IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA/446 & 447/2021

APPLICATION FOR PERMISSION TO APPEAL
AGAINST A DECISION OF A TRIBUNAL

DETERMINATION OF THE UPPER TRIBUNAL

JUDGE JONES

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant:	**Prof. Tim Crook**
Respondent:	**The Information Commissioner**
Tribunal:	**First-tier Tribunal (General Regulatory Chamber) - Information Rights**
Tribunal Case No:	**QJ/2020/0013 & 0014**
Tribunal Venue:	**N/A – decided on papers in chambers**
FTT Decision Date:	**18 January 2021**
FTT Refusal of permission On the papers:	**18 February 2021**
Upper Tribunal Hearing Date:	8 September 2021

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL FOLLOWING ORAL HEARING

I refuse permission to appeal.

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

REASONS

Proceedings before The Upper Tribunal

1. Professor Tim Crook ("the Applicant") applies for permission to appeal to the Upper Tribunal from the decision of the First-tier Tribunal ("FTT") dated 18 January 2021. By its decision the FTT reconsidered and confirmed the Registrar's decision of 18 November 2020 and struck out both of the Applicant's appeals under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules on the basis that the Tribunal had no jurisdiction to deal with them.

2. The FTT (Judge Moira MacMillan) refused permission to appeal to the Upper Tribunal on 18 February 2021. On 5 May 2021 I directed that the Applicant's application for permission to appeal to the Upper Tribunal be considered at an oral hearing and made directions for the oral hearing.

3. I held the oral hearing of the Applicant's application for permission to appeal to the Upper Tribunal at Field House, London on 8 September 2021. The Applicant appeared in person. I am grateful for the courteous and helpful way in which he presented his submissions.

4. The Information Commissioner (the First Respondent) was not represented and has made no written submissions opposing the Applicant's application. However, I had the benefit of the First Respondent's submissions in support of striking out the appeal before the FTT.

The First-tier's decision of 18 January 2021

5. On 9 and 10 March 2020 the Applicant made requests to the Security Service and Secret Intelligence Service for information about staff and students of Goldsmith's college (of which the Applicant is a Professor); about a number of deceased individuals who previously worked for the BBC; and about three deceased individuals with connections to UK Government. He was doing so as part of ongoing historical research and public interest projects. He received no response from either intelligence agency.

6. On 20 August 2020 and 7 September 2020, the Information Commissioner, replying to the Applicant's complaints about the lack of response, stated that the two intelligence

agencies were not public authorities as defined by the Freedom of Information Act 2000 ('FOIA').

7. On 16 September 2020 the Applicant appealed to the FTT.

8. By its decision of 18 January 2021, the FTT struck out the Applicant's appeals against the Information Commissioner's letters of 20 August and 7 September 2020 for lack of jurisdiction.

9. It found that the Information Commissioner's letters of August and September 2020 were not Decision Notices for the purposes of section 50 FOIA (which require a decision to have been made in respect of a request for information of a public authority) – see [16] of the FTT Decision. Thus there was no jurisdiction for the appeal to come to the FTT.

10. The FTT stated that the remedy available to the Applicant was to seek judicial review (of the intelligence agencies) but the FTT had no jurisdiction to consider the matters as they were not appeals to the FTT for the purposes of section 57 FOIA ([17-18] of the decision).

11. The FTT also held that it did not have any jurisdiction to consider the Applicant's free-standing complaint under the Human Rights Act 1998 ('HRA') that there had been a breach of his rights under Article 10 of the European Convention on Human Rights ('ECHR') following the decision of the European Court of Human Rights' ('EctHR') judgment in *Magyar Helsinki Bizottsag v Hungary* 2016 ECHR 275 ('*Magyar*'). It held that any claim under s.6 HRA should be taken in the context of judicial review or other civil proceedings in the courts (see [20] of the decision). The FTT held it was a creature of statute and had not been given any statutory jurisdiction to consider such claims.

The Applicant's six grounds of appeal

12. The Applicant relied on six grounds of appeal in his notice of appeal and at the hearing. I summarise them as follows.

Ground 1:

13. The Applicant submitted 'It is wrong in law to strike out appeals against the ICO when the Grand Chamber of the ECtHR in *Magyar* had found that there was a right of access to information for the purposes of article 10 ECHR (the right to freedom of expression). This judgment had primacy over UK domestic law and the Upper Tribunal in *Moss v Information Commissioner and Cabinet Office* [2020] UKUT 242 (AAC) was wrong to find otherwise. The FTT should have interpreted FOIA under section 3(1) of the Human Rights Act so as ensure that the primary legislation gave effect to the Applicant's article 10 rights. Likewise, the two intelligence agencies had breached the Applicant's article 10 rights, contrary to section 6 of the HRA.

Ground 2:

14. The Applicant submitted that it was Parliament's intention for Tribunals to have an article 10 FOIA jurisdiction as provided by sections 2, 3 and 6 of the Human Rights Act 1998. 'No hierarchy or subjugation between courts and tribunals has been legislated for in respect of FOIA.'

Ground 3

15. The Applicant submitted that judicial review in a county court of the High Court would not be an appropriate, reasonable and effective remedy to pursue his legal rights. It was not a realistic option or remedy – neither affordable (costing £30,000) nor accessible.

Ground 4

16. The Applicant submitted that he should not have to use judicial review because there is a system of complaining and appealing decisions of the ICO as public body to the FTT and Upper Tribunal – this is an accessible remedy.

Ground 5

17. The Applicant submitted that the FTT erred in relying upon decisions in *Sugar v BBC* [2009] UKHL 9, *Kirkham v Information Commissioner* [2018] UKUT 303 (AAC) and *Dransfield v Information Commissioner* [2020] UKUT 0346 (AAC) in the

circumstances of this case. These authorities are not binding. The right of appeal to the FTT in respect of the Security Service was endorsed by Judge Hazel Oliver in her ruling (EA/2019/02082 21 January 2020).

Ground 6

18. The Applicant submitted that the Upper Tribunal's decision in *Moss* was not binding as to the applicability of *Magyar* because the facts of his case could be distinguished. He was acting as a public watchdog in the public interest as an academic, journalist and on behalf of a NGO (president of the chartered institute of journalist) in seeking the information from the intelligence agencies. The article 10 right for such requesters is provided by *Magyar* at paragraphs 158-170 of the judgment. Further, the UT decision in *Moss* was wrong to rely on the domestic Supreme Court judgments in *Kennedy v Charity Commission* [2014] UKSC 20 and *Sugar v BBC* [2012] UKSC 4 (which held that article 10 ECHR did not provide a right of access to information) as they preceded the 2016 EctHR judgment in *Magyar*.

Discussion

Ground 1

19. I am satisfied that the FTT did not arguably err in law in striking out the Applicant's appeals for lack of jurisdiction pursuant to rule 8(2)(a) of the Tribunal Procedure Rules. It was bound to find there were no decision notices of the Information Commissioner pursuant to section 50 FOIA because the two intelligence agencies are not public authorities (they are not included in section 3 of FOIA or Schedule 1 which define and list public authorities; section 23 FOIA exempts information supplied to public authorities by the two intelligence agencies and others). Therefore, there was no right of appeal to the FTT pursuant to section 57 of FOIA and the letters of the ICO of August and September 2020 refusing jurisdiction over the complaints were not decision notices for the purposes of FOIA.

20. Even if article 10 of the ECHR provides a right to access of information (in support of a right to freedom of expression) and there has been a breach of such a right, as the Applicant argues, section 3 of the HRA only allows the FTT to read FOIA and give effect, in so far as it is possible, to article 10 compatibly with the provisions of FOIA.

21. It is not possible to read section 3 and Schedule 1 to FOIA pursuant to s. 3 HRA to include the intelligence agencies as public authorities when they are specifically excluded from being such by Parliament under the provisions of FOIA. Further the Upper Tribunal has no jurisdiction to issue a declaration of incompatibility for the purposes of section 4 HRA. The FTT was bound to follow the will of parliament as enacted in FOIA that the two intelligence agencies were excluded from the obligation to respond to information requests under FOIA.

22. Further and in any event, for the reasons set out below, I am not satisfied that it is arguable that article 10 does provide the Applicant with a right of access to information to the requested information and even if it did, that right is only limited and has not arguably been breached on the facts of this case.

Ground 2

23. I am not satisfied that this ground has any realistic prospect of success. The FTT and Upper Tribunal are creatures of statute and only have such jurisdictions as parliament has afforded them. It is not arguable that the FTT erred in law in finding that it had no jurisdiction to consider a free-standing claim or judicial review of the ICO's letters refusing to take any action for the purposes of section 6 of the Human Rights Act and article 10 ECHR.

24. It did not arguably err in finding that the only routes to challenge either the ICO's letters of August and September 2020 or the two intelligence agencies' lack of responses was to bring a claim for judicial review in the courts. There is no error of law in finding that FOIA only provides the FTT with the right to hear appeals against decision notices under section 57.

Ground 3

25. I am not satisfied that judicial review would not be an effective or accessible remedy for the remedy. Where Parliament has provided no other appeal route then judicial review is available for breaches of FOIA or any refusal to provide information. All the authorities support the availability of judicial review in the Applicant's circumstances where the FTT has no jurisdiction to hear an appeal under FOIA.

26. The court fees for bringing such an application for permission and claim for judicial review are a total around of £1,000 (less if permission is refused) and the Applicant did not suggest that this fee itself was disproportionate in the circumstances of his case. I am not satisfied that the payment of a court fee is a disproportionate obstacle to bringing a claim for judicial review or in breach of any right of access to court.

27. The Applicant suggested it would cost him £30,000 to bring a claim for judicial review but without any cogent evidence – he was probably referring to the costs of being legally represented himself and of paying the opposing parties' costs. I am satisfied that the Applicant could represent himself, as he did before me, or seek pro bono representation. He would only pay the costs of the Defendant's acknowledgment of service if permission were refused and thereafter might obtain a protective costs order if acting in the public interest and permission to apply for judicial review were granted.

Ground 4

28. For the reasons set out above, I am not satisfied this ground is arguable. The FTT was correct in law to find it had no jurisdiction to consider 'complaints' or free-standing article 10 claims in respect of the refusal to provide information. Its jurisdiction was limited to determining appeals from the decisions of the Information Commissioner as provided for by the provisions of FOIA.

Ground 5

29. This ground is unarguable. The FTT correctly followed and applied the authorities.

30. The FTT decision of Judge Hazel Oliver in *Crook v Information Commissioner* EA/2019/0282 did not suggest that the FTT has jurisdiction to consider appeals against refusal of an information request by the intelligence agencies. At [28] of that decision the Judge simply indicated that the Home Office and Security Service were separate bodies and if the Applicant believed that the Security Service exemption under FOIA breaches Article 10 he should challenge the actual application of these exemptions. This was not to suggest that the FTT had the jurisdiction to hear such a challenge. The authorities are correct in deciding that FOIA does not provide for the FTT to hear such a challenge – it is a matter for judicial review.

Ground 6

31. I am satisfied that this ground of appeal is unarguable. I am not satisfied that Judge Wright erred in *Moss* in deciding that he was bound to apply the domestic Supreme Court decisions in *Kennedy* and *Sugar* which decided that article 10 does not provide a right of access to information rather than the subsequent EctHR judgment in *Magyar*. Likewise, I am not satisfied it is arguable that the FTT erred to the extent it followed Moss. I am satisfied that *Moss* is correct in so far as it holds that the FTT and Upper Tribunal are bound by domestic precedent and cannot provide an effective remedy or have jurisdiction to hear an article 10 claim.

32. Even if the judgment in *Magyar* has developed the domestic jurisprudence such that there is a limited right of access to information in support of the right to freedom of expression, that does not assist the Applicant in his tribunal appeal for the reasons of jurisdiction as set out above. The point is one to be argued in judicial review proceedings.

33. Further, even if article 10 confers such a limited right of access to information, the Applicant has not arguably satisfied the four *Magyar* criteria set out at [157]-[170] of the Grand Chamber judgment. While the Applicant may be acting as public interest, public watchdog academic / journalist / NGO, he has not demonstrated that the two intelligence agencies have ready and available access to the information he requested (this is the fourth of the criteria – see [169]-[170] of the judgment).

34. Further, even if article 10 does apply to the information requested, the Applicant has not demonstrated that an absolute exemption from disclosure under FOIA for the intelligence agencies breaches article 10 given the balancing test to be performed under article 10(2) which is to take into account the public interest in protecting national security. The government's existing policy of only releasing historical documents after a passage of time which are no longer subject to the Official Secrets Act and have been declassified may be sufficient to achieve the objective of providing information that is no longer damaging to national security.

Conclusion

35. I refuse permission to appeal. I am not satisfied there is any realistic prospect of demonstrating that the FTT erred in law in striking out the Applicant's appeals.

(Signed on the original)

Rupert Jones
Judge of the Upper Tribunal

(Dated) **13 September 2021**