# NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

**I refuse permission to appeal.**

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

## Introduction

1. An appeal to the Upper Tribunal lies on "any point of law arising from a decision" (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 some other good reason to do so, by analogy with the principles set out by Lord Woolf MR in the Practice Note on *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538.

## The background to this application for permission to appeal

2. The factual background to this matter is not in dispute and can be taken relatively swiftly here (it is dealt with rather more fully and entirely adequately in the decision of the First-tier Tribunal (FTT) at paras [1]-[19]).

3. In 2014, five years after the Chilcot Inquiry had been set up, but (obviously) while it was still running, Dr Lamb made a request to the Cabinet Office under the Freedom of Information Act 2000 (FOIA). He asked for information about the criteria used to decide on the form of the Inquiry and the composition of its membership. The Cabinet Office decided (both in relation to the initial request and following a subsequent internal review request) that the information in question was exempt from disclosure under section 35(1)(a) of FOIA (formulation or development of government policy).

4. Dr Lamb made a complaint to the Information Commissioner (the IC). The IC issued a decision notice (DN FS5056426) in which he upheld the Cabinet Office's view that the public interest in maintaining the exemption outweighed the public interest in disclosure. However, the IC did not accept the Cabinet Office's argument that the policy formulation and development was still live at the time of Dr Lamb's request (DN at para [27]). But the IC did accept the argument that disclosure "would be very likely to result in a significant and notable chilling effect on the way in which officials advise Ministers on matters of similar importance in the future" (para [28]). The IC considered that the "significant chilling effect on policy making in the future and the danger of distracting from the ongoing Inquiry itself" outweighed the arguments in favour of disclosure (at para [32]).

5. Dr Lamb lodged an appeal to the FTT – ref. EA/2015/0136. All parties made detailed written submissions on the appeal. No party asked for an oral hearing of the appeal and the FTT decided it could proceed with determination on the papers (reasons at para [15]). No issue is taken with that procedural decision, subject to one qualification I refer to further below (at paragraph 28).

6. The FTT reviewed the background to the appeal (paras [1]-[14]) and then summarised the parties' respective contentions (paras [16]-[19]). The substance of the FTT's reasoning and analysis is to be found in paras [20]-[31] ("the Discussion section"). In summary, the FTT unanimously (i) agreed with all parties that s.35 of FOIA was engaged; (ii) agreed, however, with the IC and Dr Lamb that the relevant

policy had "crystallised" by the time of the FOIA request; and (iii) agreed with Dr Lamb that the arguments for disclosure outweighed those in favour of maintaining the exemption (and, as regards the latter, particularly the chilling effect factor). The FTT therefore allowed the appeal and substituted a new DN requiring disclosure of the withheld information within 14 days (para [32]).

7. Compressing the chronology thereafter somewhat, on 30 June 2016 Judge Peter Lane CP refused permission to appeal to the Upper Tribunal. On 19 July 2016 the Cabinet Office lodged a renewed application for permission to appeal directly with the Upper Tribunal. On 21 October 2016 I held an oral hearing of the Cabinet Office's application at Field House in London. The Cabinet Office was represented by Ms K Bretherton QC of Counsel, instructed by the Government Legal Department. The IC did not attend and was not represented, but was not required to do either. Dr Lamb attended in his own stead. I am grateful to both Ms Bretherton and Dr Lamb for their detailed and helpful oral submissions and skeleton arguments.

**The First Respondent's proposed grounds of appeal**

8. The Cabinet Office's grounds of appeal are set out in the Notice settled by Ms Bretherton and dated 19 July 2016. The overarching submission is that the FTT erred in law in its application of the public interest balancing test (PIBT). The proposed grounds of appeal are five-fold:

(i) the FTT erred in holding that the policy had crystallised although the Chilcot Inquiry itself was still continuing;
(ii) in reaching its conclusion on crystallisation, the FTT erred in focusing on the question of whether the Government might have decided to re-constitute the panel membership;
(iii) the FTT failed to give any or any proper weight to the chilling effect of disclosure;
(iv) the FTT erred in rejecting the argument that the chilling effect was particularly weighty when dealing with controversial matters considered at the highest levels of Government;
(v) the FTT effectively adopted an absolute requirement to disclose in those cases where policy had crystallised.

9. As can be seen, grounds 1, 2 and 5 all concern the issue of when the policy in question crystallised, whereas the focus of grounds 3 and 4 is the chilling effect. These grounds were supplemented by a number of further arguments as to why permission should be granted, developed further in both Ms Bretherton's skeleton argument and oral submissions.

**The Upper Tribunal's analysis**

*Introduction*

10. It is important as a starting point to make the observation, without wishing to sound trite, that one can normally assume that a specialist tribunal knows what it is doing. The FTT in this case was just such a specialist tribunal, comprising a senior Judge sitting with two members with particular experience enabling them to represent the interests both of those who make FOIA requests and the public authorities which must respond to them. As Lloyd Jones LJ put it in *Department for Work and Pensions v Information Commissioner and Zola* [2016] EWCA Civ 758 at paragraph [34] (dissenting on the outcome in that case but not on this point):

> "Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much

> as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts."

11. That observation is the answer (at least in part) to Ms Bretherton's somewhat surprising submission that the "brevity" of the Discussion section of the FTT's decision "is indicative of a cursory consideration of the decisions and submissions of both the Cabinet Office and the Information Commissioner" (skeleton argument at §8). The question is not whether the FTT's decision is *long enough*, but rather whether it is *good enough*. Brevity, of course, can be a virtue and if it is good enough, it is certainly long enough (and, in any event, inadequacy of reasons as such is not one of the grounds of appeal). Ms Bretherton complains that the Discussion section is only about 2 pages long – but in making that submission she in any event overlooks the fact that the FTT also issued a closed annex, running to a further 2 pages, in which, as the FTT said in open, the FTT "go into more detail concerning the disputed information and the issue of the balance of the public interest" (para [20]).

12. Nor do I see any force in Ms Bretherton's argument that the divergence between the approach of the Cabinet Office and the Commissioner on the one hand and the FTT on the other is a factor supporting the grant of permission. This is getting perilously close to a submission that the FTT should defer to the views of the public authority and the Commissioner where the latter coincide (and, as Dr Lamb rightly pointed out, there was in fact disagreement between the two on the issue of crystallisation). There may well have been *some* consistency of approach between the Cabinet Office and the IC, at least as regards the outcome of the PIBT; but the FTT explained adequately why that approach was consistently wrong on the particular facts of this case. That is not a matter which calls for "clarification" by the Upper Tribunal.

*The crystallisation grounds*

Ground 1

13. The Cabinet Office's first ground of appeal is that the FTT erred in holding that the policy had crystallised even though the Chilcot Inquiry itself was still continuing. The argument appears to be that the very nature of a public inquiry involves the application of an ongoing policy in contrast to e.g. an Act of Parliament, in respect of which policy is crystallised when the Act is passed. The Cabinet Office contends that it is impossible to separate the *composition* of the Inquiry panel from the *subject* of the Inquiry, which was ongoing at the time of the FOIA request. This was the point on which the IC differed from the public authority's approach. Dr Lamb also argues with some force that the case now being advanced by the public authority is subtly different to that being put forward before the FTT (i.e. the argument was originally put on the basis that disclosure would undermine the Inquiry before its report was published, whereas now the argument is that one cannot separate the composition of the panel from the subject of the Inquiry). However, I need not resolve that nuanced argument – for the simple reason that crystallisation must ultimately be a question of fact. That has long been the approach of the FTT and its predecessor tribunal; see e.g. *DfES v IC and Evening Standard* [2007] UKIT EA/2006/0006 at paragraph 75(v):

> "When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the

> exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a 'seamless web' approach to policy as a helpful guide to the question whether discussions on formulation are over."

14. In the present case, the FTT's finding was as follows (at para [23]):

> "On any sensible view, the policy was finalised when the Prime Minister made his announcement to the House of Commons in June 2009. By 2014, the Inquiry had been at work for some five years."

15. That was a finding of fact that was plainly open to the FTT on the evidence.

16. However, Ms Bretherton sought to persuade me that in this context I should examine the terms of both Dr Lamb's original FOIA request and his request for an internal review. If I followed her argument properly, it was that these reasons were in themselves informative and demonstrated that Government policy had not crystallised at the point when the Inquiry was established. In particular, Dr Lamb's emphasis in his request for an internal review on the issue of the Inquiry panel's independence showed there was a connection between the issues of the panel's composition and the Inquiry's outcome. This made the position of policy formulation on panel composition for a major Inquiry quite a different matter to policy formulation leading to e.g. an Act of Parliament. In this context Ms Bretherton relied heavily upon the decision of Charles J, sitting as Chamber President of the Upper Tribunal Administrative Appeals Chamber (UTAAC) in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) (from now on, *Lewis*; NB this decision is under appeal to the Court of Appeal, with a hearing scheduled for December 2016). Ms Bretherton placed reliance on paragraph 37 of Charles J's decision as authority for the proposition that the reasons for Dr Lamb's original FOIA request and his subsequent internal review request were of significance (my emphasis added):

> "37. But, in my view, the linkage between the contents of the information and the application of the general public interests in favour of disclosure *will often be informed by the reasons for the request*, which will normally be founded on what it is thought it contains or might contain or omit. Further, the Information Commissioner and the FTT will know the contents of the requested information and they can therefore assess how disclosure of that content will promote the public interest."

17. This argument will not wash, for at least two reasons.

18. First, it is often said that FOIA is motive-blind. Whilst it is certainly the case that there is no requirement to state any motive when making a FOIA request, the statement of principle that FOIA is motive-blind is too much of a generalisation to be of real assistance. There are clearly situations in which motive may be relevant (e.g. in assessing whether a request is vexatious for the purposes of section 14). Another such situation is in the application of the PIBT – requesters are under no obligation to reveal their motive, but if they do it may become relevant to the public interest balance (see e.g. *Kirkhope v The Information Commissioner and the Cabinet Office* [2016] UKUT 344 (AAC) at paragraph [21]). However, it seems to me far too tenuous a linkage to say that the requester's motive can impact on whether a particular Government policy has gone through the process of formulation and development such that it has crystallised. Logically the requester's subjective motive, which may or may not have been articulated, cannot determine when that stage is reached.

19. Second, having had the opportunity to re-read *Lewis*, on a proper analysis the observations of Charles J actually lend no support whatsoever to the point which is sought to be made. Charles J was certainly not saying (at paragraph 37 of *Lewis*) that the requester's motive could assist in determining when policy had crystallised. Paragraph 37 comes towards the end of a passage in which Charles J explored the arguments around the benefit of disclosure in applying the PIBT. At paragraph 36 he makes the (with respect) obvious points that the FOIA requester does not have to disclose any motive and by definition will not know the contents of the disputed information, and so will be unable to particularise a public interest argument based on those contents. It is further noted that the arguments for disclosure in the PIBT may then have to be put by the requester at a generic level. All that paragraph 37 does is confirm that the reasons for the request may have an impact on the application of the PIBT under section 2(2)(b) – not that they will assist with the conceptually quite separate issue as to whether policy has crystallised for the purpose of section 35(1)(a).

20. Indeed, rather than supporting the Cabinet Office's submissions, it seems to me that *Lewis* lends further support to Dr Lamb's argument that the FTT approached the issues it had to determine in an entirely lawful manner. The recurring theme in *Lewis* is above all that "what is required is an assessment and comparison of actual harm and benefit by reference to the contents of the requested information that falls within a qualified exemption" (at paragraph [23]). Furthermore, Charles J highlighted the difficulty associated with FOIA qualified exemptions and the candour argument so far as senior civil servants are concerned, namely the weakness that "any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest" (at paragraph [28]). In that context Charles J made the following pointed observation (at paragraph [29]):

> "… In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:
> i) this weakness,
> ii) the public interest in there being disclosure of information at an appropriate time that shows that the robust exchanges relied on as being important to good decision making have taken place, and
> iii) why persons whose views and participation in the relevant discussions would be discouraged from expressing them in promoting good decision making and administration and thereby ensuring that this is demonstrated both internally and when appropriate externally,
>
> is flawed."

21. The Cabinet Office's case as put to the FTT in the present appeal manifested precisely that flaw, as the FTT explained in both its open decision and the closed annex.

22. Finally, at a more general level, Ms Bretherton sought to pray in aid the well-known problems that have best the Independent **Inquiry** into **Child Sexual Abuse** (IICSA) and the composition of that panel (and in particular the difficulties over the appointment of a Chair). With respect, that does not advance her case here. The circumstances of the two inquiries, and in particular the issues around panel composition and leadership, are entirely different. Furthermore I do not see how the Upper Tribunal could usefully add anything to the jurisprudence on this issue, given that the issue is ultimately one of fact. This ground is not arguable.

Ground 2
23. The Cabinet Office's second proposed ground of appeal is that in reaching its conclusion on crystallisation, the FTT erred in focusing on the question of whether the Government might have decided to re-constitute the panel membership. The suggestion is that the FTT wrongly used the issue of whether the Government might have decided to re-constitute the panel's membership as the test of whether the policy had crystallised. This ground, which in some ways is another way of putting the first ground, is simply misconceived. The FTT were not using the absence of any plans to reconstitute the panel (other than in the normal course of events, following the death of Sir Martin Gilbert) as a proxy measure for determining when crystallisation of policy took place. Rather, the FTT were simply giving this factor as another reason for their finding on the facts that the policy concerning the composition of the Inquiry had crystallised in 2009. This ground is likewise unarguable.

Ground 5
24. The fifth ground of appeal is that the FTT's approach was akin to adopting an absolute requirement to disclose the requested information in those cases where the policy in question had crystallised. Ms Bretherton makes two arguments in support of this ground. First, she submits the FTT's approach is inconsistent with s.35(2) of FOIA. But s.35(2) is a specific provision which applies in the context of "statistical information", which is just not the issue in the present context. Second, she argues the FTT's approach is inconsistent with the approach set out by Charles J in *Lewis* (at paragraph [38]). It is nothing of the sort. Charles J was simply pointing out there is no statutory presumption under FOIA in favour of disclosure, but that in the event of a 'tie' on the PIBT then the burden of proof provides a result. In the present case the FTT concluded that the factors in favour of disclosure under the PIBT were "far weightier" (para [31]) than those in favour of maintaining the exemption. Patently the FTT recognised the relevant exemption was qualified and weighed the respective arguments in the scales of the PIBT. This ground is likewise not arguable.

*The chilling effect grounds*
Ground 3
25. The third ground of appeal is that the FTT's findings that the policy had already crystallised, and so the chilling effect had lesser force, tainted the FTT's approach to the PIBT. As a result, it is said, the FTT failed to give any or any proper weight to the chilling effect of disclosure. However, the challenge to the FTT's finding on crystallisation has no traction, for the reasons set out above. In addition, in dealing with this ground and the fourth ground of appeal relating to the chilling effect, I note again that the FTT's findings and reasoning in open (paras [25]-[29]) are supplemented by the detailed closed annex running to a further 2 pages. There are, obviously, limits to what a tribunal can say in open. In the present case, having rehearsed the open arguments, the FTT concluded its discussion of the chilling effect as follows:

> "29. Having examined the withheld information, we are frankly at a loss to see how its disclosure would be remotely likely to have any relevant 'chilling effect' on future advice at this level of seniority and importance. We have more to say about this in the Closed Annex. We are in no doubt that any reasonable person, reading the information, will conclude that it comprises precisely the kind of high-level and frank advice, which the public would expect the Prime Minister to be given. The suggestion that the disclosure of this information would cause the same (or future) public officials to behave differently is, at best fanciful."

26. That was, in my assessment, plainly a view the FTT was entitled to come to, having reviewed the disputed information and weighed the various submissions. As Dr Lamb argues, this ground is at heart no more than an expression of a disagreement of opinion which does not disclose any arguable error of law. Moreover, it is also axiomatic that the weight to be given to particular material considerations when undertaking the PIBT is quintessentially a matter for the decision-maker – here the FTT. As Mitting J put it in *ECGD v Friends of the Earth* [2008] EWHC 638 (Admin), that task is "plainly fact-specific" (at paragraph [25]). I dismiss this ground of appeal as unarguable.

Ground 4

27. The fourth ground of appeal, supplementing and expanding upon the third, is that the FTT erred in rejecting the Respondents' argument that the chilling effect was particularly weighty when dealing with controversial matters considered at the highest levels of Government. The relevant (open) part of the FTT's Discussion section is at paragraphs [26]-[28]:

> "26. We are entirely unpersuaded by this rationale. Taken to its logical conclusion, it would turn the qualified exemption which Parliament has seen fit to impose in respect of section 35(1) into what would, in practice, be very close to an absolute exemption in the case of advice given to the Prime Minister. By virtue of his or her office, the Prime Minister is likely to be predominantly occupied with 'high profile and potentially controversial matters.'
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> 27. The Commissioner's stance also carries the highly problematic implication that, the more senior the level of official; adviser concerned, the greater the risk that disclosure would have an adverse effect upon that (or some comparable) advisor's likely future behaviour. It is, however, precisely at the highest levels of the Civil Service that the public expects to find the highest standards of official behaviour, including robustness in giving a Prime Minister the best possible advice, candid though it may need to be.
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> 28. It is also at this level that officials can most be expected to have regard to the point recently made by Charles J in *Lewis*; namely, that public authorities operating within the realm of qualified (as opposed to absolute) exemptions in FOIA will be aware that any information they produce is potentially liable to disclosure."

28. As Dr Lamb argues, the FTT did not as such either state or imply that either Respondent was suggesting that there was an absolute exemption in play. Rather, as Dr Lamb also contends, the Cabinet Office's submission tends towards a class rather than a contents based approach. I therefore do not accept Ms Bretherton's argument that paras [26] and [27] involved the FTT mischaracterising the Respondents' written submissions in such a way that fairness demanded that they be given the opportunity to respond (either by way of adjourning for further submissions and/or an oral hearing). All the FTT was doing here was evaluating the strength of the respective arguments and pointing out their implications. That was part of the FTT's process of determinative assessment and adjudication and so did not require any sort of 'right of reply'.

*A supplementary procedural ground of appeal*

The procedural timeline

29. In its Form UT13 lodged on 19 July 2016 the Cabinet Office put forward a further ground of appeal based on a procedural point. The ground essentially is that the FTT erred in law in refusing to extend the initial stay after it had refused permission to

appeal to the Upper Tribunal. More particularly, the Cabinet Office on Form UT13 argued that the FTT had erred in law in two respects. The first was the decision on 20 May 2016 to direct disclosure in 14 days. The second was the decision to refuse to extend the stay after it had refused permission to appeal (PTA) on 30 June 2016. I will deal with each in turn. The Cabinet Office sought PTA on this procedural point "in order that guidance can be given on this issue to prevent this difficulty arising again". The relevant sequence of events was as follows:

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|---|---|
| 20 May 2016 | FTT issued its decision on appeal, substituting a DN requiring disclosure of withheld information within 14 days; |
| 24 May 2016 | GLD on behalf of Cabinet Office wrote to FTT (i) intimating that an application for permission to appeal would be lodged within 28 days of date of issue of FTT decision; and (ii) applying for stay of FTT decision pending the forthcoming application for permission to appeal; |
| 1 June 2016 | Judge Peter Lane CP granted stay of effect of FTT decision pending determination of permission application; |
| 17 June 2016 | GLD make application to FTT for permission to appeal to Upper Tribunal |
| 30 June 2016 | Judge Peter Lane CP refused permission to appeal and refused to continue stay; |
| 8 July 2016 | GLD wrote to FTT asking for confirmation that effect of 20 May 2016 FTT decision was stayed pending determination by Upper Tribunal of application for permission to appeal; |
| 11 July 2016 | FTT office replied on behalf of Judge Peter Lane CP "The stay is NOT continued, you must request one from the UTAAC"; |
| 11 July 2016 | GLD wrote to Upper Tribunal requesting stay of FTT decision; |
| 13 July 2016 | Upper Tribunal wrote to GLD advising application for stay could not be considered in absence of application for permission to appeal; |
| 19 July 2016 | GLD filed with Upper Tribunal an application for (a) permission to appeal and (b) a stay of the effect of the FTT decision; |
| 21 July 2016 | I issued initial Directions on application, including stay of effect of FTT decision. |

<u>The FTT decision on 20 May 2016 to direct disclosure in 14 days</u>

30. When the IC issues a DN requiring a public authority to take certain steps within a specified timeframe, the relevant specified period must not expire before the end of the time limit for appealing *to the FTT* (i.e. 28 days) – see FOIA section 50(6). It seems to me that provision cannot apply directly to the FTT when it is giving its own decision, as any appeal thereafter is *to the Upper Tribunal*, and not back again to the FTT against the substituted DN. I acknowledge that FOIA section 58(2) provides that where the DN is contrary to law or the IC should have exercised her discretion differently, then the FTT "shall allow the appeal or substitute such other notice as could have been served by the Commissioner". This statutory phrase is undoubtedly not without its difficulties (see *Information Commissioner v Bell (Information rights: Information rights: practice and procedure)* [2014] UKUT 106 (AAC)). However, it

does not seem to me to follow that the FTT is *necessarily* bound to grant a 'period of grace' of 28 days.

31. Of course, the time limit for applying to the FTT for PTA to the Upper Tribunal in information rights cases is also 28 days. So it might have been wise, once the FTT had decided to direct disclosure within 14 days, to abridge the time for applying for PTA to 14 days in the exercise of its powers under rule 5(3)(a), but I cannot see how it can be realistically argued that it was an error of law *not* to do so. In any event, the decision to direct disclosure within 14 days (or 21 days or 28 days or whatever) was in no way material to the outcome of the case. Indeed, by now so much water has passed under the bridge since then that it cannot seriously be argued that this factor amounts to some other good reason for granting PTA.

The FTT decision to refuse to extend the stay after refusing PTA on 30 June 2016

32. The FTT obviously has the power to suspend the effect of its own decision pending the determination of a PTA application by either the FTT or the Upper Tribunal (see rule 5(3)(l) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976); "the GRC Rules"). That is a quintessentially discretionary power that must be exercised in accordance with the overriding objective under rule 2. Judge Lane CP exercised that power on 1 June 2016 pending a ruling on the PTA application. In that latter ruling dated 30 June 2016 he gave the grounds of appeal short shrift and concluded as follows:

> "6. Having dealt with the grounds of the application, I do not consider it is appropriate to continue the suspension of the effect of the Tribunal's decision. The Cabinet Office may apply to the Upper Tribunal for a suspension, pursuant to rule 5(3)(m) of the Tribunal Procedure (Upper Tribunal) Rules 2008."

33. So, it could really not be much clearer. Rule 5(3)(l) of the GRC Rules involves the exercise of a discretion; there is no guarantee that a stay will be continued by the FTT until the Upper Tribunal has ruled on a PTA application; and Judge Lane CP made it crystal clear that he was declining to continue the stay, but pointing out that an application could be made to the Upper Tribunal. Given the clarity of Judge Lane CP's ruling, I regret to say I have some difficulty in following the sense of the GLD letter of 8 July 2016, as it appeared to be asking the FTT to confirm something to be the case which the ruling had made perfectly plain was not the case. That may well account for the rather peremptory nature of the FTT office's e-mailed reply of 11 July 2016.

34. Neither does the GLD's subsequent correspondence with the Upper Tribunal office convince me that those concerned had a full grasp of the various tribunal procedural rules. I say that as rule 5(3)(m) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; "the Upper Tribunal Rules") provides that it may "in an appeal, or an application for permission to appeal, against the decision of another tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal." Yet the GLD made an application to the Upper Tribunal for a stay on 11 July 2016 in splendid isolation, with no application for PTA, despite the plain words of rule 5(3)(m) of the Upper Tribunal Rules. Once this was rectified after the intervention of an Upper Tribunal Registrar, the stay application was properly re-made on 19 July 2016 and promptly granted.

35. Again, I do not think it is arguable that the FTT's refusal to extend the stay involved any error of law. It was a matter of discretion and Judge Lane CP's consequential case management decision was one that was well within the range of reasonable interlocutory decisions that he might have made. Nor did it have any

material effect on the outcome of the case. Nor, moreover, given the clarity of the various procedural rules, is there any good reason for the matter to be considered on appeal by the Upper Tribunal.

*Some other good reason?*

36. I recognise that even if the FTT did not err in law, I still have a discretion as to whether or not to give permission to appeal. That is a matter of discretion. That might be a suitable course of action if I am bound by authority and the point needs ultimately to be considered by the Court of Appeal. That is not the case here. It might also be appropriate where guidance on an issue of law is needed at a precedent-setting level. Ms Bretherton nails her colours to that particular mast. She says the Upper Tribunal should provide guidance on the issue of crystallisation and on the chilling effect and candour arguments. I disagree. The law is tolerably clear. Ms Bretherton has not persuaded me either that this FTT misunderstood or misapplied the law or that the law lacks clarity. Instead, I take the view that this was a case of a FTT applying the law correctly to the facts as it reasonably found them to be. Ms Bretherton also argues that this case involves sensitive matters with a high public profile that are of great importance to the Cabinet Office. That may well be right, but that does not mean Government departments are entitled to a free pass to the next level of the appellate hierarchy. This last argument relating to the inherent sensitivity of the case might conceivably help 'tip the balance' if the application was borderline but in my assessment the test for granting permission is missed by quite some margin. It is precisely because of the much wider importance of the Inquiry that this present ruling is set out in rather more detail than might otherwise have been the case, but the point goes no further. In sum, Dr Lamb has been exceedingly patient and is entitled to enjoy the fruits of his victory before the FTT.

**An ongoing stay**

37. There remains the issue of the Upper Tribunal stay. I suspended the effect of the FTT decision pending determination of this application for permission to appeal in the Upper Tribunal. I have now refused permission to appeal. Other than an application for a set aside on procedural grounds under rule 43, if the Cabinet Office wish to challenge this ruling then it will have to do so by way of judicial review in the High Court (Administrative Court), subject to satisfaction of the *Cart* second appeal criteria (Civil Procedure Rules (CPR) r 54.7A(7)). I believe that the time limit for making such an application for permission to appeal is 16 days from the date of issue by the Upper Tribunal office of this ruling (CPR r 54.7A(3)). Given the time needed to get the matter in front of a High Court Judge, I direct that the stay continues for a further 7 days after that deadline, i.e. 23 days from the date of issue of this ruling.

**Conclusion**

38. Dr Lamb's own skeleton argument concludes with the submission that "there is next to no merit in the Cabinet Office's case in seeking permission to further appeal and that what it wants to do is re-run the first appeal because it strongly disagrees with the conclusions and judgment properly made by the FTT". For the reasons set out above, I have to say that I agree with that analysis (although I would prefer to say simply "no merit" rather than "next to no merit"). I conclude that the FTT's decision discloses no arguable error of law. In addition, whilst the Chilcot Inquiry is plainly a matter of considerable public importance, I see no other good reason why permission should be granted. I therefore refuse permission to appeal from the FTT decision to the Upper Tribunal.

39. However, I also extend the stay suspending the effect of the FTT decision for 23 days from the date of issue of this ruling (i.e. as noted above, and for the avoidance

of any doubt, the date the Upper Tribunal office send it out, which may be different from the date below).

| **Signed on the original** | **Nicholas Wikeley** |
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| **on 28 October 2016** | **Judge of the Upper Tribunal** |