



PRESS SUMMARY

23 April 2024

Note:

This summary is provided to assist in understanding the Upper Tribunal's decision. It does not form part of the reasons for the decision. The full judgment of the Upper Tribunal is the only authoritative document. Judgments are public documents and are available at: <https://www.judiciary.uk/judgments> and <https://www.gov.uk/administrative-appeals-tribunal-decisions>

THE INFORMATION COMMISSIONER

Appellant

and

EXPERIAN LIMITED

Respondent

Appeal no.: UA-2023-000512-GIA

Neutral citation number: [2024] UKUT 105 (AAC)

Upper Tribunal (Administrative Appeals Chamber): The Hon Mrs Justice Heather Williams CP, UT Judge Nicholas Wikeley & UT Judge Zachary Citron

Background to the appeal

1. Experian is a well-known Credit Reference Agency ("CRA"). It holds and processes data relating to over 51 million people living in the United Kingdom, being effectively the whole of the adult population. Experian has within it a business unit, Experian Marketing Services ("EMS"), which processes the data of UK residents to provide marketing services which it sells to its third-party clients. It does so by combining their name and address information with a total of up to 13 actual attributes. It then processes this data and creates modelled information on the demographic, social, economic and behavioural characteristics of these 51 million individuals on a predictive basis, the profile for each person running to as many as 49 derived data points about individuals and up to 370 modelled points about individuals, with each profile running to many pages.

2. The Information Commissioner, who had concerns with the extent and nature of Experian's data processing in the light of the transparency requirements of the General Data Protection Regulation ("GDPR"), issued Experian with an enforcement notice ("EN") after a prolonged regulatory investigation. The EN imposed a series of requirements on Experian, set out in an Annex, to be completed within either three or nine months. Experian appealed to the First-tier Tribunal ("FTT") against the EN. Following hearings in early 2022, the FTT allowed Experian's appeal in large part in its decision of 20 February 2023, issuing a substituted and scaled down EN. The Information Commissioner appealed to the Upper Tribunal. The Hon Mrs Justice Heather Williams DBE, Chamber President of the Administrative Appeals Chamber, subsequently directed that a three-judge panel be convened to determine the appeal as it raised a point of law of special difficulty or an important point of principle.

3. This appeal was primarily concerned with the principle of transparency, both the overarching duty in Article 5(1)(a) and the more detailed obligations in Article 14 GDPR. It was common ground between the parties that the provision of transparency in the processing of personal data is foundational to data subjects' rights. The transparency principle has not been the subject of any detailed judicial consideration by the Upper Tribunal or by the appellate courts to date. The Information Commissioner, the Appellant, alleged that the FTT's decision involved multiple errors of law and that it failed to address, or adequately address, a number of relevant issues. Experian, the Respondent, contended that the FTT's decision should be upheld and that the appeal essentially sought to re-litigate unassailable findings of primary fact and evaluative assessments that were made below. The Upper Tribunal dismissed the Information Commissioner's appeal.

The Information Commissioner's five grounds of appeal

4. The Information Commissioner advanced five grounds of appeal before the Upper Tribunal. Ground 1 alleged that the FTT failed to address what the principle of transparency, enshrined especially in Article 5(1)(a) GDPR, required as a matter of law, and furthermore failed adequately to apply a legally accurate interpretation of that principle to the issues of fact, law and assessment which arose, including failing to take into account the adverse impact on transparency from the way in which Experian processed data.

5. Ground 2 concerned the data subject's journey to Experian's Consumer Information Portal ("CIP"), its website providing transparency information to data subjects about EMS's activities (<https://www.experian.co.uk/cip>) As well as several specific errors, it was argued that the FTT failed to distinguish and analyse the separate legal issues arising from each of Articles 14(1), (5)(a) and (5)(b) GDPR.

6. Ground 3 dealt with the content of Experian's CIP. It was said that the FTT erred in law by failing to address the pleaded issue of the compliance of the CIP with Article 5(1)(a) GDPR, or making any findings on the criticisms made in the EN of the CIP's approach to the layering of important privacy information on its website and so its accessibility.

7. Ground 4 was that the FTT's approach to the terms of the substituted EN in respect of the breach of Article 14 that it did find was flawed, because of the errors of law identified in Grounds 1 and/or 2. It was accepted that Ground 4 stood or fell with Grounds 1 and 2.

8. Ground 5 was that the FTT failed to address the pleaded issue as to the requirement laid on Experian to re-conduct its Legitimate Interest Assessments (“LIAs”), notwithstanding the findings it had made against Experian’s case.

The structure of the Upper Tribunal’s judgment

9. The Upper Tribunal’s judgment starts by summarising the nature of Experian’s data processing ([9]-[12]) and the Information Commissioner’s EN ([13]-[21]). It then relates the proceedings before the FTT ([22]-[48]) before setting out in detail the Commissioner’s grounds of appeal to the Upper Tribunal ([49]-[58]). The decision then explains the relevant legal frameworks ([59]-[96]), including notably an overview analysis of the transparency principle in the GDPR ([95]-[96]). This is followed by a consideration of the parties’ overarching submissions ([97]-[103]) and their arguments on each of the grounds of appeal in turn ([104]-[143]), [144]-[181], [182]-[188], [189] & [190]-[196]). The outcome of the appeal is summarised at [197]-[198].

The Upper Tribunal’s reasons for dismissing the Commissioner’s appeal

10. As to Ground 1, the Upper Tribunal rejected each of the alleged errors of law that the Information Commissioner advanced ([115]-[143]). The FTT’s decision was neither well-structured nor particularly well-reasoned, but the Upper Tribunal was satisfied that, applying the approach that the appellate authorities required it to take, there was no error of law in the FTT’s approach to these aspects of transparency.

11. As to Ground 2, the Upper Tribunal again rejected each of the alleged errors of law that the Information Commissioner advanced ([156]-[181]). The panel decided that whether the ability to access the information prescribed by Article 14 via a series of hyperlinks was sufficient to satisfy the exception in Article 14(5)(a) that applies where a data subject already “has” that information was a question of fact and degree. In doing so, the panel addressed the secondary basis on which the Information Commissioner put his case, namely that the FTT’s decision was inadequately reasoned. Having undertaken a significant amount of inferential work, the panel was satisfied that the FTT’s reasons were not so inadequate as to amount to an error of law.

12. As to Ground 3, the Upper Tribunal rejected the submission that the FTT did not have regard to or determine the Information Commissioner’s concerns as to the layering of the information provided on the CIP ([184]-[188]). It was for the FTT to make their own evaluative assessment as to whether information about Experian’s processing was sufficiently prominently displayed on the CIP; they did so and they found that it was.

13. As to Ground 4, this did not arise for decision given that Grounds 1 and 2 had both been rejected ([189]).

14. As to Ground 5, this argument too was rejected ([194]-[196]). It was apparent from the terms of the EN that the Information Commissioner’s case that the LIAs should be re-assessed rested on the propositions that Experian’s processing was intrusive, non-transparent and harmful. However, the FTT had rejected each of these propositions and there was no challenge to their conclusion in terms of the relatively innocuous nature of the processing involved. Moreover, the Upper Tribunal dismissed the grounds of appeal that challenged the FTT’s findings on intrusiveness and on transparency. It followed that the FTT’s decision contained a reasoned rejection of the Information Commissioner’s case, although it could have been clearer.