Recent decisions of the Commissioner and Tribunals

John Fitzsimons with Cornerstone Barristers highlights points of interest from decisions of the tribunals from November 2023. John is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information — see foiqualification.com

PDP would like to make readers aware that John acted for the Second Respondent, the Royal Borough of Kingston-Upon-Thames, in the second case in this update.

Department for Business and Trade v Information Commissioner and Montague [2023] EWCA Civ 1378

Summary

This appeal to the Court of Appeal concerned the proper interpretation of section 2(2) of the Freedom of Information Act 2000 ('FOIA'). In particular, it concerned whether the public interest in two or more different statutory provisions exempting information should be assessed in combination (i.e. 'aggregated') in determining whether that public interest outweighs the public interest in disclosure, or alternatively whether the public interest recognised in each provision should be weighed separately. The Court of Appeal decided that aggregation is permissible under the statute and in so doing, upheld the appeal and overturned the decision of the Upper Tribunal ('UT').

Factual background

This appeal arose as Mr Montague, a journalist, requested information about trade working groups established by the Department for International Trade (which had become the Department for Business and Trade, hereafter 'the Department', by the time the matter came to the Court of Appeal). The request related to the period prior to the withdrawal of the UK from the EU. It sought information on the existence of the various groups, their membership, the dates of meetings, the agendas and the minutes of meetings.

The Department disclosed some information but refused, amongst other things, to disclose the minutes of the meetings of trade working groups. In respect of this information, the Department cited section 27 FOIA (exemption for information which would be likely to prejudice international relations if disclosed), and section 35 FOIA (exemption for information relating to the formulation of government policy).

Mr Montague complained to the Commissioner. In a Decision Notice dated 29th March 2019, the Commissioner decided that both exemptions were engaged by the information in question and held that in respect of each exemption, the public interest in maintaining it outweighed the public interest in the disclosure of the information.

Mr Montague then appealed to the First-Tier Tribunal ('FTT'). Part of his appeal — concerning dates and agendas of meetings, information about establishing new trade working groups and a schedule of forthcoming meetings — was allowed. However, the aspect concerning the minutes of meetings of trade working groups was refused. The FTT considered sections 27 and 35 together. One of the key issues before it was whether the public interest recognised in the two statutory exemptions (and as a matter of principle, in two or more different statutory exemptions) should be assessed in combination (i.e. aggregated) in determining whether that public interest outweighs the public interest in disclosure. Alternatively, should the public interest in each provision be weighed separately against the public interest in disclosure?

The FTT held that the public interest in different exemptions could be aggregated (in the same way that such interests may be aggregated under the Environmental Information Regulations 2004, or 'EIRs', regime) and concluded that the public interest recognised in sections 27 and 35 FOIA together "narrowly" outweighed the public interest in disclosure of the minutes of the trade working groups.

On appeal to the UT, the UT identified a key issue as being "whether, when multiple FOIA exemptions are engaged by a single piece of information, the separate public interests in maintaining those different exemptions may be aggregated when weighing them against the public interest in disclosure." The UT held that FOIA did not permit the aggregation of separate public interests in non-disclosure. Instead, the UT found that the public interest in each individual statutory provision exempting information had to be weighed separately against the public interest in disclosing the information.

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In the UT's view, the critical words are those which appear in section 2 (2)(b) FOIA. These words are that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". The UT emphasised the reference to "the exemption" in the singular rather than the plural, which it considered meant as a matter of plain meaning a reference to the public interest in maintaining the exemption singular rather than plural. The UT also observed that the language of "all the circumstances of the case" did not alter its conclusion, and noted that its interpretation of section 2(2)(b) read more consistently with section 17 (refusal notices) where the language of "the exemption" is also used at section 17(3)(b) FOIA.

"The judgment in this case is important because it sets out the principled approach that needs to be taken to considering exemptions, whether by the Commissioner or by public authorities."

The Department appealed against the UT's decision on two grounds. First, it noted that the UT concluded that the aggregation approach advocated by the Department was contrary to a purposive interpretation of FOIA. The Department argued that this was incorrect, and that the Department's approach was consistent with, and indeed supported by, a purposive interpretation of FOIA. In contrast, the UT's approach was liable to lead to a failure to weigh the overall public interest in preventing the harms at which exemptions are aimed: this cannot have been the intention of Parliament.

Second, the Department argued that the UT erred in its interpretation of the language of FOIA, including that the UT interpreted "exemption" as being synonymous with "a provision of Part II" of FOIA. The Department argued that this, too, was incorrect, submitting that "exemption" refers to the exempt status of information, as conferred by the provisions of Part II of FOIA.

The Commissioner and requester resisted the appeal, arguing that the UT was correct. All parties to the appeal agreed in substance, the sole issue for the Court of Appeal was the proper interpretation of section 2 (2)(b) FOIA. The Court of Appeal therefore considered the grounds of appeal together.

The Court of Appeal's decision

Lewis LJ wrote the main judgment for the Court of Appeal, with Andrews LJ also writing separately but agreeing with Lewis LJ's judgment. The Judge observed that the issue in this case depended on the proper interpretation of section 2(2)(b) FOIA and, in particular the meaning of the phrase "the public interest in maintaining the exemption." He noted that this involves considering the words of the statutory provision, read in context, having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation.

Turning to that statutory context, Lewis LJ explained that FOIA confers a right on a person who requests information from a public authority to be told by the authority if it held the information and, if so, to be provided with a copy of the information. The right is, however, made subject to the provision of section 2 FOIA concerning exemptions.

The wording of section 2(2)(b) contains the phrase "the public interest in maintaining the exemption". The Judge's view was that that phrase, properly interpreted, means "the public interest in maintaining the exemption of the information from disclosure" and that public interest has to be weighed against the public interest in disclosure. The word "exemption" does not mean "provision of Part II". As the subsection is concerned with the public interest in maintaining the exemption of the information from disclosure, the natural inference is that it permits the decision-maker to weigh the combined, or aggregated, public interest reflected in the different applicable provisions of Part II.

He explained that there is no reason why the public interest underlying each one of the provisions conferring a non-absolute exemption should be considered separately in deciding whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure. Rather, the natural inference is that Parliament would have expected all the relevant aspects of the public interest recognised in the applicable provisions of Part II to be considered when deciding whether the public interest in maintaining the exemption of the information from disclosure outweighed the public interest in disclosure. On a proper interpretation, therefore, he concluded that section 2(2)(b) FOIA permits the public interest recognised in two or more different provisions in Part II to be assessed in combination or aggregated in determining whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Lewis LJ observed that his interpretation was consistent with the structure of FOIA and the wording of subsection 2(2)(b) taken as a whole. He disagreed with the suggestion by the Respondents that aggregation of the different public interests in non-disclosure would lead to less disclosure of information and so run counter to the purpose of FOIA which is to promote openness, characterising this submission as "too simplistic".

He also noted that the interpretation he considered correct was not inconsistent with section 17 FOIA. Indeed, his view was that section 17(3)(b), like section 2(2)(b), is not concerned with specific statutory provisions in isolation, but rather the public interest underlying the exemption of the information.

Andrews LJ, agreeing with Lewis LJ, added that she was not persuaded

that the structure of the statute points towards, let alone requires, sequential consideration of each separate exempting provision. That is not the natural reading of section 2(2)(b) or section 2 as a whole. On the contrary, she noted that if a set of information engages more than one provision to which that subsection applies, the "public interest in maintaining the exemption [from disclosure]" must logically encompass all the prejudicial consequences of the envisaged disclosure of the (provisionally) exempt information that arise in all the circumstances of the case. For Andrews LJ, that interpretation is not only the natural reading of the language used by the drafter, but makes complete sense. In principle, all the public interest considerations for and against disclosure should be weighed in the balance together.

Points to note

The judgment in this case is important because it sets out the principled approach that needs to be taken to considering exemptions, whether by the Commissioner or by public authorities. It means that the public interest may be aggregated where two or more different statutory provisions exempting information are being relied upon when determining whether that public interest outweighs the public interest in favour of disclosure. In effect, this will involve weighing all the public interest considerations for and against disclosure in the balance together.

In many ways, this approach makes sense as it is now aligned with that under the EIRs regime (see the Court of Justice of the EU's decision in Case C-71/10, *Ofcom v Commissioner*). However, the Court of Appeal did point out that consideration of the approach under the EIRs was not a "legitimate aid to the interpretation of section 2(2) FOIA" because of the fact that the EIRs were made four years after FOIA was enacted, pursuant to different statutory powers.

The case is also interesting because of the observations of Andrews LJ, writing separately but in agreement with Lewis LJ, that "it will rarely be the case that the issue of statutory construction that we have been asked to resolve would make a practical difference to the outcome of an application for disclosure under FOIA." This contrasts with the view of the UT that there may be cases in which aggregation, if permitted, could lead to less information being disclosed.

The hard fought approach to this litigation by both the Commissioner and the Department suggests that the UT may well have had a point. Indeed, the Commissioner has now sought permission to appeal to the Supreme Court, and it seems unlikely that he would wish to do so solely on the basis of having lost an argument of principle that would result in little practical difference when it comes to the determination of FOIA requests. Clearly, the Commissioner believes that this result will have such practical effects. In that regard, a statement on the website of the Information Commissioner's Office explains that the appeal to the Supreme Court is being brought in order to "support information rights and access to information for individuals".

Moss v Royal Borough of Kingston-Upon-Thames and Information Commissioner [2023] EWCA Civ 1438

Summary

This case concerned the role of the High Court (and now under the Data Protection Act 2018, the role of the UT) in contempt matters arising in FTT proceedings. The key question was whether, when seized with a certification of an offence of contempt from the FTT, the High Court/UT have jurisdiction to determine whether an act or omission amounts to contempt of court, or whether they are limited to determining the appropriate sanction on the basis that the FTT has already made a determination as to contempt. The Court of Appeal dismissed the appeal, noting that the FTT was not making a final determination of whether or not the conduct would be a contempt, and the High Court/UT may inquire into whether or not the conduct would have been a contempt if committed in proceedings before them.

Factual background

On 20th March 2017, the FTT ordered that the Royal Borough of Kingston-upon-Thames ('the Council') provide the appellant, Mr Moss, with advice and assistance within 30 days to enable him to reformulate a request for information made pursuant to FOIA. The Council failed to comply with that decision within the 30-day timeline.

Mr Moss made an application to commit the Council for contempt due to its failure to comply with the order. After some procedural back and forth between Mr Moss, the Commissioner and the FTT, eventually the application came before the FTT in January 2022. The FTT issued a lengthy decision and found that the Council had failed to comply with the FTT decision of 20th March 2017. It concluded that this failure would amount to a contempt of court had it occurred before a court having power to commit for contempt, and decided to exercise its discretion to certify an offence to the High Court.

The certification to the High Court took place because the FTT does not have the power to commit a person for contempt of court in the event of a failure to comply with one of its orders. The statutory provisions then in force for dealing with such failures (under the Data Protection Act 1998) provided that the FTT may certify what was described as an offence if any person had been guilty of an act or omission which would constitute contempt of court if it had been committed before a court having power to commit for contempt. The matter would then be transferred to the High Court. The High Court had power to inquire into the matter and, subject to certain procedural safeguards, to deal with the person in any manner in which it could have dealt with the person if they had engaged in that conduct in proceedings

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in the High Court. Under the Data Protection 2018, the High Court's role in the certification process has been replaced by the UT.

Following certification by the FTT, Mrs Justice Farbey considered the matter in the High Court (see the case update in Volume 19, Issue 4 of *Freedom of Information* journal). She found while the relevant section of the Data Protection Act 1998 (Schedule 6, paragraph 8) was not well drafted, the High Court's jurisdiction was to inquire into the matter and it was not bound to accept the conclusion of the FTT that there had been a contempt. As it happened, having heard evidence and submissions from the parties, she concluded that the failure to comply with the decision of the FTT did not amount to contempt of court.

Mr Moss appealed this decision and the principal issue on the appeal before the Court of Appeal was whether the High Court had jurisdiction to determine whether the omission amounted to a contempt of court, or whether it was limited to determining the appropriate sanction on the basis that the FTT had already determined that the omission amounted to contempt. A second issue in the appeal was whether the way in which the matter was considered by the FTT or the High Court involved a breach of Mr Moss's rights under Article 6 of the European Convention on Human Rights ('ECHR').

> ***"This case makes it clear that when the FTT certifies an offence of contempt to the High Court/UT, the High Court/UT must consider the matter afresh, both in terms of whether there has been a contempt and what the appropriate sanction should be."***

The Court of Appeal's decision

Lewis LJ wrote the main judgment with Phillips LJ and Peter Jackson LJ (writing separately) agreeing that the appeal should be dismissed, but with Phillips LJ disagreeing with part of Lewis LJ's reasoning.

Lewis LJ began by focusing on the central issue in the appeal, namely whether the High Court had jurisdiction to determine whether a failure to comply with a decision of the FTT amounted to contempt, or whether the High Court was limited to determining the appropriate sanction on the basis that the FTT had already determined that the omission amounted to contempt. In his view, the resolution depended upon the proper interpretation of paragraph 8 of Schedule 6 to the Data Protection Act 1998, noting the importance of reading that section as a whole.

With this in mind, Lewis LJ explained that the FTT is concerned with whether or not a person has done an act, or omitted to do something, in relation to proceedings before the FTT. Second, that act or omission must be of such a nature that it would be a contempt of court if it had occurred in proceedings before a court with the power to commit for contempt. The phrase "would constitute contempt of court", when read in context, is "not intended to mean that the FTT must make a final, conclusive and binding determination of whether or not, applying the law of contempt, the conduct is contempt." Instead, Lewis LJ observed that the phrase means that the act or omission is one which by its nature "is capable of constituting" a contempt of court if it had occurred in proceedings before a court or tribunal with power to commit for contempt, and the matter is therefore fit for consideration by the High Court which does have the power to deal with contempts.

As to the High Court's power to "inquire into the matter", Lewis LJ explained that this read in context is a reference to an inquiry into the matter giving rise to certification, that is whether the act or omission which occurred in proceedings before the FTT was of such a nature as would constitute contempt if it had occurred before the High Court. The High Court is therefore empowered to inquire into whether the act or omission constitutes contempt, and there is no reason to limit the words 'may inquire into the matter' to a determination of what sanction is appropriate, rather than inquiring into the whether an act or omission constitutes contempt.

In Lewis LJ's view, it followed from the above that in deciding whether an act or omission is something which would be capable by its nature of constituting a contempt, the FTT is not required to undertake a detailed analysis of the law relating to contempt, nor the application of the law of contempt to the facts. Rather, the FTT is simply considering whether the act or omission is capable of constituting a contempt. This should usually be a relatively straightforward exercise. Lewis LJ considered that issues such as service of the order, notice of the order, and mens rea (i.e. intention) were more properly factual matters for the High Court to consider.

Writing separately but agreeing with Lewis LJ that the appeal should be dismissed, Phillips LJ expressed a different view in relation to the task to be performed by the FTT in certifying an offence. He noted that the issue is one of considerable practical importance for the FTT in considering whether to certify an offence in future cases. From the perspective of Phillips LJ, the approach advocated by Lewis LJ whereby the FTT simply considers whether the act is "capable by its nature of constituting contempt" but does not concern itself with whether it "would" constitute a contempt of court (i.e. by considering service, notice, mens rea, etc.) "requires re-writing the statutory test for certification". Phillips LJ went so far as to describe it as an "abrogation of the express meaning".

Phillips LJ explained that he understood and sympathised with the desire to avoid a full evidentiary pro-

cess before the FTT only for such a process to be repeated in the (as it now is) UT. However, in his view, the answer to that problem is not to read down the statutory test for certification or require the FTT effectively to ignore issues it knows to be highly pertinent to the matter it is certifying.

For Phillips LJ, a partial answer to future cases would be for the FTT to adopt a streamlined procedure for hearing evidence and submissions, but one which leads to a reasoned decision as to whether any act or omission found would amount to contempt of court if it had occurred in proceedings before a court or tribunal with a contempt jurisdiction.

Peter Jackson LJ also agreed that the appeal should be dismissed and agreed with the approach of Lewis LJ. He disagreed with the approach proposed by Phillips LJ which he described as leading to inefficiency and potential unfairness. He noted that it would neither serve the interests of the parties nor the administration of justice. The following excerpt describes some of his reasoning:

"The enforcement process would be pointlessly onerous for applicants, who would be put to prove the same thing twice. That is likely to be undesirably discouraging to applicants, who are usually facing institutions.

Although the [Phillips LJ's] interpretation is presumably considered to offer a layer of protection to respondents, it in fact deprives them of the protections inherent in the contempt process. There is a difference between allegations and findings, and we [the Courts] do not and should not recognise a process that allows for adverse findings without the protections that apply in courts with a contempt jurisdiction. Moreover, the suggestion that the FTT might adopt a streamlined procedure leading to a reasoned decision that a contempt of a higher court would have occurred is unworkable. It is unclear what streamlining might involve, but if respondents are faced with the prospect of shadow findings of contempt, they may with good reason resist an abbreviated procedure and it might, to say the least, be unfair to impose one upon them. In any case, a process that might loosely be described as 'contempt-lite' is objectionable in principle. From the point of view of administration of justice, duplication of effort would be unavoidable and conflicting findings an ever-present possibility. If ever a case demonstrated the unsatisfactory results of the alternative statutory interpretation, the present case is it where the FTT took one view, and the High Court another."

"… much of the ambiguity around whether or not a party is in contempt of the FTT is likely to begin to fall away, and for many contempt applications it will be perfectly obvious whether the act or omission in question is capable of amounting to contempt."

In light of the above reasons, Peter Jackson LJ explained that in his view, when the FTT is asked to certify (or decides to do so itself), it is asking whether the conduct in question is of a kind that is capable of constituting contempt of court and, if so, whether it should be certified. He explained explicitly that:

"It is not making findings of fact. Instead it is performing the role of a specialist tribunal engaged in managing its proceedings, taking a view of the issue in front of it and disposing of it accordingly. In the great majority of cases, the picture will be relatively simple; in the rare case where it is not, the FTT can decide whether it needs to investigate further in order to understand enough to make a certification decision, mindful of the limited nature of the decision. Approached in this way, certification decisions should be capable of being made in accordance with the overriding objective."

Finally, turning to other ground of appeal and Mr Moss's Article 6 rights, Phillips LJ and Peter Jackson LJ agreed with the approach of Lewis LJ that there was no breach of those rights in the way that the matter proceeded in the FTT or the High Court. There was also nothing, on the facts of this case, which involved any violation of the general principles identified in case law relied upon by Mr Moss.

Points to note

This case makes it clear that when the FTT certifies an offence of contempt to the High Court/UT, the High Court/UT must consider the matter afresh, both in terms of whether there has been a contempt and what the appropriate sanction should be. It will make important reading both for those sitting in the FTT and those appearing before it. Given the agreement of Lewis LJ and Jackson LJ, it means that the FTT is likely to take a less involved approach in assessing whether or not an offence of contempt should be certified. This means that in many cases, the FTT will not consider detailed argument on issues such as service, notice and mens rea and will not embark on a fact finding pursuit.

How the procedure will look in practice will ultimately be a matter for the FTT bearing in mind the overriding objective. Faced with various contempt proceedings over the past three years, it must be acknowledged that there has been notable improvement in the quality of FTT substituted decision notices. They are now much clearer about what it is that a public authority ought to do and by when.

The upshot of this is that much of the ambiguity around whether or not a party is in contempt of the FTT is likely to begin to fall away, and for many contempt applications it will be perfectly obvious whether the act or omission in question is capable of amounting to contempt. This will enable the FTT to smoothly consider the exercise of its discretion in certifying the matter to the High

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Court/UT as the case may be. In the minority of cases where the question of whether the act or omission is capable of constituting contempt is more ambiguous, the FTT will have to navigate the tricky territory of avoiding what is described by Jackson LJ as a "contempt-lite" process, while still allowing parties to properly contest the allegations before them so as to avoid facing the costs associated with unnecessary proceedings in the UT (costs which are unlikely to be recoverable).

There will therefore undoubtedly be some practical and procedural issues for the FTT to think carefully about in light of this judgment, and it is likely that there will be further litigation teasing out the exact scope of the FTT contempt process in due course.

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