees with the Tribunal's decision, and his objections are to some extent characterised as alleged errors of law, I note that the Grounds advanced are overwhelmingly concerned with the correctness of the judgement of the Tribunal on the evidence before it and with what is essentially an argument that "no reasonable Tribunal" could have formed its conclusions.
14. The Upper Tribunal (Tax and Chancery Chamber) recently considered the nature of an appeal from the First-tier to the Upper Tribunal pursuant to s. 11(1) of the Tribunals Courts and Enforcement Act 2007 in Smith v HMRC¹. In his decision, Mr Justice Arnold reviewed a number of authorities following on from the well-known case of Edwards v Bairstow,² in which appellate courts have been asked to overturn first-instance decisions on the basis that the lower court's findings of fact could not reasonably be supported. In so doing, Arnold J quoted from Lord Justice Evans' speech in Georgiou v Customs and Excise Commissioners³ as follows:

"It follows, in my judgement, that for a question of law to arise in the circumstances, the appellant must first identify the finding challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly,

¹ http://www.tribunals.gov.uk/financeandtax/Documents/decisions/Smith_v_HMRC.pdf

² [1956] AC 14

show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunals' conclusion was against the weight of the evidence and was therefore wrong".

15. In applying this approach, I have concluded that the Grounds do not identify "errors of law" in the decision of 8 September, as required by the Rules. The Grounds submitted do not address the arguments identified by Lord Justice Evans as necessary to the advancement of an appeal based on a submission that the Tribunal's conclusions cannot be supported. In the circumstances, I conclude that there is no power for the Tribunal to review its decision in this case and I have also, for the same reasons, concluded that permission to appeal should be refused.

16. The Appellant now has the right to renew his application for permission to appeal to the Upper Tribunal (Administrative Appeals Chamber) directly, within a month of the date on which this decision is sent to him. Any such application should be sent to The Upper Tribunal (Administrative Appeals Chamber), 5th Floor Rolls Building, 7 Rolls Buildings, Fetter Lane, London, EC4A 1NL. Further information is available at <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/aa/index.htm>.

Alison McKenna
Tribunal Judge

Dated: 24 October 2011

³ [1996] STC 463



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No. GIA/3411/2011

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant: Mr David Black
Tribunal: First-tier Tribunal (Information Rights)
First-tier Tribunal Case No: EA/2011/0064
First-tier Tribunal Decision Date: 5 September 2011

**NOTICE OF DETERMINATION OF
APPLICATION FOR PERMISSION TO APPEAL**

I refuse permission to appeal.

REASONS

In my judgment the meaning of the definition of “environmental information” in Regulation 2(1) of the Environmental Information Regulations 2004 at which the First-tier Tribunal arrived in paragraph 13 of the Statement of Reasons was plainly correct. That definition replicates the definition in Directive 2003/4/EC. The Applicant has not identified any case law of the European Court of Justice which would lead to a different conclusion. Paragraphs 37 to 43 of Case C-266/09 *Stichting Natuur en Milieu and Others* (16 December 2010) do not assist him. I do not consider that the Directive 85/337 is of any relevance.

(I would add that even if the Applicant had been correct in his contention that the entirety of the information sought in his information request constituted environmental information, so that the entirety of his request fell to be considered under the 2004 Regulations, as opposed to part of it falling to be dealt with under the Freedom of Information Act 2000, I cannot at present see that the practical effect of the Information Commissioner’s decision would or ought to have been any different than it in fact was. That decision was that all the information held by English Heritage and falling within the request had been provided, and that there was no obligation to provide additional or updated information under Regulation 5(4) of the 2004 Regulations. As far as I can see that decision would have been the same even if all the information requested (as opposed to only part of it) had fallen within the definition of “environmental information.” Even if the Applicant’s contentions as to the meaning and scope of “environmental information” had been correct, his appeal to the First-tier Tribunal would therefore appear to have served no practical purpose, save possibly that of clarifying the meaning of reg. 2(1) of the 2004 Regulations).

(Signed)

**Charles Turnbull
Judge of the Upper Tribunal**

(Dated)

12 March 2012