Harron v Information Commissioner and Rotherham MBC
[2024] UKUT 275 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

UT ref: UA-2023-000467-GIA

Appellant: Liam Gerard Harron

First Respondent: The Information Commissioner

Second Respondent: Rotherham Metropolitan Borough Council

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE WRIGHT

Decision date: 5th September 2024

ON APPEAL FROM:

Tribunal: **First-tier Tribunal (General Regulatory Chamber) (Information Rights)**
Tribunal Case No: **EA/2022/0290**
Decision Dates: **18 January 2023**

This front sheet is for the convenience of the parties and does not form part of the decision

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UT ref: UA-2023-000467-GIA

On appeal from First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

Mr Liam Gerard Harron

Appellant

- v –

The Information Commissioner

First Respondent

and

Rotherham Metropolitan Borough Council

Second Respondent

Before: Upper Tribunal Judge Wright

Decided after a hearing on 16 April 2024

Representation: **Mr Harron** represented himself
Leo Davidson of counsel for the Information Commissioner
Jorren Knibbe of counsel for Rotherham Metropolitan Borough Council

Decision date: 5 September 2024

DECISION

The decision of the Upper Tribunal is to allow the appeal. The strike out decision of the First-tier Tribunal made on 18 January 2023 under case reference EA/2022/0290 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and direct that the question of whether Mr Harron's appeal should be struck out **on the ground that it has no reasonable be prospects of success** should be reconsidered by a freshly constituted First-tier Tribunal.

The First-tier Tribunal must consider whether the strike out application should be decided after or at an oral hearing of the strike out application.

REASONS FOR DECISION

Introduction

1. This appeal concerns whether the First-tier Tribunal ("the FTT") erred in law when it struck out Mr Harron's appeal to it on the basis that the FTT had no jurisdiction to determine it.

Relevant background

2. Mr Harron has for several years been, in his eyes at least, seeking to hold Rotherham Metropolitan Borough Council ("Rotherham") to account for the way it has handled child sexual exploitation in its area in the wake of the 2014 Jay Report (also known as the "Independent Inquiry into Child Sexual Exploitation). That report had estimated that approximately 1400 children were sexually exploited in Rotherham between 1997 and 2013.

3. Mr Harron is the co-author of a booklet titled "Voices of Despair, Voices of Hope", which is a collection of child sexual exploitation survivors' stories. In 2016 Rotherham reversed a decision it had previously made to distribute 1,500 copies of this booklet which it had purchased. Rotherham said it had reversed its previous decision because it considered the booklet was not suitable for use either for staff or residents as it "did not form part of the National Working Group best practice advice". Mr Harron has since then made a number of freedom of information requests to Rotherham about this reversal decision.

4. The request of 23 March 2021 with which this appeal is concerned is one such request. It asked Rotherham for two pieces of information:

> "A copy of all communications that led to and followed on from the comments made in red and added to the email I sent on 26.10.15 at 10.24am.
>
> It is also essential that the identify of any person Jean Imray contacted (Rape Crisis is mentioned) is identified as part of this request."

5. Jean Imray is a senior social worker and at the material time was the Interim Deputy Strategic Director of Children's and Young People's Services at Rotherham. Ms Imray had carried out an independent investigation following the Jay report. She was also involved in Rotherham's decision not to distribute copies of "Voices of Despair, Voices of Hope". It was Ms Imray's view, having read the booklet, that it was unsuitable for widespread distribution by Rotherham. However, she also wished to seek a second opinion on the subject, which she did. To this end, Ms Imray had contacted a practitioner who had over 30 years of experience in counselling persons affected by sexual violence and in managing and advising organisations in this field. In this decision I will refer to the person who Ms Imray contacted about the booklet either as "the practitioner" or, as the FTT did, "the expert". The practitioner was sent a copy of "Voices of Despair, Voices of Hope" and asked to comment on it, which they did. However, the practitioner had only agreed to provide their views on the booklet on the basis that their identity and the identity of the organisations for which they had worked was not disclosed.

6. Rotherham refused Mr Harron's request of 23 March 2021. It did so in short because it said that (i) it held no further information under the first part of the request; and (ii) the identity of the practitioner who had given their views to Ms Imray on "Voices of Despair, Voices of Hope" would not be disclosed because section 40(2) of the

Freedom of Information Act 2000 ("FOIA") applied to that information and exempted it from disclosure.

7. Mr Harron was dissatisfied with this outcome and complained to the Information Commissioner under section 50(1) of FOIA. In a Decision Notice of 8 September 2022, the Information Commissioner found that Rotherham had acted in accordance with Part I of FOIA in refusing to provide Mr Harron with the requested information. As to the first part of the request, the Information Commissioner decided that on the balance of probabilities Rotherham did not hold any further information which was relevant to the first part of the request. As for the second part of the request, the Information Commissioner concluded (i) that the practitioner's identity was personal data; (ii) there was insufficient legitimate interest to outweigh the practitioner's fundamental rights and interests; and, accordingly (iii) disclosure of the information would not be lawful.

8. Mr Harron appealed against the Information Commissioner's Decision Notice and it was that appeal which was struck out on the basis that the FTT did not have jurisdiction in relation to the appeal.

<u>The FTT's Strike Out decision</u>

9. The material parts of the FTT's strike out decision read as follows:

> "1. The Second Respondent's Strike Out Application….is allowed.
>
> 2. The Appellant made an information request for information about a response previously sent to him. He also asked for the name of an external expert consulted by the Second Respondent ("the Council"). The Information Commissioner published his Decision Notice on 8 September 2022 in which he found that the Council was entitled to rely on s.40 (2) FOIA to refuse to disclose the name of the expert and that no further information within the scope of the request was held.
>
> 3. The Appellant filed a Notice of Appeal on 4 October 2022. The Appellant's Grounds of Appeal are that he hopes the Information Commissioner will review the Decision Notice with minimal involvement of the Tribunal.
>
> 4….the Information Commissioner, in filing its Response to the appeal, applied for a strike out under rule 8(3)(c) of the Tribunal's rules on the basis that the appeal had no reasonable prospects of success.
>
> 5….the Council in filing its Response to the appeal, applied for a strike out under rule 8(3)(c) or under rule 8(2)(a) for want of jurisdiction. It submitted that the grounds of appeal failed to engage the statutory jurisdiction of the Tribunal….
>
> 6….the Appellant [in response to the strike out applications] reiterated his grounds of appeal and submitted that the Tribunal should investigate whether it is true, as the Council states, that the expert provided advice on conditions of anonymity. He also referred the Tribunal to case law about the anonymity of experts witnesses in court proceedings.
>
> 7. I have considered all parties' representations and concluded that the grounds of appeal in this case do not engage the Tribunal's statutory jurisdiction under s. 57 and 58 FOIA. They do not allege that the Decision Notice is wrong in law in any respect or that it involved an inappropriate exercise of jurisdiction. Indeed, they ask the Information Commissioner to

review the Decision Notice rather than asking the Tribunal to set it aside and make a substituted decision. Having regard to the Tribunal's powers under s. 58 FOIA, I note the most recent submissions appear to ask for a remedy which the Tribunal may not provide.

8. It does not therefore seem to me that the Tribunal has jurisdiction to determine this appeal. In such circumstances, a strike out is mandatory. I now direct a strike out accordingly."

Relevant statutory framework

10. Section 1 of FOIA provides, subject to immaterial exceptions on this appeal, the core duty under FOIA. It states:

> "**General right of access to information held by public authorities.**
>
> 1(1) A person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him."

11. Section 50 of FOIA is about complaints to the Information Commissioner and sets out (insofar as is relevant):

> "**Application for decision by Commissioner.**
>
> 50.-(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
>
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
>
> (4) Where the Commissioner decides that a public authority—
>
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
>
> (b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

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

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

12. Sections 57 and 58 of FOIA are concerned, respectively, with the right of appeal to the FTT and the FTT's duties and powers on an appeal to it. They provide relevantly as follows:

"**Appeal against notices served under Part IV.**

57.-(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

Determination of appeals.

58.-(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."

13. It is settled by case law that the language of "not in accordance with the law" in section 58(1)(a) does not import a secondary judicial review test of legality. Instead, the FTT has a full merits jurisdiction on an appeal: see paragraphs [45]-[46] of *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC); [2018] AACR 29 and paragraph [21] of *Lin v ICO* [2023] UKUT 143 (AAC). In other words, and to take this case as an example, the FTT's jurisdiction could extend to whether in fact Rotherham held more information falling within the first part of Mr Harron's request. It could also extend to whether on the evidence and relevant facts the practitioner's identity ought to be disclosed under section 40(2) of FOIA.

14. Finally in terms of relevant law, rule 8 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules") sets out the bases on which an FTT may strike out an appeal which has been made to it. Rule 8 provides relevantly as follows:

> "**Striking out a party's case**
>
> 8.—(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or that part of them.
>
> (2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—
>
> (a) does not have jurisdiction in relation to the proceedings or that part of them; and
>
> (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.
>
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
>
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
>
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

Discussion and Conclusion

15. In giving permission to appeal, I was concerned about two matters.

16. The first matter was whether the FTT had struck out the whole of the appeal on a basis (lack of jurisdiction) for which neither respondent was contending. That gave rise, I thought, to an issue about whether the FTT proceedings had been fair, in that Mr Harron did not have notice that the whole of the appeal proceedings might be struck out on the basis that the FTT did not have jurisdiction in respect of any part of his appeal.

17. In its written response to Mr Harron's appeal to the FTT, the Information Commissioner had opposed the appeal and asked for the appeal to be decided on the papers. In the same written response, the Information Commissioner also asked for the appeal to be struck out under rule 8(3)(c) of the GRC Rules. That provision allows an appeal to be struck out if it has no reasonable prospects of success. In part (but only in part) the basis of the Information Commissioner's rule 8(3)(c) strike out application was that the outcome sought by Mr Harron, which it identified as Mr Harron's hope that the Information Commissioner would review the Decision Notice with minimal involvement of the First-tier Tribunal, was not a remedy the FTT could provide under section 57 of FOIA. The Information Commissioner also argued that the grounds of appeal failed to set out why the Decision Notice was not in accordance with the law or why the Information Commissioner ought to have exercised his discretion differently.

18. Rotherham's response to Mr Harron's appeal opposed the appeal and also asked the FTT to strike out the appeal. It's strike out application was made on the basis that appeal proceedings should be struck out under rule 8(2) and/or 8(3)(c) of the GRC. However, and notably, its application for strike out under rule 8(2)(a) was only in respect of one of the outcomes it identified Mr Harron as seeking on his appeal, that outcome being the Information Commissioner should review the Decision Notice with minimal involvement of the First-tier Tribunal. Rotherham argued that this particular remedy was not one the FTT could provide. Rotherham's strike out application under rule 8(2)(a) continued (with my italics added for emphasis):

> "The Tribunal does not have jurisdiction to require the Commissioner to review [his] decision and so, *to the extent the appellant seeks this remedy*, it is outwith the jurisdiction of the Tribunal. Accordingly, *this part of the appeal* must be struck out pursuant to Rule 8(2)."

19. The rest of Rotherham's strike out application was founded on rule 8(3)(c) of the GRC Rules on the basis that the appeal had no reasonable prospect of success. It argued under rule 8(3)(c), by way of example and in relation to disclosure of the name of the practitioner it had consulted, that "when balancing [the legitimate interests of Mr Harron in knowing that expert's name] against the rights and fundamental freedoms of the data subject [i.e., the expert], the Tribunal is bound to find that the rights of the data subject prevailed".

20. It was on this basis that I considered it to be arguable that the strike out application had been decided on a basis for which Mr Harron had not had notice. It was I think common ground before me that the directions or notice required by rule 8(4) of the GRC Rules was (purportedly) met by paragraph 10 of the FTT Caseworker's (what looks like standard appeal) directions of 16 November 2022. That paragraph read as follows:

> "Rule 24(1) of the GRC Rues gives Liam Harron the opportunity to reply to each response within 14 days after the date on which the respondent sends the response to them."

21. What rule 8(4), when properly read in context, may require of the FTT did not really feature in this appeal. Moreover, Mr Harron did in fact respond to both the Information Commissioner's and Rotherham's responses to the appeal to the FTT and therefore, at least in theory, had an opportunity to respond to the strike out requests made by both respondents. I would observe, however, that little if anything in Mr Harron's responses grappled with whether the FTT lacked jurisdiction to deal with any part of his appeal.

22. The second concern I had was whether the FTT had erred in law in failing to explain why it had not held an oral hearing of the strike out application. This was in the context that in his 'Notice of Appeal' form (against the Information Commissioner's Decision Notice) Mr Harron had asked for the decision to be made on his appeal after a hearing.

23. The Information Commissioner's response to the first concern I had when giving permission is to argue that, although he sought strike out only on the basis of rule 8(3)(c) of the GRC Rules, in substance the strike out application was focused on jurisdiction. He highlighted in this respect that his written strike out application, having referred to Mr Harron's hope, in box 6 of the Notice of Appeal, that the "Commissioner will review the Decision with minimal involvement of the GRC FTT", had argued to the

FTT that "the Tribunal has no jurisdiction over the Commissioner's investigation which has concluded with the [Decision Notice] being issued". Paragraphs [81] and [85] of *Malnick* were cited in the strike out application in support of this argument. Other parts of the Information Commissioner's strike out application which it was argued highlighted he was in fact seeking strike out under rule 8(2) of the GRC rules were that it had argued that the "outcome sought by the Appellant [i.e.., the 'hope' identified above] is not within the [FTT's] gift" and that "ultimately the Appellant raises no valid grounds of appeal against the conclusions in the [Decision Notice] and only matters that are beyond the [FTT's] jurisdiction".

24. The Information Commissioner further argued that the FTT was under a positive duty to take any jurisdictional point on its own even if not raised by the parties, as jurisdiction cannot be created by consent if the FTT lacks jurisdiction. In this case, however, the Information Commissioner argued that Mr Harron was "fully aware that both Respondents took issue with the nature of this appeal and in particular whether it engaged the FTT's statutory jurisdiction under sections 57 and 58 of FOIA, and therefore [he] did have notice of the issue which the FTT would determine".

25. I am doubtful that this is correct. If, as the Information Commissioner now contends, the strike out application was founded in substance on the FTT lacking jurisdiction on all aspects of Mr Harron's appeal, I struggle to understand why the strike out application was not made expressly on rule 8(2) of the GRC Rules instead of (as it was in fact) rule 8(3)(c).

26. Moreover, the Information Commissioner's response to the appeal (in which the strike out application was included) also contained argument which was about the appeal having no real prosect of success (and in this context I consider the "and" in the sentence "ultimately the Appellant raises no valid grounds of appeal against the conclusions in the [Decision Notice] and only matters that are beyond the [FTT's] jurisdiction" has to be read disjunctively). That argument was set out as follows:

> "As set out in the [Decision Notice], the Appellant has made several information requests to the Council about its reversal, in 2015, of its previous decision to distribute copies of a booklet containing child sexual exploitation survivors' stories. The Council has disclosed a large amount of information to the Appellant relating to this issue and the Commissioner maintains that that the Appellant has been provided with the information sought in part 1 of the request where it is held in recorded form by the Council.
>
> In respect of part 2 of the request, the Council informed the Commissioner that it has disclosed information about why the expert opinion was sought, how it was sought, when it was sought. Further, the opinion of the expert witness has been disclosed to the Appellant with their name redacted pursuant to s. 40(2) FOIA for the reasons in the [Decision Notice] and the Council's submissions (copy attached).
>
> The Commissioner submits that the Appellant has failed to set out in his grounds of appeal why the [Decision Notice] is not in accordance with the law or why the Commissioner ought to have exercised his discretion differently. Accordingly, the Commissioner considers that there is no reasonable prospect of the Appellant's case, or any part of it, succeeding.

> The Commissioner respectfully requests that the Tribunal issue a direction to strike out the Appellant's appeal pursuant to rule 8(3)(c) of the Rules. The Commissioner is aware that striking out the appeal is a draconian measure that should not be used lightly. However, ultimately the Appellant raises no valid grounds of appeal against the conclusions in the [Decision Notice] and only matters that are beyond the Tribunal's jurisdiction."

27. These passages are advancing an argument which proceeds on the basis that the FTT has jurisdiction on the appeal but in exercise of that jurisdiction the FTT ought to strike out the appeal because on the evidence it has no reasonable prospects of success. This is not an argument which the FTT address in its decision. Nor is it an argument that lends itself to the FTT having no jurisdiction on any part of Mr Harron's appeal. I therefore struggle to accept that the Information Commissioner's strike out application was in substance one based solely on rule 8(2) of the GRC Rules and the FTT lacking jurisdiction on any aspect of Mr Harron's appeal. I remind myself here too that Rotherham's strike out application was more distinctively crafted and did not rely on rule 8(2) only.

28. Be all of this as it may, the Information Commissioner's argument could still have merit, at least in terms of whether any error of law the FTT may have made was a <u>material</u> error, if on proper analysis Mr Harron's appeal did not engage the statutory appellate jurisdiction of the FTT.

29. This is not the decision in which to engage in a detailed analysis of what rule 8(2) means by the FTT not having "jurisdiction". The law draws a distinction between two different ways in which the word "jurisdiction" is used in relation to the reach or function of a tribunal or court. It is trite law that a tribunal (or court) can act only within the jurisdiction that is conferred on it by legislation. However, there are two different meanings for the word 'jurisdiction': constitutive and adjudicative: see *Carter v Ahsan* [2005] ICR 1817 at paragraph [16] and *Garthwaite v Garthwaite* [1964] P 356. The constitutive jurisdiction is the power given to the particular judicial body to decide a class or classes of case. The adjudicative jurisdiction concerns the powers that the tribunal (or court) may exercise when reaching a decision within its constitutive jurisdiction.

30. One reading of rule 8(2) may point to it being concerned solely with the constitutive jurisdiction of the General Regulatory Chamber of FTT: that is, whether the FTT has any jurisdiction to determine the matter in dispute at all. On this reading, the transfer power in rule 8(2)(b) is for where another court or tribunal has jurisdiction (in the constitutive sense) over the matter in issue. If the rule 8(2)(b) power is exercised then the FTT does not need to strike out the proceedings because those proceedings are no longer before it. If, however, the power in rule 8(2)(b) cannot be exercised, because no other court or tribunal has jurisdiction over the matter either, then the FTT must strike out the proceedings if it has no jurisdiction in relation to the proceedings. That can only mean the <u>constitutive</u> jurisdiction as it can be no part of the FTT's role to strike out proceedings under rule 8(2)(a) if it considers the appeal to be hopeless or bound to fail, as the FTT by definition must have the jurisdiction to enable it to decide that the appeal is bound to fail. If this were an FTT's view of the appeal then it should invoke rule 8(3)(c) of the GRC Rules: see, perhaps similarly, *AW v Essex CC* (SEN) [2010] UKUT 74 (AAC); [2010] AACR 35. But that would be in respect of an appeal over which it had the constitutive jurisdiction to decide.

31. The other reading of ‘jurisdiction’ in rule 8(2) is that it concerns (or at least includes as well) the adjudicative jurisdiction of the FTT. That was the sense in which it seems to me that the FTT in Mr Harron’s appeal dealt with the appeal. It had the constitutive jurisdiction to determine the appeal as it was an appeal under section 57 of FOIA against a Decision Notice under section 50 of FOIA (and it was only the FTT which had that jurisdiction). However, in exercising that constitutive jurisdiction, the FTT lacked the adjudicative jurisdiction to provide Mr Harron with the remedy it considered he was seeking, namely to require the Information Commissioner to review the Decision Notice. On this reading of rule 8(2), rule 8(2)(a) covers where the FTT has no adjudicative jurisdiction it can exercise on the appeal <u>and</u> (per rule 8(2)(b)) nor does any other court or tribunal have the constitutive or adjudicative jurisdiction (hence why the FTT cannot transfer the proceedings under rule 8(2)(b) to another court or tribunal). In such a circumstance, where no court or tribunal has the adjudicative (or constitutive) jurisdiction, strike out for good reasons is mandatory as there is no point in proceedings continuing which no court or tribunal has the power to provide the appellant with the remedy they are seeking.

32. I note in passing that the FTT’s strike out decision under rule 8(2) did not address rule 8(2)(b) at all.

33. The problem with the respondents’ arguments, and the FTT’s conclusion, that the FTT lacked any adjudicative jurisdiction on Mr Harron’s appeal, is that they fail to read the ‘Notice of Appeal’ in full and in context.

34. The context is that Mr Harron is a litigant-in-person and such litigants may not necessarily be expected to compose their grounds of appeal with the clarity and particularity that should be expected of a lawyer. Further and more particular context is that the FTT had before it (from Mr Harron) a refusal of permission to appeal decision by Upper Tribunal Judge Wikeley in another case brought by Mr Harron concerning information he had requested from Rotherham (case UA-2022-000045-GIA). That decision (rightly in my view) describes Mr Harron’s litigant-in-person style as being one which pays “meticulous attention to detail in his extensive written submissions…, although they tend to repetition and duplication especially as submission follows incrementally on submission” and “[a]s such, it becomes difficult for the bystander, who lacks Mr Harron’s in-depth knowledge of the issues, to see the wood for all the trees”.

35. Turning to Mr Harron’s Notice of Appeal, a significant failing in the respondents’ reading of it and the FTT’s view of it is that the passage in which Mr Harron expressed his hope that “the Information Commissioner will review the Decision with minimal involvement of the GRC FTT, although it fell under box 6 of the Notice of Appeal Form, which is titled “Outcome of appeal”, expressly fell under Mr Harron’s own sub-heading of “Background Information”, which Mr Harron had asked to be noted. On its face, this ‘hope’ was not, therefore, a remedy Mr Harron was seeking from the FTT. It was, as <u>background information</u>, a hope Mr Harron was directing to the Information Commissioner and not the FTT. Whether the Information Commissioner could lawfully act on that hope was not relevant to the FTT’s jurisdiction under section 58 of FOIA as Mr Harron was not asking, or at least not asking clearly, for the FTT to provide him with the remedy of directing the Information Commissioner to review the Decision Notice. The hope was no more than an inexpert view that the Information Commissioner might change his mind.

36. I am therefore satisfied that the FTT misdirected itself, and thereby erred in law, when it stated in its strike out decision that Mr Harron’s grounds of appeal “are that he

hopes the Information Commissioner will review the Decision Notice with minimal involvement of the Tribunal". This error continued when the FTT carried this (wrong) view about the grounds of appeal into the dispositive part of its reasoning (in paragraph 7) where the FTT concluded that the grounds of appeal "do not engage the Tribunal's statutory jurisdiction under s. 57 and 58 FOIA….they ask the Information Commissioner to review the Decision Notice rather than asking the Tribunal to set it aside and make a substituted decision".

37. Just as importantly, the FTT failed to consider, or at least consider with any sufficiency, what had preceded the "Background Information" in box 6 and what Mr Harron described as the "Outcome of Appeal" he was seeking. This, admittedly, was perhaps little more than a repeat of his information request – namely a "copy of all the communications and led to and followed on from the comments made in red and added into the [26.10.15 email] and the identity of any person Jean Imray contacted". However, in terms of the FTT's jurisdiction and substantive remedy under section 58 of FOIA this was, in my judgement and per *Malnick* and *Lin*, an argument that the Information Commissioner's Decision Notice had got it wrong (or, to use the language of section 58(1)(a) of FOIA, that the Decision Notice was not in accordance with the law) and that the FTT should substitute a Decision Notice to the opposite effect. Mr Harron's arguments to this end may not have had (and may still not have) a reasonable prospect of succeeding, per rule 8(3)(c) of the GRC Rules, but that was not the basis on which his appeal was struck out.

38. As for the "Grounds of appeal" set out by Mr Harron in box 5a of the Notice of Appeal, these simply referred to an attached document titled "Grounds of Application to GRC FTT 4.10.22". That document largely does no more than repeat the two part request for information Mr Harron had made to Rotherham. It is therefore true that it does not explain in what particular respects Mr Harron was alleging, per sections 50(1) and 58(1) of FOIA, that the request for information he had made to Rotherham had not "been dealt with in accordance with the requirements of Part I [of FOIA]" and therefore the Decision Notice was not in accordance with he law (beyond the implied arguments that further information was held and the expert's identity ought to be disclosed).

39. However, in circumstances where the FTT was exercising a draconian strike out jurisdiction, had not engaged properly with the grounds of appeal and had not, per paragraph [25] of *Lin* in the exercise of its inquisitorial jurisdiction and in furtherance of the overriding objective under rule 2 of the GRC Rules, sought to have Mr Harron clarify why he considered the Information Commissioner had got it wrong, I do not consider there was any sufficient basis for the FTT to conclude as it did that it could not exercise an adjudicative jurisdiction on the appeal. It may (or may not) in the exercise of that jurisdiction have concluded that the appeal had no reasonable prospects of success, but that is not the decision it made.

40. For these reasons, I reject the Information Commissioner's reliance on the case law in *Khan v Customs and Excise* [2006] EWCA Civ 89, *Doorstep Dispensaree Ltd v ICO* [2023] UKUT 132 (AAC) and *R(Hope and Glory Public House Limited) v City of Westminster Magistrates Court* [2011] EWCA Civ 31 as imposing a requirement on litigants-in-person under section 57 of FOIA to establish grounds of appeal which demonstrate that the FTT's jurisdiction is engaged, insofar as that requirement is said to go beyond the appellant arguing in the grounds of appeal (or can reasonably be construed as arguing, per *Farnsworth v ICO* [2024] UKUT 206 (AAC)) that, for example, the information is held or the section 40(2) exemption does not apply. In my judgement, such grounds of appeal do sufficiently engage the FTT's adjudicative

jurisdiction, albeit they may well run the risk of being found to have no reasonable prospect of success if the appellant cannot back them up.

41. The decisions in *Khan*, *Doorstep Dispensaree* and *Hope and Glory* were not about the jurisdiction of the FTT. They are, at least in the passages relied on, all about the burden of proof. Nor were they decided in the context of an FTT exercising its inquisitorial jurisdiction (per *Lownie v The Information Commissioner, The Foreign and Commonwealth Office and The National Archives* (GIA) [2020] UKUT 32 at paragraph [32] and *Montague v The Information Commissioner and Department for International Trade* [2022] UKUT 104 at paragraph [17]) in respect of an appeal under section 57 of FOIA by a litigant-in-person. Moreover, what is said in paragraph [49] of *Hope and Glory* may, if applied out of context, not sit easily with paragraphs [45]-[46] of *Malnick* and paragraph [21] of *Lin*. If, per paragraph [70] of *Khan*, this case law is authority for the proposition that the burden of establishing a ground of appeal rests on the appellant then, subject to the FTT's inquisitorial role, I would not necessarily demur: see, for example, paragraphs [37] and [38] of *Forstater v Information Commissioner and others* [2023] UKUT 303 (AAC). This, however, is not a jurisdictional point. Rather, it is about establishing the appeal grounds on their merits.

42. I should add that by the time the strike out application came to be decided by the FTT, it had more than Mr Harron's Notice of Appeal, sufficient though I consider the Notice of Appeal to have been in terms of engaging the FTT's jurisdiction. It had, for example, Mr Harron's submission of 30 November 2022, which in effect was a submission replying to the Information Commissioner's response to the appeal. This submission, amongst other things, asked the FTT to undertake a very careful scrutiny of the case put forward by the Information Commissioner about anonymity. That was, in terms, argument contesting the reliance by Rotherham and the Information Commissioner on section 40(2) as the basis for not disclosing the identity of the expert Ms Imray had consulted. Mr Harron argued in this submission that there were "powerful arguments, founded in the public interest, for denying expert witnesses anonymity. That may (or may not) have been a poor argument on the merits about the application of section 40(2) of FOIA to the second part of Mr Harron's information request. However, I struggle to see on a fair reading (per paragraph [20] of *Farnsworth*) why this was not engaging the FTT's jurisdiction to decide if the Information Commissioner's decision was not in accordance with the law in relation to the second part of the information request.

43. In a later submission from Mr Harron, dated 28 December 2022 and in reply to Rotherham's response to his appeal, Mr Harron questioned, at least on the face of it, whether the expert had in fact agreed to review "Voices of Despair, Voices of Hope" only on condition of their anonymity. He also appeared to question whether Rotherham had provided him with a copy of the expert's comments on the booklet. I know not whether there is merit in either of these points made by Mr Harron. That is not the issue in an inquiry about whether the FTT had any jurisdiction it could exercise on the appeal. If, however, either point could be made good by Mr Harron, I again struggle to see why such arguments did not engage the FTT's jurisdiction.

44. The FTT in its strike out decision only addressed one of the arguments Mr Harron had made in reply to the appeal responses/strike out applications. That argument was whether it was true that the expert provided their advice on the booklet on conditions of anonymity. At the very least, the FTT's reasons failed to provide any adequate explanation for why such a factual question did not engage its jurisdiction.

45. I therefore conclude that the FTT erred in law, and moreover had no proper basis, for concluding that it lacked jurisdiction on Mr Harron's appeal.

46. In these circumstances, it is not necessary for me to address whether the FTT also erred in law in not holding a hearing, or at least in not explaining why it was not holding a hearing, before striking out Mr Harron's appeal.

47. The Information Commissioner accepted that if (as I have found) the FTT erred in law and its strike out decision is set aside, further consideration of the respondent's strike out applications should be remitted to the FTT. He relies on paragraph [28] of *Lin* where Judge Wikeley said:

> "28. In those circumstances the Commissioner's submission is that the Upper Tribunal should re-make the FTT's decision and strike out the case. This is on the basis that (as the Response argues at §40) "enough judicial time and resource has been taken up already by this plainly unmeritorious case". I demur. Fact-finding is best regarded as the prerogative of the FTT. I remit the case, and so the Commissioner's application for a strike out, to the FTT for reconsideration before a different judge."

48. Rotherham sought in the alternative to argue, somewhat late in the day, that any error of the law the FTT made in striking out the appeal for want of jurisdiction was not a material error of law because had the FTT directed its mind instead to rule 8(3)(c) of the GRC Rules it would inevitably have struck out Mr Harron's appeal on the basis that it had no reasonable prospects of success. The attempts to establish this lack of materiality, and inevitable strike out under rule 8(3)(c), took up a large amount of the hearing before me and could not be concluded in the time available, which if I may say, rather proves Judge Wikeley's point. That issue is therefore remitted to a differently constituted FTT to determine.

49. I direct the new FTT to whom this appeal is being remitted to proceed on the basis that it has jurisdiction on the appeal. Its sole consideration on the strike out applications, assuming they are maintained, will be to decide whether Mr Harron's appeal has no reasonable prospect of success.

50. Paragraph 14 of *Lin* and the case law cited therein may be of relevance to the new FTT's consideration of whether to strike out the appeal under rule 8(3)(c) of the GRC Rules as may *R(AM) v FTT* (CIC) [2013] UKUT 333 (AAC).

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 5th September 2024