THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/2936/2012

[2014] UKUT 0339 (AAC)

PARTIES

Surrey Heath Borough Council v the Information Commissioner and John Morley

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

This front sheet is not part of the decision and is issued only to the First-tier Tribunal and the parties.

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on 31 May 2012 under reference EA/2011/0173) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: the decision notice of the Information Commissioner of 19 July 2011 under reference FS50371039 was in accordance with law.

REASONS FOR DECISION

A. The issues

1. This case raises issues of the personal data of children or young persons, in particular with reference to information appearing on social media sites. My decision deals with the issues in so far as necessary to decided this case, but it is by no means the last word on the subject. The authorities show that the position is not quite as clear cut as the argument for the Information Commissioner at the oral hearing appeared to suggest.

B. Abbreviations

DPA: Data Protection Act 1998
FOIA: Freedom of Information Act 2000
The local authority: Surrey Heath Borough Council
The Youth Council: Surrey Heath Youth Council

C. The Youth Council

2. The local authority established the Surrey Heath Youth Council. It was open to young people between the ages of 13 and 19. Its constitution provided that its meetings were to be open to the press and public by invitation only and that it minutes were to be maintained by the Youth Council Coordinator appointed by Surrey Youth Development Service. Its objectives were, in summary, to:

- express views on behalf of young people;
- campaign on local issues;
- develop an understanding of local issues;
- promote and encourage activities and events;
- create opportunities;
- celebrate the achievements of young people;
- act as a sounding board for the local authority;

- promote the Council to inform and advise the community on the views of young people;
- attend meetings, seminars and workshops in the community; and
- participate in Government initiatives.

3. The Youth Council had a Facebook page. It was a closed group, meaning that its contents could only be seen by members who were allowed access, apart from a front page that anyone registered on Facebook could see. That front page contained a photograph of members and some names. It was not possible to tell whether those named comprised the whole of the Youth Council or whether those named were members at the time of the planning application.

D. An outline of the proceedings

4. In 2010, the local authority applied for planning permission in respect of the Heatherside Recreation Area. A member of the Youth Council attended at the planning meeting and spoke in support of the application. Mr Morley, a local resident, opposed the application. In November 2010, he wrote to the local authority, saying 'please supply a list of the members of the Youth Council and their place of residence within the Borough.' In December 2010, the authority declined to name the members as it was the personal data of minors, but provided a chart showing their geographical locations and distributions. On complaint by Mr Morley, the Information Commissioner decided that the authority was right to withhold the names and addresses. On appeal by Mr Morley, the First-tier Tribunal decided that certain information should be disclosed:

> We find, in short, that condition 6 [of Schedule 2 to FOIA] is met. It follows that we find that the names of the Youth Councillors whose names appear on Facebook and whose names also appear in the Minutes in the possession of the Council, should be disclosed.

The First-tier Tribunal gave permission to appeal to the Upper Tribunal, saying that 'the issues raise an important point of law of general application relating to the effect of internet publication of personal details on an individual's data protection rights, as well as in relation to the data protection rights of minors.'

5. Proceedings on the appeal were stayed pending the decision of the Court of Appeal in *Edem v the Information Commissioner and the Financial Services Authority* [2014] EWCA Civ 92. In light of that decision, the information sought was clearly personal data.

6. When the Court had given its decision, I directed an oral hearing. It took place before me on 3 July 2014. Mr Joseph Barrett of counsel appeared for the local authority. Ms Heather Emmerson appeared for the Information Commissioner. Mr Morley attended and spoke on his own behalf. I am grateful to all three for their arguments.

E. The legislation

FOIA

7. The local authority relied on the exemption in section 40(2) FOIA:

> **40 Personal information.**
>
> (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
>
> (2) Any information to which a request for information relates is also exempt information if—
>
> (a) it constitutes personal data which do not fall within subsection (1), and
>
> (b) either the first or the second condition below is satisfied.
>
> (3) The first condition is—
>
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
>
> (i) any of the data protection principles, or
>
> (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
>
> (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
>
> (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

The effect of section 40(2) is to give DPA protection to the person who is the subject of the data.

DPA

8. DPA implemented Directive 95/46/EC.

9. *Data* and *personal data* are defined by section 1:

> **1 Basic interpretative provisions.**
>
> (1) In this Act, unless the context otherwise requires—
>
> 'data' means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, ...

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);

...

'personal data' means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual; ...

10. Schedule 1 to DPA sets out the data protection principles. Paragraph 1 sets out the first principle, which is the only principle relevant to this case:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, ...

Schedule 2 sets out the conditions:

Conditions relevant for purposes of the first principle: processing of any personal data

1 The data subject has given his consent to the processing.

2 The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

(a) for the administration of justice,

(aa) for the exercise of any functions of either House of Parliament,

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6-

(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

11. Only conditions 1 and 6 are relevant as this case has been presented.

F. The First-tier Tribunal's reasoning

12. The decision was made by majority. They first considered whether it would be fair to order disclosure, drawing a distinction between those who appeared on the Facebook and those who did not. The former had chosen to make their identities available from 'a widely used and easily accessible social networking site, without placing any restrictions on access.' As to the practical problems that would arise, these might limit the extent to which the local authority could provide information, but that did not go to the fairness of doing so. The majority then considered condition 6 of Schedule 2. They found that Mr Morley was one of the people affected by the planning consent and that he had a legitimate interest in knowing the history of the application and those who may have influenced it. They said:

> ... an open and accountable democratic process involves transparency, not just about who has actually made a decision, but also who has been in a position to influence a decision. We accept that the interests of transparency would be furthered by knowing which individuals comprise the body that did play a role in the application.

They then identified the extent to which disclosure was required, which I have already quoted in paragraph 4.

13. The dissenting member disagreed with the majority on fairness, saying that as the case involved children as defined by section 65 of the Children Act 2004 (anyone under the age of 18), he preferred to err on the side of caution in the

absence of any evidence of who had actually set up the Facebook page and the understanding and expectations of those identified. He also disagreed on condition 6, saying that it should be sufficient to disclose the details of the arguments put to the decision-maker unless there were strong and compelling reasons to disclose their identity, such as impropriety. The members of the Youth Council were not public officials. Although there was no evidence of harm, the potential existed for confrontation. In any event, Mr Morley already had the names that appear on Facebook.

14. That is a summary of both the majority and the minority. It is, though, sufficient for me to decide the issues that arise.

G. My decision

15. All the parties made a number of points of detail both about fairness and about condition 6. I do not need to deal with all of them. Nor, for the purposes of my decision, do I need to distinguish between fairness and condition 6. The latter is but a specific instance of fairness.

16. It would be possible to identify a number of different flaws in the tribunal's reasoning. Most are matters of detail. I prefer to concentrate on what I regard as the fundamental flaw in the majority's reasoning, which is that it dealt with the DPA issues at too high a level of generality without sufficient specific regard to the facts and circumstances of the case. By doing so, they came to a conclusion that was impermissible. The dissenting member got the level right; his view was the proper one to reach. I have re-made the decision accordingly.

17. There was no interest in knowing the information that Mr Morley sought. There is, of course, a role for transparency and openness in decision-making. The public are entitled to know who is making decisions and who and what influences those decisions. But the extent of their interest depends on the circumstances, something which the majority appears to have overlooked. There was an interest in knowing what views had been expressed; they had been made public at the planning meeting. Beyond that, I can see no interest in knowing more about the members of the Youth Council. Although it is not a representative body, its objects show that it was not just a members' club. The members were expected to inform itself about local issues affecting their age group and to express views on their behalf. In that part of its role, the Youth Council was a channel for views of a particular age group. The person who spoke at the planning meeting, whose details have been disclosed, was speaking on behalf of the Youth Council that in turn represented the collective voice of the young people of the Borough in so far as they could be ascertained. There was no way of knowing the extent to which the view expressed represented the views of any particular person, whether a member of the Youth Council or not. Nor was there anything in the views expressed to suggest any impropriety or partiality. As Mr Barrett put it at the hearing: 'Young people want a skate boarding park' is hardly surprising news.

18. I need to deal with one point made by Mr Morley at the hearing. He argued that by putting themselves onto Facebook the members named had consented for

the purposes of condition 1. I reject that argument. For a start, satisfying condition 1 is not sufficient to allow disclosure. It is merely a specific factor that has to be considered in addition to the general requirement of fairness. aside from that, there were a number of difficulties in the way of showing consent. They were discussed at the hearing. I will take just two. There is no evidence that the persons named were members in late 2010. Nor is there any evidence that those named were responsible for putting their names on the front page.

H. Children and social media

19. Ms Emmerson argued that the First-tier Tribunal's decision was defective for failing to take account on the need to protect the interests of members of the Youth Council as children. She argued that the interests of the child was not just a factor to be put into the balance, but a paramount consideration in cases involving privacy issues, which include the DPA. She relied on the United Nations Convention on the Rights of the Child 1989, which defines a child as 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.' Article 3(1) provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Ms Emmerson also cited authorities. I can conveniently cover them by citing from the judgment of Dingemans J in *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB). The case concerned a claim for misuse of personal information by the publication of photographs of the children of a well-known musician. At the time of publication, the children were aged 10 months and 16 years. The judge said:

> 78. Courts when considering the rights of children in this area should, pursuant to the judgment in *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827 at paragraph 19, have regard to Lord Kerr's judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166; at paragraph 46. Lord Kerr stated '... *in reaching a decisions that will affect a child, a primacy of importance must be accorded to his or her interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them*'.
>
> 79. As *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at paragraph 55 makes clear, the effect of the child's age and circumstances will have different effects in different cases.

20. I have not relied on these authorities in reaching my decision, because the position is more complex than Ms Emmerson's arguments suggested. I add the following qualifications, which I hope may be useful to the Information Commissioner and in future cases.

21. First, it is not the child's age that matters so much as their maturity. Nothing changes in a brain or a personality when it attains 18 years of age. It is only necessary to recall the confidence and self-possession of Malala Yousafzai who was 15 when she was shot in the head by the Taliban for speaking out for the right to education and who gave a live address that was broadcast around the world on her 16th birthday. To take an example from closer to home, the age limit for voting in the Scottish referendum in September 2014 is 16. Tugendhat J made the same point in *Spelman* when he distinguished another case by saying:

> 55. ... The child in that case was an infant in a push chair, not a 17 year old with a personality and public profile of his own.

22. Second and linked to maturity, it is necessary to take account of the child's autonomy. Article 12 of the UN Convention makes specific provision for the child to be involved in decision-making:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

I discussed the authorities of the family courts on the role of children as witnesses in *JP v Secretary of State for Work and Pensions* [2014] UKUT 0275 (AAC). Baroness Hale discussed the involvement of the children in paragraph [34]-37] of *ZH*, concluding with the comment: 'Children can sometimes surprise one.' Lord Kerr said he agreed with her judgment.

23. Third, although Ward LJ did quote Lord Kerr's comments in *K*, he went on:

> 19. ... However this learning must, with respect, be read and understood in the context in which it is sought to be applied. It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the article 10 rights of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the

public interest will be highly material, and the interests of affected children cannot be treated as a trump card.

24. Fourth and as I said at the hearing, there was an irony, if not a contradiction, in discussing the members of the Youth Council as children unable to make decisions for themselves in the context of a case in which they were being encouraged to speak for themselves and their peers in public decision-making.

Signed on original
on 21 July 2014

Edward Jacobs
Upper Tribunal Judge