



UA-2023-001873-GIA

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2023-001873-GIA

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant: Potto Parish Council
1st Respondent: The Information Commissioner

The proposed grounds of appeal

1. The Parish Council's proposed grounds of appeal against the FTT's decision are set out in Box E of the UT13 notice of appeal. This states as follows (with typos corrected and paragraph numbers added for ease of reference):

1. As clearly stated in the U13 notes one of the reasons for allowing an appeal is the tribunal had no evidence, or not enough evidence, to support its decision.
2. As noted above, the tribunal clearly recognised that in the refusal notice that the tribunal did not consider the facts of the case and whether the evidence given was truthful or accurate, rather they focused on whether there was an error of law in their judgement.
3. We find that this approach as neither fair nor equitable and is completely at odds with the whole concept of why we have a Freedom of Information Commissioner. The Tribunal should make its decision based on the truth rather than stating we made a decision based on the wrong facts but that is OK because we did not make an error in law, this stance is completely farcical and a clear attempt at covering the actions of the tribunal rather than delivering justice.
4. The Tribunal through its decision is supporting the ongoing harassment that a volunteer organisation at the lowest level of local government has had to endure over a more than 10 year period and will now continue based on this decision.

Discussion and analysis

2. Para 1 of the grounds of appeal is correct insofar as an absence of evidence, or an insufficiency of evidence, may amount to an error of law (see paragraph 7 above). However, this is a bare assertion and does not explain how it is said that the FTT erred in law in this way.

Para 2 of the grounds is misconceived and is based on a misunderstanding of the tribunal process. The FTT properly considered the facts of the case in its paper hearing at a stage when the Parish Council for whatever reason (good, bad or indifferent) had refused the invitation to become a party to the proceedings. It cannot now ask for a replay simply because the FTT has since arrived at a decision which it is unhappy with. As Carr LCJ has put it pithily, “the trial is not a dress rehearsal. It is the first and last night of the show” (see internal para 83(ii) cited in paragraph 9 above). Furthermore, by statute the FTT could only grant the Parish Council or any party permission to appeal if there was an arguable error of law in its decision.

3. Para 3 is likewise misconceived. The FTT did not at any point state that it “made a decision based on the wrong facts”. The FTT proceeded entirely properly and in accordance with the legislative scheme of FOIA.

4. Para 4, like the preceding points, does not raise an arguable error of law. In addition, the FTT only found that this particular FOIA request was not vexatious. Any subsequent case would have to be judged on the facts relating to that case. So, a subsequent FTT may or may not reach the same conclusion as either the 2019 FTT or the 2023 FTT, depending on the circumstances.

5. Stepping back, I am satisfied that the FTT properly applied the test for section 14 of FOIA as set out by the Court of Appeal and the Upper Tribunal in the leading case of *Dransfield v The Information Commissioner & Devon CC* [2015] EWCA Civ 454. The FTT conscientiously carried out a very careful fact-finding exercise. Having done so, the FTT in effect overturned the Commissioner’s findings and reasoning; that conclusion was one that was reasonably open to the FTT panel, based on the evidence and submissions before it. It considered the 2019 FTT decision but explained why on an appropriately holistic approach it had come to a different conclusion. The fact that the Parish Council may happen to disagree with that factual conclusion does not elevate it into an error of law. The grounds of appeal are simply not arguable. They are, at heart, an impermissible attempt to re-argue the weight to be accorded to the various aspects of the section 14 test, which were quintessentially issues of fact for the FTT to determine, and which do not disclose any arguable error of law.

6. For all the reasons above, I conclude that the grounds of appeal are not arguable with a realistic prospect of success. Nor am I persuaded there is, exceptionally, any other good reason to grant permission to appeal. So, I refuse permission to appeal to the Upper Tribunal.

The application to suspend the effect of the First-tier Tribunal’s decision

7. As well as applying for permission to appeal, the Parish Council applies to have the effect of the FTT’s decision suspended, arguing as follows:

“It is clearly stated in the refusal notice that the tribunal did not consider the facts of the case and whether the evidence given was truthful or accurate, rather they focused on whether there was an error of law in their judgement. We find that this approach as neither fair nor equitable and is completely at odds with the whole

concept of why we have a Freedom of Information Commissioner. The Tribunal should make its decision based on the truth rather than stating we made a decision based on the wrong facts but that is OK because we did not make an error in law, this stance is completely farcical and a clear attempt at covering the actions of the tribunal rather than delivering justice. The Tribunal through its decision is supporting the ongoing harassment that a volunteer organisation at the lowest level of local government has had to endure over a more than 10 year period and will now continue based on this decision.”

8. The short answer is that as the application for permission to appeal has been refused, the application to suspend the effect of the FTT’s decision necessarily falls away too. There is no basis on which that further application could succeed (see the factors discussed in the Upper Tribunal’s decision in *Carmarthenshire County Council v MW and JW (SEN)* [2010] UKUT 348 (AAC); [2011] AACR 17).

9. The long(er) answer is that the grounds for this latter suspension application betray some fundamental misunderstandings on the part of the Parish Council of both the FOIA regime and the FTT process. Under FOIA it is the FTT’s role to consider the facts and make findings on the evidence – the FTT did that. Its role is not to revisit those issues when determining an application for permission to appeal, where an error of law has to be identified for the case to progress to the UT. If the Parish Council believes that the FTT was unaware of relevant evidence, then it should have applied to be made a party to Mr Woodhouse’s appeal at first instance, as it was invited. Moreover, as already noted above, the FTT only found that this particular FOIA request was not vexatious. Any subsequent case would have to be judged on the facts relating to that case. So, a subsequent FTT may or may not reach the same conclusion as either the 2019 FTT or the 2023 FTT, depending on the circumstances.

Conclusion

10. For all the reasons above, I conclude that the grounds of appeal are not arguable with a realistic prospect of success. Nor am I persuaded there is, exceptionally, any other good reason to grant permission to appeal. So, I must refuse permission to appeal to the Upper Tribunal.

11. The Parish Council has the right under the UT’s procedural rules to apply for a fresh reconsideration of this application at an oral renewal hearing before the Upper Tribunal, which as a matter of convention would be in front of a different judge. Any such application must be made in writing and within 14 days of the date that this determination is sent out by the Upper Tribunal office (i.e. the date on the enclosed covering letter or e-mail from the clerk in the Upper Tribunal office, and not the approved for issue date below) – see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 22(3)-(5).

Nicholas Wikeley
Judge of the Upper Tribunal

(Approved for issue on) 5 January 2024