

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

As the decision of the First-tier Tribunal (made on 31 January 2012 under reference EA/2011/0036) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

The tribunal must undertake a complete reconsideration of the issues that are raised by the appeal.

REASONS FOR DECISION

A. Introduction

1. This appeal concerns the application of section 27 of the Freedom of Information Act 2000 to the information contained in four documents held by the Cabinet Office. The First-tier Tribunal decided that some of the information was within the scope of section 27 and that the public interest favoured disclosure. The case was originally under the management of Upper Tribunal Judge Wikeley. He directed an oral hearing, which was held before me on 30 April 2013.
2. At the oral hearing, Julian Milford of counsel represented the Cabinet Office, as appellant. Robin Hopkins of counsel, instructed by Leigh Day & Co Solicitors, represented Mr Muttitt, the person who had requested the information. Ben Hooper of counsel had prepared a written submission on behalf of the Information Commissioner, which was neutral as to the issues raised by the appeal. I am grateful to all counsel for their help.

B. The refusal of permission by the First-tier Tribunal

3. Before coming to the issues in this case, I want to explain why I refused to allow counsel to refer to the reasons given for refusing permission in the First-tier Tribunal; they were given by the judge who had also presided at the hearing of Mr Muttitt's appeal. In refusing permission, the judge (quite properly) gave his reasons for doing so. It is not appropriate to rely on those reasons to show the reasoning of the First-tier Tribunal.
4. The Upper Tribunal has power to set aside a decision of the First-tier Tribunal if 'the making of the decision concerned involved the making of an error on a point of law': see section 12(1) of the Tribunals, Courts and Enforcement Act 2007. The 'decision' referred to is the decision under appeal. In this case, that is the decision of 31 January 2012. It is not the decision of the First-tier Tribunal refusing permission to appeal. The Upper Tribunal does not review the reasons given for refusing permission to appeal: *CIS/4772/2000* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279:

67. The Tribunal's lengthy judgment refusing permission to appeal is not to be used as a source of additional reasoning on the issues in dispute before it, but it does serve to crystallise certain matters by giving the Tribunal's reaction to the case advanced by Dŵr Cymru at the permission stage ...

5. For a start, the reasons given for refusing permission to appeal were not part of the decision under appeal. Those reasons had already been given. It is possible to correct those reasons under rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 or to amend them following a review under section 9(4)(b) of the 2007 Act. Neither of those procedures was followed in this case.

6. There is also this consideration. The judge in refusing permission acted alone, whereas in the appeal itself he had been one of a panel of three. The reasons for a tribunal's decision must be the reasons of the whole panel. There is nothing to show that the judge consulted the other members before refusing permission or in formulating his reasons for refusing. It would, in those circumstances, be dangerous to attribute what he wrote to the panel as a whole.

C. The legislation

27 International relations

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

...

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

D. The four documents

7. All four documents related to a visit by Mr Blair, who then Prime Minister, to Iraq in May 2006. Two were minutes of telephone conversations between Mr Blair's Foreign Policy Adviser and the United States' National Security Adviser. The other two were letters from the National Security Adviser recording Mr Blair's meetings with the President and Prime Minister of Iraq. All the documents were headed 'Confidential', which signifies that disclosure would be likely to 'materially damage diplomatic relations, that is, cause formal protest or other sanctions'. This classification lies between 'Restricted' (disclosure of which would be likely to 'adversely affect diplomatic relations') and 'Secret' (disclosure of which would be likely to 'raise international tensions' or 'seriously damage

relations with friendly governments'). All the documents were brought into existence on behalf of the British Prime Minister and the President of the United States.

E. The grounds of appeal

8. Mr Milford set out four grounds of appeal, but they can be distilled into two:
- the First-tier Tribunal had failed to take account of the nature of the information in contrast to its content, thereby falling into error both in deciding that parts of the information were covered by section 27 and in applying the public interest test to those parts that were;
 - the First-tier Tribunal's decision was perverse on the issue of confidentiality.

Despite his perversity argument, Mr Milford argued that the appropriate disposal if I were to allow the appeal was to remit the case to the First-tier Tribunal for rehearing.

9. To anticipate my reasoning, I accept Mr Milford's first ground of appeal. In those circumstances, I prefer not to comment on the perversity argument.

F. Counsel's arguments

10. A key part of the Cabinet Office's argument before the First-tier Tribunal was that it was not merely the contents of the four documents but especially the circumstances in which that information came to be recorded that was of crucial importance under section 27. Mr Milford argued that the tribunal's reasoning showed that it had failed to recognise this distinction and had instead concentrated on the contents of the documents. Mr Hopkins argued that the reasons showed the opposite.

11. Both counsel proceeded in the customary manner for appeals of this type. That is to say, each took sentences from the tribunal's reasons and argued that they were indicative of the reasons as a whole, before seeking to explain or minimise the effect of those sentences that could not be reconciled with that approach. It is, to be fair, difficult to take any other approach.

12. I am not going to set out their individual arguments or to follow their approach in giving my reasons. Since both agreed that the reasons had to be read as a whole, I have re-read the tribunal's reasons in the light of their arguments. My conclusion, having done so, is that Mr Milford is right. By way of example only, I will refer to merely two points. One point is general; the other is specific.

13. The general point is the frequent reference to the sensitivity of the information. This can only refer to its content. The argument for the Cabinet Office relied on the circumstances in which the document came into existence. The tribunal's assessments of how soon the information lost its 'sensitivity' is not explicable as a response to that argument. From the nature of the argument, it is improbable that the circumstances could have changed so quickly. It is, of course, possible that the tribunal simply did not accept the argument. If that was so, it

never said it, which it surely would have done if it had rejected so important an element of the argument.

14. The specific point is a quotation, taken I accept out of context:

34. ... the extent to which the subject matter remains confidential after the event, and after the passage of some length of time, must depend upon the particular circumstances. ...

Taken in isolation and at face value, there may be nothing wrong with that statement. However, this was a case in which one side's argument focused on the circumstances rather than the content. In that context, at worst this statement confuses (or fails to keep distinct) the issues of content and circumstances. At best, it does not make sufficiently clear how the tribunal analysed the information in the light of the argument.

15. I accept that my analysis may come close to treating this as a case of inadequate reasons rather than a case of misdirection. I put this to Mr Hopkins, who argued strongly that it would be wrong to deal with the case on a completely different basis from the grounds of appeal and from the way that Mr Milford had argued it. I do not see the categories as so distinct as Mr Hopkins presented them. There is, in theory, a difference. The tribunal may have directed itself correctly on the law, but the judge failed to record this adequately in the tribunal's reasons. Or the tribunal may have misdirected itself on the law and the judge recorded this accurately in the tribunal's reasons. The former is a case of inadequate reasons; the latter is a case of misdirection. To an appellate court that was not privy to the tribunal's actual reasons, they are not distinguishable.

G. Conclusion

16. Accordingly, I set aside the First-tier Tribunal's decision and remit the case for a rehearing.

**Signed on original
on 14 May 2013**

**Edward Jacobs
Upper Tribunal Judge**