



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2010/0056

BETWEEN

ROB EDWARDS

Appellant

AND

INFORMATION COMMISSIONER

Respondent

AND

MINISTRY OF DEFENCE

Additional Party

DECISION ON APPLICATION TO STRIKE OUT

Introduction

1. This is a judgment which deals with an application to strike out an Appellant's notice of appeal under the Tribunal's rules on the ground that the notice fails to disclose a reasonable prospect of success.
2. The appeal is of some age and prior to what can be seen as a recent effective disposal of the appeal at least as to its main elements by virtue of disclosure in answer to the request made, it has engaged the Tribunal in a number of prior detailed decisions and rulings. Admittedly the latter reflected the

apparent complexity of the subject matter of the appeal. However, the Tribunal has remained sensitive at all times to the need to abide by the overriding objective again as expressed in its rules.

Summary of findings

3. The Tribunal finds that the request which forms the basis of the appeal has now in effect been dealt with. In the words of the Information Commissioner (the Commissioner) and of the Additional Party this has rendered the appeal academic. The Tribunal respectfully agrees that prior to the disclosure that has now taken place the only issue raised by the Notice of Appeal was whether the public interest in maintaining the applicability of a particular qualified exemption outweighed any public interest in disclosure.
4. In the wake of the recent disclosure, the Additional Party indicated that it would be appropriate for the Appellant to confirm that the appeal would be formally withdrawn. Alternatively, an application to strike out would be made.
5. Despite the above indication advanced by the Additional Party, the Appellant subsequently refused to withdraw its appeal. The grounds on which he has done so have been described in the recent exchanges as Reason 1 and Reason 2. It is enough to say at this point that Reason 1 took issue with the way in which the Commissioner had carried out his statutory obligations whilst Reason 2 reflected outstanding queries over the information which remained withheld but outside the scope of the appeal. The Tribunal finds that neither of these Reasons constitutes a proper ground for justifying a continuation of the appeal and in the circumstances accedes to the application made by the Commissioner and the Additional Party that the appeal be struck out.

Background

6. The Appellant made a request to the Additional Party for several reports relating to the safety of nuclear weapons. Initially the Additional Party responded by disclosing redacted versions of the reports. Reliance was placed initially on the exemptions set out in section 24(1), section 26(1)(a) and (b), section 27(1)(a) and section 36(2)(b)(i) of the Freedom of Information Act 2000 (FOIA). The only real issue was to what extent the last mentioned

exemption which deals with the free and frank provision of advice was properly engaged and to what extent.

7. The Appellant submitted a Notice of Appeal dated 2 March 2010. The Grounds of Appeal took issue with the initial response submitted by the Additional Party that the initial withholding of the information requested was justified on the basis that the regulators in question “would be dissuaded from giving frank opinions on the departments or activities they are regulating if the information were to be disclosed.” The Grounds went on to say that the Appellant found it “difficult to accept that it is in the public interest to withhold all such comments” for a number of stated reasons which need not be set out here. In effect the grounds advanced in six enumerated paragraphs went to allege that the public interest militated in favour of disclosure for the various reasons there set out. The Decision Notice had addressed the public interest arguments pertaining to section 36(2)(b) and had determined that some information nonetheless was suitable for disclosure.
8. In the Commissioner’s Response to the Grounds of Appeal the Commissioner identified two grounds which comprised the appeal. The first has already been alluded to and went to the question of whether the public interest in maintaining the exemption under section 36(2)(b)(i) outweighed the public interest in disclosure. The second ground was simply put on the basis that with regard to section 27(1) of FOIA which deals with international relations, the reason for withholding information was in the words of the notice of appeal “baffling”.
9. As to the first ground it necessarily followed as the Commissioner pointed out that the Appellant did not seek to challenge the Commissioner’s earlier finding in the Decision Notice that section 36(2)(b)(i) had actually been engaged. What was in issue was the application of the public interest elements. In his Response the Commissioner maintained that the grounds for finding that the public interest militated against disclosure were amply set out in the Decision Notice given all the circumstances existing at the time of the request and that there were no grounds for upsetting the finding on that score. As to the second ground it was simply dismissed as not constituting on any basis a

valid ground of appeal. Nothing need be said further about this second ground.

10. As indicated in the preceding section of this ruling the Commissioner and the Additional Party have together agreed that disclosure has now been made in circumstances where previously it had been refused. It necessarily follows that the sole issue which would have been considered by this Tribunal on a full hearing would have been whether the qualified exemption in section 36(2)(b)(i) as invoked by the Additional Party at the date of the request was outweighed by any public interest in disclosure. As put by the Additional Party by its solicitor in an email of 6 October 2010, the Additional Party had previously explained why it considered that disclosure was not warranted. The Commissioner effectively accepted that decision after conducting his own scrutiny and assessment of the case and in issuing the Decision Notice as well as in defending the appeal.
11. As occasionally happens the public authority, here the Additional Party, took the opportunity to consider whether or not it was appropriate to continue to withhold the information under that exemption. It therefore decided to release the information previously withheld and in due course sent copies of the withheld information to the Appellant under separate cover. This was done at the beginning and towards the middle of October 2010.
12. Part of the information disclosed in the wake of this exercise was itself redacted. The redaction took place on the basis of the applicability of sections 24, 26 and/or 27 of FOIA. However, the Additional Party formally confirmed that no information was being withheld within the scope of the Appellant's appeal, ie on the grounds of section 36 and in the words of an email to the Appellant of 13 October 2010 "... it is not [the Additional Party's] intention now to withhold information on section 24, 26 or 27 grounds where this information has previously been released."
13. However, the Appellant continued to seek an indication as to which qualified exemptions had been applied to specific sections of the redacted text but the Additional Party responded that it was not prepared to provide a detailed section by section explanation as to why specific exemptions applied to specific

extracts. This was because in a number of cases an explanation of the application of a specific exemption to a specific portion of text “would cause the same prejudice to arise as if the information itself were disclosed.” In any event it was clear that what was done by way of redaction fell outside the scope and terms of the Decision Notice and of the Notice of Appeal.

14. In a considered response the Appellant by email dated 18 October 2010 wrote to the Tribunal and to the parties setting out why he did not view his appeal as having now been rendered “academic”. He stated:

“My appeal was against the decision of the Information Commissioner to endorse the case for secrecy made by the [the Additional Party]. The witness statements I submitted showed that there had been inconsistencies, errors and omissions in the handling of my request by the Information Commissioner and the [Additional Party]. The fact that the [Additional Party] reversed its position at the eleventh hour and released information it had been withholding for three years does not render that appeal redundant: on the contrary it reinforces the arguments I have been making about the flaws in the process. If there is no appeal, the serious accusations made against the Information Commissioner and the [Additional Party] will go unanswered, and they will not be held to account for the way they handled my request for information”.

15. In the remainder of that email the Appellant said that he had yet to receive a final version of the information promised by the Additional Party. He also reiterated the fact that he had made a request for an indication of what qualified exemptions under FOIA had been applied to specific sections, the same request being “necessary in order to help me determine if the disclosure complies with the undertakings given” by the Additional Party’s solicitors. For these reasons he was not withdrawing his appeal.

16. The Commissioner responded to these exchanges by characterising the two reasons advanced by the Appellant as follows. As to the first which has been ie Reason 1, the reason in question was described as being because the Appellant’s “serious accusations” made against the Commissioner and the Additional Party would “[otherwise] go unanswered”. The second reason called Reason 2 was that the information provided included redacted

paragraphs which were not originally redacted and the Additional Party had not specified which exemptions applied.

17. As to the first of these reasons the Commissioner had stated that he remained of the view that the Decision Notice was correct. Moreover, in accordance with a recent strike out ruling in this Tribunal, namely *Swain v Information Commissioner* (EA/2010/0026) particularly at paragraph 10 the Tribunal noted that he did not have jurisdiction “to monitor or influence” the way in which the Commissioner carries out his statutory obligations or the way in which public authorities carry out their duties under FOIA. The Commissioner therefore contended that Reason 1 was not a reason as to why the appeal should not be struck out. As to the second reason the Commissioner agreed that there were several queries which he, ie the Commissioner, also wanted the Additional Party to clarify as to the information which was still withheld.
18. The Tribunal's rules are the Tribunal Procedure (First-Tier Tribunal) (GRC) Rules 2009 (the “Rules”). Under Rule 8(4) the Tribunal may not strike out proceedings under the Rule “without first giving the appellant an opportunity to make representations in relation to the proposed striking out.” By an email sent to the parties of 11 November 2010 the Tribunal indicated that it had provisionally come to the conclusion that it was minded to accede to the application subject to the undoubted right of the Appellant to make submissions in relation thereto.
19. By this stage the Appellant had indicated that the information, albeit redacted, had previously been released to him. The Additional Party subsequently confirmed that this arose from what it called “an administrative error”. As at 21 October 2010 it stated that it was in the process of “producing revised versions consolidating all of the information provided to [the Appellant] for ease of reference”. It therefore submitted that bearing in mind the overriding objective it was in the circumstances “disproportionate for the appeal to proceed”. Subsequently by email dated 10 November 2010 the Additional Party confirmed to the other parties which exemptions applied to different documents which had been the subject of the redactions made to the disclosed material. It further reminded the parties that the Appellant's appeal

was “focused solely on the application of section 36” and repeated its contention which had previously been made that to have revealed how the redactions “had been applied under the terms of the Act” would “in certain cases reveal some of the information that was being withheld”. In a further exchange dated 24 November 2010 the Respondent submitted his contentions in accordance with the Tribunal’s rules as to why his appeal should not be struck out. In paragraph 4 he stated the following, namely:

“4. I strongly disagree because I believe that the disclosures clearly demonstrate that Section 36(2)(b)(i) of the Freedom of Information Act 2000 has been engaged inconsistently and incorrectly, and that the Respondent’s decision that the qualified person’s opinion was reasonable in substance was both incorrect and inappropriate.”

He went on to say:

“5. The subsequent disclosure of the disputed information by the [Additional Party] is not a right that corrects a wrong, nor does it render my appeal academic. The wrong here does not arise from the [Additional Party’s] conduct and manner in which it responded to my original request but, quite distinct from this, the wrong is the flawed and incorrect decision of the Respondent.”

20. In paragraphs 6 and 7 he took issue with the applicability of the Swain decision above referred to. He claimed that the Swain decision centred upon his dissatisfaction with the format in which the disclosed information had been provided (ie paper or electronic copy). “With respect to Mr Swain, the basis of my original complaint was much more fundamental. It relates to the Respondent’s endorsement of the case for secrecy made by the [Additional Party] and, moreover, it raises germane issues about the relationships between the public authority, the Information Commissioner and the proper administration of the Act”.
21. With respect to the Appellant he was being given an opportunity to respond to the present application and it is extremely difficult, if not impossible, to follow what he says in paragraph 5 of his recent exchange as quoted above, save with his taking issue in general terms with what is said to be a “flawed and

incorrect decision” of the Commissioner which of itself takes the matter no further. It simply repeats a global complaint about the correctness or otherwise of the Decision Notice. In any event, as the Commissioner has recently pointed out, as the appeal stands even if the matter went to appeal, the Tribunal would no longer be considering the issue of whether section 36(2)(b)(i) was engaged.

22. As to the second ground, ie Reason 2, again with great respect, simply to contend that the Commissioner has “endorsed” in some way “the case for secrecy made by the [Additional Party]” and to make it generalised allegations that the appeal in this case raises “germane issues” about the relationships between the parties as to the administration of the FOIA again does nothing to elucidate any such grounds as may still be extant. Again as the Commissioner has rightly noted, this reason is in effect entirely speculative.
23. The Tribunal sees nothing in what is said by the Appellant as justifying the continuation of this appeal and in particular nothing which suggests that in the light of the disclosure that has now been made any prospects, let alone any reasonable prospects which may be said to exist to justify the contention that the appeal has any chance of success.
24. In any event quite apart from the merits or demerits of the appeal insofar as any grounds remain the Tribunal has an overriding obligation to ensure that a case is dealt with “fairly and justly” within the meaning of rule 2 of its Rules. Rule 2(2) itemises those matters that the Tribunal should take into account. Rule 2(2)(a) and (e) deal respectively with a series of obligations on the Tribunal to consider whether a case should be dealt with in a proportionate manner, given, in particular, anticipated costs, and the resources of the parties. The last mentioned sub sub section deals with the need to consider whether a delay can be avoided “so far as compatible” with proper consideration of the issues. By Rule 5 the Tribunal may regulate its own procedure and in particular by Rule 5(2) may give a direction in relation to the conduct or disposal of proceedings at any time. Quite apart from this Tribunal determining that the Appeal should be struck out for the precise reasons set out above the Tribunal is also satisfied in this case that the combined reading of Rules 2 and 5 together justify the present order in any event.

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David Marks QC

Tribunal Judge

Dated: 2nd December 2010