Coombs v Information Commissioner and The Buckinghamshire Grammar Schools
[2023] UKUT 157 (AAC)

IN THE UPPER TRIBUNAL **Case No**. **UA-2022-000677-GIA**
ADMINISTRATIVE APPEALS CHAMBER

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

Between:

James Coombs

Appellant

- v -

Information Commissioner

First Respondent

and

The Buckinghamshire Grammar Schools

Second Respondent

Before: Upper Tribunal Judge Zachary Citron

Decision date: 5 July 2023
Decided on consideration of the papers

Representation:

Appellant:	David Lawson of counsel
First Respondent:	Felicity McMahon and Gemma McNeil-Walsh, both of counsel
Second Respondent:	Stefan Kuppen of counsel

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal under reference EA/2020/0310, made on 22 February 2022, involved the making of an error in point of law.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by a panel of the First-tier Tribunal (General Regulatory Chamber) in accordance with the following directions.

Directions

i. This case is remitted to a freshly constituted panel of the First-tier Tribunal for reconsideration at an oral hearing.

ii. There will be a complete re-hearing of the appeal in all respects except that it shall be taken as a finding of fact that the statistician's report referred to in the requested information was not held by the Second Respondent (or by another person on its behalf) at times relevant to the appeal.

iii. If any party has any further evidence to put before the First-tier Tribunal this should be sent to the First-tier Tribunal within one month of the date on which this decision is issued.

iv. A copy of this decision shall be added to the bundle to be placed before the panel of the First-tier Tribunal hearing the remitted appeal.

v. These directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR THE DECISION

1. References in what follows to

   a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000

   b. the "**FTT**" are to the First-tier Tribunal

   c. the "**FTT decision**" are to the FTT decision under reference EA/2020/0310, issued on 22 February 2022, and dismissing the appeal under s57 of the Appellant ("**Mr Coombs**") against a decision notice (the "**decision notice**") of the First Respondent dated 22 September 2020

   d. numbers in square brackets are to paragraphs of the FTT decision

   e. "**TBGS**" are to the Second Respondent.

2. This is an appeal against the FTT decision, which found that the decision notice was in accordance with the law. The FTT decision followed a hearing on 8 February 2022. Mr Coombs represented himself throughout the FTT proceedings. The First Respondent was not represented at the hearing. TBGS was represented before the FTT by Ms McMahon of counsel. Part of the hearing before the FTT was in "closed session"; when the open session resumed, counsel for TBGS provided Mr Coombs with "a comprehensive and accurate summary of the matters covered" (per [76]). The FTT decision itself was entirely "open".

3. The decision notice related to certain information requested by Mr Coombs from TBGS on 13 October 2019, namely

    a. a copy of the "detailed statistical analysis" referred to in a letter dated 1 October 2019 from TBGS to parents and carers of children who had taken an 11+ test under the auspices of TBGS in which significant errors had been discovered (this was item 1 in the request); and

    b. the following "specific information" if not included in the report above (and following the numbering of items in the decision notice):

        2. the number and nature of the 'subtests' making up the overall assessment (e.g. verbal skills, comprehension, maths/numeracy and non-verbal reasoning)

        3. for each subtest, the number of questions set and reliability when the tests are set and administered without any errors.

        4. specific to the recent errors, for each subtest

            a. the number of questions removed from the assessment and

            b. the revised reliability.

4. The background to this request was, as set out at [3], that there had been errors in the "secondary transfer test" set by TBGS and sat by children on 12 September 2019; and on 1 October 2019, GL Assessment Limited ("**GLAL**"), a third party engaged by TBGS to produce and mark the test, and TBGS had written to parents of children who sat the test, explaining what steps had been taken in the marking of the test to account for the errors.

5. TBGS did not provide items 1, 2, 3 and 4b of Mr Coombs' information request (it disclosed the information at item 4a), citing the exemptions in sections 41 (information provided in confidence) and 43 (commercial interests).

6. The decision notice concluded that TBGS correctly applied s41 and 43(2) to the information it withheld; and that TBGS did not hold the information it confirmed was not held under s1(1)(a).

The Upper Tribunal proceedings

7. Following a hearing on 2 December 2022, I gave permission to appeal on grounds limited to the following arguable errors of law in the FTT decision:

    a. the FTT decision arguably did not adequately explain its finding (i) that TBGS did not hold a report (arguably within item 1 of the information requested) by an independent statistician commissioned by GLAL, and (ii) that GLAL did not hold that report on TBGS's behalf, given the context that the following contemporaneous documentary evidence was before the FTT:

        i. the statement in a letter from GLAL to TBGS of 24 September 2019 (D198 of the open bundle) that GLAL would *be providing TBGS with the report of the independent statistician* appointed by GLAL; and

        ii. statements made in TBGS's letter to parents and carers of 1 October 2019, and in the letter from GLAL to parents and carers that accompanied it, from which, arguably, the inference might reasonably be made that TBGS was given a copy of the independent statistician's report, given the reliance being placed on it in those important communications to parents and carers. In particular,

            1. TBGS's letter (E377 of open bundle) said:

            "Along with this letter is a further letter from [GLAL] explaining what actions have been carried out in order to ensure fair and reliable results for all children. Detailed statistical analysis has been carried out and the solution proposed to and accepted by TBGS is robust. TBGS is confident that the issue has been resolved in a fair manner for all children and that the results for testing are robust. This outcome has been verified by an independent statistician"; and

            2. GLAL's letter (E378-380 of open bundle) contained the following passages:

            "… I am writing with further details about the Secondary Transfer Test and the solution we have agreed with [TBGS], following an independent review and verification".

            "[GLAL]'s statisticians have reviewed the test performance in detail and passed their findings to an independent

> statistician, who has been approved by [TBGS]. Our key findings, which have been independently verified, are outlined below."
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> "It is important to reiterate that the independent statistician has verified that the outcome of the test, without those questions, is still fair for all children, highly reliable and above the accepted conventions for admissions tests."

The arguable error is that, whilst the FTT decision clearly relied on TBGS's witness evidence to support its finding that the statistician's report was not held by TBGS – see [93] and [94] – it needed to explain why it preferred this over contemporaneous documentary evidence and/or inferences that may reasonably be drawn from such evidence (see for example *Gestmin SCPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [15-22] as to the significance of contemporaneous documentary evidence).

b. when considering those items of the requested information which it found *were* held by TBGS (i.e. the items other than item 1) and conducting a public interest balance test relevant to both exemptions under consideration (on the basis, explained at [7], that the exemption under s41, though "absolute" under s2, imported a 'public interest' defence under the general law of breach of confidence), the FTT decision arguably erred in

    i. stating that the evidence to the effect that disclosing these items would give private tutors an unfair advantage, *had not been challenged* (see [97], final sentence) – arguably, it is clear from [77], [78] (third sentence), and [79] (first two sentences), read together, that Mr Coombs *did* challenge the proposition that private tutors would obtain any material advantage from disclosure of at least some of the items; in any event, such challenge is arguably clear from paragraph 26 of Mr Coombs' written closing submissions to the FTT; and, consequently

    ii. inadequately explaining how disclosure of each item (such as, in item 3, the "reliability" and "number of questions" information) would result in that unfair advantage for private tutors: given the challenge from Mr Coombs, it was arguably inadequate for the FTT decision simply to state that it accepted the evidence of TBGS's witnesses (who were, like Mr Coombs, giving their opinion on a matter of which they did not have first-hand knowledge (as tutors) or objective expertise).

> This arguable error, if made out, was material, as the FTT decision assigned "overbearing weight" to the "unfair advantage for private tutors" factor in its public interest balance analysis – see [97], penultimate sentence.
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> c. the FTT decision arguably misdirected itself as to the public interest balance test with regard to actionable breach of confidence: whereas, at [7], the FTT decision cited paragraph 38 of *Evans v IC & ors* [2012] UKUT 313 (AAC), which refers to there being a "public interest balance" under s41 due to the defence of the breach being justified in the public interest, the FTT decision at [100] arguably gives unjustifiable special weight to the public interest in confidence ("*very significant* public interest factors must be present in order to override the *strong* public interest in maintaining confidentiality" – emphasis added). Arguably, the same error spilled over into the FTT decision's public interest balance analysis when considering s43: see [101], final sentence, which refers, in the context of the public interest balance analysis for s43, to the FTT decision's public interest balance analysis for s41.

8. Both respondents considered the appeal suitable for determination "on the papers", and the appellant was content for it to be dealt with in that way. Given these views, and that I had fulsome written submissions from counsel for all three parties, I decided it was fair and just to determine this appeal without a hearing.

9. I am grateful to counsel for their clear and helpful written submissions.

Dicta on adequacy of reasons

10. Grounds a. and b. are that the reasons for the FTT decision were, in particular respects, inadequately explained. It may assist to set out some of the well-known authorities in this area. The underlinings in what follows are mine, indicating guidance I consider most helpful to resolution of this appeal.

11. In *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, concerning reasons given by an arbitrator under agricultural holdings legislation, Megaw J said (at 478):

> Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons that will not only be intelligible, but which deal with the substantial points that have been raised.

12. In *English v Emery Reimbold & Strick Ltd* [2002] ECWA Civ 605, the Court of Appeal said at [17]: "As to adequacy of reasons, as has been said many times, this depends on the nature of the case". The court approved *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 AER 119, 122 in which Griffiths LJ had

stressed that there was no duty on a judge in giving his reasons to deal with every argument presented to him. It then said at [19]:

> ... if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.

13. The court concluded that section of the judgement thus, at [21]:

> When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision.

14. In the context of planning, Lord Brown of Eaton-under-Heywood summarised the effect of case law in *South Bucks DC v Porter* (*No.2*) [2004] UKHL 33 [2004] (at [36]):

> The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters [which contain statements of reasons] must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only

> succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

15. Even when reasons are plainly flawed, a decision will not necessarily be set aside. Referring to a decision of a reviewing officer as to whether a homeless person had a priority need for housing, Lord Neuberger said in *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7 at [51]:

> . . . a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed.

16. The respondents cited *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19 at [25], which said (at [25]):

> It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.

17. The respondents also cited *Procter & Gamble UK v HMRC* [2009] EWCA Civ 407 at [19]:

> … All that is required is that 'the judgment must enable the appellate court to understand why the judge reached his decision' (per Lord Phillips MR in *English v Emery Reimbold & Strick …*) and that the decision 'must contain …a summary of the Tribunal's basic factual conclusion and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts' (per Thomas Bingham MR in *Meek v City of Birmingham District Council* [1987] IRLR 250). It is quite clear how this tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told 'why they have won or lost' (see para 8).

18. *Davies v Information Commissioner and Cabinet Office* [2020] AACR 2 at [16-18] discussed adequacy of reasons in the context of the FTT's closed material procedure:

> 16. The adoption of a closed procedure does not diminish the fundamental obligation of a tribunal to give adequate reasons, meaning that they "must

> enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'.": *South Bucks District Council v Porter (No.2)* [2004] UKHL 33 [2004]; 1 WLR 1953 at [36]. Adequate reasons perform a number of important functions. They enable the parties to understand why one has won and the other has lost; they impose a discipline on the court or tribunal in focussing on relevant issues and ensuring that its decision is sound; and they enable a person affected by a decision or the appellate court or tribunal to judge whether the decision is lawful.
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> 17. In *Browning [v Information Commissioner* [2014] EWCA Civ 1050] Maurice Kay LJ said at [35] that, following a closed procedure a tribunal is under a duty to adopt maximum possible candour when writing the reasoned decision. This will include being told "at least whether, and as far as reasonably possible without giving the content of the material away, to what extent, the material made a difference": *Amin v Information Commissioner and DECC* [2015] UKUT 0527 (AAC) at [80]. As Upper Tribunal Judge Turnbull said later in that same decision, if the tribunal is able to explain its decision without making use of closed reasons, so much the better. <u>But if the decision cannot be explained adequately without giving closed reasons, the tribunal must do so rather than risk its decision being held to be wrong in law for inadequate reasons</u>. Providing closed reasons will not assist in the parties who have been excluded from the closed hearing or third parties understanding the result. But they will assist in fulfilling the other two functions of reasons which we have set out above: assisting the tribunal to reach the right decision and enabling the appellate court or tribunal to identify whether the decision contains an error of law.
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> 18. It follows that, even though the whole of the reasons may not be open, the required standard of reasons in a closed procedure case is no lower than that required in any other case.

Ground a.

19. The relevance of ground a. to the matter before the FTT – whether the decision notice was correct in law – is that the right of access to information, in s1, applies to information "held" by public authorities. By s3(2)(b), information is held by a public authority including where another person holds it on the authority's behalf.

20. The findings of the FTT relevant to ground a. are those at [93] and [94] that, at relevant times

    a. TBGS did not hold the statistician's report or any analysis done by GLAL

    b. GLAL did not hold the statistician's report on behalf of TBGS

    c. TBGS had no right to obtain a copy of the statistician's report.

21. The FTT decision stated that the findings at [93] and [94] were made "on the evidence".

22. The submissions of TBGS on ground a., in brief, were that none of the three letters referred to in the ground (those of 24 September and 1 October 2019) stated that the report of the independent statistician *had been* given by GLAL to TBGS (the closest they came was the first of these letters, which stated that *subsequently* that report *would be* so given). There was therefore, in the context of the FTT decision's other findings on the subject (which the submissions reviewed in detail), no error of law, in the form of inadequate explanation of how the FTT concluded that TBGS did not hold this document.

23. The appellant's submissions on ground a. were that the findings at [93] and [94] were inadequately explained in the context of

    a. the letter from GLAL to TBGS of 24 September 2019 stating that the report of the independent statistician *would* be sent to GLAL; and

    b. statements in the witness statement of Ms Walton (per [62], a consultant employed by TBGS) of 20 October 2021 (at paragraphs 24-25) that

        i. TBGS had required GLAL to obtain independent verification of any solutions proposed;

        ii. GLAL confirmed to TBGS that this had happened;

        iii. TBGS had asked for this confirmation to be put in writing as TBGS knew it would be required as part of the evidence the grammar schools would need to put together for school admission appeals; and

        iv. TBGS had no right to see the independent statistician's report but could request it.

24. It is clear from [93] and [94] that the evidence on which the FTT relied for these findings was that of Ms Walton and Mr Hilton (head of admissions testing at GLAL), whom the FTT found (at [85]) to be "competent credible and reliable". In that regard I note (and the underlinings in what follows are mine)

    a. paragraph 18 of Ms Walton's 31 March 2021 witness statement, which says (immediately after referring to the 24 September 2019 letter from GLAL to TBGS):

        > "in the event TBGS was only ever supplied with the Powerpoint presentation and the letter – <u>[GLAL] at no point provided us with the report or any other information</u>"

b. paragraph 18 of Mr Hilton's 31 March 2021 witness statement, which says (also with reference to the 24 September 2019 letter):

> "For clarity's sake, I can confirm that whilst the letter refers to the intended disclosure of a statistician's report, [GLAL] decided not to disclose the report as [GLAL] believed the PowerPoint presentation contained adequate information for TBGS' purposes."

25. The question of whether TBGS itself held the statistician's report is a straightforward question of fact, and one within the direct knowledge and experience of witnesses whom the FTT found to be credible and reliable. It is reasonably clear, in context, that the FTT accepted the witnesses' specific evidence cited above, that there was a change of heart on GLAL's part following the 24 September 2019 letter as regards giving the statistician's report to TBGS - and it decided not do so. It was adequate in the circumstances for the FTT decision to have summarised the witnesses' evidence, given its view on their credibility and reliability, and then stated that, based on this evidence, it made this finding.

26. The finding that GLAL did not hold the statistician's report on behalf of TBGS is also, to a large extent, based on evidence of Ms Walton and Mr Hilton as witnesses of facts within their direct experience – what the understanding was between the two entities, TBGS and GLAL, at the relevant time – as well as the contemporaneous documentation. At [69], the FTT decision summarised the evidence of Ms Walton that was in paragraphs 24-25 of her 20 October 2021 witness statement, cited by the appellant in his submissions (see paragraph 23 above), and stated:

> "Ms Walton also confirmed that under the terms of the agreement [with GLAL] TBGS does not have a right to request or see a copy of the internal analyses undertaken by GLAL nor reports prepared by independent statisticians. While TBGS could make a request, GLAL has no obligation to release such information".

27. In this context, including the fact that none of the letters cited in ground a. state that the statistician's report was held by GLAL on behalf of TBGS, the FTT's explanation of its finding to that effect, was adequate: it was a finding of fact based largely on the direct knowledge of witnesses deemed to be credible and reliable; and there was no contemporaneous documentary expressly to the contrary.

28. For these reasons, ground a. is not made out.

Ground b.

29. Ground b. relates to the public interest balance test that the FTT (rightly) undertook when considering both sections relevant to whether the requested information was exempt information. The public interest balance test is "in-built" to s43 (commercial interests), as s43 does not confer absolute exemption, and so s2(2)(b) applies. As the FTT decision stated at [7], s41 (information provided in confidence) *does* confer absolute exemption but

    a. for the exemption to apply, disclosure of the information must constitute an actionable breach of confidence; and

    b. overriding public interest in disclosure is a defence to an action for breach of confidentiality.

30. The FTT decision gave conclusions on the public interest balance test at [97], [99] and [100] – it was s41 being considered at this point in the decision but the same analysis is imported into the s43 analysis, at [101], last two sentences. Those paragraphs read as follows:

> [97] Clearly there is a public interest in scrutiny of the administration of entrance tests. We also agree that there is a public interest in knowing how pupils who sat the test were affected by errors in it. However, as the Appellant has argued "that no one knew how each child was impacted or how long it took to contact the schools involved" – it is therefore difficult to assess what weight might be given to this in the Public Interest test. The evidence of Ms Walton suggests there was overall satisfaction with the final outcome, suggesting little weight, if any, in disclosure. We accept this on the evidence before us. In any event we must consider the overbearing weight to be given to the significant edge to those pupils receiving tuition, were the withheld information to provide private tutors with such an unfair advantage as has been so clearly identified by the witnesses at this hearing. We unreservedly accept this evidence, which, in any event has not been challenged.
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> …
>
> [99] As argued by TBGS, there is an important general public interest in maintaining the integrity and fairness of the test and ensuring, so far as possible, that pupils who can access private tutoring are not at an advantage over those that cannot. We accept the evidence in this regard.
>
> [100] In terms of the FOIA generally, and as the Commissioner acknowledged, there is a public interest in openness and accountability surrounding 11 plus testing. However, there is also a wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. As decisions taken by the Courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, in relation to matters such as misconduct, illegality or gross immorality for example. This is not a case where such matters as outlined above arise

> however. The Tribunal finds that the balance in this case clearly favours non-disclosure.

31. Consideration of ground b. can be broken down as follows:

    a. what was the evidence before the FTT as regards what is referred to in [97] as "the significant edge to those pupils receiving tuition" (and which I will refer to as "**'tutors' advantage'**")

    b. was that evidence challenged?

    c. in the context of the answers to the questions above, did the FTT decision adequately explain why "overbearing weight" was to be given to 'tutors' advantage' in the public interest balance test?

What was the evidence of 'tutors' advantage'?

32. At [72], the FTT decision recorded Ms Walton's oral evidence that the "detail" of the requested information "would give Tutors an advantage and their clients would benefit from this unfair advantage"; and that the number of questions had always been kept from the wider public knowledge for good reasons - as it would greatly assist private tutors and give their client pupils an unfair advantage.

33. [72] also records Mr Hilton's oral evidence that the number of questions needed to be kept out of public domain, as those concerned could by means of reverse engineering provide commercially sensitive information; which would provide an unfair advantage to private tutors.

34. [73] states that "the evidence before [the FTT]" was that 10 year olds (i.e. those sitting the tests) would be unlikely to be able to work out number of questions in the test; it also records Mr Coombs as disagreeing, and supporting his position by reference to an earlier FTT decision (*Reading School v IC* EA/2013/0257) (which, as the FTT decision said, was decided on its own facts and was not binding on it).

35. Paragraphs 21-23 of Mr Hilton's 31 March 2021 witness statement explained 'tutors' advantage' thus:

> 21. If the number of items per section and completion rates of sections were publicly known, then tutors would be able to create targeted materials to coach students based on this information. This is because tutors could ascertain insight into which point in the test do students generally drop off in terms of completion. If, for example, they see that most students drop off completion at question X, they could advise their students to guess the answers from that point in the test if they are short of time because other students won't have answered those questions at all. This creates an unfair advantage.

> 22. If the mean raw scores were widely known, then tutors would use this information to coach students to aim for a certain raw score mark. This would show tutors how difficult the test is, thereby giving them a framework for coaching students.
>
> 23. The reliability figures are strongly affected by the number of items in any given test, so if this information was in the public domain, this information could also be used by tutors to predict the number of items in a test, which, as described above, would help tutors coach students towards an optimal raw mark.

36. Paragraph 36 added:

> There is a legitimate concern (as highlighted above) that the information requested about the test (and contained in the PowerPoint presentation) could, if disclosed to the public, be used to ascertain which areas of the test to give more focus to when preparing children to take future tests in order to maximise marks. This would be particularly advantageous for 11+ tutoring organisations, and those children whose parents can afford to engage those tutors.

37. Counsel's note of Mr Hilton's evidence in "closed session" said:

> Q: Why would it benefit tutors?
>
> Mr Hilton responded that in giving information about completion rates, the information also gives the number of questions. This would show where candidates tailed off and tutors could tell students from where to guess the rest if time is low. It would enable coaching techniques to be used
>
> Further, if one has a good foundation in statistics one could deduce the number of questions from the completion rates

38. Ms Walton's 31 March 2021 witness statement said this:

> "24. As part of their work tutors try and work out as much as they can about the [test] so that they can tailor their approach to what may be in the test to benefit the children that are being tutored. So, the types of question being asked are of interest for example. Other information such as the number of questions in the test or in a particular section is also useful as tutors can then get children to practise answering a fixed number of questions in a given time frame. Although tutoring is widely available, many children do not have tutoring and many families cannot afford the costs involved. The test must be fair to all children and children from poorer families should not be disadvantaged. It is therefore really important that details about the content and construction of the test are kept confidential to minimise any advantage of tutoring. Test materials are delivered to test centres securely and are stored securely during and after testing before being returned to GL Assessment where they are pulped. Additionally, all

> involved in testing agree to not discuss the test. Children are also told not to do so at the end of the test.
>
> …
>
> 26. The number of questions in each test paper and section is not published. Claims by Mr Coombs and others that this information is known are incorrect as evidenced by the inaccurate numbers of questions that they claim are in our test. The way our test papers are numbered also means that children would have to count up the number of questions in each section of each paper manually and then remember the total. This is highly unlikely and also assumes that children have time to spare at the end of the test paper. At the end of the test children are also specifically told: You are not allowed to discuss the test questions with anyone once you have left the room. Test centres are similarly required to agree to keep the test materials confidential at all times."

39. I take from the foregoing that following can be said of the evidence before the FTT of 'tutors' advantage'

    a. the evidence for 'tutors' advantage' was that of Mr Hilton and Ms Walton;

    b. the evidence was that the advantage was derived from tutors discovering (as result of disclosure of the requested information) the number of questions in the test;

    c. the FTT decision did not itself explain *how* knowledge of the number of questions in a test gave rise to 'tutors' advantage', but, on looking at the evidence before the FTT, one finds the following explanation of how the advantage was said to arise:

        i. per Mr Hilton, the advantage would arise by tutors coaching candidates that, after reaching question number X (being the question after which candidates started to "tail off" – and could only be ascertained if the number of questions was known), they should (if short of time) start to rapidly answer (i.e. guess) the remaining questions (the tests appear, from evidence in the FTT's open bundle, to be "multiple choice");

        ii. per Ms Walton, the advantage would arise by tutors getting children to practice answering a fixed number of questions in a given time frame.

Was the evidence of 'tutors' advantage' challenged?

40. [78] records Mr Coombs' arguments that

a. Mr Hilton's evidence was contrary to Ms Walton's evidence that test candidates were "incapable of recalling how many questions were in a test", and

b. if tutors wanted to know how many questions were in a test, they could simply ask candidates who had sat the test,

as well as Mr Coombs' request that Mr Hilton's evidence be "disregarded".

41. [78] falls within the section of the FTT decision headed "Appellant's Closing Submissions". It was based on the following paragraphs of Mr Coombs' written closing submissions:

> 22. Knowing the number of questions candidates need to complete is of no benefit to tutors but is directly related to reliability. In a multiple-choice questions, one answer is always correct. Therefore, a random guess has a one in five probability of being correct. Candidates are always instructed to keep careful note of the time and in the last minute complete any remaining questions by guessing.
>
> 23. Mr Hilton's evidence was that some children fail to complete the test. He provided no evidence that the individuals who failed to complete the test were tutored and yet were unaware that they could gain, on average 20% marks in the sections they did not complete. He argued there exist tutors unaware of the simple and effective tactic of guessing any remaining questions during the last minute and that these tutors could use drop off rates as the basis of coaching children to start guessing after completing a given number of questions [H486 PDF502 §21]. This conflicted with Miss Walton's evidence that these children were incapable of even recalling how many questions there were in the test.
>
> 24. Mr Hilton claimed that if the test reliability was disclosed that tutors could use this to reverse engineer the number of questions in the test. This is true, however an indication of the complexity of calculating this can be found in the appendix to my submission [A69 PDF78]. If knowing the number of questions was of any benefit to tutors, they would simply ask someone who took the test to provide this.
>
> 25. Mr Hilton also said that information about the completion rates could be used to work out which question number to start guessing from, instead of the tried and tested method (which from personal experience I can date back to the 1970s) to guess all outstanding questions during the final minute or two of the test.
>
> 26. In summary, Mr Hilton's suggestions as to how tutors could benefit from disclosure of any of the information contained in the detailed statistical analysis, or the PowerPoint presentation summarising it amount to the sort of cunning plan one would expect from the character Baldrick in Black Adder and should be discounted accordingly.

42. It is clear from the foregoing that Mr Coombs *did* challenge the evidence of 'tutors' advantage'. He challenged the advantage as explained by Mr Hilton by saying that the strategy posited

    a. would not work if (as Ms Walton's evidence suggested, and as the FTT appeared to accept at [73]) candidates would not know what question "number" they had reached (because the questions were designed to obscure this – see paragraph 26 of Ms Walton's 31 March 2021 witness statement, quoted at paragraph 38 above); and

    b. boiled down to what Mr Coombs said was a well-known tactic of advising candidates to guess the remaining questions once time ran short (for which knowledge of the number of questions in the test was not required).

    Mr Coombs more generally challenged the proposition that tutors knowing the number of questions in a test would give rise to any material advantage for tutored candidates; he reasoned that this was intuitively unlikely as it was something tutors could ask their pupils to tell them after they had taken the test (despite Ms Walton's evidence about this being discouraged – again, see paragraph 26 of her 31 March 2021 witness statement).

Did the FTT decision adequately explain why "overbearing weight" was to be given to 'tutors' advantage' in the public interest balance test?

43. It seems clear that

    a. the FTT decision made a factual finding (the "**'tutors' advantage' finding**") that 'tutors' advantage' would arise as a result of disclosure of the requested information

    b. that finding was based on the evidence of Mr Hilton and Ms Walton, which the FTT regarded as consistent and compelling

    c. that evidence was challenged by Mr Coombs in terms that were rational and intelligible (if not necessarily correct)

    d. the 'tutors' advantage' finding was material to the outcome of the FTT decision's public interest balance test, given

        i. that the FTT decision considered 'tutors' advantage' to be contrary to the public interest (because it unfairly advantaged those who could afford tutors); and

        ii. the reference at [97] to the "overbearing weight to be given" to the "significant edge" to pupils receiving tuition, that would result from disclosure providing private tutors

with "such an unfair advantage as has been so clearly identified by the witnesses" at the hearing.

44. In this situation, the dicta about "adequacy of reasons" cited above indicate that the FTT decision needed to explain why it rejected Mr Coombs' challenge to the evidence of 'tutors' advantage', unless its reasons for doing so were reasonably obvious from the context of the FTT decision as whole.

45. The FTT decision did not expressly provide such an explanation; but it did make clear its assessment of Mr Hilton and Ms Walton as competent, credible, reliable and well versed in the subjects that had to be addressed. I will therefore consider:

    a. whether it is reasonably obvious from the context as to why the FTT decision rejected Mr Coombs' challenge to 'tutors' advantage'; and, if not

    b. whether reference to the reliability and credibility of Mr Hilton and Ms Walton is, in the context of this case, adequate explanation of the 'tutors' advantage' finding.

Reasonably obvious from context why Mr Coombs' challenge rejected?

46. It is not at all obvious why the FTT decision rejected Mr Coombs' challenge to 'tutors' advantage' as that advantage is explained in some detail in Mr Hilton's evidence; namely, how could tutors instruct candidates to adopt a strategy when they reached question number X, when the test was designed to obscure the numbering of the questions?; and, in any case, how did that strategy differ, materially, from a simple strategy of guessing the remainder of the questions when time grew short (which would not require knowledge of the number of questions in the test)?

47. I note that, in Ms Walton's evidence, the explanation of how 'tutors' advantage' would arise is less detailed and in somewhat different terms (it was said to arise by tutors getting children to practice answering a fixed number of questions in a given time frame). However, it is far from obvious that the FTT considered that Ms Walton's version of 'tutors' advantage' withstood Mr Coombs' challenge in a way that Mr Hilton's version did not: it is clear that the FTT regarded the evidence of Mr Hilton and Ms Walton as consistent. In any case, Mr Coombs' more general challenge to the proposition that tutors knowing the number of questions in a test would give rise to any material advantage for their pupils, applies equally to Ms Walton's version of 'tutors' advantage' (in part because, following disclosure, *all* candidates, not just tutored ones, would know the number of questions in the test, and could "practice" in the way posited by Ms Walton).

Reliability and credibility of witnesses - adequate explanation of the 'tutors' advantage' finding?

48. As the court said in *English v Emery Reimbold & Strick* at [21] (cited above), there may be situations where critical issues of fact *can* be explained adequately by saying one witness was preferred to another because, say, that witness' memory was clearly better (and, indeed, that line of authority supports my dismissing ground a. in this case). However, the 'tutors' advantage' finding is not one that can be explained adequately in this way, since:

    a. the evidence about 'tutors' advantage' was evidence in the form of reasoned opinion about what may happen in the future – in contrast to, say, evidence of something of which Mr Hilton or Ms Walton had sensory experience (i.e. they heard it or saw it) (and that Mr Coombs had not);

    b. the topic about which opinion was being expressed by the witnesses – what would be the likely effect on tutors and their pupils of disclosure of the requested information – was not one in which any of the witnesses (Mr Hilton, Ms Walton, or indeed Mr Coombs) had specific specialism – none of them was a tutor, or an expert in the tutoring business; Ms Walton and Mr Hilton were in businesses in the same area as that of tutors (i.e. education) but it was not a topic so specialised or technical that a "layman" (like Mr Coombs) could not have a rational and intelligible opinion;

    c. Mr Coombs' challenges to the opinions of Mr Hilton and Ms Walton were rational and intelligible – whether or not they were correct.

Relevance of "closed session" information?

49. TBGS's submissions made the point that the FTT had the "advantage" (over Mr Coombs) of having sight of the withheld information, including the structure and number of questions on the test. It was submitted that, from this, the TBGS witnesses were able to explain to the FTT how the items of information would benefit tutors. It was submitted that, as the FTT had the benefit of this knowledge (in the closed bundle), it was well able to test and understand the position, whilst having both parties' contentions in mind.

50. These submissions do not, to my mind, "help", "excuse" or "mitigate" any inadequacy of reasons in the FTT decision. As was said in *Davies* (see paragraph 18 above), the required standard of reasons in a closed procedure case is no lower than that required in any other case.

Materiality of the 'tutors' advantage' finding?

51. TBGS made a further submission that appeared to say that because the 'tutors' advantage' finding weighed on the same side of the public interest balance as the public interest in the maintenance of confidences, it was not

relevant, or materially relevant, if the FTT decision erred in relation to 'tutors' advantage'. I do not accept such a submission: the FTT decision recognised one or more factors weighing in the public interest balance in favour of disclosure (see at [97]) and then found that the 'tutors' advantage' factor carried "overbearing weight". If one removes the 'tutors' advantage' factor from the balance (on grounds that it was inadequately explained and so represented an error of law), the overall public interest balance is, clearly, materially changed.

Conclusion on ground b.

52. It follows that ground b. has been made out: the FTT decision erred in law in not adequately explaining why it rejected Mr Coombs' challenge to the evidence of 'tutors' advantage'. The error was material in that the FTT found 'tutors' advantage' to be decisive in conducting the public interest balance test. Although the foundation for conducting a public interest balance test is different as between sections 41 and 43, the FTT essentially relied on its s41 public interest balance test in conducting that test for s43 (see [101], final sentence); hence the error of law affects the FTT's decision with regard to both exemptions.

Disposal

53. It follows from my conclusion on ground b. that the FTT decision falls to be set aside. As to whether this tribunal should remit the case to the FTT for reconsideration, or re-make the decision, it seems to me that on the issue on which I have found the FTT decision erred – broadly, the application of the exemptions in s41 and s43 and, specifically, the weight to be put on 'tutors' advantage' in the public interest balance test – the decision-making tribunal will need to hear, assess and weigh up all the evidence. An appropriate panel of the specialist and fact-finding tribunal looking at the case afresh is best-positioned for this. I therefore decline to remake the decision and have directed a rehearing before the FTT.

54. In the light of this, it is unnecessary for me to determine ground c.; the issue raised in ground c. will be subsumed in matters considered at the remitted hearing.

55. In contrast, ground a. is a distinct issue to the one in which I have found there to be an error of law and, given my conclusions on it above, it will not be necessary to revisit the question of whether TBGS held the statistician's report; I have accordingly made direction ii. on the terms set out above.

Zachary Citron
Judge of the Upper Tribunal

Authorised for issue 5 July 2023