UA-2022-000676-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000457-GIA
& UA-2022-000676-GIA

Applicant: Mr Gregory Lawton

Respondent: The Information Commissioner

DETERMINATION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE WIKELEY

Decision date: 11 January 2023

ON APPEAL FROM:

UA-2021-000457-GIA

Tribunal: **First-tier Tribunal (General Regulatory Chamber)**
Tribunal Case No: **EA/2021/0228/GDPR**
Tribunal Venue: **In chambers**
Decision Date: **5 November 2020**

UA-2022-000676-GIA

Tribunal: **First-tier Tribunal (General Regulatory Chamber)**
Tribunal Case No: **EA/2021/0323/GDPR**
Tribunal Venue: **In chambers**
Decision Date: **15 February 2022**

This front sheet is for the convenience of the parties and does not form part of the decision

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000457-GIA
& UA-2022-000676-GIA

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

Mr Gregory Lawton

Applicant

- v –

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 8 December 2022
Decision date: 11 January 2023

Representation:

Applicant: In person
Respondent: No attendance or representation

NOTICE OF DETERMINATION OF APPLICATIONS FOR PERMISSION TO APPEAL

I refuse permission to appeal to the Upper Tribunal.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DETERMINATION

Introduction

1. This case concerns two applications for permission to appeal brought by the Applicant, Mr Lawton. The Respondent in both cases is the Information Commissioner. The data processor in the first application (UA-2021-000457-GIA), which is to be known as *Lawton v Information Commissioner (No.1)*, is the British Broadcasting Corporation (the BBC). The data processor in the second application (UA-2022-000676-GIA or *Lawton v Information Commissioner (No.2)*) is the Royal Pharmaceutical Society (the RPS). Neither the BBC nor the RPS was a party to the proceedings before the First-tier Tribunal (FTT), and that remains the case before the Upper Tribunal.

2. The two applications in essence raise the same legal issues and so are dealt with in this single joint ruling, although the facts are to some extent different.

The oral permission hearing

3. I held an oral hearing of both applications for permission to appeal at the Employment Tribunal hearing venue in Leeds on 8 December 2022. Mr Lawton attended in person, ably representing himself. The Information Commissioner did not attend and was not represented, but had not been directed to do so (although he had made written submissions in advance of the hearing, resisting both applications). I am indebted to Mr Lawton for his detailed submissions both in person and on paper. I should add that both the Information Commissioner and Mr Lawton availed themselves of the opportunity given to them after the hearing in Leeds to make written representations on the very recent decision of Mostyn J in the High Court in *R (on the application of Delo) v Information Commissioner and Wise Payments Limited* [2022] EWHC 3046 (Admin) ("*R (on the application of Delo")*, a judgment which was handed down on 2 December 2022, i.e. just a few days before the hearing in Leeds.

The background to *Lawton v Information Commissioner (No.1)*

4. The basic chronology is not in dispute and so need not be set out in detail here. Suffice to say that on 30 October 2020 Mr Lawton made a subject access request (SAR) to the BBC. On 12 January 2021 he complained to the Information Commissioner about how the BBC had handled his SAR. After what may be described for present purposes as some to-ing and fro-ing (summarised by the Commissioner in his response dated 22 April 2022 at §9-§18, and taken issue with in certain respects by Mr Lawton in his submission dated 20 May 2022 at §13-§16), on 5 July 2021 the Commissioner wrote to the Applicant providing an outcome to his complaint.

5. On 23 August 2021 Mr Lawton applied to the FTT under section 166 of the Data Protection Act (DPA) 2018. In summary, he argued that the Commissioner had not taken appropriate steps to investigate his complaint. Following an application by the Commissioner, on 26 October 2021 GRC Registrar Worth struck out Mr Lawton's application as having no reasonable prospects of success. On 5 November 2021 Judge McKenna reviewed the matter under rule 4(3) and reached the same conclusion herself.

6. I should mention here, by way of context, that the Upper Tribunal decided the case (or rather, in effect, the joined cases) of *Killock and Veale v Information*

Commissioner; EW v IC and Coghlan (on behalf of C) v IC ("Killock and Veale") [2021] UKUT 299 (AAC); [2022] AACR 4 on 24 November 2021, and so about three weeks after Judge McKenna's strike out decision. To this extent at least there is a factual difference with Mr Lawton's other case, in which the FTT decision was made some two months after the Upper Tribunal's decision in *Killock and Veale* was promulgated. Judge McKenna later refused permission to appeal. Mr Lawton then applied direct to the Upper Tribunal for permission to appeal.

The background to *Lawton v Information Commissioner (No.2)*

7. Again, the basic chronology is not in dispute. On 30 October 2020 Mr Lawton made a subject access request (SAR) to the RPS. On 30 December 2020 he complained to the Information Commissioner about how the RPS had handled his SAR. After some to-ing and fro-ing (summarised by the Commissioner in his response dated 27 October 2022 at §4-§19, and taken issue with in certain respects by Mr Lawton in his submission dated 26 November 2022 at §17), on 2 October 2021 the Commissioner effectively treated the complaint as closed.

8. On 25 October 2021 Mr Lawton applied to the FTT under section 166. In summary, he argued, as in his earlier application, that the Commissioner had not taken appropriate steps to investigate his complaint. Following an application by the Commissioner, on 28 January 2022 a GRC Registrar struck out Mr Lawton's application as having no reasonable prospects of success. On 15 February 2022 Judge Griffin reviewed the matter under rule 4(3) and reached the same conclusion herself.

9. As noted above, *Lawton v Information Commissioner (No.1)* was decided by the FTT before *Killock and Veale* whereas the FTT decided *Lawton v Information Commissioner (No.2)* after the Upper Tribunal's decision in *Killock and Veale* was promulgated. All this means in practice is that Judge Griffin had the advantage of having read that decision, a benefit denied to Judge McKenna. Judge Griffin later refused permission to appeal. Mr Lawton subsequently applied direct to the Upper Tribunal for permission to appeal.

Applications for permission to appeal: the general principles

10. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" of the FTT (see section 11(1) of the Tribunals, Courts and Enforcement Act 2007). The Upper Tribunal will give permission to appeal only if there is a realistic prospect of an appeal succeeding, unless there is exceptionally some other good reason to do so: Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

11. The error of law must also be material, i.e. one that affected the outcome of the case in some relevant way. The Court of Appeal has set out a summary of the main errors of law in its decision in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9] (sometimes known as the *Iran* criteria). The main examples of where the FTT may go wrong in law include (in plain English):

    - the tribunal did not apply the correct law or wrongly interpreted the law;
    - the tribunal made a procedural error;
    - the tribunal had no or not enough evidence to support its decision;
    - the tribunal failed to find sufficient facts;

- the tribunal did not give adequate reasons.

12. I also bear in mind that the principles governing appellate review in tribunals are common across the board. In the context of employment tribunal proceedings, they were helpfully expressed as follows by the Employment Appeal Tribunal (EAT, Elias J presiding) in *ASLEF v Brady* [2006] IRLR 576 at para [55] (so, for example, in the following extract substitute 'Upper Tribunal' for 'EAT' and 'FTT' for 'Employment Tribunal'):

> "The EAT must respect the factual findings of the Employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine toothcomb' to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."

The statutory framework

13. The domestic statutory framework must be understood against the backdrop of the UK GDPR. This provides that one of the Commissioner's tasks is to "handle complaints lodged by a data subject … and investigate, to the extent appropriate, the subject matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period" (Article 57.1(f)). Article 77.1 then vests the data subject with the right to make a complaint to the Commissioner, who "shall inform the complainant on the progress and the outcome of the complaint" (Article 77.2). Article 78.2 further provides that "each data subject shall have the right to an effective judicial remedy where the Commissioner does not handle a complaint or does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77".

14. So far as is relevant, section 165 of the DPA 2018 provides as follows:

> **Complaints by data subjects**
>
> **165.**–(1) Articles 57(1)(f) and (2) and 77 of the GDPR (data subject's right to lodge a complaint) confer rights on data subjects to complain to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of the GDPR.
>
> (2) A data subject may make a complaint to the Commissioner if the data subject considers that, in connection with personal data relating to him or her, there is an infringement of Part 3 or 4 of this Act.
>
> …
>
> (4) If the Commissioner receives a complaint under subsection (2), the Commissioner must—
>
> (a) take appropriate steps to respond to the complaint,
>
> (b) inform the complainant of the outcome of the complaint,
>
> (c) inform the complainant of the rights under section 166, and

(d) if asked to do so by the complainant, provide the complainant with further information about how to pursue the complaint.

(5) The reference in subsection (4)(a) to taking appropriate steps in response to a complaint includes—

(a) investigating the subject matter of the complaint, to the extent appropriate, and

(b) informing the complainant about progress on the complaint, including about whether further investigation or co-ordination with another supervisory authority or foreign designated authority is necessary.

15. Section 166 then provides the judicial remedy mandated by Article 78.2 thus:

Orders to progress complaints

166.–(1) This section applies where, after a data subject makes a complaint under section 165 or Article 77 of the GDPR, the Commissioner—

(a) fails to take appropriate steps to respond to the complaint,

(b) fails to provide the complainant with information about progress on the complaint, or of the outcome of the complaint, before the end of the period of 3 months beginning when the Commissioner received the complaint, or

(c) if the Commissioner's consideration of the complaint is not concluded during that period, fails to provide the complainant with such information during a subsequent period of 3 months.

(2) The Tribunal may, on an application by the data subject, make an order requiring the Commissioner—

(a) to take appropriate steps to respond to the complaint, or

(b) to inform the complainant of progress on the complaint, or of the outcome of the complaint, within a period specified in the order.

(3) An order under subsection (2)(a) may require the Commissioner—

(a) to take steps specified in the order;

(b) to conclude an investigation, or take a specified step, within a period specified in the order.

(4) Section 165(5) applies for the purposes of subsections (1)(a) and (2)(a) as it applies for the purposes of section 165(4)(a).

16. The proper scope of section 166 lies at the heart of the present application.

The central point of contention in this case

17. Mr Lawton’s case, in essence, is that the Information Commissioner did not investigate his complaints about the processing of his personal data by the BBC and the RPS respectively to the extent appropriate. The Applicant further argues that in those circumstances, and even though the Commissioner had provided an “outcome” to his complaint, the FTT has the power under section 166 to order the Commissioner to investigate to the extent appropriate, including specifying particular investigatory steps to be taken.

18. The Information Commissioner's case, again in essence, is that in such circumstances his decision not to pursue the complaint further is the "outcome". Moreover, the Commissioner submits that such an "outcome" is unimpeachable under section 166 except in a case where there has been a total absence of any investigation. The Commissioner additionally argues that a considered decision not to pursue a complaint further is one that in nearly all cases will involve the lawful exercise of his broad discretion as expert regulator on how to prioritise and handle complaints. As such, it is not to be interfered with in the absence of good reason.

19. Section 166 has not been 'on the statute book' for very long but has already generated a body of case law. However, before considering those decisions, I need to address some knotty questions of precedent.

Some observations on precedent in the context of these applications

Introduction

20. The present application raises two issues of judicial precedent which need to be mentioned. These issues are the extent to which I am bound (if at all) by the Upper Tribunal's decision in *Killock and Veale* and the High Court's decision in *R (on the application of Delo)* respectively. I should say at the outset that the discussion on precedent that follows owes much to the expert commentary and analysis in Rowland and Ward, *Social Security Legislation 2022/23, Volume III: Administration, Adjudication and the European Dimension* (2022). I should also perhaps declare an interest as General Editor of that series, although I have no role in Volume III.

Precedent and the Upper Tribunal's decision in *Killock and Veale*

21. The starting point is that Upper Tribunal itself generally follows its own decisions on matters of legal principle "in the interests of comity and to secure certainty and avoid confusion". However, the Upper Tribunal recognises that "a slavish adherence to this could lead to the perpetuation of error", in a jurisdiction where most decisions are given without the assistance of legal submissions by professional representatives acting for the parties, and so a single judge will not follow a decision of another single judge if satisfied that it was wrong (*Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC)).

22. However, a single judge of the Administrative Appeals Chamber will always follow the decision of a three-judge panel (*Dorset Healthcare*). Furthermore, a three-judge panel will generally follow a decision of another three-judge panel but will not do so if satisfied that it was wrong (Social Security Commissioners' decision *R(U) 4/88*).

23. But is *Killock and Veale* actually a decision of a three-judge panel ("3JP"), properly so called? I may have referred to it as such, but if so on reflection I must plead guilty to being slipshod. To be more accurate, *Killock and Veale* is a decision of a three-judicial-office-holder panel, a variant of panel composition which has only been possible since the implementation of the Tribunals, Courts and Enforcement Act 2008. To be more precise, of the three cases heard together, *Coghlan (on behalf of C)* was a decision of a two-judge panel (Farbey J and UTJ West sitting as a "2JP") on an appeal to the Upper Tribunal while *Killock and Veale* and *EW v IC* were decisions of a two-judge panel (Farbey J and UTJ West again) sitting together with a specialist member (Mr De Waal) on

a discretionary transfer from the FTT (perhaps denoted by the abbreviation "2JP+").

24. *Dorset Healthcare* has nothing to say about the precedential status of such a hybrid panel. Is it no more authoritative than the decision of a single judge, or the same as a 3JP, or somewhere in between? The precise status of a two-judge panel – whether a 2JP or a 2JP+ – therefore remains somewhat uncertain. In the Court of Appeal, a two-judge court deciding a substantive appeal is treated in the same way as a three-judge court (*Cave v Robinson Jarvis & Rolf* [2001] EWCA Civ 245; [2002] 1 WLR 581 at [21]). There is surely considerable force in the same approach being taken in the Upper Tribunal, at least arguing from first principles. However, and be that as it may, in *IC v Poplar Housing Association* [2020] UKUT 182 (AAC); [2020] AACR 28 Farbey J, the then Chamber President of the Administrative Appeals Chamber, declined to consider herself bound by a decision of a panel comprised of two judges and an expert member. Farbey J adopted this stance even though the criteria for appointing a 2JP+ panel were (and are) the same as those for appointing a three-judge panel. Her decision on this point has since been followed (but apparently without full argument) by UTJ Markus KC in *Commissioner of the Police of the Metropolis v IC* [2021] UKUT 5 (AAC).

25. In summary, although the matter has yet to be conclusively resolved, there may appear to be early signs of an emerging view that a single judge is not strictly bound by the decision of a 2JP or a 2JP+. I am certainly not aware of any authority which specifically holds that a decision of a 2JP or a 2JP+ carries the same weight as that of a 3JP. However, I consider that the decision in *Killock and Veale* carries more weight than the decision of a single judge in the Chamber. I say that because (i) it is the decision of three judicial office holders, one of whom is a High Court judge, one a UTJ and one a specialist member; (ii) the three cases in question were heard together to provide authoritative guidance on DPA 2018 s.166 issues across a range of factual scenarios; (iii) the panel had the benefit of receiving argument from several very experienced practitioners (including three silks); and (iv), last but not least, it has been selected for reporting ([2022] AACR 4) and as such carries added precedential weight and status – see the discussion in *London Borough of Croydon v K-A (SEN)* [2022] UKUT 106 (AAC) at paragraphs 46-50.

26. As a matter of judicial comity, I should accordingly follow *Killock and Veale* unless persuaded that it is wrong in law in a material respect. Such judicial comity contributes to coherence and certainty within the legal system as well as by the way to the efficient and more cost-effective use of resources, as the same point will not normally be re-argued at length and cost before different panels (*R (on the application of Jollah) v Secretary of State for the Home Department* [2017] EWHC 330 (Admin) at [46]).

Precedent and the High Court's decision in *R (on the application of Delo)*

27. The position on precedent as regards the Upper Tribunal and decisions of the High Court is rather more straightforward.

28. The basic position, as established by the case law, is that the Upper Tribunal is not bound by any decision of the High Court other than on judicial review of the Upper Tribunal itself. See further *Chief Supplementary Benefit Officer v Leary* [1985] 1 W.L.R. 84 (also reported as an appendix to *R(SB) 6/85*); *Secretary of*

State for Justice v RB [2010] UKUT 454 (AAC); [2012] AACR 31); *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC); [2015] Ch. 183; and most recently *Hussain v Waltham Forest LBC* [2019] UKUT 339 (LC); [2020] 1 W.L.R. 2723. It follows that even if a proposition is part of the *ratio decidendi* of the High Court's decision it is not strictly binding on the Upper Tribunal; *obiter dicta*, by definition, are not binding in any circumstances.

29. That said, as a matter of judicial comity the Upper Tribunal, as a court of record, is likely to follow a decision of another court of record of co-ordinate jurisdiction (such as the High Court) unless there are compelling reasons to the contrary. By the same token, High Court judges "are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so" (*Willers v Joyce (Re Gubay (deceased) No. 2)* [2016] UKSC 44 at [9]).

The decision in *Killock and Veale*

30. Although *Killock and Veale* concerned what were in effect three joined cases, for present purposes it is helpful to focus on just two of them, being *Killock and Veale* itself and *EW v IC*.

31. In *Killock and Veale* itself, the Commissioner had considered a complaint and undertaken some investigation, but then decided to take the complaint itself no further (although a related but separate investigation continued). The Upper Tribunal treated this discontinuance as the outcome of the complaint and beyond further challenge under section 166 (see in particular paragraph 105).

32. In *EW v IC*, by contrast, the Commissioner, relying on a misapplication of his own policy, had declined to engage at all with the data subject's complaint. There had simply been no investigation. The Upper Tribunal ordered the Commissioner to take further appropriate steps to investigate and to respond to the complaint (see paragraph 118).

33. Thus, a key passage in the Upper Tribunal's decision in *Killock and Veale* involves an emphasis on the procedural nature of section 166, which accordingly does not confer a right to challenge the outcome of a complaint to the Commissioner:

> "**Analysis and discussion**
>
> 74. The remedy in s.166 is limited to the mischiefs identified in s.166(1). We agree with Judge Wikeley's conclusion in *Leighton (No 2)* that those are all procedural failings. They are (in broad summary) the failure to respond appropriately to a complaint, the failure to provide timely information in relation to a complaint and the failure to provide a timely complaint outcome. We do not need to go further by characterising s.166 as a "remedy for inaction" which we regard as an unnecessary gloss on the statutory provision. It is plain from the statutory words that, on an application under s.166, the Tribunal will not be concerned and has no power to deal with the merits of the complaint or its outcome. We reach this conclusion on the plain and ordinary meaning of the statutory language but it is supported by the Explanatory Notes to the Act which regard the s.166 remedy as reflecting the provisions of article 78(2) which are procedural. Any attempt by a party to divert a Tribunal from the

> procedural failings listed in s.166 towards a decision on the merits of the complaint must be firmly resisted by Tribunals.
>
> 75. We do not accept that the limits of s.166 mean that the rights of data subjects are not protected to the extent required by the GDPR or by the CFR. Infringement of rights under data protection legislation is remediable in the courts (ss.167-169 DPA). In addition, if a data subject decides to complain to the Commissioner, s.166 provides procedural protections in order to ensure that the complaint receives appropriate, timely and transparent consideration. The Tribunal as a judicial body has expertise in procedural matters. It is therefore apt for a Tribunal to provide a remedy against procedural failings in complaints handling.
>
> 76. The Tribunal does not have the same expertise in determining the appropriate outcome of complaints. The Commissioner is the expert regulator. She is in the best position to consider the merits of a complaint and to reach a conclusion as to its outcome. In so far as the Commissioner's regulatory judgments would not and cannot be matched by expertise in the Tribunal, it is readily comprehensible that Parliament has not provided a remedy in the Tribunal in relation to the merits of complaints.
>
> 77. This does not leave data subjects unprotected. If the Commissioner goes outside her statutory powers or makes any other error of law, the High Court will correct her on ordinary public law principles in judicial review proceedings. The combination of a statutory remedy in the Tribunal in relation to procedures and to the supervision of the High Court in relation to substance provides appropriate and effective protection to individuals. It does not require us to strain the language of s.166 to rectify any lack of protection or to correct any defect in Parliament's enactment of the UK's obligations to protect an individual's data."

34. I interpose here that Mostyn J in *R (on the application of Delo)* (at [130]) "fully" agreed with the opening paragraph 74 in the above passage.

35. The Upper Tribunal then ruled that "the Commissioner's multifactorial decisions as to the outcome of complaints in the context of the specialist regulatory area of data protection" meant that judicial review was an effective remedy in relation to the substance of complaints (at paragraph 82). The Upper Tribunal further held as follows (the passage in paragraph 87 has been highlighted for reasons that will become apparent):

> "83. We agree however with Ms Lester's submission that a s.166 order should not be reduced to a formalistic remedy and that the various elements of s.166(2) have real content in the sense of ensuring the progress of complaints. Parliament has empowered the Tribunal to make an order requiring the Commissioner to take appropriate steps to respond to a complaint (s.166(2)(a)). Any such steps will be specified in the order (s.166(3)(a)). Appropriate steps include "investigating the subject matter of the complaint, to the extent appropriate" (s.165(5)(a)).
>
> 84. There is nothing in the statutory language to suggest that the question of what amounts to an appropriate step is determined by the opinion of Commissioner. As Mr Black submitted, the language of s.165 and s.166 is

objective in that it does not suggest that an investigative step in response to a complaint is appropriate because the Commissioner thinks that it is appropriate: her view will not be decisive. Nor has Parliament stated that the Tribunal should apply the principles of judicial review which would have limited the Tribunal to considering whether the Commissioner's approach to appropriateness was reasonable and correct in law. In determining whether a step is appropriate, the Tribunal will decide the question of appropriateness for itself.

85. However, in considering appropriateness, the Tribunal will be bound to take into consideration and give weight to the views of the Commissioner as an expert regulator. The GRC is a specialist tribunal and may deploy (as in *Platts*) its non-legal members appointed to the Tribunal for their expertise. It is nevertheless our view that, in the sphere of complaints, the Commissioner has the institutional competence and is in the best position to decide what investigations she should undertake into any particular issue, and how she should conduct those investigations. As Mr Milford emphasised, her decisions about these matters will be informed not only by the nature of the complaint itself but also by a range of other factors such as her own regulatory priorities, other investigations in the same subject area and her judgment on how to deploy her limited resources most effectively. Any decision of a Tribunal which fails to recognise the wider regulatory context of a complaint and to demonstrate respect for the special position of the Commissioner may be susceptible to appeal in this Chamber.

86. We do not mean to suggest that the Tribunal must regard all matters before it as matters of regulatory judgment: the Tribunal may be in as good a position as the Commissioner to decide (to take Mr Milford's example) whether a complainant should receive a response to a complaint in Braille. Nor need the Tribunal in all cases tamely accept the Commissioner's judgment which would derogate from the judicial duty to scrutinise a party's case. However, where it is established that the Commissioner has exercised a regulatory judgment, the Tribunal will need good reason to interfere (which may in turn depend on the degree of regulatory judgment involved) and cannot simply substitute its own view.

87. Moreover, s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. The Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court). It will do so in the context of securing the progress of the complaint in question. ***We do not rule out circumstances in which a complainant, having received an outcome to his or her complaint under s.165(b), may ask the Tribunal to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint under s.166(2)(a).*** However, should that happen, the Tribunal will cast a critical eye to assure itself that the complainant is not using the s.166 process to achieve a different complaint outcome.

> 88. The same reasoning applies to orders under s.166(2)(b) requiring the Commissioner to inform the complainant of progress on the complaint or of the outcome of the complaint within a specified period. These are procedural matters (giving information) and should not be used to achieve a substantive regulatory outcome."

36. The italicised passage in paragraph 87 in the extract above was questioned by Mostyn J in *R (on the application of Delo)* (at [130]-[131]), as discussed below.

The decision in *R (on the application of Delo)*

37. In terms of the Commissioner's function of the handling of complaints made by data subjects, Mostyn J observed in *R (on the application of Delo)* as follows (at [57]):

> "The treatment of such complaints by the Commissioner, as before, remains within his exclusive discretion. He decides the scale of an investigation of a complaint to the extent that he thinks appropriate. He decides therefore whether an investigation is to be short, narrow and light or whether it is to be long, wide and heavy."

38. So far as DPA 2018 section 165 is concerned, Mostyn J concluded as follows (at [85]):

> "… the legislative scheme requires the Commissioner to receive and consider a complaint and then provides the Commissioner with a broad discretion as to whether to conduct a further investigation, and, if so, to what extent. [Counsel for the Commissioner] correctly submits, further, that this discretion properly recognises that the Commissioner is an expert Regulator who is best placed to determine on which cases he should focus."

39. This approach, of course, is entirely consistent with that of the Upper Tribunal in *Killock and Veale*.

40. As regards DPA 2018 section 166, Mostyn J held as follows:

> "128. Section 166(2) thus provides the "effective judicial remedy" for dilatoriness referred to in Article 78.2. Sections 166(2) and (3) allow the Tribunal to order the Commissioner to take steps specified in the order to respond to the complaint. In my judgment, this would not extend to telling the Commissioner that he had to reach a conclusive determination on a complaint where the Commissioner had rendered an outcome of no further action without reaching a conclusive determination. This is because s.166 by its terms applies only where the claim is pending and has not reached the outcome stage. It applies only to alleged deficiencies in procedural steps along the way and clearly does not apply to a merits-based outcome decision."

41. Again, this is essentially on all fours with the decision in *Killock and Veale*. Indeed, as already noted above, at [130] Mostyn J indicated his full agreement with paragraph 74 of *Killock and Veale*. However, Mostyn J then identified what "seems to be some back-tracking" in paragraph 87 of *Killock and Veale* (in the italicised passage highlighted in paragraph 35 above). He added:

> "131. For my part, if an outcome has been pronounced, I would rule out any attempt by the data subject to wind back the clock and to try by sleight of hand to achieve a different outcome by asking for an order specifying an appropriate responsive step which in fact has that effect. The Upper Tribunal rightly identified in [77] that if an outcome was pronounced which the complainant considered was unlawful or irrational then they can seek judicial review in the High Court. ..."

42. Ironically, in the course of argument in *R (on the application of Delo)* the Information Commissioner advanced a submission which in certain respects at least has echoes of Mr Lawton's own contentions in the present proceedings, namely (at [132], citing Mr Bedenham, counsel for the Commissioner; and I recognise that for tactical reasons a party may make a submission in Case A which runs wholly counter to a contrary submission made in unrelated Case B):

> "The Claimant's challenge is not that the Commissioner's substantive decision was wrong on its merits but rather that the Commissioner failed to adequately determine the complaint (i.e. failed to take appropriate steps to respond to the complaint). That is a procedural failing of the sort where the appropriate forum for redress is the Tribunal by way of an application pursuant to section 166(2). The Claimant's complaint is that the Commissioner should have approached Wise for further information and that the Commissioner should have reached a concluded view on whether Wise had complied with its data protection obligations. The Claimant could, pursuant to s 166 DPA 2018, have asked the Tribunal to require the Commissioner to take those steps."

43. Put shortly, Mostyn J was having nothing to do with such a proposition:

> "133. In my judgment this is precisely the sort of sleight of hand with which I disagree. The Commissioner's argument seeks to clothe a merits-based outcome decision with garments of procedural failings. The substantive relief sought by the Claimant was disclosure of the documents. The Commissioner's argument is that the Tribunal could have made a mandatory procedural order specifying as a responsive step the disclosure of those very documents.
>
> 134. I disagree with Mr Bedenham. I agree with Mr Coppel KC that s.166 did not provide the Claimant with an alternative remedy."

44. Finally, at least on these case law authorities, I do not consider that the fact there appears to be at least a limited element of disagreement between the Upper Tribunal in *Killock and Veale* and the High Court in *R (on the application of Delo)* is, in and of itself, a good reason for giving permission to appeal in either of the instant cases. Put simply, the decision in *Killock and Veale* at paragraphs 74 and 87 is unhelpful to Mr Lawton's cause and the judgment in *R (on the application of Delo)* at [128]-[133] is even more unhelpful in that respect. Read fairly as a whole, neither decision provides any meaningful support for Mr Lawton's position on section 166. Insofar as there is or may be a difference of view between *Killock and Veale* and *R (on the application of Delo)* it is best left to be resolved in a case where the point is material. I turn now to the FTT decisions under challenge.

The First-tier Tribunal's decision in *Lawton v Information Commissioner (No. 1)*

45. A FTT registrar granted the Commissioner's strike out application. She noted that the FTT "cannot tell the Information Commissioner's Office what they should say in their overall assessment, but only has power to tell the Information Commissioner's Office to 'get on with' the investigation and if necessary how to get on with it" (at [5]). Having reviewed the case papers, the registrar observed (at [8]) that the Applicant was seeking two things: (i) an interpretation of what "journalistic purposes" means in the DPA 2018; and (ii) for the BBC to comply with his subject access request. She concluded:

> "9. This Tribunal cannot give him either of these things. This Tribunal's jurisdiction is very limited – all that can be done is to tell the Information Commissioner's Office to provide an assessment. That has happened here.
>
> 10. There is no order for this Tribunal to make – Mr Lawton has received what he is entitled to: the Information Commissioner's Office assessment. Therefore, and pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 I strike out the application as there is no reasonable prospect of it succeeding."

46. Judge McKenna's reconsideration decision was in the following terms:

> "RULING on Rule 4 (3) Application
>
> 1. The Registrar's Decision of 26 October 2021 stands. The Applicant's application is struck out.
>
> REASONS
>
> 2. The Applicant has by application dated 26 October 2021 asked for a Judge to consider afresh the Registrar's Decision of 26 October 2021, by which she struck out his Notice of Appeal as having no reasonable prospects of success. This I now do.
>
> 3. The Applicant's Notice of Appeal dated 23 August 2021 contained an application for an Order under s. 166 DPA 2018. He requested the following remedy:
>
> *I would like the tribunal to issue an order under section 166(2)(a) of the Data Protection Act 2018 requiring the Commissioner to take appropriate steps to respond to my complaint, and specifically to require the BBC to disclose all of the personal data it holds about me, to me, unless the BBC can justify applying the journalistic purposes exemption - i.e. that it is genuinely holding all of the personal data I have requested with a view to publishing it in the public interest (which should be evident from some recent internal BBC email or document saying so). I would also like the tribunal to interpret the journalistic purposes exemption, considering whether the interpretation I set out in my email to the BBC of 19 December 2020 at 18:24 is correct (this is included in the file "Combined Correspondence 23-08-2021"). This I believe would assist the ICO in determining whether the BBC had applied it correctly.*
>
> 4. In responding to the Notice of Appeal, the Information Commissioner applied for a strike out. The Information Commissioner set out the steps it

had taken in a fairly lengthy engagement with the Applicant and submitted that the Applicant's case, properly understood, related to his dissatisfaction with the outcome of that process. It was submitted that, as confirmed by the Upper Tribunal, the Tribunal's jurisdiction under s. 166 DPA 2018 is limited to procedural matters and the Tribunal cannot substitute its own complaint outcome for that of the Information Commissioner.

5. The Applicant made submissions in response to the proposed strike out, in which he submitted that the Information Commissioner had not properly discharged its duty of investigation in this particular case.

6. On 26 October 2021, Registrar Worth struck out the Notice of Appeal on the basis that it had no reasonable prospects of success. She noted that the remedy requested by the Applicant went beyond the procedural matters in respect of which this Tribunal has jurisdiction. She noted that the matters in respect of which the Applicant seeks a remedy are justiciable by the High Court or County Court.

7. Having considered the matter afresh, I agree with the Registrar's Decision of 26 October 2021. The Notice of Appeal is therefore struck out and will accordingly proceed no further."

47. I remind myself that neither Registrar Worth nor Judge McKenna had had the advantage of having seen the decision in *Killock and Veale* before drafting their reasons.

The First-tier Tribunal's decision in *Lawton v Information Commissioner (No.2)*

48. As in the previous case, a FTT registrar granted the Commissioner's application to have the section 166 application struck out on the basis that it had no reasonable prospects of success. Judge Griffin then carried out a rule 4(3) reconsideration. Having referred to paragraph 74 of *Killock and Veale*, she set out the relevant principles as follows:

"18. This Tribunal may consider whether a step is appropriate; the Information Commissioner's view on this will not be determinative but should be considered by this Tribunal and accorded due weight given the Commissioner is an expert regulator in the best position to decide what investigations she should undertake into any particular issue and how she should do so. This Tribunal will not interfere with an exercise of regulatory judgement without good reason. See *Killock* paras 84 to 86.

19. The appropriateness of any investigative steps taken is an objective matter which is within the jurisdiction of this Tribunal. However, as stated in paragraph 87 of *Killock*, s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint.

20. This Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given. It will do so in the context of securing the progress of the complaint in question. It may be possible to wind back the clock and to make an order for an appropriate step to be taken in response to the complaint under s.166(2)(a). However, if invited to do so this Tribunal will

> cast a critical eye to assure itself that the complainant is not using the s.166 process to achieve a different complaint outcome.
>
> 21. Moreover, the Upper Tribunal said in *Killock* that if the Commissioner goes outside her statutory powers or makes any other error of law, it is for the High Court to correct her on ordinary public law principles in judicial review proceedings. The assessment of the appropriateness of a response already given is for the High Court and not this Tribunal; that remedy will include consideration of whether the reasons/evidence were sufficient to sustain the outcome reached. The combination of a statutory remedy in the Tribunal in relation to procedures and to the supervision of the High Court in relation to substance provides appropriate and effective protection to individuals."

49. In doing so, the FTT accurately directed itself as to the relevant law as confirmed in *Killock and Veale.*

50. Furthermore, Judge Griffin, having summarised the Applicant's submissions and reviewed the relevant law, then analysed the issues in this case in this way:

> "24. The appropriateness of the investigative steps taken by the Commissioner is an objective matter which is within the jurisdiction of the Tribunal and is not something solely within the remit of the Commissioner to determine, see paragraph 116 of *Killock & Veale*. However, in the sphere of complaints, the Commissioner has the institutional competence and is in the best position to decide what investigations he should undertake into any particular issue, and how he should conduct those investigations. Decisions about these matters will be informed not only by the nature of the complaint itself but also by a range of other factors such as the Commissioner's regulatory priorities, other investigations in the same subject area and his judgment on how to deploy his limited resources most effectively. A Tribunal must therefore consider whether there is a good reason to interfere with the exercise of a regulatory judgement, see paragraphs 85 and 86 of *Killock & Veale*.
>
> 25. Mr Lawton has his own views about what would have been the appropriate steps to consider his complaint. His case is that there was more that could and should have been done to underpin the outcome of the investigation.
>
> 26. The extent of an investigation is part of the Commissioner's regulatory judgement. The Applicant submits that the Tribunal should substitute its own view of what were the appropriate steps to have been taken and suggests those steps.
>
> 27. As to any good reason to interfere in the exercise of the Regulator's judgement, the Applicant states in his notice of appeal that the Tribunal should "consider the ICO's motives" and then theorises about those motives and the reasons for them based on internet reviews from which he extrapolates his theory that the Commissioner takes "the easiest approach". However, this theory is speculative, undefined, and tenuous. Moreover, there are no grounds to substantiate any allegation that the conduct of the investigation into his complaint by the Commissioner was motivated by anything other than proper regulatory considerations.

> 28. Furthermore, the Applicant was advised of his right to request a case review from the Commissioner should he be dissatisfied with the way in which the complaint was handled, however at the time of writing his response, the Commissioner informed the Tribunal that the Applicant had not requested a case review.
>
> 29. The Applicant submits that the Registrar wrongly interpreted the decision of the Upper Tribunal in *Killock and Veale* and how it applies to this case. In so far as this decision departs from that of the Registrar, I agree. In particular I agree that the tribunal has the power to direct an appropriate step to be taken notwithstanding that an "outcome" has been provided to the complaint but only if there is good reason to interfere in the Regulator's exercise of his regulatory function.
>
> 30. The Applicant is correct that an outcome is not to be confused/conflated with investigation and that taking steps to respond to the complaint is distinct from investigating to the extent appropriate. However that is not the live issue in this case.
>
> 31. It is not necessary for me to consider the legislative intention as regards the timing of applications given my conclusions and the circumstances of this case. Neither do the content of the appeal form T98 nor the guidance thereto assist me in the analysis of the relevant issues. The T98 form is a general form designed to elicit the nature and grounds for an appeal to this tribunal, it does not have any persuasive force as to the interpretation of the law.
>
> 32. Although a complainant may not know what steps were taken by the Commissioner until after the investigation has been completed this is not a reason, of itself, to "wind back the clock" and invest the tribunal with the right to make an order directing that an "appropriate investigation" is carried out. There must be a good reason to intervene in the exercise of regulatory judgement and in my view it would be wrong to do so in order that a complainant would have the knowledge that the outcome was the product of an investigation conducted to their satisfaction as this would divest the Commissioner of his regulatory responsibilities and discretion. As the Upper Tribunal has recognised, a complainant is entitled to an outcome to their complaint but not to an outcome that is to their satisfaction."

51. That analysis led Judge Griffin to conclude as follows:

> "33. I conclude that there is no good reason to interfere with the Commissioner's exercise of his regulatory function.
>
> 34. As Mr Lawton has received an outcome to his complaint and there is no basis upon which this Tribunal can substitute further or alternative investigatory steps. Thus, there is no order that is open to this Tribunal to make.
>
> 35. Therefore, this application has no reasonable prospects of success and I strike it out under rule 8(3)(c)."

52. Judge Griffin added the following observations and/or gloss in her subsequent ruling refusing permission to appeal:

> "6. The Tribunal need not address every point made to it but only those that are relevant to the determination of the question before it. It was not necessary for the tribunal to address each of the suggested steps proposed by the Applicant. As set out in the decision having cast a critical eye over the suggestions, I concluded that the complainant is using the s.166 process to achieve a different complaint outcome. Furthermore, the assessment of the appropriateness of a response already given is for the High Court and not this Tribunal; that remedy will include consideration of whether the reasons/evidence were sufficient to sustain the outcome reached."

53. I will deal first with the grounds of appeal in *Lawton v Information Commissioner (No.2)* as they are the more extensive (and there is a degree of overlap with the grounds of appeal in relation to the first application).

The Applicant's grounds of appeal in *Lawton v IC (No.2)* in summary

54. Mr Lawton helpfully condensed his original and very extensively argued grounds of appeal (over some 22 pages) into the 10-page document dated 21 July 2022. His grounds of appeal in *Lawton v Information Commissioner (No.2)* are 8-fold:

> A. The FTT erred at law because it did not correctly apply the law, or wrongly interpreted the law. It erroneously concluded that there was no basis on which it could order further or alternative investigatory steps, and no order it could make.
>
> B. The FTT's reasoning was not adequate and/or it incorrectly applied or wrongly interpreted the law.
>
> C. The FTT's reasoning was not adequate and/or it had no evidence to support its decision.
>
> D. The FTT erred at law because its decision did not consider the grounds of the appeal submitted to it (a procedural error) and as such its decision is inconsistent with those grounds. Further or alternatively, it did not provide adequate reasons for its decision.
>
> E. The tribunal erred at law because it failed to correctly apply the statutory test for strike out.
>
> F. The process adopted by the FTT was unfair (an error at law and/or a procedural defect).
>
> G. The FTT erred at law because it considered only peripheral matters submitted to it in the appeal and not the main grounds of appeal asking for an order to require the Commissioner to investigate to the extent appropriate.
>
> H. The Tribunal failed to consider an aspect of the law relevant to its decision.

55. The Commissioner's written response to Mr Lawton's application for permission to appeal seeks to address each of these grounds in turn. Those grounds are considered below and in alphabetical order. However, the Commissioner's response also makes two over-arching submissions which should be noted. The first is that the Respondent argues that, contrary to his protestations, Mr Lawton

is in fact challenging the outcome of his complaint to the regulator. The second is the Commissioner's submission that there is no basis for impeaching the exercise of his regulatory discretion in this case.

Analysis

56. There is a fundamental difficulty with Mr Lawton's submissions on his applications for permission to appeal in these cases. This concerns the relevance of the decisions in both *Killock and Veale* and *R (on the application of Delo)*. I do not understand Mr Lawton to be arguing that the FTT's decisions are inconsistent in any significant respect with the principles set out in those two judgments. Rather, Mr Lawton's fundamental position on the significance of those authorities appears to be either that those two judgments did not directly address the type of challenge he is making, and so were properly not binding on the FTT, and/or those two cases were in any event wrongly decided in important respects. I will take those propositions in reverse order.

57. First, and as noted above, there is a considerable and extensive degree of common ground between *Killock and Veale* and *R (on the application of Delo)*. Furthermore, insofar as there is a difference of view between the two authorities, it does not materially assist Mr Lawton. Even if neither decision is strictly binding upon me as a matter of judicial precedent – and at least as regards *Killock and Veale* that proposition is by no means obviously correct – there is, as a matter of judicial comity, no compelling reason for me to depart from those decisions, not least for the following reasons.

58. Second, and in any event, I am satisfied that both *Killock and Veale* and *R (on the application of Delo)* were (a) (with respect) correctly decided; and (b) govern the scenario in the Applicant's case. Both decisions demonstrate that the nature of section 166 is that of a limited procedural provision. Mr Lawton rightly accepts that section 166 does not provide a route of appeal to the FTT in a case where a party is dissatisfied with the outcome of their complaint to the Commissioner. He argues, however, that section 166 enables him to challenge whether the Commissioner has investigated the subject matter of the complaint to the extent appropriate and thus as a potential failure to take appropriate steps to respond to the complaint (see DPA 2018 s.166(1)(a), (2)(a) and (4)). But this is just another example of the "sleight of hand" identified by Mostyn J in *R (on the application of Delo)*; it is an attempt to clothe a merits-based outcome decision with the garments of procedural failings. This objection is not, as Mr Lawton would have it, an erroneous conflation of the 'investigation' and the 'outcome'. If the FTT were to order the Commissioner under section 166 to take further alternative steps, in the absence of circumstances such as those in *EW v IC*, then the outcome of the complaint would necessarily be subject to an impermissible collateral challenge – a challenge that the case law confirms beyond any doubt could only be launched by way of a judicial review.

59. In sum, Article 77.2 provides for an effective judicial remedy where "the Commissioner does not handle a complaint". Mostyn J ruled that 'handling' a complaint includes not acting on a complaint as well as rejecting it (at [68]) – but in this instance the Commissioner plainly *handled* Mr Lawton's complaint, albeit he handled it in a manner and to an end which left Mr Lawton dissatisfied. But the purpose of section 166 is also evident from its heading – it provides for "Orders *to progress* complaints", not for "Orders *to re-open or re-investigate*

complaints". The short answer to Mr Lawton's case is that his complaint had been progressed to an outcome, and so there was no longer any scope for a section 166 order to bite. As Mostyn J held, section 166 "by its terms applies only where the claim is pending and has not reached the outcome stage" (at [128]; presumably in that passage the word 'claim' must be a typo for 'complaint'). In the same vein, the Upper Tribunal ruled that "s.166 is a forward-looking provision, concerned with remedying ongoing procedural defects that stand in the way of the timely resolution of a complaint. The Tribunal is tasked with specifying appropriate "steps to respond" and not with assessing the appropriateness of a response that has already been given (which would raise substantial regulatory questions susceptible only to the supervision of the High Court). It will do so in the context of securing the progress of the complaint in question" (*Killock and Veale*, paragraph 87). As such, and as the Respondent submits, the fallacy in the Applicant's central argument is laid bare. If Mr Lawton is right, then any data subject who is dissatisfied with the outcome of their complaint to the Commissioner could simply allege that it was reached after an inadequate investigation, and thereby launch a collateral attack on the outcome itself with the aim of the complaint decision being re-made with a different outcome. Such a scenario would be inconsistent with the purport of Article 78.2, the heading and text of section 166 and the thrust of the decision and reasoning in both *Killock and Veale* and *R (on the application of Delo)*. It would also make a nonsense of the jurisdictional demarcation line between the FTT under section 166 and the High Court on an application for judicial review.

60. Notwithstanding all of Mr Lawton's detailed oral and written submissions, the points made in the three previous paragraphs are in my judgement reason enough to refuse permission to appeal. Accordingly, it is not necessary to address each and every other submission that the Applicant makes in support of his applications.

61. There is, however, one such argument that needs to be confronted head-on. In short, Mr Lawton submits that both *Killock and Veale* and *R (on the application of Delo)* fell into error in holding that tribunals and courts should defer to the Commissioner's (supposed, as he would doubtless put it) institutional competence as an expert regulator. I simply make two short points. First, I do not regard his arguments as undermining in any way the reasons given by both the Upper Tribunal and the High Court for their conclusions on this issue. Second, there is nothing out of the ordinary (or indeed contrary to the principles of natural justice or the overriding objective) in courts and tribunals giving weight to the views of decision-makers in particular fields of expertise. Two examples will suffice. In the field of national security, the courts and tribunals will pay especially careful heed to the views of Government, informed as they are by the expertise of the security services. In the field of social security benefits, and absent a clear human rights breach, courts and tribunals will defer to the policy choices made by Parliament. In a sense, such approaches do no more than recognise the basic constitutional principle of the separation of powers between the judiciary, the executive and the legislature.

62. I now turn to consider the Applicant's specific grounds of appeal in *Lawton v Information Commissioner (No.2)*. I start with a general observation.

The assessment of adequate reasoning in a tribunal's decision

63. Grounds B, C and D are to a degree repetitive in that they all allege, in one context or another, that the FTT did not provide adequate reasons for its decision. A good starting point for understanding the duty of a first instance tribunal to give reasons is the Court of Appeal's decision in *H v East Sussex CC* [2009] EWCA Civ 249 at [16], where Waller LJ explained that the decision of a tribunal " … is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts." This case happened to have been decided in the context of a special educational needs tribunal but the principle stated is accepted as being of much wider application and so across tribunals more generally.

64. Furthermore, I must bear in mind the observations of both the Court of Appeal and the Supreme Court on the appropriate level of intensity of review when considering a reasons challenge to the decision of a first instance tribunal. See, for example, Lord Hope DPSC's judgment in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, where he held that it is:

> "… well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it (at para [25])."

65. Bearing that authoritative guidance firmly in mind, I now turn to consider the specifics of each of the Applicant's proposed grounds of appeal.

Ground A

66. The Applicant's first ground of appeal has its focus on paragraph [34] of the FTT's decision. There, the FTT ruled that there was no basis on which it could make an order for further or alternative investigatory steps to be taken. I disregard the undoubted fact that the syntax in the FTT's decision has unfortunately become somewhat mangled in paragraph [34], as that is not indicative of any arguable error of law but is rather just a presentational mishap. In any event, paragraph [34] cannot be cherry-picked and read in isolation, but rather must be read in the context of the decision as a whole. As such, the FTT was not saying that it lacked the power to order further or alternative investigatory steps in an appropriate case. On the contrary, it was saying that in all the circumstances of this particular case – given the outcome reached and the Commissioner's wide discretion in regulatory matters – this was not a case for such an order. In this first ground of appeal the Applicant is at heart simply highlighting a disagreement over the outcome of the FTT proceedings rather than identifying an arguable error of law on the part of the FTT such as to warrant a grant of permission to appeal.

Ground B

67. In substance this ground of appeal is a challenge to the reasoning in the FTT's ruling dated 18 March 2022, in which Judge Griffin refused permission to appeal. This ground of appeal goes nowhere. This is for the simple reason that

the right of appeal to the Upper Tribunal lies against the substantive FTT decision and not against any subsequent ruling by that tribunal refusing permission to appeal (a ruling which, of course, is sometimes given by a different judge, if not in this case). Thus, reasons given by the FTT for refusing permission to appeal are not themselves the subject of review on a further appeal: see e.g. Social Security Commissioner's decision *CIS/4772/2000* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision in issue which is the subject of an actual or potential appeal (*Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67]: a "judgment refusing permission to appeal is not to be used as a source of additional reasoning on the issues in dispute before it").

Ground C

68. As with Ground B, this ground of appeal is for the most part a challenge to the FTT's reasoning in its ruling dated 18 March 2022, in which Judge Griffin refused permission to appeal. To that extent the challenge is misconceived for the same reason as explained in the previous paragraph. Putting that point to one side, the more substantive issue is that the Applicant objects that he is not seeking a different outcome to the complaint in his case. This has been addressed above and as such the ground is not arguable.

Ground D

69. The Applicant's fourth ground of appeal is that the FTT failed to consider his grounds of appeal in the way that those were set out on his FTT Form T98 and associated correspondence. In particular, he argues that the FTT failed to engage with the specific aspects in respect of which he said there were "numerous material flaws in the Commissioner's investigation of my complaint". There are at least two reasons why this is not persuasive. The first is that if the FTT were to conduct a detailed review of specific aspects of the Respondent's investigation that would be inconsistent with the broad discretion vested in the Commissioner and recognised by both *Killock and Veale* and now *R (on the application of Delo)*. The second it is trite law that a tribunal, while it may have to engage with the substance of an applicant's or appellant's grounds of appeal, need not address every single argument advanced in support of that person's case.

Ground E

70. The Applicant takes issue with paragraph [22] of Judge Griffin's ruling dated 15 February 2022, and in particular he objects to the first sentence of that paragraph, which asserts that the FTT "does not have an oversight function in relation to" the ICO. Wrong, says Mr Lawton. This is, frankly, a nit-picking ground. It is perfectly obvious from the paragraph as a whole that the Judge meant that the FTT "does not have a *general* oversight function in relation to" the ICO. Given the context of her discussion, it is plain that the Judge was drawing a distinction between a general oversight role, which the FTT does not have in relation to the ICO, and a specific jurisdiction to hear appeals and applications where the relevant statutory criteria are satisfied (e.g. where there has been a decision notice in relation to a FOIA request). The FTT also correctly directed itself as to the principles governing the proper application of the test for striking out proceedings (see paragraph [23]). In all other respects I

agree with the Respondent that this ground of appeal is in substance repetitive of the Applicant's other and primary grounds of appeal.

Ground F

71. The Applicant argues that the FTT gave undue deference to the Information Commissioner's position in dealing with complaints and this in turn amounted to procedural unfairness in the way his application to the tribunal was handled. In part this is simply another way of putting the primary grounds of appeal. However, *Killock and Veale* establishes and confirms that appropriate deference to the Commissioner's view as an expert regulator is properly part and parcel of the FTT's role in addressing a section 166 application. That approach has been forcefully underlined by the dicta of Mostyn J in *R (on the application of Delo)*. I recognise that neither authority is strictly binding on me; however, the direction of travel of the case law is self-evident. I see no realistic prospect that the principle of deference to the institutional competence of the Commissioner in handling complaints as an expert regulator is likely to be overturned.

Ground G

72. The Applicant submits that the FTT's decision involves an erroneous focus on peripheral aspects of the appeal. He says that paragraph [27] involves the suggestion that internet reviews were the sole basis he had advanced for interfering in the exercise of the Respondent's judgement. This is not a fair characterisation of the FTT's decision read as a whole. Paragraph [27] of the decision is simply one part of the Judge's analysis of the Applicant's case. Indeed, the issue of internet reviews and the Commissioner's motives is not even listed in the summary of the Applicant's principal submissions at paragraph [3a]-[3i], which substantially undermines the suggestion that this issue was accorded undue weight.

Ground H

73. The Applicant's final ground of appeal is concerned with the FTT's mention at paragraph [28] of the fact that he had not sought a case review from the Commissioner before lodging a section 166 application with the FTT. This is stony ground on which to raise an arguable error of law. On any fair reading this was a passing reference to the factual matrix of the case. It made sense in the context of the previous paragraph as by inference it rather undermined the suggestion that the Commissioner was inclined to take "the easiest approach" to regulating complaints handling. This is a long way from demonstrating an arguable error of law.

The Applicant's grounds of appeal in *Lawton v IC (No.1)* in summary

74. The Applicant's grounds of appeal in *Lawton v Information Commissioner (No.1)* are 5-fold:

A. The tribunal erred at law because its decision to strike out my case did not consider the grounds of the appeal submitted to it and as such its decision is inconsistent with these grounds.

B. The tribunal erred at law because it struck out my case on the basis that it does not have jurisdiction to require the ICO to investigate my complaint to the extent appropriate, when in fact it does have such powers.

C. The tribunal erred at law because it applied the wrong test, and failed to apply the correct statutory test, in considering the appeal, whether the appeal had reasonable prospects of success and whether it had jurisdiction to take the action requested.

D. The tribunal did not provide adequate reasons for its decisions.

E. The process adopted was unfair.

75. Grounds A, B and C duplicate grounds in relation to *Lawton v Information Commissioner (No.2)* and are unpersuasive for the same reasons. Ground D also has echoes of several grounds in the other application. The reasoning in Judge McKenna's pre-*Killock and Veale* reconsideration ruling is certainly succinct but it is by no stretch of the imagination inadequate. It conveys the essential reasons for granting the strike out application, namely that (a) section 166 is a procedural provision; and (b) the remedy sought by the Applicant went beyond the FTT's jurisdiction. Those reasons disclose no arguable error of law.

76. Ground E is not replicated in the other application. The Applicant's submission here is that the language used in an e-mail he received from a FTT administrative officer indicated that the FTT had already made up its mind to strike out his section 166 application. The e-mail in question read "The Tribunal has been asked to strike your case out, that is bring it to an end, on the ground that it has no reasonable prospect of success. Before doing this the Tribunal wishes to give you the opportunity to explain why you think your case should go ahead and how it might succeed. If you wish to make any comment please do so by 20 October 2021." This proposed ground of appeal is wholly unpersuasive. It seeks to read far too much into the text of an e-mail drafted by a (with respect) relatively low grade HMCTS civil servant, doubtless working under considerable pressures of both time and workloads. True, it might have been better if the e-mail had been drafted so as to read "Before considering the Commissioner's application…" rather than "Before doing this…" but this is a long way removed from being an arguable error of law on the part of the FTT itself.

Conclusion

77. In conclusion, and despite the assiduous research by, and sterling efforts of, Mr Lawton, the proposed appeals have no realistic prospects of success on a point of law. I therefore must refuse both applications for permission to appeal.

Nicholas Wikeley
Judge of the Upper Tribunal

Signed on the original on 11 January 2023