DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decisions of the First-tier Tribunal (made on 22 October 2018 under references EA/2017/0111 and 0113) involved the making of an error in point of law, they are SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the cases are REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

The tribunal must undertake a complete reconsideration of the issues that are raised by the appeals

REASONS FOR DECISION

A. These appeals are about the form in which the First-tier Tribunal may give a decision

1. These appeals are mainly about the proper form of decision that a First-tier Tribunal may give if it allows an appeal. The answer is governed by the decision of the three-judge panel in *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC) (*Malnick*), although it appears that some judges in the First-tier Tribunal and some public authorities do not understand that decision. There are other issues, but they can be dealt with briefly.

B. The decision given by the First-tier Tribunal on Mr Dean's appeal

2. Mr Dean was interested in the plans for a seven-day service to be delivered by NHS England. He made two requests to NHS England under the Freedom of Information Act 2000 (FOIA). NHS England provided some of the information he requested and denied holding other information. For the remainder, it refused to provide the information in reliance on sections 36(2)(b)(ii) and (c) and 43(2). Essentially, the information withheld relates to a presentation made by Deloitte in order to inform the analysis of the proposals.

3. On Mr Dean's complaint to the Information Commissioner, NHS England withdrew reliance on section 43 and relied only on section 36. The Commissioner decided that the information was exempt under section 36(2)(b)(ii), meaning that disclosure 'would, or would be likely to, inhibit … the free and frank exchange of views for the purposes of deliberation'. She did not mention section 36(3). On appeal to the First-tier Tribunal, the tribunal decided that if section 36 applied, the balance of the public interests under section 2(2)(b) favoured disclosure. It therefore allowed the appeal and gave this decision:

> The Tribunal allows the appeal for the reasons given below. NHS England is required to respond anew to Dr Dean's enquiry, taking into account the Tribunal's decision, within 28 days of the publication of this decision. This judgment stands as the substituted Decision Notice.

It is not clear from the tribunal's written reasons, at least not to me, why it gave a decision in that form.

C. The judge's explanation and grant of permission to appeal

4. The only explanation for the form of decision is what the judge wrote when he gave NHS England permission to appeal to the Upper Tribunal:

> It may be for example that the public authority originally relied on an exemption which covered all the withheld material. There may however be other exemptions (for example the personal data exemption at s.40 FOIA) which only relates to a small part of the material and has not been relied on at any stage by the public authority for that very reason. In my view an FTT cannot require a blanket disclosure of all the disputed material and deprive the public authority of the possibility of contending that a previously unargued exemption applies and of redacting, for example, personal data. The form of words used in this judgement is a form that has been specifically requested by other public authorities.

The judge commented that this was consistent with *Malnick*. He went on to say, though, that that decision:

> has created considerable uncertainty for FTTs about the correct procedure and conclusions to be adopted when there may be a number of exemptions that could be relied on by a public authority and whether different approaches should be adopted when those exemptions are claimed or not claimed or not considered by the Commissioner. For that reason alone I think that it is appropriate to grant PTA in this case.

5. Although the judge said that he had given permission to appeal for that reason alone, he did not limited his permission. That left it unclear whether the parties could refer to other issues, which is why I gave permission to appeal on all the grounds put forward by NHS England.

6. I do not want to make too much of this, but it is worth drawing attention to what the Court of Appeal said in *Secretary of State for the Home Department v Rodriguez* [2014] EWCA Civ 2.

> 80. … The guiding consideration must always be, where it is intended that a grant of permission to appeal is to be limited or restricted, that the grant is unambiguously clear. It thus should, in my view, be regarded as good practice to be followed in such cases that the wording of the actual grant itself is explicit that the permission to appeal is limited or restricted: for example 'permission is granted, limited to grounds 1 and 4 [or as the case may be]…' or 'permission is granted, limited as hereafter set out…' It is not good practice to give an ostensibly unlimited grant and then to impose limitations in the Reasons thereafter given in the order: indeed such a

> procedure may only result in the kinds of problems thrown up in the present case. Ultimately, as Blake J said in his Presidential Guidance: 'If nevertheless it is decided permission should only be granted on limited or restricted grounds, the judge should state this expressly (and precisely)….'. That is guidance to be followed.

This is not just a matter of making it clear to the parties what the judge intends. There are also practical consequences, because the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698) provide that if the First-tier Tribunal has given limited permission to appeal:

- the appellant may apply to the Upper Tribunal for permission on other grounds (rule 21(2)(b)); and
- if the Upper Tribunal refuses permission, the appellant may apply for the refusal to be reconsidered at an oral hearing (rule 22(4)).

D. What Malnick decided and why the tribunal did not comply with it

7. The answer to the judge's concern is in *Malnick* at paragraphs 73 to 109. I do not understand why judges and public authorities have found that decision difficult to follow. It may be that that is a result of failing to extract the basic principles from the factual context of that particular case. I will set out what the panel decided, but I want to make it clear that I am not adding anything to the reasoning of the panel, I am not glossing it or even explaining it. The proper course for the First-tier Tribunal in the future is to read and apply what the panel said for itself. The panel analysed the roles of the public authority, the Information Commissioner and the First-tier Tribunal under FOIA. I take them in turn.

8. The 'public authority must state all the exemptions which it relies upon', although 'it need only be right about one of them' (paragraph 74). That duty arises from section 17(1)(b). 'Once the authority has complied with its obligations under sections 1 and 17, it has fulfilled its duties in relation to that request' (paragraph 76).

9. The Commissioner must consider all issues necessary to support her decision under section 50. If she finds that the public authority was entitled to rely on one exemption, that is sufficient to show that the authority dealt with the request in accordance with Part I of FOIA and she may decide accordingly. If she finds that the authority was not entitled to rely on the exemptions it identified, her duty is to decide whether 'the authority has complied with section 1, and so the Commissioner must decide whether any of the disputed information is exempt in any respect and, if so, specify that respect' (paragraph 80). That duty arises from section 50. And 'once the Commissioner has issued a decision notice stating that the authority has complied with section 1 …, the Commissioner has entirely discharged her functions under section 50' (paragraph 81). This is against the background of the decision in *Birkett v the Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, [2012] AACR 32, which decided that the Commissioner was not limited in her consideration to exemptions raised by the parties.

10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply' (paragraph 90). That follows from section 58(2) and *Birkett*. As does this crystal clear statement of the tribunal's powers and duties at paragraph 102:

> … the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner …

11. It follows that once the public authority has given its response to the request, it has no further role 'save for compliance with a decision notice of the IC or a decision of the FTT' (paragraph 76). And, as I have shown, both the Commissioner and the tribunal are under a duty to consider any exemption that might apply, regardless of whether it has been raised. Once the case is before them, that is their role, not the authority's.

12. So the tribunal was right to be concerned that there could be exemptions that had not been considered by either NHS England or the Information Commissioner. But it was wrong to deal with that issue by remitting the case back to the authority. What it should have done was to give directions to the authority to identify any other exemptions that might apply, to consider whether or not any did, and then to make a decision accordingly.

E. The balance of public interests has to be tested at the time of public authority's decision on the request

13. The First-tier Tribunal said that there was a 'lack of clarity around the issue' of the time at which the test had to be applied, but that in the event 'this was not a determinative point in the Tribunal's decision-making' (paragraph 36 of its written reasons). The tribunal was wrong to say there was a lack of clarity. The Supreme Court in *R (Evans) v Attorney-General* [2015] AC 1787 at [72]-[73] suggested that the relevant time was when the public authority refused the request and the three-judge panel in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office* [2016] AACR 5 at [49]-[50] put beyond any doubt that that was the law.

F. How the tribunal analysed the public interests balance and the reasons it gave

14. There are three other grounds of appeal, which can conveniently be dealt with under this heading. As there will be a rehearing of these cases, I limit myself to making some general comments on the approach that the tribunal should have taken, picking up on points made in the grounds of appeal. Analysing what errors of approach the tribunal may or may not have made, and the adequacy or otherwise of its reasoning would add no value to this decision.

15. It is convenient to quote what I wrote in *O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC):

> 15. Section 2(1)(b) says 'outweighs', which inevitably leads to talk of balance, as I did in paragraph 4, and scales, as the tribunal did. These metaphors may be difficult to avoid, not least because they have a statutory basis, but they conceal the analysis that section 2(1)(b) requires. The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did. This explanation should not be difficult if the tribunal has undertaken the analysis in the first two steps properly. It may even be self-evident.

It follows that any factor that is capable of affecting the operation of those values and policies is relevant to the balancing exercise. That includes both the content of the information and the possible consequences of disclosure or non-disclosure. The arguments presented may be general in their nature or unique to the information in issue. But the test is not an abstract one; the issue is always whether the information covered by the request should be disclosed.

16. I have been asked to say whether the 'public authorities are <u>necessarily required</u> to make submissions that refer explicitly to the content of the withheld information.' The underlining is in the original. I decline that invitation. First, because public authorities are not required to make any submissions; what they say is a matter for them. Authorities come in all shapes and sizes. Some of the smaller ones who are unfamiliar with FOIA may benefit from some guidance from the First-tier Tribunal. Others have no such need. Those represented by the likes of the experienced information rights counsel who have appeared for the Commissioner and NHS England need look no further for advice on what arguments to make or how to present them. Second, the nature of the arguments will vary according to the information and the circumstances. Any guidance on what is appropriate must depend on the particular case.

17. As I explained *FCO v Information Commissioner and Plowden* [2013] UKUT 275 (AAC) at [15], the balancing of the public interests is a comparative exercise. What matters is the comparative significance of the interests. The absolute significance of the public interests in disclosure or non-disclosure is not in point, although all parties will naturally want to present the strongest case they can.

18. That, I think, is the clearest response I can properly give to the points made in the remaining grounds of appeal.

Signed on original
on 30 April 2019

Edward Jacobs
Upper Tribunal Judge