IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2023-001057-GIA
& UA-2023-001058-GIA
[2024] UKUT 127 (AAC)

On appeal from the First-tier Tribunal (General Regulatory Chamber)

In UA-2023-001057-GIA between:

Dr Reuben Kirkham

Applicant

- v -

The Information Commissioner

Respondent

In UA-2023-001058-JR between:

Dr Reuben Kirkham

Applicant

- v –

The First-tier Tribunal

Respondent

and

The Information Commissioner

Interested Party

Before: Upper Tribunal Judge Wikeley

Hearing date: 11 April 2024
Decision date: 22 April 2024

Representation:

Applicant: In person
Respondent: Mr Leo Davidson of Counsel, instructed by the Information Commissioner's legal office

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPEAL

The application for permission to appeal to the Upper Tribunal is struck out as having no reasonable prospects of success.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 8, 21 & 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

NOTICE OF DETERMINATION OF APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

The application for permission to apply for judicial review is refused.

This determination is made under sections 15 and 18 of the Tribunals, Courts and Enforcement Act 2007 and Part 4 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

REASONS FOR DECISION

The outcome of these proceedings in the Upper Tribunal

1. The application by Dr Kirkham for permission to appeal against the First-tier Tribunal's decision dated 18 April 2023 is struck out as having no reasonable prospects of success. The parallel application for permission to apply for judicial review of that same decision is dismissed.

The Upper Tribunal oral hearing

2. I held a remote oral hearing by CVP in this matter on 11 April 2024. Dr Kirkham, the Applicant, attended in person, representing himself, while the Information Commissioner was represented by Mr Leo Davidson of Counsel. The hearing lasted for just under 2 hours. Happily, there were no technical glitches in the course of the CVP hearing. However, regrettably there were several occasions on which I had to remind Dr Kirkham to focus his oral submissions on the issues which were directly relevant to the matters in hand. Just by way of example, Dr Kirkham insisted on telling me on several occasions about what he alleged were egregious data protection breaches by HMCTS in relation to the disclosure of documents released under the open justice principle in other proceedings sometime after the First-tier Tribunal's decision now under challenge. He may (or may not) be right about such matters, but those concerns shed no light on the lawfulness or otherwise of the First-tier Tribunal's decision of 18 April 2023.

3. These reminders should not have been necessary as Dr Kirkham is an experienced litigant in person. Furthermore, he has been reminded before of the importance of focussing on the proper role of both the First-tier Tribunal and the Upper Tribunal. As Upper Tribunal Judge Jacobs explained in *Kirkham v Information Commissioner (Section 12 of FOIA)* [2018] UKUT 126 (AAC) at paragraph 38:

> 38. As my decision draws to a close, this is a convenient place to make a general point about some of Mr Kirkham's ambitious submissions to the First-tier Tribunal and on this appeal. The role of the Upper Tribunal is to decide first whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). If, and only if, it so decides, it then has power to re-make the decision or to remit the case to the First-tier Tribunal for rehearing. It is part of the Upper Tribunal's function that it may give guidance to decision-makers and the First-tier Tribunal. That power is, however, confined to the issues that arise in the case before it. It does not include general guidance that extends beyond the scope of those issues. To take a couple of examples raised by Mr Kirkham, it does not include power for me in the context of this case to give guidance to the Information Commissioner on how to deal with issues under the Equality Act 2010 or on the proper form in which a decision should be made and issued.

An outline of the context to these proceedings

4. The background to this matter is somewhat convoluted. Suffice to say for present purposes that Dr Kirkham expressed concerns to Judge O'Connor, the Chamber President of the First-tier Tribunal (General Regulatory Chamber) (Information Rights), about the Tribunal's decisions to strike out certain appeals. It so happens that each of the strike out decisions in question had been taken by Judge McKenna. It is also only right to say that Dr Kirkham was neither a party to any of the appeals that had been struck out and nor was he acting as the representative for any such affected party.

5. Dr Kirkham wrote to Judge O'Connor referencing his concerns and citing the case reference numbers for 11 such cases. In doing so, Dr Kirkham applied for the decisions to be set aside (quite which decisions were in issue is a matter of some dispute and I return to later). Judge O'Connor refused the set aside applications and subsequently refused permission to appeal to the Upper Tribunal.

6. Dr Kirkham then applied direct to the Upper Tribunal for permission to appeal (UA-2023-001057-GIA) and in the alternative for permission to apply for judicial review (UA-2023-001058-JR). Initially I issued a strike out warning in respect of the application for permission to appeal on the basis that the First-tier Tribunal (FTT) may not have had jurisdiction in the first place to entertain the set aside applications made by Dr Kirkham. Subsequently, and in the interest of ensuring that relevant arguments were fully ventilated, I directed a joint oral hearing of the strike out proposal and the application for permission to apply for judicial review.

The proceedings before the First-tier Tribunal

7. On 9 April 2023 Dr Kirkham sent Judge O'Connor a submission headed "In the Matter of Third Party Disclosure in the cases of EA/2022/0243, EA/2022/0096, EA/2022/0212, EA/2022/0211, EA/2022/0235, EA/2022/0319, EA/2022/0326, EA/2022/0377, EA/2022/0290, EA/2022/0263 & EA/2022/0292". The reference to "Third Party Disclosure" was a reference to Dr Kirkham's then extant open justice application for disclosure of case documents relating to the 11 appeals cited. Judge Hughes subsequently granted Dr Kirkham's disclosure applications in a ruling dated 8 October 2023 (*Kirkham v Information Commissioner* [2023] UKFTT 00833 (GRC)).

8. The core of Dr Kirkham's submission dated 9 April 2023 read as follows:

> 10. The McKenna strike out cases that I have seen all involve errors of the merits. The concerns that I had were well established.
>
> 11. However, there were more fundamental issues that can be only be seen from reading the files:
>
> a. There is a tendency for Ms McKenna to impute a position on behalf of a party which is not consistent with what a party said. In other words, the strike outs were on a false basis.
>
> b. The Section 8 'strike out' warnings were invalid, because they were made by a staff member, rather than a Judge or Registrar.
>
> c. In any event, the Section 8 strike out rulings did not do anything than say 'please respond' to the Information Commissioner's application. They did not involve any form of judicial consideration of the merits of the Commissioner' case. This is not a proper implementation of the Rule 8 procedure, especially when considered with respect to the 'overriding objective'.
>
> d. There is a lack of natural justice, in that the applicants have (wrongly) assumed their full file is in front of the Tribunal and have acted accordingly. In other words, the whole strike out process proceeded based on a false assumption.

9. In paragraph [12] of his application. Dr Kirkham applied "for all of the McKenna strike out rulings on Freedom of Information Act (2000) and/or Environmental Information Regulations (2003) cases where a case was struck out to be set aside."

10. Judge O'Connor dealt with Dr Kirkham's application in his ruling dated 18 April 2023. The Judge first dealt with the question of whether the composite set aside application

was confined to the 11 cases specifically cited by Dr Kirkham or extended to all such cases involving strike outs by Judge McKenna. On that issue the Chamber President ruled as follows:

> 2. The application is to be found at paragraph 12 of a document in which the abovementioned Tribunal case references constitute part of the heading. It is unclear whether Dr Kirkham's application relate only to the appeals identified in the heading ("the eleven matters"), or all appeals which fall within the scope of the italicised words in paragraph 1 above. I treat the application as relating to the former.
>
> 3. I have not invited representations from any of the parties in the eleven matters because in my view would be disproportionate and unnecessary in all the circumstances.
>
> 4. Insofar as it is intended that the application relates to decisions in appeals in addition to the eleven matters, it is refused. It is wholly disproportionate for the Tribunal, of its own volition, to search through all decisions made by Judge McKenna to identify whether any of them fall within scope. Judge McKenna's decisions are a matter of public record. The burden of identifying decisions which Dr Kirkham seeks to make an application in relation to, falls on Dr Kirkham, as does the task of identifying in each case the relevant matters said to engage rule 41 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("2009 Rules").

11. Judge O'Connor then noted the context of the application:

> 5. Turning to the eleven matters referred to in the heading of the document containing the application, it must first be observed that Dr Kirkham was not a party to any of those eleven matters. It is also the case that Judge McKenna was the judge who considered and determined each of the eleven matters. These same eleven matters are also the subject of an application by Dr Kirkham for disclosure of the documents that were before the Judge McKenna when she considered and determined the appeals ("the disclosure applications"). The disclosure applications are pending before the Tribunal.

12. As already noted, another FTT (Judge Hughes) subsequently granted Dr Kirkham's disclosure applications in *Kirkham v Information Commissioner* [2023] UKFTT 00833 (GRC).

13. Returning to the decision now under challenge, Judge O'Connor dealt with the issue of jurisdiction in the following terms:

> 6. The Tribunal has jurisdiction to set aside a decision or part of a decision which disposes of proceedings, if the conditions identified in rule 41 of the 2009 Rules are met. It can plainly do so of its own volition or upon application. Rule 41 is silent as to whether such an application can be made by a person who was not a party to the proceedings, but I observe that rule 41(3) specifically provides for procedural obligations on parties if they are seeking for a decision to be set aside. It makes no reference to third parties. Nevertheless, I proceed on the basis that there is no jurisdictional bar to me considering Dr Kirkham's applications, although I do not specifically determine that point. Nor do I determine whether Dr Kirkham is subject to the time limitations identified in Rule 41.

14. After directing himself as to the requirements of rule 41, and reminding himself as to the core of Dr Kirkham's application (see paragraph 8 above), Judge O'Connor concluded as follows:

> 9. I conclude that none of the conditions in rule 41(2) are met.
>
> 10. There is no evidence to support a contention that any of the requirements of rule 41(2)(a)-(c) are met, and upon analysis of Dr Kirkham's reasons for making the applications I do not accept that "there has been some other procedural irregularity in the proceedings" [(r.41(2)(d)].
>
> 11. Points 11a and 11c of the application, if made out which I do not accept they are, are more properly the subject of an application by an aggrieved party for permission to appeal to the Upper Tribunal. Whilst these points allege error in Judge McKenna's decision, they are not capable of constituting a procedural irregularity of the type envisaged by rule 41(2)(d).
>
> 12. Point 11b of Dr Kirkham's application has no merit. Rule 8(4) of the 2009 Rules requires that "the Tribunal may not strike out the whole or part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed strike out". In each of the matters the appellant was given the opportunity to make representations in relation to the proposed strike out. Rule 8 does not dictate that the notification providing such opportunity be drawn in the hand of a judge or registrar, nor does any other provision of the 2009 Rules or the Tribunals, Courts and Enforcement Act 2007 provide for such. The procedural requirement is for the provision of an opportunity to make representations, that procedural requirement has been met. In any event, if I am wrong in this regard I observe that by rule 7(1) "an irregularity resulting from a failure to comply with any provision of the Rules …does not of itself render void the proceedings or any step in the proceedings."
>
> 13. Furthermore, even if capable of constituting procedural irregularity, and I conclude that it is not, the matters raised in point 11d of Dr Kirkham's application are entirely unsupported by evidence.
>
> 14. For all these reasons I do not accept that the requirements of rule 41(1)(b) are made out.
>
> 15. If I am wrong in my conclusions above I, nevertheless, conclude, having considered all the circumstances, that it is not in the interests of justice to set any of the above referenced decisions in the eleven matters aside upon the application of a third party.
>
> 16. The 2009 Rules provide remedies for aggrieved parties. Such a party can, for example, make an application to reinstate an appeal which has been struck out (rule 8(5)), make an application for permission to appeal (rule 42) or make an application to set aside Judge McKenna's decision (rule 41). Indeed, a number of the parties in the eleven matters have made an application for permission to appeal. The consequences of Judge McKenna's decisions bear directly on the parties, as would the consequences of an accession to Dr Kirkham's applications. Dr Kirkham is not acting on behalf of any the parties and, other than a tangentially as a consequence of the fact that any information that might hypothetically be released by the public authority would be available to the world at large including Dr Kirkham, he is entirely unaffected by the outcome of the proceedings.

15. Judge O'Connor accordingly dismissed the applications for the 11 cited decisions to be set aside.

16. Dr Kirkham brings what is effectively a two-pronged challenge to the FTT's decision. First, he submits that he should be granted permission to appeal Judge O'Connor's decision of 18 April 2023. Failing that, and secondly and in the alternative, he argues that he should be given permission to apply for judicial review of the FTT's decision.

The application for permission to appeal

Introduction

17. I am not at this stage deciding more generally whether to give permission to appeal. Rather, I am deciding the somewhat narrower question as to whether the application for permission to appeal should be struck out as having no reasonable prospects of success.

The Upper Tribunal's strike out warning

18. On 16 August 2023 I issued a strike out warning in the following terms:

> **PROPOSAL TO STRIKE OUT**
>
> **APPLICATION FOR PERMISSION TO APPEAL**
>
> **I propose to strike out this application for permission to appeal, and without holding an oral hearing, as I consider it has no reasonable prospects of success (under rule 8(3)(c)). However, the Applicant may make representations on this proposal in accordance with the Directions at the end of the Observations below.**
>
> **JUDGE'S OBSERVATIONS**
>
> 1. This application for permission to appeal to the Upper Tribunal made on Form UT13 (and associated documentation) goes under the case reference UA-2023-001057-GIA. For the reasons that follow, I am proposing that this application should be struck out, without an oral hearing, on the basis that it has no reasonable prospects of success. I am not at present satisfied that scarce judicial resource should be devoted to holding an oral hearing of this application for permission to appeal. For the record, there is a parallel application for permission to apply for judicial review being dealt with under case reference UA-2023-001058-JR, subject to separate case management directions also of today's date.
>
> 2. The Applicant's application for permission to appeal is stated to relate to a First-tier Tribunal (FTT) decision of 19 May 2023. This appears to be the date that the FTT refusal of permission to appeal ruling was issued to the Applicant (a ruling dated 15 May 2023). As such, the challenge is effectively to the FTT's original decision dated 18 April 2023. This was Judge O'Connor CP's decision on the Applicant's application dated 9 April 2023 to set aside certain FTT decisions under rule 41 of the Tribunal Procedure (FTT) (GRC) Rules 2009 (SI 2009/1976).
>
> 3. Judge O'Connor appears to have proceeded on the basis or assumption that the Applicant had standing to bring the application under rule 41, even though he was not a party to any of the 11 cases concerned. Judge O'Connor dealt with the jurisdictional point as follows (at para 6):
>
> > The Tribunal has jurisdiction to set aside a decision or part of a decision which disposes of proceedings, if the conditions identified in rule 41 of the

2009 Rules are met. It can plainly do so of its own volition or upon application. Rule 41 is silent as to whether such an application can be made by a person who was not a party to the proceedings, but I observe that rule 41(3) specifically provides for procedural obligations on parties if they are seeking for a decision to be set aside. It makes no reference to third parties. Nevertheless, I proceed on the basis that there is no jurisdictional bar to me considering Dr Kirkham's applications, although I do not specifically determine that point. Nor do I determine whether Dr Kirkham is subject to the time limitations identified in Rule 41.

4. In his subsequent ruling refusing permission to appeal, Judge O'Connor expressly stated that he was not deciding the jurisdictional point (para 3). Be that as it may, and as regards invoking rule 41, it is not the case that the FTT can "plainly do so of its own volition". The weight of authority is that the FTT does not have power to act on its own initiative under rule 41 – see *MA v SSWP (PIP)* [2020] UKUT 172 (AAC). Judge Poynter expressed a minority dissenting view, without giving reasons, in *KH (dec'd) (by AMH) v SSWP (IIDB)* [2021] UKUT 189 (AAC), but even so recognised that the majority view was binding on the FTT. However, any error of law on the part of this FTT on this particular point was not material given that the FTT itself did not purport to initiate action under rule 41.

5. Rather, the question was whether Dr Kirkham had standing to bring the rule 41 set aside application(s). Rule 41 provides as follows:

> **Setting aside a decision which disposes of proceedings**
>
> **41.—**(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.
>
> (3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

6. Rule 1(3) defines "party" as follows:

> "party" means—

(a) a person who is an appellant or a respondent;

(b) if the proceedings have been concluded, a person who was an appellant or a respondent when the Tribunal finally disposed of all issues in the proceedings;

7. There is no suggestion in rule 41 (or indeed elsewhere in the 2009 Rules) that a person who is not a party can make an application under the rule for a decision to be set aside. Indeed, it would be extremely surprising if that were the case, not least as an application for a set aside might well cut across other post-decision remedies being pursued by the actual parties to the case. Moreover, and as Judge O'Connor observed, a party can only apply for a set aside if they make a written application and make it within 28 days (subject to any extension of time under rule 5) – see rule 41(3). If a non-party could indeed make such a set aside application, there is no requirement that they make the application in writing and no requirement that they make the application within 28 days. It cannot have been contemplated that a non-party should have the right to apply for a set aside on more generous and indeed open-ended terms than the conditions applying to the actual parties to the proceedings themselves.

8. In the instant case it is not in dispute that Dr Kirkham was not a party (as defined by rule 1(3)) to any of the 11 sets of proceedings in question. As such on the face of it he had no standing to make an application under rule 41 (different considerations may apply to the parallel application for permission to apply for judicial review). On that basis Judge O'Connor CP should simply have ruled that the FTT did not have jurisdiction to consider the substance of Dr Kirkham's rule 41 application in relation to the 11 cases. On the face of it, the jurisdictional point is fatal to Dr Kirkham's case. While the FTT has made a decision, and so to that extent at least the Upper Tribunal has jurisdiction, the Upper Tribunal cannot ignore the fact that the FTT did not seemingly have jurisdiction to make a substantive rule 41 determination. Accordingly, it appears the proposed appeal has no reasonable prospect of success. For present purposes I put to one side the argument that Dr Kirkham's application to the Upper Tribunal for permission to appeal should not be admitted as he is not a "party" within the meaning of that term in TCEA 2007 section 11(2).

9. Court and tribunal time is a precious resource. For the reasons above, I can see no proper basis on which this application for permission to appeal can succeed. I am therefore considering striking out this application – without holding an oral hearing – under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). This would be on the basis that it has no reasonable prospects of success. I am considering that course of action in the light of my provisional views as set out above as to the jurisdictional problem with the original rule 41 application.

10. In making this proposal, I recognise that striking out an application without an oral hearing is a draconian step. I also bear in mind, by reference to Court of Appeal authorities, that the strike out power under rule 8 must be used for legitimate case management purposes, not for some other purpose. It should also not be exercised unless the tribunal has considered whether its other case management powers could be used to arrive at a more just result. Finally, since it is a method of "final disposal", it should only be used as a "last resort". Taking

those matters into account, I still provisionally conclude that this application has no reasonable prospects of success.

11. The Applicant may now make representations on the proposal to strike out this application without a hearing.

19. As already noted, I subsequently decided to direct an oral hearing to consider the strike out issue alongside the judicial review application.

The legislative framework

20. The key provision is rule 41, which is set out in full in the strike out warning referred to above and so need not be repeated here.

An outline of the parties' submissions on the strike out issue

21. As intimated earlier, Dr Kirkham's submissions, both on paper and orally at the remote CVP hearing, roamed far and wide. However, his primary and overarching argument was that both the Upper Tribunal and the Information Commissioner had fundamentally misunderstood the nature of his challenge. It was, he said, a mistake to characterise his challenge as being to the FTT's strike out decisions. Rather, he argued, he had made the application in question within the context of his own open justice proceedings for the disclosure of relevant documents. Dr Kirkham further contended that Judge O'Connor's decision was a case management decision within his open justice proceedings: "In effect, Judge O'Connor should have given directions on how the interrelated issues (namely the likely set aside or permission to appeal applications made by parties) were to be progressed. He failed to deal with the issue at all. That was an error of law and one which I have jurisdiction to challenge." If he was wrong about the essential nature of the FTT proceedings in question, Dr Kirkham further submitted that the approach of the Upper Tribunal's strike out warning to the construction of rule 41 was mistaken. In particular, rule 41 only applied to parties and did not say that other people cannot apply, and no such restriction should be read in. The cases on whether the FTT had a power to set aside of its own motion had been decided in the Social Entitlement Chamber and different policy considerations applied in the arena of information rights.

22. Mr Davidson's submissions on behalf of the Information Commissioner were shorter and to the point. In summary, his argument proceeded by way of four stages. First, Dr Kirkham had made an application for certain FTT decisions to be set aside. Second, Judge O'Connor had refused that application. Third, the Upper Tribunal's strike out warning had identified a jurisdictional point which would have prevented the FTT from considering the set aside application in any event. Fourth, the jurisdictional point relating to rule 41 was sound, meaning that in any event any onward appeal to the Upper Tribunal was bound to fail.

Discussion

23. Dr Kirkham's characterisation as to the nature of his challenge to Judge O'Connor's ruling is wholly misconceived. Dr Kirkham may well see his application as part and parcel of his open justice proceedings for disclosure of the documents in the appeals in question. However, saying that it is so does not make it so. Nor does labelling the application "In the Matter of Third Party Disclosure in the cases of (etc)" make it so. It is the function of the court or tribunal concerned to identify the true nature of the application before it. In this case, and in any event, paragraph [12] of the application was quite clear that Dr Kirkham was applying, in his own words, "for all of the McKenna strike out rulings on Freedom of Information Act (2000) and/or Environmental

Information Regulations (2003) cases where a case was struck out to be set aside." It would have been positively perverse for Judge O'Connor to have construed Dr Kirkham's request as anything other than an application for the decisions in the cases in question to be set aside. The Chamber President furthermore recognised the open justice proceedings as a discrete matter continuing on its own track (see paragraph 5 of his ruling).

24. Indeed, the only apparent uncertainty surrounding the nature of the application was whether it was referring just to the 11 cases specifically cited or whether it referred to all of Judge McKenna's strike out rulings. Judge O'Connor decided it was the former, and for the reasons he gave in paragraph 4 of his decision. That explanation displays no arguable error of law. Indeed, any other approach would have been simply unworkable. If the application truly related to all Judge McKenna's strike out rulings, what time limit if any was to apply? In a further ambitious submission at the oral hearing, Dr Kirkham suggested that Judge O'Connor should have directed that all the FTT's strike out decisions (and not just those of Judge McKenna) should be identified and reviewed for error. The proposition only needs to be stated for its absurdity to be immediately apparent. Indeed, what price finality then?

25. Having correctly identified the nature and scope of the application before the FTT, Judge O'Connor proceeded to deal with the composite set aside application on its merits. Finding that it lacked any such merits, the application was dismissed. In doing so, Judge O'Connor in effect assumed for the purposes of argument that there was no jurisdictional bar to Dr Kirkham bringing such an application. My conclusion is that Judge O'Connor erred in law in taking that approach, but it was not a material error as the set aside application would have been refused in any event (albeit on the basis of lack of jurisdiction rather than lack of merits).

26. As to the jurisdictional bar and rule 41, Dr Kirkham advanced several arguments in support of his submission that the FTT in the General Regulatory Chamber has the power of its own motion to set aside one of its earlier decisions (notwithstanding *MA v Secretary of State for Work and Pensions (PIP)* [2020] UKUT 172 (AAC), a decision on the equivalent rule in the Social Entitlement Chamber). However, the point need not be resolved in the context of the present proceedings. The question at issue here is not whether the FTT can set aside of its own motion. Rather, the critical question is whether a non-party can make an application for a decision in other FTT proceedings to be set aside.

27. The short answer is that a non-party cannot do so, for the reasons identified in the strike out warning:

> 7. There is no suggestion in rule 41 (or indeed elsewhere in the 2009 Rules) that a person who is not a party can make an application under the rule for a decision to be set aside. Indeed, it would be extremely surprising if that were the case, not least as an application for a set aside might well cut across other post-decision remedies being pursued by the actual parties to the case. Moreover, and as Judge O'Connor observed, a party can only apply for a set aside if they make a written application and make it within 28 days (subject to any extension of time under rule 5) – see rule 41(3). If a non-party could indeed make such a set aside application, there is no requirement that they make the application in writing and no requirement that they make the application within 28 days. It cannot have been contemplated that a non-party should have the right to apply for a set aside on

more generous and indeed open-ended terms than the conditions applying to the actual parties to the proceedings themselves.

28. Dr Kirkham argued that there would be the risk of serious injustice in the information rights field if a non-party did not have such a right to apply for a FTT decision to be set aside. The answer to that is that under rule 9(3) a non-party always has the option of applying to be made a party (and so then making a set aside application), even after the event (see *Razzaq v Charity Commission for England and Wales* [2016] UKUT 546 (TCC)), and that is the appropriate way of protecting the interests of all concerned (see generally *Information Commissioner v Spiers* [2022] UKUT 93 (AAC)).

29. It follows that the FTT had no jurisdiction to entertain Dr Kirkham's application to have the decisions in the 11 cited cases set aside. That being so, his proposed onward appeal to the Upper Tribunal has no reasonable prospects of success and must be struck out.

The application for permission to apply for judicial review

Introduction

30. In the alternative, and if his application for permission to appeal to the Upper Tribunal was struck out, Dr Kirkham's backstop position was that he should be granted permission to apply for judicial review of the FTT's decision dated 18 April 2023.

The legislative framework

31. Section 15(1) of the Tribunals, Courts and Enforcement Act 2007 vests the Upper Tribunal with a judicial review jurisdiction. By virtue of section 15(2)(a), these powers can only be exercised if four specific conditions are met, as stipulated in section 18.

32. Section 18 in turn materially provides as follows:

> **Limits of jurisdiction under section 15(1)**
>
> **18.** — (1) This section applies where an application made to the Upper Tribunal seeks (whether or not alone)—
>
> (a) relief under section 15(1), or
>
> (b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1).
>
> (2) If Conditions 1 to 4 are met, the tribunal has the function of deciding the application.
>
> (3) If the tribunal does not have the function of deciding the application, it must by order transfer the application to the High Court.
>
> (4) Condition 1 is that the application does not seek anything other than—
>
> (a) relief under section 15(1);
>
> (b) permission (or, in a case arising under the law of Northern Ireland, leave) to apply for relief under section 15(1);
>
> (c) an award under section 16(6);
>
> (d) interest;
>
> (e) costs.
>
> (5) Condition 2 is that the application does not call into question anything done by the Crown Court.

> (6) Condition 3 is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (c. 4).
>
> (7) The power to give directions under subsection (6) includes—
>
> (a) power to vary or revoke directions made in exercise of the power, and
>
> (b) power to make different provision for different purposes.
>
> (8) Condition 4 is that the judge presiding at the hearing of the application is either—
>
> (a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or
>
> (b) such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.

33. So far as Condition 3 (see section 18(6)) is concerned, paragraph 2 of the Lord Chief Justice's *Practice Direction (Upper Tribunal: Judicial Review Jurisdiction)* [2009] 1 WLR 327 provides as follows:

> 2. The Lord Chief Justice hereby directs that the following classes of case are specified for the purposes of section 18(6) of the 2007 Act:
>
> (a) any decision of the First-tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on reviews); and
>
> (b) any decision of the First-tier Tribunal made under Tribunal Procedure Rules or section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of the 2007 Act.

34. Plainly Dr Kirkham's challenge to Judge O'Connor's ruling does not fall within paragraph 2(a) of the Practice Direction. The question then is whether the challenge falls within the category of case identified by paragraph 2(b). If it does, then the Upper Tribunal has jurisdiction to hear and determine his application for permission to apply for judicial review. If it does not, the Upper Tribunal necessarily lacks jurisdiction and must by order transfer the application to the High Court (section 18(3)).

<u>An outline of the parties' submissions on the judicial review issue</u>

35. Dr Kirkham placed most emphasis in his submissions on his application for permission to appeal. He acknowledged that his application for permission to apply for judicial review was very much a fall-back position. As to this, his principal submission, drawing on *R (on the application of Good Law Project Ltd v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC), was that standing was not properly a matter for the permission stage at all but rather should be addressed at a later stage in the proceedings. Dr Kirkham further argued that the approach to standing was typically liberal and that what he characterised as "the general dysfunction" (his words) of the FTT (General Regulatory Chamber) was a matter of "considerable public interest". He further contended that the Upper Tribunal had jurisdiction to decide his application for judicial review.

36. Mr Davidson submitted that there were three compelling reasons why Dr Kirkham's application for permission to apply for judicial review should be refused. The first and primary reason was that as a matter of principle permission should not be granted where there was an adequate alternative remedy, here in the form of a statutory right of appeal under the 2007 Act. The second reason was that Dr Kirkham lacked standing, in the sense of a sufficient interest, to apply for a set aside of any of the 11 specified FTT strike out rulings. The third reason, which Mr Davidson argued he need not rely on given the strength of his first two reasons, was that it was in any event questionable whether Condition 3 in section 18 of the 2007 Act was met so as to confer jurisdiction on the Upper Tribunal.

Discussion

37. Dr Kirkham did not have a persuasive answer to any of Mr Davidson's three reasons.

38. As to the first reason, it is axiomatic that judicial review is a remedy of last resort and as such permission to apply for judicial review will usually be refused where there is an adequate alternative remedy (*MRH Solicitors Ltd v Manchester County Court* [2015] EWHC 1795 (Admin) at [18]). As Lord Templeman once put it, the default position is that "Judicial review process should not be allowed to supplant the normal statutory appeal procedure" (*R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 at 862). The general principles governing alternative remedies to judicial review were helpfully summarised by the Court of Appeal in *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154 at [19]:

> 19. These principles are not in dispute and can be summarised briefly. If other means of redress are "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review: per Lord Bingham of Cornhill in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 30. It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available. This principle applies with particular force where Parliament has enacted a statutory scheme that enables persons against whom decisions are made and actions taken to refer the matter to a specialist tribunal (such as the First-tier Tribunal (General Regulatory Chamber) (Charity)). To allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision risks undermining the will of Parliament; see per Mummery LJ in *R (Davies) v Financial Services Authority* [2004] 1 WLR 185, paras 30-31; per Lord Phillips of Worth Matravers MR in *R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445 at para 20; and per Moore-Bick LJ in *R (Willford) v Financial Services Authority* [2013] EWCA Civ 677 at [20], [23] and [36]. I would also refer to the helpful and comprehensive summary of the relevant principles by Hickinbottom J in *R (Great Yarmouth Port Co Ltd) v Marine Management Organisation* [2014] LLR 361, paras 35-72.

39. I interpose here that it is important to be clear about the nature of the adequate alternative remedy with which we are concerned. In this context it is not about whether Dr Kirkham has an alternative route to securing a set aside of the FTT decisions in the 11 cases. Rather, the question is whether, other than an application for judicial review, he has an adequate alternative remedy to challenging the decision of Judge O'Connor dated 18 April 2023. The short point is that Judge O'Connor made a decision with respect to which Dr Kirkham had the right of appeal to the Upper Tribunal, subject to

permission being granted in the normal way (and subject to the possibility of the proceedings being struck out).

40. As to the second reason for refusing permission to apply for judicial review, relating to standing, Mr Davidson was careful to eschew the language of the "meddlesome busybody" (*R v Monopolies and Mergers Commission ex p Argyll Group plc* [1986] 1 WLR 763 at 773H). However, I accept the central thrust of his submission, namely that while Dr Kirkham may well be interested in (in the sense of curious about) the 11 cited cases, he does not have an interest properly so-called in the underlying cases. Put very simply, he has nothing to do with them and they have nothing to do with him. Dr Kirkham's repeated protestations that he was not a "meddlesome busybody" but rather had been "dragged into" (his words) the proceedings at the request of other litigants lacked evidential coherence and cannot disguise the absence of any such proper interest. Dr Kirkham also seeks to argue that standing should be determined at trial of the substantive application for judicial review. However, that submission is to overlook the two-stage approach to standing in judicial review proceedings as identified in *R v Monopolies and Mergers Commission ex p Argyll Group plc*. It also fails to recognise that the presence of an adequate alternative remedy by way of a statutory appeal means that arguments about standing do not and cannot take Dr Kirkham any further forward.

41. As to the third reason, Dr Kirkham argued that Mr Davidson's approach involved an "unnatural reading" of the Practice Direction. If I understood Dr Kirkham correctly, his submission was that Mr Davidson's reading meant that if somebody somewhere could appeal the disputed decision, then nobody else could bring proceedings for judicial review "which makes no sense at all". I need not resolve the Practice Direction point given the strength of Mr Davidson's first two reasons. In particular, the fact of the matter is that Dr Kirkham has an alternative remedy, namely his right of appeal against the FTT's decision of 18 April 2023. The fact that that application for permission to appeal has no prospects of success is neither here nor there. It follows that the application for permission to apply for judicial review must be refused.

Conclusion

42. In conclusion, Dr Kirkham's application for permission to appeal against the First-tier Tribunal's decision of 18 April 2023 is struck out as having no reasonable prospects of success. The parallel application for permission to apply for judicial review of the same decision is refused.

Nicholas Wikeley
Judge of the Upper Tribunal

Approved for issue on 22 April 2024