IN THE UPPER TRIBUNAL **Case No.** GT/978/2016
ADMINISTRATIVE APPEALS CHAMBER

1. This is a driving instructor's appeal against a decision of a First-tier Tribunal (FTT) made on 9 March 2016. For the reasons referred to below that decision was in my judgment wrong in law. I allow the appeal, set aside the FTT's decision and remit the matter for redetermination by an entirely differently constituted FTT. In connection with that redetermination **I DIRECT as follows:**

(1) The Appellant must sent to the First-tier Tribunals Service, within one month from the date of issue of this decision, any additional documentation on which he intends to rely at the rehearing.

(2) After the expiry of that one month period the appeal shall come before a Judge of the First-tier Tribunal for consideration whether to direct that any additional evidence be obtained.

2. I gave permission to appeal following an oral hearing of the application for permission on 6 June 2016, at which the Appellant appeared in person and the Registrar was represented (as he had been before the FTT) by Mrs Turland, an employee of the Driver and Vehicle Standards Agency. Since the grant of permission I have received a short written submission in the appeal from the Registrar. I have not considered it necessary to invite the Appellant to respond, or to hold a hearing of the appeal itself.

3. The FTT's decision was to dismiss the Appellant's appeal against a decision of the Respondent, notified to the Appellant on 16 November 2015, refusing the Appellant's application for re-registration as an approved driving instructor.

4. Appeal to the Upper Tribunal from the FTT's decision lies only on the ground of error of law by the First-tier Tribunal.

The facts
5. The Appellant is a man now aged 51 whose name was first entered on the Register in May 2011. His name was removed from the Register on 1 June 2015, following expiry of his certificate of registration by effluxion of time on the last day of May 2015. He told me at the hearing that his registration expired because, owing to the time which it took to obtain a Disclosure and Barring Service Certificate, for which he had applied on 22 March 2015, he was unable to apply for reregistration prior to the expiry of his registration.

6. (Mrs Turland informed me at the hearing of the application for permission that the Registrar writes to registered instructors 7 months before the expiry of their registration, advising them that the process of obtaining a DBS certificate may take several months. If an applicant can show that he has applied for a DBS certificate in good time – i.e. not less than 3 months before the expiry of the registration - but the certificate has nevertheless not arrived by the time of the expiry of the registration, the Registrar will provide the applicant with a letter which will prevent him from being prosecuted for continuing to give paid driving instruction whilst unregistered, if the delay in obtaining reregistration is due to the delay in obtaining the DBS certificate).

7. In the event the Applicant's DBS certificate was not issued until 28 September 2015. He applied for reregistration on 5 October 2015. His DBS certificate, and his completed application for re-registration, disclosed convictions in April 2001 for failing to provide a specimen for analysis and failing to provide a specimen of breath, for which he was

disqualified from driving for 18 months. More significantly for present purposes, it also disclosed a conviction on 28 April 2014 for driving a motor vehicle with excess alcohol, contrary to s.5(1)(a) of the Road Traffic Act 1988, for which the sentence was a fine of £260, costs of £85 and victim surcharge of £20.

8. On 6 October 2015 the Registrar wrote to the Appellant asking whether he wished to provide any information in relation to the convictions, and for an explanation as to why he had not notified the Registrar within 7 days of the 2014 conviction, as he had undertaken to do in his original application for registration, dated 3 May 2011.

9. The Appellant replied by email dated 8 October 2015, stating the circumstances of the 2014 conviction. This email is set out in full in para. 14 of the FTT's decision. The essence of it is that he said that his cousin had driven him and his family to a restaurant, and parked in the restaurant car park. The Appellant after eating and drinking felt sick, and came out to the car to collect his jacket, but decided to stay in the car and wait for his cousin to drive them home. He sat in the driver's seat and switched on the engine in order to get the heating going, which involved depressing the clutch, and whilst he was sitting there with the engine running the police arrived in relation to an incident which did not involve him or his family, and when questioning him smelt alcohol on his breath. He had no intention of driving the car.

> "I was charged to court and was convicted of having excess alcohol but not drink driving because I DID NOT DRIVE THE CAR because the car was parked in the restaurant car park by my cousin and while I was in the car it DIDN'T MOVE FROM ITS ORIGINAL PARKED POSITION by my cousin."

In relation to the failure to inform the Registrar of the conviction he said that he thought he only had to inform the Registrar if he got an endorsement on his driving licence.

10. The contention that he had not been convicted of "drink driving" flatly contradicted both what he had said on his application for registration and what was stated on the DBS certificate.

11. By letter from the Registrar dated 16 November 2015 the Appellant was informed that his application for reregistration had been refused because the Registrar could not be satisfied that he was a fit and proper person to have his name entered on the register, as required by s.125(3)(e) of the Road Traffic Act 1988. The letter stated:

> "He came to this conclusion because of your conviction which you failed to declare on 28 April 2014 for d*riving a motor vehicle with excess alcohol* ……."

12. The Appellant appealed to the FTT. In his response to the appeal the Registrar set out his reasons for refusal in more detail, as set out verbatim in para. 21 of the FTT's decision.

13. In the course of the appeal the Appellant submitted page 1 of a document headed "MEMORANDUM of an ENTRY entered in the REGISTER of the South London Magistrates' Court" for 6 August 2014. It states that the Appellant pleaded guilty on 28 April 2014 to the following offence: "on 13 April 2014 at ……. drove a motor vehicle namely [the Appellant's car] on a public place, namely car park of [ ] restaurant ……. after consuming so much alcohol that the proportion of it in your breath, namely 62 microgrammes of alcohol in 100 millilitres of breath, exceeded the prescribed limit", contrary to s.5(1)(a) of the 1988 Act. The document appears to state that the Defendant was present and represented by a

solicitor. Under the heading "NDSR" (which I assume to stand for "no driving disqualification special reasons") it states:

> "No obligatory driving disqualification. Special reasons. No disqualification – Special reasons found based on shortness of distance – most importantly we found there was no intention to drive and the distance driven was very short indeed."

14. The explanation for the reference to 'special reasons' is, no doubt, that section 34(1) of the Road Traffic Offenders Act 1988 provides:

> "Where a person is convicted of an offence involving obligatory disqualification the Court must order him to be disqualified for such period not less than twelve months as the Court thinks fit unless the Court for special reasons thinks fit to order him to be disqualified for a shorter period, or not to order him to be disqualified."

15. The wording of the 'special reason' entry on the Magistrates' Court record is curious and appears to support the Appellant's current version of events in so far as it says that there was "no intention to drive", but not in so far as it states that "the distance driven was very short indeed." The Appellant says that the car did not move at all. Indeed, it would seem to be only in the most unusual of circumstances that a car could move any appreciable distance without there being <u>any</u> intention to drive (such as, perhaps, where a person not intending to drive switches on the engine without appreciating that the car is in gear, something which I believe cannot happen in most modern cars, as it will be necessary to depress the clutch in order to start the engine).

16. The FTT dealt with the significance of the Appellant's version of events in paras. 26 and 27 of its decision:

> "26. We have considered the Appellant's oral and written evidence concerning the circumstances which gave rise to his conviction for the offence of driving a motor vehicle with excess alcohol, including the photographs which he submitted. We have noted that the entry from the Register of the South London Magistrates' Court is ambiguous in that it records that the magistrates found that there was no intention to drive but also that 'the distance driven was very short indeed'. The criminal offence with which the Appellant was charged and to which he entered a plea of guilty was that he drove a motor vehicle after consuming alcohol in excess of the prescribed limits. In these circumstances we cannot be totally convinced that the vehicle remained stationary at all times as has been asserted by the Appellant.
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> 27. While acknowledging that the Magistrates accepted that special circumstances existed so that an obligatory driving disqualification should not be imposed it remains the case that the Appellant has been convicted, on his own admission, of the criminal offence of driving a motor vehicle after consuming alcohol in excess of the prescribed limits. We cannot ignore the gravity of that conviction."

17. The Appellant confirmed to me that he pleaded guilty. It appears from the Court record that that was at the first hearing of the matter on 28 April 2014, only some 15 days after the offence occurred. The Appellant told me that he pleaded guilty on the advice of his solicitor that he had no defence. It appears that the matter must then have been adjourned for sentencing, possibly so that the issue of 'special reasons' could be tried, in so far as necessary. The matter appears to have come back to the court on 6 August 2014. The Appellant told me that he was represented and that he had the owner of the restaurant and his cousin present as witnesses, and that they gave evidence on his behalf.

Would the Appellant's contentions have amounted to a defence?

18. I have examined the case law in order to form at least a preliminary view on the question, whether, if the facts were as the Appellant now asserts, he would have had a defence to the charge under s.5(1)(a) of the 1988 Act. In *R v MacDonagh* [1974] QB 448 it was said that "the Act does not define the word "drive" and in its simplest meaning we think that it refers to a person using the driver's controls for the purpose of directing the movement of the vehicle", and that "although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language." In *Leach v DPP* [1993] RTR 161 a case stated by justices asked the question "whether a person sitting in the driving seat of a stationary motor vehicle, who switches on the engine by turning the ignition key, sits erect in his seat and places his hands on the steering wheel could be a person driving a motor vehicle within the meaning of s.163 of the Road Traffic Act 1988". The Divisional Court answered that question in the negative. In that case the defendant switched on the engine with a view to driving off, which he subsequently did, and the case was therefore a stronger one than the present for arguing that the defendant was driving while the vehicle was still stationary. In *Blayney v* Knight (1974) 60 Cr. Appeal. R. 269 the Lord Chief Justice said in the Divisional Court:

> "The word 'drive' in this sort of context has been in contest and defined more than almost any other word in the English language, but it is I think of importance to remember that in one of the most remembered cases, namely that of *McDonagh* (1974) 59 Cr. App. R. 55, a full Court of Appeal decided, amongst other things, that an activity could not be described as driving despite the wide meaning of that word if the activity was something which could not be accepted as driving in any ordinary use of that word in the English language. So I ask myself at first in this case if anyone using the English language in the normal way was told or observed that someone sitting in the driving seat of a car accidentally depressed the accelerator and thus caused the vehicle to move, would anybody giving the word 'drive' any sort of its common meaning in English have said that that man was driving, and it seems to me clearly he was not. I think this is quite a different case from almost any of the other cases where the person was consciously seeking some movement of the car in some way, and was thus driving. Here one has a man sitting in the driving seat, not intending to drive, and as far as I can see not intending to exercise any control over the vehicle, and accidentally his foot touches the accelerator and off goes the car. I content myself by saying I do not think that in any ordinary use of the word 'driving' that conduct would be included."

In *R v. Attorney-General's Reference (No 4 of 2000)* [2001] 2 Cr. App. R. 22, on the other hand, it was held that a bus driver who drove about 100 yards, out of control and not intending to do so, because he pressed what he thought was the brake but was in fact the accelerator, was driving the bus.

19. The upshot of the case law appears to be that if the facts were as the Appellant asserts, namely that he did no more than press the clutch and switch on the engine, in order to heat the car, with no intention of making the car move, either then or later, and that the car did not move, then he did not drive the car, for the purposes of s. 5(1)(a), and so ought not to have been advised that he had no option but to plead guilty. That may also be the case even if the car did move a very small amount, without the Appellant intending that it should do so, although the position would then perhaps have been somewhat less clear.

20. Section 5(1)(b) of the 1988 Act contains the alternative offence of being in charge of a motor vehicle on a road or other public place, after consuming alcohol in excess of the prescribed limit. However, in relation to that offence it is provided in s.5(2) that it is a defence to prove that the circumstances were such that there was no likelihood of the accused driving the vehicle while the prescribed limit was exceeded. If, therefore, the facts were that the Appellant did not drive and had no intention to drive his car, he was not guilty of that offence either.

Was the Appellant entitled to seek to go behind the conviction?

21. The FTT appears to have been content to decide the matter on the footing that (a) the Appellant had been convicted on his own admission of the offence of drink driving and (b) the FTT "could not be totally convinced that the vehicle remained stationary at all times." In other words, the FTT appears to have considered that, the Appellant having been convicted on his own admission, it was not necessary for the FTT to investigate the facts further, with a view to considering whether he would have had a defence if had not pleaded guilty. It was sufficient that he had pleaded guilty to the serious offence of drink driving. In his extremely brief submission in this appeal the Registrar appears to adopt that approach, submitting as follows:

> "I do not consider that it is my jurisdiction to go behind a conviction, and therefore rely on the conviction itself as an indication of guilt."

22. The Registrar has, however, helpfully referred me to the decision of a FTT (ref D/2011/130), chaired by Judge Michael Brodrick (then principal judge of the First-tier Tribunal (Transport)), in which consideration was given to the significance of a conviction in driving instructor cases. The FTT noted in para. 21 of its decision that until that decision the approach of FTTs had apparently been that the FTT was "bound" by a conviction – i.e. could not in deciding the appeal reconsider whether the offence had in fact been committed. The FTT in that case decided that it was open to a First-tier Tribunal to find that the offence was not in fact committed. Its reasoning was as follows. That is the position even in civil courts to which the strict rules of evidence apply. In such courts the effect of s.11(1) and (2)(a) of the Civil Evidence Act 1968 is that a person is taken to have committed an offence of which he has been convicted (whether on a plea of guilty or otherwise) unless the contrary is proved. The strict rules of evidence do not apply to FTTs, and before an FTT the fact of a conviction, even on a plea of guilty, cannot be conclusive evidence that the offence was committed.

23. In considering whether and to what extent it is permissible, in these cases, for an applicant to seek to go behind a conviction, I have become aware of the decision of Tucker J. in *Nottingham City Council v Farooq* [1998] EWHC Admin 991. That was an appeal by way of case stated from a decision of magistrates, who were themselves deciding an appeal against a decision by the local authority that Mr Farooq was not a fit and proper person to hold a private hire vehicle licence under the relevant statutory provision. One of the questions posed for decision in the case stated was whether the magistrates had been entitled to review the merits of the applicant's convictions for theft and deception. The applicant had pleaded guilty to those offences, and his stated reason for wishing to go behind them was that he had pleaded guilty in an attempt to help a friend. Tucker J held that it was not permissible for the justices to review the merits of the convictions. He said:

> "To that my answer is unhesitatingly 'no'. The reason for that is that the convictions were recorded on a plea of guilty, and if they had been contested would have had to be proved so as to make the Justices sure of their truth. In other words, the Justices would have had to be satisfied beyond reasonable doubt of the respondent's guilt, whereas in a civil case a very different standard of proof applies, that is to say balance of probabilities."

24. Tucker J considered that his conclusion was supported by two authorities. The first was the decision of Sedley J. in *Adamson v Waveney District Council* [1997] 2 All ER 898, who said (at p.904):

> "Once some or all of the spent convictions are admitted in evidence, either before the local authority committee or before justices, the applicant is then entitled naturally to be heard, not by way of suggesting that the convictions were incorrectly arrived at but in order to persuade

> the judicial authority that they are either, in truth, irrelevant or such, by reason of their age, circumstances or lack of seriousness, that they should not jeopardise his application. All of that is simple natural justice."

25. Secondly, Tucker J referred to a passage from the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police and Others* [1982] A.C. 529, a case relating to the circumstances in which it may be an abuse of process, and therefore impermissible, for a *claimant* to seek to mount a collateral attack on a decision of a court of competent jurisdiction (i.e. a criminal conviction) by *initiating* civil proceedings based on or involving a contention that he did not commit the offence.

26. I have also come across a decision of Sir Stephen Oliver QC, sitting as a Judge of the Upper Tribunal (Tax and Chancery Chamber), in *Sharma v FSA;* ref FS/2010/0008. That was an appeal against a decision of the FSA containing an order prohibiting Mr Sharma from performing any functions in relation to any regulated activities, on the ground of his lack of fitness and propriety to conduct financial services business by reason of his convictions of two financial services-related offences. The convictions followed a plea of guilty, and Mr Sharma's contention in the appeal was that he was not guilty but had pleaded guilty on advice from his barrister that had he done otherwise he might have had to pay prosecution costs of some £30,000 (see para. 25 of the decision). The Upper Tribunal struck out the appeals, stating:

> "49. By seeking to bring a collateral civil challenge to his criminal convictions via the Tribunal, Mr Sharma is, I think, abusing the process. The leading case on the application of the power to dismiss proceedings on this ground is *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. That and subsequent authority explain that the decision of a court of competent jurisdiction should not be relitigated. On that basis, Mr Sharma should not, in my view, be permitted to relitigate the matters behind his criminal convictions before this Tribunal. Nor should he be permitted to go behind these convictions. The right course would have been to have initiated a formal appeal in the criminal courts. I therefore conclude that Mr Sharma's reference constitutes an abuse of process and should be struck out for that reason (as a component of the wider strike out jurisdiction), as well as on the basis that he has no prospect of success."

27. However, in so far as the basis of the decisions in *Nottingham City Council v Farooq* and *Sharma v FSA* was that there was a rule of public policy which absolutely prevented the applicants in those cases from going behind their convictions, the decisions were in my judgment wrong, for two reasons. First, the decisions were purportedly founded on the decision of the House of Lords in the *Hunter* case. However, the rule of public policy referred to by Lord Diplock appears to be one applying only in the situation where a *claimant* seeks to mount a collateral attack on his previous conviction by mounting a civil action involving a contention that he did not commit the offence. It has been so held in, for example, *J v Oyston* [1999] 1 WLR 694 and *CXX v DXX* [2012] EWHC 1535 (QBD). See also Halsbury's Laws, Vol 12A (Civil Procedure) at para. 1644, footnote 9. However, the reasoning behind these latter cases was in turn that it cannot automatically be an abuse to do what s. 11 of the Civil Evidence Act 1968 permits a *defendant* to do – i.e. to seek to establish that he did not commit the offence. But that reasoning itself does not apply directly to appeals before tribunals, which are not "civil proceedings" within the meaning of the 1968 Act. It is unclear whether, for the purposes of the rule of public policy referred to in the *Hunter* case, an appellant who seeks to overturn a decision that he is not a fit and proper person to hold a licence or be on a register is to be considered as a person who is *initiating* proceedings mounting a collateral attack on a conviction, or rather as a person in a position analogous to that of a defendant to a civil claim. I would have thought it was more the latter.

28. Secondly, and in any event, it was recognised in the *Hunter* case that the rule of public policy is not absolute, and admits of an exception in, for example, the case of fresh evidence not available at the time of the conviction. Lord Diplock recognised that s.11 of the 1968 Act can cover a wide variety of circumstances (and the same is plainly true in relation to the circumstances in which a person may seek to go behind a conviction in tribunal proceedings):

> "The section covers a wide variety of circumstances: the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; **the conviction, particularly of a traffic offence, may have been entered on a plea of guilty accompanied by a written explanation in mitigation**; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial. This wide variety of circumstances in which s.11 may be applicable includes some in which justice would require that no fetters should be imposed on the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction." (My emphasis).

29. However, it might be argued on behalf of the Registrar, and in support of the FTT's approach in this case, as well as that taken in the *Farooq* and *Sharma* cases, that the position in relation to what may be described as "fit and proper person" cases, is in effect *sui generis*, in that the mere fact that, as a matter of public record, the applicant stands convicted of a serious and recent offence, at any rate one related to driving, should render the applicant an unfit person. To enter or allow his name to remain on the Register, or to grant him a licence, would bring the registration or licensing process into disrepute. Whether or not he was in fact guilty, the fact remains that he has been convicted, in this case on his own admission. One cannot (so the argument would run) have a person registered as an approved driving instructor when he stands convicted of a serious and recent offence.

30. I would not accept that argument. In my judgment there is no rule, whether arising from the terms and purpose of the legislation relating to the register of driving instructors, or from general principles of public policy, which absolutely and in all circumstances prevents an applicant from seeking to go behind a conviction. If there are facts which justify an FTT in looking behind the conviction, and then in determining that the offence was not in fact committed, the mere fact of the conviction, even a recent and serious one, should not necessarily mean that the applicant is not a fit and proper person to be on the Register.

31. It is not necessary or appropriate for me, in this case, to attempt to formulate any general principles as to when it is permissible for an applicant to seek to go behind a conviction. It seems to me that it will only be in exceptional cases that it will be appropriate for a FTT to go behind a conviction, and in practice there is likely to be a heavy evidential burden on the applicant to prove that the conviction was not merited. Absent special reason an applicant should not, it seems to me, be entitled simply to relitigate, on a balance of probabilities, a conviction reached on the basis of no reasonable doubt.

32. It may also be relevant in the present case, albeit merely by way of background, that where a person pleads guilty in the Magistrates' Court the only right of appeal is against sentence: see s.108(1)(a) of the Magistrates Courts Act 1980. However, it is possible to permit an accused to withdraw a guilty plea before sentence. He must apply to withdraw the plea as soon as practicable after becoming aware of the reasons for doing so. See, generally, Halsbury's Laws, Vol 27 (Criminal Procedure), para. 187. In addition, a defendant may appeal against conviction where the magistrates' court proceeded on an equivocal plea of guilty. That covers cases, essentially, where a defendant indicates an intention to plead

guilty but then goes on to allege facts which, if proved, would provide a defence: see Halsbury's Laws, Vol 28 (Criminal Procedure), para. 665.

Was the FTT's decision wrong in law?

33. I am satisfied that the Appellant's contentions in the present case (if established) do render the case an exceptional one in which it would be permissible and appropriate to go behind the conviction. The Appellant's contention that the car did not move at all is to some extent supported by the wording of the "special reasons" – i.e. the Court's own record - which as the FTT pointed out appears to be self-contradictory. The Court's summary that the car moved only a very short distance and that he had 'no intention to drive' is curious, and appears to cry out for further enquiry as to whether he was in fact driving his car.

34. In circumstances where the FTT attached substantial significance to the fact of conviction, under a plea of guilty, in my judgment the FTT went wrong in law in not further investigating how the plea of guilty came about, and whether in fact the Appellant may have been wrongly advised that on his version of the facts he had no option but to plead guilty. If, on the facts put to and accepted by the Magistrates' Court at the time of sentencing, he did not, as a matter of law, 'drive' the car and therefore was not in fact guilty of the offence, that is something which the FTT should in my judgment have taken into account. The effect of the refusal to renew his registration has been to deprive the Appellant of his livelihood, which is of course a very serious matter. The Appellant told me, and Mrs Turland did not specifically dispute, that the FTT did not question the Appellant as to how the plea of guilty came about.

35. The FTT would of course have been entitled to be sceptical about the Appellant's version of events. For one thing, as a matter of inherent probability it is unlikely that a solicitor would have advised him to plead guilty if, on his version of the facts, he was not, given the potentially very serious consequences, for the Appellant, of a conviction. In addition, the version of events which the Applicant gave me conflicted to some extent with that set out in his email of 8 October 2015. He told me that the reason why his cousin drove him and his family to the restaurant in the Appellant's own car was that he (the Appellant) was giving his cousin (a learner driver) a driving lesson at the time, and that it was another cousin who was to drive them home. However, his email of 8 October said that he decided to start the car and put the heater on "while I wait for my cousin who drove us to the restaurant to come out and take us home."

36. I do not of course overlook that there were other matters on which the Registrar and the First-tier Tribunal relied as grounds for refusing registration, namely the previous convictions in 2001 and the failure to inform the Registrar of the 2014 conviction. I record that Mrs Turland told me that a failure to inform the Registrar about a conviction would not of itself (i.e. in the absence of other contributing factors) necessarily be considered a sufficiently serious ground for refusing registration.

Directions to the new tribunal

37. The new tribunal will therefore need to consider and make findings, in as much detail as practicable, as to (i) the circumstances which led to the Appellant pleading guilty when (on his current version of events) it appears that he was in effect asserting that he was not and (ii) whether he was in fact guilty of the offence of which he was convicted, or any related offence. It will need to take its findings into account when deciding whether to allow his appeal. The facts are entirely at large before the new tribunal.

38. There are additional items of evidence which may be forthcoming and which may either confirm or undermine the Appellant's version of events. The police may have made witness statements for the purpose of the case, which may throw light on what they said

happened in the car park. Those and other papers may be obtainable from either the police or the Crown Prosecution Service or the Appellant's solicitor. The Appellant's solicitor may hold other papers, and be able to confirm that he advised the Appellant to plead guilty, and why (although the Appellant would of course have to voluntarily waive legal professional privilege in order to permit the solicitor to say what happened).

39. The evidential burden of establishing that he was not guilty of the offence in practice lies on the Appellant. He must therefore carefully consider what further evidence, and in particular documentation, he can obtain. But the FTT also of course has an investigatory function, and may consider it necessary, of its own motion, to direct third parties (and in particular those mentioned in para. 31 above) to provide additional information, subject in the case of the Appellant's solicitors to questions of legal professional privilege. **See, therefore, my Directions in para. 1 above.**

Charles Turnbull
Judge of the Upper Tribunal
28 June 2016