IN THE UPPER TRIBUNAL **UT reference nos: GIA/2103/2019**
GIA/753/2020

ADMINISTRATIVE APPEALS CHAMBER

NOTICE OF DETERMINATION OF APPLICATIONS FOR PERMISSION TO APPEAL AFTER ORAL HEARING ON 14 April 2021

Applicant:	**Professor Tim Crook**
First Respondent:	**The Information Commissioner**
Second Respondent:	**The Home Office**
Tribunal:	**First-tier Tribunal (General Regulatory Chamber)**
Tribunal Case Nos:	**EA/2019/0073 and EA/2019/0282**
FtT decision dates:	**19 July 2019 and 17 February 2020**

DETERMINATION

I refuse Professor Crook permission to appeal on both applications for permission to appeal.

REASONS

1. These two applications for permission to appeal have been case managed, heard and then decided together because of their essential similarities. In both cases the applicant and the respondents are the same.

2. I apologise for the time it has taken me to commit my decision to writing since the hearing and since the further information provided by Professor Crook after that hearing.

3. In **GIA/2103/2019** the application for permission to appeal relates to a request for information made by Professor Crook to the Home Office on 25 January 2018. The essence of that application was that Professor Crook was seeking information for the period between 1911 and 1989:

> "held by the Security Service, otherwise known as MI5, concerning anything to do with the University of London, Goldsmiths' College, the activities of staff and students, relations with the Soviet Union, membership and activities of staff and students who were members of the Communist Party, and during the 1930s any members of the British Union of Fascists."

4. Professor Crook contended, and continues to argue, that the Home Office was the relevant public authority to apply to for this information:

> "because prior to the Security Service Act 1989, the Security Service did not have a separate legal statutory existence as a security body defined by section 23 of the FOI legislation. MI5/Security Service was legally part of the Home Office jurisdiction.....Any information held by MI5/Security Service prior to the enactment of the Security Service Act 1989 is, therefore, the legal responsibility of the Home Office."

5. The Home Office's response was that it did not hold information on behalf of the Security Service and the Security Service is not the subject of the Freedom of Information Act 2000 ("FOIA"). It supplemented this on a later date by arguing:

> ".....whilst the Security Service Act 1989 (SSA) put the Security Service on a statutory footing, the Service existed as a separate entity under prerogative powers prior to the commencement of SSA...section 1(1) SSA...provides that 'there shall continue to be a Security Service under the authority of the Secretary of State'. Therefore, the Security Service has continued is existence as a single and distinct entity for the duration of its history.
>
> The fact that the Service existed (and continues to exist) under the authority of the Secretary of State does not mean that the Service is (or at any time has been) part of any ministerial government department...."

6. The Information Commissioner upheld the Home Office's decision on Professor Crook's complaint to her under section 50 of FOIA. In the course of investigating that complaint the ICO had asked for and been provided with the evidence on which the Home Office had based its answer that it did not hold the information requested. Because of the age and date range of the information requested (1911-1989) it had consulted its manual and paper files in its Historic Review Team and its Office for Security and Counter-Terrorism. It informed the ICO that as

a result of these searches "no recorded information was ever held relevant to the scope of the... request".

7. Professor Crook appealed against the ICO's Decision Notice to the First-tier Tribunal. He had three grounds of appeal.

(i) The ICO had wrongly decided the Home Office did not hold the requested information because the Security Service in its form prior to the SSA was the responsibility of the Home Office and is not subject to any absolute exemption under FOIA.

(ii) The ICO had wrongly concluded that she could only intervene and adjudicate in respect of information held by the public body at the time of the request for information. It was not unreasonable for information to be sought and retrieved that had previously been passed on to another public body for archiving.

(iii) The ICO had wrongly failed to take account of the Grand Chamber of the European Court of Human Right's ("ECtHR's") decision in *Magyar Helsinki Bizogttsag v Hungary* ("*Magyar*") on the right of access to information encompassed within Article 10(1) of the European Convention on Human Rights ("ECHR").

8. The First-tier Tribunal rejected all three grounds of appeal in its decision of 19 July 2019.

9. On the first ground it held that the ICO had been entitled to conclude on the evidence before her that the Home Office did not hold the information requested. Indeed, it noted that Professor Crook had conceded that the information was not physically held by the Home Office at the date of his request. That took the argument to the second ground of appeal.

10. The First-tier Tribunal rejected the second ground as well because the correct date for identifying if information was held was the date of receipt of the request: per section 1(4) of FOIA. Professor Crook's argument that the Home Office 'had legal and archival responsibility' for security service information from before 1989 and so could ask the Security Service for that information following his request was rejected. The First-tier Tribunal concluded that the basis for this argument was not made out on the evidence as the Security Service was not the responsibility of the Home Office prior to 1989 but was responsible instead to the Home Secretary personally.

11. As for the third ground of appeal, it too failed because the ICO had been correct to hold that Article 10 of the ECHR was not engaged. *Magyar* in any event as concerned with a right of access to information held by a public authority and not a case where the information was not held.

12. It is this decision against which Professor Crook seeks permission to appeal, the First-tier Tribunal having refused him permission to appeal on 21 August 2019.

13. The proceedings in **GIA/753/2020** cover very similar terrain. They concern a request for information made by Professor Crook to the Home Office on 8 January 2018 for the release of Security Service files about by then historic employees of the BBC. The Home Office refused the request. In the course of Professor Crook's subsequent complaint to the ICO the Home Office changed the reasons for its refusal to the following:

> "....the request is in fact seeking **files held by the Security Service** (i.e. the Security Service's **own** files), rather than simply **Security Service files/information** (i.e. any files held by the Home Office containing information received from the Security Service, which may or may not encompass information about named individuals in the request).
>
> Having now refined the request to **files held by the Security Service**, the appropriate response in this case....is to confirm that we do not hold any information in the scope of the request. The Home Office does not have, and has never had, 'ownership' of the Security Service. Consequently, it does not hold and did not hold at the time of the request Security Service files (i.e. the Security Service's **own** files)."

14. The ICO dismissed the complaint and upheld the Home Office's decision as being in accordance with Part 1 of FOIA. She accepted the above argument and also concluded that the searches made by the Home Office's Historic Review Team and its Office for Security and Counter-Terrorism for information falling within the scope of Professor Crook's request had not shown any such information held by the Home Office.

15. Professor Crook's grounds of appeal to the First-tier Tribunal against the ICO's decision were virtually identical to those set out above in the GIA/2103/2019 case. However, he also argued explicitly that the "information was held on behalf of the Home Office by the Security Service under section 3(2)(b) FOIA, as it was held under the legal, constitutional and executive control of the Home Office".

16. The First-tier Tribunal dismissed Professor Crook's appeal. Having reviewed the evidence put before the ICO by the Home Office showing the searches carried out by its Historic Review Team and Office for Security and Counter-Terrorism for the information sought by Professor Crook, the tribunal accepted, on the balance of probabilities, that at the time of the request none of the information sought was held by the Home Office. It further held that even if before the Security Service Act 1989 the Home Office had held information relating to the Security Services, no such information was held by the Home Office at the time of Professor Crook's request. The First-tier Tribunal also

rejected Professor Crook's argument that the Security Service remained part of the Home Office. In the tribunal's judgment the Security Service is a separate public body from the Home Office and there was no requirement on the latter to obtain information from the former in order to answer a request. The tribunal noted that the argument under section 3(2)(b) of FOIA had not been pursued at the oral hearing of the appeal, but the tribunal in any event found no evidence that the information sought by Professor Crook was held by the Security Service on behalf of the Home Office. Further, *Magyar* could not assist the arguments advanced by Professor Crook as it was concerned with denying access to information which was held by a public authority whereas here the information was not held by the Home Office. Nor did *Magyar* support an argument that the test was whether the information was held by the State as opposed to a public authority within that State. And any argument that the absolute exemption in section 23 of FOIA, in respect of security service information, breached Article 10 of the ECHR following *Magyar* was misplaced as section 23 was not being relied on by the Home Office, its case was simply that it did not in fact hold any of the information sought.

17. Both First-tier Tribunals refused Professor Crook permission to appeal,

18. His renewed applications for permission to appeal in these two cases were then stayed to await my decision in *Moss v ICO and the Cabinet Office* [2020] UKUT 242 (AAC). This was because *Moss* was to decide the extent to which (if any) the view in *Magyar* that Article 10 of the ECHR encompassed a right of access to information applied in the law of England and Wales. *Moss* was decided on 30 July 2020. I then sought further written submissions from all parties on the relevance of *Moss* to these two permission to appeal proceedings. Covid-19 restrictions and associated difficulties with organising the hearing of these application for permission to appeal meant that that hearing could not take place until 14 April 2021. It was a face-to-face hearing. Professor Crook attended the hearing and argued why he should be given permission to appeal. The ICO did not attend the hearing nor was she represented at it. Ms Charlotte Ventham represented the Home Office at the hearing. I only called on her to address me on the 'non-*Moss*' grounds of appeal.

19. Both before and at the hearing (and after it when Professor Crook provided me with further written argument on why *Moss* had been wrongly decided), the vast bulk of Professor Crook's argument on both applications for permission to appeal was taken up with why *Moss* had been wrongly decided. This was understandable as his arguments had largely, if not exclusively, become premised on Article 10 of the ECHR providing a right to obtain information through FOIA. The effect of *Moss* - put very shortly – is that the ECtHR's view in *Magyar* that Article 10(1) covers a right of access to information does <u>not</u> apply in domestic law in England and Wales because it conflicts with binding authority of the Court of Appeal and Supreme Court.

20. I have found nothing in any Professor Crook's arguments which persuades me that *Moss* was even arguably wrongly decided. I agree with the Information Commissioner that as a recent and fully reasoned decision of the Upper Tribunal that deals with all key authorities after detailed legal argument, I should only depart from *Moss* if I am satisfied that it is (at least arguably) plainly wrong: see paragraph 38(3) *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC); [2009] PTSR 1112, and *Police Authority for Huddersfield v Watson* [1947] KB 842, at 848. I note, moreover that the decision has been selected to be reported in the Administrative Appeals Chamber Reports. Remaking the same arguments as were put before me in *Moss*, which is effectively what Professor Crook does on these applications does nothing to lead me to conclude that *Moss* was even arguably wrongly decided.

21. The decision in *Moss* dealt with many of the arguments that Professor Crook sought to remake. For example, his argument that the Supreme Court's decision in *Kennedy* was only a 'holding' decision (see page 68 of GIA/753/2019) was expressly rejected in paragraphs [72]-[73] of *Moss*. Likewise, the argument that *Magyar* somehow has a greater status because the UK Government intervened in it was also rejected at paragraphs [70]-71] in *Moss*.

22. I have also read with interest the arguments made by Professor Pattinson of Durham University in his paper "The Human Rights Act and the Doctrine of Precedent " in Legal Studies 35(1) (2015) at pages 753-773, on which Professor Crook sought to place significant reliance. I consider I need say no more than whatever the merits of the arguments made by Professor Pattinson, they do not allow me to depart from the clear instruction given by the House of Lords in paragraph [43] of *Kay v Lambeth* [2006] UKHL 10.

23. I should add that I have some scepticism that the failure to apply *Magyar* directly in domestic law at a level below the Supreme Court is leading to ossification of the law and significant prohibitions on the right of access to information, as Professor Crook appeared to argue. I would have thought that cases where the *Magyar* Article 10 line of analysis would make the critical difference to information being provided to a person or organisation would be able to get to the Supreme Court for *Kennedy* to be reconsidered relatively quickly. The 'leapfrog' procedure in section 14A of the Tribunals, Courts and Enforcement Act 2007 would not apply to these applications, however, as it only covers decision made by the Upper Tribunal on appeals. (And I bear in mind in these cases the argument that even if applicable in domestic law *Magyar* may not assist Professor Crook as it does not provide a right of access to information not held by a public authority.)

24. The argument that *Moss* was wrongly decided was central to all but one of Professor Crook's grounds of appeal, and even that (third) ground may in the end have founded to some extent on *Moss* being wrong. My rejection of Professor Crook's arguments that *Moss* was even arguably

wrong leads me to refuse him permission to appeal on all his grounds of appeal, save for his third ground.

25. The third ground of appeal, if it has an existence independent of *Moss*, *Magyar* and Article 10 of the ECHR, is that Professor Crook had demonstrated on the balance of probabilities that in law the information requested was held by the Security Service (MI5) under the legal constitutional and executive control of the Home Office. This seems to be an argument based on section 3(2)(b) of FOIA. There is, however, in my judgment no arguable legal merit in this argument because it is doing no more than rearguing the factual merits of an argument Professor Crook made, and lost, before the First-tier Tribunals. Even outside this factual merits' criticism of this ground of appeal, there is force in the Information Commissioner's argument that FOIA itself makes plain that the Security Services are separate from the Home Office (see, for example section 84 and paragraph 1 in Schedule 1 to FOIA).

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 22nd July 2021