

NCN: [2023] UKFTT 00353 (GRC) Case Reference: EA/ 2022/0432

**FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 6 April 2023

Decision given on: 6 April 2023

Before: Judge Alison McKenna

MALCOLM REEVES

- and -

THE INFORMATION COMMISSIONER

RULING ON STRIKE OUT APPLICATION:

The application for strike out is refused.

REASONS

1.

The Information Commissioner published a Decision Notice on 13 December 2022 which found that the public authority was entitled to rely on regulation 6 (1) (b) EIRs to refuse to provide better quality (higher resolution) photographs than those appearing on its website, on the basis that the information requested was already available to the Appellant.

2.

The Appellant filed a Notice of Appeal dated 16 December 2022. His grounds of appeal primarily concerned an allegation that the public authority was refusing to provide further information within its possession (the original photographs). He submitted that the Information Commissioner's investigation had been inadequate to uncover the additional information and that the public authority had displayed bias in its dealings with him.

3.

On 16 February 2023, the Information Commissioner, in filing his Response to the appeal, applied for a strike out of the Notice of Appeal under rule 8 (3)(c) of the Tribunal's Rules on the basis that the appeal had no reasonable prospects of success. He submitted that the Appellant had failed to make submissions which engaged the Tribunal's jurisdiction because he did not suggest that the Decision Notice was erroneous in law or involved an inappropriate exercise of discretion. The Information Commissioner also, correctly, points out that the Appellant has made a number of unevicenced assumptions, for example that the public authority would have continued to hold the original photographs, and further that the conduct of his investigation is not a matter within the jurisdiction of this Tribunal.

4.

The Appellant was invited to make submissions in response to the proposed strike out pursuant to rule 8 (4). In a submission dated 22 February 2023, he acknowledged that his Notice of Appeal had failed

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to address the Tribunal's statutory remit. He there argued, for the first time, that the Decision Notice was wrong in law to find that regulation 6 (1) (b) EIRs, which refers to 'form and format' included the resolution of photographs. He submitted that a low-resolution photograph is different to a high-resolution photograph in the same way that a redacted letter is different to an unredacted letter, i.e., that it is qualitatively different so that it was wrong to find that the information requested was already available to him.

5.

I note that both parties have cited First-tier Tribunal Decisions in their submissions. I remind them that these do not create legal precedent and bind the parties to that appeal only. It is only Decisions of the Upper Tribunal or higher courts which create legal precedent.

6.

I have considered the Upper Tribunal's decision in HMRC v Fairford Group (in liquidation) and Fairford Partnership Limited (in liquidation) [2014] UKUT 0329 (TCC), in which it is stated at [41] that

...an application to strike out in the FTT under rule 8 (3) (c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier to summary judgement under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing...The Tribunal must avoid conducting a "mini-trial". As Lord Hope observed in Three Rivers the strike out procedure is to deal with cases that are not fit for a full hearing at all.

7.

Having applied the relevant principles to the parties' submissions, it does not seem to me that this appeal is one that can be described as 'not fit for a full hearing'. The Appellant has (albeit belatedly) raised a triable issue, which is whether regulation 6 (1) (b) EIRs is engaged by photographs of different resolution and so whether the Decision Notice contains an error of law. I am content to allow the addition of this ground of appeal. The Respondent may wish to respond to this new ground.

8.

Accordingly, I am satisfied that this matter is fit to proceed to a hearing, and so I refuse the Respondent's application for a strike out.

(Signed) Dated: 6 April 2023

Judge Alison McKenna

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