Neutral Citation Number: [2024] UKUT 245 (AAC) **Appeal No. UA-2024-000181-GIA**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

SHIBU GANGADHARAN

Appellant

- v -

INFORMATION COMMISSIONER

Respondent

Before: Upper Tribunal Judge Stout
Decided on consideration of the papers

Representation:
Appellant: In person
Respondent: Leo Davidson (counsel)

On appeal from:
Tribunal: First-Tier Tribunal (Information Rights)
Tribunal Case No: EA/2023/0175
Tribunal Venue: On the papers
Decision Date: 31 October 2023

SUMMARY OF DECISION

Information Rights (93)

The Tribunal erred in law in failing to deal with part of the appellant's request for information in the decision. This part of the appeal was remitted for rehearing before the same Tribunal.

The Tribunal did not err in law in its approach to section 40(2) of the Freedom of Information Act 2000 (FOIA). It had been open to it to conclude (in respect of the parts of the appellant's request that it dealt with) that disclosure of the information requested by the appellant was not necessary to the pursuit of a legitimate interest for the purpose of Article 6(1)(f) of the UK General Data Protection Regulation (UK GDPR) so that disclosure of the information would constitute a breach of the data protection principles.

Obiter:- The Upper Tribunal doubted whether the guidance given by the Court of Appeal in *DB v General Medical Council* [2018] EWCA Civ 1497, [2019] 1 WLR 4044 about the approach to the balancing of interests under section 7(4)(b) of the Data Protection Act 1998 could be read across to section 40(2) of the FOIA and Article 6(1)(f) of the UK GDPR.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal in part. The decision of the First-tier Tribunal was made in error of law insofar as it did not deal with the appellant's Request (4). Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set the decision aside to that extent only and remit the case to be reconsidered by the same tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the same First-tier Tribunal for further consideration.**

2. **The file is to be placed before a First-tier Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge for further directions.**

REASONS FOR DECISION

Introduction

1. This appeal concerns a request for information that Mr Gangadharan (the appellant) made to Oxford Spires Academy (the School) on 14 July 2022. The appellant appeals against the decision of the First-tier Tribunal of 31 October 2023 in which the First-tier Tribunal dismissed his appeal against the Information Commissioner's Decision Notice IC-179205-F3M4 of 3 March 2023 which had found the School's refusal to provide the information requested to be lawful under the Freedom of Information Act 2000 (FOIA 2000).

2. The parties have each consented to a decision being made on the papers without an oral hearing (as permitted by Rule 34(1) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules)), and I am satisfied that it is appropriate in this case, and in accordance with the overriding objective in Rule 2, for this appeal to be determined on the papers without an oral hearing because the issues have been well-rehearsed by the parties in their written submissions and I do not consider it would assist to have an oral hearing.

3. The structure of this decision is as follows:-

Background

4. The request that the appellant made to the School on 14 July 2022 was in the following terms. When granting permission on this matter, I observed that the request could be read as comprising four separate requests as indicated in square brackets below. The parties have been content to adopt my reading of the request in that respect:

> "Please provide data of ranking order for GCSE mock results for the 2020 batch.
>
> [Request 1] The data should include the mock result of each assessment taken and the actual awarded Centre assessed grade (CAG) and also include the students' specific ethnicity, no other personal information is needed.
>
> Please provide this information for the whole cohort in the subjects, Business Studies, English Language, English Literature, Maths, Chemistry and Religious Education.
>
> [Request 2] To check alignment with other year groups please provide the same information for years 2019 (actual exam assessed) and 2021 (CAGs).
>
> Business Studies results for GCSE year 2020 were moderated from actual assessed mock exams as advised by the School.

> [Request 3] Under the Freedom of information Act (2000), please provide data for the difference in moderated grades from actual assessed exams for all ethnic groups. Data to include the whole cohort showing mock examined grade vs moderated awarded grades alongside the specific ethnicity of the student.
>
> Fisher Family trust (FFT) can be used as a benchmark to see what would be expected by a cohort of students in terms of results.
>
> [Request 4] Under the Freedom of information Act (2000), please provide data FFT vs CAG for the percentage of Caucasian students vs percentage of non-Caucasian/BAME students achieving level 7, level 8 and level 9 independently for the subjects, Business Studies, English Language, English Literature, Maths, Chemistry and Religious Education. Please include FFT reference data."

5. On 22 July 2022, the School refused to provide information in response to the request, relying on the exemption in section 40(2) FOIA for personal information. It maintained this position after internal review, on 19 October 2022.

6. The appellant complained to the Information Commissioner. On 3 March 2023, the Commissioner issued a Decision Notice under section 50 of FOIA upholding the School's decision.

7. Exercising his right under section 57 of FOIA, the appellant appealed to the First-tier Tribunal.

The First-tier Tribunal's decision

8. In accordance with the parties' wishes, the Tribunal (Judge Findlay, sitting with members) heard the appeal on the papers. The Tribunal dismissed his appeal.

9. At [12]-[18] of the decision, the Tribunal set out the relevant provisions of FOIA, and also the relevant provisions of the Data Protection Act 2018 ("DPA") to which the exemption in section 40(2) of FOIA for personal information refers. In summary, the particular questions that the Tribunal identified it had to address in relation to the information requested by the appellant were:

    a. Is the information personal data of persons other than the requester within the meaning of FOIA and the DPA, i.e. is it information relating to an identified individual or an individual that it is reasonably likely would

be identifiable from that and other information available to the requester and/or the public?

b. Would disclosure comply with the data protection principles, in particular:
    i. would Article 6(1)(f) of the UK General Data Protection Regulation (UK GDPR) be satisfied in that disclosure is necessary for the purposes of legitimate interests pursued by the School or the appellant; and, if so,
    ii. were those legitimate interests overridden by the interests or fundamental rights and freedoms of the data subject?

10. At [19]-[21] the Tribunal directed itself as to the principles to apply in deciding whether the information constitutes personal data.

11. At [22]-[29] the Tribunal directed itself as to the relevant principles to apply in deciding whether or not disclosure of the information would contravene the data protection principles.

12. The Tribunal then set out the parties' respective submissions.

13. At [57]-[66] it expressed its conclusions as follows:-

> 57. The Tribunal's remit is governed by section 58 of the FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether that discretion should have been exercised differently. The Tribunal may consider evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.
>
> 58. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.
>
> 59. The Tribunal found that the requested information constitutes the personal data of the students, and did not accept the Appellant's argument that students could not be identifiable. The Appellant argues that s.40(2) FOIA is not engaged on the basis that the information is not personal data.
>
> 60. The Tribunal found that an individual is reasonably likely to be identifiable. This could be done by a person combining the requested information with other information. The Tribunal found that as a disclosure under the FOIA is a disclosure to

the world at large not only would the Appellant be able to identify individuals but this would be possible by others.

61. In reaching this decision the Tribunal has taken into account that the requested information is categorised according to year, subject and ethnicity against the performance in examinations and against the assessments recorded and that identification of individuals could be made by considering public information known about the students of the school community. The Tribunal considered it likely that some parents and some other students would have knowledge of the personal characteristics of students including their ethnicity, the subjects they were studying and their abilities in each subject.

62. The Tribunal found that it was reasonably likely that individual students and their grades could be identified by studying the requested information and comparing it with known information about individual students' strengths or weaknesses in particular subjects and their ethnic origin. Not all students could be identified but it is enough that some individuals could be identified. In addition, students would be able to identify themselves.

63. The Tribunal found that there was public interest in the information requested as it would show how the School approached grading and, if it were the case as alleged, whether there was an anomaly correlating to ethnicity. However, the Tribunal was satisfied that the School's statistical analysis demonstrates that public interest would not be advanced by disclosure of the information. In reaching this decision the Tribunal has taken note of the conclusion that the "Ethnicity groups are too small to establish statistical significance." The Tribunal found that the School provided detailed analysis about whether there was a statistical anomaly relating to ethnicity, and other characteristics, and this was done without disclosing personal data. The Tribunal found that the disclosure of the information would simply be a repetition of that statistical analysis which is unnecessary.

64. Having found that disclosure is unnecessary the Tribunal is not required to consider the overall balance test namely whether the interests relating to show racial discrimination and other misconduct by the School overrides the legitimate interests of fundamental rights and freedoms of the data subject. Had the Tribunal been required to consider this issue the Tribunal would have found that the public interests did not outweigh the rights of the data subjects.

65. In view of the findings of the Tribunal above it is not necessary to deal with the points raised by the Appellant in paragraphs 34 to 42 above.

66. The Tribunal recognises that each case must be determined on its merits. Having considered all the evidence the Tribunal found that the Commissioner carried out a comprehensive investigation into the complaint, the Decision Notice was in accordance with the law, and the Tribunal accepts and endorses the reasons provided for the findings in the Decision Notice for the reasons as stated above.

My reasons for granting permission

14. On 22 April 2024, I granted permission to appeal, making the following observations:

10. It is difficult to tell from the decision which elements of the requested information the school, the Commissioner or the Tribunal were dealing with, but it appears that the appellant's request was dealt with as a request for specific exam results for individual students identified by ethnicity. In other words, Requests 1-3 above. The decision does not deal with Request 4, which requested information based on percentages of students achieving certain grades broken down on a non-Caucasian/BAME vs others basis.

11. The appellant when applying for permission to appeal to the First-tier Tribunal raised what appears to be broadly this point in his paragraph 2f, suggesting that "rather than giving actual numerical exam marks these could be given as percentages and ethnicities could be broken down into two broad groups white and non-white". In refusing permission to appeal, Judge Findlay appears to have considered this was a proposal by the appellant to amend his request. However, it seems to me that it arguably was, or should have been treated by the First-tier Tribunal as being, a reference to the terms of the appellant's original request, i.e. Request 4 which has not been dealt with by the Tribunal.

12. This is a point that the appellant has raised again in his renewed application for permission to appeal where he states: "In relation to my specific statistics requests, no reason was given from the ICO or tribunal as to why this could not be disclosed. This is an obvious omission by the ICO and the tribunal under the FOI law".

13. In the circumstances, I grant permission on what I will label **Ground 1**, being that the First-tier Tribunal arguably erred in law by failing to deal in its decision with the

whole of the appellant's request for information and specifically by omitting to deal with Request 4.

14. The appellant has made a number of other points in seeking leave to appeal. For the most part, I agree with Judge Jacobs that he has not identified anything that arguably amounts to an error of law rather than a disagreement with the Tribunal's application of the law to the facts of his case.

15. The broad thrust of his complaints are that either the Tribunal should not have concluded that the requested information constituted personal data or that it should have concluded that disclosure of the information requested was necessary for the purposes of the appellant's legitimate interest in transparency as to whether ethnicity may have affected grading.

16. Having reviewed the Tribunal's decision carefully, I am not satisfied that it is arguable that the Tribunal has erred in concluding that the data requested as Requests 1-3 above constitutes personal data, given that it is a request for individual exam results by reference to specific ethnicity in respect of a relatively small cohort of students from an individual school.

17. However, I am satisfied that the Tribunal has arguably erred in law in its approach to Article 6(1)(f) and legitimate interest. This is because the Tribunal has arguably regarded it as conclusive of the question of whether it is necessary to disclose the information to serve the appellant's legitimate interest that the school has carried out a statistical analysis and determined that ethnicity groups are too small to establish statistical significance. However, statistical significance is not an absolute, and statisticians will argue as to what level of statistical significance should be applied in any particular case. In the context of an indirect discrimination claim, it is for the Tribunal or court to decide what is statistically significant and data may be significant even where the group is small (see eg Cheshire and Wirral Partnership NHS Trust v Abbott and ors at [17]-[22]). Further, even if the data set is too small to establish a case of indirect discrimination on the basis of statistics, it may still provide evidence from which it may be inferred that ethnicity has influenced the decision-making process on a directly discriminatory basis: see West Midlands Passenger Transport Executive v Singh [1988] 1 WLR 730.

18. In the circumstances, I am satisfied that the Tribunal has arguably erred in law in its conclusion on legitimate interest by failing to apply its own mind to the question of

> whether the information requested was capable of serving the legitimate interest of the appellant and/or by failing to take account of relevant factors as to how the data requested might serve the appellant's legitimate interest and/or in providing inadequate reasons for its decision. I label this **Ground 2**.
>
> 19. I appreciate that the foregoing paragraphs identifying what I have labelled as Ground 2 restate the appellant's case in lawyer's terms. However, I consider that in substance they properly reflect the arguments that he as a litigant in person has sought to make and that it is appropriate, and in accordance with the over-riding objective, for me to set out the argument as I have done in order to explain why I grant permission on that Ground. I emphasise that my decision is only that Ground 2 as I have identified it is arguable.
>
> 20. This grant of permission does not mean that either ground of appeal will succeed.
>
> 21. I add that I note that the First-tier Tribunal went on in [64] to consider the overall balancing exercise and that in principle its decision that that weighed in favour of refusing the request may in any event mean that its decision should be upheld. However, I am satisfied that if the final outcome of this appeal is that Ground 2 succeeds, it is arguable that that will undermine the First-tier Tribunal's conclusion on the balancing exercise. Again, both parties will need at the final hearing of this appeal to make submissions on the question of the effect of the appeal (if it is successful), given the First-tier Tribunal's conclusion at [64].

My final decision on the appeal

15. Both parties have had the opportunity since permission was granted to file further submissions. I have read those submissions carefully, but I only set them out below insofar as is necessary to explain the decision that I have reached on the appeal.

<u>Ground 1: Failure to deal in the decision with the whole of the appellant's request for information (specifically, Request 4)</u>

16. The Information Commissioner resists the appeal on this ground. The Commissioner submits that the Tribunal was clear in its decision that its findings, including its finding of fact that "an individual is reasonably likely to be identifiable" applied to the whole of "the requested information" ([59], [61], [62]), without

limitation. The Commissioner submits that the Tribunal's reasons at [61]-[62] apply to Request 4 as well as Requests 1-3. The Commissioner submits that, given the small cohorts of students involved, even providing the statistics as requested by the appellant in Request 4 would give rise to the risk of jigsaw identification identified by the Tribunal.

17. The Information Commissioner reminds me of the well-established principles to be applied when the Upper Tribunal scrutinises the decision of a First-tier Tribunal. The Upper Tribunal should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out: *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, at [25]. The reasons of the tribunal must be considered as a whole, and the Upper Tribunal should not limit itself to what is explicitly shown on the face of the decision. It should also have regard to that which is implicit in the decision, so that absence of express reference is not determinative: *Information Commissioner v Experian Limited* [2024] UKUT 105 (AAC) at [65] and [118].

18. The appellant for his part urges me to uphold the appeal on this ground.

19. I have re-read the Tribunal's decision, consciously directing myself to the generous approach that the authorities require me to take to the reasons of the First-tier Tribunal. I am afraid, however, that I have reached the firm conclusion that the Tribunal's decision has not dealt with Request 4. This is because Request 4 is different to Requests 1 to 3 in that it is a request for information based on percentages of Caucasian and non-Caucasian/BAME students achieving particular grades in particular subjects. Unlike requests 1 to 3, it is not a request for information about individual student's results.

20. It is clear to me that the Tribunal did not have Request 4 in mind when making its decision in this case. The Tribunal's record of the Information Commissioner's response and submissions at [43]-[56] contains no reference to any submissions that could be construed as submissions about a request for percentage figures such as those requested in Request 4. The Tribunal's conclusions at [57]-[66] likewise contain no such reference. The Tribunal's description of the requested information at [61] is not in my judgment capable of being construed as covering the percentage information requested under Request 4. What the Tribunal describes in that paragraph corresponds to the information requested in Requests 1 to 3 and not 4. Likewise, what the Tribunal says at [62] about the way in which an individual student could be identified by cross-referencing the requested information about individual students and their grades against known

information about individual students' strengths, weaknesses and their ethnic origin has no relevance to the information requested under Request 4 which did not include a request for any individual student data.

21. Moreover, the School had itself released some statistical analysis indicating that in principle the School considered that the release of statistical data (and percentages are statistical data) could be done without risking revelation of individual student's personal data. Consideration of Request (4) would need to have engaged with that, but there is nothing to indicate that the Tribunal had understood the appellant had made a request for statistical data/percentages as he did in Request (4).

22. That Request (4) had been overlooked is also clear from what the judge said about the appellant's grounds of appeal when refusing permission to appeal. At [2f] of the decision refusing permission, the judge recorded the appellant's contention that the possibility of identification of individuals could be eliminated by the data being released as percentages of exam marks for "two broad groups white and non-white". The appellant when drafting that ground of appeal had evidently himself forgotten that his Request 4 already made such a request so it is understandable that the Judge when refusing permission to appeal dealt with this point by stating "The Applicant at paragraph 2f suggests amending his request by 'being less specific' to eliminate the possibility of a person being identified. This is not a valid ground for permission to appeal." However, while the judge's error is understandable given the way in which the appellant presented the point in his grounds of appeal, it is nonetheless clear from the judge's response that the Tribunal had not understood the appellant's request that they dealt with in the decision as including Request 4.

23. In those circumstances, I must conclude that the Tribunal erred in law as (despite purporting to do so) it has not in fact dealt with the whole of the appellant's request. Further, Request 4 is, as I have observed, different in nature to Requests 1 to 3. It is not possible to read across the Tribunal's reasons for dismissing the appeal as dealing with Request 4. The reasons are inadequate as they do not explain why the Tribunal concluded that the Information Commissioner was right to find that the School had dealt with Request 4 in accordance with FOIA.

24. This case will therefore need to be remitted in order for the Tribunal to consider the appellant's Request 4. I add in that regard that I note that the appellant has in a number of his communications suggested he might further amend his request in various ways. For the avoidance of doubt, any amended request has to be put

afresh to the School as public authority. While there is nothing to stop the parties at any point reaching agreement between themselves in relation to an amended request, Tribunal appeal proceedings cannot be used as a forum for exploration of evolving requests or negotiation as to alternative requests that might be accepted. The Tribunal's jurisdiction (like the Commissioner's) relates only to the request in the form it was originally made. On remission, therefore, the Tribunal will be dealing with Request 4 solely as originally set out in the appellant's letter of 14 July 2022 and not any modified version.

Ground 2: failure to apply Tribunal's own mind to the question of whether the information requested was capable of serving the legitimate interest of the appellant and/or failure to take account of relevant factors as to how the data requested might serve the appellant's legitimate interest and/or failure to provide adequate reasons for its decision

25. The appellant's case was that the data he requested would demonstrate and/or further inform his belief that there had been race discrimination in the School's GCSE results. My concerns on granting permission to appeal on this ground were, as set out above, (a) that the Tribunal had arguably failed to understand (and thus take into account) how disclosure of the information he requested might have furthered the legitimate interest in exposing discrimination (or, at least, enabling analysis of whether or not there may have been discrimination); and/or (b) that the Tribunal had wrongly abrogated its duty to decide for itself whether the data would further that legitimate interest rather than accepting the school's statistical analysis; and/or (c) that the Tribunal had failed to give adequate reasons for rejecting the appellant's case in relation to this aspect of the appeal.

26. The Information Commissioner in his response to the appeal, however, submits that the Tribunal has not erred in law in its approach to this issue. The Commissioner submits that the language the Tribunal uses at [63] ("the Tribunal was satisfied…") makes clear that it did not abrogate its decision-making function but assessed the evidence for itself, only 'taking note' of the School's statistical analysis.

27. The Information Commissioner further submits that under the data protection statutory regime, it is primarily a matter for the data controller to make evaluative judgments and they enjoy a wide margin of appreciation when doing so, akin to that margin that may be allowed to public authorities in certain human rights contexts.

28. The Commissioner refers in support of that submission to *DB v General Medical Council* [2018] EWCA Civ 1497, [2019] 1 WLR 4044. That case concerned a subject access request made to the GMC by a patient who wished to bring a claim against his GP. The request was for report that the GMC had obtained about the GP for the purpose of fitness to practice proceedings. GMC agreed to disclose the report to the patient although it also contained the personal data of the GP because it considered that it would be "reasonable in all the circumstances" to comply with the request despite the lack of consent from the GP applying the test in what was then section 7(4)(b) of the Data Protection Act 1998 (the 1998 Act). The GP brought a Part 8 claim seeking to prevent the disclosure of the report. The judge at first instance found in favour of the GP. The Court of Appeal reversed that decision. Among other things, the Court of Appeal held that, when balancing the rights of data subjects in respect of personal data requested under s 7 of the 1998 Act, the data controller was the primary decision-maker. The majority of the Court of Appeal put it as follows at [86]:

> 86. The legal context is that the relevant duties under section 7(1) and under section 7(4)–(6) are duties imposed on data controllers. In a mixed data case falling for consideration under section 7(4)(b) , a data controller will be obliged to disclose relevant information if it is reasonable in all the circumstances to do so. It is the data controller who is the primary decision-maker in assessing whether it is reasonable or not. The class of persons who qualify as data controllers under the DPA is a very wide one. They come in all shapes and sizes, across a very wide range in terms of resources available to them to deal with SARs which may be made to them. The legislation confers rights on the whole population. The potential number of SARs is huge. In this context, the legislature contemplated that individual data controllers should be afforded a wide margin of assessment in making the evaluative judgments required in balancing the privacy rights and other interests in issue under section 7(4) . The incommensurable and very varied nature of the interests of requesters, objectors and data controllers which might be taken into consideration in the balancing exercise under section 7(4)–(6) also indicates that individual data controllers have a wide margin of assessment under section 7(4)(b) . This corresponds to the wide margin of appreciation which a public authority enjoys when competing Convention rights under article 8 of the ECHR fall to be balanced against each other: see Evans v United Kingdom [2007] 1 FLR 1990 , para 77. The effect of all this is that, apart from the mandatory relevant considerations identified in section 7(6) , data controllers generally have a wide discretion as to which particular factors to treat as relevant to the balancing exercise: R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening) [2009] AC 756 , para 40, per Lord Bingham of Cornhill. They

> also have a wide discretion as to the weight to be given to each factor they treat as relevant. As Auld LJ stated in Durant v Financial Services Authority [2004] FSR 28 , para 60:
>
> > "Parliament cannot have intended that courts in applications under section 7(9) should be able routinely to 'second-guess' decisions of data controllers, who may be employees of bodies large or small, public or private or be self-employed. To so interpret the legislation would encourage litigation and appellate challenge by way of full rehearing on the merits and, in that manner, impose disproportionate burdens on them and their employers in their discharge of their many responsibilities under the Act …"

29. The Commissioner also submits that the authorities that I cited in the grant of permission from the sphere of employment discrimination law have "no bearing" on the Tribunal's judgment in this case. The Commissioner submits that the context of an employment discrimination claim is different in that the regime under the Equality Act 2010 sets out what the Commissioner describes as a "formal comparative framework", whereas in this case the Tribunal was concerned with the value of the specific information requested to the appellant in view of his accepted legitimate interest.

30. Having reflected further on this case in the light of both parties' submissions, I accept the Commissioner's submission that the Tribunal in this case has not erred in law in the respect identified in this ground of appeal.

31. The Tribunal in its decision has properly directed itself to the correct legal principles. At [63] it identified the legitimate interest of the School/appellant for the purposes of Article 6(1)(f) of the GDPR as being to "show how the School approached grading and, if it were the case as alleged, whether there was an anomaly correlating to ethnicity". (The Tribunal referred to this legitimate interest as being the "public interest" as if it was dealing with the test in section 2 of FOIA, but I do not think that anything turns on that misuse of terminology which is a semantic point in this context.)

32. The Tribunal has then at [63] explained why it considers that it is not necessary for the pursuit of that legitimate interest for the information requested to be disclosed (by which it was referring for the reasons I have given only to Requests 1, 2 and 3 and not 4). In reaching that conclusion, it has relied heavily on the

statistical data already published by the School and the School's view that the ethnicity groups are too small to establish statistical significance. However, I am satisfied that when the decision is read in the generous way that the authorities require me to read it, it is clear that the Tribunal has applied its own mind to the correct legal issue. The factors it has relied on in reaching its conclusion were undoubtedly relevant factors. The weight that it gave those factors was a matter for it and cannot be overturned on appeal unless the Tribunal's decision reaches the high threshold of perversity.

33. I further agree with the Information Commissioner's submission that the Tribunal has not erred in law by failing to take account of the ways in which data such as that requested by the appellant might be relevant to proving discrimination in the context of a claim under the Equality Act 2010 (EA 2010). Whether or not the sort of data that the appellant has requested in this case would fall to be disclosed in proceedings if he were to bring a claim under the EA 2010 against the school would be a matter for the relevant tribunal or court to judge by reference to the particular pleaded case. Disclosure of information of this type would not be routine. More importantly, however, as the Information Commissioner submits, the Tribunal in this case under FOIA is faced with the different question of whether it is 'necessary' to the pursuit of the identified legitimate interest (which was not the making of a claim under the EA 2010) to disclose the information requested. The Tribunal's reasons for finding it was not necessary in this particular case were in my judgment adequate and there was no need for it to go further of its own motion to explore the kind of points that I referred to when granting permission to appeal (especially as the appellant had not before the First-tier Tribunal formulated his case in those terms).

34. For these reasons, this ground of appeal fails.

35. It will be noted that I have reached my conclusion without reference to the Court of Appeal's decision in *DB*, relied on by the Information Commissioner. That is because I am not satisfied that what the Court of Appeal said in that case at [86] about the approach to section 7(4)(b) of the 1998 Act can be read across to section 40(2) of FOIA. I have in mind that section 7(4)(b) of the 1998 Act requires the data controller to assess the balance to be struck between the competing interests of two (or more) data subjects whose personal data it holds. The data controller's own personal interests will often not be engaged at all. The data controller is therefore likely in general to be in a good position fairly to assess and

balance the competing interests at stake. The Court of Appeal's reasons in *DB* appear to me to reflect that context.

36. The position is somewhat different under section 40(2) of FOIA and Article 6(1)(f) of the GDPR because there is not in principle parity between the interests at stake. The exercise will very often equate to the balancing act under section 2 of FOIA with which the Tribunal will be most familiar, i.e. a balance between the 'private' interests of the data subject and the 'public' interests of the requestor, which latter may run counter to the 'personal' interest of the public authority itself. Thus in this case the appellant has made no secret of his belief that there has been discrimination and the School will have an interest in defending itself from that 'charge'. I am not therefore satisfied that it would be right for a 'margin of appreciation'-type approach to be taken under section 40(2) of FOIA. However, I am satisfied that the Tribunal in this case did not in fact apply a 'margin of appreciation'-type approach. It did not say it was doing so and the language of the decision does not suggest that it did. I have therefore been able to reach the conclusion that there was no error of law in this aspect of the Tribunal's decision without making any determination as to whether the Commissioner's submission in reliance on *DB* is correct in law or not.

Conclusion

37. I therefore conclude that the decision of the First-tier Tribunal involves an error of law in that it has not dealt with Request (4). I allow the appeal and set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

38. I am not in a position to remake the decision which must be remitted for consideration of Request (4). Remission will be to the same Tribunal panel as there is no reason to doubt their professionalism or ability to approach the Request (4) issue with an open mind. It is a point that they have simply not dealt with at all in the first decision.

39. I am aware that the appellant requested that his case be dealt with by "a BAME judge". However, cases are not allocated to judges on discriminatory bases such as that. All judges swear the judicial oath to "do right to all manner of people … without fear or favour, affection or ill-will" and all judges of the relevant First-tier Tribunal chamber are in principle able to deal with this case. In any event, one Tribunal has already dealt with this case and it would not be an efficient use of

public resources (or in accordance with the overriding objective) to remit this to a different Tribunal, provided the original Tribunal is still available to hear it.

40. The case must (under section 12(2)(b)(i)) be remitted for re-hearing in respect of Request (4) only by the same tribunal subject to the directions above.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 9 August 2024