IN THE UPPER TRIBUNAL **Appeal No. GIA/26/2020**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant:	Mr Terry Crossland
Respondent:	The Information Commissioner
Tribunal:	First-tier Tribunal (Information Rights)
Tribunal Case No:	EA/2019/0252
Tribunal Venue:	in chambers
Decision Date:	4 November 2019

RULING ON APPLICATIONS

I refuse the repeat recusal application (dated 5 June 2020) for the same reasons as set out in the original recusal ruling (dated 4 May 2020).

For the avoidance of doubt, and in the alternative, I am treating the repeat recusal application as an application to set aside the recusal ruling and in turn (under rule 48) as an application for permission to appeal the recusal ruling to the Court of Appeal.

I also refuse the first and second set aside applications (dated 15 June 2020 and 22 June 2020) to set aside the ruling (dated 4 May 2020) striking out the application for permission to appeal against the above decision of the First-tier Tribunal.

For the avoidance of doubt, and in the alternative, I also treat (under rule 48) the set aside applications as an application for permission to appeal to the Court of Appeal.

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL TO THE COURT OF APPEAL AGAINST A DECISION OF THE UPPER TRIBUNAL

In the matter of an application by Mr Terry Crossland for permission to appeal on a point of law against the decisions of the Upper Tribunal under file number GIA/26/2020, dated 4 May 2020, being the recusal ruling and the strike out ruling.

The Upper Tribunal has considered whether:

a) **the proposed appeal would raise some important point of principle or practice: or**
b) **there is some other compelling reason for the relevant appellate Court to hear the appeal.**

Permission to appeal is refused. The appropriate court, assuming it has jurisdiction, is the Court of Appeal. For the reasons explained in this ruling, the appropriate route to challenge this ruling may instead be by way of judicial review in the High Court.

These rulings are made under the Tribunal Procedure (Upper Tribunal) Rules 2008, rules 2, 5, 6, 8, 43-46 and 48.

REASONS

Introduction and background

1. The full chronology of these proceedings will be evident from the case file. For present purposes it is helpful to start with my three rulings dated 4 May 2020.

2. In the first ruling on 4 May 2020, I refused Mr Crossland permission to appeal to the Court of Appeal against my earlier ruling of 14 February 2020, in which in turn I dismissed Mr Crossland's application to receive electronic copies of all documents in the proceedings relating to his application for permission to appeal, namely GIA/26/2020 (in addition to hard copies issued as per the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). I call this "the original refusal of permission to appeal to the Court of Appeal ruling".

3. In the second ruling on 4 May 2020, I refused Mr Crossland's application that I should recuse myself from dealing with his application for permission to appeal to the Upper Tribunal in GIA/26/2020 (and indeed any further future applications or appeals involving the Applicant). I call this "the recusal ruling".

4. In the third ruling on 4 May 2020, I struck out Mr Crossland's application for permission to appeal to the Upper Tribunal in GIA/26/2020. This application for permission to appeal had been made in respect of First-tier Tribunal's case management ruling of 4 November 2019 (EA/2019/0252) and allied case management rulings. The application was struck out on the basis of want of jurisdiction and/or lack of reasonable prospects of success (rules 8(2)(a) and 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008). I call this "the strike out ruling".

5. Those three rulings were issued by the Upper Tribunal more than two weeks later on 22 May 2020. The delay was doubtless due to the impact of the Coronavirus crisis on the Upper Tribunal office, which has yet to return to a full complement of working.

6. Mr Crossland has responded with three applications to the Upper Tribunal dated 5 June 2020, 15 June 2020 and 22 June 2020. Those applications are in time.

7. In the application dated 5 June 2020, headed "Application for Judge Wikeley to recuse himself", Mr Crossland requests that I recuse myself (para. [6]) and, failing that, that I direct an oral hearing of the recusal application (para. [7]). I call this "the repeat recusal application".

8. In the application dated 15 June 2020, headed "Application for strike-out decision to be set aside and the PTA considered at a hearing in the interest of justice", Mr Crossland requests that I set aside the strike out ruling and instead direct a hearing of his application for permission to appeal against the First-tier Tribunal's ruling(s). I call this "the first set aside application".

9. In the application dated 22 June 2020, headed "Application for strike-out decision to be set aside in the interest of justice", Mr Crossland repeats his request that I set aside the strike out ruling and instead direct a hearing of his application for permission to appeal against the First-tier Tribunal's ruling(s). I call this "the second set aside application".

The repeat recusal application

10. The repeat recusal application dated 5 June 2020 is a repetition of the recusal application, which was considered and refused in the recusal ruling of 4 May 2020. In plain English, Mr Crossland is asking me to re-open and revisit a decision that has already been taken.

11. It would not seem possible to challenge the recusal ruling by way of a set aside application under rule 43, given that the recusal ruling was not "a decision which disposes of proceedings" within the terms of rule 43. However, although it has not been articulated as such, the repeat recusal application may be seen as an application for a direction setting aside the recusal ruling (see rule 6(5)). If so, I refuse that application for the same reasons as set out in the original recusal ruling.

12. Mr Crossland may then ask how he can challenge the Upper Tribunal's recusal ruling. There would seem to be two possibilities.

13. One possibility is that he applies for permission to appeal to the Court of Appeal, on the basis that the recusal ruling is "a decision made by the Upper Tribunal other than an excluded decision" (within section 13(1) of the Tribunals, Courts and Enforcement Act (TCEA) 2017).

14. A second and alternative possibility is that he applies to the Administrative Court for judicial review of the recusal ruling. The basis for this view is that the recusal ruling is "any decision of the Upper Tribunal on an application under TCEA section 11(4)(b) (application for permission or leave to appeal)", given the breadth of the term "any decision". If so, the recusal ruling is an excluded decision (TCEA, section 13(8)(c)) and so not appealable to the Court of Appeal. If that is right, then the remedy lies in judicial review proceedings in the High Court.

15. The legal position as to which of those two options is the proper course of action is unclear. This is undesirable from the point of view of users, especially for litigants in person.

16. In those circumstances, and for the avoidance of doubt, I treat the repeat recusal application as an application for a set aside and in turn (under rule 48) as an application for permission to appeal the recusal ruling to the Court of Appeal. This is without prejudice to the problem identified in paragraphs 13-15 above.

17. The right of appeal from the Upper Tribunal to the Court of Appeal lies on a point of law only (TCEA, section 13(1)). Any such applicant has to seek permission to appeal from the Upper Tribunal or from the Court of Appeal (see section 13(4)) and can only apply to the Court of Appeal if permission has first been refused by the Upper Tribunal (section 13(5)). The appeal lies to "the relevant appellate court" (section 13(11) and (12)), which for these purposes is the Court of Appeal of England and Wales, assuming it has jurisdiction (on the basis summarised in paragraph 12 above).

18. Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order (SI 2008/2834) further provides that the Upper Tribunal may not grant permission to appeal to the Court of Appeal unless it:

> "considers that –
> (a) the proposed appeal would raise some important point of principle or practice; or
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

19. I am refusing permission to appeal to the Court of Appeal because in my view neither of the conditions (a) and (b) set out in paragraph 18 above is satisfied. The Appellant is evidently not satisfied with the recusal ruling dated 4 May 2020 but, in my view, has not identified any arguable legal error in that ruling, let alone one that meets the stringent criteria set out above. In all the circumstances, I can see no other compelling reason for the Court of Appeal to hear an appeal in this matter, not least given the fact-sensitive nature of this case. I also bear in mind that the substantive application for permission to appeal has been struck out by a ruling on the basis that the Tribunal lacks jurisdiction and/or the application has no reasonable prospects of success.

20. It follows I am not persuaded there is any important point of principle or practice involved in the proposed appeal; nor can I see any other compelling reason to grant permission to appeal. I therefore refuse permission to appeal to the Court of Appeal.

21. For completeness, there are no grounds for setting aside the Upper Tribunal's decision for procedural reasons or for reviewing the decision.

22. Finally, I simply make the obvious point that it is not for this Tribunal to determine the jurisdiction of the High Court and the Court of Appeal respectively (see paragraphs 13-15 above). Nor can the Upper Tribunal or its staff provide legal advice.

The first set aside application

23. In the first set aside application of 15 June 2020, Mr Crossland requests that I set aside the strike out ruling and direct an oral hearing to consider his application for permission to appeal against the First-tier Tribunal's case management ruling(s).

24. I start with the obvious point that there is no right to an oral hearing where the Upper Tribunal is considering whether to strike out proceedings. The whole point of the strike out procedure is to prevent scarce judicial resources from being diverted to deal with cases which are in effect an abuse of process (see e.g. *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1). This objective would be undermined if there were oral hearings as a matter of course. There is no Article 6 ECHR right to an oral hearing in strike out proceedings.

25. Rule 6(5) would seem to have no purchase in the present context. This is because the strike out ruling was not a 'direction' by the Upper Tribunal, but rather a 'decision'.

26. However, although it is not explicitly framed in terms of rule 43, the application of 5 June 2020 could be construed as an application under rule 43 to set aside for a procedural irregularity. I need not pursue that line of enquiry as the further application of 22 June is expressly made under rule 43.

27. Rather, the basis for the first set aside application is Mr Crossland's argument that rule 22(3)(iia) and (4)(a) applies to the present circumstances, entitling him, so he says, to an oral hearing of his permission application. This submission is wholly misconceived. The right of oral renewal under rule 22 applies where an application for permission to appeal has been *refused* or (which comes to the same thing) *dismissed*. It does not apply where proceedings on an application for permission to appeal have been *struck out*. There is a fundamental conceptual difference between the two procedures. If the proceedings have been struck out, there is no application remaining to be determined under rule 22, whether by granting permission or refusing permission or giving limited permission. I therefore dismiss the first set aside application erroneously premised on rule 22.

28. For completeness, and in the alternative, I treat (under rule 48) the first set aside application as an application for permission to appeal to the Court of Appeal.

29. I refuse the deemed application for permission to appeal to the Court of Appeal from the Upper Tribunal's strike out ruling for the same reasons as set out above at paragraphs 16-20. Those reasons are incorporated herein. For completeness, there are no grounds for setting aside the Upper Tribunal's decision for procedural reasons or for reviewing the decision.

30. Mr Crossland may again ask how he can challenge the Upper Tribunal's strike out ruling. There would again seem to be two possibilities (see paragraphs 13 and 14 above).

31. So, to reiterate, one possibility is that Mr Crossland applies for permission to appeal to the Court of Appeal, on the basis that the strike out ruling is "a decision made by the Upper Tribunal other than an excluded decision" (within section 13(1) of TCEA 2017).

32. The second, and alternative, possibility is that Mr Crossland applies to the Administrative Court for judicial review of the strike out ruling. This is on the basis that the strike out ruling is arguably "any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal" (TCEA section 13(8)(c)). If so, the strike out ruling is an excluded decision and so is not appealable to the Court of Appeal. If that is right, then the remedy lies in judicial review proceedings in the High Court.

33. I repeat the observation about the undesirable legal uncertainty as to the appropriate route to challenge the strike out ruling (see paragraph 15 above).

The second set aside application

34. In the second set aside application of 22 June 2020, Mr Crossland has explicitly nailed his colours to the rule 43 mast. Certainly, the strike out ruling of 4 May 2020 is self-evidently "a decision which disposes of proceedings" and so in principle rule 43 may be invoked. Mr Crossland's case, in summary, is that the decision to strike out without holding an oral hearing on the permission application was "some other procedural irregularity" within rule 43(2)(d).

35. The limits of rule 43 are clear. It is not an opportunity to reargue the substantive merits of the case or to recycle the substantive grounds of appeal. Nor is it an opportunity to raise allegations of a supposed procedural irregularity in the First-tier Tribunal proceedings (see generally *SK v Secretary of State for Work and Pensions* [2016] UKUT 529 (AAC)).

36. Mr Crossland has submitted a 30-page document in support of his second set aside application. It would be plainly disproportionate to address each of his various points. I refuse the second set aside application essentially for two reasons, which I can summarise quite shortly.

37. The first is that it is not in the interests of justice (rule 43(1)(a)) for this case to proceed any further (for the reasons spelt out clearly in the original strike out ruling and which need not be repeated here).

38. The second is that there was no procedural irregularity (rule 43(1)(b) and 43(2)) in the Upper Tribunal proceedings. The more one scrutinises Mr Crossland's detailed grounds in his second set aside application, the more it becomes clear that he disagrees with and wishes to re-argue the merits of the strike out ruling. That being so, that disagreement is a substantive dispute, not a purely procedural matter as befits rule 43, and one which can only be resolved on judicial review or appeal.

39. For completeness, and in the alternative, I also treat (under rule 48) the second set aside application as an application for permission to appeal to the Court of Appeal. I refuse it for the same reasons as set out at paragraphs 28 and 29 above in respect of the first set aside application. I make the same further observations as in paragraphs 30-33 above.

Final observations

40. Although it is not for me to decide the point, on balance the better view seems to be that the proper route of challenge for both the recusal ruling and the strike out ruling is by way of judicial review. In principle the same must apply to the original refusal of permission to appeal to the Court of Appeal ruling (see paragraph 2 above). It is clear that there is no right of appeal to the Court of Appeal against an Upper Tribunal refusal of permission to appeal from a decision of the First-tier Tribunal. This is because such an Upper Tribunal refusal of permission is an excluded decision (see TCEA section 13(8)(c)). It is likewise clear that there is no right

of appeal against an Upper Tribunal refusal of permission even where such a decision is not technically an excluded decision (see *Sarfraz v Disclosure and Barring Service* [2015] 1 WLR 4441; [2015] AACR 35). Instead, any such refusal of permission may be challenged on an application for judicial review in the High Court. Any such application for judicial review faces a high hurdle in terms of the test applied for giving permission (see *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2011] UKSC 28; [2011] AACR 38) and is also subject to strict time limits.

41. Consistency would suggest that any ruling related to or associated with an application for permission to appeal ought to be considered either to be covered by the exclusion in TCEA section 13(8)(c) or by the principle applied in *Sarfraz v DBS* and so to be likewise challengeable only by judicial review. There would seem to be little logic in a permission ruling being subject to judicial review in the High Court whilst associated rulings are subject to separate appeal rights to the Court of Appeal. That is a recipe for jurisdictional confusion.

42. However, the position is by no means free from doubt. I say that as the Court of Appeal has considered an appeal against a refusal by the Upper Tribunal to set aside a refusal of permission to appeal – see *Samuda v Secretary of State for Work and Pensions* [2014] EWCA Civ 1 (and see to similar effect, albeit in the context of the courts, *Patel v Mussa* [2015] EWCA Civ 434). However, one difficulty with the decision in *Samuda* is that the Court of Appeal appears to have understood the Upper Tribunal to have been operating under the review power in TCEA section 10, whereas on a close reading of the case it seems the Upper Tribunal was actually applying rule 43 (which is not made under TCEA section 10). See further *R (Singh) v Secretary of State for the Home Department* [2019] EWCA Civ 1014.

43. The fundamental question, yet to be answered definitively by the superior courts, concerns the scope of the exclusion in TCEA section 13(8)(c). Does it simply exclude a right of appeal against an Upper Tribunal refusal of permission to appeal? Or does it also exclude a right of appeal against an Upper Tribunal ruling which is directly associated with a refusal of permission to appeal (e.g. a refusal by the Judge to recuse herself/himself and/or a ruling striking out the application for permission to appeal)?

44. Finally, I should remind Mr Crossland that the time limit for applying to the High Court for judicial review of an Upper Tribunal decision is very tight. Rule 54.7A(3) of the Civil Procedure Rules provides that a judicial review claim form and supporting documentation "must be filed no later than 16 days after the date on which notice of the Upper Tribunal's decision was sent to the applicant." The Upper Tribunal has no authority to extend that time limit. However, given the legal uncertainty referred to above, Mr Crossland would plainly have an argument that the 16 days runs from the date this final ruling is issued to him by the Upper Tribunal office (and so not the date I approve this ruling for issue, nor indeed the date of the original rulings dated 4 May 2020). However, I reiterate that I have no authority to extend judicial review time limits in the High Court.

Nicholas Wikeley
Judge of the Upper Tribunal

(Approved for issue on) **23 June 2020**