Appeal number: QJ/2020/0013 & 0014

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

PROFESSOR TIM CROOK **Appellant**

- and -

INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: JUDGE MOIRA MACMILLAN
Sitting in Chambers on 18 January 2021

RULING ON APPLICATION FOR RECONSIDERATION BY A JUDGE OF THE REGISTRAR'S DIRECTIONS OF 18 NOVEMBER 2020

DECISION

1. Having considered the matter afresh pursuant to rule 4(3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, I have decided that the Registrar's Decision of 18 November 2020 should stand.

REASONS

2. On 18 November 2020 the Registrar struck out both of Professor Crook's appeals under rule 8(2)(a) on the basis that the Tribunal has no jurisdiction to deal with them.

3. That decision was not communicated to Professor Crook until 28 November 2020. On 2 December 2020 Professor Crook asked for the decision to be reconsidered by a Judge under rule 4(3). This I now do.

Background

4. On 9 March 2020 Professor Crook made a request to the Security Service ('SyS) under the Freedom of Information Act 2000 ('FOIA') for information about staff and students and Goldsmiths' College; about a number of deceased individuals who previously worked the BBC; and about three deceased individuals with connections to UK government.

5. Having received no substantive reply, on 5 July 2020 Professor Crook made a complaint to the Commissioner. He received a letter in response dated 20 August 2020 in which the Commissioner stated that SyS is not a public authority as defined by FOIA and therefore had no obligation to respond to his request. The Commissioner informed Professor Crook that she would not be taking any further action in relation to his complaint.

6. On 10 March 2020 Professor Crook made a separate FOIA request to the Secret Intelligence Service ('SIS') for information about three of the same individuals. Having received no substantive reply, on 10 August 2020 he made a second complaint to the Commissioner.

7. The Commissioner responded by letter on 7 September 2020, giving broadly the same response as she gave on 20 August 2020, namely that SIS is not a public authority for the purposes of FOIA.

8. On 16 September 2020 Professor Crook lodged a Notice of Appeal with the Tribunal against the 20 August 2020 letter (*QJ/2020/0013*) and on 18 September 2020 against the 7 September 2020 letter (*QJ/2020/0014*).

9. In his grounds of appeal and in subsequent submissions, Professor Crook contends that the Tribunal has jurisdiction to consider his appeals and has an obligation to do so in order to secure his Article 10[1]

[1] Article 10 of the European Convention on Human Rights

rights. At the heart of his case is a contention that he is entitled to receive the requested information by virtue of the Grand Chamber decision in *Magyar Helsinki Bizottság v Hungary 2016 ECHR 275* ('*Magyar*'). In that case the ECtHR decided that the right to Freedom of Expression extends to a limited right to access information, in circumstances where access to the information is instrumental for the individual's exercise of their right and where four specified criteria are met.

10. Professor Crook submits that the Tribunal has an obligation under the Human Rights Act 1998 ('HRA') to interpret FOIA in a manner which is consistent with his human rights, and should accept jurisdiction in his appeals in order to allow him a legal remedy whereby it can be determined whether his Article 10 rights have been breached.

11. On 18 November 2020, having considered Professor Crook's submissions, the Registrar struck out both appeals under rule 8(2)(a). She concluded that the Tribunal has no jurisdiction to consider either case because Professor Crook has not received as.50 FOIA decision notice from the Commissioner in response to his complaints. As a consequence, Professor Crook has no right of appeal under s.57. The Registrar further concluded that the appropriate venue for resolving the human rights issues Professor Crook has raised is the High Court, where matters of this nature are generally dealt with by way of an application for judicial review.

Rule 4(3) request

12. Professor Crook has objected to the Registrar's decision for reasons which may be summarised as follows:

> (a) He submits that the Commissioner's letters are a 'decision' about his complaints and therefore amount to 'decision notices' for the purposes of FOIA;
>
> (b) That, in any event, the Tribunal has jurisdiction under the HRA in relation to any complaint that a public body has breached human rights in the context of Information Rights Law;
>
> (c) That the Tribunal "*has been constituted by Act of Parliament to adjudicate complaints against and appeals addressed in relation to decisions and actions of the Office of Information Commissioner*"; and

(d) That the Commissioner has breached his human rights and her obligations under the HRA by failing to properly consider his complaints against SyS and SIS.

(e) Professor Crook further submits that the Upper Tribunal erred in the case of *Moss v Information Commissioner and the Cabinet Office: [2020] UKUT 242 (AAC) ('Moss')*, when it decided that it was bound to follow the Supreme Court decision in *Kennedy v Charity Commission (Secretary of State for Justice and others intervening) [2014] UKSC 20; [2015] A.C. 455* and rejected arguments that the application of *Magyar* was consistent with, and required under, domestic law.

(f) He contends that the Tribunal is obliged to interpret FOIA in accordance with the HRA and should accept jurisdiction in order to resolve the human rights issue he has raised, since his occupation as a journalist means that he better meets the *Magyar* criteria than Mr Moss did, making him a better 'test case'; and

(g) That the option of applying for permission for judicial review is not available to him for reasons of cost.

s.50 Decision Notice

13. S.50 provides a right to apply to the Commissioner for a decision as to whether a request for information made to a public authority has been correctly dealt with.

> ***Application for decision by Commissioner.***
>
> *(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.*
>
> *(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him –*
>
> > *(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,*
> >
> > *(b) that there has been undue delay in making the application,*
> >
> > *(c) that the application is frivolous or vexatious, or*

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either –

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority –

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

14. The House of Lords provided guidance on what constitutes a s.50 'decision notice' in the case of *Sugar v BBC [2009] UKHL 9* (emphasis added):

"37. The issue that the Commissioner was asked to resolve by Mr Sugar by his letter of complaint was whether the BBC was correct to contend that the Balen Report was held "for the purpose of journalism". The Commissioner decided that question. He found that the BBC was not under an obligation to release the contents of the Report. This was a decision that Mr Sugar was entitled to challenge before the Tribunal, provided that the Commissioner had conveyed it to him in a "decision notice". Section 50 of the Act does not prescribe the form of a "decision

notice". I consider that this phrase simply describes a letter setting out the Commissioner's decision. That is precisely the letter that the Commissioner wrote to Mr Sugar. His letter does not suggest that the request or the complaint was not within the Act, or that the Commissioner had no jurisdiction to make a decision or that he was not making a decision."

15. This approach was confirmed more recently by the Upper Tribunal in *Kirkham v Information Commissioner [2018] UKUT 303 (AAC):*

> *" for it to amount to a "Decision Notice" under section 50(3)(b) of FOIA the email of 9 November 2017 had to amount to the Information Commissioner's decision on Dr Kirkham's complaint about whether the EPSRC had dealt with his request for information in accordance with Part I of FOIA. On no rational basis can the ICO's email of 9 November be read as making such a decision. All it was 'deciding' was not to accelerate the making of the decision on Dr Kirkham's compliant about the EPSRC's handing of his request for information. The contrary is simply not arguable."*

16. Therefore, although a decision notice issued under s. 50(3)(b) need not be in a specific format, it must contain a decision about a complaint made under s. 50(1), and determine whether a public authority has dealt with a request for information in accordance with FOIA. In this case the Commissioner's letters express the view that SyS and SIS are not public authorities for the purposes of FOIA. In other words, adopting the language of *Sugar*, the letters state that the complaints were not "within the Act" and that the Commissioner "is not making a decision".

17. In a number of binding authorities, most recently in *Dransfield -v- Information Commissioner (Section 50(2): Jurisdiction) [2020] UKUT 0346 (AAC)*, the Upper Tribunal has confirmed that the remedy available to a person who has not received a s.50(3)(b) decision notice is to seek judicial review.

18. This Tribunal simply does not have jurisdiction to consider such a matter. Its jurisdiction is restricted under s.57 to circumstances in which a decision notice has been served under Part IV:

> ***Appeal against notices served under Part IV.***
>
> *(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.*

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

(3) In relation to a decision notice or enforcement notice which relates –

(a) to information to which section 66 applies, and

(b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority, subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

Jurisdiction under the HRA

19. Professor Crook's submissions (i) that the Tribunal has jurisdiction under the HRA in relation to <u>any</u> complaint that a public body has breached human rights in the context of Information Rights Law, and (ii) that the Tribunal is able to adjudicate complaints against the Commissioner, are misconceived.

20. The Tribunal is a creature of statute. It has only those powers that Parliament has given it. There is no statutory basis upon which the Tribunal can consider free-standing complaints under the HRA, whether or not in the context of information rights. Human rights claims are generally dealt with by the courts, either in the context of judicial review or in other civil proceedings.

21. Neither is it part of the Tribunal's role to supervise the work of the Commissioner, nor to determine complaints made against her. Such a complaint may also be dealt with by way of judicial review, or may sometimes be made to the Parliamentary Health Services Ombudsman, a process which does not carry the same cost implications.

22. I agree with the Registrar's conclusion that no s.50 decision notices have been issued in these cases, and that the Tribunal has no jurisdiction under s.57 to consider the matters raised by Professor Crook. Even were the Tribunal to consider the issued raised in the context of a case in which s.57 jurisdiction did arise, it would be bound by the Upper Tribunal's decision in *Moss*.

23. The Registrar weighed up the competing factors and made a decision which I find to be fair and just in all the circumstances. Accordingly, I make the same decision myself.

(Signed)

DATE: 18 January 2021

Judge Moira Macmillan