IN THE UPPER TRIBUNAL **Upper Tribunal case No.** GIA/246/2015
ADMINISTRATIVE APPEALS CHAMBER

Before: Mr. E Mitchell, Judge of the Upper Tribunal

Decision: The proceedings on the Appellant's application for permission to appeal against the decision of the First-tier Tribunal (11th December 2014, file reference EA 2014/0149) are **STRUCK OUT** in their entirety under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

1. Mr Dransfield has applied to the Upper Tribunal for permission to appeal against the First-tier Tribunal's decision.

Background: Mr Dransfield's requests to the Information Commissioners' Office (ICO)

2. This section contains a summary of the disputed requests for information.

30th December 2013

3. By email of this date, Mr Dransfield asked the ICO why new guidelines concerning vexatious requests were not signed and dated.

3rd January 2014

4. On this date Mr Dransfield made three emailed requests:

(a) one email requested the names of ICO staff who had attended "Common Purpose" training in the previous 10 years, and the total costs of such training;

(b) one email requested invoices submitted to the ICO by two named barristers and tender documents concerning services provided to the ICO by a named barristers' chambers. This email also made a complaint that the ICO used unqualified barristers and objected to one of those barristers referring to himself as 'Tom' rather than 'Thomas' which was said to be disrespectful;

(c) one email requested all invoices submitted to the ICO between October 2011 and December 2013 in respect of services provided by barristers at a named chambers.

4th January 2014

5. On this date Mr Dransfield made three emailed requests:

(a) the first email requested the full names and job titles of all ICO staff, the "legal credentials" of all ICO solicitors, the "contract" between the ICO and the named set of barristers' chambers referred to above, all invoices submitted by barristers of that chambers from October 2011 to December 2012 (on a weekly basis), the "qualifications and credentials" of two named ICO staff and all ICO Department heads; and copies of the ICO's ISO 4000 & 9000 audits for the last three years;

(b) the second email requested all internal correspondence, emails and notes of telephone conversations between September 2011 and "April 30th" concerning the ICO's vexatious requests guidelines, as well as minutes of meetings about the guidelines;

(c) the third email asked for an explanation of guidance referred to in an ICO report to a Parliamentary inquiry and to identify Upper Tribunal decisions referred to in the report.

5th January 2014

6. On this date, Mr Dransfield made two emailed requests:

(a) the first request was for the "minutes" of a presentation given by the Deputy ICO which Mr Dransfield said would prove the existence of a conspiracy. This email also described the presentation as, at best, "hogwash" and, at worst, "an attempt to pervert the course of justice";

(b) the second request was for the minutes of the ICO's 9th annual meeting, its full costs including details of who paid for wine and canapés, and how many people attended.

7th January 2014

7. On this date, Mr Dransfield made two emailed requests:

(a) the first request was for a "copy of the ICO complaints/allegations of fraud procedures";

(b) the second request was for "full bio data" for a Deputy ICO and a "full list" of his legal credentials.

12th January 2014

8. On this date, Mr Dransfield emailed a complaint about the composition of the "ICO Counsel Committee" which he asserts also contains a request for information.

16th January 2014

9. On this date, Mr Dransfield emailed a request for the "Security Attendance Sign-in Sheet" for a First-tier Tribunal hearing held on 14th January 2014.

19th January 2014

10. On this date, Mr Dransfield emailed a request to be informed of the number of ICO staff members who had resigned from ICO employment, giving as a reason for resignation stress associated with another request made by Mr Dransfield

21st January 2014

11. On this date, Mr Dransfield emailed a request for any ICO reports connected with its "monitoring" of Devon County Council.

12. The Information Commissioner refused to supply any of the information sought, relying on section 14(1) Freedom of Information Act 2000 (FOIA), a decision which remained unaltered on an internal ICO review.

13. Mr Dransfield complained to the ICO about its handling of his requests. His complaint was rejected.

14. Mr Dransfield appealed to the First-tier Tribunal. His grounds were that (a) no person "applying a right and proper mind" could have decided his requests were vexatious; (b) the ICO were complicit in "silent fraud"; (c) the ICO were wrong to rely on Judge Wikeley's decision in *Dransfield v the Information Commissioner* when it was under appeal to the Court of Appeal; (d) "breach of stare decisis, sub judice, due process and common sense"; (e) the ICO failed to investigate his allegations of bad faith.

15. The Information Commissioner resisted the appeal. He responded to Mr Dransfield's grounds in turn and argued that, more generally, his decision was in accordance with the law. He relied on his decision notice which concluded that the requests were vexatious for a number of connected reasons: the receipt of 15 requests within 16 working days was a strong indication that "this is likely to cause a disproportionate or unjustified level of disruption, irritation or distress"; "unreasonable persistence"; "intransigence"; and "frequent or overlapping requests".

The First-tier Tribunal's decision

16. The Tribunal held a hearing attended by Mr Dransfield and counsel for the ICO. In its statement of reasons, the Tribunal said it "has put from its mind…the Appellant's name or the history associated with his appeals". The Tribunal also rejected Mr Dransfield's 'expert report' as to the meaning of "vexatious".

17. The Tribunal dismissed Mr Dransfield's appeal. The nub of its reasoning was as follows:

> "this series of requests were vexatious because of the number and frequency of them, their overlapping nature, the tone of them and the lack of an obvious benefit that might be derived from responding to any or all of them. The Appellant offered no explaination about any benefit that might accrue from responding to them."

Legal framework, including the Court of Appeal's decision in *Dransfield v The Information Commissioner & Devon County Council* [2015] EWCA Civ 454

18. The Court of Appeal's decision, given after the First-tier Tribunal gave its decision, is the leading authority on the meaning of "vexatious request" in section 14 of the Freedom of Information Act 2000. Section 14 deals with both vexatious and repeated requests.

19. So far as vexatious requests are concerned, section 14(1) provides that "section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious". In other words, a public authority's duty to respond to a request for information by informing the requester whether information of the description specified in the request and, if so, to communicate the information to the requester is disapplied in relation to any vexatious request.

20. Section 14(2) deals with repeated requests. It applies where a public authority has previously complied with a person's request for information. It has not been argued that section 14(2) applies in this case.

21. I should also mention the general time-limits for a public authority to comply with a request for information. Section 14(1) provides that the authority must comply "promptly and in any event not later than the twentieth working day following the date of receipt". Accordingly, the Act envisages that, before a request has been complied with, further requests might be made. This happened here. All of Mr Dransfield's subsequent requests were made within twenty working days of his first request.

22. To put the Court of Appeal's decision in context, I need to explain the Upper Tribunal decision under appeal. This was *Dransfield v the Information Commissioner* [2012] UKUT 440 (AAC) and it arose from a single request for information in relation to a certain bridge and its lightning protection system. This decision was made before the First-tier Tribunal gave its decision. Certain aspects of Upper Tribunal Judge Wikeley's reasons for his decision, and the general guidance he gave, were not disputed before the Court of Appeal, including:

> (a) the question is not whether the requester is vexatious; it is whether the request is vexatious;
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> (b) a request which is annoying or irritating to the recipient may be vexatious, but that is not a rule. Annoying or irritating requests are not necessarily vexatious;
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> (c) a useful "starting point" was the Information Commissioner's guidance - "the key question is whether the request is likely to cause distress, disruption or irritation,

without any proper or justified cause" – so long as it was remembered to place emphasis on justification:

(d) "a single abusive and offensive request may well cause *distress*, and so be vexatious within section 14, applying the ordinary meaning of the word. A torrent of individually benign requests may well cause *disruption*, so one further such request may also be vexatious in the FOIA sense. However, for the reason noted in the previous paragraph, it may be more difficult to construe a request which merely causes *irritation*, without more, as vexatious under section 14. Thus an important aspect of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request";

(e) Judge Wikeley went on to give guidance about identifying a vexatious request. The Court of Appeal observed that this guidance was not challenged before it. The guidance identified four relevant considerations: (i) burden (to include "number, breadth, pattern and duration of previous requests"); (ii) motive; (iii) "value or serious purpose"; (iv) "causing harassment of, or distress to, staff".

23. Arden LJ, who gave the principal judgment in the Court of Appeal, found as follows:

(a) the "precise issue" on Mr Dransfield's appeal was whether "past requests are relevant only if they taint or infect the request which is said to be vexatious";

(b) on its face, Mr Dransfield's request was not vexatious;

(c) "there must be some limits on the ability to look at past dealings in this situation" and "even if the requester has made vexatious requests in the past, there must always be the possibility that, on this occasion, the requester…may be making a request that needs to be heeded, and that the request is for information that ought to be disclosed to achieve the statutory objective. The requester is after all exercising an important statutory right";

(d) while "the term "misuse" of rights" is a useful expression for the purpose of identifying "a badge of vexatiousness on the particular facts of a case" it "cannot be a criterion for vexatiousness" because it lacks any precise definition;

(e) a "comprehensive or exhaustive definition" could not be given because it was "better to allow the meaning of the phrase to be winnowed out in cases that arise";

(f) "the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision-maker should consider all the relevant circumstances in order to reach a balanced

conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available";

(g) the First-tier Tribunal had misconstrued section 14(1) in finding that the only prior requests that could be taken into account in assessing whether the instant request was vexatious were those that "infected" the request. This contravened the "rounded" approach call for by the Act. Arden LJ went on:

> "It involved drawing bright lines between requests which spring from some common underlying grievance and those which, for example, relate to the same subject matter although there is no underlying grievance in common. This distinction is difficult to justify in logic and there is no statutory mandate for it. If the F-tT were right, the decision-maker may have to disregard other evidence which may throw light on whether a request is vexatious, just as the F-tT left out of account the evidence in relation to prior requests that had led abuse and unsubstantiated allegations, of which the authority had first-hand knowledge because they had been directed to the authority's staff."

(h) earlier requests that the First-tier Tribunal left out of account, described by the Court as abusive and involving unsubstantiated allegations, were "clearly capable of throwing light on whether the current request directed to the same matter was not an inquiry into health and safety but (say) a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority".

The course of the proceedings before the Upper Tribunal

24. Having been refused permission to appeal by the First-tier Tribunal against its decision, Mr Dransfield applied to the Upper Tribunal for permission. His grounds of appeal were:

(a) "no person applying a right and proper mind could have reached such a decision":

(b) section 77 of FOIA 2000 has been breached;

(c) the First-tier Tribunal erred in law by hearing the appeal while the Court of Appeal's decision in *Dransfield* was pending;

(d) the First-tier Tribunal erred in law "by not identifying first time FOI request".

25. By subsequent email, Mr Dransfield requested an oral hearing of his application.

26. On 17th April 2015, I issued directions staying the proceedings pending the Court of Appeal's decision. Mr Dransfield by email of 22nd April 2015 informed the Upper Tribunal that he agreed with the direction to stay the proceedings.

27. On 8th September 2015, I gave directions lifting the stay of proceedings and inviting the parties to make written submissions on the implications for this application of the Court of Appeal's decision. Mr Dransfield objected by letter received on 5th October 2015 because that decision was "currently before the Supreme Court". However, the Supreme Court subsequently refused him permission to appeal to it against the Court of Appeal's decision.

28. On 10th February 2016, I issued directions informing the parties that I proposed to strike out Mr Dransfield's application on the basis that it appeared not to have a reasonable prospect of success, and to do so without holding a hearing. The parties were invited to make written representations on that (provisional) proposal.

29. On 17th February 2016, the Upper Tribunal received Mr Dransfield's written representations. He asserted the Upper Tribunal had no power to strike out without holding a hearing. He also argued that all of the instant requests were new requests and so the Court of Appeal's decision "had no standing" and added:

> "At best your letter is HOGWASH and at worst it is designed to pervert the Course of Justice. I suggest the latter. There is no doubt in my mind the UT are complicit with all this Vexatious BS and you are hell bent on gagging Joe Public, so strike me out if you so wish".

30. On 19th February 2016, the ICO made written representations arguing that the appeal had no reasonable prospect of success and in so doing adopted my provisional views of 10th February 2016.

Conclusion

Legal framework

31. Rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 confers power on the Upper Tribunal to strike out the whole or part of "proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings" if "the Upper Tribunal considers there is no reasonable prospect of the appellant's…case, or part of it, succeeding". The present matter is not an appeal – it is an application for permission to appeal – and so the power in rule 8(3)(c) is potentially available. However, the Tribunal may not strike out proceedings without giving the applicant "an opportunity to make representations in relation to the proposed striking out". That opportunity has been given.

32. Rule 34(1) provides that the Upper Tribunal "may make any decision without a hearing", although rule 34(2) provides that the Tribunal "must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter".

33. The overriding objective of the Upper Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly (rule 2(1)). That includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties" and "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings". The overriding objective must be taken into account by the Tribunal when it exercises any power under the Rules or interprets a rule.

34. The power to strike out the proceedings on an application for permission to appeal must be exercised with caution since it is a denial of access to appellate justice.

35. Upper Tribunal Judge Jacobs in *AD v Information Commissioner & Devon County Council* [2013] UKUT 0550 (AAC) considered the First-tier Tribunal's use of the strike-out power in an information rights case. He made the point that "all aspects of the overriding objective have to be taken into account when a tribunal is considering exercising its power to strike out". That applies equally to the Upper Tribunal's exercise of its strike-out power since its procedural rules are, in material respects, constructed in the same way as the First-tier Tribunal's. However, there is a contextual difference in that, where the applicant seeks permission to appeal against the First-tier Tribunal's determination of the merits of an appeal, s/he has already had the benefit of a judicial adjudication of his/her right to the information requested.

36. Judge Jacobs also made the important points, by reference to Court of Appeal authorities, that the strike-out power:

> (a) must be used for legitimate case management purposes, not for some other purpose;
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> (b) should not be exercised unless the tribunal has considered whether its other case management powers could be used to arrive at a more just result;
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> (c) since it is a method of "final disposal", should only be used as a "last resort".

37. Upper Tribunal Judge Wikeley in *AW v the Information Commissioner & Blackpool CC* [2013] UKUT 030 (AAC) also considered the First-tier Tribunal's use of its strike-out power in an information rights case. I shall quote his helpful description of the development and purpose of the power to strike out proceedings:

> "7. It is important to consider issues of first principle. It is well established in the ordinary courts that the historic justification for striking out a claim is that the proceedings are an abuse of process (see e.g. *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 541B *per* Lord Diplock). On that basis, the power should only be exercised in plain and obvious cases (see *Lonrho PLC v Fayed* [1990] 2 QB 479 at 489F-G *per* Dillon LJ and 492G-H *per* Ralph Gibson LJ).
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> 8. More recent rulings from the superior courts point to the need to look at the interests of justice as a whole (see e.g. *Swain v Hillman* [2011] 1 All ER 91). It is also well established that striking out is a draconian power of last resort: see *Biguzzi v Rank*

> *Leisure plc* [1999] 1 WLR 1926 at 1933B *per* Lord Woolf MR (where, admittedly, the issue was delay rather than lack of reasonable prospects) and also, in the Upper Tribunal, *AS v Buckinghamshire CC (SEN)* [2011] AACR 20 and [2010] UKUT 407 (AAC) at [14]. It is, moreover, plainly a decision which involves a balancing exercise and the exercise of a judicial discretion, taking into account in particular the requirements of Rule 2 of the GRC Rules [the overriding objective provisions].
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> 9. So what then is meant by saying that "there is no reasonable prospect of the appellant's case, or part of it, succeeding" (within rule 8(3)(c))? The standard and authoritative commentary on tribunal procedure, by Judge Edward Jacobs (*Tribunal Practice and Procedure*, 2nd edn, 2011, at [12.39]), advises that this "is only appropriate if the outcome of the case is, realistically and for practical purposes, clear and incontestable…"

Why I strike out this application

38. I have decided to strike out Mr Dransfield's application for permission to appeal, and to do so without directing a hearing. I do so for the following reasons.

39. Mr Dransfield's appeal is without merit. The outcome, were permission to appeal granted, would be "clear and incontestable". Mr Dransfield's appeal would not succeed. His grounds of appeal do not have even a remote prospect of success:

> (a) the argument that "no person applying a right and proper mind could have reached such a decision [that all his requests were vexatious]" cannot succeed. The First-tier Tribunal did not have the benefit of the Court of Appeal's decision in *Dransfield*. However, neither that Court's rulings about the nature of a "vexatious request" nor those elements of Judge Wikeley's decision that were not disputed before the Court provide any support for the argument that the Tribunal's decision was irrational or perverse. The factors taken into account by the First-tier Tribunal were legitimate considerations in the light of those decisions and were all adequately supported by the evidence before the Tribunal. Taking those factors in turn:
>
> > (i) the number and frequency of the requests was a legitimate consideration. As Judge Wikeley said in his guidance, a "torrent of individually benign requests" can justify a finding that the requests are vexatious. And, as Arden LJ held, there is no rule that only those requests that "infect" another request may be taken into account in assessing whether that request is vexatious;
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> > (ii) the overlapping nature of the requests was a legitimate consideration. As Judge Wikeley said, the pattern of requests may be taken into account;
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> > (iii) the tone of certain of the requests was a legitimate consideration. While there is probably only one request that can properly be described as rude (that which included a description of a presentation given by a Deputy Information

Commissioner as "hogwash"), the Tribunal was certainly entitled, looking at the set of requests as a package, to place adverse reliance on the tone of the requests;

(iv) the finding that there was a lack of an obvious benefit that might be derived from any of the requests can, I accept, be criticised on the ground that, standing alone, certain of the requests might have generated some benefit for Mr Dransfield by helping him better to understand the ICO's then practice in applying section 14. However, there were many requests in respect of which the finding of a lack of obvious benefit was entirely justified. For example, the request relating to the full first name of a particular barrister and for details of who paid for wine and canapés at a particular ICO event. Since this was but one factor relied on by the First-tier Tribunal, its blanket categorisation of all requests as lacking any obvious benefit does not come close to demonstrating an arguable material error of law in the Tribunal's decision and certainly does not demonstrate perversity as Mr Dransfield effectively argues;

(v) the absence of any explanation on Mr Dransfield's part as to the benefit that might accrue from disclosure of the information sought was a legitimate consideration. As Arden LJ held, "the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation";

(b) the ground which relies on an asserted breach of section 77 of FOIA 2000 has no merit. Section 77 criminalises certain conduct, such as alteration of records, in response to a request for information where it is done with the intention of preventing disclosure of information to which the requester would have been entitled. Mr Dransfield put forward no remotely plausible evidence to the First-tier Tribunal to indicate that the Information Commissioner, or a member of staff, had altered information, or done any of the other prohibited acts, with the intention of preventing disclosure;

(c) the ground that the First-tier Tribunal erred in law by deciding the appeal while the Court of Appeal's decision in *Dransfield* was pending has no merit. The First-tier Tribunal was entitled not to stay the proceedings. In the circumstances, it was not bound to conclude that the outcome of *Dransfield* was likely to have a material influence on the appeal. In any event, Mr Dransfied has not explained how the Court of Appeal's decision, had it been given before the First-tier Tribunal's decision, might have affected the outcome;

(d) the bare assertion that the First-tier Tribunal erred in law "by not identifying first time FOI request" has no merit. The fact that a request is not a duplicate request does not immunise it from a finding that it is vexatious.

40. I ask myself whether exercising the power to strike-out Mr Dransfield's application would be for a legitimate case management purpose and whether it would be in accordance with the overriding objective of dealing with cases fairly and justly, including in particular "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the

issues, the anticipated costs and the resources of the parties" and "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings".

41. I recognise that, by striking-out Mr Dransfield's application, rather than refusing permission to appeal on the papers, I deprive him of the chance under rule 22(4) of the Upper Tribunal Rules to have his application reconsidered at a hearing (the rule does not confer in terms a right to such a hearing but the Administrative Appeal Chamber's practice is to grant a request for reconsideration and I know of no case in which it has been refused). The right to apply for oral reconsideration only applies where, in certain cases, the Upper Tribunal determines an application for permission to appeal.

42. However, the case management consequence of a decision to strike out an application for permission to appeal is not something I am obliged to avoid, especially where an application does not have even a remote prospect of success. The Upper Tribunal does not have unlimited resources. A hearing incurs financial and other costs and also delays the hearing of some other case. I also take into account that the Upper Tribunal's rules anticipate the possibility of striking-out an application which, if simply refused on the papers, would allow the applicant to seek an oral reconsideration. The rules do not disapply the power to strike out in a case where, had permission to appeal been refused on the papers, the Appellant would have the right to seek an oral reconsideration. For certain immigration decisions, rule 34(3) requires a hearing before "disposing" of the case. And so the makers of the Rules identified certain categories of case where a hearing would always be required. But the Rules do not, in the same way, treat as a special case an application for permission to appeal against an information rights decision of the First-tier Tribunal.

43. Striking-out Mr Dransfield's application is neither unfair nor unjust. It might be if he had even a remote prospect of success but he does not and, of course, he has already had the benefit of a judicial determination of his rights to the information requested.

44. Striking-out the application is not a disproportionate response having regard to the case's importance, complexity and the anticipated costs and resources of the parties. The case is not of general importance. Mr Dransfield principally seeks information about how the ICO approached section 14 FOIA but at a time before the Court of Appeal gave what is now the leading decision on the section. He also seeks information in relation to the competence of ICO staff, its use of external legal services and its "monitoring" of Devon County Council but without there being any indication that the ICO might be remiss in those respects. I am sure Mr Dransfield is of the view that the case is very important to him but the fact remains that his principal aim seems to be to illuminate the ICO's approach to applying section 14 at a time before the Court of Appeal gave what is now the leading decision on section 14. The complexity of the case seems to me to have little relevance to striking out a case such as this without even a remote prospect of success. The anticipated costs and resources of the parties supply no weight in Mr Dransfield's favour. He is representing himself and it is obvious that he is more than *au fait* with FOIA. On the other hand, the ICO is a public authority with finite resources and striking-out the application will reduce the costs it incurs in resisting an application that is without merit.

45. I am also satisfied that Mr Dransfield has been able to participate fully in the proceedings. He is clearly familiar with FOIA and has been given the opportunity to make representations against the proposed striking-out of his application. I do not consider that, were his application to proceed to an oral hearing of the proposed strike-out, or his application for permission to appeal, he would be able to participate more fully in the proceedings. In his written representations, Mr Dransfield did not argue that he would be able better to present his case at a hearing. He simply asserted that the Upper Tribunal had no power to strike-out his application without holding a hearing.

46. I have considered whether the exercise of some other case management power would be a more just way to proceed. But there is no case management power that could convert his hopeless case into a case with arguable merit.

47. For the above reasons, I refuse to direct a hearing of the proposed striking-out of Mr Dransfield's application and, having found that there is not a reasonable prospect of his case succeeding, I decide to strike out the proceedings on his application in their entirety.

(Signed on the original) **E Mitchell**
Judge of the Upper Tribunal

(Dated) **5th May 2016**

These reasons were corrected on 2nd June 2016 under rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the purposes of correcting typographical errors and re-formatting.