IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA2011/0218

BETWEEN:

COLIN ANDERSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

STRIKE OUT RULING

RULING in relation to the Information Commissioner's Decision Notice No: FS50304794

Introduction

1. The Appellant made a complaint to the Public Health Service Ombudsman (PHSO) in relation to the care provided to his late Mother by Dartford and Gravesham NHS Trust. The PHSO investigated the matter and provided the Appellant with a report setting out their conclusions in August 2009.

2. On 14 September 2009 the Appellant wrote to the PHSO asking for:
   "the medical records for my mother".
   The PHSO refused the request on 13 October 2009 relying upon s44 FOIA because such disclosure would be prohibited by s15 of the Health Service Commissioners Act 1993 (HSCA). They explained that:
   - By law, the Ombudsman's investigations must be conducted in private.
   - Information obtained by the Ombudsman for the purposes of an investigation can only be disclosed pursuant to s15 of the HSCA 1993.

- This allows for disclosure in the report setting out the conclusions of an investigation.

3. They confirmed that:

> *"...all the information from your mother's medical records on which we have relied is contained in the draft report that was sent you ... in August 2009. Any other information contained in your mother's medical records, i.e. that on which we have not relied, is caught by section 15 of the Health Service Commissioners Act 1993 and cannot be disclosed to you."*

The Commissioner's Decision

4. The PHSO refusal was upheld on internal review and the Appellant complained to the Commissioner. In his Decision Notice dated 7th September 2011 the Commissioner held that the disputed information was exempt under s44(1)(a) FOIA and there was no breach of s1 FOIA. In particular:
    a. The information had been obtained by the PHSO for the purposes of an investigation into the Appellant's complaint and fell within the terms of s15(1) of the HSCA.
    b. None of the exceptions to the prohibition on disclosure contained in s15(1) HSCA applied.[1]

5. The Commissioner also observed that even if s44 FOIA did not apply, it was likely that the information requested would also be exempt under section 41 FOIA (Confidential Information) but he made no finding on the matter since s44 was an end to the matter.

The Appeal to the Tribunal

6. The Appellant appealed on 29th September 2011. His grounds of appeal were not clearly itemized, however, I note that the Appellant is a litigant in person and not therefore accustomed to the process of drafting grounds of appeal. Whilst it is not the role of the Tribunal to assist one party to present its case, I do give effect to

[1] The Decision Notice relates to those parts of the medical records which have not already been disclosed by way of the PHSO's investigatory report (pursuant to s15(1)(a) HSCA).

the overriding objective as set out in rule 2(2)(a), (b) and (c) *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (GRC Rules) and am satisfied that it would not be appropriate to strike out the grounds of appeal purely as a result of the way in which they are presented. It is clear that the Appellant wishes the Decision Notice to be overturned, and I have adopted a purposive approach in determining the reasons for this highlighted in the grounds of appeal and his r8(4) submissions.

7. His grounds of appeal can be summarized as:

I. He s<u>hould</u> be entitled to the disputed information because:
   - He instigated the complaint,
   - Had he sued in a law Court he would be entitled to the information by way of discovery,
   - Failure to provide the evidence upon which a decision is based is a breach of natural justice,
   - He is suspicious of the correctness of much of the evidence and has no way of checking if it is right or challenging it.
   - Britain has a history of open justice and withholding this information breaches this.

II. The Commissioner did not consider whether the information could be disclosed under s41 FOIA, and this is wrong in law as the Appellant should be given every opportunity to receive the information.

III. The Commissioner was wrong not to view the disputed information to see whether the Appellant had a valid reason for wanting it.

IV. The information could have been disclosed in redacted form.

8. The Information Commissioner in his response dated 28th October 2011 applied for the appeal to be struck out because, in his view, it has no reasonable prospect of success. The Commissioner argued that the grounds of appeal did not address the Commissioner's decision that the requested information is exempt under s44

FOIA, in particular the Appellant provided no arguments that undermine or address the Commissioner's findings that:

(i) the information requested falls within the statutory prohibition contained in section 15(1) HSCA or

(ii) that none of the exceptions to that prohibition contained in section 15(1) HSCA are applicable.

9. Under rule 8(3) of the GRC Rules:

   "the Tribunal may strike out the whole or part of the proceedings if

   …(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

10. Pursuant to rule 8(4):

    "the Tribunal may not strike out the whole or part of the proceedings under paragraph ...3(c) without first giving the appellant an opportunity to make representations in relation to the proposed strike out."

11. On 8th November 2011, the Tribunal invited the Appellant to make further representations in relation to the application that the case should be struck out and in particular the matters identified in paragraph 8 above.

12. The Appellant's rule 8(4) submissions dated 18th November 2011 argued:

    i) The strike out application was in breach of Article 6 of the ECHR since a strike out hearing was:
       - Not fair,
       - Not a public hearing,
       - Pursuant to Article 6(3)(d) it breached the Appellant's right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf... (by which the Tribunal understands that the Appellant means that he has a right to ensure that the Tribunal hears evidence before deciding the appeal).

    ii) The Tribunal also understands the Appellant to be arguing that the failure to disclose the information breaches Article 6 in that he is not being provided

with the information upon which the investigation (and hence the Decision not to impose sanctions against the NHS Trust) is based.[2]

iii) He also relies upon the public interest element in rule 41 as explored in the Tribunal case of *Bluck v Information Commissioner* EA/2006/0090 and lists reasons why he would argue that the public interest lies in favour of disclosure.[3]

Article 6 ECHR.

13. Article 6 provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

(3) Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

14. The Freedom of information act provides a mechanism for the provision of information to the world at large. The Tribunal does not consider that this is a civil right, in that of itself it is not a private law right of an individual; s 56 FOIA provides:

(1) This Act does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by or under this Act.

Even if I am wrong on this point and the disclosure of information constitutes a civil right, I am satisfied that the strike out provisions as set out in rule 8 GRC rules would not breach Article 6 in any event.

15. Strike out hearings are habitually decided upon the papers (which does not constitute a public hearing, although the decision is generally public). There is no

[2] This relates to ground 1 of the Appellant's grounds of appeal.
[3] This is an expansion upon ground 2 of the Appellant's grounds of appeal.

requirement to hold an oral strike out hearing under the GRC Rules. Rule 32 provides:

> *(3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).*

16. In Kennedy v. Uk (application no. 26839/05) 18 08 2010 the Court observed at paragraph 188:

    "As regards limitations on oral and public hearings, the Court recalls, first, that the obligation to hold a hearing is not absolute. There may be proceedings in which an oral hearing is not required and where the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials. The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court."

17. In this case I am satisfied that an oral hearing is not required. As set out below, I am satisfied that the Appellant has not raised any valid grounds of appeal. The Appellant has not raised any arguments to counter the Commissioner's finding that the material is covered by an absolute prohibition. There is no evidence that he has identified that is on point and no arguments that he seeks to raise that would alter that conclusion. Consequently an oral hearing would serve no purpose beyond the fact that it would be public. I am satisfied that the benefit of a public hearing is greatly reduced by the fact that the ruling and hence the arguments advanced and reasoning adopted to reach the conclusion (that there are no valid grounds of appeal) will itself be public. I am further satisfied that an oral hearing would be contrary to the overriding objective as set out in rule 2 GRC rules which provides that:

    ....*(2)Dealing with a case fairly and justly includes—*

    (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

    ...

    (e) avoiding delay, so far as compatible with proper consideration of the issues.

18. The Tribunal acknowledges that there is also the duty under rule 2(2) GRC rules

    (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

There is no suggestion that the Appellant is disadvantaged in producing his submissions in writing or unable to participate through this method.

19. In relation to the Appellant's reliance upon Article 6 (3)(d), this is misconceived, as it specifically relates to criminal proceedings. There is no suggestion that it is applicable here. Additionally insofar as this is an assertion that the case should not be determined in the absence of evidence, I note that this is a case that turns on the applicability of the law and not upon factual dispute.

The Grounds of Appeal

Ground 1

20. The Appellant cites reasons why he should be entitled to the disputed information including in his rule 8(4) submissions an argument that s15 HSCA and the consequent failure to disclose the disputed information itself breaches Article 6 ECHR. None of the factors raised in his grounds of appeal would bring him within one of the s15 HSCA exemptions, consequently the prohibition on disclosure is engaged and s44 FOIA applies. S44 FOIA is an absolute exemption with no public interest test consequently there is no basis upon which the Tribunal can take the Appellant's public interest arguments into account. The Tribunal's jurisdiction is limited to applying the law as it exists. I am satisfied that this ground must therefore fail.

Ground 2

21. This ground is misconceived. The Commissioner did not consider whether the information could be disclosed under s41 FOIA, because he had already decided that there was an absolute prohibition on disclosure under s44 FOIA. The fact that if there were no such prohibition another exemption under FOIA may or may not apply, is irrelevant. On the facts of this case, even if the

Commissioner had found in the Appellant’s favour in relation to s41 FOIA, this would be academic and he would still not get the information because of the Commissioner’s finding that the information <u>cannot</u> be disclosed pursuant to s44 FOIA. I am therefore satisfied that this ground also fails.

Ground 3

22. The nature of s15 HSCA is that it is engaged dependant upon the circumstances in which information is obtained by PHSO and the use to which they put it. Whilst the Appellant may dispute the accuracy or veracity of the disputed information; the circumstances in which it was provided to the PHSO and the reasons for this are not in dispute. The Appellant’s reasons for wanting the information are not material to the question before the Commissioner namely whether s15 HSCA is engaged. I am satisfied therefore that viewing the material was not necessary and could not have altered what was a decision based on the law rather than factual dispute.

Ground 4

23. The prohibition in s15 HSCA relates to

(1) “ *Information obtained by a Commissioner or his officers in the course of or for the purposes of an investigation ...”*

The prohibition therefore relates to all the information obtained, and there is no way that redaction could prevent the disputed information being caught within the terms of s15 HSCA. Therefore this ground too must fail.

Conclusion

24. For these reasons I find that the Appellant has no reasonable prospect of succeeding before this Tribunal and I strike out the appeal.

Dated this 9th day of December 2011

Fiona Henderson

Judge