



Appeal number: EA/2019/0073

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

PROFESSOR TIM CROOK

Applicant

- and -

THE INFORMATION COMMISSIONER

First Respondent

- and -

THE HOME OFFICE

Second Respondent

TRIBUNAL: JUDGE ALEXANDRA MARKS CBE

**Sitting in Chambers
on 20 August 2019**

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Permission to appeal is refused.

REASONS

Background to Appeal

1. The Applicant seeks permission to appeal a Decision dated 19 July 2019 of the First-Tier Tribunal (General Regulatory Chamber – Information Rights).
2. The Decision was made after a hearing before a Tribunal panel on 10 July 2019. At the hearing, the Applicant appeared in person, and The Home Office (“HO”) was represented by Counsel. The Information Commissioner (“the Commissioner”) did not appear and was not represented.
3. The Tribunal dismissed the Applicant’s appeal against the Commissioner’s Decision Notice dated 14 February 2019.
4. The essence of the Applicant’s appeal was that the Commissioner had erred in upholding the response of the Home Office (“HO”) that it does not hold the information sought by the Applicant under the Freedom of Information Act 2000 (“FOIA”).
5. The Commissioner’s Decision Notice set out her assessment of the written evidence and submissions of the Applicant and HO. During her investigation, the Commissioner enquired of HO specifically about the searches for information which it had carried out. The Commissioner was satisfied with HO’s response, and HO’s explanation why the information is not held.
6. Consequently, the Commissioner found that, on the balance of probabilities, HO had complied with the requirements of section 1 FOIA. The Commissioner’s Decision Notice set out her reasoning.

The Application for Permission to Appeal

I. Articles 10 and 13 ECHR

7. The Applicant claims that the Tribunal made an error of law because the current UK FOIA regime does not provide the applicant with Article 10 freedom of expression rights to access state archives for the purposes of public interest/watchdog historical research when no other human rights are being breached.
8. The Applicant says this is a denial of remedy under Article 13 of the Human Rights Act and European Convention of Human rights, particularly as the Grand Chamber ruling in *Magyar Helsinki Bizottsag v. Hungary* (8 November 2016) established such a standing right.
9. The Applicant claims that the FOIA is therefore incompatible with Articles 10 and 13.

II. Seeking information from another public body

10. The Applicant says that, contrary to the Tribunal’s view, there is European authority for the proposition that if a public authority does not hold the requested official document (or is not authorised to process the request) that authority shall wherever possible, refer the application or applicant to the competent authority. He cites The Council of Europe

Convention on Access to Official Documents from 18 June 2009 and the ECHR ruling in *Kenedi v. Hungary* [2009] ECHR 786 to the effect that *'the change in the physical whereabouts of the document did not exempt the Ministry from its obligation to grant the applicant access.'*

11. The Applicant argues that the issue of how FOIA is to be interpreted in respect of the holding of the information being sought, and its location at the time of the request, is a matter of law of general importance that should be considered by way of appeal in respect of human rights law according to *Magyar*.
12. The Applicant contends this is particularly so when, at the time of the FOIA application, the information is being held under section 3(2)(b) *'by another person on behalf of the authority.'*

III. On the balance of probabilities, the information was held by HO

13. The Applicant argues that the Tribunal was wrong in law to reach its conclusions (at paragraphs 38-40 of its Decision) that MI5 was, prior to the Security Service Act 1989, *'of'* HO even though not *'part of'* HO.
14. The Applicant cites in support of this proposition Lord Denning's Report 1963, a copy of which was included in HO's evidence in this case. The Applicant contends that the effect of Denning's recommendations was that the Director-General ("D-G") of MI5 would be able to turn to the senior Permanent Secretary of HO for advice and assistance on the policy aspects of his work and on his relations with other Government Departments; and he would receive from the permanent head of HO support and guidance. Thus, the Applicant says, *'this was a context and relationship that was much more executively embedded within and as part of HO rather than an individual relationship...between the D-G of the then MI5 and the Home Secretary.'*
15. The Applicant claims that the Tribunal gave insufficient consideration to his arguments in this respect, and his analysis of the Maxwell Fyfe directive.

Ruling

16. I have considered in accordance with rule 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("Tribunal Rules") whether to review the Tribunal's Decision. I am satisfied that the Tribunal gave full consideration to all the evidence and submissions from each of the parties and, as it was entitled to do, gave weight to them as it thought fit in reaching its decision. I have decided not to undertake a review of the Tribunal's Decision because I am not satisfied it made any error of law.
17. I have considered whether the Applicant's grounds of appeal (summarised in paragraphs 7-15 above) are *arguable*. This means that there must be a realistic (as opposed to fanciful) prospect of success – see Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538. I have concluded that the grounds do not have a reasonable prospect of success, and are therefore not arguable, for the following reasons:
 - a. The Applicant's Grounds of Appeal (summarised as I, II and III in paragraphs 7-15 above) effectively repeat his written and oral submissions to the Tribunal, albeit expressed in slightly different terms.

- b. In respect of Ground I, as stated in paragraphs 42-44 of the Tribunal's Decision, human rights claims are not engaged in this case because HO was not denying the requester of information *access* to it (as was the case in both *Magyar* and *Kenedi*). Instead, this was a case where, as the Applicant himself accepts, the public authority to which he submitted his FOIA request (namely, HO) does not *hold* the information.
- c. In respect of Ground II, in contrast to the position in the cases of *Magyar* and *Kenedi*, it is not clear in this case that the information ever existed at all (or still exists, albeit in the hands of another). Even if such information did ever exist, and is still held by MI5, I do not accept that the Tribunal made an error of law in concluding as it did in paragraph 41 of its Decision that a public authority (such as HO) is not required to seek information from another public authority (such as MI5) in order to respond to a FOIA request.
- d. In respect of Ground III, as stated in paragraphs 33-41 of the Tribunal's Decision, the Commissioner made no error of law in finding – on the balance of probabilities – that the information was not held by HO at the time of the request. The Applicant's submissions did not satisfy the Tribunal (for the reasons stated in its Decision), nor do his current grounds of appeal satisfy me, that the Commissioner and the Tribunal were wrong in law to find that HO did not '*hold*' MI5 information and files even prior to the Security Service Act 1989. I do not accept that Lord Denning's Report in 1963 nor the Applicant's argument that MI5 was '*of*' (although not '*part of*') HO prior to 1989 undermine the Tribunal's interpretation of the 1952 Maxwell Fyfe directions. I do not accept that HO was ever '*legally responsible*' for MI5 information and files.
- e. The Applicant failed to satisfy the Tribunal that the Commissioner's decision was wrong in law in any of the above respects, and his current grounds of appeal have failed to satisfy me that the Applicant has a reasonable prospect of success. I therefore find his appeal unarguable.

18. I conclude that the Tribunal made no error of law in finding that the Commissioner was entitled to determine that, on the balance of probabilities, information sought by the Applicant's FOIA request was not held by HO.

19. Accordingly, permission to appeal is hereby refused.

20. The Applicant is entitled to renew his application to the Upper Tribunal.

(Signed)

DATE: 21 AUGUST 2019

**ALEXANDRA MARKS CBE
JUDGE of the FIRST-TIER TRIBUNAL**