DETERMINATION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER) ON A PRELIMINARY ISSUE AND ON AN APPLICATION TO STRIKE OUT FOR WANT OF JURISDICTION

The **DETERMINATION** of the Upper Tribunal is to strike out the appeal by the Appellant. This is because neither the First-tier Tribunal nor the Upper Tribunal has jurisdiction to hear this appeal.

This ruling is given under rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

REASONS FOR DECISION

The Upper Tribunal's decision in outline

1. This case concerns an information rights appeal to the First-tier Tribunal which has since been transferred to the Upper Tribunal (under rule 19(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976; "the 2009 Rules")). The Information Commissioner has applied for the appeal to be struck out for want of jurisdiction under rule 8(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; "the 2008 Rules"). I accede to that application for the following reasons. In a sentence, however, I am striking out the appeal as I find the information request was made to the Senior President of Tribunals, who is not a "public authority" for the purposes of the Freedom of Information Act 2000 (FOIA).

The information request and the complaint to the Information Commissioner

2. On 16 November 2016 the Appellant, Dr Reuben Kirkham, sent an e-mail to Mr Simon Carr, the Assistant Private Secretary to the Senior President of Tribunals (Ryder LJ). The e-mail read as follows:

> "Dear Mr Carr
>
> I would like to make an application to the Senior President in respect of three cases of judicial misconduct, two of which were considered by Mr Justice Charles. I also wish to make a Freedom of Information Request, either under the FOIA or the Common Law, to obtain documents pertaining to how the judiciary are trained and managed (as I explain below, a recent decision of the ECtHR allows me to do this).
>
> > [*The e-mail then continued for five paragraphs which have, by agreement between the parties, been redacted from the copy I have seen, as being irrelevant to the issues I have to decide*].
>
> I also ask – pursuant to the decision in *Magyar Helsinki Bizottság v Hungary* (18030/11) – for all training material pertaining to (i) judicial conduct and (ii) reasonable adjustments. If this is to be considered under the FOIA (2000) I note that the court records exemption (s.32 of the FOIA (2000)) can be read to allow training material to be made available and this must be done pursuant to the Human Rights Act (1998). However, the Senior President has the power to

publish these documents regardless and I consider that he should do so outwith the FOIA regime, if it is necessary for him to do so."

3. On 21 November 2016 Mr Carr replied to Dr Kirkham with a one sentence e-mail acknowledging receipt of the e-mailed request, which he promised "to bring to the attention of the Senior President of Tribunals."

4. On 26 January 2017, and having heard no more, Dr Kirkham lodged a complaint with the Information Commissioner's Office (the ICO). In answer to the first question on the complaint form ("What is your concern?"), he put a cross in the box for the option "The public body has not responded to my request". In answer to the third question ("Details of the public body you requested information from"), he answered "Lord Justice Ryder (acting as (i) an administrative officer of HMCTS and (ii) the Senior President of Tribunals)".

5. On 16 February 2017 the ICO acknowledged Dr Kirkham's complaint, giving him reference number FS50664994.

6. Meanwhile a few days later, on 20 February 2017, Mr Carr replied to Dr Kirkham by e-mail in the following terms:

> "Dear Mr Kirkham
>
> I apologise for the delay in responding to your e-mail. The Senior President of Tribunals has considered your request and advises as follows:
>
> - [*redacted*]
> - That the request for the release of training materials should be made to the Judicial College under the Freedom of Information Act."

7. On 12 April 2017 a senior case worker at the ICO sent Dr Kirkham an e-mail in the following terms (omitting the footnotes, which referred to the First-tier Tribunal's decision in *Gardiner v Information Commissioner* (EA/2016/0094)):

> "Case Reference Number FS50664994
>
> Dear Mr Kirkham
>
> **Information request to the Senior President of Tribunals**
>
> I am writing further to my correspondence of 5 April 2017 regarding your complaint about the way in which your request for information dated 16 November 2016 was handled.
>
> Thank you for your prompt response and for providing a copy of the relevant correspondence.
>
> You have confirmed that the request was made to the Senior President, Lord Justice Ryder.
>
> The Commissioner has previously considered whether the judiciary falls within the remit of the FOIA. The Commissioner's conclusion in that case, that the judiciary is not a 'public authority' as defined by section 3(1) of the FOIA, was confirmed by the First-tier Tribunal (Information Rights) (the Tribunal).

> For this reason the Information Commissioner is unable to proceed with your complaint and has closed your case."

8. The senior case officer's e-mail did not refer to any appeal rights that Dr Kirkham might have. Nor does it appear that a copy of the e-mail was sent to either the Senior President or Mr Carr.

The appeal to the First-tier Tribunal

9. Undeterred, on 22 April 2017 Dr Kirkham lodged an appeal with the First-tier Tribunal (General Regulatory Chamber) (Information Rights). In terms of the outcome of the appeal that he was seeking, Dr Kirkham responded as follows: "A declaration that the Senior President of Tribunals, acting as an Officer of HMCTS, breached s.10 of FOIA. An order for disclosure of the documentation requested in my Information Request". In the accompanying Notice of Appeal, he stated that he had "made it clear in his form [i.e. on his complaint form to the ICO] that the case was against 'Lord Justice Ryder (acting as (i) an administrative officer of HMCTS and (ii) the Senior President of Tribunals)'. This is a position that he has consistently maintained throughout this case".

10. On 24 April 2017, a member of the GRC's administrative team sent a copy of the appeal by e-mail to Mr Sowerbutts, a solicitor in the ICO. The covering e-mail stated "we have an appellant who is insisting that this is a decision notice, we do not recognise this as an official decision notice, but you may know better, please can you advise if this is a valid appeal." This e-mail was not (at that time) copied to Dr Kirkham (although it was on the following day). Mr Sowerbutts's response by e-mail to the GRC team was that "This appears to be a case where the Commissioner has not issued a decision notice under section 50 FOIA because, in her view, she does not have jurisdiction to do so."

11. On 26 April 2017 the GRC Registrar issued detailed directions requiring the Information Commissioner to clarify whether or not it was accepted that the senior case officer's e-mail dated 12 April 2017 was a decision notice for the purposes of FOIA. This was followed by an exchange of detailed e-mails between Dr Kirkham and Mr Sowerbutts on the issue of jurisdiction.

12. On 3 May 2017 the GRC Registrar issued further directions giving Dr Kirkham an opportunity to make any further representations as to why his appeal should not be struck out for want of jurisdiction (on the basis that no decision notice had been issued). She invited any final representations by 5 May 2017. Dr Kirkham by return immediately applied for the Registrar's directions to be reconsidered by a Judge. However, on 4 May 2017 the appeal was transferred to the Upper Tribunal under rule 19(3) of the 2009 Rules by the GRC Chamber President, Judge (now Mr Justice) Lane, with the agreement of Mr Justice Charles, the Chamber President of the Upper Tribunal (Administrative Appeals Chamber).

The proceedings in the Upper Tribunal on the transferred appeal

13. On 10 May 2017 I issued Initial Observations and Case Management Directions on the transferred appeal. These were followed by further Directions on 8 June 2017 and 4 July 2017. In the latter Directions I noted that if the Upper Tribunal did not have jurisdiction to hear the appeal, then I "must" strike out the proceedings (see rule 8(2)(a) of the 2008 Rules), but only if the appellant was first given the opportunity to make representations as to why the appeal should not be struck out (rule 8(4) of the 2008 Rules). In the same Directions I proposed to treat three questions as a preliminary issue under rule 5(3)(e) of the 2008 Rules, namely:

(1) to whom was the request for information made on 16 November 2016?
(2) was that person/body a "public authority" for the purposes of FOIA?
(3) was the Respondent's letter of 12 April 2017 (ref FS50664994) a "decision notice"?

14. On 17 August 2017 the Commissioner filed her response to the transferred appeal. Her conclusion was set out as follows:

> "32. Properly, objectively, considered in its context, the Request was made to the Senior President of Tribunals. The Senior President of Tribunals is not a person or office listed in Schedule 1 to FOIA. He is not a '*public authority*' for the purposes of FOIA and the Tribunals have no jurisdiction to hear any appeal concerning a Request made to him. The appeal must be struck out.
>
> 33. Moreover, should it be necessary to adopt a further reason, the Tribunal also has no jurisdiction to hear the appeal because the Commissioner had no jurisdiction to issue a '*decision notice*' in respect of the Senior President (and did not purport to do so). Where a request is made under FOIA to a person not designated in Schedule 1, the Commissioner has no jurisdiction to act. The Tribunal's jurisdiction is parasitic on the Commissioner's. For this reason too, the appeal must be struck out."

15. On 20 August 2017 Dr Kirkham filed his reply to the Information Commissioner's response. He summarised his answers to the three questions identified as the preliminary issue as follows:

> "a. The request was made to HMCTS or a *de facto* hybrid of HMCTS and the Judiciary who as part of that process would have been guided and directed by Lord Justice Ryder and/or another appropriate member of the Judiciary. Accordingly the Upper Tribunal has jurisdiction to proceed for that reason alone.
>
> b. For the purposes of this case, Lord Justice Ryder and/or the Judiciary can be made a public authority, or alternatively my Article 10 complaint (if not otiose) can be addressed within the Tribunal system. *Kennedy* is no obstacle in the circumstances of *this* particular case. The true route towards solving this problem seems to be to channel the UN CRPD through the overriding objective, which is now the recognised approach concerning matters of that Convention.
>
> c. Per *Fish Legal*, the document in question (the e-mail from [the senior case officer] on behalf of the Commissioner) is a decision notice under the Freedom of Information Act (2000)."

16. In the course of his reply, Dr Kirkham made a number of further applications, including an application for the appeal to be heard by a two or three judge panel (with the further observation that, given the particular circumstances of the appeal, only the Lord Chief Justice should have a role in the appointment of the judge(s)). On 11 September 2017 Mr Justice Charles refused that application for the case to be heard by a two or three judge panel on the basis that it did not meet the terms of the Senior President's relevant Practice Statement on panel composition.

17. On 12 and 22 September 2017 I issued Directions for the oral hearing of the preliminary issue along with the Information Commissioner's strike out application.

18. On 16 October 2017 Dr Kirkham made a total of seven further applications in connection with the proceedings. In a ruling of 26 October 2017 I granted four of

those applications, and refused the other three, for reasons which I gave at the time and which do not need repeating here.

19. On 6 December 2017 I held an oral hearing on the preliminary issue and the Information Commissioner's strike out application. Dr Kirkham attended representing himself. Mr Christopher Knight of Counsel, instructed by Mr Robin Bailey, Solicitor to the ICO, appeared for the Information Commissioner. I am grateful to them both for their written and oral submissions. I will not seek to summarise their respective arguments in any detail here, but deal with specific points as and when they materially arise. The gist of each of their cases is apparent from the summaries at paragraphs 14 and 15 above.

The FOIA legislative scheme

20. Section 1(1) of FOIA provides as follows (emphasis added):

> "*General right of access to information held by public authorities*
> 1.(1) Any person **making a request for information to a public authority** is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him."

21. Section 3 of FOIA gives the following definition of "public authority":

> *Public authorities*
> 3.(1) In this Act "public authority" means—
> (a) subject to section 4(4), any body which, any other person who, or the holder of any office which—
> (i) is listed in Schedule 1, or
> (ii) is designated by order under section 5, or
> (b) a publicly-owned company as defined by section 6.
> (2) For the purposes of this Act, information is held by a public authority if—
> (a) it is held by the authority, otherwise than on behalf of another person, or
> (b) it is held by another person on behalf of the authority."

22. There has been no suggestion from Dr Kirkham that the Senior President of Tribunals is listed in Schedule 1 to FOIA or otherwise formally designated as a public authority. Equally it is accepted by Mr Knight that the Ministry of Justice is a government department and thus a public authority by virtue of paragraph 1 of Part I of Schedule 1 to the Act. Mr Knight also accepts that while HMCTS is not itself listed in Schedule 1, it is in effect the operating arm of the Ministry of Justice and thus (in practical terms) a public authority. I also note that the now disbanded Judicial Studies Board is specifically listed in Part VI of Schedule 1 to FOIA, whereas there is no reference to the Judicial College (which has effectively taken its place, and the support staff for which form part of the Judicial Office: see *Judicial Office Business Plan 2017-18* p.12). Nor, incidentally, does the Judicial Office itself appear in Part VI of Schedule 1.[1]

[1] The Judicial Office was established following the Constitutional Reform Act 2005. It "reports to the Lord Chief Justice and Senior President of Tribunals – its purpose is to support the judiciary in upholding the rule of law and in delivering justice impartially, speedily and efficiently": see https://www.judiciary.gov.uk/about-the-judiciary/training-support/jo-index/.

23. Section 7 ('Public authorities to which Act has limited application') deals with so-called 'hybrid' public authorities. According to sub-section (1):

> "(1) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority."

24. Section 8 ('Request for information') then provides as follows:

> "(1) In this Act any reference to a "request for information" is a reference to such a request which—
>
> (a) is in writing,
>
> (b) states the name of the applicant and an address for correspondence, and
>
> (c) describes the information requested.
>
> (2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request—
>
> (a) is transmitted by electronic means,
>
> (b) is received in legible form, and
>
> (c) is capable of being used for subsequent reference."

25. Section 10 ('Time for compliance with request'), in so far as is material, states:

> "(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

26. Section 50, in Part IV of FOIA ('Enforcement'), deals with applications for decision by the Commissioner (emphasis added):

> "(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, **a request for information made by the complainant to a public authority** has been dealt with in accordance with the requirements of Part I.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
>
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
>
> (4) Where the Commissioner decides that a public authority—
>
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
>
> (b) has failed to comply with any of the requirements of sections 11 and 17,
>
> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

> (5) A decision notice must contain particulars of the right of appeal conferred by section 57.
> (6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
> (7) This section has effect subject to section 53."

27. Section 57 ('Appeal against notices served under Part IV') deals with appeal rights:

> "(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
> (2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.
> (3) In relation to a decision notice or enforcement notice which relates—
>
> (a) to information to which section 66 applies, and
> (b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority,
>
> subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority."

28. I now turn to address the three questions that arise on the preliminary issue of jurisdiction.

Q1: to whom was the request for information made on 16 November 2016?

The legal framework

29. What are the principles to be applied in interpreting a person's request for information under FOIA? According to Richards LJ, giving the leading judgment in *Independent Parliamentary Standards Authority v Information Commissioner and Leapman* [2015] EWCA Civ 388; [2015] 1 WLR 2879 (referred to below as simply '*Leapman*') at paragraph 57:

> "I have no difficulty with the proposition that the interpretation of a written request depends on the objective meaning of the words used, read in their context and in the light of relevant background facts. But I do not think that one should approach the matter as if one were construing a contract or determining whether a document is defamatory. Although requests must be in writing, they may be relatively informal in character."

30. Richards LJ continued in *Leapman* (at paragraph 58) by adding that "I am inclined to treat the interpretation of a request as a question of fact rather than of law, or at least to treat it as a mixed question of fact and law."

31. It follows that the nature of Dr Kirkham's request of 16 November 2016 is to be judged objectively, reading the text of the request in context but eschewing a narrowly linguistic and overly (or indeed overtly) legalistic analysis. Dr Kirkham's position (or at least his position now) is that his request was made either to HMCTS (on the basis that Mr Carr must be either a Ministry of Justice or HMCTS civil

servant[2]) or to what he described as a *de facto* hybrid of HMCTS and the Judiciary. I consider each argument in turn.

Was the request made to HMCTS?

A summary of Dr Kirkham's submissions

32. Dr Kirkham argued that there were three fundamental problems with the Information Commissioner's contention that his information request had been made to the Senior President and not to HMCTS. Logically, therefore, Dr Kirkham was arguing that the same three reasons supported his claim that the request had been made to HMCTS (or, alternatively, to some kind of hybrid of HMCTS and the Judiciary). More particularly, Dr Kirkham's submissions were that (i) making an information request under FOIA is a purely mechanical process; (ii) FOIA must be construed as a benevolent regime, so it provides a genuinely accessible right to information to ordinary citizens; and (iii) any other construction than his own reading would mean that he had deliberately undermined his own request so as to make it ineffective, which made no sense.

33. Thus Dr Kirkham's first argument in support of his contention that the information request had been made to HMCTS was that making such a request under FOIA is a purely mechanical process. In doing so, Dr Kirkham placed considerable reliance on the very modest requirements laid down by section 8 of FOIA. These requirements, he argued, amounted to "a very low hurdle for a requester to satisfy", being focussed on the various purely mechanical acts referred to in section 8 itself (see paragraph 24 above). However, this argument is wholly misconceived. As Mr Knight submitted, there is no dispute that *if the request had been made to a public authority* then it satisfied the limited formalities required by section 8. Mr Knight was not seeking, as Dr Kirkham alleged, to read in or over-complicate the simple language of section 8, so as to supplement those requirements with a further condition under section 8 about the "direction" of the request. Rather, the question is one antecedent to section 8 in the first place, namely was this request made *to a public authority* within the terms of sections 1 and 3 of FOIA? If it was, then the box for compliance with section 8 would be ticked with no further ado. As Mr Knight put it in oral argument, section 8 was all about form and provided the key to passing through the FOIA gateway. However, that presupposed that one had arrived at the right gate in the first place, i.e. a public authority under FOIA.

34. Dr Kirkham's second submission was that FOIA must be construed as a benevolent regime, so as to provide a genuinely accessible right for ordinary citizens to obtain information from official bodies. He argued that it was unrealistic to expect the average citizen to know how particular public authorities organised themselves and so the FOIA regime needed to be interpreted in an appropriately purposive fashion. In that context Dr Kirkham relied on Richards LJ's observation in *Leapman* that requests under FOIA "may be made by individuals 'who cannot be expected to express themselves with precision'" (at paragraph 57). I note that, in doing so, Richards LJ was of course echoing the comments made by Lord Reed, giving the judgment of the Inner House of the Court of Session in *Glasgow City Council v*

[2] I should note that I received no evidence as to the precise status of Mr Carr. My recollection is that when HMCTS was created, the Senior President's private office was moved out of what was then the Tribunals Service and moved into the new Judicial Office (see paragraph 22 above). Be that as it may, his precise status is not material for present purposes and further enquiries were not needed. This is because (1) I conclude that the request was made to the Senior President in any event; and (2) Mr Carr is unquestionably a civil servant whose ultimate paymaster is presumably the Ministry of Justice.

Scottish Information Commissioner [2009] CSIH 73, an appeal concerning the parallel Scots legislation (at paragraph 45):

> "We accept, of course, that the Act confers a right on the public at large, and that it should not be interpreted or applied in a manner which would render the exercise of that right impractical or unduly difficult. In particular, although there will be cases where the request is made by persons who can be expected to describe precisely what it is that they wish to receive (the present case, where the requests were made by solicitors on behalf of a commercial client, being a paradigm case), there will also be cases where requests are made by individuals who cannot be expected to express themselves with precision. Allowance has to be made for that possibility in the application of the Act; and that is reflected, in particular, in the duty placed upon public authorities by section 15 of the Act to provide advice and assistance to a person who proposes to make, or has made, a request for information."

35. That statement of general principle is not in dispute. For example, Mr Knight also relied upon Richards LJ's dicta in *Leapman*. However, that does not take Dr Kirkham very far, if anywhere at all. The fundamental thrust of Mr Knight's analysis on this issue – that the information request had to construed objectively, reading the text of the request in context but eschewing what I described above as a narrowly linguistic and overly legalistic analysis – is correctly premised on the approach taken in *Leapman*. Furthermore, the facilitative nature of the FOIA regime is not exclusively a one-way street. As Lord Reed also observed in *Glasgow City Council v Scottish Information Commissioner* (also at paragraph 45), "The importance of giving appropriate assistance to persons who have difficulty describing the information which they desire is not however inconsistent with the necessity of identifying precisely what that information is." In the same way, a benign construction and application of FOIA is not inconsistent with a requirement that the requester start the process by identifying a public authority as the recipient of the request. Dr Kirkham singularly failed to satisfy me that adopting the approach laid down by the Court of Appeal in *Leapman* would lead to any serious undermining of the rights enshrined in FOIA.

36. Thirdly, Dr Kirkham argued that the Information Commissioner's interpretation of the request, that it was solely directed to the Senior President, necessarily meant that he had deliberately undermined his own request so as to make it ineffective, which would be nonsensical. He further contended that the references in his information request to the Senior President were simply by way of signposting "intended to help smooth the process", as Ryder LJ might well be consulted by HMCTS on the handling of such an inquiry under FOIA. Indeed, if he had intended the request to have been made exclusively to the Senior President as a member of the judiciary, he would have opened with a form of address such as "Dear Lord Justice Ryder", or included a covering note asking Mr Carr to forward his requests to the Senior President. There are at least two inter-related problems with this line of argument. First, it was never Mr Knight's case that Dr Kirkham had attempted to negate his own request, so to that extent this is a straw man argument. Second, this argument is incompatible with the objective focus required by *Leapman*; moreover, its premise (that the request was not made to the Senior President) is simply inconsistent with the circumstances of the case, as explained further below.

A summary of Mr Knight's submissions

37. In his response to the appeal, Mr Knight assured me that he was not seeking to argue from some "grand theoretical edifice". Rather, applying *Leapman*, his primary submission was that one needed simply to read the document in question (i.e. the

information request of 16 November 2016) and decide to whom it was directed. Mr Knight's argument was that it was made to the Senior President of Tribunals.

38. In support of his argument, Mr Knight referred to a number of features of the request. It was certainly addressed to Mr Carr, but his role was stated to be as Assistant Private Secretary to the Senior President,[3] and it was customary for civil servants to deal with correspondence on behalf of judges. Moreover, read as a whole the request was directed in any event to the Senior President. Thus it began by stating "I would like to make an application to the Senior President in respect of three cases of judicial misconduct .... I also wish to make a Freedom of Information Request…". The FOIA request referred to there was not differentiated as being other than also being directed to the Senior President. Furthermore, the final paragraph of the request, containing the details of the material sought, specifically stated that "the Senior President has the power to publish these documents regardless and I consider that he should do so outwith the FOIA regime, if it is necessary for him to do so". It was hard to see the relevance of that assertion if the request had in truth been made to HMCTS or the Ministry of Justice, rather than to the Senior President, who was apparently being invited to exercise his powers outside the FOIA scheme. In addition, the subject matter of the e-mail as a whole (in both parts) was directly concerned with the Senior President's judicial leadership and management functions. It had nothing whatsoever to do with the (with respect) more humdrum administrative functions of HMCTS. Finally, Mr Knight readily accepted that if Dr Kirkham's e-mailed request had begun "Dear Lord Justice Ryder", then it would have been even more obvious that the request had been made to the Senior President. However, the absence of such a salutation did not detract from the fact that on any fair and proper reading the information request had been made to the Senior President and not to HMCTS.

The Upper Tribunal's analysis

39. In my assessment Mr Knight's analysis is compelling. Unlike Dr Kirkham's somewhat generalised arguments, it is consistently grounded in the actual terms of the e-mailed request of 16 November 2016, in accordance with the test expounded in *Leapman*. Objectively construed, that request was directed to the Senior President of Tribunals and to him alone.

40. It is also instructive to consider the correspondence subsequent to that request. Such later correspondence cannot be determinative of the issue to be resolved here, as Mr Knight readily acknowledged. That said, the later exchanges are supportive of the conclusion reached by Mr Knight in applying the *Leapman* test to the purported FOIA request itself. They show that all the parties concerned regarded the request as having been made to the Senior President.

41. First, Mr Carr certainly thought it was directed to the Senior President. He acknowledged the request, "which I shall bring to the attention of the Senior President of Tribunals" (paragraph 3 above). It is perhaps noteworthy that this did not prompt an immediate riposte from Dr Kirkham to the effect that "the FOIA request was also directed to you in your capacity as a functionary of HMCTS/ the Ministry of Justice".

42. Second, Dr Kirkham certainly asserted to the ICO that he had addressed the request to "Lord Justice Ryder (acting as (i) an administrative officer of HMCTS and (ii) the Senior President of Tribunals)" (paragraph 4 above).

[3] One might also note that Mr Carr's e-mail address included the 'judiciary' domain name and not the 'HMCTS' domain name used by HMCTS staff.

43. Third, the ICO senior case worker certainly proceeded (again without complaint) on the basis that the request had been directed to the Senior President: "You have confirmed that the request was made to the Senior President, Lord Justice Ryder" (paragraph 7 above). This finding was presumably based on Dr Kirkham's e-mail to her which read as follows (underlining added):

> "Can I also correct the position – this was not a request to HMCTS, but to the Office of the Senior President who manages HMCTS. The effect of that is to widen the scope of what can be expected. Moreover the Senior President is an Office of HMCTS, so a request to his Office is sufficient to trigger the FOIA duty (rather than to write to the Judicial Office)."

44. Fourth, in his appeal to the First-tier Tribunal Dr Kirkham was again adamant, talking of himself in the third person, that the complaint "was against 'Lord Justice Ryder (acting as (i) an administrative officer of HMCTS and (ii) the Senior President of Tribunals)'. This is a position that he has consistently maintained throughout this case." In fact, as Mr Knight observes, and as the account above amply illustrates, Dr Kirkham's position as to the true recipient of his emailed information request has self-evidently altered over time.

45. For the avoidance of any doubt, I also accept Mr Knight's submissions as to the role and status of the Senior President of Tribunals, which is a senior judicial office (see section 2 of, and Schedule 1 to, the Tribunals, Courts and Enforcement Act 2007). The Senior President is in no sense an "administrative officer" of HMCTS; he is not employed by HMCTS and he is not accountable to HMCTS – if he were, such an arrangement would represent a fundamental breach of the constitutional doctrine of the separation of powers. It is true that amongst his many other functions and duties the Senior President is an independent judicial member of the HMCTS Board, but then so are others who are not officers of, nor employees of, nor persons accountable to HMCTS. Whatever his subjective intentions, the fact that Dr Kirkham may have misunderstood the constitutional proprieties cannot alter the fact that, judged objectively, he made a purported FOIA request to the Senior President of Tribunals, the holder of a senior judicial office. It is in any event axiomatic that a requester's subjective opinion cannot determine the jurisdiction of statutory authorities (see by analogy Lord Hoffmann in *BBC v Sugar* at paragraph 48).

46. If, as I conclude, the request of 16 November 2016 was not sent to HMCTS, that then takes us to Dr Kirkham's alternative argument.

Was the request made to a 'de facto hybrid' of HMCTS and the Judiciary?

47. Faced with the difficulties outlined above, Dr Kirkham valiantly sought to argue that if the request had not been made exclusively to HMCTS then it had necessarily been made to what he described as a *"de facto* hybrid of HMCTS and the Judiciary". This '*de facto* hybrid' argument takes Dr Kirkham nowhere. He sought to justify this bold submission by wide-ranging references to the decisions of the Supreme Court in *Kennedy v The Charity Commission* [2014] UKSC 20 and the European Court of Human Rights in *Magyar Helsinki Bizottság v Hungary* (Application no.18030/11) as well as more particularly to the UN Convention on the Rights of Disabled Persons (UNCRDP), enshrined in European Union law. However, he singularly failed to explain how these authorities and the Convention could alter the clear wording of the statutory scheme enshrined in FOIA.

48. There is, very simply, no such body as a *de facto* hybrid public authority for the purposes of FOIA. Either an organisation or person is inside FOIA as a public

authority (the Ministry of Justice/HMCTS) or it is outside FOIA (the Senior President) or (exceptionally) it is part in and part out, but under carefully defined legislative conditions, in effect as a *de jure* hybrid public authority, whether by virtue of Schedule 1 to FOIA (e.g. the BBC) or a Designation Order (e.g. UCAS). As Lord Hoffmann succinctly put it in *British Broadcasting Corporation v Sugar* [2009] UKHL 9; [2009] 1 WLR 430 ('*BBC v Sugar*'), "For the most part, you are either on the list or you are not" (at paragraph 41).

49. There is therefore simply no scope for the Upper Tribunal to create and add new *de facto* hybrid public authorities to the FOIA list on a case by case basis, which is in effect what Dr Kirkham is inviting me to do. To do so would be judicial legislation writ large. The decision on whether a particular named person or body is to be classified as a "public authority" *for the purposes of FOIA* is ultimately a matter for Parliament alone. (I recognise, of course, that the position is rather more nuanced under regulation 2(2) of the Environmental Information Regulations 2004 (SI 2004/3391), but the complications generated by that regime do not apply in the present context).

50. It follows that my conclusion on Question 1, applying the *Leapman* test, is that Dr Kirkham's request of 16 November 2016 was made to the Senior President of Tribunals and to no other person or body.

Q2: is that person or body a "public authority" for the purposes of FOIA?

51. In the light of my conclusions on Question 1, this second question answers itself. Despite Dr Kirkham's best efforts to over-complicate matters, the underlying issue is quite simple. It is a binary choice. If the information request had as a matter of fact been made to HMCTS, as a manifestation of the Ministry of Justice, then it had been made to a public authority for the purposes of FOIA (and it further met the requirements of form set out in section 8). If, on the other hand, the information request had been made to the Senior President of Tribunals, it had not been made to a public authority within FOIA. No amount of obscurantism can avoid confronting that ultimate hard-edged question.

52. As I conclude it was the latter outcome of that binary choice, it follows that neither the Commissioner nor on appeal the First-tier Tribunal (nor indeed the Upper Tribunal) has any jurisdiction. The Senior President of Tribunals is not a public authority as defined by section 3 of, and Schedule 1 to, FOIA. It followed the request had not been made in exercise of the right under section 1(1) of FOIA. The Senior President was not subject to the 20-day rule in section 10(1). Furthermore, it also followed that Dr Kirkham's e-mail of 16 November 2016 was not by any reckoning "a request for information made by the complainant to a public authority" within the meaning of section 50(1).

Q3: was the ICO senior case officer's letter (12 April 2017) a "decision notice"?

Introduction

53. Question 3 is the deceptively simply phrased issue as to whether or not the senior case officer's letter to Dr Kirkham of 12 April 2017 was indeed a "decision notice" for the purposes of FOIA.

54. Given my findings on Questions 1 and 2, it is not necessary for me to reach a final conclusion on Question 3. Furthermore, given the potentially complex issues raised by Question 3, I do not consider it appropriate to reach a definitive resolution of this third and final issue, not least as this is a determination on a preliminary issue in the light of the Information Commissioner's strike out application. The issues raised under Question 3, if they are indeed problematic, are best dealt with after full argument in a substantive appeal where the matters in question are material to the

outcome. However, in fairness to the submissions of both Dr Kirkham and Mr Knight, it is right at least to set out the broad parameters to the dispute. In a nutshell, Dr Kirkham argued that the letter of 12 April 2017 was a decision notice for the purpose of sections 50(3)(b) and 57(1) of FOIA while Mr Knight submitted it was not.

55. In his opening submissions at the oral hearing, Mr Knight described Question 3 as involving a diversion down a "tricky byroad", albeit a detour that might not be strictly necessary for the Upper Tribunal to take when resolving the preliminary issue. Maintaining but modifying the analogy, and if we are to stick to the main highway, another way of putting it might be to say that an Upper Tribunal Judge in this scenario may be like the motorist approaching Spaghetti Junction. She or he may be faced with a confusing array of signs pointing in different directions – the House of Lords says go this way (or that way or a third way), but the three-judge panel of the Upper Tribunal points in another direction altogether (which may or may not reach the same destination as the House of Lords). Identifying what may be the straight and narrow juridical route in such taxing circumstances is not necessarily straightforward.

56. One potential area of dispute can be disposed of quickly in this context. Does it matter that the senior case officer's communication of 12 April 2017 was by way of a letter e-mailed to Dr Kirkham, rather than in the familiar stand-alone format of an Information Commissioner's formal Decision Notice with all its usual trappings? Mr Knight accepted that this made no difference in and of itself. That concession on behalf of the Information Commissioner must be right. As Lord Phillips of Worth Matravers held in *BBC v Sugar*, "Section 50 of the Act does not prescribe the form of a 'decision notice'. I consider that this phrase simply describes a letter setting out the commissioner's decision" (at paragraph 37).

57. I then turn to map out the core of the dispute as to the proper approach to Question 3 as between Dr Kirkham and Mr Knight. I summarise Mr Knight's arguments first, simply because he bases his submissions on the judgment of the House of Lords in *BBC v Sugar*, which pre-dates *Fish Legal v Information Commissioner and Others* [2015] UKUT 52 (AAC); [2015] AACR 33 ('*Fish Legal*'), the Upper Tribunal decision on which Dr Kirkham places reliance.

The Information Commissioner's submissions on Question 3

58. Mr Knight's central submission was that the Information Commissioner has no jurisdiction to issue a decision notice under FOIA in relation to a person (such as the Senior President) who is not designated as a public authority under FOIA. Mr Knight argued this proposition flowed from the reasoning of all five of their Lordships in *BBC v Sugar*. One of the issues there was the jurisdictional question, as the BBC is expressly designated as a public authority under Schedule 1 to FOIA for some but not all of the purposes for which it might hold information. The majority of the House of Lords (Lord Phillips, Lord Hope of Craighead and Lord Neuberger of Abbotsbury) held that in those circumstances the Information Commissioner had jurisdiction to issue a decision notice that could be appealed to (what is now) the First-tier Tribunal, even where the decision notice was to the effect that the information requested did not fall within the scope of the partial designation. All three of their Lordships in the majority based their reasoning (even if expressed in rather different terms) on the fact that the BBC is listed in Schedule 1 as a public authority for the purposes of FOIA (albeit not exclusively so). The minority, being Lord Hoffmann and Lady Hale, considered that the Information Commissioner had no jurisdiction to decide whether or not a body is a public authority for the purposes of FOIA, that being an issue which, on their view, could be tested only on judicial review (and, at the material time, only in the Administrative Court).

59. Mr Knight developed his submission in his skeleton argument as follows (omitting a footnote):

> "33. The Commissioner considers it clear from *Sugar* – not least from the speeches of Lord Hope at paragraphs 52 and 57, Lord Hoffmann at paragraphs 41-42 and Lady Hale at paragraph 70 – that she has no power to issue a decision notice within the meaning of section 50(3)(b) and 57(1) against a body or person not for any purpose designated in Schedule 1 to FOIA, and that any purported error in her view in this respect is challengeable by way of judicial review and not by way of statutory appeal. That this is the case in respect of a positive or negative decision on jurisdiction, and both being subject to judicial review, is supported by: Lord Phillips at paragraph 20, Lord Hoffmann at paragraph 41 and Lord Hope at paragraph 57 (cf Lady Hale at paragraph 67).
>
> 34. It is accepted that the reasoning of the Upper Tribunal in *Fish Legal* is not entirely consistent with this approach. However, it cannot alter the effect of the House of Lords in *Sugar*. It is *Sugar* which binds this Tribunal. Moreover, *Sugar* directly concerned FOIA. *Fish Legal* did not. None of the cases before the Upper Tribunal in *Fish Legal*, or linked to them, were brought under FOIA. All were EIR cases. Although *Fish Legal* purported to determine the application of *Sugar* under the EIR and under FOIA (paragraph 19), it cannot have done so in a binding nature in respect of FOIA because that was not an issue before it. The Commissioner could not have appealed *Fish Legal* in respect of its application to FOIA because that issue did not arise. Further, the judgment in *Fish Legal* does not bind this Tribunal not only because it was not addressing the same issue, but also because the Upper Tribunal cannot formally bind itself. It is of course correct that a single judge of the Upper Tribunal ought ordinarily to follow a three-judge panel because it is in accordance with legal certainty and judicial comity to do so, but it is not bound to follow a judgment if that judgment is wrong: *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC); [2009] PTSR 1112 at paragraph 37(iii). Here, insofar as it purported to interpret and apply *Sugar* in the context of FOIA, *Fish Legal* ought not to be followed; the reasoning and effect of *Sugar* must be applied instead."

Dr Kirkham's submissions on Question 3

60. Dr Kirkham's primary submission was admirably straightforward and so can be summarised more shortly. The decision of the three-judge panel of the Upper Tribunal in *Fish Legal* was clear, he said, as shown by the conclusion in that case on the jurisdictional issue:

> "55. In summary, the Commissioner has jurisdiction both to investigate and decide whether a body is a public authority. That decision is one made on the application under section 50 of FOIA and so the document giving notice of that decision is a decision notice served under section 50(3)(b)…"

61. Dr Kirkham pointed out that the Upper Tribunal in *Fish Legal* had reached this conclusion after full argument in a joined series of proceedings involving 12 counsel (and including six QCs) and after detailed consideration of their Lordships' opinions in *BBC v Sugar* (see *Fish Legal* at paragraphs 43-54). Dr Kirkham accordingly adopted and relied upon the analysis of the three-judge panel both as regards its reading of *BBC v Sugar* and its construction of the legislative and jurisdictional framework of the FOIA/EIR appellate process. The Information Commissioner (and so the First-tier Tribunal and Upper Tribunal) had the jurisdiction to make both a positive decision (that a body is a public authority) and a negative decision (that a

body is not a public authority) alike. In his submission, the Upper Tribunal in *Fish Legal* had arrived at "the only reasonable conclusion on the question raised before that Tribunal and that conclusion must apply to this case and every case before the Tribunal system". Dr Kirkham further contended that the Information Commissioner had "inexplicably chosen not to implement the decision in *Fish Legal* and continued to act as if *Fish Legal* did not exist". He referred to a number of other cases in which, he argued, the Information Commissioner had refused to issue a decision notice (such as the letter he had received) but where such refusals, properly interpreted, amounted to "many hundreds of decision notices by accident" (but with no accompanying notification of complainants' appeal rights). In short, Dr Kirkham argued that the Information Commissioner was now seeking to re-open and re-argue *Fish Legal* on the jurisdictional point when the proper course would have been to appeal that decision at the appropriate time. Thus, he contended, the Information Commissioner's submissions in the present proceedings on this point amounted to an abuse of process.

The Upper Tribunal's preliminary observations on Question 3

62. I can deal with that last argument swiftly. There is nothing improper in the Information Commissioner advancing the arguments she now does in relation to Question 3. The substantive outcome of the *Fish Legal* litigation was that the Upper Tribunal agreed with the Information Commissioner's finding that the water companies were public authorities for the purposes of the EIR and in the light of the CJEU case law. A challenge to the panel's conclusion on the separate jurisdictional point would also most likely have received short shrift in the Court of Appeal, not least given the Upper Tribunal was simultaneously exercising its judicial review powers in those proceedings. This is the not the first time and doubtless will not be the last time that a party agrees with the outcome of a previously decided case but does not agree with all the reasoning by which that conclusion was reached. It is in the very nature of the development of the common law that such issues can be raised in subsequent litigation in which they arise and where they do matter.

63. I accept that at first sight there may appear to be a parallel between the central issue in *BBC v Sugar* (and *Fish Legal*) and that in the current appeal. As Lord Phillips observed (at paragraph 25 of his opinion in *BBC v Sugar*), "The seminal question is whether Mr Sugar made a request for information to a public authority under section 1 of the Act". Reformulated for present purposes, the seminal question in the present proceedings likewise is whether Dr Kirkham made a request for information to a public authority under section 1 of the Act.

64. However, on closer scrutiny the apparent parallel is not quite so straightforward. In both *BBC v Sugar* and *Fish Legal* the House of Lords and the Upper Tribunal respectively were concerned with cases where the identity of the recipient of the information request was undisputed. However, what was very much in issue in both sets of proceedings was the true status of that body for the purposes of the respective information rights legislative regime (FOIA in *BBC v Sugar* and EIR in *Fish Legal*). In *BBC v Sugar* the House was concerned with a body that was on the Schedule 1 list for certain purposes but not others; moreover, some of those designations had "fuzzy edges", as Lord Hoffman and Lord Hope characterised them (at paragraphs 41 and 56). In *Fish Legal* the Upper Tribunal was concerned with the open-textured definition in regulation 2(2) of the EIR, where "fuzzy edges" are arguably part and parcel of the general definition.

65. The present case is very different. It concerns an *a priori* question and the converse problem. This is a case in which the identity of the recipient is very much a disputed and live issue. What is not in issue here is the proper status of the body in

question, once the identity of the recipient is established. As already noted, if the request was made to HMCTS, it was made to a public authority and if it was made to the Senior President it was not. Put in more generic terms, the prime issue for determination in *BBC v Sugar* was this: "is body *X* (the identity of which is known) a 'public authority' for the purposes of FOIA?" Similarly, in *Fish Legal* the central question was "is body *X* (the identity of which is known) a 'public authority' for the purposes of the EIR?" But the seminal issue in the present case was qualitatively different, namely "was the request made to body *Y* (which is a public authority under FOIA) and/or alternatively to body *Z* (which is not a public authority under FOIA)?" The factual matrix is accordingly very different from the scenarios which were before the House of Lords and the Upper Tribunal respectively, meaning that the decisions may actually be of limited assistance in the present context, which concerns a point that was not in fact raised by those cases. This is a further reason (in addition to those outlined in paragraph 54 above) for declining to accede to the invitation to try and square the circle (if such be the problem) between *BBC v Sugar* and *Fish Legal*. Indeed, if the authorities do need to be reconciled, that may well be a task for the Court of Appeal or the Supreme Court in an appeal where the point is actually determinative. It is not determinative here so I need say no more.

Other arguments

66. Dr Kirkham sought to run a number of other subsidiary arguments. However, none of them even began to persuade me that this information request had been made other than to the Senior President of Tribunals. At one point he even argued that I was personally required by both the UNCRDP and the overriding objective to disclose the judicial training documentation that he had requested. This was apparently on the basis that I have served as a temporary Chamber President (in the War Pensions and Armed Forces Compensation Chamber) and so (according to Dr Kirkham) "plainly must have access to the documentation" in question. This is all smoke and mirrors. My sole role here is as an Upper Tribunal Judge to determine the preliminary issue raised by Dr Kirkham's transferred appeal and the Information Commissioner's strike out application. The UNCRDP has not been incorporated into domestic law and does not assist Dr Kirkham for the reasons that Mr Knight spelt out clearly in his written and oral submissions and I need not repeat here. In particular, Dr Kirkham conspicuously failed to explain how the UNCRDP modified the clear wording of FOIA. As an Upper Tribunal Judge, I am also required to seek to give effect to the overriding objective (i.e. to enable cases to be dealt with fairly and justly) when exercising any power under the 2008 Rules or interpreting any rule or practice direction (see rule 2(3)). The overriding objective is thus grounded in the procedural rules – it is not some magic wand that can be waved so as to re-write primary legislation.

The exchange between the GRC and the Information Commissioner's Office

67. I referred above (at paragraph 10) to a brief e-mail exchange between a member of the GRC administrative team and Mr Sowerbutts, a solicitor working for the ICO. Dr Kirkham (perhaps understandably) took great exception to this inquiry to the ICO from the GRC office about the validity of his appeal, which was made without copying him in. At the oral hearing Mr Knight, while making it clear he held no brief for the GRC, unhesitatingly accepted that what happened was not appropriate. In a masterly understatement, Mr Knight described it as "some way short of best practice to e-mail one party and not both."

68. I agree entirely with Mr Knight. Dr Kirkham's complaint about the HMCTS practice in this regard was certainly justified. I recognise there are clearly going to be some generic and non-case specific issues where it may be entirely appropriate for tribunal administrators to deal exclusively with one party without involving the other

(e.g. handling an appellant's enquiry about car parking facilities at or near a tribunal venue or the payment of expenses, where allowed). However, any communication which touches on either the procedure or the substance of the dispute which is the subject of the tribunal proceedings must be shared with both or all parties (see e.g. *SM v Secretary of State for Work and Pensions (SPC)* [2017] UKUT 336 (AAC) at paragraphs 57-58 and *AF v SSWP (No.2)* [2017] UKUT 366 (AAC) at paragraphs 38-41). Of course, special considerations and modifications may apply in the information rights jurisdiction where closed material is in issue.

69. In any event, in the present case the GRC clerk's inquiry should have been addressed not to the ICO, as the respondent and so a party to the appeal, but to the GRC Registrar (or the GRC Chamber President or Principal Judge), who could then, if they considered it appropriate, have invited representations from both parties on the jurisdictional issue that arose (as indeed the GRC Registrar did swiftly afterwards on 3 May 2017). The unfortunate incident revealed here does perhaps suggest a training need for the relevant HMCTS staff. However, I am not satisfied that there was any lasting prejudice to Dr Kirkham, not least as the relevant correspondence was copied to him within 24 hours and he has had ample opportunity since to make his case about jurisdiction.

Conclusion

70. This is, of course, a transferred appeal from the First-tier Tribunal, so there is no First-tier Tribunal decision now under appeal in the usual way under the Tribunals, Courts and Enforcement Act 2007. The Upper Tribunal is accordingly in effect acting as a first instance appellate decision maker. I decide the three questions that form the preliminary issue as follows:

(1) *To whom was the request for information made on 16 November 2016?*
The Senior President of Tribunals.

(2) *Was that person/body a "public authority" for the purposes of FOIA?*
No.

(3) *Was the Respondent's letter of 12 April 2017 (ref FS50664994) a "decision notice"?*
This question need not be resolved in the light of the answers to (1) and (2) above.

71. In the light of those findings, I have no option but to strike out this appeal as the Upper Tribunal does not have jurisdiction in relation to these proceedings (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 8(2)(a)). My ruling is as set out above.

Signed on the original
on 9 January 2018

Nicholas Wikeley
Judge of the Upper Tribunal