THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-000889-GIA [2022] UKUT 315 (AAC)

ANNA CHRISTIE V INFORMATION COMMISSIONER

Decided without a hearing

Representatives

Appellant	Represented herself
Information Commissioner	Nicholas Martin, solicitor

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	EA/2021/0355
Decision date:	3 May 2022
Hearing:	By CVP

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A. The route to the Upper Tribunal

1. On 7 October 2020, Ms Christie made a request to Gloucestershire Constabulary under the Freedom of Information Act 2000 (FOIA). it read:

> Please provide me with the number of female suspects who have made complaints of sexual misconduct against [redacted] or sometimes known as [redacted] or also known as [redacted], who worked as a [redacted] at Gloucester Police Station between 2012-2015.

The Constabulary declined to confirm or deny that it held any information and this was upheld by the Information Commissioner on a complaint by Ms Christie under section 50 FOIA. The Constabulary's response to the request relied on section 40(5B) FOIA and the Commissioner confirmed its response on that basis. The First-tier Tribunal

dismissed Ms Christie's appeal but gave her permission to appeal to the Upper Tribunal.

B. The duty to confirm or deny

2. Section 1(1)(a) FOIA requires a public authority to inform the requester 'whether it holds information of the description specified in the request'. This is known as the duty to confirm or deny. Section 2(1) provides that this duty does not apply if FOIA so provides. Section 40(5B) does so provide:

> **40 Personal information**
>
> (5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—
>
> (a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a)—
>
> (i) would (apart from this Act) contravene any of the data protection principles, or
>
> (ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;
>
> (b) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the GDPR (general processing: right to object to processing);
>
> (c) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);
>
> (d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

GDPR stands for the General Data Protection Regulation ((EU) 2016/679).

3. Article 5(1)(a) GDPR provides that 'Personal data shall be processed lawfully'. Article 6(1) provides that personal data will only be processed lawfully if one of a number of conditions applies. The only relevant condition is Article 6(1)(f):

> processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Ms Christie is 'a third party' for the purposes of that provision and the person named in her request is 'the data subject'.

C. The First-tier Tribunal's reasoning

4. Ms Christie's appeal to the First-tier Tribunal was governed by section 58 FOIA. This required the tribunal to decide whether the Commissioner's decision notice was 'in accordance with the law'.

5. The tribunal's reasons focus on the decision notice, summarising and confirming the Commissioner's reasoning by reference to the parties arguments. This has made the reasons somewhat disjointed, but it is possible on a careful reading to extract the tribunal's analysis. The legal standard required is whether the reasons were adequate, not whether they are easy reading. They satisfy that test.

6. The tribunal took the correct approach to Article 6(1)(f). It applied the decision of the Supreme Court in *South Lanarkshire Council v Scottish Information Commissioner* [2013] 1 WLR 2421, which dealt with an equivalent provision to Article 6(1)(f). The Court identified three questions that had to be answered:

> 18. It is obvious that condition 6 requires three questions to be answered:
>
> (i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
>
> (ii) Is the processing involved necessary for the purposes of those interests?
>
> (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

7. The tribunal set out the Commissioner's conclusion on each of those questions together with a summary of the submissions of her representative and of Ms Christie.

Question 1

8. The tribunal accepted the Commissioner's analysis of this question. The Commissioner had accepted Ms Christie's own statement of her interests:

> … the public has a right to be informed of the allegations made and the number of women who have made allegations disclosed. [Redacted] was acting in a position of trust with vulnerable women, and if he cannot be trusted the public has a right to know.

As far as I can see, Ms Christie did not challenge that statement as inaccurate. She did consider that sufficient significance had not been attached to it, but that is a different matter that is relevant to the other questions.

Question 2

9. The tribunal found that processing would be necessary to satisfy Ms Christie's interests, meaning 'necessary' in the sense that it was more than desirable but less then indispensable or absolute necessity. That reflects the way the word is used in everyday speech. The Commissioner's view was that there was nothing in the public domain about complaints or allegations relating to the subject of the requests.

Question 3

10. The tribunal also confirmed the Commissioner's answer to this question. The Commissioner analysed Ms Christie as having legitimate interests in the disclosure of whether individuals maintained appropriate standards in positions of trust and in being

able to scrutinise whether those individuals met the standard required. The Commissioner also identified a legitimate interest in maintaining public confidence, but noted that solicitors were subject to an official complaints and investigation procedure by a professional regulatory standards authority. As the tribunal noted, it was not part of that reasoning that the complaints procedure should be sufficient to ensure the public release of the information that Ms Christie sought.

D. Why the First-tier Tribunal did not make an error of law

11. I gratefully adopt the classification of Ms Christie's grounds of appeal in the Commissioner's response to the Upper Tribunal. There is some overlap between those grounds. Before coming to those grounds individually, I will make some general remarks.

12. The tribunal's reasons show that it applied the correct legal tests, both to the appeal itself (section 58 FOIA) and to the proper response to Ms Christie's request (Section 40(5B) FOIA). Ms Christie has not disputed the analysis of her legitimate interests. It is surely self-evident that the request could not be satisfied to protect those interests without processing any data held by the Constabulary. The only contentious issue for the tribunal was whether Ms Christie's interests were overridden by those of the data subject. The tribunal took account of the factors relevant to that exercise on both sides. The core of the grounds of appeal is that the tribunal should have found that Ms Christie's interests overrode those of the data subject. I do not accept that the tribunal made an error of law in that regard. The tribunal consisted of a judge sitting with two specialist members chosen for their skill and experience. The tribunal's reasons explain how their judgment was made and show that it was rational.

13. I come now to the specific grounds of appeal.

Comparators

14. The comparators that the tribunal had to apply were set out in Article 6(1)(f): Ms Christie and the person who was the subject of the information she sought. The core of Ms Christie's appeals both to the First-tier Tribunal and to the Upper Tribunal is that the balance should have been struck in her favour, not that the wrong comparators were used.

The interests of Ms Christie and the data subject

15. Before a balance can be struck, the interests have to be identified. I have already summarised Ms Christie's interests as identified by the Commissioner. Ms Christie does not dispute them, only the significance attached to them. As to the data subject's interests, Ms Christie argues that the other routes available – the solicitors' regulatory authority, the police and the crown prosecution authority – are not available to her as she is not a victim. That may be so, but the interests identified were in general terms and not personal to Ms Christie. The availability of means to protect the interests identified is relevant to the balance to be struck. The tribunal was right to take them into account.

Criminal trial

16. I accept the Commissioner's submission that this issue was not put to the First-tier Tribunal, so there was no error of law in failing to deal with it.

Solicitors' regulatory authority correspondence

17. Ms Christie considers this important and she has used the information she has obtained from the authority to enhance her case as best she can. There are, though, three flaws in her reasoning. First, she assumes that she has identified a single person who has used different names. That is not necessarily so. Second, Ms Christie assumes that a complaint about a person means that the person has engaged in misconduct. That is not necessarily the case. The most that can be said is that there *may* have been misconduct of some sort. Third, the fact that a solicitor has a restriction on his practice does not show that it was imposed for any reason connected to Ms Christie's concerns about sexual misconduct.

E. The grant of permission to the Upper Tribunal

18. I end with some comments about the First-tier Tribunal's reasoning when it gave Ms Christie permission to appeal to the Upper Tribunal.

19. Permission is a threshold requirement, meaning that once it was satisfied Ms Christie's case passed to the appeal stage. It is not necessary for her to persuade the Upper Tribunal that she should have permission. She has it and that is that. In order to succeed in her appeal, she has to show the Upper Tribunal that the First-tier Tribunal made an error of law under section 12 of the Tribunals, Courts and Enforcement Act 2007, but that is a different matter.

20. Permission was given by the judge who presided at the hearing of the appeal in the First-tier Tribunal. There is no criticism of the practice of referring an application for permission to the presiding judge; that judge may be best placed to understand the application. Nor is there any criticism of the First-tier Tribunal giving permission to appeal; section 11(4)(a) of the 2007 Act gives the tribunal that power.

21. The normal principles for giving permission apply. They were set out in the guidance given by Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538 at 1538-1529:

> 1. The court will only *refuse* leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.
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> 2. The court can *grant* the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.

I will come back to that guidance. Lord Woolf was speaking of an application for permission to appeal to the Court of Appeal, but it is capable of general application and is applied by the Upper Tribunal.

22. In giving permission, the judge wrote:

> 5. The FTT has considered whether to review its impugned decision under rule 43(1) of the Rules the [Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976)], taking into account the overriding objective in rule 2, and has decided not to review its decision because the grounds of application raise arguable points of law in a highly sensitive area of significant public interest and effect (see below) which can be more appropriately dealt with in the Upper Tribunal.
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> 6. [Summarises Ms Christie's grounds of appeal.]
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> 7. As stated in Paragraph 5 above, it is not for the FTT to determine such challenges, and it is accepted by the FTT that the issues herein are sensitive and of significant public interest. If these assertions are found to have appropriate veracity, the UT may be persuaded that any such material, proportionate and justified challenges established therein may have had such a bearing on the outcome and effect of the impugned decision that the FTT have thereby made an error of law. In those circumstances the appellant would have an arguable case and should be allowed an opportunity to make this appeal to present her arguments.

23. I now come back to Lord Woolf's guidance. I like to think that the judge would have expressed himself differently if he had kept that it in mind. Lord Woolf set out two tests. The first test is based on a prediction of the likely success of an appeal. The second test is only needed if the first is not satisfied. It is necessarily more vague. Although Lord Woolf did not use the word, it applies in exceptional cases. If it were otherwise, it would subsume the first test and render it redundant.

24. Looking at the grant of permission through the lens of Lord Woolf's guidance shows confusion between the two tests. The judge refers 'a highly sensitive area of significant public interest and effect', which would be appropriate to the exceptional circumstances test, but then goes on to say that in that context the Upper Tribunal may be able to identify an error of law, which is appropriate to the 'realistic prospect of success' test. In other words, the judge was using the exceptional circumstances ground to give the Upper Tribunal the chance to decide for itself whether there were errors of law, thereby avoiding the need for the First-tier Tribunal to apply the realistic prospect of success test itself. That is not what Lord Woolf envisioned.

25. There is a final point. I mention this just for completeness because the judge got this right by identifying points of law in paragraph 5 of his grant of permission. Although it is possible to give permission to appeal in exceptional circumstances, permission should only be given if the Upper Tribunal would have jurisdiction to deal with it. As the Court of Session explained in *Secretary of State for Work and Pensions v Robertson* [2015] CSIH 82:

> 42. Potentially, the question as to whether the court should entertain this appeal has a number of aspects but, as each of the counsel who appeared before us agreed, irrespective of other considerations, the court can only entertain the appeal if it has power to do so and therefore, the first question to be addressed by the court is one of competency in the sense of its fundamental jurisdiction. If the court does not have jurisdiction the other questions do not arise.
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> 43. The Upper Tribunal is a creature of statute (2007 Act section 3). Accordingly, if a decision made in terms of its statutory power is to be

> challenged by way of appeal (as opposed to judicial review) then provision for such an appeal and, therefore, the powers of the relevant appellate body to hear such an appeal must be found in a statutory measure conferring appellate jurisdiction. The only such statutory measure suggested in the present case is the 2007 Act and, in particular, sections 13 and 14 of that Act. Section 13 (1) delineates the right of appeal conferred by the section as 'a right to appeal to [the Court of Session] on any point of law arising from a decision made by the Upper Tribunal.' Thus, the right is limited to appeal on point of law but it is further limited to point of law 'arising from' a 'decision' made by the Upper Tribunal.

In short, the First-tier Tribunal may give permission to appeal to the Upper Tribunal in exceptional circumstances, but only if the case raises a point of law. That is a jurisdictional requirement imposed by section 11(1) of the 2007 Act, which defines the right of appeal as 'a right to appeal to the Upper Tribunal on any point of law'. In *Robertson*, the Court was concerned with the same language in section 13(1). If the First-tier Tribunal were to give permission in circumstances where the Upper Tribunal would have no jurisdiction, the latter would be required to strike out the proceedings under rule 8(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698).

Authorised for issue on 23 November 2022	**Edward Jacobs Upper Tribunal Judge**