Neutral Citation Number: [2016] EWCA Civ 758

Case No: C3/2014/3212

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
GIA25602013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2016

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LLOYD JONES
and
SIR STEPHEN RICHARDS

- -

Between :

DEPARTMENT FOR WORK AND PENSIONS	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**First Respondent**
FRANK ZOLA	**Second Respondent**

- -
- -

Mr. Andrew Sharland (instructed by **Government Legal Department**) for the **Appellant**
Mr. Robin Hopkins (instructed by **Information Commissioner**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented.

Hearing date: Monday 13th June 2016

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Judgment Approved

Judgment Approved by the court for handing down.

Lord Justice Lloyd Jones :

1. This appeal concerns requests made to the Department for Work and Pensions, ("DWP") the appellant in this appeal, under the Freedom of Information Act 2000 ("FOIA") for the communication of the identities of some of the organisations, primarily charities and businesses, who were at the time of the requests hosting placements under certain schemes aimed at promoting the employment prospects of jobseekers. The DWP withheld the identities of those placement hosts. Following complaints, the Information Commissioner, the first respondent in this appeal, issued decision notices ordering the disclosure of the information. The DWP's appeals to the First-tier Tribunal were dismissed in a determination dated 17 May 2013. A further appeal by the DWP to the Upper Tribunal was dismissed in its determination dated 15 July 2014 ([2014] UKUT 0334 (AAC)).

2. The FOIA requests with which this appeal is concerned relate to three of the appellant's employment schemes, the Mandatory Work Activity scheme ("MWA"), Work Experience and the Work Programme ("WP"). These schemes and other similar schemes are often collectively referred to as "workfare". Under the MWA and WP schemes placement hosts, which may be charities, private sector companies or public authorities, receive a benefit in the form of free labour. Placements are arranged by contractors and sub-contractors who receive payment from the appellant. In the majority of cases, referral to the schemes is mandatory and, at the time of the relevant requests, non-compliance was subject to a sanction in the form of a loss of Jobseeker's Allowance for specified periods. The schemes affect many thousands of jobseekers. By January 2012 nearly 50,000 claimants had been referred for placements on MWA. In the case of MWA there was an express commitment to placements benefiting local communities. Workfare schemes generally attracted considerable controversy and media attention.

3. Prior to January 2012 the appellant had, in response to FOIA requests, released the names of placement hosts involved in various workfare schemes. Boycott Workfare, a pressure group which has campaigned against workfare schemes, used these FOIA responses to compile a list of names of placement hosts. It published this list ("the Boycott Workfare List") on its website. The version on its website at 16 February 2012 described their goal as to "expose and take action against companies and organisations profiting from workfare". That version of the list contained some 200 names but only a fraction of those were placement hosts in the MWA and WP schemes.

4. In January and February 2012 The Guardian newspaper published a series of articles criticizing the workfare schemes and certain organisations that hosted placements under such schemes. It referred to the increasing pressure on such organisations to withdraw from the schemes.

5. The requests which are the subject of this appeal were made in January 2012. Each requested the name of placement hosts participating in either MWA or WP. In February 2012 the DWP refused these requests, relying on section 43(2) of the Freedom of Information Act on the ground that disclosure would prejudice the commercial interests of the DWP and those delivering services on its behalf.

6. The requesters complained to the Information Commissioner. The DWP then obtained an opinion from Mr. Chris Grayling, then Minister for Employment, which enabled it to rely, in addition, on section 36(2)(c) of the Freedom of Information Act.

7. In August 2012, in three almost identical decision notices, the Information Commissioner found that section 43(2) was not engaged. The Commissioner accepted that section 36(2)(c) was engaged but he found that the public interest weighed in favour of disclosure.

8. The appellant appealed to the First-tier Tribunal against the three decision notices and the three appeals were joined. As it was entitled to, the DWP relied before the First-tier Tribunal on further documentary evidence which had not been before the Commissioner. This included, in particular:

   (1) Forty responses to a survey conducted by the appellant, from placement hosts, contractors and sub-contractors.

   (2) Five longer letters from contractors who were particularly opposed to disclosure.

   (3) Various materials referred to as case studies relating in particular to three charities that had been publicly named by Boycott Workfare, namely Sue Ryder, PDSA and the Salvation Army.

9. In its determination the First-tier Tribunal held that section 43(2) was not engaged and that, although section 36(2)(c) was engaged, the public interest favoured disclosure.

10. With the leave of the First-tier Tribunal the appellant appealed to the Upper Tribunal on the following grounds

    (1) The First-tier Tribunal failed to give adequate reasons for its conclusion that section 43(2) was not engaged.

    (2) The First-tier Tribunal misdirected itself as to the test to be applied under section 43(2).

    (3) The First-tier Tribunal failed to take into account material evidence and/or reached perverse conclusions in relation to such evidence on section 43(2).

    (4) The First-tier Tribunal erred in law in its approach to the public interest generally and in relation to section 36(2)(c) in particular.

11. The Upper Tribunal (Administrative Appeals Chamber) (Judge Wikeley) dismissed the appellant's appeal on all four grounds. Judge Wikeley refused permission to appeal to the Court of Appeal. However, on 12 June 2015 Vos LJ granted permission to appeal.

Legal Provisions.

12. Section 1, FOIA 2000 provides in relevant part:

> (1) Any person making a request for information to a public authority is entitled—
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

Section 2(2) FOIA provides:

> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 36(2) which appears in Part II of the Act provides:

> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
>
> (a) would, or would be likely to, prejudice—
>
> (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
>
> (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
>
> (iii) the work of the Cabinet of the Welsh Assembly Government.]
>
> (b) would, or would be likely to, inhibit—
>
> (i) the free and frank provision of advice, or
>
> (ii) the free and frank exchange of views for the purposes of deliberation, or

> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 43(2) which appears in Part II of the Act provides:

> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Ground 1: The Upper Tribunal erred in law when it concluded that the First-tier Tribunal had not misdirected itself as to the law.

13. The DWP relies on what are said to be two distinct errors of law. The first concerns the meaning of "commercial interests" in section 43(2). The second concerns the meaning of "prejudice" within section 36(2) and section 43(2).

Commercial interests.

14. On behalf of the DWP Mr. Andrew Sharland submits that the First-tier Tribunal, and the Upper Tribunal when dismissing the Appellant's appeal, misdirected itself as to the meaning of "commercial interests" in relation to the placement hosts.

15. Before the First-tier Tribunal the DWP's case as to prejudice to the commercial interests of the placement hosts was that some placement hosts had suffered or would be likely to suffer prejudice as a result of the disclosure of names because they would be likely to suffer a loss of customers (which would result in a loss of income and profits) and, in the case of charities, a reduction in the amount of donations. The appellant also contended that in certain cases, disclosure of the names of placement hosts pursuant to a FOIA request would lead to aggressive lobbying led by social media groups which was likely to result in the placement hosts withdrawing from MWA or WP and thus losing volunteers who are a valuable resource.

16. In support of the contention that these interests constitute "commercial interests" within section 43(2) the DWP relies on the decisions of the Information Tribunal in *Student Loans Company Limited v Information Commission,* EA/2008/0092, at [42]–[43] and *University of Central Lancashire v Information Commission* [2011] 1 Info LR 1170 at [31] that "commercial interests" is a term which deserves a broad interpretation which will depend largely on the particular context.

17. Mr. Sharland then submits that the First-tier Tribunal must be taken to have concluded that the loss of custom, income and profits and, in the case of charities, donations do not amount to prejudice to commercial interests within section 43(2) because otherwise it could not have concluded at paragraph [192] of its determination, that the critical question was whether the naming of a placement host had led to withdrawal from the scheme. He submits that the First-tier Tribunal's focus solely on the issue of

withdrawal when considering prejudice to commercial interests was erroneous and took too restricted a view of the commercial interests of placement hosts.

18. I accept Mr. Sharland's submission that "commercial interests" in section 43(2) is wide enough to include loss of income, profits and donations and the loss of volunteer workers. However, I am unpersuaded that there has been an error of law as he contends. First there is no express statement by the First-tier Tribunal to this effect. Secondly, it is to my mind impossible to infer such an error on the part of the Tribunal. We have been told that, in fact, there was no dispute before the First-tier Tribunal that loss of custom, profits or donations or loss of volunteer workers would constitute prejudice to commercial interests. The argument before the First-tier Tribunal on the meaning of commercial interests concentrated on the discrete issue as to whether or not the appellant's welfare bill constituted a commercial interest. (The Information Commissioner was successful in his submission that it did not and that conclusion was not challenged before the Upper Tribunal or this court.) The decision of the First-tier Tribunal certainly concentrated on the potential withdrawal of placement hosts. This may have been a reflection of the way in which the DWP presented its case.

19. Mr. Sharland submitted in the alternative that, if it is concluded that the First-tier Tribunal did not make the error of law for which he contends, it must be concluded that it simply failed to address at all the question of prejudice to these interests. It seems to me that there is greater force in this submission. In summarising the contentions of the DWP in its determination (at [129]) the First-tier Tribunal expressly drew attention to the appellant's submissions in relation to loss of custom, profits and donations and in relation to loss of volunteer workers. Later in its determination (at [196] and [205]) it expressed its conclusion that there was no causal link between the naming of parties and the risk of commercial prejudice in very general terms which are wide enough to include the particular interests of placement hosts under consideration here. Thus it stated that what was needed to be shown was the critical causal link between the act of naming the participants and "*any* consequential commercial prejudice or real risk of commercial prejudice" (emphasis added). It was not satisfied that the causal link had been demonstrated.

20. Insofar as the appellant's submission on this point relates to loss of voluntary workers by placement hosts, it is itself dependent on the withdrawal of placement hosts from the schemes. The First-tier Tribunal concluded that there was no causal link between the disclosure of names and the risk of withdrawal by placement hosts and this might explain why there is no express explanation as to why loss of voluntary workers was not considered a head of likely commercial prejudice. However, at no point did the First-tier Tribunal explain why there was no sufficient risk of commercial prejudice resulting from the loss of custom, income or profits or, in the case of charities, donations – matters which were not dependent on withdrawal. I shall return to this issue under Ground 2.

21. Finally in this regard, Mr. Sharland makes a subsidiary submission which relates to the appellant's own commercial interests. He accepts that additional public spending on benefits is not a commercial interest but a financial interest. However, he submits that where additional costs are incurred by contractors and sub-contractors as a result of withdrawals by placement hosts and these additional costs are passed on to the appellant, these fall squarely within "commercial interests" within section 43(2). He

then points to the conclusion of the First-tier Tribunal (at [189]) that any prejudice that might be said to have been suffered by the appellant is of a financial rather than of a commercial nature and submits that this is an error of law because it fails to take account of such additional costs. To my mind, such additional costs incurred by the appellant would not be commercial in nature because they are incurred in the administration of a social welfare scheme. In any event, the only evidence before the First-tier Tribunal to support this head of claimed commercial prejudice was in the letters produced from the contractors. The First-tier Tribunal considered that these were speculative on this point and declined to give them any weight. I consider that it was entitled to take this view.

Prejudice.

22. The second error of law for which the appellant contends relates to the First-tier Tribunal's approach to the issue of prejudice. The appellant takes as its starting point the following statement by the Information Tribunal in *Hogan and Oxford City Council v Information Commissioner* [2011] 1 Info LR 588:

> "29. First, there is a need to identify the applicable interest(s) within the relevant exemption…
>
> 30. Second, the nature of the "prejudice" being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on "prejudice" should be rejected. There is therefore effectively a *de minimis* threshold which must be met…
>
> …
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> 34. A third step for the decision maker concerns the likelihood or occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where the comparable approach was taken to the construction of similar words in the Data Protection Act 1998. Mr Justice Munby stated that "likely":
>
> > connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified

> public interests. The degree of risk must be such that there "may very well" be prejudice to those interests, even if the risk falls short of being more probable than not".
>
> 35. On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not ."

23. On behalf of the appellant, Mr. Sharland draws attention to the following paragraph in the determination of the First-tier Tribunal in this case (at [188]):

> "As for section 43(2), the Tribunal is satisfied that the burden to demonstrate the requisite degree of prejudice is borne by the DWP. In the Tribunal's judgment, this has not been contested by the DWP. The requisite standard has been set out above. On any view, the burden is to show that the risk of prejudice is real, actual or substantial."

24. On behalf of the DWP it is submitted that the approach of the First-tier Tribunal at this point differs from that laid down in *Hogan*. It is said that it conflates and confuses the second and third steps. At the second step of the analysis the Tribunal was required to consider whether the prejudice claimed (as opposed to the risk of prejudice) is "real, actual or of substance" i.e. the asserted prejudice is more than *de minimis*. At the third step the risk of prejudice occurring must be a real and significant risk, even if it cannot be said that the occurrence of prejudice is more probable than not. Mr. Sharland submits that in the present case the claimed prejudice was clearly more than *de minimis*. In relation to the placement hosts it was loss of custom, income and donations and in certain circumstances loss of volunteers as a result of withdrawal. Here, he also repeats his submissions in relation to prejudice to the commercial interests of the contract providers, sub-contractors and the appellant.

25. The Upper Tribunal dismissed the submission that the First-tier Tribunal had conflated the separate issues of risk and prejudice as resulting from focussing on particular words or flawed passages and taking them out of context. In its view the passage at [188] was not an essential step for the First-tier Tribunal's reasoning but simply summarising and referring back to a point made earlier in the decision where the Tribunal's correct understanding of the principles in play was set out. Any apparent elision of the tests in paragraph [188] was apparent and not real and the function of compressed drafting rather than any fundamental misunderstanding as to the relevant law (at [28]).

26. In response Mr. Sharland submits before us that paragraph [188] informs the analysis that follows and is thus clearly an essential step of the decision. Moreover it is an incorrect summary of the earlier point.

27. I am prepared to accept for present purposes that the passage in *Hogan and Oxford City Council v Information Commissioner* set out above is an accurate statement of the correct approach to the issue of prejudice. Furthermore, it does seem to me that

there is some elision of the second and third steps in paragraph [188] of the determination of the First-tier Tribunal. It is not clear to me whether the last sentence of paragraph [188] is intended to relate to the second or third step. However, I am not persuaded that this is evidence of a material misdirection on the part of the First-tier Tribunal. So far as the third step is concerned, it is clear from the earlier passages of the determination referred to at paragraph [188] (i.e. paragraphs [49], [61] and [165]) that the Tribunal had firmly in mind the correct test as to the likelihood of occurrence of prejudice. So far as the second step is concerned, even if paragraph [188] can be read as imposing a higher threshold, which I doubt, it was not material in the context of this case. Despite some ambiguous statements in the determination, in particular at [187] and [188], the second step does not appear to have been a live issue before the First-tier Tribunal. As Mr Hopkins submits, the real issue there was as to the likelihood of prejudice occurring, i.e. the issue at the third step. The First-tier Tribunal concluded that disclosure of the information by the DWP would not be likely to lead to the prejudicial consequences for which the DWP contended. Accordingly, I do not consider that there was a material misdirection as to the meaning of prejudice.

Ground 2: The conclusion of the First-tier Tribunal that section 43(2) was not engaged was perverse.

28. One ground of appeal relied on by the appellant before the Upper Tribunal was a perversity challenge to the First-tier Tribunal's conclusion that section 43(2) was not engaged because there was no evidence that disclosure of the names of participants in the WP and/or MWA schemes would cause or would be likely to cause prejudice to commercial interests of such placement providers either because they were forced to leave the scheme and lost the benefit of volunteer workers or they remained in the scheme but suffered commercial prejudice as a result of loss of customers and/or loss of donations. This ground was emphatically rejected by the Upper Tribunal which considered that it did not disclose any arguable material error of law.

29. On this further appeal the appellant submits that;

    (1) the Upper Tribunal misdirected itself as to the relevant test for perversity;

    (2) even applying the very high threshold articulated by the Upper Tribunal, the Upper Tribunal erred in law in failing to set aside the conclusion of the First-tier Tribunal that disclosure was not likely to prejudice the commercial interests of placement hosts.

The applicable standard

30. The Upper Tribunal, at paragraph [46] of its determination stated:

> "…This ground of appeal essentially boils down to a perversity challenge. That being so, the onus is on the Department to make out an "overwhelming case" that no reasonable Tribunal, properly directing itself on the law and the evidence, could have arrived at the decision this Tribunal reached. This demanding threshold was applied in the FOIA context by Irwin J. in *British Broadcasting Cooperation v Information Commissioner* [2009] EWHC 2348 (admin) (at [83] – [85]). Of

> course, the same threshold for perversity applies in other jurisdictions (e.g. in Employment Tribunals, see Mummery LJ in *Yeboah v Crofton* [2002] EWCA Civ. 794, at [92] – [95], and Social Security Tribunals, see Sir John Donaldson, MR, in *Murrell v Secretary of State for Social Services*, reported as Appendix to Social Security Commissioner's decision R(I) 3/84, asking whether the decision was so "wildly wrong" as to merit being set aside"

31. The passage in the judgment of Irwin J. in *BBC v The Information Commissioner* [2009] EWHC 234 (Admin) referred to begins as follows:

> "83. In seeking to support the Tribunal's conclusion, the Information Commissioner has relied on a number of authorities, where the courts have suggested that considerable deference should be paid to the conclusions of a specialist or expert Tribunal. Perhaps the high water mark of this consideration is to be found in the judgment of Lord Justice Mummery at [83] – [96] of *Yeboah v Crofton* [2002] IRLR 634 where, *inter alia* specifically dealing with a perversity appeal from an Employment Tribunal, he said:
>
> > "Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal have "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care": *British Telecommunications Plc v Sheridan* [1990] IRLR 27, [34]."
>
> Essentially to underscore the same point, the Information Commissioner relies on the dicta of Lord Denning in *Hollister v National Farmers Union* [1979] ICR 542 at pages 552H – 553D."

32. Irwin J. went on to note that the Information Tribunal was a specialist Tribunal, comprising a majority of members with particular experience which enabled them to represent the interests both of those who make Freedom of Information Act requests, and the public authorities which must respond to them. He also drew attention to the fact that the Tribunal had the benefit of hearing oral evidence. He noted that a similar approach had been adopted by Wyn Williams J. in *Department for Business Enterprise and Regulatory Reform v O'Brian and The Information Commissioner* [2009] EWHC 164 (QB) at [32] where the judge stated that a court is usually slow to find that a specialist Tribunal has failed to afford appropriate weight to factors relevant to its decision.

33. Irwin J. then went on to accept this approach subject to two qualifications. First he noted that this approach is confined to allegedly perverse findings of fact and does not extend to the law. Secondly where the law and fact are related in a complex way and where the application of the legal formulation is new and untested, it may be

appropriate to intervene in relation to findings somewhat more readily than in the context of a case such as *Yeboah* where both law and practice were well established. In the present case, the DWP, while accepting that "this issue was not the focus of the appellant's submissions before the Upper Tribunal" nevertheless submits that the Upper Tribunal in this part of its determination simply applied too high a test of perversity. Seizing on the reference to "an overwhelming case" it submits that it imposes a higher threshold than even *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223.

34. The approach to be followed in perversity challenges to decisions of specialist Tribunals, as described by Irwin J. in the *BBC* case, is simply a reflection of the respect which is naturally paid to the decisions of a specialist Tribunal in an area where it possesses a particular expertise. Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts. It has been described in various ways in the cases. I agree with Irwin J. that the formulation employed by Mummery LJ in *Yeboah* requiring an overwhelming case, may perhaps be the high water mark of this consideration, although the formulation employed by Sir John Donaldson, MR, in *Murrell* (so wildly wrong as to merit being set aside) would be a close rival. Both were referred to by the Upper Tribunal in the present case at [48]. Nevertheless it is clear from the context – in particular from the careful explanation of Irwin J. – that the approach referred to by the Upper Tribunal is no more than paying appropriate respect to a decision of a specialist Tribunal and in my view does not amount to an error of law.

35. On behalf of the appellant, Mr. Sharland then submits that the Upper Tribunal in any event failed to have regard to the qualifications entered by Irwin J. to the approach which he adopted. However, the present case did not turn on legal analysis but on the evaluation of factual evidence. In addition, the issue with which we are here concerned is not one where law and fact are related in a complex way and where the application of the legal formulation is new and untested. In this regard, Mr. Hopkins is able to point to the appellant's own argument in relation to the second limb of Ground 1 that the correct approach to the issue of prejudice under the Freedom of Information Act is well established.

36. Furthermore, while it is undoubtedly the case that certain situations call for a more intense scrutiny on judicial review (see, for example, *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at [554]; *R (Ali) v Secretary of State for Justice* [2013] EWHC 70 (Admin); [2013] 2 All ER 1055 at [58]–[64]), there is no good reason for adopting such an approach in circumstances such as the present. On the contrary, the expertise of the Information Tribunal strongly suggests that a lighter touch is appropriate.

The substance of the perversity challenge

37. On behalf of the appellant, Mr. Sharland submits that, even applying the threshold articulated by the Upper Tribunal, it erred in law in concluding that the First-tier

Tribunal was entitled to conclude that disclosure was not likely to prejudice the commercial interests of charities such as the PDSA. He points to the view expressed by the First-tier Tribunal that the best way to judge whether there was the requisite degree of likely prejudice to commercial interests was to analyse "what actually happened in the cases that are put before the Tribunal" (at [192]). He submits that the undisputed evidence before the FTT was that two of the three cases put before the Tribunal (PDSA and Sue Ryder) did withdraw because of the previous disclosure of their names pursuant to a Freedom of Information Act request. He submits that the First-tier Tribunal could not reasonably conclude in the light of this evidence that there was "no clear evidence that as a result of being named they suffered or were likely to suffer commercial prejudice".

38. On behalf of the respondent, Mr. Hopkins accepts that there was no dispute that those charities had been named in response to previous Freedom of Information Act requests at some point before January 2012 and that they withdrew from the schemes in February 2013. He submits that there was, however, a dispute as to the causal link between those two events and the adequacy of those two case studies as a basis for engaging section 43(2) in respect of the particular information in dispute before the First-tier Tribunal.

39. The First-tier Tribunal observed that at the time of the requests with which we are concerned the names of some 200 placement hosts were in the public domain, some of which had been disclosed following a prior Freedom of Information Act request. It considered that the best way to judge whether there was the requisite degree of likely prejudice was to analyse what actually happened in the particular cases that had been put before the Tribunal. It was not willing to attach anything like as much weight to the surveys conducted by Ms. Elliott for the appellant, of which it was critical for the reasons set out in the determination at [198] to [205]. I consider that this was a reasonable approach. In its view, the critical question was whether the fact of being named had led in any of those specific cases before it to a withdrawal from the schemes. It considered that, at most, only seven out of the 200 or so disclosed names in the public domain could be said to have come in for criticism which could arguably be said to have resulted in withdrawal. Of those, Tesco's position it regarded as self-inflicted. TK Maxx and Sainsbury's were, in its view, major institutions and there was no support for the contention that the fact of their being named resulted in any meaningful prejudice. Oxfam had clearly reassessed its own position based on what it called ethical considerations or reconsiderations. The Salvation Army was still "holding the line".

40. It then turned to PDSA and Sue Ryder on which the appellant relies on this appeal. The First-tier Tribunal observed that what needed to be shown was the critical causal link between the act of naming them and any consequential commercial prejudice or real risk of commercial prejudice. The Tribunal was not satisfied that the causal link had been demonstrated. It accepted that PDSA and Sue Ryder could rightly be termed as being, to some extent, vulnerable. It was to be expected that some charities might find it difficult if not impossible to defend themselves against the actions of Boycott Welfare as robustly as organisations such as Tesco. It then expressed the rather cryptic conclusion:

> "The Tribunal finds that even if it could be said that these two charitable entities did not otherwise address any media

> attention they attracted, there is no clear evidence that as a result of being named they suffered or were likely to suffer commercial prejudice." (at [196])

41. The statement published by Sue Ryder on 25 February 2013 states:

> "Sue Ryder has reviewed its position with regard to the Department for Work and Pensions' mandatory back-to-work schemes.
>
> …
>
> Recent online lobbying using strong and emotive language and making misleading claims about our volunteering practices has presented a risk to our critical work. Equally we need to protect our service users, their families, our supporters and Sue Ryder staff and volunteers from any further distress.
>
> Therefore, we have taken the decision to withdraw from the DWP's mandatory back-to-work schemes. We do this with a heavy heart as our volunteers, including those on placements, regularly tell us how much they have benefited from their time with us and we are immensely grateful to them for their time and dedication. …"

42. The statement published by PDSA on 20 February 2013 states:

> "You may have recently seen on the news that some work experience schemes set up by the Government have been heavily criticised. The main area of debate and discussion is that some of these schemes require people to "volunteer" to gain work experience for a set period of time and, if they refuse, they face losing their benefits.
>
> Despite the positive benefits to be gained from volunteering, PDSA has been subject to criticism from the same protest group that is currently challenging the Government to change these schemes. This is because we work with job centres and agencies which find people work experience opportunities. We have therefore reviewed our position and taken the decision to withdraw from all Government work experience schemes."

43. To my mind, these statements provide compelling evidence that Sue Ryder and PDSA respectively withdrew from the schemes because of aggressive campaigning directed specifically against them by Boycott Workfare. Moreover, it is not disputed that the names on the Boycott Workfare website were obtained as a result of a previous Freedom of Information Act request. On its face, the evidence of these instances

appears to demonstrate a clear link in that the naming of participating charities enabled pressure groups to campaign against that participation by those charities and this has resulted in their withdrawal from the schemes. It is accepted on behalf of the respondent that the loss of volunteer workers is capable of constituting commercial prejudice within section 43(2). Moreover, in the case of MWA all placement hosts are charitable organisations or not-for-profit organisations and the description by the First-tier Tribunal of the position of Sue Ryder and PDSA as "to some extent vulnerable", is likely to apply with equal force to many other charities of similar size.

44. This was evidence which required to be addressed by the First-tier Tribunal when considering whether section 43(2) was engaged. In my view its summary conclusion that there was "no clear evidence that as a result of being named they suffered or were likely to suffer commercial prejudice" fails to take proper account of this evidence.

45. Before us, Mr. Hopkins relied heavily on the facts that the disclosure of the names of these charities took place at the latest in January 2012 and neither withdrew until February 2013. This, he submits, demonstrates the absence of a causal link between the naming of the charities and their decision to withdraw from the schemes. This is not a matter to which the First-tier Tribunal refers in its determination. However, to my mind the fact that the campaign against these charities may have been delayed does not detract from the fact that it was possible because of the disclosure of the names of participants. When one turns to consider the likely effect of the disclosure sought in these proceedings, it could be expected that disclosure of the names of participants in a position similar to that of these charities would expose them to similar pressure at an early stage. The First-tier Tribunal, in my view, has failed to take account of these considerations.

46. Respect is due to a Tribunal such as the Information Tribunal because of its expertise in its particular field. However, here we are not concerned with a matter falling within its particular expertise but with identifying and taking account of relevant evidence relating to actual or likely prejudice to commercial interests. In these circumstances, I consider that it erred in its dismissal of the evidence relating to the withdrawal by Sue Ryder and the PDSA as incapable of supporting a causal link between the publication of names of participant hosts and actual or likely commercial prejudice. In my view the decision is flawed because of a failure to take account of relevant evidence and I would order reconsideration on this narrow ground.

47. Furthermore, as explained earlier in this judgment, I consider that the First-tier Tribunal failed to address, adequately or at all, in its determination the question relating to the actual or likely loss of custom, income and profit and, in the case of charities, donations, as a result of the publication of their names as placement hosts. This matter is distinct from pressure resulting in termination of participation in the scheme and is a matter on which there was relevant evidence in the form of the statements from Sue Ryder and PDSA. With respect to the view expressed by Sir Stephen Richards, I am unable to accept that the fact that the First-tier Tribunal expressed its overall conclusions in terms wide enough to include this basis of commercial prejudice is sufficient to demonstrate that it took due account of this matter. No indication is given in the determination as to the basis on which the submission is rejected. In my view this also amounts to a failure to take into account a relevant consideration.

48. In light of this failure to take account of relevant considerations, I would therefore remit the matter to the First-tier Tribunal in order for it to reconsider its conclusion that section 43(2) is not engaged taking proper account of the relevant evidence.

Ground 3: The First-tier Tribunal erred in its assessment of the public interest considerations in the context of Section 36(2)(c).

49. Both section 36(2)(c) and section 43(2) are "qualified" exemptions, with the result that when they are engaged the relevant information need not be disclosed where "in all the circumstances of the case, a public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)). As a result, it was necessary for the First-tier Tribunal to carry out an evaluation of the competing public interest considerations.

50. On behalf of the appellant Mr. Sharland submits that the First-tier Tribunal erred in two respects in its assessment of the public interest considerations. First he submits that it misstated the law on section 36. Secondly he submits that the Tribunal failed to have regard to the single most important factor in favour of maintaining the section 36 exemption, namely the public interest in reducing unemployment.

51. If I am correct in my conclusion that the First-tier Tribunal erred in law in failing to have regard to relevant evidence on the likelihood of commercial prejudice resulting from publication of the names of placement hosts, this error will inevitably have had an effect on the Tribunal's evaluation of the competing public interest. This is readily apparent from the First Tier-Tribunal's discussion (at [215]) of elements said to favour the maintaining of both exemptions, where the Tribunal states that, with regard to "the smaller, more vulnerable charitable organisations" there is "no evidence which compels a finding in favour of either exemption militating in favour of non-disclosure in these appeals". Then (at [217]) the first factor it identifies in favour of disclosure is that "the existence and facts surrounding the case studies described earlier in this section show that no prejudice of any substance has been experienced". As a result I have come to the conclusion that the First-tier Tribunal's evaluation of the public interest considerations is flawed for the same reasons.

52. In these circumstances, I can deal briefly with the two specific points raised by the appellant.

53. The first submission advanced under this ground concerns the effect to be given in the balancing of competing public interest considerations to the opinion of the qualified person which is required under section 36. Mr. Sharland complains that the analysis of the First-tier Tribunal was flawed because it stated (at [212]) that so far as section 36 is concerned "the scales stand empty at the outset of the analysis". He submits that, as a result, the First-tier Tribunal failed to take appropriate account of an important element in the balancing of the competing public interests.

54. The Upper Tribunal appears to have considered that this was an error of approach but that it was not material given the First-tier Tribunal's conclusion that in these appeals the scales were weighed appreciably in favour of disclosure.

55. It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public

interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates. Provided this is done, it does not seem to me to matter greatly whether it is taken into account at the outset or at a later stage. Between paragraphs [207] and [222] of its determination the First-tier Tribunal set out what it considered to be the relevant considerations but these did not include the opinion of the qualified person. There is, therefore, nothing in its determination which indicates that any weight was given to the opinion of the qualified person in this case.

56. On the basis of the First-tier Tribunal's conclusions on commercial prejudice and causation, the opinion of the qualified person would, I accept, be entitled to only the most limited weight in the exercise of balancing the public interests. In those circumstances, the scales would as the Tribunal put it, be weighted appreciably in favour of disclosure and I should have been prepared to accept that the failure to give weight to the opinion of the qualified person was not a material error because the Tribunal would inevitably have reached the same conclusion in any event. However, because of my conclusions on Ground 2 and its effect on the Tribunal's conclusions on commercial prejudice and causation, I am not able to conclude that the error was immaterial.

57. So far as the second submission is concerned, it is correct that in setting out the competing public interest considerations, the First-tier Tribunal did not expressly refer to the public interest in reducing unemployment. However, when the determination is read as a whole, it can be seen to include a number of references to the likely reduction in the number of opportunities available for jobseekers and the possible collapse of the schemes, not only in the section setting out the submissions of the appellant (see [67], [68]) but also in the Tribunal's evaluation of the submissions (see [133], [139]). I consider, however, that its treatment of the competing public interests is flawed for the more fundamental reason that in its assessment of the likely effect of the publication of the names of participants it failed to take account of relevant considerations.

58. This leaves for consideration the question whether, had the First-tier Tribunal not made the errors which I attribute to it, it would inevitably have reached the same conclusion in any event on the basis of the public interest balance. Here, I accept that the Tribunal referred in its determination (at [208] to [222]) to other factors weighing in favour of disclosure in the public interest. Furthermore, I accept that the Tribunal concluded that the public interest balance came down "strongly" (at [187]) or "appreciably" (at [214]) in favour of disclosure. However, the Tribunal (at [216] and [217]) places at the forefront of its reasons justifying disclosure that "the facts surrounding the case studies described earlier in this section show that no prejudice of any substance has been experienced". In these circumstances, I am unable to conclude that the Tribunal would in any event have reached the same conclusion.

Conclusion

59. For these reasons I would allow the appeal and remit the matter to the First-tier Tribunal for reconsideration taking account of all the evidence.

Sir Stephen Richards:

60. I gratefully adopt the factual and legal introduction in the judgment of Lloyd Jones LJ. I agree with him on ground 1 but I respectfully disagree with his conclusions on grounds 2 and 3. My reasons are as follows.

61. As to ground 2, I agree with Lloyd Jones LJ's analysis concerning the standard of perversity but I take a different view on the application of that standard to the facts. I do not accept that the First-tier Tribunal's conclusion that the DWP had failed to discharge the burden of showing that section 43(2) was engaged was flawed by legal error. Moreover, the Tribunal also concluded that even if section 43(2) was engaged, the public interest balance would favour disclosure; and, subject to consideration of the issue in ground 3, that was a sufficient basis for the Tribunal's dismissal of the DWP's appeal in respect of section 43(2) and leads me to the view that there should be no remittal in any event.

62. At paragraphs 40-46 of his judgment, Lloyd Jones LJ focuses on the statements from Sue Ryder and the PDSA as providing evidence of a causal link between being named as a placement host and withdrawal from the relevant scheme. He finds that the First-tier Tribunal's determination was flawed by a failure to take this evidence properly into account. As it seems to me, however, the Tribunal plainly took the evidence into consideration: it referred to it in its detailed summary of the evidence before the Tribunal, in particular at paragraph 111, and it addressed it in its reasoning at paragraph 196. In the light of Lloyd Jones LJ's analysis, I accept that the Tribunal overstated the position in saying at the end of paragraph 196 that there was *no* clear evidence that Sue Ryder or the PDSA had suffered or were likely to suffer commercial prejudice as a result of being named. But I do not accept that this was sufficient to vitiate the decision. The case studies in question did not compel the conclusion that a causal link had been established even in the case of those two charities, let alone that there was sufficient to engage section 43(2) in the light of the evidence as a whole, which included not only extensive documentary evidence but also some exploration of that evidence in cross-examination of the DWP's witness, Ms Elliott. The Tribunal had to consider in the light of the evidence overall, and having regard *inter alia* to the lapse of time between disclosure of the two charities' names and their own withdrawal from the scheme, whether it had been demonstrated that the naming of placement hosts in accordance with the information requests would, or would be likely to, cause commercial prejudice through withdrawals from the scheme or otherwise. The Tribunal's reasoning was far from perfect, though it should be noted that a separate challenge relating to the adequacy of the reasons was dismissed by the Upper Tribunal and has not been pursued before this court. Standing back, however, and bearing in mind the high degree of respect due to a specialist Tribunal of this kind, I am not persuaded that the conclusion reached was *Wednesbury* unreasonable or otherwise vitiated by legal error.

63. I apply the same approach, and reach the same conclusion, in relation to the point made by Lloyd Jones LJ in paragraph 47 of his judgment, concerning the loss of custom, income and profit and, in the case of charities, donations, as a result of publication of the names of placement hosts. It is true that the First-tier Tribunal did not focus on this issue in its reasoning, concentrating instead on the issue of prejudice resulting from withdrawal from the scheme, which appears to have been the focus of the argument before it. But the Tribunal was clearly aware of the issue of loss of custom etc., which was referred to in its summary of the DWP's case, at paragraph

129 of the determination, and it expressed its conclusions in terms wide enough to cover the issue. I am not prepared to infer in the circumstances that the Tribunal failed to have regard either to the issue itself or to evidence bearing on it.

64. Even if, contrary to my view, the Tribunal erred in finding that section 43(2) was not engaged, it does not follow that the case should be remitted for reconsideration. The Tribunal made a clear alternative finding that the public interest balance would favour disclosure in any event. It stated in paragraph 187:

> "The Tribunal's conclusions address the two exemptions which feature in these appeals. The Tribunal is entirely satisfied that on the evidence it has heard and seen and in the light of the parties' submissions, section 43(2) is not engaged. This is principally on the ground that the requisite threshold of the degree of prejudice has not been satisfied. The Tribunal however agrees that section 36(2) is engaged but finds that the public interest balance militates strongly in favour of disclosure. The Tribunal has also concluded that, even if section 43(2) were engaged, the public interest balance would again favour disclosure."

The Tribunal's subsequent analysis of the competing public interest, at paragraphs 207-222, is for the most part applicable to the exemption under section 43(2) as well as to that under section 36(2).

65. That brings me to the arguments under ground 3 that the First-tier Tribunal erred in its assessment of the public interest considerations. The arguments are advanced specifically in relation to section 36(2) but are also relevant to the Tribunal's alternative finding in relation to section 43(2) that the public interest balance would favour disclosure even if the exemption were engaged.

66. Lloyd Jones LJ makes the valid point, at paragraph 51 of his judgment, that if the Tribunal erred in law in its assessment of the evidence on the likelihood of commercial prejudice resulting from publication of the names of placement hosts, that error affects the Tribunal's analysis of the competing public interests and that this can be seen in particular from the considerations set out at paragraphs 215 and 217 of the Tribunal's determination. I also accept his point at paragraphs 55-56, in relation to section 36(2), that appropriate consideration should be given to the opinion of the qualified person at some point in the balancing exercise and that the failure to do so cannot readily be dismissed as immaterial if the Tribunal erred in reaching its conclusions on the likelihood of commercial prejudice under section 43(2). If I am right in rejecting the challenge to the Tribunal's conclusions in relation to section 43(2), the points fall away; but if the Tribunal did err in reaching its conclusions in relation to section 43(2), then I agree that the Tribunal's analysis of the public interest balance is thereby flawed.

67. Even if, however, the analysis of the public interest balance is flawed in the ways identified by Lloyd Jones LJ, it is important to look at the other factors relied on by the Tribunal in support of its conclusion that the public interest favoured disclosure:

> "218. Second, the schemes each and all involve a considerable amount of public money.
> 219. Third, in her witness statement, Ms Elliott … confirms that the DWP does not specify what a placement should be or should consist of in any particular

> case, but that it does expect that every placement offers persons the opportunity to gain fundamental work disciplines, as well as benefiting the local communities. She adds that the Work Programme allows providers to deliver their support 'without undue pressure' from the Government. Counsel for the Commissioner called that approach 'a light touch', and the Tribunal agrees. In the Tribunal's judgment, it also increases the need for public scrutiny.
> 220. Fourth and related to the above issue is the need for the public to be in a position to make informed decisions about how a scheme operates, if only given the fact that there is a resultant community benefit.
> 221. Fifth, account should be taken of existing debate in the media, albeit an informal one, but one which is clearly addressing the controversial nature of the schemes.
> 222. Sixth, it is of importance for the public to see and examine how the schemes and those who participate in them (placement providers and contractors) perform."

68. Those are plainly powerful factors to which the Tribunal attached considerable weight. It stated in paragraph 187 that the public interest balance militated *strongly* in favour of disclosure in relation to section 36(2); and it seems to me that it was making the same point in relation to section 43(2) when it said that the public interest balance would again favour disclosure. It is necessary to consider whether in those circumstances there is any real possibility that the Tribunal would have reached a different conclusion as to the public interest balance in the absence of the errors attributed to it by Lloyd Jones LJ. I am conscious of the need to avoid imputing my own views on weight to the Tribunal and to focus on how the Tribunal would have dealt with the matter. I think it sufficiently clear from its determination, however, that the Tribunal would have reached the same conclusion in any event. It follows that, if the Tribunal erred in the ways attributed to it, the errors were not material and the case should not be remitted.

69. For those reasons, I would dismiss the appeal.

Master of the Rolls:

70. There is disagreement between Lloyd Jones LJ and Sir Stephen Richards in relation to grounds 2 and 3.

Ground 2

71. In relation to ground 2, Lloyd Jones LJ says that the First-tier Tribunal ("FTT") failed to take into account the evidence that Sue Ryder and PDSA withdrew from the schemes. The relevant parts of that evidence are set out by Lloyd Jones LJ at paras 41 and 42 above. I agree with him that, if read literally, the last sentence of para 196 of the judgment of the FTT is plainly wrong. That is because there was nothing *unclear* about the evidence of Sue Ryder and PDSA as to the reasons for their withdrawals from the schemes. They both said unequivocally that they withdrew because of the public criticism of their involvement in them.

72. In my view, what the FTT must have meant to say was that it was not persuaded by the evidence of Sue Ryder and PDSA that the reasons they gave were in fact the reasons for their withdrawal. That would be consistent with its earlier statement in

para 196 that it was "not satisfied that the causal link has been demonstrated". On any view, the reasoning of para 196 is unsatisfactory. But, as Sir Stephen Richards says, the FTT had earlier referred to the evidence of Sue Ryder and PDSA at para 111 of its judgment. It was an important part of the evidence relied on by the appellant. My understanding is that the *clarity* of this evidence was never in issue. What was in issue was whether that evidence established the necessary causal link. As to that, the FTT expressed the clear conclusion that it had not been. In these circumstances, there needs to be a cogent indication that the FTT failed to take account of this important evidence. There is nothing beyond the literal language of the last sentence of para 196. In my view, this is not enough. It follows that I am not persuaded that the decision was flawed because of a failure to take account of the evidence of Sue Ryder and PDSA.

73. I acknowledge that the FTT failed to deal with the issue of the loss of custom etc to which Lloyd Jones LJ refers at paragraph 47 above. It does not, however, follow that it failed to take it into account as a relevant consideration. It was aware of the issue (see para 129). I agree that the FTT should have dealt with it in its reasons. But like Sir Stephen Richards, I am not prepared to infer that the FTT failed to have regard to the issue or the evidence bearing on it. This complaint is more appropriately classified as a reasons challenge. But as Sir Stephen Richards points out, a separate challenge relating to the adequacy of the reasons was dismissed by the Upper Tribunal and has not been pursued before us.

Ground 3

74. Since I have concluded, in agreement with Sir Stephen Richards, that ground 2 should be rejected, the analysis of the public interest balance is not flawed in the ways identified by Lloyd Jones LJ and the appeal should be dismissed.

75. But in case I am wrong thus far and the public interest balance is flawed, the question remains whether there is any real possibility that the FTT would have reached a different conclusion on the public interest balance if it had been conducted without the flaws identified by Lloyd Jones LJ. If it were necessary to reach a decision on this question, I would have been inclined to agree with Sir Stephen Richards that there is no such possibility. At para 214, the FTT said that it was "firmly" of the view that the scales were weighed "appreciably" in favour of disclosure. Looking at paras 195 and 196 overall, it is clear that the FTT was indeed of the view that, as it put it at para 217, "the existence and facts surrounding the cases studies described earlier in this section show that no prejudice *of any substance* has been experienced" (emphasis added). This statement was justified by the fact that "at most, only seven out of the 200 odd disclosed names in the public domain could be said to have come in for criticism which could arguably be said to have resulted in withdrawal" (para 195). In other words, the amount of prejudice resulting from disclosure was negligible.

76. I would therefore reject ground 3.

Conclusion

77. For these reasons, I would dismiss the appeal.