IN THE UPPER TRIBUNAL **Appeal No. GIA/2705/2014**
ADMINISTRATIVE APPEALS CHAMBER **GIA/2721/2014 & GIA/2725/2014**

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Name:	Department for Work and Pensions
Tribunal:	First-tier Tribunal (Information Rights)
Tribunal Case No:	EA/2013/0145, EA/2013/0148 & EA/2013/0149
Tribunal Venue:	London
Decision Date:	19 March 2014
Issue Date:	24 March 2014

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal in respect of all three applications.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

Introduction

1. This is the Department's application for permission to appeal against the First-tier Tribunal ('the Tribunal')'s decision dated 19 March 2014 (promulgated on 24 March 2014). Technically the Tribunal was dealing with three separate appeals (or perhaps rather two appeals and a cross-appeal) against two decision notices issued by the Information Commissioner, but it sensibly issued a single decision with reasons. The Tribunal was concerned with whether certain information relating to the development of the new social security benefit known as universal credit should be released under FOIA. The Information Commissioner had decided that the Department should release the universal credit programme's Project Assessment Review Issues Register and High Level Milestone Schedule. The Commissioner had ruled that the Risk Register need not be disclosed. The Tribunal dismissed the Department's appeals and allowed the requester's appeal as regards the Risk Register, subject to certain redactions.

The three proposed grounds of appeal

(1) The chilling effect

2. The first proposed ground of appeal is that the Tribunal misunderstood the nature of the chilling effect and the evidential basis needed to support such an argument. This ground of appeal is essentially a challenge to paragraph [62] of the Tribunal's reasons, with that paragraph largely taken in isolation. However, the Tribunal's decision must be read as a whole. Paragraph [62] comes part way through the Tribunal's analysis of the Department's claim of a chilling effect. This is a well known concept, and I can see no support for the argument that the Tribunal misunderstood its meaning (see e.g. paragraph [60]). The opening sentence of paragraph [62] might perhaps have been better phrased, but it seems to me still some way from suggesting an arguable error of law. The Tribunal was surely saying (as it went on in the rest of its reasons to spell out) that whilst it heard Ms Cox's claim that disclosure would have a chilling effect, neither she nor the Department

provided any persuasive evidence to that effect. Indeed, the Tribunal noted, as it was entitled to, that Ms Cox did not suggest that frank discussion had been inhibited in any way by a third party's revelation of the "Starting Gate Review".

3. In my view the Tribunal here has done exactly what it is meant to do when weighing up the competing considerations in the application of the public interest test. It is plain from its comprehensive and cogent reasons that it has considered the evidence (including Ms Cox's evidence), had regard to the particular documents and their differing natures within the relevant timescales, applied its expertise and reached a decision that the chilling effect argument was unpersuasive. The Tribunal was careful to distinguish between the various documents, explaining why it reached a different view to that of the Commissioner with regard to the Risk Register.

(2) Perversity

4. The principles by which perversity is to be judged were set out by Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ 794 (at paragraphs [92]-[95]), adopted in the FOIA context by Irwin J. in *British Broadcasting Corporation v The Information Commissioner* [2009] EWHC 2348 (Admin) at paragraphs [83]-[85]). In summary, a submission that a tribunal decision is perverse will only succeed where an overwhelming case is made out that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. In particular, an appeal on a question of law should not be allowed to turn into a rehearing of the evidence by an appellate tribunal which can only rule on points of law. Put another way, the test according to Sir John Donaldson MR, also sitting in the Court of Appeal, was whether the decision was so "wildly wrong" as to merit being set aside (*Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision R(I) 3/84).

5. As the application acknowledges, it therefore follows that the threshold for a perversity appeal is a high one. This challenge, in my assessment, does not get near clearing this high hurdle. The Tribunal identified the relevant issues, analysed the material evidence, made its findings and in that context reached its conclusions, explaining why it had done so. It seems to me its approach was entirely sustainable. In reality, this ground actually adds nothing to the first ground of appeal as regards the chilling effect. The perversity ground is not arguable.

(3) Due weight to the expertise of relevant witness

6. The argument here is that the Tribunal failed to give appropriate weight to the Department's witness Ms Cox. However, obviously an appeal to the Upper Tribunal is confined to a point of law. Upper Tribunal Judges cannot substitute their own view of the facts for that taken by the Tribunal – not least as the Tribunal is an expert tribunal in this specialist field. In particular, as Dobbs J. remarked in the context of a different type of tribunal (although the same principle as she expressed on that occasion holds good here), it is axiomatic that the weight to be attached to any particular evidence "is essentially a matter for the Tribunal, unless the approach can be shown to be so illogical as to be irrational or perverse" (per Dobbs J. in *W.S. (by his litigation friend Mr S) v Governors of Whitefield Schools and Centre* [2008] EWHC 1196 (Admin) at paragraph [27]). Similarly, it is not the Upper Tribunal's role to "set the appeal tribunal to rights by teaching them how to do their job of weighing the evidence" (*Fryer-Kelsey v Secretary of State* [2005] EWCA Civ 511, reported as R(IB) 6/05, at paragraph [25]). The Court of Appeal has likewise observed that the role of a Social Security Commissioner (now an Upper Tribunal Judge) is not "to reanalyse evidence (which he had not heard) from a perspective that he preferred" (*Secretary of State for Work & Pensions v Roach* [2006] EWCA Civ 1746, at paragraph [37]).

7. In the present case the Tribunal summarised Ms Cox's evidence in some detail (at paragraphs [35]-[42]). It does not appear to be suggested that there was any error of law in that account. The Tribunal then took her evidence into account when weighing the public interest test (see e.g. paragraphs [55], [62], [68] and [69]). Ms Cox's evidence went primarily to the disputed issue of the chilling effect, and the Tribunal explained their reasoning at e.g. paragraphs [63]-[65]). In my view this proposed ground of appeal, as with the second, adds nothing to the first ground of appeal on the chilling effect. I conclude it is not arguable.

Conclusion

8. I therefore refuse permission to appeal to the Upper Tribunal.

9. There are three other matters raised by the TSol letter on behalf of the Department dated 27 May 2014: (1) an application for a stay (or suspension), (2) an application under rule 14 (use of documents and information) and (3) an application under rule 37 as regards a private hearing for closed material.

10. As to the first, the Upper Tribunal's power to issue a stay arises under rule 5(3)(j) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). The decision on whether or not to exercise that power must be made in the light of the overriding objective of dealing with cases fairly and justly (see rule 2). In this case a failure to stay the effect of the Tribunal's decision whilst the appellate process is still in train will obviously undermine (and negate) the Department's right of appeal. I therefore suspend the effect of the First-tier Tribunal decision dated 19 March 2014 under FTT references EA/2013/0145, 0148 and 0149 until the earlier of (a) 14 days from the date that this ruling is issued by the Upper Tribunal office, assuming that no application for renewal is received by that date; (b) a further order of the Upper Tribunal; or (c) the final disposal of any appeal, if permission is granted on renewal. Insofar as is necessary, this stay has retrospective effect.

11. As to the second, it is not entirely clear whether the application is made under rule 14(1) or rule 14(8), or both rule 14(1) and rule 14(8). In any event, I consider that a direction under rule 14 is not necessary at this stage. The Upper Tribunal has been provided with the closed material that was before the Tribunal, and of course the Upper Tribunal will hold that information and conduct the proceedings in accordance with the rule 14 direction given by the Tribunal below (i.e. its contents will not be disclosed to anyone other than the Department, the Commissioner and their representatives). In the event that there is an application for a fresh reconsideration of this ruling at an oral hearing, then further directions may be made in this regard.

12. As to the third, and again in the event that there is an application for a fresh reconsideration of this ruling at an oral hearing, this is a matter which is best left to the judgment of the Judge concerned when making directions for any such oral hearing.

13. Finally, the Applicant has the right to apply for a reconsideration of this determination at an oral hearing before the Upper Tribunal, which by convention is in front of a different judge. Any such application must be made in writing and within 14 days of the date that this determination is sent out by the Upper Tribunal office (so 14 days from the date on the covering letter, not the date below) – see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 22(3)-(5).

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **24 June 2014**