IN THE UPPER TRIBUNAL **Appeal No. GIA/1862/2018**
ADMINISTRATIVE APPEALS CHAMBER

Appellant: E.ON UK plc

First Respondent: The Information Commissioner

Second Respondent : Fish Legal

Before: Upper Tribunal Judge K Markus QC

Representation:
Appellant: Mr Rupert Paines (counsel)
1st Respondent: Ms Julianne Kerr Morrison (counsel)
2nd Respondent: Ms Nina Pindham (counsel)

Hearing date: 13th March 2019
Decision date: 16th April 2019

DECISION

The appeal is dismissed

REASONS FOR DECISION

Introduction

1. This appeal arises from a request for information relating to the Rampion Offshore Windfarm, made to E.ON UK plc ('E.ON') by Mr Geoff Hardy, solicitor for Fish Legal. It is common ground that the request falls within the Environmental Information Regulations 2004 ('EIR'). E.ON did not respond to the request but, following Mr Hardy's complaint to the Information Commissioner, E.ON set out its position. In essence, this was that E.ON was not a public authority but that, in any event, it did not hold the information requested. Following some communication between the Information Commissioner and E.ON regarding both matters, the Information Commissioner served an information notice on E.ON requiring it to provide information to assist her consideration of whether E.ON was a public authority for the purposes of the EIR.

2. E.ON appealed to the First-tier Tribunal against the Information Notice, on two grounds:

   Ground 1: The decision to issue the information notice was unlawful because, as E.ON did not hold the requested information, it was pointless, disproportionate and academic

   Ground 2: The information requested in the notice was wholly or mainly in the public domain and so it was unlawful to issue an information notice to require E.On to provide the information.

3. In relation to Ground 1, the Information Commissioner submitted that neither she nor the Tribunal could consider any aspect of the case unless and until it was established that E.ON was a public authority. At the hearing the First-tier Tribunal decided that it should first determine whether the Information Commissioner's approach was correct and proceeded to hear oral submissions on the point. In a reserved decision described as being on a "Preliminary Issue", the First-tier Tribunal decided that the Commissioner's approach was correct and invited submissions from the parties as to the onward progress of the appeal.

4. E.ON has appealed to the Upper Tribunal against the decision of the First-tier Tribunal, on three grounds:

> "(1) It is contrary to basic principles of the statutory regime of the Freedom of Information Act 2000 ("FOIA") and Environmental Information Regulations 2004 ("EIR") as interpreted by binding decisions of the appellate courts and tribunals.
>
> (2) It involved a basic failure to give reasons; the FTT never even dealt with the core arguments raised by E.ON plc as to its entitlement to argue Ground 1.
>
> (3) It was reached in a procedurally unfair fashion: the FTT gave no indication prior to the hearing that it wished to consider a 'preliminary issue', and the scope of the preliminary issue was never precisely formulated: leading to the unfortunate situation that (even now) it is not wholly clear what the FTT's conclusion in fact was."

5. I gave permission to appeal, joined Fish Legal as Second Respondent, and directed an oral hearing of the appeal which took place before me on 13th March 2019.

Legal Framework

6. The Environmental Information Regulations 2004 ('EIR') apply as prescribed by regulation 3:

> "3(1) Subject to paragraphs (3) and (4), these Regulations apply to public authorities.
>
> (2) For the purposes of these Regulations, environmental information is held by a public authority if the information—
>
> (a) is in the authority's possession and has been produced or received by the authority; or
>
> (b) is held by another person on behalf of the authority.
>
> …"

7. Regulation 2(2) defines 'public authority'.

8. The duty of a public authority under the EIR is set out in regulation 5:

> "5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
>
> (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
>
> …"

9. Regulation 12 provides for exceptions to the duty to disclose in regulation 5: It includes the following:

> 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> …
>
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> (a) it does not hold that information when an applicant's request is received;
>
> (b)the request for information is manifestly unreasonable;
>
> …"

10. By virtue of regulation 18 of the EIR, the enforcement and appeal provisions of the Freedom of Information Act 2000 ('FOIA') apply for the purposes of the EIR, with specified modifications. The relevant enforcement and appeal provisions, with the modifications for the purposes of the EIR shown in square brackets after the corresponding FOIA provision, are as follows:

> **"PART IV**
> **ENFORCEMENT**
>
> **50 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 1 [Parts 2 and 3 of these Regulations].
>
> (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 [regulation 16(1)],
>
> (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 [these Regulations] 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 [a response under regulation 12(6) or 13(5)], in a case where it is required to do so by section 1(1) [regulation 5(1)], or

(b) has failed to comply with any of the requirements of sections 11 and 17 [regulations 6, 11 or 14],

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.

…

51 Information notices

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part 1 [Parts 2 and 3 of these Regulations], or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under these Regulations conforms with that proposed in the codes of practice under sections 45 and 46 [regulation 16(1)],

he may serve the authority with a notice (in this Act [these Regulations] referred to as 'an information notice') requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part 1 [Parts 2 and 3 of these Regulations] or to conformity with the code of practice as is so specified.

…

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

…

PART V
APPEALS

57 Appeal against notice 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.

…

58 Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

Factual background

11. In correspondence with Mr Hardy shortly before he made the request for information, E.ON suggested that it may not be a public authority. It did not respond to his request, and so its position was not confirmed until after Mr Hardy had complained to the Information Commissioner on the 20th April 2017. In correspondence between the Commissioner and Mr Hardy it was established that, if E.ON accepted that it was a public authority, Mr Hardy would not require the Commissioner to make a formal decision. Presumably this was because, in that eventuality, E.ON would be expected to comply with its obligations as a public authority under the EIR. On the 26th May 2017, E.ON wrote to Mr Hardy to state that it was not a public authority but that "Since the ICO have been asked to make a determination, we are content to wait upon that decision process to conclude". Mr Hardy forwarded the response to the Commissioner and asked for a formal decision notice.

12. The Commissioner's Case Officer wrote to E.ON on the 31st May 2017 stating that the Commissioner's practice was to give a public authority one opportunity to justify its position before issuing a decision notice. He referred to the Information Commissioner's guidance about how complaints are handled. The letter said that upon conclusion of the investigation the Commissioner would issue a decision notice under section 50 of FOIA setting out her decision as to whether E.ON is a public authority and, if she decides that it is, E.ON would be required to respond to the request by providing the information or issuing an appropriate refusal notice. The letter referred to the decision of a three-Judge panel of the Upper Tribunal (Administrative Appeals Chamber) in *Fish Legal and Emily Shirley v. Information Commissioner and others* [2015] UKUT 52 (AAC), [2015] AACR 33 (*'Fish Legal'*) regarding the Commissioner's power to investigate complaints and issue decision notices "in these circumstances", a reference to her powers where the public authority issue is disputed.

13. On the same date, the Case Officer also wrote to Mr Hardy explaining the investigation process. He said that the Commissioner preferred complaints to be resolved informally where possible and with that in mind would write to the public authority to ask it to revisit the request and in any event to provide its arguments in support of its position, after which the Case Officer would either contact Mr Hardy to discuss the matter further or prepare a decision notice. The Case Officer said that the focus of his case was to determine whether E.ON was a public authority for the purpose of the EIR.

14. On the 16th June 2017 E.ON responded to the Commissioner's letter of 31st May stating that a different entity, Rampion Offshore Wind Limited ("ROWL"), held the information in question, and it repeated the claim that it was not a public

authority. On the 26th June the Case Officer wrote to Mr Hardy to inform him of E.ON's position and stating that "it may be that even if the Commissioner were to find E.ON UK Plc was a public authority, the notice may conclude that E.ON UK simply failed to comply with its obligation to refuse the request under regulation 12(4)(a) – information not held." The Case Officer said that he had not fully considered E.ON's arguments but thought it appropriate to discuss the matter with Mr Hardy before writing to E.ON again. In a reply on the 26th June, Mr Hardy did not accept E.ON's position that it held none of the information and asked that his reasons be put to E.ON. He said that he would wish to make further representations depending on E.ON's comments. There followed some correspondence between the Commissioner and Mr Hardy regarding other matters.

15. On the 3rd July the Case Officer wrote again to E.ON stating that, as Fish Legal was sceptical about E.ON's position that it had no involvement with the Rampion Offshore Windfarm project, the Commissioner still needed to establish whether E.ON was a public authority. He identified the issues which arose and asked for further information from E.ON in that regard. The letter then said "Notwithstanding whether E.ON UK Plc is a public authority for the purposes of the EIR there is the issue of whether you are likely to hold any of the requested information." It stated that, if Fish Legal was satisfied that E.ON did not hold the information, they may choose to withdraw the complaint. The letter asked for further information "in order to pursue this means of informally resolving the complaint" and asked for further comments on what the Case Officer described as "the apparent contradiction between the publicly available information and your position". E.ON replied on 11th July addressing various matters including repeating its position that the request should have been made to ROWL rather than to E.ON. There was no further correspondence before the Commissioner served the information notice on 17th July, seeking information solely relating to the public authority question. The notice provided a summary of the background correspondence and included the following:

> "7. The Commissioner recognises that E.ON UK Plc believes the complainant should direct his request to Rampion Offshore Wind Limited. Nevertheless, it is not in dispute that the complainant made a request for information to E.ON UK Plc and the complainant has asked for a decision on whether E.ON UK Plc's response to that request satisfied any obligations it may have under the EIR.
>
> 8. The initial matter to be decided is whether E.ON UK Plc is a public authority as defined by regulation 2(2) of the EIR. The Commissioner's power to investigate complaints and issue both information notices and decision notices in these circumstances was established by the Upper Tribunal Administrative Appeals Chamber in Fish Legal v the Information Commissioner and Others (GIA/0979/2011 & GIA/0980/2011)."

16. E.ON appealed to the First-tier Tribunal against the information notice, on the grounds set out at paragraph 2 above. The Information Commissioner resisted both grounds of appeal. Her written response to ground 1 was that the

Information Commissioner must first decide the "preliminary issue" whether the EIR applied to E.ON and that she could not decide not to carry out her responsibilities simply because the body asserted that it did not hold the information requested.

17. In a written Reply, E.ON described the issue under Ground 1 as follows:

> "The essence of the Commissioner's case on Ground 1 appears to be that the Commissioner is required to determine a *"preliminary issue"* as to whether the EIR applies to E.ON plc, even if it is clear that E.ON plc does not hold the information requested, so that the determination is entirely academic. That approach is misconceived and wholly without merit"

18. In the First-tier Tribunal proceedings E.ON submitted substantial evidence in support of its factual claim that it did not hold the information. In its skeleton argument prepared for the First-tier Tribunal hearing, E.ON summarised the evidence and said that "the Tribunal can be confident that E.ON plc does not hold the requested information". This factual claim was the foundation of E.ON's legal submissions under ground 1.

19. In her skeleton argument for the First-tier Tribunal the Information Commissioner noted the substantial amount of evidence served by E.ON relating to whether it held the information and said

> "The Information Commissioner is concerned that a one-day listing may not be sufficient if the Tribunal wishes to hear full evidence on this issue which, for the reasons outlined below, the Information Commissioner submits is neither necessary nor is it appropriate for the Tribunal to determine at this stage. As a result, the Tribunal may wish to hear legal submissions on the nature and scope of this appeal first, before hearing evidence from the witnesses if necessary. Alternatively, it may be necessary for a further hearing to be listed to allow full argument to be heard."

20. The Commissioner explained that, with E.ON's agreement, E.ON's submissions and evidence had been provided to Fish Legal but that Fish Legal wanted the public authority question to be decided under section 50 and that Fish Legal had concerns about E.ON's claim that it did not hold the information.

21. On the substantive issues under ground 1, the Information Commissioner submitted that E.ON's argument

> "puts the cart before the horse. It is not open to the Information Commissioner to determine that the information is or is not held if she does not have jurisdiction. Jurisdiction must be determined as a 'preliminary issue' or an initial step in the process because it is a condition precedent to the Information Commissioner's ability to hold a body or person accountable for how they respond to requests for information."

22. The Commissioner also explained her concerns about E.ON's claim not to hold the information, as to which, if there needed to be an investigation (ie if E.ON was a public authority), the Commissioner would need to conduct further enquiries.

The First-tier Tribunal's decision

23. At the hearing on 20th February 2018 the First-tier Tribunal stated that it wished to consider the nature and scope of the appeal, and heard submissions on that matter. Its reserved decision was dated 25th April 2018. The tribunal explained its approach in the Introduction:

> "2. The appellant, E.ON UK plc (E.ON) has appealed the Notice pursuant to s57 FOIA. Firstly, it is said that because 'it is clear' that the appellant does not hold the information sought by the applicant, then the decision to issue the Notice by the Commissioner is 'pointless, disproportionate, and academic'. Secondly, it is said that the Commissioner could obtain all the information sought from the appellant from publicly available sources and therefore it is wrong for the Commissioner to require the appellant to provide the information rather than carry out her own investigation.
>
> 3. In relation to the first ground of appeal the Commissioner argues that at this stage it is irrelevant whether or not the appellant holds the information sought by the applicant, because the issue now is whether the appellant is a public body and comes within the EIR at all. Until that has been determined the Commissioner is not looking at any other aspect of the case, and neither should the Tribunal.
>
> 4. Given the stances of the parties, we decided that we needed to decide this issue before considering anything else in the appeal, and this ruling relates to that issue. At the end of the judgment we invite written submissions as to how the appeal should now proceed in the light of our findings."

24. After setting out the relevant facts, the First-tier Tribunal made the following observations: (1) an application could only be made under section 50 where a request had been made to a public authority for information; (2) the Commissioner must make a decision unless an exception in section 50(2) applies; (3) where an application under section 50 is received the Commissioner may serve an information notice under section 51 requiring the public authority to provide such information relating to the application, to compliance with Part 1 or to conformity with the code of practice as is specified.

25. The tribunal then referred to the decision of the House of Lords in *British Broadcasting Corporation v. Sugar* [2009] UKHL 9, [2009] 1 WLR 430 ('*Sugar*'), and the decision of the three-judge panel of the Upper Tribunal in *Fish Legal* (see paragraph 12 above), and continued:

> "21. …Therefore, on the face of the cases, the Commissioner has acted according to the statutory framework in asking for information which goes to the question as to whether E.ON is a public authority, and therefore whether the EIR and the disclosure duties thereunder apply at all. We do not understand E.ON to argue that the Commissioner does not have the function to decide the issue of jurisdiction.

22. In *Fish Legal*, the Upper Tribunal made it clear that 'Jurisdiction is fundamental to the operation of a statutory tribunal, because it has no power to act outside its jurisdiction' (paragraph 18). The Commissioner's approach is that jurisdiction needs to be established before anything else in the EIR is considered. It is said that it is a condition precedent that needs to be determined before the Commissioner (and after that the Tribunal on any appeal) can consider whether or not the body has or has not complied with the applicable legal regime under the EIR.

23. However, E.ON say that that should not be the approach in this case. In a nutshell, E.ON says that it has 'put its cards on the table' and stated that (be it a public authority or not) it does not have the information sought by the requester, and has presented evidence to that effect. E.ON argues that an appeal against the Information Notice which seeks details relating to the nature of the body can be successful on the basis that to issue the Information Notice in those circumstances is disproportionate (noting that the EIR transpose Directive 2003/4/EC and so the principle of proportionality applies to the exercise of the Commissioner's powers). It is also said that as the question whether E.ON is a public authority is 'academic' (because E.ON says it does not hold the information) and the resolution of the issue therefore 'pointless'.

24. In our view E.ON's submissions are not correct. They would involve the Tribunal having to make an assessment as to whether information is held by E.ON or not in an appeal which concerns the contents of an Information Notice issued by the Commissioner, aimed at making an assessment as to whether E.ON is a public authority. However, under the statutory scheme, the assessment as to whether information is held is, initially, the job of the Commissioner, but only once it has been established that she has jurisdiction to do so.

25. The Commissioner explains, correctly in our view, the consequences of quashing the Information Notice on the basis sought by E.ON. There would still be a complaint for the Commissioner to determine for the purposes of section 50 FOIA, and none of the exceptions in s50(2)(a)-(d) would apply. The Commissioner would still have to determine whether she had jurisdiction, but would have to make this determination in the absence of the information sought in the Information Notice.

26. If the Commissioner finds that E.ON is a public authority then the consequence would be a Decision Notice requiring E.ON to respond to the request, with the consequent process of a review, a complaint and a possible appeal depending on how E.ON responded (including if E.ON responded by saying that it did not hold the information). If the Tribunal proceeds to determine this appeal by E.ON on the basis requested, then all that structure is effectively sidestepped, including any potential appeal right for Fish Legal.

27. From a very practical point of view, the Commissioner says that in deciding whether or not E.ON holds the information (assuming that is a public authority) she would need to take into account the submissions of the requester and to carry out her own enquiries. She sets out a number of concerns she has about the claim that E.ON does not hold the requested information for the purposes of the EIR, including (i) E.ON's relationship with the body it says would hold the information; (ii) the timescale of the search for information carried out by E.ON; (iii)apparent internet links between EC&R and E.ON, and (iv) further questions raised by the requester.

> 28. In our view, it is not the role of the Tribunal at this point to explore these issues for the purposes of deciding whether the Information Notice should have been issued. These are questions for the Commissioner to investigate (with such accompanying reviews and appeals as may be provided for) once the question of jurisdiction has been determined by the Commissioner. Accordingly, we so decide.
>
> NEXT STEPS
>
> 29. We have decided that the Commissioner in this case needs to resolve the issue of jurisdiction before anything else happens in the case. At the hearing on 20 February 2018 we described the dispute between the parties as one which needed to be resolved in order that the parameters of the appeal could be set.
>
> 30. At the end of that hearing we stated that we would request submissions in writing as to how this appeal should now proceed. The parties are invited to make those submissions within seven days of this ruling. Our preliminary view is that it is appropriate to make directions for the hearing to reconvene to hear any remaining submissions (if any) in relation to ground one of the appeal in the light of our findings above, and to consider ground two of the appeal."

The parties' submissions

26. E.ON's first and principal ground of appeal to the Upper Tribunal was that the First-tier Tribunal's decision amounted to an unlawful refusal to hear and determine E.ON's arguments on ground 1 of the appeal to that tribunal. Mr Paines submitted that the First-tier Tribunal's task was to conduct a full merits review of the information notice, including consideration of fresh evidence and any relevant issue put to it by any party. The decisions in *Sugar* and *Fish Legal* meant that the First-tier Tribunal could have addressed ground 1 even though E.ON's status as a public authority had not been established. It was open to the Commissioner to issue an information notice to a body in order to assist in establishing whether it was a public authority, and that body had a right of appeal to the First-tier Tribunal against the information notice even though its status as a public authority had not yet been established. That body ('the putative public authority') could advance any ground that was relevant to the lawfulness of the information notice. An information notice could properly be challenged on the ground that the decision to serve it was unreasonable or disproportionate. It would be unreasonable and disproportionate to require a body to provide extensive information related to its status where the Commissioner could more easily resolve the complaint by other means. In this case, the Commissioner could more easily have resolved the complaint either by accepting that E.ON did not hold the information, or by deciding that the application was frivolous or vexatious within section 50(2)(c) of FOIA, or by encouraging informal resolution of the dispute. If that ground was correct, then it would have determined the appeal in E.ON's favour. There was no legal basis upon which the First-tier Tribunal could properly have refused to determine ground 1. Moreover, its refusal was based on the erroneous view that the First-tier Tribunal could not decide whether E.ON held the information until the Commissioner had done so.

27. E.ON's second ground of appeal was that the First-tier Tribunal failed to record or address E.ON's arguments on the preliminary issue. The First-tier Tribunal's summary of E.ON's position, at paragraph 23 of the tribunal's decision, was E.ON's position on the substantive rather than the preliminary issue. Further, the FTT failed to explain clearly what it had decided.

28. E.ON's third ground of appeal was that the First-tier Tribunal's approach to the preliminary issue was unfair because there had been no prior direction for the determination of a preliminary issue and the issue had not been precisely formulated at the hearing. E.ON did not address the preliminary issue in its skeleton argument and it was only floated in the Commissioner's skeleton. In consequence E.ON was caused prejudice and the First-tier Tribunal's decision was incoherent.

29. For the Information Commissioner, Ms Morrison did not dispute that E.ON had a right of appeal to the First-tier Tribunal against both a decision notice and an information notice even though its status as a public authority was not established. That was the effect of *Fish Legal*. However, the Commissioner's position before the First-tier Tribunal had been that, unless and until the status of the body as a public authority was established, the Commissioner's power to issue an information notice was limited to seeking information relevant to that question. That being so, it was irrelevant to consider whether the Commissioner could (let alone should) have taken any other action. If the Commissioner was correct on that matter, it would have disposed of E.ON's first ground of appeal to the First-tier Tribunal. That was what the First-tier Tribunal decided. It did not decline to address ground 1.

30. Ms Morrison submitted that the reasons for the First-tier Tribunal's decision were adequate. Moreover, there was no procedural unfairness. The parties' respective positions were clearly set out prior to the hearing, and the First-tier Tribunal's decision to address the jurisdiction issue first was a reasonable case management decision.

31. Ms Pindham, acting for Fish Legal, agreed with Ms Morrison's arguments.

Discussion

Ground 1: Substantive error of law

Jurisdiction

32. An administrative decision-maker or statutory tribunal may only act within its statutory power or jurisdiction: *Evans v. Bartlam* [1937] AC 473 at 480. Jurisdiction cannot be conferred by consent. This fundamental principle was the starting point for the Upper Tribunal's analysis in *Fish Legal* at [18]. Jurisdiction cannot be conferred by consent. As another three-judge panel of the Upper Tribunal said, in *LS and RS v. Her Majesty's Revenue and Customs* [2017] UKUT 257 (AAC), [2018] AACR 2 at [17], there is no scope for a pragmatic approach to jurisdiction. It is also clearly established that a tribunal has jurisdiction to decide

whether a case falls within its jurisdiction, also recently reiterated by the Upper Tribunal in *LS and RS* at [18].

33. In *Fish Legal* the three-judge panel of the Upper Tribunal explained the scope of the Information Commissioner's jurisdiction at [32]:

> "FOIA is based on three key concepts: (i) a request (ii) for information (iii) held by a public authority. When in sections 50 and 51 the legislation refers to public authorities as it does, it is merely a convenient way of referring back to a request made under section 1 that is a trigger to the application of FOIA."

34. Thus unless section 1 applies, FOIA does not apply and so sections 50 and 51 cannot apply. With respect to the panel, concept (iii) requires a little clarification. The conditions for the application of FOIA set out in section 1(1) are, using the statutory wording, "making a request for information to a public authority". It is not a condition of making a valid application that the information is held by the authority. Whether the information is held affects the content of the substantive obligations under section 1(1), subparagraph (a) applying whether or not the information is held and subparagraph (b) applying only if the information is held. The position under the EIR is similar, although the regulations are structured differently to the corresponding provisions of FOIA. Although the particular duty under regulation 5(1) arises only where a public authority holds the information requested, holding the information is not a condition for the application of the regulations. Regulation 3 simply states that the "Regulations apply to public authorities". Regulation 12(1) and regulation 12(4)(a) create an exception to the duty to disclose where the authority does not hold the information but other provisions apply whether or not the information is held: for instance regulations 9 and 14. The enforcement and appeal provisions (which are contained in FOIA) apply to a refusal under regulation 14, including where an authority relies on the information not being held.

35. I am satisfied that the Upper Tribunal in *Fish Legal* did not mean that "held by" was one of the jurisdictional triggers to FOIA or the EIR. To do so would have been inconsistent with the above statutory frameworks. At paragraph [27] the Tribunal listed the key elements on which section 50(1) is predicated. These did not include that the information is held by the authority. The Tribunal put the position beyond doubt at paragraph [55], which I refer to in more detail below, where it said that the legislation is based on three key concepts: "request, information and public authority". It is clear that this is what the Upper Tribunal also meant at paragraph [32]. The words "held by" simply provided the link between the second and third concepts in that passage but they were not part of the key concept.

36. The Upper Tribunal's conclusion in *Fish Legal* was that, where an application is made to the Information Commissioner under section 50, the Commissioner has power to decide whether the three concepts exist:

> "55. In summary, the Commissioner has jurisdiction both to investigate and decide whether a body is a public authority. That decision is one made on the application under section 50 of FOIA and so the document giving notice of that decision is a

> decision notice served under section 50(3)(b). Sections 50 and 51 are predicated upon the existence of the three key concepts of request, information and public authority on which the legislation is based. But that does not deprive the First-tier Tribunal of jurisdiction to deal with those issues. As Mr Barrett put it at the hearing, section 50(1) merely describes the matters that may be the subject of an application under that section and so a complaint about the way the specific request has been dealt with; it does not prescribe conditions that must be met before an application can be made and determined by the Commissioner. When that section and section 51 refer to an application, they refer to a complaint to the Commissioner that any requirement of the legislation has not been met and the Commissioner can address all the reasons advanced as to why this has not occurred, including the assertion that FOIA does not apply because the request was not made to a public authority."

37. The reference in the last sentence of this passage to "all the reasons advanced as to why this has not occurred" does not mean that the Commissioner may address any matter raised, regardless of whether FOIA applies. In the context of the passage as a whole, and the preceding reasoning in particular at [52], the Upper Tribunal was saying that the Commissioner is able to carry out her duty under sections 50 or 51 whether or not it is established that the key concepts exist in the particular case. But that does not detract from the fundamental proposition that jurisdiction must be established and, unless and until it is, under section 50 the Commissioner may do no more than determine whether she has jurisdiction. Her decision as to that matter, whether positive or negative, is a decision within section 50(3)(b).

38. In the context of the present case this means that, unless all three of the key jurisdictional concepts applied, the Commissioner did not have power to decide whether any exception under regulation 12 of the EIR applied including whether the body held the information requested.

39. The above reasoning also applies to section 51 of FOIA: *Fish Legal* at [27], [41] and [55]. In the present case the Commissioner served the information notice pursuant to section 51(1)(a). That required there to be an application under section 50, and that in turn required the existence of the three jurisdictional triggers. In accordance with *Fish Legal,* the Commissioner had jurisdiction under section 50 to decide whether the triggers existed, and so could require information relating to that question, as was made clear by Lord Phillips in *Sugar* at [20] and cited with approval in *Fish Legal* at [41].

The Information Commissioner's duty under section 50

40. In *Fish Legal* the Upper Tribunal explained at [25]-[26] that section 50 is in mandatory terms. If the Commissioner relies on section 50(2), she must notify the complainant under section 50(3)(a) that she is not making a decision. In all other cases, section 50(3)(b) obliges the Commissioner to come to a decision whether the request was dealt with in accordance with Part 1 of FOIA, or Parts 2 and 3 of the EIR, and serve a decision notice. At [27] the Upper Tribunal posed the question raised in that appeal, which was whether the position was any different where the proper classification of the body was in issue. The analysis which followed and the conclusion at [55] was that the position was no different in such

a case, and a decision whether or not a body was a public authority was a decision within section 50(3)(b).

41. As section 50 is in mandatory terms, it is not open to the Commissioner to refuse to make a decision even if she thinks that it is inconvenient to do so or that it is likely that her decision will be that the body in question had dealt with the request lawfully, or because she thinks that the request (as opposed to the application under section 50) may be vexatious. Unless those or other factors lead her to conclude that the application is frivolous or vexations within section 50(2)(c), they are to be addressed within the substantive scope of section 50, but only if the Commissioner has jurisdiction to do so.

Whether the First-tier Tribunal erred in law

42. On an appeal under section 57 of FOIA the First-tier Tribunal exercises a full merits appellate jurisdiction: *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) at [46] and [90], as further explained (in the context of an appeal against a section 50 decision notice) in *DEFRA v. Information Commissioner and Birkett* [2011] UKUT 17 (AAC):

> "58 That is what section 58 does. The tribunal is required to consider whether the Commissioner's decision notice was in accordance with law. That directs attention to the contents of the notice and the scope of the Commissioner's duty under section 50. And that directs attention to whether the public authority is required to disclose the information. There is nothing in the language of the section or inherent in the nature of the tribunal's task to limit the scope of that consideration. In other words, the section imposes the "in accordance with the law" test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority."

43. Applying that approach to an appeal against an information notice, section 58 directs attention to the information notice and the Commissioner's power under section 51. That, as I have explained, is limited by the scope of the Commissioner's duty under section 50 where jurisdiction is in issue. The Commissioner was bound to make a decision under section 50 and, until she had determined the jurisdictional question, she had no power to determine anything else. It would not have been lawful to serve an information notice directed to any other matter, either because at that stage section 51(1) did not permit her to do so or because it would have been pointless and so an improper exercise of her discretion. She was not bound to serve an information notice but, if she did not, she would have had to determine the jurisdictional question but without the information that she required.

44. This was the point that the First-tier Tribunal succinctly made at paragraph 25 of its reasons, but Mr Paines disagreed. He said that it was not E.ON's case that, if its appeal in the First-tier Tribunal was successful and the information notice was quashed, the Commissioner or the tribunal would have had to consider again whether to serve a notice. This submission does not stand up to scrutiny. In the light of E.ON's fundamental position that the public authority question was

academic, another information notice relating to that question would have met with the same objections as the first.

45. Mr Paines accepted that the public authority question was a matter of jurisdiction and that the Commissioner could not act without jurisdiction. He sought to avoid the consequences of that constraint on the Commissioner's powers by advancing an ingenious but, for reasons which I now explain, misconceived alternative approach. He said that, although the Commissioner could not make a section 50 decision as to whether the information was held before establishing her jurisdiction under section 50, she should nonetheless have decided whether the information was held in order to assess whether it was proportionate or otherwise reasonable to serve the information notice.

46. I reject this submission. The Commissioner's functions are entirely prescribed by the legislation. She has a duty to act reasonably and proportionately, but only within the bounds of her statutory functions. If E.ON was correct it would mean that the Commissioner could (and, in certain circumstances, should) reach a conclusion on a matter relevant to the substantive lawfulness of a body's response to a request for information (including, under the EIR, whether any exception in regulation 12 applied) *before* deciding whether she had jurisdiction under section 50. If the Commissioner were to make the finding that E.ON said should have made in this case, namely that E.ON did not hold the information, that would have disposed of the application. And yet no decision notice could have been served in relation to that matter because it would not have been a decision which the Commissioner had jurisdiction to make under section 50, and there would have been no right of appeal against the Commissioner's finding.

47. Mr Paines' position appeared to be that this did not matter because the decision would not have been a section 50 decision. It would simply have been a decision as to how proportionately to address the complaint. Yet that position would lead the Commissioner to a dead end. There is no statutory provision which could accommodate the outcome for which Mr Paines contended, that being a decision by the Commissioner not to address the public authority question because there was no point in doing so. The Commissioner could not have served a section 50 decision notice that E.ON did not hold the information because she had no jurisdiction to do so. She could not have served a decision notice that E.ON was not a public authority because she did not have the information which she required to do so and, anyway, E.ON's case was that the question was academic. But she could not have refused to make a decision under section 50 unless section 50(2) applied, which (as I explain below) it did not.

48. It follows from this analysis that the question whether E.ON was a public authority was not academic. On the contrary, it was the only question that the Commissioner could have determined at that stage of the exercise of her functions. It also follows, for the same reasons, that it could not have been disproportionate to seek to address the public authority question before

addressing the holding question. The Commissioner could not lawfully have done otherwise.

49. The First-tier Tribunal's decision was entirely consistent with the above and was correct. Contrary to Mr Paines' submission, at paragraph 24 of its decision the tribunal was not saying that it could not decide any matter which had not first been addressed by the Commissioner. Its decision was that the question whether the information was held was simply irrelevant to the appeal against the information notice which was directed to the prior question of jurisdiction. Paragraph 24 reflected the correct analysis which I have set out above. Whether the information was held by E.ON would be addressed, if at all, when the Commissioner made a decision under section 50 but she had not yet done so. The First-tier Tribunal could not consider matters that might arise under section 50 unless and until a section 50 decision has been made and there had been an appeal to the First-tier Tribunal against that decision.

50. Moreover, it is wrong to characterise the First-tier Tribunal's approach as a refusal to decide E.ON's first ground of appeal. Ground 1 turned on two issues. There was the factual issue whether E.ON held the information, and there was the legal issue whether that was relevant to the appeal against the information notice. E.ON had to be right on both in order to succeed. The tribunal decided the legal issue, against E.ON, and so the factual issue was irrelevant.

E.ON's suggested alternative steps and proportionality

51. E.ON submitted that the First-tier Tribunal wrongly failed to consider its case that that there were alternative steps that the Commissioner should have taken in response to Mr Hardy's application: (1) making further enquiries as to whether E.ON held the information; (2) assessing the matter as suitable for informal resolution and seeking to persuade Mr Hardy to withdraw the request or redirect it to ROWL; (3) assessing the application as frivolous or vexatious. E.ON submitted that the principle of proportionality meant that the Commissioner was bound to consider or attempt any of the above steps, or to explain if she did not do so.

52. Ms Morrison and Ms Pinder agreed that the Commissioner must exercise her functions in a proportionate manner, and that this means that, where there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused by the measure adopted must not be disproportionate to the aims pursued.

53. Mr Paines referred to a number of authorities including *Scotch Whisky Association v Lord Advocate* Case C-333/14, [2016] 1 WLR 2283; and *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd and others* [2018] QB 256. Those cases were concerned with very different contexts to that of the present appeal. The *Scotch Whisky* case concerned the balance between two articles of the Treaty on the Functioning of the European Union. Proportionality was the central issue. *Ittihadieh* involved the application of the principle of proportionality in the context

of domestic information rights legislation, but the Court of Appeal's reasoning was based on the particular statutory provisions of the 1998 Act and the Directive to which it gave effect, and different obligations to those in issue here. These cases were not concerned with and do not provide authority for E.ON's underlying proposition that the Commissioner and First-tier Tribunal were required to take action outside of the legislative structure instead of fulfilling their obligations under that legislation. Indeed, at [100] of *Ittadieh,* Lewison LJ noted at [100] that there was no express provision in the DPA relieving a data controller from the obligation in section 7(1) and said that "the principle of proportionality cannot justify a blanket refusal to comply with" the duties under that Act.

54. The first step suggested by E.ON was irrelevant. This follows from my conclusions above as to the correct approach in law. The question whether E.ON held the information was not within the scope of the Commissioner's functions at that stage, and she was bound to determine the public authority question in any event.

55. As for the second suggested step, Mr Paines submitted that the Commissioner should have continued the process of informal resolution which she had instigated but not completed.

56. It is important to note that there is no statutory provision for informal resolution of complaints to the Commissioner. Informal resolution is a pragmatic approach adopted by the Commissioner which in some cases avoids the need for further investigation and decision. This is reflected in the Information Commissioner's guide for public authorities, "How we deal with complaints". The Commissioner has no power to require the parties to resolve a case informally nor to require a requester to withdraw a complaint. That is a matter for the parties. Unless an application is withdrawn, the Commissioner must as a matter of law determine it. In the present case Mr Hardy did not withdraw his application. E.ON cannot sidestep the Commissioner's obligation by appealing to EU principles of proportionality.

57. In any event, I am satisfied that on the facts E.ON's arguments could not succeed. Referring to the *Scotch Whisky* case at [53]-[54], Mr Paines submitted that the Commissioner could not show that sending the information notice was reasonable or proportionate because she had not provided evidence to that effect. That case concerned a specific derogation from a fundamental principle of EU law where, in accordance with established principles (see for instance *R (Lusmsdon) v Legal Services Board* [2016] AC 697), the principle of proportionality is applied strictly. The approach to proportionality is heavily dependent on context. The present case is very different and the approach to proportionality is more akin to the application of conventional public law principles.

58. Mr Paines also relied on the recent decision of the First-tier Tribunal (General Regulatory Chamber) in *Doorstep Dispensaree Ltd v Information Commissioner*

EA/2018/0265, dated 28th January 2019, a tribunal comprising the President of the General Regulatory Chamber in an appeal against an information notice. The Tribunal said at [23] that it would have been helpful to have had a short witness statement from the Commissioner's case officer as to the factors taken in to account in making the decision to serve the notice. Mr Paines, rightly, did not suggest that this was binding but that it illustrated the importance of having evidence. The decision does not assist me one way or the other. Aside from the obvious point that a decision of the First-tier Tribunal does not bind the Upper Tribunal, the comment in that case was simply a passing observation made at the end of a decision which concerned a different issue to the one in hand.

59. In the present case, neither the Commissioner nor Fish Legal was satisfied that E.ON did not hold any of the information. The Commissioner summarised her concerns about this in her skeleton argument for the First-tier Tribunal. The Commissioner had a discretion whether to carry on pursuing that question, informally, or whether to get on with deciding the complaint pursuant to her legal duty to do so. It was clear that she had decided on the latter. In the information notice the Commissioner explained that she was aware that E.ON's case was that ROWL held the information, but that the complainant had asked for a decision and so she had to decide the public authority question first. This cannot be said to have been disproportionate or otherwise unreasonable. In its email of 26 May 2017 E.ON had said that it was content for the Commissioner to decide the public authority question (see paragraph 11 above) and had not subsequently indicated a change of position in that regard. In any event, there was no particular reason for the Commissioner to have expected that informal resolution would have been achieved by pressing E.ON further on the question whether the information was held. She was entitled to get on with determining the statutory questions with which she was charged. As Upper Tribunal Judge Wikeley said in *United Kingdom Independence Party Ltd v Information Commissioner* [2019] UKUT 62 (AAC), when faced with a similar situation under the Data Protection Act 1998 whether to serve an information notice or continue to press informally for a response,

> "30…where the Commissioner is seeking information from a data controller she can always write another letter. Sometimes that will be an appropriate course of action, sometimes it will not.
>
> 31. …The choice as to the most appropriate approach is a classic issue of discretion, as here."

60. Finally, I come to suggested step (3). Mr Paines submitted that Mr Hardy's refusal to accept that E.ON did not hold the information and so redirect his request to ROWL, and instead to pursue his application under section 50, showed that the application was frivolous or vexatious and that section 50(2)(c) applied. Mr Paines submitted that the First-tier Tribunal failed to consider this and, instead, stated without reasons that no exception in section 50(2) applied.

61. The submission is hopeless. The question whether E.ON held the information was not resolved and neither the Commissioner nor Mr Hardy thought that it was clear. It was be determined by the Commissioner but only once her jurisdiction

was established. Whether or not eventually E.ON turned out to be correct on the issue, it could not and cannot be said that this was clearly an application without merit and so it was not frivolous. Mr Paines did not suggest that "vexatious" in this context meant anything different to that term in section 14 of FOIA. The meaning and application of that term has been explained by the Upper Tribunal and Court of Appeal in *Dransfield v Information Commissioner and Devon CC* [2012] UKUT 440 (AAC) and [2015] EWCA Civ 454. I do not set out the principles established there. There is nothing in this case which gets close to meeting the high standard set by vexatiousness.

Ground 2: Reasons

62. Mr Paines submitted that (i) the First-tier Tribunal failed to deal with E.ON's arguments on the preliminary issue, and (ii) failed adequately to explain its decision.

63. As for (i), E.ON's case on the ground 1 and the preliminary issue were closely linked. At paragraph 23 the First-tier Tribunal summarised E.ON's substantive case on proportionality. The question on the preliminary issue was whether the arguments and evidence under that ground were relevant. That is what the tribunal addressed.

64. As for (ii), the tribunal stated its conclusion in the first sentence of paragraph 24. An explanation was provided in the subsequent paragraphs, which are to be read in the light of the preceding summary of the decision in *Fish Legal*. As the tribunal stated clearly at paragraph 28, that meant that the question whether the information was held was not to be determined at that stage.

65. In two respects the reasons a little unclear, but neither materially undermines the decision. First, the statement at paragraph 29 that "the Commissioner needs to resolve the issue of jurisdiction *before anything else happens in the case"* (my emphasis) could, if read alone, give the impression that the tribunal thought that the appeal could not be determined until the Commissioner had resolved jurisdiction. If that was the tribunal's decision, it would have been wrong. However it is clear, from the substance of the decision (in particular paragraphs 24, 26 and 28), and from paragraph 30 in which the tribunal made it clear that what remained of the appeal would proceed, that that was not what the tribunal decided. I am satisfied that the first sentence of paragraph 29 was carelessly worded but that what the tribunal meant to say was that the Commissioner needed to resolve jurisdiction before *she* could do anything else in relation to the complaint.

66. Second, at paragraph 30 the tribunal left open the possibility that there may be more to be said on ground 1. As the tribunal's conclusion on ground 1 effectively determined that ground, I do not know what the tribunal had in mind. Indeed, it may be that it was not accurate to describe the decision as being on a "preliminary issue". Jurisdiction was a preliminary issue for the Commissioner, but the tribunal's decision on the consequence of that for ground 1 was a

determination of that ground. However, it does not matter because it does not undermine the substantive decision on the issue decided and, as the tribunal had directed further submissions as to how the appeal should proceed, any such matters as I have identified here could have been clarified within that process. The First-tier Tribunal can clarify the position when it gives its final determination of this appeal under section 58.

67. The First-tier Tribunal properly left open ground 2. That ground was directed to the nature of the information sought, was unaffected by the tribunal's conclusion on ground 1 and remains to be argued.

Ground 3: Procedural unfairness

68. E.ON submitted that the First-tier Tribunal's approach to the preliminary issue was procedurally unfair because no directions for a preliminary issue were made prior to the hearing, that the scope of the preliminary issue was not precisely formulated at the hearing, and that this caused prejudice to E.ON.

69. The Commissioner's case on ground 1 was crystal clear. E.ON's written Reply showed that it understood that the Commissioner's case was that she was required to determine the "preliminary issue" of jurisdiction. In her skeleton argument for the First-tier Tribunal the Commissioner suggested that the nature and scope of the appeal should be addressed by the tribunal as a preliminary issue. The Commissioner's legal arguments as to the scope of the appeal, which went to the heart of the substantive issues under ground 1, were clearly set out in the Commissioner's response to E.ON's appeal and in her skeleton argument. Those submissions rested centrally on the decision in *Fish Legal*. There was no unfairness to E.ON in the tribunal deciding to address that key issue first. It was a sensible case management decision to do so because, if the Commissioner was right, there would be no need for the tribunal to address whether the information was held by E.ON.

Conclusion

70. For the above reasons, this appeal is dismissed.

71. The consequence is that the remaining issues in E.ON's appeal against the information notice are yet to be determined by the First-tier Tribunal.

Signed on the original
on 17th April 2019

Kate Markus QC
Judge of the Upper Tribunal