



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. GIA/2319/2019

On appeal from the First-tier Tribunal (Social Entitlement Chamber)

Between:

Dr Reuben Kirkham

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge K Markus QC

Decided on consideration of the papers

On 16th December 2019

Representation:

Appellant: In person

Respondent: In-house solicitor

DECISION

The decision of the Upper Tribunal **is to allow the appeal**. The decision of the First-tier Tribunal made on 3rd September 2019 under number EA/2018/0036 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remake it as follows:

The Appellant does not require permission to request a transcript of the hearing in the First-tier Tribunal dated 5th March 2019, such transcript to be paid for at his expense.

Alternatively, if it is required, permission is given.

REASONS FOR DECISION

1. Dr Kirkham had appealed under section 57 of the Freedom of Information Act 2000 to the First-tier Tribunal ('FTT') against a decision of the Information Commissioner. A substantive hearing of that appeal took place in the FTT on 5th March 2019. The FTT had arranged for the hearing to be recorded and Dr Kirkham was provided with CDs containing the recording. In case management directions made by the Registrar of the General Regulatory Chamber ('GRC') of the FTT dated 22nd March 2019, limitations were placed on the use by Dr Kirkham of the recording without the express written permission of the Chamber President of the GRC.

GIA/2319/2019

2. On 1st May 2019 Dr Kirkham sent an email to the FTT in which he indicated his intention to apply for an official transcript of the hearing of 5th March 2019 “so I can make what was said a public document”. He said that he was concerned that the decision did not accurately represent what happened in the proceedings. In Case Management Directions the Registrar observed that the intended use of the transcript would contravene directions of 22nd March. Dr Kirkham’s email was sent to the President of the GRC.

3. It does not appear that anything further occurred in this regard until, on 2nd August 2019, Dr Kirkham completed the standard form to request a transcript which was to be paid for by him. On 3rd September 2019 an Administrative Officer of the GRC wrote to Dr Kirkham to inform him that “permission to request a transcript has been refused by the Chamber President. If the UT needs a transcript they will, no doubt, order that one be provided”. Dr Kirkham sought permission to appeal. The Administrative office replied that the CP had commented that “as she has never issued a ruling that the Applicant is not entitled to a transcript, this application seems inappropriate.”

4. I gave Dr Kirkham permission to appeal, observing that the decision of 3rd September appeared to be wrong in law and indicating that, unless a party objected, I was minded to allow the appeal and remake the decision. The parties have not objected and I allow the appeal for the reasons which follow. However, I first say a few words about jurisdiction. Although no party has raised an issue about the Upper Tribunal’s jurisdiction in this case, it is for this Tribunal to be satisfied that it has jurisdiction and it seems to me that the circumstances in which this matter has come to the Upper Tribunal call for a brief consideration of the matter.

5. By virtue of section 11(1) of the Tribunals Courts and Enforcement Act 2007 a party has a right to appeal against a decision of the FTT on a point of law unless the decision is an excluded decision within section 11(5). Despite the GRC President’s view that she had not issued a ruling, I am satisfied that the Administrative Officer’s email of 3rd September was a communication of a decision to refuse consent. Furthermore the decision was not an excluded decision.

6. For reasons which I explain below, I have concluded that the FTT judge did not have power in this case either to give or to refuse consent. It follows that her decision was made without jurisdiction. However, it is clearly established that the Upper Tribunal has jurisdiction to decide the matter even if it was made without jurisdiction. See the following passage from the decision of the Upper Tribunal in *LS and RS v Her Majesty’s Revenue and Customs* [2017] UKUT 257 (AAC)

“23. In the case of the Upper Tribunal, an appeal is governed by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, which provides for the right of appeal on any point of law arising from a decision made by the First-tier Tribunal. That decision is valid for the purposes of an appeal regardless of whether or not it was made within the tribunal’s jurisdiction, whether or not it was validly made, and whether or not it involved the making of an error of law. If it were otherwise, the right of appeal would be ineffective, as the Privy Council recognised in *Calvin v Carr* [1980] AC 574 at 590:

“... where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal.”

GIA/2319/2019

7. I am satisfied that, in the present case, the FTT made a decision to refuse consent to the transcript. The decision is valid for the purpose of this appeal, regardless of whether the FTT had jurisdiction to make it.

8. In the present case, no consent was required to request a transcript. Consent is required in certain cases, such as in some family proceedings, where proceedings were held in private or where they include confidential matters. I am not aware of any requirement for consent in a case such as the present. A direction would be required if a transcript was sought at public expense, but Dr Kirkham was seeking a transcript at his own expense.

9. There is a Practice Direction of the Senior President of Tribunals as to transcripts of proceedings in the Upper Tribunal. A party is entitled as of right to a transcript, to be paid for by that party if they apply in writing within six months of the date of the hearing. There is not an equivalent Practice Direction relating to the FTT, but there is no reason why a party in the FTT should not also be entitled to a transcript. If I am correct in that regard, then responding to Dr Kirkham's request for a transcript was an administrative matter. On that basis, the judge's refusal of consent was made without jurisdiction and I set it aside.

10. I also consider this case on the alternative basis that, contrary to the position I set out above, there is some arcane rule requiring consent in a case such as the present although none has been drawn to my attention and I have not been able to discover one. If there is, the FTT should have given consent. The FTT provided no reason for refusing. There was nothing in the circumstances of the case to justify refusing consent. It was irrelevant that the CD recordings of the hearing had been provided to Dr Kirkham subject to limitations as to the use to be made of them. Whether or not there was good reason for imposing limitations (as to which I express no view in this case), those limitations did not apply to obtaining and using an official transcript.

11. In conclusion, the FTT's response to the request for consent to seeking a transcript should have been to decline to deal with it on the basis that no consent was required or, alternatively, to give consent. It is not proportionate to consume further resources enquiring as to the precise procedural requirements for obtaining a transcript of proceedings in the FTT. The most practical way of disposing of this appeal is to do what I suggested when I gave permission to appeal and to which neither party has objected: to set aside the decision made by the FTT and to substitute it with a decision that no consent was required or, if it was, to give consent.

**Signed on the original
on 16th December 2019**

**Kate Markus QC
Judge of the Upper Tribunal**