UA-2021-000143-GIA

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2021-000143-GIA

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

Tribunals, Courts and Enforcement Act 2007, section 11
Tribunal Procedure (Upper Tribunal) Rules 2008

Appellant:	Professor Tim Crook
Respondents:	Information Commissioner and Commissioner of Police for the Metropolis
First-tier Tribunal no:	EA/2019/0014
Date of decision:	23 July 2021

DECISION

The Upper Tribunal REFUSES permission to appeal.

REASONS FOR DECISION

1. I held an oral hearing of Professor Crook's application for permission to appeal on 19 April 2022. He attended and spoke on his own behalf. David Messling of counsel appeared for the Commissioner of Police. I am grateful to them both for their clear and succinct submissions. The Information Commissioner did not appear.

A. The tests I have to apply

2. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal 'on any point of law arising from a decision made by the First-tier Tribunal'.

3. In *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538, Lord Woolf MR explained the circumstances in which permission would be given. In effect, there are two tests that apply in different circumstances.

4. Most appeals under section 11 are brought on the basis that the decision under appeal was made in error of law. The test in those circumstances is whether the appellant has a 'realistic prospect of succeeding on the appeal'.

5. Sometimes an appeal my be justified despite there being no issue about the correctness of the decision. The test in these circumstances is whether there is a good enough reason to justify hearing an appeal despite the decision being correct in law.

6. Those two approaches provide a convenient structure for giving my reasons for refusing permission to appeal.

B. There are no realistic prospects of showing that the First-tier Tribunal made an error of law

7. The starting point is that a tribunal must act only within its jurisdiction. In this case, the First-tier Tribunal's jurisdiction was limited by the Freedom of Information Act 2000 (FOIA).

8. Professor Crook made his request to the Metropolitan Police, but received a neither confirm nor deny response under section 23 FOIA. He complained to the Information Commissioner under section 50. The Commissioner had to decide whether the request 'has been dealt with in accordance with the requirements of Part I.'

9. On appeal to the First-tier Tribunal under sections 57 and 58, the issue was whether the Commissioner should have given a different notice. The language of the sections is more complicated than that in order to deal with the different forms of notice that the Commissioner may issue. But, in simple English, the issue in this case was whether the Commissioner was right to decide, as she did, that section 23 applied.

10. This presented a difficulty for Professor Crook, as I pointed out at the start of the hearing. He was relying on a Convention right to information under Article 10. If he wanted to rely on it before the First-tier Tribunal or the Upper Tribunal, he would have to show that it operated within FOIA, because the jurisdiction of those tribunals is limited to FOIA. The Upper Tribunal has no power to make a declaration of incompatibility. Even if it had, that would not of itself change FOIA; that would require further legislation. The Upper Tribunal does have power, indeed a duty, to read and give effect to legislation in a way that is compatible with Convention rights. That is provided by section 3(1) of the Human Rights Act 1998 and it applies to FOIA, as it does to all legislation. But the duty only applies 'So far as it is possible to do so'. I can see no way to read or give effect to section 23 in a way that is compatible with the exercise of an Article 10 right to information. The language is to clear for that. Professor Crook did not try to persuade me otherwise.

11. It is possible to enforce an Article 10 right by way of judicial review. The Supreme Court has said that that is a sufficient remedy. Professor Crook told me that the costs of those proceedings would be prohibitive for an individual without backing. I accept that that would be so. But even if I were free to disregard and differ from the Supreme Court, it would still leave the difficulty that there is no way to read or give effect to section 23 in a way that would override its clear wording.

12. The same problem arises on Professor Crook's criticisms of the caselaw that decides Article 10 does not operate through FOIA. He argued that the cases failed to consider the operation of the Article 10 right in the correct context. By that, he meant that it was limited to those who perform a watchdog role: academic, journalist, or NGO. Assuming that he is right about that, he is still left with the problem that I have identified. Looking at the issue afresh and without reference to the caselaw, there is still no way that I can see to override section 23.

13. Professor Crook also argued that the courts had changed the paradigm to the extent that the neither confirm nor deny approach of section 23 was no longer sustainable. In support, he referred me to two recent judgments of Chamberlain J in *Her Majesty's Attorney General for England and Wales v BBC* [2022] EWHC 380 and 826 (QB). He is right that the court was there more willing than in the past to decide whether the interests of national security should prevent the naming of a serving officer of the security service in a television programme. But those cases, as Mr Messling pointed out, were not concerned with FOIA and were concerned with an attempt to

prevent disclosure. Aside from those points, I have to come back to the point I have already made: these cases cannot give me the power to override the clear meaning and effect of section 23.

14. I come now to the case of Margot Heinemann. Professor Crook showed me the information that had been released, with redactions, from her special branch file after a reference to her had been found in material deposited with the National Archives. As Mr Messling accepted, it was no longer possible in those circumstances to refuse to confirm that the information existed. He did not explain under what provision of FOIA the information had been released. It is possible that it was not provided under FOIA at all. Whatever the basis on which it was disclosed, it cannot help Professor Crook for the reasons aforesaid.

C. There is no other reason to justify giving permission to appeal

15. Everything I have said so far has been mere prologue to this issue: should I give permission to appeal, not in the hope of showing an error, but to allow the Upper Tribunal to comment on the newly recognised right under Article 10 and the paradigm shift in the common law?

16. Lord Woolf's approach to permission to appeal would allow me to do this if appropriate. I do not consider that it would be appropriate, for the following reasons.

17. Judges do comment on legislation from time to time. When they do, the comments usually relate to matters of procedure or to technical flaws in the substantive law. That allows the comments to reflect the judges' experience. The point that Professor Crook would like me to make would be a matter of policy rather than a technical flaw in the legislation. If I understood him correctly, he would be content if section 23 ceased to be an absolute exemption and became subject to a balance of public interests test. Even if that is all that would be required, any change to the approach to information held by the security services would be controversial and highly political. Moreover, it could not be isolated to a minor amendment to FOIA. One consideration would be whether Professor Crook's paradigm shift would be acknowledged and accepted as desirable. The existence of the Human Rights Act 1998 and the extent of the Convention rights that it brought into domestic law are themselves controversial and highly political. In the result, any reform of access to information, especially information relating to national security, would require a balancing or, more likely, a choice between strongly held views on controversial issues with a significant political element. Those words – security, controversial, political, and balancing – are all warning signs to avoid unnecessary judicial comment. Taken together, they are decisive.

Authorised for issue
on 20 April 2022

Edward Jacobs
Upper Tribunal Judge