DECISION BY THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The DECISION of the Upper Tribunal is to allow the appeal – although this does not actually assist the appellant in the eventual outcome.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 20 December 2011, following the paper hearings on 28 September 2011 and 29 November 2011 under file reference EA/2011/0129, involves an error on a point of law. The appeal is therefore allowed. The First-tier Tribunal's decision is set aside.

However, the Tribunal's decision is re-made in essentially the same terms:

> *"The Tribunal confirms the conclusion in the Decision Notice (FS50358047) that the request of 18 May 2010 was vexatious within section 14(1) of FOIA and manifestly unreasonable within regulation 12(4)(b) of the EIR. Mrs Craven's appeal to the First-tier Tribunal is therefore dismissed."*

This decision is given under sections 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

REASONS

The wider context of this appeal

1. Section 14(1) of the Freedom of Information Act 2000 (FOIA) allows a public authority to decline to make a substantive response (other than by simply issuing a refusal notice under section 17) to an information request which is found to be "vexatious".

2. Regulation 12(4)(b) of the Environmental Information Regulations 2004 (SI 2004/3391) provides the public authority with a broadly equivalent "escape clause" where the request is "manifestly unreasonable".

3. This case is one of three appeals before the Upper Tribunal concerning the proper test to be applied in determining whether or not a request made under information rights legislation is "vexatious" or "manifestly unreasonable".

4. The present case concerns Mrs Craven's appeal to the First-tier Tribunal (FTT) against the Information Commissioner's Decision Notice (FS50358047) in respect of her request for information made to the Department of Energy and Climate Change. The other two appeals were *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) (also known as GIA/3037/2011) and (*Ainslie v Information Commissioner and Dorset County Council* [2012] UKUT 441 (AAC) (GIA/294/2012). For convenience, and with no disrespect intended to the individuals concerned, I simply refer to the three appeals by the name of the individual requester, irrespective of their status in the proceedings either before the FTT or the Upper Tribunal (hence *Craven, Dransfield* and *Ainslie*).

Some preliminary observations

5. Each case, of course, has its own particular factual context (and indeed the present appeal raises an entirely separate issue concerning majority decisions in the FTT). However, the common legal issues around the meaning of section 14(1) and

regulation 12(4)(b) made it desirable to hear the appeals together, or at least within a short timeframe. Listing problems meant that my original intention to hear all three appeals together foundered. However, I was able to hold oral hearings of *Dransfield* and *Ainslie* on 14 November 2012, followed by this appeal on 29 November 2012 at Field House in London.

6. The Information Commissioner (IC), the First Respondent in this appeal, was represented by Mr Tom Cross of Counsel, as in both *Dransfield* and *Ainslie*. The Department of Energy and Climate Change (DECC), the Second Respondent, was represented by Mr James Cornwell of Counsel. Mrs Craven appeared in person. I am grateful to all three for their submissions. I have tried to make allowance for the fact that Mrs Craven, whatever her skills in other areas, is not a lawyer. I just make two further preliminary observations.

7. First, of this troika of appeals, I have treated *Dransfield*, the first of the three appeals to be lodged with the Upper Tribunal, as the lead case. I have therefore considered the scope of section 14(1) of FOIA in some detail in that decision. My decisions in *Craven* and *Ainslie*, insofar as they concern the meaning of a "vexatious request" under FOIA, therefore need to be read in the light of that decision and in particular the passage in *Dransfield* at paragraphs 24-39. The question of how far (if at all) the test for a "manifestly unreasonable" request under regulation 12(4)(b) of the EIR differs from the section 14 test, something of a side issue in both *Dransfield* and *Ainslie*, came to the fore in the present appeal, and so that issue is considered in more depth below.

8. The second point is this: I had the advantage of hearing in person from the requesters in each of the three appeals, albeit that each was in the rather uncomfortable and difficult position of being a lay person, trying to focus their arguments on legal submissions rather than factual matters, and in Mrs Craven's case under the double disadvantage of facing two experienced counsel on the other side. Mrs Craven had opted for a paper hearing before the FTT. I return to the implications of this at paragraphs 95 and 96 below.

An outline of the particular context of this appeal

9. For present purposes this can be summarised (in very broad terms) as follows. Mrs Craven lives on a farm in Yorkshire. In 1998 official consent was given for a new North Yorkshire Moors overhead power line. Her land was subject to a compulsory wayleave and Mrs Craven was involved in a dispute with the National Grid, resulting in a court action which she lost in 2002. In 2005 and 2006 she made extensive FOIA requests to DECC (or rather that Department's predecessor) for information relating to high voltage overhead electricity cables and in particular with regard to the relevant legal framework. Both requests were treated by the Department as vexatious under section 14.

10. On 18 May 2010 Mrs Craven made a further (and again very detailed) FOIA request relating broadly to the same subject matter, although with some changes. DECC refused to comply, again stating that the request was vexatious within section 14(1), a decision confirmed on internal review. Mrs Craven then complained to the Information Commissioner (IC).

The Information Commissioner's Decision Notice (FS50358047)

11. The IC's Decision Notice (FS50358047) was issued on 24 May 2011. The Summary read as follows:

> "The complainant made a number of requests to the Department for Environment and Climate Change (the "DECC") on 18 May 2010 relating to the primary and secondary legislation and other prescribed rules, regulations, and procedures governing the acquisition of land rights and the acquisition of other permissions, in connection with high voltage overhead powerlines. The DECC refused to comply with the requests under section 14(1) of the Freedom of Information Act 2000 as it deemed the requests vexatious. The Commissioner considers that section 14(1) was applied correctly to some of the requests: however he has found that some of the requests were for environmental information. During the course of the Commissioner's investigation the DECC applied regulation 12(4)(b) of the Environmental Information Regulations 2004 to the parts of the request for environmental information as it deemed those requests to be manifestly unreasonable. The Commissioner considers that regulation 12(4)(b) was applied correctly to the environmental information. The complainant subsequently made another request for information relating to the same subject matter on 16 June 2010. The DECC did not respond to this request. The Commissioner considers that the request of 16 June 2010 was for environmental information and requires the DECC to respond to this request under the appropriate legislation."

12. Mrs Craven then lodged an appeal with the First-tier Tribunal.

The First-tier Tribunal's decision (EA/2011/0097)

13. The FTT first considered the appeal at a paper hearing on 28 September 2011. It declined to accede to the IC's application to strike out the appeal (which was made on the basis that it had no reasonable prospects of success). It also adjourned the matter, given there had been a difficulty over the service of relevant paperwork. The same panel then considered the appeal on the papers on 29 November 2011. They identified the question that they had to resolve as whether the 18 May 2010 requests were "vexatious within s.14 FOIA and regulation 12(4)(b) EIR" (reasons, paragraph [25]).

14. The tribunal's decision, by a majority, was to dismiss the appeal and to uphold the IC's Decision Notice (EA/2011/0129). According to its reasons, the majority (the Tribunal Judge and one member) "decided the matter was finely balanced and fell narrowly in favour of the IC and DECC" while the other member decided the matter in Mrs Craven's favour (paragraph [27]). In particular, the majority found that the public interest test under the EIR fell narrowly in favour of the Respondents (paragraph [48]).

The issues for decision by the Upper Tribunal

15. Mrs Craven made very extensive submissions in writing which she developed further at the oral hearing. Her "statement of case" for the Upper Tribunal, in effect a rather overweight skeleton (argument), ran to 66 pages; I hope she will not mind if I say that at times it became more of a stream of consciousness, but I hope that I have distilled her main arguments in the course of reaching this decision. I make some further observations below about the difficulties faced by requesters who act in person in FOIA (or EIR) appeals. Mr Cross and Mr Cornwell, with the benefit of their professional experience, provided detailed but focussed written submissions which they then developed in oral argument. Given the nature of this appeal, I do not think it helpful to set out all those various submissions here. Rather, I focus on what I judge to be the central issues for decision and, in the course of so doing, deal with the parties' principal contentions on each issue in turn.

16. The key question I have to answer is whether or not the FTT's decision "involved the making of an error on a point of law" (Tribunals, Courts and Enforcement Act (TCEA) 2007, section 12(1)). If not, I must dismiss the appeal. If it does, then I must allow the appeal but a range of different options are available as regards disposal.

17. In order to answer that central question, I need to address a number of discrete questions. In my view it makes sense to do so in the following order:

(1) In general terms, is there a material distinction between the test under section 14(1) of FOIA and under regulation 12(4)(b) of the EIR?

(2) In general terms, what is the obligation as regards the giving of reasons where the FTT's decision is by a majority?

(3) In this particular case, did the FTT comply with the obligation to give adequate reasons?

(4) What then is the appropriate mode of disposal of this appeal?

(1) Is there a material distinction between section 14(1) and regulation 12(4)(b)?
The parties' submissions
18. Mrs Craven argued that the terms "vexatious" in section 14(1) and "manifestly unreasonable" in regulation 12(4)(b) were fundamentally different, although neither was an exemption from the duty to disclose. She contended that the word "vexatious" in FOIA, being unqualified, represented an absolute threshold, with the test being as set out in *Bhamjee v Forsdick and Others* [2003] EWCA Civ 779 and *Bhamjee v Forsdick and Others (No. 2)* [2003] EWCA Civ 1113 – namely a request that was a nuisance, devoid of merit, quite hopeless and, in effect, an abuse of process. She suggested that the five-fold test for identifying an allegedly vexatious request, as set out in the IC's Guidance (see *Dransfield* at paragraphs 12-14), was misleading. She further argued that the expression "manifestly unreasonable" in the EIR was confined to the nature of the request and was not concerned with the requester's conduct; applying ordinary dictionary definitions, it meant a request that was e.g. unquestionably excessive or unrealistic.

19. Mr Cross, for the IC, submitted, in essence, that there was no discernible or material difference between the two tests. As a matter of ordinary language, the considerations that were relevant to deciding whether a FOIA request was vexatious were of equal potential relevance to the test of whether a request under the EIR was manifestly unreasonable. There was nothing in the relevant EC Directive 2003/4 (on public access to environmental information) to suggest the contrary. There were, he conceded, three conceptual differences in the application of the two tests. First, section 14 excuses the public authority from responding, but is not formally a FOIA exemption, whereas regulation 12(4)(d) is structurally an exception under the EIR. Second, the EIR provision is expressly subject to a public interest test. Third, under the EIR there is a presumption in favour of disclosure (see regulation 12(2)). However, these structural differences did not mean that the outcome in any given case should be any different – indeed, the IC could not envisage circumstances in which a request might pass muster under one regime whilst being, in effect, disqualified under the other. The IC therefore agreed with the view that had been expressed in various ways in FTT decisions to the effect that the tests were, in practice, indistinguishable – see e.g. both *Carpenter v Information Commissioner and Stevenage Borough Council* (EA/2008/0046) (at paragraphs [46], [51] and [52]) and

Harding v Information Commissioner and London Borough of Camden EA/2011/0110 (at paragraphs [11] and [12]).

20. Mr Cornwell for DECC, agreed with Mr Cross that there was no discernible material distinction between the two tests. Although they were couched in different language, the same or similar factors would remain relevant under either regime. The word "vexatious" was an ordinary English word, and the discussion in *Bhamjee* was not directly relevant for two reasons. First, the test under section 14 is whether the request is vexatious, whereas the issue in *Bhamjee* was whether the individual was vexatious. Secondly, *Bhamjee* was concerned with the fundamental right of access to the court, an integral part of the rule of law and a right protected by Article 6 of the European Convention on Human Rights. FOIA, however, enshrined a different and lesser sort of right – a restricted right that had only been in existence since 1 January 2005, which was hedged round with various qualifications, and did not engage Article 10 of the Convention (*Sugar v BBC* [2012] UKSC 4 at [94], *per* Lord Brown). In those circumstances section 14 had to be seen as imposing a lower threshold for vexatious requests than *Bhamjee* did for vexatious litigants.

21. Mrs Craven and both counsel also referred me to the Aarhus Convention of 1998 (the Convention on Access to Information, Public Participation in decision-making and Access to justice in Environmental Matters) and to Directive 2003/4/EC. Plainly the EIR must be read in the context of these important international instruments. That said, the relative generality of their drafting does not take us much further forward. As Mr Cross noted, the Aarhus Convention provides that a request for environmental information may be refused if it is either "manifestly unreasonable or formulated in too general a manner" (Article 4(3)(b)). The EC Directive, which Mr Cross fairly described as "not especially enlightening", now sub-divides these into two separate headings (Article 4(1)(b) and (c) respectively; previously Article 3(3) of Directive 90/313/EC); it also confirms that such grounds for refusal are to be interpreted restrictively (see Preamble at (16) and Article 4(1)). Mr Cornwell also helpfully referred me to the decision of the European Court of Justice in *Commission v France* C-233/00 [2003] ECR I-6625, in which the Court characterised these grounds of refusal as signifying "misuse of rights" (at I-6679, paragraph 74). This indicated, in Mr Cornwell's submission, the need to consider whether the request was disproportionate in the sense of e.g. imposing an unreasonable burden on the public authority.

The Upper Tribunal's analysis

22. I accept Mr Cross and Mr Cornwell's principal submission that in practice there is no material difference between the two tests under section 14(1) and regulation 12(4)(b). Plainly the two decision-making processes are conceptually different in the three ways described by Mr Cross. However, like the IC, I find it very hard to see how an identical request might "pass" under FOIA but "fail" under EIR, or vice versa. In particular, given that the same sorts of considerations should apply, I do not believe that the existence of the explicit public interest test in the EIR and the statutory presumption of a restrictive interpretation of regulation 12(4)(b) should mean that, even at the margins, it is in some way "easier" to get a request accepted under the EIR than under FOIA. Indeed, the concept of "misuse of rights" identified by the ECJ in *Commission v France*, or what in English law we might characterise as an "abuse of process", seems to me to be entirely consistent with my conclusions in *Dransfield* on the construction of section 14.

23. There is one further reason which I regard as conclusive of the matter, even if the point is as much pragmatic as principled. Mr Cross pointed out that the question as to whether particular requested information falls under FOIA or the EIR may not

always be straightforward, given the complex and wide-ranging definition of "environmental information" (see Directive 2003/4/EC Article 2(1) and EIR, regulation 2(1)). In a case such as the present, where the public authority has invoked section 14(1) or regulation 12(4)(b), the IC and the FTT would not usually have access to the actual information in question (whether nominally requested under FOIA or the EIR), and so would not be able to establish definitively whether the information fell within one statutory regime or the other. This would pose a real practical difficulty for the Commissioner, if decision makers had to apply two fundamentally different tests to different parts of the same (unseen) information. Furthermore, as Mr Cornwell argued, the whole purpose of both section 14(1) and regulation 12(4)(b) was to protect public authorities from exposure to a disproportionate burden in handling information requests. That goal would be defeated if, as part of the very process of applying the relevant criteria, the public authority had to identify which was environmental information and which was non-environmental information. I agree that this would be both an empty duty and a counter-productive enterprise. It follows, in my view, that public authorities, the Commissioner and tribunals are perfectly entitled, where appropriate, to address such requests on an "either/or" basis. (It necessarily also follows that I do not regard DECC's failure to comply with the FTT's earlier direction to specify which information was environmental and which non-environmental as unjustified).

24. There is, however, one further matter touched on in the course of oral argument which needs to be addressed in this context. This relates to the burden on the public authority in terms of the cost of compliance. This points to a further difference between the two information rights regimes. Under FOIA, a public authority need not comply with a request for information where the cost of complying would exceed a specified limit (section 12(1) FOIA; the prescribed limit is £600 for central government departments). There is no equivalent provision in the EIR (although there is a limited power to charge a fee for making the requested information available: see regulation 8). The question is whether or not this distinction entails any difference when it comes to the treatment of requests which are extremely onerous on public authorities in terms of their costs implications.

25. Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable. I note that the IC's advice to public authorities is that regulation 12(4)(b) typically applies to two categories of case, namely those where (i) "dealing with a request would create unreasonable costs or an unreasonable diversion of resources" and (ii) "an equivalent request would be found 'vexatious' if it was subject to the Freedom of Information Act" (IC, *When can we refuse a request for environmental information*?). I agree with that analysis.

26. The question then is whether the position is any different under FOIA. Does the very existence of section 12 mean that a public authority cannot rely on excessive cost alone as a basis for applying section 14? I describe this as the exclusive approach to the construction of section 12. Mr Cross argued that a request could not be treated as vexatious under section 14 on the basis of cost alone where the costs of compliance would not exceed the appropriate limit under section 12. Thus the IC's position was that it was impermissible for a public authority to use section 14 as a means of sidestepping the cost threshold, or the detailed requirements as to the cost calculation, provided in and under section 12. However,

Mr Cross further submitted that, just as under the EIR, excessive cost alone could justify treating a request as vexatious under section 14 in the absence of any other aggravating factor, irrespective of the existence of section 12. The IC accordingly accepted, as an accurate statement of the law, the observation by the FTT in *Independent Police Complaints Commission v Information Commissioner* (EA/2011/0222) (at paragraph [15]):

> "A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12."

27. It is relatively easy to see how an extremely burdensome request which forms part of a wider course of dealing between a requester and the same public authority might be found to be vexatious on cost grounds. However, does the same apply to an individual or "one-off" FOIA request in the absence of any such history? It might be argued that permitting a public authority to rely on section 14(1) in such a situation runs precisely the risk that the IC was concerned to guard against, namely an over-zealous use of section 14 as a means of circumventing the constraints of section 12. Indeed, one might ask, if the public authority was sufficiently confident that the costs limit had been exceeded under section 12, why then would it seek to rely on section 14(1) instead? On this basis it might be argued that section 12 provides a discrete and comprehensive code, with its own built-in safeguards, for dealing with high-cost information requests under FOIA, and so – absent some other feature – section 14(1) cannot be applied in such circumstances.

28. If this were right, then a public authority faced with an extremely burdensome one-off request would have to determine whether the request falls under FOIA or EIR in order to decide whether to apply section 12 or regulation 12(4)(b) on cost grounds. This would raise the very real practical problem identified by Mr Cross and Mr Cornwell (see paragraph 23 above). It might be said in response that the difficulty is more illusory than real. In practice it will be a very rare case where a public authority decides, in relation to a one-off request, that the request does not exceed the section 12 costs limit yet at one and the same time is manifestly unreasonable within regulation 12(4)(b) (or the other way round). Nonetheless, this exclusive construction of section 12 hardly seems consistent with the underlying purpose of both section 14 and regulation 12(4)(b).

29. There are two other reasons why I conclude that a one-off FOIA request can be adjudged to be vexatious purely on the grounds of cost, irrespective of the possibility of section 12 applying. First, sections 12 and 14 of FOIA are both discretionary provisions. There is no obligation on a public authority to apply them. Parliament has vested public authorities with a broad margin of judgement on such matters, and it would be inappropriate to fetter the exercise of that discretion in any way. Second, of course, Parliament has studiously avoided defining what is meant by a "vexatious request". Adopting an exclusive construction of section 12 would necessarily involve cutting down the very wide words used by the legislators. Moreover, if section 12 were intended to be an exclusive code, section 14(1) could easily have been prefaced with the phrase "Where section 12 does not apply...".

30. It follows that, in deciding whether a request is "manifestly unreasonable" under the EIR, a tribunal should have regard to the same types of considerations as apply to the determination of whether a request is "vexatious" within FOIA. The conceptual structure for decision-making is different, but the outcome will surely be the same, whichever route is adopted. Insofar as a request is for environmental

information, it therefore follows that the meaning of the expression "manifestly unreasonable" is essentially the same as "vexatious" (on which see *Dransfield* at paragraphs 24-39).

31. Notwithstanding the above, if the public authority's principal reason (and especially where it is the sole reason) for wishing to reject the request concerns the projected costs of compliance, then as a matter of good practice serious consideration should be given to applying section 12 rather than section 14 in the FOIA context. Unnecessary resort to section 14 can be guaranteed to raise the temperature in FOIA disputes. In principle, however, there is no reason why excessive compliance costs alone should not be a reason for invoking section 14, just as may be done under regulation 12(4)(b), and in either case whether it is a "one-off" request or one made as part of a course of dealings.

32. I should just add that there is nothing in the FTT's decision in *Craven* to suggest that the tribunal approached this particular issue in the wrong way. What is clear about its decision is that the tribunal regarded the terms as synonymous, albeit that the decision-making structure for the EIR was different in that the public interest test had to be specifically addressed. The tribunal identified the central question for it to answer as being "Were the Appellant's requests for information on 18 May 2010 vexatious within s.14 FOIA and regulation 12(4)(b) EIR?" (reasons, paragraph 25). A legal pedant might say that the tribunal should rather have asked itself "Were the Appellant's requests for information on 18 May 2010 vexatious within s.14 FOIA and *manifestly unreasonable within* regulation 12(4)(b) EIR?", but the elision of terms is just that, and does not disclose any material error of law.

33. On this first question, therefore, I am with Mr Cross and Mr Cornwell and against Mrs Craven. On the second question, however, I am with Mrs Craven and against both counsel, for the reasons that follow.

(2) How should the FTT give its reasons in a majority decision?

Introduction

34. This was, rather unusually but perfectly properly, a majority decision (see paragraph 14 above). The FTT stated that, despite this, "there was considerable agreement between all members of the Tribunal and – for clarity – the areas of agreement and disagreement are set out below" (at paragraph [28]). The FTT did not set out a majority decision with reasons followed by the minority's separate reasons. Instead, the FTT's reasons proceeded to examine Mrs Craven's grounds of appeal one by one; in respect of some grounds, the tribunal's reasons were given with no indication as to whether they were unanimous or by a majority while in relation to others a majority or a minority view (or indeed both) were expressed. I return to the question of the adequacy of the reasons below. For present purposes, the focus is on the narrower issue of the nature of the requirement on the FTT to explain the basis of a majority/minority decision (other than the general requirement to give adequate reasons for its decision).

The parties' submissions

35. Mrs Craven relied on the decision of Judge Mesher in *Secretary of State for Work and Pensions v SS (DLA)* [2010] UKUT 3834 (AAC); [2011] AACR 24. That was an appeal by the Secretary of State against a FTT (Social Entitlement Chamber) [SEC] decision on a disability living allowance (DLA) appeal. The FTT's record of proceedings showed that it had allowed the claimant's appeal by a majority. However, in contrast (and in contradiction) the FTT's decision notice suggested that the decision was unanimous as the pre-printed word "unanimous" was not struck out. The FTT's statement of reasons was silent as to whether the decision had been

unanimous or by a majority. The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) (unlike the previous rules in that jurisdiction) do not require a tribunal to record in a decision notice or statement of reasons that one of the members dissented or their reasons (the same applies to reasons given by FTTs in the information rights jurisdiction). On appeal to the Upper Tribunal, the Secretary of State submitted that a statement of reasons was inadequate if it failed to record that information.

36. Judge Mesher allowed the Secretary of State's appeal and remitted the case to a new FTT. The key passage in his decision for present purposes was paragraph 10:

> "10. However, if the tribunal in question has said on the decision notice that the decision was unanimous or by a majority, that statement should be accurate. If the decision notice accurately records that the decision was by a majority and a statement of reasons is prepared, at least a brief statement of the reasons for the dissent of the minority member should be given there. Even though the obligation under rule 34(2) and (3) of the Procedure Rules is, on request, to give reasons for the decision, and the decision of the majority is the decision of the tribunal, it seems to me in these circumstances implicit in the basic principle of enabling the losing party to understand why he or she has lost that there should be some statement of in what respects the minority member would have decided in his or her favour. That can sometimes point up and clarify where the majority found the losing party's case wanting. Sometimes it can expose a potential flaw in the majority's reasoning. The same approach must apply where the decision was in fact by a majority, but the decision notice stated that it was unanimous, with perhaps an additional obligation to acknowledge the discrepancy in the documents."

37. Mrs Craven also relied on the decision of the Employment Appeal Tribunal (EAT) in *Parkers Bakeries Ltd v R E Palmer* [1977] IRLR 215 in which Phillips J. (as he then was) stated as follows (at 217[11]):

> "… where there is a majority decision it is very desirable that the views of the majority and those of the minority should be set out clearly and distinctly in separate paragraphs. Unless that is done neither the parties nor the Appeal Tribunal can really get a clear idea of precisely what are the views of the majority and the minority respectively."

38. Similarly, Nelson J., giving the decision of the EAT in *Stobbs v B Cookson Ltd* [2002] UKEAT 560, observed that:

> "We are satisfied that good practice requires the separate views of the majority and the minority to be set out in the decision. This is particularly important when different findings of fact may have been made by the majority and minority and, the finding of such facts determines the outcome of the hearing."

39. Mrs Craven's argument, put shortly, was that the principles set out by Judge Mesher and in the EAT case law applied equally in her case too, yet she did not know why the case had been decided as it had; in particular, as she claimed in her notice of appeal to the Upper Tribunal, "I have absolutely no idea what the dissenting panel member's views were".

40. Mr Cross and Mr Cornwell launched what might be described as a two-pronged counter attack to Mrs Craven's challenge on this point. First, they argued, the FTT's decision in this case met both the requirements set by Judge Mesher in *Secretary of State for Work and Pensions v SS (DLA)* (especially at paragraph 10) and more generally the duty to give adequate reasons for a tribunal's decision. I deal with this submission in more detail under (3) below. Second, and in the alternative,

they argued that if that was wrong, then in any event *SS (DLA)* should not be followed and/or was wrongly decided. In particular, they argued that on its particular facts the clear flaw in the FTT decision in that case was the inaccuracy in the decision notice (see the first sentence of paragraph 10 of *SS (DLA)* – the remainder of paragraph 10, they argued, was obiter, i.e. not essential reasoning for the Upper Tribunal's decision). In their submission, an absolute requirement that the FTT's decision should include an explicit statement of the minority member's reasons in their own terms was unjustified for the following four reasons:

(i) there was no authority at a higher level compelling such a conclusion;
(ii) *SS (DLA)* was not binding on me;
(iii) the FTT's decision was the decision of the majority, and that was what had to be adequately explained; and
(iv) it would be absurd if an otherwise impeccably reasoned majority decision was at risk of being overturned simply because the minority member had no sensible reasons that could be included in the tribunal's decision.

41. Mr Cornwell also made submissions on the relevance of the EAT case law – *Parker's Bakeries*, *Stobbs* and (to similar effect) *Fox v Betesh Fox & Co* [2002] UKEAT 363. In all these cases, as in *SS (DLA)*, there had been a problem with the decision of the majority of the tribunal in question. There was no case in which the majority's decision was clear but a lack of clarity about the minority's reasons had resulted in a finding that there had been an error of law. The suggestion that the minority's reasoning should be set out separately was at best a statement of good practice.

The Upper Tribunal's analysis

42. Very simply, I am not prepared to depart from the decision and reasoning of Judge Mesher in *SS (DLA)*. I shall deal first with the four arguments set out at the end of paragraph 40 above. As to (i), the absence of any Court of Appeal (or higher) authority on the point adds nothing either way. As to (ii), of course *SS (DLA)* is not strictly binding on me; I can decline to follow it if I take the view that it was wrongly decided, but in the interests of comity I would normally take the same approach (see *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) at paragraph 37(iii)). In my respectful view *SS (DLA)* was correctly decided, a view given no little support by the fact that the decision has been reported in the official Administrative Appeals Chamber Reports (AACR), thereby showing that it commands the broad assent of the majority of judges in the Chamber. Point (iii) is best addressed under heading (3) below, as it is of more general application. Point (iv) is, with respect, a straw man argument – where the decision is stated to be other than unanimous, it is the responsibility of the tribunal judge (or other presiding member) to capture any dissenting reasoning whether good, bad or indifferent. An appellate tribunal or court is then in a position to decide for itself whether the decision as a whole discloses any material error of law.

43. That said, I do accept that the way in which the dissenting member's views are recorded is to a great extent a matter of style. One way is for the majority's reasoning of the majority to be set out first in the statement of reasons, and then, separately, the reasoning of the minority, before any concluding matters are dealt with – the approach helpfully taken by the FTT in *Stevenson v Information Commissioner and North Lancashire Primary Care Trust* (EA/2011/0119). Another way is for the majority's reasoning to comprise the totality of the main body of the tribunal's statement of reasons itself, with the minority's reasons included as an

annex, rather in the style of judgments delivered by the European Court of Human Rights. A third way – and the way adopted in this case – is for the majority and minority reasoning to be interwoven as each issue arising on the appeal is addressed. There may be other ways – for example, a grid or flow diagram might be used to illustrate the divergent findings and reasoning.

44. The obvious advantages of both the first and second methods is that the dissenting member can be given the primary responsibility for setting out their reasoning, which the judge or other presiding member can then "cut and paste" into the tribunal's overall statement of reasons with minimal difficulty. The potential difficulty with the third approach is that there may be a lack of clarity in the tribunal's reasons as a whole. This takes me to the third question to be addressed in *Craven*. On this, again, I am with Mrs Craven rather than with counsel.

(3) Did the FTT comply with the obligation to give adequate reasons?

Introduction

45. The test of adequacy of reasons is well-known. It may be summarised simply thus – did the tribunal do enough to explain why one party had won and (more importantly) why the other had lost? Mrs Craven plainly thought not and was particularly unclear as to what the dissenting panel member had decided. However, the test of adequacy of reasons must be judged objectively. Mr Cross and Mr Cornwell both supported the FTT's reasons as being adequate; according to Mr Cross, it was "tolerably clear" why Mrs Craven had lost. I regret to say I have to disagree with that submission – I have read the FTT's decision several times and, despite having had the benefit of being taken through it in oral argument by Mr Cross (and Mr Cornwell), I am still struggling to see *why* Mrs Craven lost. Because of the drafting style adopted, the FTT's reasoning must be seen against the background of the IC's Decision Notice, so I start there.

The Information Commissioner's Decision Notice

46. The official summary of the Decision Notice is at paragraph 11 above. The key findings are as follows. The IC first considered the application of section 14(1) to the non-environmental information, applying the five-fold criteria from his Guidance. He accepted that the requests were "extremely voluminous" and compliance would "create a significant burden in terms of expense and distraction" (paragraph 25). He concluded that although their effect was disruptive, there was no evidence they were designed to have this effect or cause annoyance (paragraph 27). Taking into account all the circumstances, he decided that they could "fairly be characterised as obsessive and manifestly unreasonable" (paragraph 35). He also concluded that their value was limited and the serious purpose behind them was outweighed by the other factors (paragraph 38). There was no suggestion whatsoever that harassment of DECC staff was an issue. It followed that the basis of the IC's section 14(1) finding was – in shorthand terms – (i) significant burden; (ii) obsessive or manifestly unreasonable; and (iii) limited value.

47. The IC then turned to consider the potential application of regulation 12(4)(b) to the environmental information. Whilst accepting the strong public interest in openness, transparency and accountability, he concluded that the "very significant burden" imposed on the public authority by the requests made them disproportionate, so the public interest in maintaining the exception outweighed the public interest in disclosure (paragraph 47).

Mrs Craven's grounds of appeal to the FTT

48. Mrs Craven, faced with a tight deadline to submit her appeal, listed 12 grounds of appeal to the FTT, most of which were expressed at a fairly high level of

generality (e.g. ground 6 was simply "unreasonable delay" and ground 7 was "unfairness"). This prompted the IC's (unsuccessful) application to strike out the appeal on the basis that it stood no reasonable prospects of success. The FTT's adjournment directions indicated that the appeal would "address the issues of vexatiousness within s.14(1) FOIA 2000 and manifest unreasonableness within regulation 12(4)(b) EIR 2004". Mrs Craven submitted a 2-page clarification of her grounds of appeal, as directed, focussing on what she claimed was the misapplication of the test of vexatiousness / manifest unreasonableness.

49. The FTT concluded that grounds 1-8 and 10-12 were all outside the tribunal's jurisdiction (paragraph [26]). This left ground 9, which Mrs Craven had divided into four elements, namely that the IC had (a) considered irrelevant matters; (b) considered matters which were defamatory or otherwise prejudicial to her; (c) misapplied the test for vexatiousness; and (d) misapplied the public interest test.

The First-tier Tribunal's decision on ground 9(a)

50. The FTT unanimously concluded that this first sub-ground of appeal failed – the IC, it said, was entitled to have regard to the previous contact between Mrs Craven and DECC. That proposition must be right as a matter of law (see *Dransfield* at paragraph 29).

51. However, what is less clear is what the FTT actually decided about the previous history and its significance in terms of its findings of primary fact. In its discussions of the parties' submissions, the FTT referred to Mrs Craven's first request to the DTI (now succeeded by DECC) on 13 April 2005, which was refused under section 14(1), the Department indicating, by way of a rather questionable pre-emptive strike, that any future requests would also be treated as vexatious (paragraph [17]). A second request was submitted on 5 November 2006 and also duly refused under section 14(1). Mrs Craven complained to the IC and "the matter was subject to informal resolution during March 2008" (paragraph [18]). In March 2010 she was advised that the matter could not be appealed, due to the passage of time, and that "the request would have to be re-submitted in order to pursue a complaint to [the IC's] office in the event that the request was again refused". This resulted in the third FOIA request on 18 May 2010, the subject matter of the appeal.

52. There was no dispute as to the fact that there were indeed three distinct but overlapping FOIA requests. What is less clear is the actual fate of the second request in November 2006.

53. Mrs Craven's argument, in essence, is that her November 2006 request had effectively disappeared and, moreover, that she had not withdrawn her complaint (FS501555469) to the IC; rather, she said, the IC had "abandoned" her and had not advised her that the case had been closed. A DECC official's witness statement, along with a DECC letter to the IC, stated that Mrs Craven's appeal had been "rejected" by the IC in 2007. According to the IC's Decision Notice, the IC had not taken a formal decision but had "confirmed informally" the Department's decision in 2007 (paragraphs 4 and 31). The IC's further submission to the FTT, following Mrs Craven's clarification of her grounds of appeal, was that the IC had written to her on 12 March 2008 indicating that it was likely that the IC would agree with the public authority and "as there was no response to this letter, the file was closed". Mrs Craven denied ever having received that letter and argues that neither she nor the Department were informed that the case had been closed.

54. The FTT's reasoning on ground 9(a) included this enigmatic comment "it is quite clear that the Appellant was prohibited from making an appeal to us (i.e. the

FTT) in respect of her second request, dated 5 November 2006. Little has been said in relation to this by the other parties" (paragraph [30]). The FTT then immediately stated that ground 9(a) failed.

55. It seems to me that paragraphs 29 and 30 of the FTT's reasons dealing with ground 9(a) can only be read in one way. The FTT's unanimous conclusion was that the IC was right to consider the previous course of dealings between the parties in the context of deciding whether a request fell foul of section 14(1) or regulation 12(4)(b). However, that historical context had to include the unsatisfactory resolution of the second request. The only way to read paragraph 30 is that the FTT accepted Mrs Craven's argument that her complaint to the IC following the refusal of her November 2006 request had not been dealt with properly under section 50 of FOIA. Teasing out the tribunal's thinking as best I can, presumably the FTT thought that even if the IC was relieved from the obligation of making a decision, because it "appeared" to him that the complaint had been withdrawn or abandoned (section 50(2)(d)), he had not notified Mrs Craven appropriately within section 50(3)(a).

56. The FTT's finding seems to me a weighty one. It is important in two respects. First, it points to a denial of justice so far as Mrs Craven was concerned – she was in effect prohibited from making an appeal at the relevant time. Second, it lends some force to Mrs Craven's argument that one of the reasons she made her third request in 2010 was because her 2006 request had not been addressed by DECC or the IC. I simply note at this stage that the FTT then made no further reference to this point in the later parts of its decision. The point was simply left hanging.

The First-tier Tribunal's decision on ground 9(b)

57. As to the second sub-ground of appeal, the FTT concluded that Mrs Craven's argument that the other parties had raised matters which were an affront to her character in the sense of being defamatory or otherwise prejudicial to her was "without substance". The FTT noted that it was an unfortunate but inevitable consequence of the language of section 14(1) and regulation 12(4)(b) that this perception arose. The FTT did not say whether its conclusion on this ground was unanimous or by a majority but it is reasonable to conclude that it was the former. I see no basis at all for interfering with its conclusion on this matter.

The First-tier Tribunal's decision on ground 9(c)

58. The third sub-ground was the alleged misapplication of the test of vexatiousness. The FTT began by noting that the IC had found the request to be "burdensome, obsessive and lacking in serious purpose" (paragraph [32]). As Mrs Craven argues, this is not wholly accurate – in fact the IC had concluded the request was burdensome, obsessive and having a limited valid purpose that was outweighed by the other factors. The FTT's rather compressed shorthand in paragraph [32] is not itself an error of law – the FTT's decision has to be read as a whole, and paragraphs [44] and [45] confirm that the tribunal was well aware of the IC's actual finding on the value to be attached to the request. The FTT then went on to consider in turn each of the three factors derived from the IC's Guidance and identified by the Decision Notice as being relevant, namely that the request was said to be *burdensome* (paragraphs [33]-[39]), *obsessive* (paragraphs [40]-[43]) and *lacking in serious purpose* (paragraphs [44] and [45]).

<u>Burdensome</u>

59. The FTT devoted most attention to this point in the course of its reasons. Its reasoning showed that it considered the scope of Mrs Craven's request in some detail and subjected the correspondence and witness statement from DECC officials to critical scrutiny. Its primary findings of fact can be summarised thus: (i) the DECC

letter did not provide "significant substantiation of the burden in terms of estimated expense of the amount of time it would take to respond" (paragraph [33]); (ii) Mrs Craven's request for copies of various legislation should have been refused under FOIA section 21(1) or regulation 6(1)(b) of the EIR (paragraph [34]); (iii) despite being advised to the contrary, some elements of her request were requests for legal advice or legal clarification; (iv) applying the 'filters' from (ii) and (iii) above reduced the number of separate elements in the request from 51 to 22 (paragraph [36]); (v) the IC had failed to undertake the same exercise in his Decision Notice (paragraph [37]); (vi) the estimate of a total cost of compliance of at least £1,700, contained in the DECC official's witness statement, was noted (but not explicitly accepted) but some of the requests were accepted to be "exceptionally wide" (paragraph [38]).

60. The findings of fact summarised as (iii) and (vi) above were expressly stated to be majority views. I accept that the other findings were, by necessary implication, unanimous.

61. The FTT then reached the "unanimous decision... that this 'burdensome' element of the test has been incorrectly applied as it believes that responding to the narrower requests would not have taken as long as is claimed" (paragraph [39]).

62. In reaching the overall conclusion set out in the previous paragraph, the FTT can only have been exercising its discretion to "review any finding of fact on which the notice in question was based" (FOIA, section 58(2)), i.e. the facts as to the nature and extent of the burden involved. It was therefore again incumbent on the FTT to make its own assessment of the burden involved. What would have been the correct application of this test, taken in the round? Put another way, did the net overall burden of the remaining elements of the request, once the appropriate filters had been applied, result in a request which was still disproportionate or plainly very burdensome and so pointing to the conclusion that it was vexatious or manifestly unreasonable? On balance, I would surmise that the FTT's majority view was that the burden was disproportionate, given conclusion (vi) (see paragraph 59 above), but the FTT's decision does not actually say as much in those terms. This is symptomatic of a lack of clarity in its reasoning taken as a whole.

Obsessive

63. The FTT here dealt with the IC's application of the fourth of his five s.14 criteria, derived, from the Guidance, namely whether the request can fairly be seen as obsessive or manifestly unreasonable. First of all, the FTT summarised the IC's Decision Notice (paragraphs [40] and [41]). The FTT then stated its own conclusions on the point as follows (emphasis in the original):

> "42. The majority of the Tribunal finds that her previous requests should not be taken into account as a *singular* factor (both due to the IC advice to resubmit, and due to the time that has passed and the differences in the actual information sought).
>
> 43. Despite that, the 18 May 2010 requests *can* be characterised as 'manifestly unreasonable' on the basis of their volume, scope and complexity *and* when taken against an assessment based on her past approach."

64. The conclusion in paragraph [42] was stated to be the majority view. I am also satisfied that, in the context of the decision as a whole, the reference to "manifestly unreasonable" in paragraph [43] was a reference back to the IC's Guidance on section 14(1), and not a direct finding on the overall issue as to whether the request was "manifestly unreasonable" within regulation 12(4)(b). Beyond that I must confess

to struggling with this passage. I think paragraph [42] means that the majority felt that Mrs Craven's previous FOIA requests did not by themselves support a finding that the latest request was vexatious (or manifestly unreasonable), but that her general past conduct was relevant, taken together with factors such as volume and complexity. I also think that the conclusion in paragraph [43] that the latest request was "manifestly unreasonable" was a unanimous view, although the point is not beyond doubt given the previous paragraph.

Lacking in serious purpose

65. The FTT dealt with this point in two short paragraphs, which I think we must assume were unanimous. First, in paragraph [44], it fairly summarised the gist of the IC's conclusion in the Decision Notice (see paragraphs 36-38). Second, and as a rider in paragraph [45], the FTT noted that the IC had overlooked the fact that Mrs Craven was faced in the near future with the prospect of the wayleaves over her land being renewed. The compulsory wayleaves are due to expire (very shortly now) on 25 April 2013. The FTT concluded that the IC had not allocated "any value in relation to [her] desire to bring clarity to this complex area for the benefit of others".

66. This last consideration would obviously be relevant to weighing the public interest factors. However, the FTT's reasoning necessarily meant that Mrs Craven had a very real personal interest in the matter. In my view this lessens the force of any argument that Mrs Craven is simply seeking to reargue through FOIA issues which have been decided against her in the past through other avenues, e.g. the 2002 court proceedings.

67. The FTT did not explain (a) what value it would have allocated to the subject matter of its rider in paragraph [44] and more particularly (b) what significance, if any, this extra consideration had. In acting as it did, the Tribunal can only have been exercising its section 58(2) discretion. It was therefore again incumbent on the FTT to make its own assessment of the seriousness of the request and the value to be attached to it. Reading between the lines – never a very satisfactory exercise – my assessment is that the FTT was probably deciding that (i) the IC had erred by disregarding the extra factors highlighted but (ii) the IC was right to conclude that, despite the serious purpose, the value of the requests was limited and overridden by the other considerations – albeit that their value was not as limited as the IC had found. If this was the only weakness in the decision, I doubt the FTT's lack of clarity on this point would amount to a material error of law. However, taken together with the other problems identified, it is indicative of a failure to provide adequate reasons.

The First-tier Tribunal's decision on ground 9(d)

68. The fourth and final sub-ground of appeal concerned the claimed misapplication of the public interest test. The IC had decided that the burden involved 'tipped the balance' in favour of non-disclosure. The FTT's majority view was that the estimated cost of compliance of £1,700 or more "would have been a significant resource allocation that would not have been justified on public interest grounds" (paragraph [47]). The balancing exercise fell "narrowly" in favour of the respondents, according to the majority (paragraph [49]).

69. The dissenting member's reasons are not set out in the FTT's decision. The minority member doubtless would have signed up to the various 'pro-disclosure' factors identified by the FTT in paragraph [48]. However, beyond that it is unclear why he took the view that the case fell on the other side of the line, and would have determined the public interest test in favour of Mrs Craven. I also accept Mrs Craven's point that there is an apparent inconsistency between the FTT's unanimous finding that the "burdensome" factor had been misapplied (at paragraph [39]) and its

subsequent majority conclusion that the £1,700 estimate (for the unfiltered request) was to be accepted as an accurate assessment of its burden in the context of the public interest test.

The Upper Tribunal's conclusions on adequacy of reasoning

70. Despite the sterling efforts of both Mr Cross and Mr Cornwell, I am with Mrs Craven on the adequacy of reasons point. For the reasons set out above, it is not entirely clear precisely what the FTT's conclusions were on several issues which were said to be decided unanimously, leaving aside the lack of clarity as to the majority and minority views on some issues. The reader simply has to work too hard and infer too much.

71. If one focuses on the information covered by FOIA, the FTT plainly concluded (probably unanimously, but I cannot be certain) that the nature of the request, in the light of Mrs Craven's past dealings with DECC, and in terms of volume, scope and complexity, was "manifestly unreasonable" in the context of the IC's Guidance on relevant factors to be considered under FOIA (paragraph [43]). It may be that the FTT took the view that this factor alone was sufficient to trump all other considerations and to demonstrate conclusively that section 14(1) applied. However, nowhere did the FTT actually say that. The FTT made criticisms of the IC's Decision Notice in terms of the assessment of the burden and the value to be attached to the requests, but the significance of these conclusions is unclear.

72. The lack of clarity in the FTT's findings and reasoning was compounded by the tribunal's failure to reach an overall conclusion on ground 9(c). Mr Cross referred to this as the "heart of the decision" by the FTT. However, although the three factors identified in the Decision Notice were each discussed in turn, the threads were not pulled together to reach an overall conclusion on the section 14(1) test. In addition, there is no hint that the FTT had regard to other potentially relevant factors, most notably the issue around the fate of the 2006 request, which was clearly germane to the question of the previous course of dealing between the parties.

73. Some of the disagreements between the majority and minority members may not have been material (see e.g. the FTT's treatment of the burden point). However, the crucial difference seems to have been over the application of the public interest test under the EIR. We know from the FTT's decision that this was a borderline decision – but we do not know why the majority concluded it fell narrowly on the non-disclosure of the line while the minority member took the opposing view. The respective conclusions are asserted rather than reasoned – the majority's reasoning also obscures the FTT's unanimous conclusion that the IC had misapplied the burden test, while the minority view is simply not clear.

74. My conclusion, therefore, is that the FTT's reasoning is not "tolerably clear", as Mr Cross urged on me. I find that it meets neither the general test of adequacy of reasoning nor the more particular requirements where the FTT's decision is stated to be a majority one. As such the FTT's decision involves an error of law.

75. I would just add that in my view this difficulty stems from the approach the FTT has taken to explaining its reasoning. First, the FTT has structured its decision by way of an issue-by-issue evaluation of the IC's Decision Notice, within the context set by Mrs Craven's stated grounds of appeal, rather than by undertaking a completely fresh examination of whether the public authority was correct to treat the request as vexatious (or manifestly unreasonable). Second, the FTT has intermingled its explanation of the majority and minority reasoning and findings within that

structure. The combination of those two approaches has led to the lack of clarity and inadequacy of reasoning identified above.

(4) What is the appropriate mode of disposal of this appeal?

The Upper Tribunal's jurisdiction

76. The right of appeal to the Upper Tribunal is limited to "any point of law arising from a decision made by the First-tier Tribunal" (Tribunals, Courts and Enforcement Act 2007, section 11(1)). If I conclude that the FTT's decision "involved the making of an error on a point of law" (section 12(1)), then as a matter of discretion I may (but need not) set the FTT's decision aside (section 12(2)(a)) but, if I do set it aside, I must either remit the case to the FTT or re-make the decision myself (section 12(2)(b)).

77. In the remainder of this decision I explain why I conclude that (i) the FTT's decision should be set aside; (ii) the case should not be remitted to the FTT; and (iii) the decision as re-made is that the requests in issue were both vexatious within section 14(1) of FOIA and manifestly unreasonable within regulation 12(4(c).

The reason why the FTT's decision should be set aside

78. Having found that the FTT's decision involves an error of law, I have to consider as a matter of discretion whether it should be set aside. Given my findings above, I do not think it would be fair or just to Mrs Craven simply to leave the FTT's decision in place. The FTT's decision is accordingly set aside.

The reason why the case should not be remitted to the FTT

79. Mr Cross submitted that if I was not with him on the substantive issues in the appeal, then I should decide the matter myself rather than remit the case for re-hearing before a new FTT. He gave two reasons for making that suggestion. First, there had been no oral hearing at FTT level with live witnesses, but I had had the advantage of an oral hearing and indeed had heard first-hand from Mrs Craven. Second, it was in everyone's interests that the matter was resolved speedily, not least Mrs Craven's, given the impending expiry of the compulsory wayleave and its probable renewal. I accept those points as well-made. Mr Cornwell took a similar approach, arguing also that the IC's Decision Notice was unimpeachable and should simply be confirmed as appropriate in all the circumstances of the case. Mrs Craven had made it clear she wanted a full review of her case, but without indicating a preference for the level at which that should take place.

80. In my judgement the balance of convenience is overwhelmingly in favour of the underlying appeal being resolved and the FTT's decision being re-made now rather than remitted.

The Upper Tribunal's re-made decision

Introduction

81. In re-making the decision, the Upper Tribunal is in effect standing in the shoes of the First-tier Tribunal. I can make any decision that the FTT could have made. Despite the rather curious wording of section 58(1) of FOIA, the FTT's role is not limited to the approach undertaken by the High Court on an application for judicial review. Rather, the FTT's function is to undertake a full merits review of the IC's decision. The former information tribunal adopted that approach (see e.g. *Guardian Newspapers Ltd v Information Commissioner and the BBC* [2007] UKIT EA/2006/0013 at paragraph [14]). That analysis is also entirely consistent with the thrust of the reforms embodied in the Tribunals, Courts and Enforcement Act 2007.

82. The FTT held a paper hearing. It had extensive documentation before it. I had a copy of the FTT file. I also had the benefit of a further bundle of 120 pages for the purpose of the Upper Tribunal proceedings, half of which comprised Mrs Craven's "statement of case". In my view I have ample material on which to make a decision.

The relevant test to be applied under section 14(1)

83. I adopt the reasoning in *Dransfield* at paragraphs 24-39. In summary, the issue I have to decide is whether the May 2010 request was (as regards information covered by FOIA) vexatious in the sense of demonstrating a "'manifestly unjustified, inappropriate or improper use" of the FOIA procedure.

84. In arriving at that decision I must take into account all the material circumstances of the case.

85. In my assessment the following considerations would point to a conclusion that the request of 18 May 2010 was *not* vexatious:

(i) The request of 18 May 2010 was only the third FOIA request that Mrs Craven had made of the public authority in the space of 5 years;

(ii) Mrs Craven's second request in November 2006 had resulted in a complaint to the IC which had not been properly handled, resulting in her being denied the possibility of a right of appeal at that stage;

(iii) Mrs Craven made her third request following the suggestion from the IC's Office that as the second matter was now closed, she could make a further request to the public authority;

(iv) Each individual element of the third request (once identified against the background of other material and isolated) was clearly set out;

(v) The issues underpinning the request are of particular personal and financial importance to Mrs Craven, given the impending expiry in April 2013 of the compulsory wayleave over her land;

(vi) The issues underpinning the request are also a matter of general public interest;

(vii) The third request was not in any way designed to cause disruption to DECC business or annoyance to DECC staff;

(viii) There has been no suggestion that Mrs Craven has sought to harass the Department's officials in any way; nor is there any evidence whatsoever to suggest that she has used intemperate or offensive language. Furthermore, Mrs Craven has conducted herself entirely properly in her dealings with the Department – she has written polite letters from time to time and has not e.g. bombarded the public authority with frequent letters, telephone calls and/or e-mails expressed in scurrilous terms;

86. However, in my assessment the following considerations would point to a conclusion that the request of 18 May 2010 *was* vexatious:

(i) On any reckoning, the request of 18 May 2010 was very extensive in its scope – the request itself ran to eight pages of printed text with a total of 51 separate questions, some of which were further sub-divided; even with the filtering applied by the FTT a total of 22 individual questions remained;

(ii) There was a considerable degree of overlap between the first two requests in 2005 and 2006 – both of which were refused as vexatious – and the third request;

(iii) Accepting that the DECC estimate of the cost of compliance being (at a minimum) £1,700 related to all 51 issues enumerated in the third request, dealing with the 22 filtered requests alone would still have imposed a considerable and unreasonable burden on DECC;

(iv) Mrs Craven had been given advice about the importance of revising her requests to reduce their scope to a more manageable size; however, despite this advice, the component elements of the request were intermingled with other material, making it difficult to ascertain precisely what information was being requested.

87. It will be seen that (on a purely numerical basis) the factors suggesting the request was not vexatious outnumber those indicating the contrary conclusion by a factor of two to one. However, the assessment of whether a request is caught by section 14(1) is not a simple headcount or a tick box exercise. What is important is the weight to be attached to the various considerations, bearing in mind that the question that has to be answered is whether the request is vexatious.

88. This was obviously a borderline case. The FTT decided the case against Mrs Craven by a majority, evidence itself that reasonable people might well come to divergent conclusions on the same evidence. In my judgment the majority view of the FTT should be recognised. Mrs Craven has good reason to feel let down by the system in various respects, not least as regards the fate of her 2006 request. However, on balance I take the view that the combined impact of the factors identified in paragraph 86 outweighs the aggregate effect those listed in paragraph 85. Even with the filtering process identified as necessary by the FTT, the remaining requests would undoubtedly have placed a very considerable and disproportionate administrative burden on the public authority. I understand Mrs Craven's point that she is by herself on one side, faced by the massed ranks of the officials and lawyers of the IC and the Department. However, the fact is that she does not have an absolute but only a qualified right to access information held by public authorities.

89. This is also a case where there has obviously been a lengthy previous course of dealing between the requester and the public authority. However, for the reasons given above, I do not take the view that this past history weighs heavily in the scales so as to make the May 2010 request vexatious. There have only been three requests (albeit they were all hydra-headed). Mrs Craven appears to have been badly served by the system as regards the second request (although I doubt any appeal would have been successful). The suggestion of making a further request was put to her by the IC's office (although, of course, she was, and could have been, given no guarantee as to the outcome). She is not simply seeking to re-open the 2002 court case in a different arena. She has been polite at all times; in her own words, she "did not want a confrontation".

90. The fundamental problem, in my view, is the sheer scale of the May 2010 requests, even with the "weeding" undertaken by the FTT. The DECC official's witness statement estimated that dealing with the request would involve one member of staff dedicating about 3-4 working days locating, searching and checking relevant documents and a further 3-4 days assembling an analysis of what was held to produce a response to the third request. Having reviewed the May 2010 request myself, that estimate does not strike me as far off the mark. Even if the time was reduced to say 40% of that estimate, reflecting the reduction from 51 elements to 22,

it remains a significant and in my view disproportionate burden. Taking 40 per cent as a rough guide, this would bring the DECC estimate of the cost of compliance of £1,700 down to approximately £680 (and this, I note, is a minimum figure). DECC would, on any view, have been entitled to apply section 12 in these circumstances. As a matter of good practice it might have been better if they had. However, as a matter of law I find that the Department was entitled to rely alternatively on section 14(1).

The relevant test to be applied under regulation 12(4)(b)

91. The core factors to be considered in assessing whether a request is "manifestly unreasonable" under regulation 12(4)(b) in this case are essentially the same as those relevant to section 14(1).

92. The EIR also require me to take into account the public interest test, and to operate a presumption in favour of disclosure. In my judgment that presumption is rebutted and the public interest test falls to be decided narrowly in favour of non-disclosure. The reason for that is the disproportionate burden that full compliance with even the net elements of the 18 May 2010 request would involve for the public authority, as discussed above.

The re-made decision

93. It follows that my decision is to re-make the decision under appeal in the same terms, namely that the Decision Notice is upheld and the appeal dismissed. Like the FTT, I do not think the Decision Notice took into account all material considerations. However, I am satisfied that it came to the correct outcome on an overall assessment of the case, namely that section 14(1) and, where relevant, regulation 12(4)(b) had been properly applied.

Mrs Craven's other points

94. Mrs Craven made a number of other points, but none has persuaded me that the overall outcome is affected. She was plainly upset that DECC had been joined as a party, giving her the impression that the IC and a powerful Government department were "ganging up" on her. However, it will often be appropriate to join a public authority to an information rights appeal. She was also insistent that she had applied under FOIA, not EIR. However, the proper classification of information as non-environmental (and so subject to FOIA) or environmental (and so within EIR) is ultimately a matter of law; the request route used by the individual cannot be determinative. Mrs Craven was also much exercised, and in my view understandably so, by the IC's earlier application to strike out her appeal. She appeared to think that this had put her at a disadvantage and prejudiced her case. I find no evidence of that, as the FTT simply refused the IC's application. However, I have indicated in other decisions recently that careful consideration needs to be undertaken before a party makes an application to strike out proceedings in the information rights jurisdiction (see *Ivanov v Information Commissioner* [2013] UKUT 008 (AAC) (GIA/3030/2012) and *Wise v Information Commissioner* [2013] UKUT [NCN to be allocated] (AAC) (GIA/366/2012)).

Two final observations

95. First, this was a case where the appellant had asked for a paper hearing of her appeal. I simply repeat my observation in *Ainslie* (at paragraph 73) that "the very nature of the issues involved in appeals concerning requests which have been found to be either vexatious or manifestly unreasonable is such that every effort should be made to ensure that the parties can participate in an oral hearing. This allows the relevant issues to be properly explored in a way that is simply not always possible on the papers."

96. Second, the proceedings before the FTT have in many ways been been conducted in a highly adversarial fashion (not least by the application to strike out). This puts the individual citizen such as Mrs Craven at a distinct disadvantage; she is an unrepresented party, a "one-shotter", unfamiliar with the processes involved, facing the "repeat players" of the Information Commissioner and the public authority who know the rules and know how to play the litigation game. Tribunals need to be more alive to the importance of making their processes accessible to ordinary citizens acting without the benefit of professional representation. In the proceedings before both the FTT and the Upper Tribunal, the respondents have made some mileage out of Mrs Craven's understandable difficulty in formulating carefully crafted grounds of appeal that satisfy forensic legal minds. But the real issue in this case was not complex – was the request vexatious or manifestly unreasonable (or not)? The appellate process in such a case needs to focus on that question, rather than indulge in legalistic point-scoring. Tribunals are for users, after all, not just (if at all) for lawyers.

Conclusion

97. I therefore allow Mrs Craven's appeal against the FTT's decision, set aside that decision but, in effect, remake it in the same terms.

Signed on the original
on 28 January 2013

Nicholas Wikeley
Judge of the Upper Tribunal