IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. GIA/2481/2018

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant:	The Home Office
1st Respondent:	The Information Commissioner
2nd Respondent:	Mr Anthony Webber
Potential Interested Parties:	The Attorneys-General of Guernsey, Jersey and the Isle of Man
Tribunal:	First-tier Tribunal (Information Rights)
Tribunal Case No:	EA/2017/0281
Tribunal Venue:	Leicester
Decision Date:	12 July 2018

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

I refuse permission to appeal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 21, 22 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS

Introduction

1. This is an application by the Home Office for permission to appeal against the decision of the First-tier Tribunal [Judge Cragg QC, Ms Chafer and Mr Watson] dated 1 August 2018. The First-tier Tribunal ("the FTT") allowed an appeal by Mr Anthony Webber, the requester, against the Information Commissioner's decision notice dated 30 October 2017 (FS50666313). The Commissioner had decided that the Home Office had properly applied section 36(2)(c) of FOIA when refusing to disclose information requested by Mr Webber that related to the Syrian Vulnerable Persons Resettlement (VPR) Scheme in the context of Guernsey, Jersey and the Isle of Man ("the Crown Dependencies").

2. The FTT held an oral hearing on 12 July 2018 at which Mr Webber represented himself and the Home Office was represented by Mr Alex Ustych of Counsel. The Information Commissioner chose not to be represented at that FTT hearing. The FTT agreed that section 36(2)(c) was engaged, but disagreed with the Commissioner on the balancing of the public interest test and so allowed Mr Webber's appeal. Its decision was dated 1 August 2018. Judge Cragg QC subsequently refused permission to appeal to the Upper Tribunal in a ruling dated 6 September 2018 ("the FTT refusal of permission ruling").

3. I held an oral hearing of the Home Office's application for permission to appeal on 4 February 2019 at Field House in London. Mr Ustych appeared again for the Home Office. Mr Webber was fortunate to be represented on this occasion by Mr Maurice Frankel of the Campaign for Freedom of Information. The Information Commissioner again chose 'to sit this one out': I draw no conclusions from that other than that presumably the Commissioner took the view that, from her perspective at least, the matter was not sufficiently pressing that she should be separately represented. I am grateful to all those who attended for their patience and good humour while we had to move courtrooms owing to a lighting failure.

4. The procedural position was complicated a little by the appearance of Mr Tim Pitt-Payne for the Attorneys-General of Guernsey, Jersey and the Isle of Man (collectively "the Attorneys-General"). I interpose that the information requested by Mr Webber was in the form of communications between Home Office officials and representatives of the three Crown Dependencies. The Crown Dependencies were not parties before the FTT. Suffice to say that three civil servants in the islands' governments had sent a detailed and lengthy letter to the Home Office on 31 August 2018 – i.e. after the FTT had heard and decided the appeal – expressing their concern both at the FTT's decision and at its broader implications ("the Crown Dependencies' joint letter"). In summary, the letter also (a) explained that the writers had not been aware of the FTT proceedings; (b) argued that section 27 (international relations) should have been in issue in the FTT appeal; and (c) emphasised the chilling effect that disclosure would have on future communications between the UK Government and the governments of the Crown Dependencies.

5. The Home Office advances four grounds of appeal, namely that the FTT erred in law by: (1) failing to give any or any appropriate weight to the reasonable opinion of the qualified person when assessing the public interest balancing test; (2) focussing solely or largely on whether the content of the withheld material was "controversial" rather than on the wider prejudice of disclosing such communications; (3) reaching irrational conclusions when balancing the public interest; and (4) failing to admit the Crown Dependencies' joint letter.

6. Mr Pitt-Payne, for the Attorneys General, in turn requested that the Upper Tribunal (1) admit the written submissions by the Attorneys General (dated 11 October 2018); (2) take those submissions into account when determining the Home Office's application for permission; (3) grant the Home Office permission to appeal; and (4) if permission is granted, join the Attorneys General as interested parties under rule 9(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; "the 2008 Rules").

7. Mr Frankel, for Mr Webber, unsurprisingly, resisted the Home Office's application and hence also the substance of the application by the Attorneys General.

8. In summary, I am refusing the Home Office's application for permission to appeal for the following reasons. I accede to the first two of the requests by the Attorneys General; however, as I have refused the third point their fourth request necessarily falls with that refusal of permission.

Ground 1

9. The Home Office's first ground of appeal is that the FTT erred in law by failing to give any, or any appropriate, weight to the reasonable opinion of the qualified person (QP) when assessing the public interest balancing test. Mr Ustych contends that the FTT followed the approach of the information tribunal in *Evans v IC and the MoD* (26 October 2007) (namely that the QP's evidence is not a "major piece of evidence in its own right") in preference to Guardian *Newspapers and Brooke v IC and the BBC* (8 January 2007) (namely the tribunal must give weight to QP's opinion as an important piece of evidence). The Home Office's submission is that the FTT's attribution of little or no weight to the QP's opinion was in error of law, essentially as that was inconsistent with both its finding that the QP's opinion was

reasonable and with the higher case law authority of *DWP v IC* [2016] EWCA Civ 758 and *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC). It is further argued that the FTT's reasons for discounting the QP's opinion could not withstand scrutiny.

10. First, did the FTT wrongly adopt the *Evans* approach? The short answer is in the negative. The FTT expressly stated that it did not need to decide between the two approaches, as even following the *Brooke* approach the FTT was not persuaded by the QP's opinion. The bottom line is that the QP's opinion must be afforded *appropriate consideration* (see *DWP v IC* and *Malnick*). However, having done precisely that, the FTT found that the QP's opinion only merited little weight, for the reasons that it gave. There is no inconsistency between finding that the QP's opinion was reasonable for the purpose of the exemption being engaged, but that it did not prevail in the balancing test. This is because by definition the QP's opinion is only looking at one half of that equation (namely whether disclosure would have, or would be likely to have, any of the effects set out in s.36(2)(a)(c)).

11. Second, did the FTT wrongly conduct the weighing of the QP's opinion? The answer again is no. It is axiomatic that the weighing of the evidence is an evaluative function for the first instance tribunal. The FTT explained why it placed little store by the QP's opinion – notably relying on the poor quality of the original submission to the QP and the fact the minister had not viewed the material in issue. Mr Ustych argued that any lack of clarity in the original submission to the QP did not impact on the QP's opinion. However, those were ultimately issues of fact for the FTT to adjudicate upon. The FTT also looked at the evidence in the round and took into account the fact that there was nothing in the closed material which went beyond the stated public position of the Crown Dependencies. As Mr Frankel pointed out, there was nothing to indicate that the minister was aware of this feature of the withheld information, which would further justify the FTT's conclusion.

12. Overall, I also agree with Mr Frankel's more fundamental criticism of this ground of appeal, namely that the Home Office's suggestion the FTT gave "little or no weight" to the QP's opinion conflates two unrelated situations. The first is a failure to give *any* weight to the opinion, which may well be an error of law. The second is to give it *little* weight, which involves the exercise of judgement in assessing the facts. It is axiomatic that the weight to be attached to any particular piece of evidence is quintessentially a matter for the fact-finding tribunal. As Rix L.J. explained in *Fryer-Kelsey v Secretary of State for Work and Pensions* [2005] EWCA Civ 511 (reported as R(IB) 6/05), it is not the function of appellate courts (and thus also the Upper Tribunal) "to set the appeal tribunal to rights by teaching them how to do their job of weighing the evidence" (at paragraph 25).

Ground 2

13. The second proposed ground of appeal is that the FTT erred in law by focussing solely or largely on whether the content of the withheld material was "controversial", rather than on the wider prejudice of disclosing such communications, i.e. on the 'chilling effect'. Thus, Mr Ustych submitted that the FTT's decision involved an "overwhelming focus on the assessment of how controversial the Withheld Material was, rather than on the wider risk of prejudice to the 'safe space' for frank communications which would arise from disclosure" (application at §23). This ground is not arguable. There is just one reference by the FTT to the issue of whether the disputed material was "controversial" (see the FTT's reasons at para. [15]). Reading the FTT's reasons as whole, there is nothing to suggest that the FTT proceeded on the mistaken basis that the presence or absence of controversial material was determinative in the sense of being the overwhelming factor in applying the balancing test. Rather, I am entirely satisfied that the FTT had regard to the chilling effect as part of its fact-sensitive analysis in the context of the circumstances of the present case (see especially its reasons at para. [17] and also para. [20]). The FTT plainly considered the potential chilling effect. It just was not persuaded on the facts of this case that there would be such an impact on the relationship between the UK Government and the Crown Dependencies. The reasons

given by the FTT may not be extensive but they are sufficient. This ground is, at heart, another attempt to re-open the evaluation of the evidence as part of the weighing process in the public interest balancing test. That is the proper task of the specialist FTT. This ground discloses no arguable error of law.

Ground 3

14. The third ground of appeal is that the FTT erred in law by reaching irrational conclusions when balancing the public interest test. Insofar as this ground relies on the submissions already made in respect of the first and second grounds, it faces the same problems as identified above, which are not repeated here. For the most part the submissions made in support of this third ground, in as much as they do go further than those made in respect of the first two grounds, amount to an attempt to re-litigate the public interest balancing test, rather than pointing to any arguable error of law in the FTT's approach. For example, what are said to be contradictory findings by the FTT (see e.g. its reasons at paras. [15] and [18]) are, on closer scrutiny, not inconsistent at all (see e.g. the FTT refusal of permission ruling at para. [11] and Mr Frankel's skeleton argument at §34-§37, with both of which I concur). Similarly, it was argued that the FTT failed to take any account of the fact that the Syrian VPR Scheme was ongoing. Yet the FTT plainly had regard to that factor – see e.g. at paras [9] and [15].

15. Mr Ustych (and Mr Pitt-Payne) sought to persuade me that the FTT had erroneously conflated the position of the Crown Dependencies with that of local authorities within UK territory. This conflation, it was argued, was perverse and led the FTT to misapply the public interest balancing test. I remain unpersuaded by this submission. As I said at the hearing, the peculiar constitutional status of the Crown Dependencies (if not the finer points of detail of their relationship with the UK Government) is the stuff of year 1 LLB Constitutional Law lectures. I would need a lot of persuading that a FTT panel comprising a public law silk and two very experienced specialist members would make such an elementary error. As it is, there is nothing in the FTT's reasons to add credence to such a suggestion. Indeed, I agree with the extremely helpful analysis in Mr Frankel's skeleton argument at §38-§51 to the effect that the language deployed by the FTT in its reasons was echoing both the focus and the usage of the Home Office's submissions to the tribunal below.

16. Various submissions were made to me about section 27 of FOIA (international relations). There may well be some nice legal questions about the applicability of section 27 in the context of the Crown Dependencies but this is not the place to engage with them. They are for another day. The simple fact is that section 27 could have been put in issue before the Commissioner and/or the FTT by the Home Office but was not. It is idle, however interesting it may be, to speculate as to why that was the case. Mr Pitt-Payne rightly acknowledged that he could not now argue in the circumstances of this case that the FTT should have considered section 27 of its own initiative. As it is, the FTT properly considered, albeit concisely, the potential chilling effect in relations between the UK Government and the Crown Dependencies. In the event the FTT was not persuaded on the facts of this case and on the evidence before them. Necessarily that was without prejudice to any other future case which would have to be determined on its own merits (FTT reasons at para. [20]). The remaining ground of appeal turns on whether the Home Office can 'backfill' the evidentiary weaknesses identified by the FTT by now introducing the Crown Dependencies' joint letter.

Ground 4

17. Lastly, the fourth ground of appeal by the Home Office is that the FTT erred in law by failing to admit the Crown Dependencies' joint letter. The FTT refusal of permission ruling summarised the contents of the Crown Dependencies' joint letter and the Home Office's stance on the issue (and that of Mr Webber) and concluded as follows:

"5. I have read the letter and noted the contents and the job titles of its authors. It was not before the Tribunal and therefore not considered by the Tribunal (or of course the Commissioner). There is no submission that s36(2)(c) FOIA is not applicable to this case. I note that the public interest test applies to both s36 and s27 FOIA, as qualified exemptions. I note that the letter makes no reference to paragraph 20 of the decision which emphasises that the decision applies only to this request for information and does not have any general applicability. I do not give permission under rule 5(3) or the Tribunal's general powers for this document to be admitted before the Tribunal, at a stage where the Tribunal has already given judgment on the appeal."

18. There is a short and rather pedantic answer to this last ground of appeal. It goes nowhere. This is because the Home Office's application for permission to appeal is against the FTT's substantive decision promulgated on 1 August 2018. It is not an appeal against the subsequent FTT refusal of permission ruling dated 6 September 2018. There is technically no right of appeal against that determination, but there does not need to be one for the simple reason there is a right to renew the application direct to the Upper Tribunal, a right the Home Office has duly exercised. Whatever the FTT itself did, or did not do, when considering the Home Office's original application for permission to appeal together with the issue of the admissibility of the Crown Dependencies' joint letter (of 31 August 2018) cannot be used to identify any error of law in the FTT's substantive decision (of 1 August 2018).

19. Instead, the issue of the Crown Dependencies' joint letter is most appropriately treated as an application to the Upper Tribunal to admit that evidence when considering the application for permission to appeal (and, in fairness, Mr Ustych for the Home Office puts it that way in the alternative).

The Crown Dependencies' joint letter: to admit or not to admit?

20. Classically, the admissibility of new evidence on appeal involves consideration of the three *Ladd v Marshall* [1954] 1 WLR 1489 criteria, the first of which is that "the evidence could not have been obtained with reasonable diligence for use at the trial". Mr Ustych candidly (and correctly) conceded that he might face a struggle in showing that the first leg of the *Ladd v Marshall* test was met. Those criteria, of course, are principles rather than rules (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 at 2325 *per* Hale LJ as she then was). Furthermore, and in any event, this Tribunal has a broad power to admit evidence, whether or not it would be admissible in a civil trial and whether or not it was previously available: see rule 15(2)(a) of the 2008 Rules. As that power involves the exercise of a discretion, the starting point must be that cases should be dealt with fairly and justly in accordance with the overriding objective under rule 2. The *Ladd v Marshall* criteria should therefore be borne in mind, being persuasive but without being determinative, when exercising the discretion under rule 15(2)(a); see further *Reed Employment Plc v HMRC* [2014] UKUT 160 (TCC) and *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 214 (TCC).

21. For example, in *Bramley Ferry Supplies Ltd v HMRC*, where an application to introduce new evidence on an application for permission to appeal was refused, the Upper Tribunal concluded as follows (at paragraph [24]):

"...In making this application and the application to admit a new ground of appeal, the Appellant seeks to have a "second bite at the cherry" having seen the concerns raised by the judge about the strength of the evidence, which he set out in the FTT Decision after taking into account all of the other matters raised at the initial hearing. If we were to allow the application to introduce a new ground of appeal and adduce new evidence in these circumstances, we would permit an unsuccessful party to reopen issues that have been dealt with appropriately at the original hearing and risk the hearing becoming an iterative process. In our view, it would not be in the interests of effective case

management and accordingly not in the interests of justice, to permit the Appellant to reopen this issue in this way."

22. Likewise, in *Cavendish Green Ltd v HMRC* [2018] UKUT 66 (TCC) the Upper Tribunal expressed its view as follows:

> "34. It is important to appreciate that it is not sufficient for an appellant to say that the overriding objective should be to achieve the right result on the appeal come what may. An appeal hearing is not a hearing *de novo*, and it is inherent in the *Ladd v Marshall* approach that even if new evidence is credible and may have an important influence on the result of the case, an appellate court may decline to admit that evidence if the first of the criteria is not met. That is because an appeal inevitably involves delay, expense and the increased utilisation of the limited resources of the tribunal system. Hence there is a clear policy justification for requiring a party to present his entire case at first instance and not, without good reason, giving him a "second bite of the cherry" on different facts on appeal. The first-tier hearing and any appeal should not simply become an iterative process."

23. Although Mr Frankel did not make detailed submissions on the point, understandably focussing his arguments on the 'pure' FOIA aspects of the application, he did effectively make the same point (see e.g. his contention that the Home Office was seeking to have a second bite of the cherry: skeleton argument at §61).

24. Plainly the observations in *Bramley Ferry Supplies Ltd* and *Cavendish Green Ltd* are not determinative of the application in the present case. They do, however, set the analytical framework for the proper consideration of the Home Office's application. The reality is that no reason, let alone any good reason, has been proffered for the failure by the Home Office to produce the Crown Dependencies' joint letter (or e.g. witness evidence to similar effect) at an earlier juncture when it could have been properly considered by the FTT. To that extent the application therefore falls, or at the very least stumbles, at the first fence of the *Ladd v Marshall* criteria. Can it surmount the latter two hurdles? Mr Webber would doubtless also dispute whether the latter two criteria are met – namely that the evidence would probably have an important influence on the outcome and the evidence must be apparently credible. Even if he is wrong on both those points, the fact remains that there is rightly a considerable public interest in finality where litigation has been properly conducted. It is not just a matter of "the increased utilisation of the limited resources of the tribunal system" (as it was put in *Cavendish Green Ltd*); there is the obvious prejudice and costs that would be incurred by the other parties to these proceedings (here Mr Webber and the Information Commissioner). Frankly I do not see how it is remotely arguable that it would be fair and just for the Home Office to be allowed to introduce this new evidence (whether at the stage when the First-tier Tribunal was considering the permission application or now before the Upper Tribunal).

The position of the Attorneys General

25. Given that I have concluded that the Home Office's application for permission to appeal should be dismissed, it follows that I also dismiss the application of the Attorneys General to be joined. I simply make the following observations. They are premised on the assumption that the Crown Dependencies were unaware of the FTT proceedings until 'after the event'. (I recognise that Mr Webber was deeply sceptical about that, but there is nothing to be gained by seeking to resolve that issue of fact in the present circumstances). Obviously, were it the case that the Crown Dependencies had in fact been aware of the FTT proceedings, but had not taken any steps, the case for subsequent joinder would have been very difficult to justify (see by analogy *Lubicz v Information Commissioner and King's College London* [2015] UKUT 555 (AAC)).

26. As a matter of principle, it is undoubtedly right that a person who was not a party to an appeal before the FTT may be joined as a party to the proceedings 'after the event' so as to challenge that FTT decision. The relevant case law includes *Razzaq and Malik v Charity Commission for England and Wales* [2016] UKUT 546 (TCC) and *JW v Kent CC (SEN)* [2017] UKUT 281 (AAC). That said, the circumstances in which permission will be given to a non-party to join later will in practice be the exception rather than the rule (see e.g. *Pierhead Drinks Ltd v HMRC* [2019] UKUT 7 (TCC)). There is certainly no *right* to be so joined or even any presumption. It all depends on the circumstances. The overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber Rules 2009 (SI 2009/1976) ("the GRC Rules"), namely to deal with cases fairly and justly, has several different dimensions and they may not all point in the same direction. Furthermore, as already noted, finality in litigation is an important social good.

27. I put to Mr Pitt-Payne at the hearing the question of why the Crown Dependencies' joint letter should be formally admitted now. He acknowledged that as regard the bilateral dispute between the Home Office and Mr Webber, *Ladd v Marshall* was an appropriate lens through which to consider the issue. It would, he conceded, have been open to the Home Office to contact the Crown Dependencies and to garner the appropriate evidence as part of its case before the FTT. But, Mr Pitt-Payne submitted, an approach such as that disregarded the issue of fairness to the Crown Dependencies. They were plainly affected by the disclosure of their correspondence with the Home Office. If the Crown Dependencies had made an application to be joined as parties to the FTT proceedings in good time before the hearing it was, Mr Pitt-Payne argued, "overwhelmingly likely" that their application would have been granted.

28. Notwithstanding Mr Pitt-Payne's superficially attractive arguments, I consider this does not advance the case for the Attorneys General. The fact is they made no such application and the caravan has moved on. The FTT proceedings have taken their course. Mr Webber should not now be denied the fruits of his success at the FTT simply because the Home Office apparently did not notify the Crown Dependencies of the proceedings and certainly did not seek to adduce witness evidence from that quarter. One need only consider the wider ramifications of the arguments put on behalf of the Crown Dependencies in the present case. For example, First-tier Tribunals frequently hear cases in which the central issue is whether the exemption relating to an individual's personal data applies (FOIA section 40(2)). The parties in those cases are typically the requester and the Information Commissioner and sometimes the public authority. It would be unusual for the individual whose personal data and privacy rights are in issue to be a party to the proceedings (see by analogy *Morton v Information Commissioner and Wirral MBC* [2018] UKUT 295 (AAC)). Indeed, it is difficult to see how any system would be workable in which the Commissioner (and/or the public authority) were in some way obliged to consider who else might be joined to the FTT proceedings. Certainly, there is no such obligation.

29. As regard the wider issue of fairness, I do not consider that the resolution of this issue is in any way affected by the special constitutional position of the Crown Dependencies. As the FTT pointed out (paragraph 20 of its reasons), the decision it made has no implications for other FOIA requests which are made for information to be found in communications between departments of state of the UK Government and the relevant authorities in the Crown Dependencies. Each case will turn on its own facts and which qualified or absolute exemptions are in issue. The decision of the First-tier Tribunal in the present case is not a precedent in any meaningful sense (see further *LO v Information Commissioner* [2019] UKUT 34 (AAC) at paragraph 17 *per* Upper Tribunal Judge Jacobs).

Conclusion

30. For all those reasons, I refuse the Home Office's application for permission to appeal. For the same and the additional reasons set out above, I also dismiss the substance of the requests by the Attorneys General.

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **19 February 2019**