Neutral Citation Number: [2014] EWCA Civ 253

Case No: C3/2013/1236

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
[2013] UKUT 075 (AAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2014

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE PITCHFORD

- -

Between:

Rob Evans	**First Respondent**
- and -	
The Information Commissioner	**Second Respondent**
- and -	
(1) Department for Business, Innovation and Skills **(2) Department of Health** **(3) Department for Children, Schools and Families** **(4) Department for Environment, Food and Rural Affairs** **(5) Department for Culture, Media and Sport** **(6) Northern Ireland Office** **(7) Cabinet Office**	**Appellants**

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Jonathan Swift QC and Julian Milford (instructed by **the Treasury Solicitor**) for the **Appellants**
Aidan Eardley (instructed by **Guardian News and Media Ltd, Editorial Legal Services**) for the **First Respondent**
Timothy Pitt-Payne QC (instructed by **The Information Commissioner**) for the **Second Respondent**

Hearing date: 26 February 2014

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Approved Judgment

Lord Justice Richards:

1. At the heart of this appeal is a short point of construction of the written reasons for a decision given by the Upper Tribunal (Administrative Appeals Chamber) ("the UT"). The question is whether by that decision the UT had disposed of a particular issue, so that it fell into legal error in purporting to deal with that issue in a subsequent decision.

2. The general background to the case is set out in the judgment of this court in *R (Evans) v Her Majesty's Attorney General & Another* [2014] EWCA Civ 254. The way in which the present appeal arises can be summarised as follows:

   (1) Mr Evans made requests to a number of Government Departments for disclosure, pursuant to the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004, of correspondence between The Prince of Wales and Government ministers. The requests were for (a) lists of such correspondence, (b) copies of each piece of correspondence, and (c) schedules of the documents relevant to the requests (with a brief description of the nature of each document, its date and whether it was being released or not).

   (2) The Departments refused the disclosure sought. Mr Evans then complained to the Information Commissioner ("the Commissioner"), who concluded that the Departments were entitled to refuse disclosure and issued decision notices to that effect. Mr Evans's appeals against those decision notices were transferred to the UT.

   (3) By a decision dated 18 September 2012 ("the September 2012 decision") the UT allowed the appeals: see [2012] UKUT 313 (AAC). The written reasons for the decision made clear that the UT accepted Mr Evans's arguments on the substance of what was described as "advocacy correspondence" falling within the requests and that it would substitute decision notices requiring disclosure of copies of such correspondence, subject to redactions to protect the personal data of third parties. The UT said that in the circumstances "it is not necessary for us to discuss the parties' contentions as regards lists and schedules" (paragraph 243 of the reasons, quoted in full below).

   (4) On 16 October 2012 the Attorney General issued a certificate under section 53 of the FOIA, with the statutory consequence that the September 2012 decision ceased to have effect. Mr Evans's challenge to the Attorney General's certificate is the subject of the separate judgment referred to above.

   (5) Following the issue of the Attorney General's certificate, Mr Evans wrote to the UT on 1 November 2012 to ask it to rule on his requests for lists and schedules. The Departments and the Commissioner opposed that course, arguing that the September 2012 decision had already disposed of the issue.

(6) By a decision dated 20 February 2013 ("the February 2013 decision") the UT held that (a) the September 2012 decision had not disposed of those parts of the appeals which concerned the requests for lists and schedules, and that it therefore had power to rule on them now; (b) it should exercise that power as a matter of discretion; and (c) it would allow the relevant parts of the appeals and substitute decision notices requiring disclosure of information of the kind requested: see [2013] UKUT 075 (AAC).

3. The Departments now appeal against the February 2013 decision. There are two grounds of appeal. The first ground is to the effect that the September 2012 decision had already disposed of the appeals in respect of lists and schedules and that the UT therefore erred in law in purporting to deal with that issue in February 2013. The second ground is to the effect that the decision to require disclosure of lists and schedules of the correspondence was inconsistent with the Attorney General's certificate and therefore erroneous in law.

4. The significance of the present appeal is greatly diminished by this court's decision in *R (Evans) v Her Majesty's Attorney General & Another* that the Attorney General's certificate was unlawful and should be quashed, thus reinstating the full effect of the UT's September 2012 decision. But it remains appropriate to determine whether the UT erred in imposing, by the February 2013 decision, a separate requirement to disclose lists and schedules.

The legal framework

5. For the wider legal framework reference can be made to the judgment in *R (Evans) v Her Majesty's Attorney General & Another*. The statutory provisions and procedural rules relating specifically to the determination of appeals are as follows.

6. Where the Commissioner has served a "decision notice" under section 50 of the FOIA rejecting a complaint, section 57 gives the complainant a right of appeal to the Tribunal against the notice. Section 58 makes provision for the determination of such appeals:

> "58.(1) If on an appeal under section 57 the Tribunal considers:
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> (a) that the notice against which the appeal is brought is not in accordance with the law, or
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> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
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> 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.

…."

Although the section states that the Tribunal "shall allow the appeal *or* substitute such other notice as could have been served by the Commissioner" (emphasis added), it is common ground that where the Tribunal allows an appeal by an applicant for information it must allow the appeal *and* substitute an appropriate decision notice.

7. Appeals under FOIA are conducted in the UT in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). References below are to the version of the Rules in force at the material time.

8. By rule 1(3), the expression "dispose of proceedings" is defined to include, unless indicated otherwise, "disposing of a part of the proceedings". Rule 40 provides:

> "**40. Decisions**
>
> (1) The Upper Tribunal may give a decision orally at a hearing.
>
> (2) Except where rule 40A (special procedure for providing notice of a decision relating to an asylum case) applies, the Upper Tribunal must provide to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings (except a decision under Part 7 [which relates to correcting, setting aside, reviewing and appealing decisions of the Tribunal] –
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> (a) a decision notice stating the Tribunal's decision; and
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> (b) notification of any rights of review or appeal against the decision and the time and manner in which such rights of review or appeal may be exercised.
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> (3) Subject to rule 14(11) (prevention of disclosure or publication of documents and information), the Upper Tribunal must provide written reasons for its decision with a decision notice provided under paragraph (2)(a) unless –
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> (a) the decision was made with the consent of the parties; or
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> (b) the parties have consented to the Upper Tribunal not giving written reasons.
>
> (4) The Upper Tribunal may provide written reasons for any decision to which paragraph (2) does not apply.
>
> …."

9. It should be noted that the "decision notice" referred to in rule 40 is conceptually distinct from the notice that the Tribunal may substitute under section 58 of FOIA for the decision notice served by the Information Commissioner, though the same document may serve both functions.

10. By section 13 of the Tribunals, Courts and Enforcement Act 2007 there is a right of appeal to the Court of Appeal on a point of law arising from any decision made by the UT (other than excluded decisions, which are not material here). The right may be exercised only with permission, which must be sought first from the UT. By rule 40(4) of the Rules, time for applying for permission to appeal runs, so far as relevant, from the date on which the UT sent "written reasons for the decision" to the person making the application.

The decisions

11. The September 2012 decision was in these terms:

> "The Upper Tribunal allows the appeals by Mr Evans. A further decision identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices, will be issued pursuant to the tribunal's directions dated 17 September 2012."

The directions dated 17 September 2012 were a revised version of directions given earlier in September. So far as material, they set out a timetable for submissions relating to the redaction of personal details of individuals other than The Prince of Wales from the documents which would fall for disclosure in accordance with the closed annex to the decision, as further explained below.

12. The decision has to be read with the accompanying written reasons for the decision. The introduction to the reasons referred to the UT's conclusion that "under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of 'advocacy correspondence' falling within the requests", and stated that "[in] broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of 'advocacy correspondence' falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure" (paragraph 5).

13. Paragraph 9 of the reasons described the way in which the details of disclosure pursuant to the decision were to be handled:

> "9. We have given directions so that a decision can be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices. When that decision is made we will publish a further open annex on the principles governing redaction of personal details of individuals other

> than Prince Charles. Arrangements have been made for a closed annex setting out our analysis of the disputed information and the evidence and arguments dealt with in closed session. If there is no appeal against our decision, or any appeal is unsuccessful, then certain parts of the closed annex will no longer need to remain closed, and these will be in a conditionally suspended annex."

14. In the next sentence of paragraph 9 the UT set out a contents table of "[t]he matters which we deal with in the present judgment". Those matters included, in section K8, "Lists and schedules under the Act and the Regulations".

15. Section K8 consisted of a single paragraph, as follows:

> "243. We summarise at sections B5 and B9 of OA3 [Open Annex 3] the Commissioner's conclusions as regards the requests for lists and schedules under the Act and the Regulations. The closing skeleton argument for Mr Evans indicated that these requests will not need to be considered if we accepted his arguments on the substance of the correspondence. In the result we have in broad terms reached the conclusions sought by Mr Evans on the substance of the correspondence. Accordingly it is not necessary for us to discuss the parties' contentions as regards lists and schedules. We do not set them out here, or seek to analyse them: if we are wrong in our broad conclusions as to the arguments on the substance, then it seems to us that the correct conclusion as regards lists and schedules will depend upon the reasoning adopted in reaching a different conclusion on the substance of the correspondence."

16. On 12 October 2012 the UT issued a procedural decision relating to the third party redactions. It stated:

> "The tribunal's decision of 18 September 2012 ('the September 2012 decision') allowed the appeals of Mr Evans. At that stage the tribunal deferred its consideration of substituted decision notices in order to enable the parties to make submissions as to the principles governing the redaction of personal data of individuals other than Prince Charles. The tribunal's directions of 17 September 2012 ('the September 2012 directions') provided for representations to be made in that regard. Having considered those representations, in order to proceed, in a manner which is fair to all concerned, to make such decisions on the appeals as it considers appropriate under section 58 of the Freedom of Information Act 2000 and regulation 18 of the Environmental Information Regulations, the tribunal directs …."

Detailed directions were then given. Paragraph (6) of the directions provided that if prior to 4 pm on Thursday 18 October 2012 the UT received an application for permission to appeal as regards the September 2012 decision, the operation of paragraphs (1) to (5) would be suspended.

17. The reasons for the 12 October 2012 procedural decision opened with the statement that "The September 2012 decision was our primary determination in this matter: it allowed the appeals". It then went on to explain the basis of the various directions.

18. The Attorney General's certificate under section 53(2) of the FOIA was given a few days later. Thereafter the UT gave further directions suspending the effect of the directions given to date.

19. On 1 November 2012 Mr Evans requested the UT to rule on the requests for lists and schedules. This led to the making of further directions, dated 27 November 2012, followed by a further hearing and by the February 2013 decision and reasons.

20. The February 2013 decision included the following:

> "3. Pursuant to the tribunal's directions dated 27 November 2012:
>
> (1) the tribunal determines that it has power to rule on those parts of Mr Evans's appeals which complained of the Commissioner's refusal to order each Department to comply with his request for lists and schedules ('the lists and schedules requests'), in particular because the tribunal's decision of 18 September 2012 allowing the appeals did not dispose of those parts of Mr Evans's appeals;
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> (2) the tribunal determines that it should exercise that power as a matter of discretion;
>
> (3) in the exercise of that power the tribunal makes the further determinations set out in the remainder of this decision."

21. The further determinations included the substitution of decision notices requiring the departments, as regards the advocacy correspondence identified in the closed annex to the September 2012 decision, to provide to Mr Evans a schedule numbering each document and giving information to include the date, sender, recipient, description of the form of correspondence, and "the subject-matters covered by the document, or in a case where only part or parts of it are identified in the Closed Annex as constituting advocacy correspondence, the subject-matters covered by the part or parts so identified".

22. The written reasons for the February 2013 decision included the following passage explaining why the UT had concluded that it had power to rule on the requests for lists and schedules:

> "38. Did the September Decision dispose of that part of the proceedings which was concerned with the lists and schedules requests? We think it abundantly clear that it did not.
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> 39. Mr Swift submitted that in order to identify what was disposed of one must read both the decision and the reasons. We agree. Paragraph 243 of the September Reasons, submitted Mr Swift, showed that what the tribunal did was not to put off a decision on lists and schedules but to say that they were not being dealt with. As to that, however, paragraph 243 must be read in context.
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> 40. The lists and schedules requests were noted in paragraph 10 and not referred to again until paragraph 243. With those two exceptions, the whole of the September Reasons were concerned with Mr Evans's request for correspondence. Paragraph 243 explained why this was so. It was because of a concession by Mr Evans: if we accepted his arguments on the correspondence then he would not need us to deal with lists and schedules. Underlying that concession was the obvious point that if Mr Evans had the correspondence then he could make his own lists and schedules. What was being said was, 'If I have a decision ordering disclosure of the correspondence, then I do not need to ask for lists and schedules'.
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> 41. In the September Reasons we were, as explained in paragraph 4, setting out why we had concluded, under relevant legislative provisions Mr Evans would, in the circumstances of the present case, generally be entitled to disclosure of 'advocacy correspondence' falling within his requests. That conclusion meant that the appeal must be allowed. In paragraph 243 we said that our conclusion on the correspondence, in conjunction with Mr Evans's concession, meant that we did not need to discuss the parties' contentions as to lists and schedules.
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> 42. It would in our view be manifestly unfair and unjust to read this as a disposal of the part of the case concerned with the lists and schedule requests. Our intention was that we would shortly issue substituted decision notices requiring disclosure of the advocacy correspondence sought by Mr Evans. When that happened there would no longer be a need to deal with the lists and schedules requests. Until it happened, however, we were not disposing of those requests. We had no reason to do more than explain that in the light of the concession we did not need in the September Reasons to deal with the arguments about lists and schedules. Moreover it would have been inconsistent with

> Mr Evans's concession for us to proceed then and there to dispose of the lists and schedules requests at a stage when we had not yet issued substituted decision notices requiring disclosure of that correspondence.
>
> 43. For all these reasons we conclude that we have power to rule on Mr Evans's requests for lists and schedules."

The first ground of appeal

23. By the first ground of appeal the Departments contend that the UT fell into legal error in finding that it had power in February 2013 to deal with the requests for lists and schedules. The submissions of Mr Swift QC on behalf of the Departments were supported on this ground by Mr Pitt-Payne QC on behalf of the Commissioner. They were opposed by Mr Eardley on behalf of Mr Evans. I have taken the various submissions of counsel into account in the discussion that follows. I have also borne in mind the reasons given by the UT for refusing permission to appeal, though I think it unnecessary to set those reasons out.

24. My starting point is the simple fact that the September 2012 decision allowed Mr Evans's appeals. It is true that the decision contemplated the issue of a further decision identifying the information to be disclosed and the terms of substituted decision notices, but it is clear from the directions to which it referred and from the reasons for the decision that the only matter still to be resolved was the redaction of third party personal data and that subject to those redactions the identification of the information to be disclosed and the terms of the substituted decision notices would be determined by the September 2012 decision.

25. All concerned proceeded on the basis that the September 2012 decision constituted a determination of Mr Evans's appeals notwithstanding that the redaction of third party data still had to be dealt with and substituted decision notices issued. The existence of that outstanding issue may have meant that the decision was not "a decision which finally disposes of all issues in the proceedings" within rule 40(2). It was, however, a decision for which the UT had provided written reasons as permitted by rule 40(4). It engaged a right of appeal to the Court of Appeal under section 13 of the Tribunals, Courts and Enforcement Act 2007, subject to the grant of permission; and, by rule 44(4), time for applying for permission ran from the date when the written reasons were sent to the parties. The terms of the 12 October 2012 procedural decision show that the UT itself considered that time was running for an application for permission to appeal. The Attorney General's certificate under section 53(2) of the FOIA was likewise given on the basis that the appeals had been determined: such a certificate had to be given not later than the twentieth working day following "the effective date", defined by section 53(4), so far as relevant, as the day on which the appeal "is determined". No-one contended at the time that the certificates were premature because the appeals had not yet been determined.

26. That is the context within which one must consider whether the September 2012 decision had disposed of that part of the proceedings concerned with the requests for lists and schedules. The answer to that question falls to be determined objectively by reference to the language of the decision and the written reasons, read in context.

27. In my judgment, the answer is made perfectly plain by paragraph 243 of the written reasons: the September 2012 decision disposed of the part of proceedings concerned with the requests for lists and schedules; it did so on the basis that no decision was needed in relation to that issue in circumstances where the appeals were being allowed in respect of disclosure of copies of the correspondence. As paragraph 243 states, Mr Evans had conceded that the lists and schedules requests would not need to be considered if the UT accepted his arguments on the substance of the correspondence; the UT had in broad terms reached the conclusions sought by him on the substance of the correspondence; accordingly it was not necessary for the UT to discuss the parties' contentions as regards lists and schedules. The reasoning could not be clearer.

28. The last part of paragraph 243 leads in the same direction. It refers to the situation that might arise if the UT's conclusion on the substance of the correspondence were reversed on further appeal and the case were remitted for reconsideration: in that event the issue of lists and schedules might have to be considered but such consideration would take place in the light of the reasoning adopted in reaching a different conclusion on the substance of the correspondence. A recognition that the issue might arise for consideration on a remittal following a successful appeal against the September 2012 decision was plainly very different from an intention to leave the issue over for future disposal separately from the September 2012 decision.

29. My reading of paragraph 243 is reinforced by the terms of paragraph 9 of the written reasons. The only outstanding issue referred to in that paragraph is the redaction of third party personal data. By contrast, the issue of lists and schedules is expressly included among "[t]he matters which we deal with in the present judgment". Again the evident intention was to deal with the issue as part of the September 2012 decision, not to leave it over for future disposal.

30. The heart of the UT's reasons for taking a contrary view is at paragraph 42 of the February 2013 decision. In that paragraph the UT states that at the time of the September 2012 decision its intention was shortly to issue substituted decision notices requiring disclosure of the relevant correspondence; that when that happened there would no longer be a need to deal with the lists and schedules requests; but that until it happened it was not disposing of those requests. In my respectful view, that reasoning does not withstand analysis. If disposal of the requests for lists and schedules depended on the issuing of substituted decision notices, it is difficult to see why the same did not apply to disposal of the requests for copies of the correspondence. Yet the September 2012 decision was plainly a legally effective, appealable decision as to disclosure of copies of the correspondence, and the substituted decision notices would have to reflect that decision, subject only to the redaction of third party personal data. Leaving aside immaterial powers under the

Rules to set aside or review a decision, the UT was not entitled to reopen the September 2012 decision or to reach a fresh decision as to disclosure of copies of the correspondence. If that issue had been disposed of, then so too, on the logic of paragraph 243, had been the lists and schedules issue. In neither case could the substituted decision notices have any material effect on the position.

31. The UT seems to have thought, moreover, that the lists and schedules issue would simply fall away, as no longer needing to be dealt with, once substituted decision notices were issued. If would be highly unsatisfactory, however, for part of an appeal to be left in limbo without any formal disposal. That problem does not arise on the view I take as to the effect of the September 2012 decision.

32. In my judgment, therefore, the Departments' first ground of appeal is well founded. The September 2012 decision had disposed of Mr Evans's appeals in respect of lists and schedules, and the UT was wrong in law to hold that it had power to deal with that issue in the February 2013 decision.

The second ground of appeal

33. The substance of the second ground of appeal is that a requirement to disclose lists and schedules was inconsistent with the effect of the Attorney General's certificate, in particular because disclosure of the lists and schedules would amount to disclosure of a "digest or summary" (within section 11(1)(c) of the FOIA) of information which by reason of the certificate was not itself disclosable; a concern said to be highlighted by the terms of the February 2013 decision which required disclosure of schedules including "the subject-matters covered by [each] document". This ground was not supported by Mr Pitt-Payne on behalf of the Commissioner. It was actively opposed on behalf of Mr Evans by Mr Eardley, who submitted that the section 11 point was a new one which the Departments should not be permitted to raise for the first time on this appeal, and that it was in any event a bad point.

34. The conclusion I have reached on the first ground of appeal makes it unnecessary to deal with this second ground; and since I have found that the UT had no power to rule on the lists and schedules requests in February 2013, I think it better not to examine the substance of that ruling. In any event the premise of Mr Swift's argument, that by reason of the Attorney General's certificate the underlying information was not disclosable, is removed by the conclusion in *R (Evans) v Her Majesty's Attorney General & Another* that the certificate was unlawful and should be quashed.

35. If the court allows the Departments' appeal without dealing with the second ground, on the basis that it is unnecessary to do so, it will be providing an illustration of why the first ground is well founded. The fact that no conclusion is reached on the second ground does not mean that the court will have left that part of the appeal for disposal at a later date or without any disposal at all. The appeal will have been disposed of in its entirety. There is an obvious parallel with the way in which the UT approached

the lists and schedules issue in paragraph 243 of the reasons for the September 2012 decision.

Conclusion

36. I would hold that the UT disposed of the lists and schedules issue by the September 2012 decision and had no power to deal with that issue in the February 2013 decision. I would therefore allow the appeal to this court and would order that the February 2013 decision be set aside.

Lord Justice Pitchford:

37. I agree.

Master of the Rolls:

38. I also agree.